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AN UPDATE ON ADMINISTRATION ACTION TO REDUCE UNNECESSARY REGULATORY BURDENS ON AMERICA'S SMALL MANUFACTURERS

HEARING

BEFORE THE

SUBCOMMITTEE ON REGULATORY REFORM AND OVERSIGHT

OF THE

COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES

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AN UPDATE ON ADMINISTRATION ACTION TO REDUCE UNNECESSARY REGULATORY BURDENS ON AMERICA'S SMALL MANUFACTURERS

THURSDAY, JULY 13, 2006

HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON REGULATORY REFORM OVERSIGHT
COMMITTEE ON SMALL BUSINESS
Washington, DC

The Subcommittee met, pursuant to call, at 10:00 a.m., in Room 2360 Rayburn House Office Building, Hon. W. Todd Akin [Chairman of the Subcommittee] presiding.

Present: Representatives Akin, Bordallo, Christensen, Gohmert, Kelly, Sodrel.

Chairman AKIN. The hearing will come to order. The best way to keep us on time is to start on time, and so we are at least fairly close to that.

Good morning, and welcome to today's hearing entitled, "An Update on Administration Action to Reduce Unnecessary Regulatory Burdens on America's small manufacturers."

I want to especially thank the witnesses who have taken time out of their busy day to participate in this important hearing.

The well-being of U.S. manufacturers is a vital concern to this Subcommittee and to Congress as a whole. America's manufacturing base constitutes, roughly, 12 percent of the gross domestic product to the United States economy, which has slowly decreased in recent years. About 95 percent of all U.S. manufacturers are small or medium-size enterprises. Small U.S. manufacturers in particular have faced fierce global competition in recent years. Much of this competition comes from countries that have minimal to no regulatory compliance cost.

The Administration has recognized that by reducing unnecessary regulatory burden. It also bolsters the strategic competitive position of small U.S. manufacturers in the global marketplace. This has been exemplified through the solicitation of public nominations for regulatory reform by the Office of Management and Budget, OMB, in 2004. These nominations emphasized easing the regulatory burden on small and medium enterprises in the manufacturing sector.

The independent Office of Advocacy at the Small Business Administration and the manufacturing industrial industry answered

by delivering 189 nominations to the Federal Government for the reduction of unnecessary regulation through rule making.

Ultimately, of the 189, 76 nominations were selected to reform unnecessary regulatory burden in collaboration with the appropriate Federal agencies.

On April 28, 2005, this Subcommittee held a hearing entitled, "The Administration's Program to Reduce Unnecessary Regulatory Burden on Manufacturers: A Promise to be Kept?" At that hearing, we heard testimony regarding the Administration's time line and commitment to reform the 76 burdensome regulations.

Nearly 15 months have passed since we last addressed this important issue, and this Subcommittee seeks an update regarding the progress the Administration has made on these important reforms. We also hope to learn how the Administration's regulatory review process has benefitted by engaging in this collaborative effort.

I look forward to learning more about how these regulatory reform initiatives are progressing and what more we can do to aid our Nation's manufacturers.

I now yield to the Gentlelady from Guam, a lady who also hosted a wonderful party last night, Madame Bordallo.

[Chairman Akin's opening statement may be found in the appendix.]

Ms. BORDALLO. Thank you, Mr. Chairman, but sad to say we missed you, so we'll have another one next year. He's talking about the 62nd anniversary of our liberation, and we had one here last evening.

Mr. Chairman, thank you for calling this meeting, and I'd like to extend a warm welcome to our witnesses who are here this morning. This is, indeed, an important topic, and one that could have positive impact upon many of America's small businesses.

I think the committee was pleased that the Office of Information and Regulatory Affairs, the OIRA, solicited recommendations to update and modify outdated or overly burdensome regulations. The committee's suggestion that such a review be made was seconded by industry groups.

I am concerned, however, about the apparent slow progress made to date on this matter, and I am particularly concerned that the Administration has, perhaps, not committed all of the resources and political will necessary to complete the work.

Small businesses expressed this concern to the committee last year. They said they were concerned that OIRA and others lacked sufficient funding to thoroughly review new regulations. This would lead me to believe that the office also does not have the resources to review burdensome longstanding ones. More needs to be done to help small businesses with the Federal regulatory and paperwork burden. This is a message that is often delivered to this committee, every small business witness, and every major association that has testified, has put regulatory burden at or near the top of their priority list during the half a dozen hearings that we have held on this particular issue.

I am concerned that the regulatory burden shouldered by America's approximately 23 million hard working small businesses has increased each year, and this fact would seem to run counter to the

assurances that this committee was provided that some of these burdens would be eased.

There is no doubt that Federal red tape impacts national competitiveness. Federal agencies must be held accountable for this, including being required to undergo a regular review of the regulations. This should be done to ensure that the regulations are appropriate and reflect the pressures of modern business.

I represent Guam. We are neighbors to some of the world's most dynamic and competitive economies, China, Singapore, South Korea, Australia, Japan and India, just to name a few. Small businesses on Guam need to be efficient in order to succeed in the Asia Pacific Region.

Reducing the regulatory burdens on business, including reducing paperwork requirements, in an important element for improving America business efficiency and competitiveness in the world economy.

It is this committee's responsibility to ensure that this task is completed, but we cannot afford to sacrifice our high standards. The committee has been careful in the past to ensure that important safeguards are dismantled. Together we must find intelligent ways to protect health and safety, while promoting fair competition.

Again, Mr. Chairman, thank you very much for calling this hearing this morning, and I look forward to the witnesses' testimony.

Chairman AKIN. Thank you very much for those great comments.

What we are going to do is, we are going to watch the clock a little bit closely here. Those of you who are first timers, there's a little set of lights there in front of you, and when it turns red that's when your five minutes are up. And, what we'll try and do is to run across all of the witnesses first, let each of you make a five-minute statement, and then we'll come over to some questions.

And, my recommendation is that if you have some notes, which I would hope that you may, if you'd like to submit them for the record you can do that, and then just tell us the things that you think are most important that we need to know and that facilitates things moving along pretty rapidly, and then we'll come back with some questions. So, I'm just going to run right across.

Chairman AKIN. Our first witness is Steve Aitken. You are the Acting Director of the Office of Information and Regulatory Affairs, Office of Management and Budget. You haven't come too far, from Washington, D.C., and, Steve, I understand that at least on a temporary basis this project—or these series of projects are pretty much your area of responsibility.

If you would proceed, you have five minutes. Thank you, Steve.

STATEMENT OF STEVE AITKEN, THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET

Mr. AITKEN. I will speak briefly from my oral statement.

Chairman Akin, Representative Member Bordallo, and distinguished Members of the Subcommittee—

Chairman AKIN. Steve, could you just do me a favor, pull that mic a little closer to you. You've got to kind of get into these things to get good volume for people in back. Thank you.

Mr. AITKEN. Chairman Aitken, Ranking Member Bordallo, and distinguished Members of this Subcommittee, I am Steven D. Aitken, Acting Administrator of the Office of Information and Regulatory Affairs, OIRA, an office within the Office of Management and Budget.

Thank you for inviting me to this hearing, and for giving me the opportunity to testify today on the status of the 76 manufacturing reform nominations that OIRA and the agency selected in March of last year.

This is my first opportunity to testify before the Subcommittee. By way of background, I have worked at OMB for 17 years. Up until the beginning of last month I have been in the OMB Counsel's Office, most recently serving as Deputy General Counsel. In early June, I began my service as OIRA's Acting Administrator.

Two of OIRA's key roles are to work with the agencies in their development of new regulations and to stimulate the modernization of existing rules. One tool that OIRA uses to improve existing rules is our call for public reform nominations pursuant to what is commonly referred to as the Regulatory Right To Know Act.

Under this Act, OIRA has initiated three public nomination processes to undertake reform of existing regulations. The first two nomination processes were in 2001 and 2002. OIRA's most recent request for public nominations was in February of 2002, in connection with the government-wide effort to reform regulation of the U.S. manufacturing sector, which continues to be one of the most heavily regulated sectors of our economy.

OIRA asked the public to suggest specific reforms to regulations, guidance documents, or paperwork requirements, that the commenters believed would improve manufacturing regulation. OIRA also mentioned it was particularly interested in reforms that addressed burdens on small and medium-sized manufacturers, where burdens tend to be relatively large. Finally, OIRA suggested that commenters consider the extent to which a benefit cost case can be made for the reform.

In response to the request for public input, OIRA received 189 reform nominations. OIRA evaluated the nominations along with the relevant Federal agencies, including SBA's Office of Advocacy and the Commerce Department's Office of the Assistant Secretary for Manufacturing and Services.

As a result of this process, in March of last year OIRA issued a report on regulatory reform of the United States manufacturing sector. In that report, Federal agencies and OMB determined that 76 of the 189 nominations had potential merit, and justified further action.

The March, 2005 report also identified milestones and deadlines. Milestones ranged from an agency performing a priority review and reporting to OMB, in order to determine appropriate next steps to an agency issuing modernized regulations.

Late last year, OIRA reported on the status of each of the reform nominations as of the end of Fiscal Year 2005. This update was provided in OIRA's 2005 report to Congress on the cost and benefits of Federal regulations.

During Fiscal Year 2006, agencies have continued to make progress on the reform nominations. According to the most recent

information that OIRA has received, which is preliminary, the agencies have now completed 36 of the 76 reform items. OIRA will continue to work with the agencies to verify and update the status of the 76 reforms in preparation for our 2006 report to Congress, in which we will provide the status of the reform nominations as of September 30th of this year.

Several of the reforms which have already been completed successfully improved existing regulations, in that the reforms increased the net benefits of regulation while maintaining important environmental, health and safety protections.

I would like to briefly mention three examples. Last October, EPA issued a final rule that streamlines the monitoring and oversight requirements for industrial facilities that discharge into wastewater treatment plants. This rule is expected to reduce burden on discharges and treatment plant operators by about 240,000 hours.

Last December, EPA issued a final rule that permanently exempts certain categories of "non-major" industrial sources that are subject to national emissions standards, perhaps, such as air pollutants, the NESHAPs, and the requirement to obtain an operating permit under Title 5 of the Clean Air Act. EPA estimates that this rule will provide regulatory relief for over 38,000 sources, many of which are small entities.

And, this past April EPA issued a final rule that streamlines the requirements under the Resource Conservation and Recovery Act for certain RCRA facilities. Overall, this rule is expected to reduce compliance costs by $2 to $3 million annually.

OIRA remains dedicated to the continued implementation and appropriate completion of these reform initiatives. To that end, OIRA will continue to oversee the reform process to make sure that agencies make further sustained process on the remaining reforms that have not already been completed.

Under the timetable that was set forth in OIRA's report from March of last year, in which the 76 reforms were announced, the agencies are to complete their actions on all 76 reforms by the end of 2008.

Thank you very much for the opportunity to participate today in this important hearing. I would be happy to answer any questions that you may have.

[Mr. Aitken's testimony may be found in the appendix.]

Chairman AKIN. Thank you very much, Steve.

You brought it in on time and under budget, so you are certainly starting things off well.

Chairman AKIN. Our next witness is Richard Otis, Deputy Associate Administrator, Policy Economics and Innovation, the EPA, Washington, D.C.

Richard.

STATEMENT OR RICHARD OTIS, POLICY ECONOMICS AND INNOVATION, ENVIRONMENTAL PROTECTION AGENCY

Mr. OTIS. Mr. Chairman, Members of the Subcommittee, thank you very much for the opportunity to appear this morning, and I will try to maintain that track record of staying under five minutes.

My primary purpose this morning is to discuss the EPA's regulatory initiatives included in OMB's 2005 report, "Regulatory Reform in the United States," and I believe the Subcommittee, or I should hope the Subcommittee, will be pleased to hear that we have made significant progress in meeting our commitments.

In nominating our Administrator, Steve Johnson, President Bush challenged him to accelerate the pace of our Nation's environmental progress, while maintaining our economic competitiveness. This is a clear recognition by the President of two very important points.

First, it recognizes that as individuals and as a Nation we share a strong belief in our responsibility to ensure our children will inherit a healthier, safer world. It is a core American value I believe we all share, and so does the President.

Second, it recognizes that as a Nation, and as you indicated earlier, we face significant global economic challenges and opportunities. At EPA, we are acutely aware of both points, and join the President in seeking to ensure our children inherit a safer, healthier and more economically vibrant future, and to achieve that goal we understand we must continuously look for opportunities to improve our regulations, and through such efforts as a manufacturing initiative.

And, in that regard, we have completed more than half of the commitments that are identified in the March, 2005 report, and are getting close to completing our work. There are several remaining nominations where we have a clear sense of the direction and the timing for resolving them, and there are others where the agency has made progress but is still trying to figure out the proper resolution. It is no surprise that some of those are among the more difficult and complex nominations.

We have put in place a strong internal management and tracking system and report our progress routinely to the Administrator, Deputy Administrator, and OMB. I was going to give you an example, but Mr. Aitken gave it to you, so I will skip beyond that one.

Before I sort of complete my remarks, I want to raise one other subject with you that I think is directly related to the topic of your hearing, and one that we would like to discuss further with members of the Committee and staff in the coming months, and it goes more to the heart of how EPA examines the value and effectiveness of our one-size-fits-all regulatory system, and looks towards more innovative collaborative and results-driven approach to achieving environmental progress and economic competitiveness.

There is a substantial amount of innovative thinking and action occurring within our agency, state government, interest groups, think tanks, academia, other Federal agencies and industry. It is built upon the lessons that we have all learned over the past 35 years of EPA's history, and that innovation is critical to achieving the President's challenge.

Let me give you one very quick example. EPA has a new environmental performance track program. It is built upon similar state programs, and is helping us change how we regulate. It encourages and rewards facilities that go beyond compliance and attain levels of environmental performance that benefit the company, the workforce communities, and the environment. This is a clear recognition

that many companies have figured out how to achieve environmental excellence and success in the marketplace by more fully integrating environmental issues into their core business strategies. Facilities that earn membership in this program get public recognition and flexibility in meeting certain administrative and regulatory requirements where we have the legal flexibility to so do.

With this program, EPA is acknowledging that we should not treat all regulated facilities as though they operate equally, but rather it makes sense for government to encourage facilities that have demonstrated a strong commitment to environmental excellence, thereby allowing us to focus our time and resources on those that have done less so.

And, at a future date, perhaps, we can discuss more of these innovations and some of the interesting challenges and statutory challenges we face in heading down that path.

On behalf of EPA, I want you to know that we are committed to helping small business and manufacturing, as well as protecting the environment, through smarter regulations and innovative ways of conducting our core mission.

Thank you very much.

[Mr. Otis's testimony may be found in the appendix.]

Chairman AKIN. Thank you very much, and also for your thought-provoking, little bit of a tantalizer that you threw out there, that we can approach things from a little different angle. It's very interesting.

Chairman AKIN. Our next witness is Lawrence Fineran, Vice President, Legal and Regulatory Reform Policy, National Association of Manufacturers, Washington, D.C.

Lawrence, welcome.

STATEMENT OF LAWRENCE A. FINERAN, LEGAL AND REGULATORY REFORM POLICY, NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. FINERAN. Call me Larry.

Chairman Akin, Ms. Bordallo, thank you for the opportunity to testify on behalf of the National Association of Manufacturers, about the Administration's call in 2004 for regulations, especially those that affect manufacturing, that could be improved. If nothing else, it will help to let the agencies know that there is continued congressional interest in seeing results from this project.

My name is Larry Fineran, and I serve as Vice President, Legal and Regulatory Reform Policy, for the NAM, which is the Nation's largest industrial trade association representing manufacturers in every industrial sector and in all 50 states.

Three quarters of the NAM's membership are small and medium manufacturers. The special attention that manufacturing regulations was warranted, since at the time manufacturing was experiencing a recession. For the first time since World War II, our sector led the down turn and lagged in recovery. The NAM participated in a similar exercise in 2002.

Unfortunately, none of the regulations that the NAM nominated for improvement in 2002 had been changed by 2004. We were assured, however, that this time it would be different because it was part of the Administration's manufacturing initiative. Because of

our lack of success in seeing changes from our 2002 submission, the NAM decided to place special emphasis on a handful of regulations where improvement would truly make a difference.

We also did a much better job of vetting the technical suggestions, and making sure that OIRA had enough information as to the problem and possible solution.

When the list of 76 regulations was released on March 9, 2005, the NAM was very pleased that five of its seven highlighted regulations were on the list. We are also pleased that a number of the more specific regulations—or suggestions for improvement were on there, and that most of the regulations included a timetable or action plan. We thought that this indicated that the progress of the agencies would be tracked by OIRA, thus we express our disappointment when the 2005 draft report on the benefits and costs of Federal regulatory programs did not have a status report on this project.

And, at this point I'd like to clarify that the NAM's written statements, as of the 2005 final report, did not include a status report. The word full should have preceded status report, as there is an update in that final report. My apologies to OIRA, although it does not discuss regulations for which there was no progress. So, with your permission, Mr. Chairman, I will work with the staff to make sure the permanent record is clarified.

I am glad to hear that there will be an update in the 2006 final report.

I can only testify about what agencies have contacted the NAM for follow up. I should also mention that if Members of the Subcommittee ask specific questions about specific regulations rather than process I may have to respond in writing if it's not my specialty area.

I'm pleased to report that EPA has contacted us about a number of their regulations that we submitted, and has made some improvements as a result. I understand that they made changes to other regulations, even if they had not contacted us.

In addition, we have heard from the Departments of State and Commerce.

The Department of Labor is a different story. We made substantial suggestions for overhauling the rules implementing the Family Medical Leave Act, which the Supreme Court has ruled were not noticed properly. In addition, courts are very much in conflict about what the rules do say.

The timetable for completed action was supposed to be 2005. We are well into 2006, and still have not seen an updated proposed rule.

OSHA has been the poster child, perhaps, for agency intransigence. In 2002, we nominated two CFR references that require adherence to 1969 fire standards, and we renominated that rule in 2004 because OSHA had done nothing. OSHA has been petitioned repeatedly by affected entities to allow the use of modern fire standards, but the agency has refused to do a rule making and there's no indication that OSHA will finally act as a result of this project.

For instance, this minor improvement became much larger when the list of 76 came out, and has no timetable for completion. In the

meantime, we understand that marine manufacturers have been cited because their facilities have modern rather than 1969 fire standards.

Congress also shares at least some of the blame responsibility for regulatory problems, as many statutes are nebulous, vague and/or confusing, and sometimes all three.

With the leadership changes at OIRA and OMB, the NAM was concerned that agencies such as OSHA would be allowed to win the game of waiting it out. We were about to do our own follow up and publicize what, if anything, the agencies have done or not done. This is why we appreciate you holding this hearing. Your interest, and the interest shown by Representative Candice Miller's Regulatory Affairs Subcommittee will help to let OIRA and OMB, as well as the agencies, know that Congress supports improvements to rules affecting manufacturing.

[Mr. Fineran's testimony may be found in the appendix.]

Chairman AKIN. You had three seconds left, that's a pretty good job.

Mr. FINERAN. I did skip two sentences at the end.

Chairman AKIN. Larry, thank you for your testimony, and also it raises some interesting questions. We'll get to those in just a little while.

Chairman AKIN. We now have the Honorable Veronica Vargas Stidvent?

Ms. STIDVENT. That's right.

Chairman AKIN. Pretty close? Okay. Assistant Secretary for Policy, Department of Labor, Washington, D.C.

Veronica.

STATEMENT OF THE HONORABLE VERONICA VARGAS STIDVENT, DEPARTMENT OF LABOR

Ms. STIDVENT. Thank you.

Chairman Akin and distinguished Members of the Subcommittee, I 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 in OMB's report.

I'll briefly discuss the Department's progress on each of those nominations, and I've submitted written testimony that goes in further detail.

Hexavalent chromium, commenters urged OSHA to minimize the impact of its final standard on small business. The standard published on February 28, 2006, incorporated many recommendations from the SBREFA panel and other stakeholders, including an extended four-year compliance period for engineering controls and a higher pel than the one proposed in the proposed rule.

Coke Oven emission standards, commenters recommended the standard be revised to account for new technology and that medical monitoring be reduced. One commenter specifically recommended that OSHA finalize the changes to the Coke Oven emission standard proposed in Phase 2 of OSHA Standards Improvement Project.

In January, 2005, OSHA published the Phase 2 final rule, which streamlined several provisions of the Coke Oven emissions standard, including reducing the frequency of medical monitoring for certain employees. OSHA has not taken any further action on the

standard, however, if commenters still have issues of concern they can raise them as suggestions in response to the advanced notice of proposed rule making on Phase 3 of the Standards Improvement Project for moving on to the next phase.

Permanent labor certification, one commenter was critical of the process for certifying the unavailability of U.S. workers for positions for which foreign nationals are sponsored. The Department's Employment and Training Administration 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.

Hazard communication material safety data sheets, these are MSDSs, several commenters indicated the 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 completed in 2007.

In addition, OSHA has submitted for OMB review an advanced notice of proposed rule making addressing the possible modification of the hazard communication standard to be consistent with the globally harmonized standard classification and labeling of chemicals. This global approach to hazard communication include the standardized format for MSDSs, as well as standardized label requirements.

Annual training requirements for separate standards. One commenter observed that OSHA had separate annual training requirements for a number of standards. The commenter recommended that the agency develop a single integrated training program.

The Department met its obligation to provide OMB with a report on training requirements by May, 2005. The report noted that OSHA actually does not require separate training programs for each standard that requires training. Rather, employers are permitted to organize and present training in whatever manner is most effective for the workplace involved.

Hazard communication training. One commenter stated that draft guidance OSHA made available for comment in 2004 was too complicated for small business. OSHA anticipates finalizing that draft in 2007, and the agency is considering issuing two products. One would be a final version for the model training program and the other would be a simplified approach for small business.

The sling standard, too commenters recommended that OSHA update the sling standard to reflect the American Society of Mechanical Engineers consensus standard. OSHA plans to update the sling standard as part of its regulatory project update, all standards based on national consensus standards. The sling standard will be part of a later phase of the project. OSHA has developed a guidance document on the selection and use of slings, which it plans to issue this year. This document would make it clear that slings meeting the newer ANSI/ASME standard are acceptable.

Guard rails around stacks of steel, one commenter objected to OSHA's requirement to provide either guard rails or tie off projections to workers who must perform their duties 48 inches or more above the ground. The Department, once again, met its obligation to provide OMB with a report on this requirement by May, 2005. This noted that OSHA is currently conducting a rule making on its

walking and working surfaces standard, and will consider the guard rail requirement as part of that rule making. It also stated that OSHA reached out and contacted the commenter to discuss OSHA's plan, and that the commenter supported addressing this issue in the walking and working surfaces standard.

Which brings me to walking and working surfaces. One commenter stated that the OSHA regulations, under some circumstances, require use of fixed ladders when spiral stairways or ship stairs would be safer. Again, the Department met its obligation to provide OMB a report by May, 2005, which stated that this issue also would be considered as part of OSHA's rule making on the walking and working surfaces standard. It stated that the agency had contacted the commenter, once again, and that the commenter supported including a flexible policy for ship stairs in the final rule.

OSHA flammable liquids, which Mr. Fineran referred to, two commenters recommended that OSHA update the current rule, which cites the '69 fire protection standard. OSHA intends to include the flammable liquid standard in its ongoing project to update standards on national consensus standards.

And finally, the Family Medical Leave Act, many commenters recommended changes to these regulations, and Federal courts, including the United States Supreme Court, have invalidated some provisions of these regulations. The Employment Standards Administration continues to review the issues and the possibility of revisions to the regulations. This remains on the Department's regulatory agenda. No final decisions have yet been reached as to what, if any, changes should be proposed.

Mr. Chairman, this concludes my update on the status of the regulations. I would be glad to respond to any questions you may have.

[The Honorable Veronica Vargas Stidvent's testimony may be found in the appendix.]

Chairman AKIN. Thank you, Veronica. I think we'll be getting back to you with some questions.

Our last witness is, is it William Kovacs?

Mr. KOVACS. Kovacs.

Chairman AKIN. Kovacs, okay. Do you go by Bill or William?

Mr. KOVACS. I go by Bill.

Chairman AKIN. Bill, okay, Bill Kovacs, Vice President, Environmental Technology and Regulatory Affairs, U.S. Chamber of Commerce, Washington, D.C.

Bill, proceed, thank you.

STATEMENT OF WILLIAM KOVACS, ENVIRONMENTAL TECHNOLOGY AND REGULATORY AFFAIRS, U.S. CHAMBER OF COMMERCE

Mr. KOVACS. Thank you, Mr. Chairman and Members of the Committee. It is a pleasure to be here today, because 97 percent of the members of the Chamber are small businesses. And, I'm going to talk About an overview of the regulatory efforts, because they have really been significant, and there really is more than just the nomination process.

For example, Section 610 of the Regulatory Flexibility Act requires agencies every year to set up a plan as to how they are going to go back and review these regulations that are really out of date in many instances.

And so, when we look at the regulatory process, Congress has been very good. They've got a clear and comprehensive effort. I mean, we've got the Small Business Regulatory Fairness Act, the Congressional Review Act, the Paperwork Reduction Act, Truth in Regulating Mandates Information, Government Performance and Results Act for the business plans data access, data quality, and several executive orders. So, it's not like there isn't an effort.

And, the reason why there's so much effort on this is that every year agencies pass 4,000 regulations. There are 110,000 regulations overall, 73,000 pages, and the small businesses of the United States have to deal with it. So, it is significant, and these efforts are worth doing.

And, this covers everything from the quality of information used by an agency in a rule making, to conducting a cost benefit analysis, plans for reviewing outdated regulations, peer review studies so we get the science right, and finally, public nominations, which we applaud but it's not the only access.

Now, with this comprehensive structure, there are two problems with it. One is, there's very little transparency in the entire process. The agencies don't make it easy. For example, on the nomination process, something that is so simple, they've asked us what regulations were a problem. Well, we tell them, but we never can find out what it is.

The Chamber actually, two years ago, contacted every single entity that submitted a nomination, and 70 percent of them had no information on where the nomination was in the process, and yet, with the web all they would have to do is put the four, or five, or six, or ten nominations that were sent to the agency on the web and discuss what the status is. That would help, and the reason why it would help is because without knowledge everyone is becoming very discouraged over the process.

If you look, in 2002, 1,700 commenters participated in the process. In 2004, that dropped to 41, and that's what the problem is, people have just — they don't care because they don't think the agency is going to respond.

And, the second point, which is just as important as no transparency, is there's no accountability. Once the process starts with the agency, the agency can do something or they can't do something, it's up to them. And, I'll give you an example under the Data Quality Act, we submitted a petition with EPA, and we said something very simple, you have 16 databases, and everyone in the world uses these databases to determine the value of chemicals, and it goes to clean up risk assessment. And, we said, if you look at the 16, we ran a spreadsheet, the same chemical has different values on every database, and sometimes the value can be as much as a billion in difference.

And, we then asked our contractors, go back and tell us, if you were involved in this Superfund site, and you used the transport database versus the chem fate database, what would be the difference in cost in clean-up? And, just depending on the database

that you use, the difference in cost of clean-up was $7.5 million for one and $63 million for another. It's been two years since EPA has had the database petition, and they haven't responded, and all we've ever asked is that they put together an interagency working group with other agencies that really have scientific knowledge like this, and let's get working on it so that we can get the database uniform.

We've even had government agencies in Switzerland comment on the need to have this consistency, because these databases are used throughout the world.

So finally, I've still got a little bit of time, I have a few suggestions, because I really think that Congress has done everything that it possibly can.

Chairman AKIN. You have a minute and a half.

Mr. KOVACS. Okay.

It's done everything that it possibly can in terms of legislation to put a structure around this, to force the agencies to think about outdated regulations. The first thing is, you might consider doing a point of order to the agencies appropriations if they don't actually do regulatory review. They've got that obligation right now under 610 of the Regulatory Flexibility Act, but they don't do it, and they've had it for 20 years. They don't do it.

I think every year we have somewhere between 20 and 30 regulations looked at by the agencies. That's out of 110,000. We've got a long way to go.

Second, I think you could amend the Government Performance and Results Act to include in that a requirement that they put their Section 610 reviews as part of their strategic plan. They have to do it on a five-year period that's excellent, they should be planning, but one of the things that they need to do is, how are they going to get some of these old regulations off the books?

A little bit more controversial, but my third recommendation would be a private right of action. If they don't undertake these administrative proceedings, allow the private sector, you know, everyone in the private sector, both the business community, the environmental community, whoever, to bring a lawsuit.

And finally, if you want to do everything administratively, there may be a way in which to allow the administrative law judges to handle these kind of regulatory reform requirements, so that there's someone independent of the agency that is handling how the agency is working with these very technical procedures.

Anyway, with that, thank you very much, and I'm here to answer any questions.

[Mr. Kovacs' testimony may be found in the appendix.]

Chairman AKIN. Thank you.

For five witnesses from Washington, D.C., you gentlemen and lady were anything but boring. Usually, when we get D.C. witnesses they put our panel to sleep, but you guys did a good job keeping us alert this morning.

Let me start by asking for a report card from the Chamber and from NAM, if you were to rate our progress on this overall project, I believe we started with 76 projects that were identified, out of 189 we went to 76, how would you rate the progress overall that

we're making, and then if you were to give a grade to the various agencies. How are we doing, and has it varied over time?

Larry, I'll let you go first.

Mr. FINERAN. One of the problems, Mr. Chairman, with the agency-specific grade, would be that we really can only know what happened to our nominations. I mean, OSHA, or the Department of Labor, has testified on some of the other work that they've done, that may not have come from us. So, we really can only tell you, talk about where we are at. So, we can't give an overall performance.

Chairman AKIN. Just the ones that you submitted are the only ones you have data on.

Mr. FINERAN. Right, exactly, but again, one part of the problem is—

Chairman AKIN. And, there's no report overall that says how we are doing per se?

Mr. FINERAN. Yes, as Bill alluded to, there really is no centralized system of transparency.

Chairman AKIN. Okay.

So, from what you've seen gives you just sort of a statistical sampling then, how would you say we are doing, and has it been consistent over time, or were we doing better a few years ago, has it gotten worse, or better, or how do you think we are doing?

Mr. FINERAN. When we—in our written testimony we go into the fact that in 2004, when this came up in 2004, some of our members were very skeptical, they didn't even give us any regulations, because they had participated in 2002, and they saw nothing had really come out of that exercise, and so they just didn't think it was worth it to have their companies go through that process again, because it's not easy to do. You would think that the companies could just do it off the top of their head, but they want to get it right.

The difference between 2002 and 2004 really is that OIRA really did want benefit cost analysis, which I understand, but it's kind of hard, very hard for trade associations to do that unless they've been dealing with the regulation for a number of years, because we just don't have the money to do a benefit cost regulation on the number of regulations that we ended up nominating.

Even on the seven that we highlighted, we couldn't do, we couldn't afford to do a benefit cost—

Chairman AKIN. Of the seven you highlighted, how many of those are complete and done, signed, sealed, delivered?

Mr. FINERAN. Complete and done, I am not sure I know that. Well, five made the list, one of them was particulate matter, which was being reviewed under a different process, so we understand why that was not on the list.

Of the others, I can tell you the FCC do not fax rule is definitely finished, because Congress had to pass a statute there, and you did.

On the other regulations, I believe that they are still working on them, I'll defer to Rick on that, like definition of solid waste I believe.

Another one, TRI regulatory burden, unfortunately, you know, EPA did respond to that, and did make changes in response to the burdensome paperwork. Unfortunately, though, the House did re-

cently respond, and denied funding for that rule to be implemented.

Chairman AKIN. So, of the five, you've got one done for sure.

Mr. FINERAN. Right, we've got one done, and—

Chairman AKIN. And, the House messed up one of them.

Mr. FINERAN. Right.

Chairman AKIN. Okay.

Mr. FINERAN. And, I believe the other three EPA is working on them.

Chairman AKIN. And so, there's three that are in process.

Mr. FINERAN. Right.

Chairman AKIN. Of the five, and those five were submitted when?

Mr. FINERAN. Back in 2004, May, I guess, of 2004.

Chairman AKIN. 2004?

Mr. FINERAN. Yes.

Chairman AKIN. So, a couple years on those. Okay.

Mr. FINERAN. But, you've got to remember, the list was not released of the finished by OIRA until the end of 2004, and the list didn't come out until March of 2005, so it's been more like a little bit over a year.

Chairman AKIN. Okay.

I want to ask you the same question, Bill.

Mr. KOVACS. Sure. I guess I probably wouldn't be—some of the regulations, for example, have been settled by court, new source review, others the programs have died, like environmental justice, so it's very hard to sit here.

But, I don't want you to forget that the process was in 2001 and 2002, we have a chart here, for example, in 2001 there were 23 high priority items designated by OIRA, and literally nothing happened with those, and I don't even know that there was a report. They just sort of disappeared.

In 2002, there were 161, and out of that 45 candidates emerged and went to the agency. So, there again, they were just lost, and the next year there was no nomination process.

So, that's where the discouragement came in, and then by the fact that you can't get timely information, which is the key, and there's no reason for that in the internet age, you don't have people willing to participate in the process because when you enter into this regulatory process, whether it be just nominations, and I keep on saying that's only one part of what Congress set up, it takes an enormous amount of effort. You have to have people who understand how the regulation works in the real world, and then how it's processed, and then we have to put it in writing to the agency.

So, when we go out to hundreds of members, which we do, to get a list of 16, 35 in one year, and about 40 in another year, you are asking them to do a lot of work. So, I would say that I would probably give them a C, and the reason I would give them a C is because both Congress and OIRA, for the last year, at least on the manufacturing regulations, have put an enormous amount of pressure on OIRA, and OIRA is now talking to the agencies, but prior to that time there was no one speaking to anyone. They just sent it there, and whatever the agency did, and I think OIRA's last testimony before the Government Reform Committee was, they

weren't really sure what all the agencies were doing themselves, whether they were trying to compile it.

Chairman AKIN. I'm going to try and follow my own rules. My five minutes are up. I've been joined by three fantastic colleagues, Mr. Sodrel, and Ms. Kelly to my right, and Ms. Christensen to my left.

Just a quick review of what we are talking about here. There was a process put together to try to streamline and get rid of red tape in various agencies, and so what happened is, a bunch of small businesses have made recommendations, of 189 there were 76 that were called out as top priorities. We are taking a look at the progress that the agencies have made on those various projects, and what needs to be done to possibly effect that process, or to encourage further changes.

So, with that, I'm going to turn to my Ranking Member for five minutes.

Ms. BORDALLO. Thank you very much, Mr. Chairman.

I don't know whether the progress is as good as we felt it was going, but I have, first of all, I have a copy of the—it's the congressional report, 2005 report to Congress on costs and benefits of Federal regulations, and I notice that, and I just want a yes or a no to this first question.

Many of the ones that they categorized as done were merely reports to OMB on the issue, no changes. Many of the 36 they say are done are disputed. I'd like to ask you that, Mr. Aitken, do you say this is true? Is done done, or is it just a report filed?

Mr. AITKEN. In developing the 76 reform nominations, OIRA and the agencies reviewed the nominations that had been received and made determinations on a case-by-case basis, based on the knowledge that the agency and OMB had at the time, whether the next step would be to do further research and prepare a report on an issue, which would then help to inform whether further rule making would be appropriate, or whether there was sufficient information and knowledge to be able to go forward and say at that point that the agency should move forward and take regulatory action.

And so, therefore, for some of the nominations the preparation of a report was what was decided as the best course of action.

Ms. BORDALLO. What have you done with these reports? I mean, when I see something done, I think it's done, it's gone through everything, regulations are in place, and we go forward.

Mr. AITKEN. I would need to look into that and get back to you.

Ms. BORDALLO. Would you give that to the Committee, Mr. Chairman? Yes. All right.

We've been at this for a number of years. Mr. Kovacs, how do you feel about the done that they have on this report?

Mr. KOVACS. Well, you know, it's hard—you know, you've got to leave some discretion with the agencies. The problem is, done sometimes is the easiest way out, and I guess we keep on coming back, the nominations are great, but you have a process in place with Section 610 of the Regulatory Flexibility Act, which requires the agency, not periodically, not on 76 regs, or something, but every year to sit down and think about what is it that we are going to do, because we've got 110,000 regulations, and the Congress is never going to get their handle on it. Industry is never going to get

their handle, but the agency is the one entity that gets the complaint, knows what the problem is, knows what the practical thing is, and they need to begin bringing groups together within the agency to say, we've heard this from this group or that group and how do we work these regulations.

And, a lot of the regulations, frankly, are simple business practices right now. They've been there for a long time, and we need to leave them there, but there are a lot of regulations, like the definition of solid waste with EPA, which they are handling now and was on the list, which is something that's been going on since 1976. They've got to figure out how to do it.

Ms. BORDALLO. Thank you, thank you very much.

Now, my second question is, last year I recommended that we meet with our counterparts in other countries, to discuss regulations and their lack of humane and appropriate regulations and appropriate standards.

At that time, the panel mentioned ten European countries that we have had regulatory talks with or traded ideas with, but not one Asian country at that time. Shouldn't we be doing something to systematically keep track of the regulation and laws that influence our competitors? Do we have a strategy to work with our competitors, including Asian countries on basic health and human safety regulations and innovative ideas? And, can you give us an update of the progress of the toxic release inventory rule, and the spill prevention petroleum counter measure reforms?

I don't know whether Mr. Aitken, would you—or whoever would like to take this up, what are we doing with the Asian countries? Have we improved?

Mr. AITKEN. I'm not familiar.

Ms. BORDALLO. Can anybody answer that?

Yes.

Mr. OTIS. Yes, let me—

Ms. BORDALLO. Mr. Otis.

Mr. OTIS. Both the spill control and the toxic release inventory, I'm probably the best person to respond to both of those.

With respect to your question on Asian countries, the Administrator of the agency was in China for about a ten-day period about a month ago, and that was our first step towards beginning to build at that level more concrete relationship with the State Environmental Protection Administration, SEPA, in Beijing. He was in Shanghai and several other cities, and so we are—we are beginning that process.

It is not an easy one for us, in the sense that we have no institutional mechanisms within the agency to do this sort of thing, but we recognize some of the issues that you are talking About and have clearly begun to do that at a senior level.

Ms. BORDALLO. All right.

I guess my time is up, Mr. Chairman, but I certainly hope—this is an important aspect.

Mr. OTIS. I would love to talk to you further about it.

Ms. BORDALLO. Thank you.

Chairman AKIN. I don't recall the order of people coming in. Mr. Sodrel, I think you were next, is that correct? Do you have question or answer?

Mr. SODREL. Yes, thank you, Mr. Chairman.

You know, I came a small business background, and when you keep talking about 76 I thought about 1776. Thomas Jefferson wrote a paragraph in the Declaration of Independence that always sticks with me. He said, when he is giving a reason to separate our relationship with King George, he said, "He has erected a multitude of new offices and sent hither swarms of officers to harass our people and eat out their substance." It sounds kind of contemporary to me.

Since the system of suggesting that agencies change does not work very well, and I'd like to address this to both NAM and the Chamber representatives. You talked a little bit about ALJ relief, or civil court, or some other standard, unfortunately, agencies have a vested interest in maintaining the status quo, or growing the organization, I mean, that's just human nature. They don't want to make the agency smaller. They don't want less influence. It tends to grow. So, how would you suggest that we enforce some discipline?

Mr. KOVACS. Sir, I do have one comment on that. When we were going through some of the more recent efforts, not the nominations, but like the guidelines for data quality, which really goes to the heart and soul of the rule making process, literally, there was not one agency, and you can go to the transcripts that they would have, like at the National Science Foundation and other public events that ever supported these. All they ever talked about is how opening up the agency and using good information, I mean, we are talking about agencies using good information, up to date, accurate information. How could you be resistant to that?

And, it all goes to, really, agency discretion. They have there right now, the courts are very pro agency, and we understand that, so they know that if they can get to the weight of evidence, or to their judgment, they have a very good chance of being of help.

So, what you have to have is some mechanism, Congress has legislated beyond anything we could ever dream of, I mean, I think you've done a good job of putting the structure in place, but it's not enforceable. So, there has to be some way, and I guess probably if I wanted to really sting an agency, the way I would do it is, I would take a paragraph out of the Mandates Information Act, which allows you to do a point of order if they don't consider the impact on local government, and if the agency doesn't fulfill its Section 610 review plan, which it's got to do, which it should be doing every year and has not done, then maybe a member of Congress should be allowed to raise a point of order, because once you do that, you fool with the one thing they care about, and that's their budget. And, that's the number one thing, that's where I would go.

Mr. FINERAN. Yes, I would just respond, agencies, you know, obviously, do want to stick with the status quo, and that's one reason why, you know, we've been concerned, you know, since 2002, on this fire standard. I mean, I know more about that fire standard than I should, given how technical it is. We've been working with NMA.

Again, it's a very technical regulation, apparently, and using a certain resonant boat building, but it incorporated the standards from 1969 of the National Fire Protection Association. The Na-

tional Marine Manufacturers Association has been petitioning, and there are other entities, since '94 to have that changed.

We nominated it in 2002, nothing happened. We nominated it in 2004, she indicated there are consensus standards. That's the whole process. When OIRA was talking with the agencies about the list of 76, I don't know why OSHA did not just accept, okay, we will update this regulation, put three sentences in the Federal Register, say we want to incorporate the latest standards from NFPA, out for public comment, and that's it, they checked the box.

Instead, it came back as part of the overall consensus regulations, but that, you know, is confusing to us and to the National Marine Manufacturers Association.

In the meantime, as they submitted a letter for the record, in the meantime numerous of their members are cited because they used modern fire standards, because they are not 1969.

Mr. SODREL. Well, whatever we need to do to impose some common sense on the system. I mean, nobody is opposed to safe workplace.

Mr. FINERAN. No.

Mr. SODREL. Nobody is opposed to protecting the environment, but we need to do it in the most economical and common sense fashion that we can to achieve the desired result.

Thank you all for being here today.

I've still got a few seconds left, apparently.

Mr. OTIS. Yes, if I could answer your question in part.

Mr. SODREL. Sure.

Mr. OTIS. I had an ancestor in 1763 who argued against the British Crown and the writs of assistance, and in four hours James Otis also laid out the groundwork similar to what you spoke. So, I have, perhaps, a genetic agreement with you on many cases.

I worked in the early 1980s in the Office of Information and Regulatory Affairs, as did the gentleman I currently work for, and our Deputy Administrator, and all of us have spent a considerable time in the regulatory process, much of what Bill is talking about.

And, perhaps, one of the things that the committee might think about, and the future Administrator or OIRA might think about, is that OIRA has always seen its role of what I would call inspecting quality at the end of the rule making process, and has not spent much time focusing on the actually regulatory development process itself, the skill sets of the agency employees involved, and many of the procedural things that Bill is talking about. They have spent some time, but, perhaps, not as much as it could.

So, one of the things your committee may want to discuss with the future OIRA Administrator is the issue of, is OIRA's principal responsibility working with agencies on that end of pipe review, inspecting quality at the end, or should a portion of its time be spent working with agencies on improving their regulatory development process itself in a fairly nitty, gritty fashion, and, therein lies, perhaps, a treasure trope of things that could be done.

Chairman AKIN. Very good questions and very interesting answers.

I think next in line is Ms. Christensen, if I'm not mistaken.

Ms. CHRISTENSEN. Thank you, Mr. Chairman.

Chairman AKIN. Excuse me, could I interrupt just one second. I also want to introduce another member of the committee here, that is the Gentleman from Texas, and also a fellow that's pretty darn good at cooking ribs, considering he's that far south of Kansas City, and a judge as well. So, we've got to mind our behavior.

Thank you, Louie.

Ms. CHRISTENSEN. Thank you, Mr. Chairman.

I'm going to ask a question to the EPA and Labor representatives here. Realizing that these 76 existing rules were singled out, had some targets singled out for immediate action to relieve the regulatory burden, we do have the Regulatory Flexibility Act, and I've always been very concerned about how that Act has not really been used to the extent that it needs to be to relieve some of the burdens on our small businesses.

So, I'd like to ask both Veronica Stidvent and Mr. Otis, what efforts have you made to comply with the Regulatory Flexibility Act requirements that agencies review every ten years regulations that have a significant impact on a substantial number of small businesses, to see if they can be simplified or eliminated, just through the regular process? And, have you ever published any regulations to be reviewed pursuant to Section 610 of the RFA, that ten-year review of regulations?

Mr. OTIS. I'll go first.

I will have to get back to you on the answer of whether we have actually published a 610 list or proposal. I have a feeling that Bill may be able to give us an answer to that. I have a feeling not.

One of the things I think you are aiming for and the committee is aiming for here is the question over whether or not as agencies we are as closely managing the regulatory development process as we should, including things like the 610 list you are talking about.

I will tell you I think at EPA right now we have a Senior Management Corps, perhaps, we are, as senior managers, all inside Washington at this point, and we critically understand that the issue of the process itself and the various component pieces, and the importance of those pieces to the outcome.

So, I think you will see in the next couple of years a greater focus on these more procedural aspects of the rule making process, including 610.

Now, there are a variety of things that occur under the Regulatory Flexibility Act, and my office has principal responsibility for trying to drive them throughout the agency, and we have done quite a few SBREFA-related panels. I think it's fair to say that the small business function that we have within EPA, my office is quite dedicated to that, those sorts of functions, and I think we have found both our rule writing staff, depending upon the program and the specific issue they are talking about, have found quite great value in those kinds of, whether they are a citizens advisory committee of some kind, or formal SBREFA panel, or a formal FACA panel, that those are helpful to us, and we have actually begun to realize their value, not as argumentative forums, but as cooperative forums for understanding how we can improve a rule, and I think we can give you examples where they have had that kind of positive value.

Ms. CHRISTENSEN. Ms. Stidvent?

Ms. STIDVENT. Yes, I can assure you that we take very seriously our responsibilities under the Regulatory Flexibility Act, not only in the 610 reviews, and my colleagues just handed me a publication from April of this year where we published three rules to be looked at under 610, and we continue to do that on a regular basis. There are a number of rules we did a look-back review on.

But also, new rules, and I think that that is where we try to make the greatest impact, is any time we undertake a new regulation my office makes sure that the analysis is done to look very carefully at the impact of those regulations on small businesses. And, that's in anticipation, too, of a further review of that by OMB in consultation with the SBA Office of Advocacy. So, we take very seriously our responsibilities under the RFA, both in the look-back review and for new rules.

Ms. CHRISTENSEN. Thank you.

Mr. Aitken, I know that this hearing is most—is chiefly around the review of the past year, but Mr. Kovacs from the Chamber said that with respect to the recommendations made in 2002 and 2003 that they seem to have disappeared, running the risk of losing support for this initiative, especially since people seem to put in a lot of time and effort to reviewing the recommendations and coming up with the final list.

What happens, an you tell us what happened with the recommendations made in the rounds in 2002 and 2003?

Mr. AITKEN. As I mentioned during my oral statement, I started in OIRA in early June, having come from Counsel's Office, and at this point I'm not very familiar with the status of the 2001 and 2002 nominations. But, I can provide additional information to the Subcommittee regarding those nominations.

Ms. CHRISTENSEN. I'd appreciate that, through the Chair, if we could find out what happened.

Chairman AKIN. Without objection.

Ms. CHRISTENSEN. Thank you.

Chairman AKIN. Okay. I think next the Gentlelady from New York, Ms. Kelly.

Ms. KELLY. Thank you.

I'm interested in whether or not the agencies that are represented here at the table speak to each other when they are promulgating rules and regulations?

Mr. AITKEN. As Mr. Otis said, under Presidential Executive Order OMB/OIRA reviews drafts of proposed rules and final rules near the end of the—

Ms. KELLY. All of them?

Mr. AITKEN. The—

Ms. KELLY. All 4,000 a year?

Mr. AITKEN. No, the significant ones, either those that are economically significant, which have impacts of over $100 million annually, or that otherwise have a significant impact on a sector or raise novel legal issues, or impact on other agencies.

Ms. KELLY. What happens when that is reviewed? Just walk me through that process, can you?

Mr. AITKEN. An agency would submit, near the end of its development of the rule, would submit a draft of the rule to OIRA for review, and we would then have discussion with the agency, and

with other interested agencies and offices, about the rule. And, if it was an economically significant rule, the agency would have prepared a regulatory impact analysis, which we would then review with the agency.

And, at the conclusion of our review, the agency would then issue the rule, whether it be the proposed rule or the final rule.

Ms. KELLY. When you do a regulatory impact analysis, who gets that to evaluate, because I don't believe that it comes up to this committee.

Mr. AITKEN. The agency, the rule making agency itself, would be the one that prepares the regulatory impact analysis.

Ms. KELLY. So, I'm sorry, I just have to—I'm trying to understand. You are saying that something like a Labor Department would do—would prepare its own report. I thought you said OIRA was looking at that.

Mr. AITKEN. Oh, sorry for the confusion. The rule making agencies, say OSHA, or EPA, or another agency, in connection with an economically significant rule, one with $100 million impact.

Ms. KELLY. Right, $100 million or more.

Mr. AITKEN. They would prepare a regulatory impact analysis of the anticipated benefits and costs of the rules. It would then submit that analysis to OIRA, along with the draft of the proposed or final rule, and then that would be part of our review, discussing the regulatory impact analysis, as well as the draft rule, to get a better sense of the relationship of the estimated costs and benefits of the rule.

Ms. KELLY. So, this is all done within the Executive Branch of Government, rather than the Congressional Branch. There's no input from the Congressional Branch, if I understand you correctly.

Mr. AITKEN. That Executive Order process is an internal Executive Branch process.

Ms. KELLY. Okay.

Mr. OTIS. Congressman, if I could, those analyses, however, are part of the public docket, and now those are internet accessible as part of the new Federal Government-wide Docket Management System.

And, you've raised a very important question over our ability to work with fellow agencies. For us, much of what we do very clearly touches on virtually every other federal agency's jurisdiction, particularly, Agriculture and Energy. And, we have in this Administration created an Agricultural Advisor to the Administrator. He directly reports to the Administrator, and has helped us build quite a few bridges, both at the career and senior political manager level with the Department of Agriculture, in many ways that we as an agency never had before. And, we've been starting to do that in many different levels with the Energy Department.

We are working, for example, on the spill control rule to conduct an analysis that was requested of us by the Energy Department, and we have a team from both departments working on it.

I don't want you to go away thinking that everything is fine, but I think it's an area where this gets back to the issue I raised over sort of the more mechanistic aspects of the rule making process. I think we need to do more of that, and we've been struggling to, and I think we've done better, and need to do more.

Ms. KELLY. I'd be interested—I'm sorry that the Commerce—Department of Commerce isn't here, but maybe the Chamber can give me some kind of an idea, they are looking at this at a cost benefit analysis, do you know whether or not they are also checking for redundancy and overlap? And, wouldn't that be a place where we could certainly cut down on some of the rules and regulations?

Mr. KOVACS. The answer is yes. The biggest single problem that we have, and I'm talking about as—

Ms. KELLY. The answer is yes to what?

Mr. KOVACS. Yes, we could—

Ms. KELLY. That the agencies are looking at redundancy and overlap?

Mr. KOVACS. No, they are not.

Ms. KELLY. They are not.

Mr. KOVACS. The biggest single issue in the rule making process, we've been fighting this issue for years, is that the Data Quality Act required the agencies, and they just hate this, to use the most recent best quality data, so you don't have a rule making where the agency is using data that's ten years old, or you don't have an agency using, you know, taking certain studies that may be outliers, but not using the bulk of the studies.

And, the courts have been very clear that the Data Quality Act is not enforceable, it's really between OIRA and the agencies, and they can do whatever it is they want. There's no way to enforce it, so that if an agency, and this is what the 4th Circuit says, this isn't the Chambers' position, if the agency wants to rely on data that is not the most accurate, not the most reliable, and not necessarily in the mainstream, they are free to do that, and, in fact, just yesterday the D.C. Circuit said, not only can they do that, but if they go into a rule making process and they have one rule which is for the proposed rule, and they come out with a totally different final rule, that's even acceptable, too.

So, the problem is, the agencies have enormous discretion in the information they use, how they select it, and who they talk to, and there's nothing that anyone on the outside can do about that.

Ms. KELLY. Thank you.

My time is up.

Chairman AKIN. Well, this is a hearing I'm sure could go longer than we are going to be able to make it, but, Mr. Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman, and I appreciate you all being here. I'm sorry I was a little late.

You know, so many of these committee hearings, I'm sure you've been through, people like to preach, and I like this committee, there's not that much preaching at people as there is really trying to gather information.

I just have a couple questions for Mr. Fineran and Mr. Kovacs.

In the information provided by agencies, there are indications that 36 of the 76 priority reforms have been accomplished, and through 2005, 33 of the 46 reform milestones identified by the U.S. manufacturing sector report have been reached. And so, I wanted to ask you guys, that's what the Government is saying, do you agree with that?

Mr. Kovacs?

Mr. KOVACS. We had the discussion of what's completed already.

Mr. GOHMERT. Okay.

Mr. KOVACS. And, the answer is sometimes the word is done, and that's what the agency says, it's just done.

You have to be careful. I mean, the agency does need some discretion, and they are the experts in this area. What we really need, though, is the transparency, and, really, some integrity in the process.

You know, we have a right, if we don't like the rule—

Mr. GOHMERT. But, you understand this is a government, and so you are wanting integrity in the process, is that right? I mean, let's don't hope for too much here, you know.

Mr. KOVACS. Transparency, I mean, we are all in this boat together, and we've got these 110,000 regulations, and we've got to figure out how to do them the right way. And, what we've always preached is, that the agencies need to figure out how to prioritize this, because with limited resources they have, we are all for protecting public health and safety. We are all for having the safest workplace, but, you know, we spend $300 billion a year on environmental protection, and we spend it a lot of times on what the experts would say are not the main issues and the big issues we sort of let go.

So, when they say done, there's no way for us to really challenge that. I mean, if they want to say it's done, it's done.

Mr. GOHMERT. Well, I was giving you the chance to challenge it, here and now.

Mr. KOVACS. Well, we've challenged it in the sense that we've said that on a lot of the rules, like the definition of solid waste, this is something they've worked on for years. They are sort of going through a rule making process, they are saying they are doing something, but they've been going through the same rule making process since 1980. They've got to come to—they've got to come to a conclusion, and that's where the problem is in the regulatory process, it just gets lost.

And, what happens a lot of times is, there's so much, there's so much regulation, that the stuff that's really important gets the same amount of attention as the stuff that's not important, and that's where I think the small businesses come.

We could bring in like some of the stuff that EPA is doing with home builders, for example, on enforcement. If your silt fence is down for a day, they may fine you $10,000, so you are focusing on whether or not you've got your paperwork in, but you are not focusing on whether or not the excavation is right, and that's where the problems come in.

Mr. GOHMERT. Sure.

Well, Mr. Fineran?

Mr. FINERAN. Well, you know, as Bill said, you know, what is done, a number of them are reports, but does that mean there is or is going to be a change in the regulations?

But, I think that having the milestones in there does show that something did come out of the 2002 exercise and 2001 exercise, which is that, you know, those did not have any kind of overall deadlines or what agencies should achieve when. So, at least that was one useful thing that came out of the previous exercise, we can do that.

Again, the problem is, if you were to ask us to find out today where the regulations stand today, Bill and I can't really tell you. You know, there's no place, OIRA doesn't have it, the centralized tracking system, they don't have the list of 76 posted, where the agencies are, have they met their deadlines, the individual agencies, as far as I know, don't have it on their public websites.

There may be reasons for that that I'm not necessarily aware of legal or other, but again, that has been one problem.

Mr. GOHMERT. Well, let me ask you this. What do you think is the most important specific reform that needs to be achieved, the next most important specific reform that should be achieved? If you could do one thing.

Mr. KOVACS. I would—

Mr. GOHMERT. King for a day.

Mr. KOVACS. I would take the passage out of the Mandates Information Act, which allows a member of Congress to raise a point of order on an agency appropriation, if they don't perform, whether it be the 610 reviews or the nomination process, and in a transparent way.

And, I say that because there's nothing, if you ever, if the Congress and the American people are ever going to get control over the regulatory process, the Section 610 review and the Regulatory Flexibility Act is the key, because when Congress legislated that what they said is, the agencies have to have a part of the strategic plan and to focus on those regulations that are out of date or should be changed. And, the agencies, for the last 20 years, that's been in the breach, periodically, about every year, you know, you can find 15 or 20 that will appear in the Federal Register, but there is no consistent plan, and that's the one thing, when you get that report you are able to see it, we are able to see it, and the process, we can begin talking to each other.

And, I don't know how else. I mean, we could argue, give us a right to review it in court, you know, all that does is, that's just more litigation, let's get the job done, and that is, the agency hears the complaints, they know what the problems are, and let's get the process started, so we can be involved in looking at it, and Congress can see what the results are every year.

Mr. GOHMERT. Would Mr. Fineran be allowed to answer?

Mr. FINERAN. Real short, I can answer.

One thing I would like to see happen, the NAM would like to see happen, is to have the Executive Order 12866 made statutory, so that OIRA would have some statutory authority. Also, as part of that, you know, have judicial review now, the Administration will hate that, whoever is the Administration at the time, but to Dr. Christensen's point, when the RFA was completely non-judicially reviewable in the '80s, under the Reagan Administration, every regulation that came out just About said that this regulation does not affect small entities in any way, because that relieved them from doing—from adhering to RFA.

And, once it became judicially reviewable, I think that went away.

Mr. GOHMERT. Thank you.

Thank you, Mr. Chairman.

Chairman AKIN. I thank the committee and also our guests for participating, I think, in an interesting discussion. I'm not content that it's just an interesting discussion, and I'm going to be pressing this committee to take a look, particularly, at your recommendations, Bill.

But, my sense is, is that with the people that are here, there's a good intent to do what's right, but somehow we get ourselves tangled up in an awful lot of extra hoops and things that we have to run through.

And, I'd like to figure out what's the best way to proceed. We've already seen that we passed a lot of bills, there's an intent on everybody's part to try to streamline the process, and there is increasing competition internationally that says we have to succeed in this.

So, we are going to be taking a look at what needs to be done to try to move things along.

I'm going to make a closing statement here, so that everybody is forewarned. Although I hate red tape, I'm somewhat sympathetic, being a Congressman for six years, I know how slow it is for us to get very simple things done. I understand that you may have great intentions, as many of us do, and it still just seems like we are watching glacier races some weeks. So, I'm not blaming anybody personally or particularly, but I think we want to try to get through this and figure out what needs to be done.

I have one quick question and then I want to make a closing statement. The quick question is, to the agencies, when I used to work for IBM one of the rules on project management we had was, if you've got a project that you really care about put one person in charge and hold them accountable.

On these different things that we are trying to clean up, is there ever one person given that job, and just say, okay, this is your deal, now you go take care of it and get it, not done, but complete, in a satisfactory fashion? Is it ever done that way, or are these sort of lists sort of passed around and passed around, nobody specifically accountable? Just a quick answer and then I've got close up.

Mr. OTIS. The answer from EPA's point of view is, generally, yes. If it's a particular rule making, there is, indeed, a workgroup chair who is given responsibility of dealing with that, with that particular rule.

And then in a management sense, we've done the same thing. We know what these particular nominations are, and we have the management team is held accountable to the point where the Deputy Administrator and Administrator are asking periodically, how are you doing.

So, yes, there's a work level person who is in charge, and then there's a management chain very clearly held accountable.

Chairman AKIN. Thank you.

Let me go ahead and close up here, at least for the moment.

First of all, thank you all for participating in the hearing, and it does hearten me to hear that there has been progress, but I'm concerned that I don't have a very clear-cut picture of exactly where these things are, the status of where they are, when they are actually completed to the point of being satisfactory from the point of view the people that are affected by the regulations, and

I think we need to figure out some ways that we can create a more transparent system for the individuals who have made the recommendations that we've heard.

And, we must consider whether institutional changes must be made that will transcend the loss of those individuals that are actively seeking ways to reduce regulatory burden.

In regards to the 76 nominations, Mr. Aitken, I would like your office to submit a chart for the record outlining where Federal agencies are on the nominations that have been agreed to, their progress, and when they are actually completed in a way that is satisfactory to the people that made the recommendation, I want to know the date and when those were checked off, when we got them done. You know, this is the satisfaction of a "to do" list, you want to check them off, you want to see, the ones that are checked off, and then where the status of the other ones are.

I'm also going to be asking our staff to take a look at what we can do to try to streamline the process, hold people accountable, move the projects along, and so we'll be continuing on this. This is the second hearing we've had on this, it's not something that we are going to be dropping.

I understand, Mr. Aitken, that you are an interim, too, in the position, and that makes it maybe a little bit more complicated, but I have had a chance to chat with some of the people in charge of your agency, and I think there's an interest in cooperating and putting this all together, making it work.

I also wanted to compliment you, Mr. Otis, it seems like you are really on top of what we are trying to do, and trying to make the thing work.

And, all of you, I think, have been helpful, but I just think we need to do a little bit better job. All of you that have heard this hearing would probably agree on that point.

So, we are not done with this yet, the report issued in 30 days, is 30 days okay, Mr. Aitken?

Mr. AITKEN. I'll need to look into that, but I would hope that 30 days would be fine.

Chairman AKIN. All right. If it's not 30 days, we are going to need an awful good reason why we can't do that in a month, just know where the status of those projects are.

Supposedly, people are tracking them, it's a matter of just collecting the information.

Yes, Madam Chair—oh, closing statement, yes.

Ms. BORDALLO. Thank you, Mr. Chairman, and thank you to the witnesses.

As the Chairman stated, I think we all want the same thing, but, you know, with 90 percent, 97 percent of the businesses in America being small businesses, I think we should put this up on our priority list.

Listening to the Chamber of Commerce and their reports for the last how many years here, one year nothing was done, 2003. You know, we'll be here until 2015, and maybe still going over the same situation.

So, I just say, isn't there—could we envision a system where when the industry establishes a new standard that they meet immediately with the appropriate agencies, and work together on a

negotiated rule making, to bring the agency rule up to date. Something has to be done where we could meet together, not individually, because I think what Congress is being misled here, we think that, you know, everything is done, but it's not done, we've just filed the report, and we seem to be just spinning our wheels.

So, I would suggest that, Mr. Chairman, we find a more efficient way to work together and to try to remove some of these things off our books.

Thank you very much.

Chairman AKIN. Thank you, everybody, with that the hearing is adjourned.

[The hearing was adjourned at 11:28 a.m.]

Opening Statement
July 13, 2006
Regulatory Reform and Oversight Subcommittee
House Committee on Small Business
W. Todd Akin, Chairman

Good morning and welcome to today's hearing entitled "An Update on Administration Action to Reduce Unnecessary Regulatory Burdens on America's Small Manufacturers." I want to especially thank the witnesses who have taken time out of their busy day to participate at this important hearing.

The well-being of U.S. manufacturers is of vital concern to this subcommittee and to Congress as a whole. America's manufacturing base constitutes roughly 12 percent of the Gross Domestic Product (GDP) of the United States economy, which has slowly decreased in recent years. About 95 percent of all U.S. manufacturers are small or medium-sized enterprises. Small U.S. manufacturers in particular have faced fierce global competition in recent years. Much of this competition comes from countries that have minimal or no regulatory compliance cost.

The Administration has recognized that by reducing unnecessary regulatory burden, it also bolsters the strategic competitive position of small U.S. manufacturers in the global marketplace. This has been exemplified through the solicitation of public nominations for regulatory reform by the Office of Management and Budget (OMB) in 2004. These nominations emphasized easing the regulatory burden of small and medium enterprises in the manufacturing sector. The independent Office of Advocacy at the Small Business Administration (SBA) and the manufacturing industry answered by delivering 189 nominations to the federal government for the reduction of unnecessary regulation through rulemaking. Ultimately, 76 nominations were selected to reform unnecessary regulatory burden in collaboration with the appropriate federal agencies.

On April 28, 2005 this Subcommittee held a hearing entitled "The Administration's Program to Reduce Unnecessary Regulatory Burden on Manufacturers – A Promise to be Kept?" At that hearing we heard testimony regarding the Administration's timeline and commitment to reform the 76 burdensome regulations.

Nearly 15 months have passed since we last addressed this important issue and this subcommittee seeks an update regarding the progress the Administration has made on

these important reforms. We also hope to learn how the Administration's regulatory review process has benefited by engaging in this collaborative effort.

I look forward to learning more about how these regulatory reform initiatives are progressing and what more we can do to aid our nation's manufacturers. I now yield to the gentlelady from Guam, Madame Bordallo.

STATEMENT OF
STEVEN D. AITKEN
ACTING ADMINISTRATOR,
OFFICE OF INFORMATION AND REGULATORY AFFAIRS
BEFORE THE
SUBCOMMITTEE ON REGULATORY REFORM AND OVERSIGHT
OF THE
COMMITTEE ON SMALL BUSINESS,
UNITED STATES HOUSE OF REPRESENTATIVES

July 13, 2006

Chairman Akin, Ranking Member Bordallo, and distinguished Members of this Subcommittee, I am Steven D. Aitken, Acting Administrator, Office of Information and Regulatory Affairs (OIRA), U.S. Office of Management and Budget (OMB). I have worked at OMB for 17 years, most recently serving as Deputy General Counsel. This is my first appearance before this Committee. Thank you for inviting me to this hearing and for giving me the opportunity to testify today on the reform of regulations that impact the United States manufacturing sector.

As you know, two keys roles of OIRA are to review new rulemakings and stimulate modernization of existing rules. In my testimony today, I will discuss the process OIRA has used to receive public input on reforming existing rules and how OIRA ensures that agencies consider the impact of new rules on small businesses.

The 2004 Manufacturing Initiative

A major tool that OIRA uses to improve existing rules is our call for public reform nominations pursuant to the Regulatory Right to Know Act.[1] Pursuant to this Act, OIRA has initiated three public nomination processes to undertake reform of existing regulations. In 2001, OMB requested public nominations of rules that should be rescinded or modified. We received 71 nominations from 33 commenters. In 2002, OMB again requested public nominations of reforms of rules and also sought nominations for reform of guidance documents and paperwork requirements. We received 316 distinct reform nominations from more than 1,700 commenters.

Our most recent request for public nominations was in February of 2004 - in our draft Report to Congress on the Costs and Benefits of Federal Regulations.[2] In that request, OIRA focused on the manufacturing sector because it continues to be one of the most heavily regulated sectors of our economy. We asked nominators to suggest specific reforms to regulations, guidance documents or paperwork requirements that would improve manufacturing regulation by reducing unnecessary costs, increasing effectiveness, enhancing competitiveness, reducing uncertainty and increasing flexibility. We also mentioned that OIRA is particularly interested in reforms that address burdens on small and medium-sized manufacturers, where burdens tend to be relatively large. Finally, since any proposed reforms would need to be evaluated as any other regulatory

[1] Section 624 of the Treasury and General Government Appropriations Act of 2001 (31 U.S.C. § 1105 note, Pub. L. 106-554)
[2] Available at http://www.whitehouse.gov/omb/inforeg/draft_2004_cbreport.pdf

action under Executive Order 12866, we suggested that commenters consider the extent to which a benefit-cost case (quantitative and/or qualitative) can be made for the reform.

In response to the solicitation, OMB received 189 distinct reform nominations from 41 commenters. The materials submitted by the 41 commenters are available on OMB's web site, and the 189 reform nominations are summarized in OMB's Final 2004 Report to Congress on the Costs and Benefits of Federal Regulations, which was issued on December 17, 2004.[3] OMB evaluated the reform nominations and collaborated with federal agencies in the development of response plans. OMB also sought evaluations of the recommendations by the Office of Advocacy of the US Small Business Administration and the US Department of Commerce's Office of the Assistant Secretary for Manufacturing and Services. As a result of this process, on March 4, 2005, OMB issued the Regulatory Reform of the U.S. Manufacturing Sector Report. In this report, Federal agencies and OMB determined that 76 of the 189 nominations have potential merit and justify further action[4]. For all future actions on these reforms, the report also identified milestones and deadlines, which range from performing a priority investigation and reporting to OMB in order to determine appropriate next steps, to issuing modernized regulations.

Status of the 2004 Manufacturing Reform Initiative

The U.S. Manufacturing Sector Report identified 46 milestones that agencies were due to complete (i.e., by publishing a proposed rule or submitting a report to OMB) by the end of FY 2005. Agencies reached 33 of these 46 reform milestones. We report on each of the reform nominations in the final 2005 Report to Congress on the Costs and Benefits of Federal Regulations.[5]

According to the most recent information provided to OMB, the agencies have now completed 36 of the 76 priority reforms. Please note that these numbers are preliminary; we will continue to work with the agencies to verify and update the status of the priority reforms in preparation for our 2006 final report to Congress. Several of these reforms successfully improved existing regulations, in that the reforms increase the net benefits of regulation while maintaining important environmental, health, and safety protections. The first two reforms listed below were also identified as high priorities by SBA's Office of Advocacy.

- In December 2005, EPA issued a final rule permanently exempting certain categories of "non-major" industrial sources that are subject to national emission standards for hazardous air pollutants (NESHAP) from the requirement to obtain an operating permit under title V of the Clean Air Act. The five exempted source categories are dry cleaners, halogenated solvent degreasers, chromium electroplaters, ethylene oxide sterilizers and secondary aluminum smelters. The sources affected by this rule are primarily smaller businesses and EPA estimates that this final rule will provide regulatory relief for over

[3] Available at http://www.whitehouse.gov/omb/inforeg/2004_cb_final.pdf
[4] A detailed explanation of each priority reform, along with milestones, can be found in OMB's report on Regulatory Reform of the U.S. Manufacturing Sector, available at http://www.whitehouse.gov/omb/inforeg/reports/manufacturing_initiative.pdf
[5] Available at http://www.whitehouse.gov/omb/inforeg/2005_cb/final_2005_cb_report.pdf

38,000 sources, many of which are small entities. This reform was in response to nomination number 108[6], which requested that EPA develop a rule that permanently exempts metal finishing facilities from federal permitting requirements. EPA studied this issue and found that it had merit.

- In October 2005, EPA published the final rule, which included about a dozen targeted revisions to EPA's industrial pretreatment program, which streamlined the monitoring and oversight requirements for industrial facilities discharging into wastewater treatment plans. One provision allowed treatment plant operators to waive sampling for regulated ("categorical") pollutants upon a showing by the discharger that the pollutant is not expected to be present in its wastewater. Another allowed treatment plant operators to reduce oversight of facilities with small volume discharges in order to allow greater focus on dischargers with the greatest potential for adverse environmental impact. The rule was estimated to reduce burden on dischargers and treatment plant operators by about 240,000 hours. This reform was in response to nomination number 47, which asked the EPA to finalize a rule they had already proposed that streamlined the general Pretreatment Regulations for Existing and New Sources of Pollution.

- On April 2006, EPA published a final rule streamlining requirements under the Resource Conservation and Recovery Act (RCRA). This rule was a result of a multi-year effort that was designed to systematically reduce burden while ensuring protection of human health and the environment. Numerous changes were made to provide greater flexibility (e.g., allow in-house professional engineers to make required certifications) and reduce paperwork requirements (e.g., lessen the frequency of required self-inspections for facilities with exemplary environmental performance, eliminate duplicative recordkeeping and reporting requirements). Overall, this final rule is expected to reduce compliance costs by $2 million to $3 million annually, without lessening environmental protections. The annual burden hour savings range from 22,000 hours to 37,500 hours per year. This reform was in response to nomination number 92, which requested that EPA should reduce the frequency of inspections of large quantity generator accumulation areas regulated under RCRA. EPA had already begun a rulemaking to streamline these requirements before this round of reform nominations.

OMB remains dedicated to these reform initiatives; we will continue to oversee the reform process to make sure that agencies make adequate progress so that these nominations can be closed out by the end of 2008.

OIRA undertakes many other activities, in addition to the manufacturing regulatory reform process, to ensure that agencies consider the impact of their regulatory actions on small business. We work closely with the Office of Advocacy of the Small Business Administration to ensure that agencies meet their obligations to analyze the impact of regulations and to consider less burdensome regulatory alternatives for small businesses. For example, OIRA, along with Advocacy, sits on Small Business Advocacy Review Panels, pursuant to Small Business Regulatory Enforcement Fairness Act (SBREFA). These panels ensure meaningful small

[6] The reforms were numbered for tracking purposes in OMB's final 2004 Report to Congress on the Costs and Benefits of Federal Regulations.

business input in the early stages of rule development for all EPA and OSHA rules that may have significant small business impacts. To date, OIRA has participated in 30 EPA and 7 OSHA SBREFA panels. While not legally binding, the recommendations of these panels are taken seriously by the agencies and have frequently resulted in significant improvements to the proposed regulations.

In addition, Executive Order 13272, issued in August 2002, strengthens agency compliance with the Regulatory Flexibility Act (RFA) and Advocacy's role in ensuring that agencies make minimization of small business impacts a central consideration in the rule development process. The Executive Order states that agencies must thoroughly review draft rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the RFA.

Thank you very much for the opportunity to participate today in this important hearing. I would be happy to answer any questions you may have.

Testimony of Richard D. Otis,
Deputy Associate Administrator, Office of Policy, Economics and Innovation
U.S. Environmental Protection Agency,
before the
Committee on Small Business
Subcommittee on Regulatory Reform and Oversight
U.S. House of Representatives

July 13, 2006

I. Introduction

Mr. Chairman and Members of the Subcommittee, good morning and thank you for giving me the opportunity to appear before you today. My name is Rick Otis, I am the Deputy Associate Administrator of the Office of Policy, Economics, and Innovation (OPEI) at the EPA. Located in the Office of the Administrator, OPEI is the primary policy arm of EPA and we work with all other parts of the Agency and federal government on regulatory policy, the development of new innovative approaches to environmental protection, and economic analyses. In recent years, OPEI has been specifically charged by the Administrator to improve the quality of the science, policy, and economics that underlie EPA's regulations, including the assessment of small business impacts. These vital functions give OPEI a central focus in the development of regulatory policy and innovation. As a senior managing official of OPEI, I have a personal interest in ensuring that the commitments to regulatory improvement made by the Agency are successfully fulfilled.

My primary purpose for appearing this morning is to discuss the Environmental Protection Agency's regulatory initiatives included in the Office of Management and Budgets (OMB) 2005 report entitled Regulatory Reform of the United States Manufacturing Sector. I also want to take this opportunity to touch on two other important and closely related topics. March of this

year marked the 10th anniversary of the passage of the Small Business Regulatory Enforcement Fairness Act (SBREFA), so I will take a few moments to describe some of EPA's efforts to address small business concerns in the context of the main subject of this hearing. And lastly, I will outline a few key innovative actions we are taking to move EPA beyond simply producing better regulatory actions, but take us towards new ways of achieving environmental protection.

When nominating Administrator Steve Johnson, President Bush challenged him and the Agency to accelerate our nation's environmental progress while maintaining our economic competitiveness. This is a clear recognition by the President of two very important points. First, it recognizes that as a nation we have a core, underlying set of values that lead us to provide our children with a healthier, safer world. Second, it recognizes that we face significant and growing global economic competition. At EPA, we are critically aware of the role we play in both these issues and join the President in ensuring our children inherit a safer, healthier, more economically vibrant future.

The manufacturing sector is a cornerstone of our nation's economic vitality and provides American's with excellent products, job opportunities, and a better quality of life. However, the challenges confronting American manufacturers, particularly those in the small business sector, are urgent. U.S. manufacturers compete with businesses from both developed and developing countries in an increasingly global economy. This global economic challenge influences American businesses, and makes it imperative that regulatory agencies, such as EPA, seek regulatory options that achieve environmental results and economic success.

Small businesses represent 99.7 percent of all employer firms, employ half of all private sector employees, pay 45 percent of the total U.S. payroll, and have generated 60 to 80 percent of new

jobs annually over the last decade.[1] To keep this part of our economy vibrant, and growing, we must seek cost-effective, innovative, and practical environmental solutions. As such, our work on innovative approaches to achieve environmental results often focuses on small business. We are pursuing innovative strategies that can lead us to a more results-oriented system of environmental regulation and that harness the growing needs in environmental stewardship.

Just over a year ago, Ms. Stephanie Daigle, Acting Associate Administrator of EPA's Office of Policy, Economics and Innovation testified before this subcommittee on our commitment for regulatory reform of the manufacturing sector, and the vitality of EPA's small business programs. I believe that the subcommittee will be pleased to hear that the Agency has made significant progress in meeting our commitments and continues to be a leader in federal small business programs.

II. Manufacturing Initiative

In 2004, in a report entitled *Manufacturing in America*, the Department of Commerce recommended regulatory reform as a key activity government can undertake to ensure the continued competitiveness of U.S. manufacturing in a global market. This report became the driving force behind the Administration's initiative to reform regulations that place unnecessary or counter productive requirements on the manufacturing sector. EPA shares that interest, and recognizes that more targeted, flexible, and appropriate regulatory requirements will help accelerate the pace of environmental protection in a manner that is more consistent with our

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[1]Ths information comes from the Small Business Administration Office of Advocacy October 2005 Frequently Asked Questions Fact Sheet. The Office Of Advocacy defines a small business for research purposes as an independent business having fewer than 500 employees. For EPA's RFA/SBREFA uses definitions codified at 13 CFR 121.201.

national responsibility to maintain a strong economy, including manufacturing. We believe that smarter regulations enable manufacturing facilities to focus their resources on higher priority environmental issues and result in better environmental protection.

Since 1997, OMB has submitted an annual Report to Congress estimating the total costs, benefits, and impacts of federal rules and paperwork. OMB publishes a draft report each spring and solicits public comments on the content of the report and on any regulatory actions or guidance documents the public believes should be nominated for reform. In 2004, OMB focused their Report to Congress on regulatory reforms relevant to the manufacturing sector. OMB requested public nominations of specific regulations, guidance documents, and paperwork requirements that, if carefully modified, may reduce costs, increase effectiveness, enhance competitiveness, and increase flexibility. One hundred and eighty nine responses were submitted to OMB from 41 different commenters. Most of the nominations pertained to regulations promulgated by EPA and the Department of Labor. In December 2004, OMB referred 90 reforms to EPA for our review and consideration. EPA evaluated the merits of each of the reform nominations and, in January 2005, submitted its reform recommendations to OMB. EPA carefully examined each and every reform suggested by the public and considered:

- if the action was based on sound science;
- if implementation of the action was the most effective way to manage for environmental results;
- and, whether the same, *or better*, environmental outcome could be achieved through a cooperative partnership rather than command and control regulation.

Applying those criteria, EPA and OMB agreed to pursue 42 reforms that were included in the report. EPA's commitments cover a wide range of issues, most of which will reduce the burden

of monitoring and reporting requirements, while still protecting human health and the environment. This is particularly important for small businesses which often face a disproportionate share of the regulatory burden.

Our review of the nominations has helped to either confirm the Agency's initial approach or recognize the need for revision or clarification. It has also highlighted other opportunities for us to accelerate the pace of environmental protection through cooperative partnership and stewardship.

III. Progress on Regulatory Reform Nominations: Completed Actions

OPEI is responsible for overseeing the Agency's efforts to meet the Manufacturing Initiative milestones, and I am pleased to report that we have almost completed our commitment. We developed and maintain a database to track the milestones for each regulatory initiative, and the Agency's progress is presented to the Administrator on an on-going basis. Overall the Agency has made significant progress. We have completed our reform commitments for 22 of the 42 nominations, more than half of the commitments identified in the March 2005 OMB report. We are on track to complete several additional actions that we expect to finalize by the end of 2006, including four for which we are in the process of confirming with OMB whether our commitments are fully complete. Many of these nominations focus on reducing the frequency and burden of reporting requirements, but still maintain the Agency's emissions and risk exposure limits. These considerable modifications effectively protect the environment and human health at a level above, or at least equal to, our current standards but at a lower cost. While we are close to completing our work on the Manufacturing Initiative, there are a few remaining nominations for which the Agency is still considering the best approach to address the outstanding issues raised by commenters.

I would like to highlight our progress on two reforms that illustrate the meaningful steps the Agency has taken in responding to OMB.

Pretreatment Streamlining

The National Pretreatment Program is part of the Clean Water Act's (CWA) water pollution control program. The program is a joint regulatory effort by local, state, and Federal authorities that requires the control of industrial and commercial sources of pollutants discharged to municipal wastewater plants (called "Publicly Owned Treatment Works" or "POTWs"). Control of pollutants prior to discharge of wastewater to the sewer minimizes the possibility of pollutants interfering with the operation of the POTW and reduces the levels of toxic pollutants in wastewater discharges from the POTW and in the sludge resulting from municipal wastewater treatment.

Although adoption of the General Pretreatment Regulations has resulted in more consistent implementation of the Pretreatment program on a national basis, many individual POTWs and industrial users have experienced problems implementing certain requirements. As a result, EPA promulgated a rule in June 2005, which streamlined and clarified certain provisions of the General Pretreatment Regulations for Existing and New Sources of Pollution. The rule allows Control Authorities to better focus oversight resources on industrial users with the greatest potential for affecting POTW operations or the environment. One example of the benefits of the changes is that local governments which implement the pretreatment program are no longer required to sample for pollutants that are not present at the industrial users facility. This change will substantially reduce the costs to facilities, while still holding those facilities to the same federal discharge limits currently in place.

This rule reduces the overall burden from technical and administrative requirements that affect industrial users, local control authorities and approval authorities, providing more flexibility to achieve environmental protection. If POTWs adopt the regulatory flexibility option, the estimated savings in annual burden hours and costs to the affected respondents could be as much as 240,000 hours or $10.1 million.

Title V Operating Permits

The 1990 Clean Air Act Amendments require that all states develop operating permit programs under Title V of the Act. Under these operating permit programs, every industrial facility that is a major source of air pollution must apply for an operating permit. In addition, some industrial facilities that release smaller quantities of air pollutants, known as "area sources", must also obtain operating permits unless EPA specifically exempts them from permit requirements through federal rules. As a result, some minor stationary sources have been required to file for operating permits under the Title V program. Stakeholders expressed concern that the growing number of requirements under Title V, coupled with the growth of state permit programs created confusion and additional unnecessary burden on some small entities. EPA was requested to review the permitting process and seek approaches that would reduce costs.

EPA has successfully addressed both of these concerns. On December 9, 2005, the EPA issued a final rule to permanently exempt from the requirement to obtain federal operating permits small facilities in five industry sectors: dry cleaners, halogenated solvent degreasers, chromium electroplaters, ethylene oxide sterilizers, and secondary aluminum smelters. This rule reduces the economic impacts on small entities by exempting certain categories of "non-major" industrial sources from the permitting requirements. For toxic air pollutants, the Clean Air Act defines "major" industrial sources as those emitting 10 tons per year or more of any one hazardous air

pollutant or 25 tons per year or more of any combination of hazardous air pollutants. Sources emitting less than that are "non-major." Only facilities that are "area sources" would receive the exemption, and permits are still required for larger (major) sources of air toxics in these industry categories. The final rule also prohibits states from issuing federal operating permits to these sources once the Agency has exempted them from the national permitting program. States may continue to issue other types of air permits for such sources, such as state operating permits. We have estimated that this action will reduce the burden for over 38,000 sources, many of which are small entities. While we have not calculated specific cost savings for area sources from these exemptions, we estimate that average annual Title V costs per source at $7,300. In addition to the 2005 rule, we are taking other actions to reform the Title V program that go beyond the commitments we made in response to OMB's Manufacturing Initiative. The Clean Air Act Advisory Committee (CAAAC) recently formed a task force -- made up of stakeholders from a variety of interests -- and charged it with studying the Title V program and developing a series of recommendations on how to improve the implementation of the program. The task force has now completed their work; EPA is reviewing the recommendations and developing an implementation plan, which will be presented to the CAAAC at their next meeting in September 2006.

IV. EPA's Commitment to Small Businesses.

Mr. Chairman, the Manufacturing Sector Report issued by OMB and EPA's related actions are just one aspect to our overall efforts to enhance environmental protection while addressing the unique issues associated with small business and manufacturing. Through a variety of Agency programs and policies, we are working as partners with America's small businesses to further improve our regulatory processes and develop other non-regulatory approaches to achieve environmental protection.

EPA is a government leader in implementing the Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA). Although EPA has a long history of considering the concerns of small business, certainly one factor that sharpened EPA's attention to small businesses is the Small Business Advocacy Review Panel provision of SBREFA. Along with OSHA, EPA is required to convene a panel unless it certifies that a rule, if promulgated, will not impose a significant economic impact on a substantial number of small entities.

Here on the 10th anniversary of SBREFA, EPA has so far completed 29 panels with over 450 small-business, small-government, and small non-profit representatives providing regulatory input to the Agency. The panels, conducted in partnership with SBA's Chief Counsel for Advocacy and OMB's Administrator of the Office of Information and Regulatory Affairs, ensure meaningful small business input in the early stages of rule development and result in excellent suggestions on how our regulatory actions can implement less burdensome and environmentally protective regulatory approaches for small businesses.

There has been real benefit from the SBREFA process to small businesses. The panels conducted to date have produced recommendations that would reduce the potential burden on small businesses and communities while achieving environmental objectives. For example, this past year we completed a panel for a proposed rule on the control of hazardous air pollutants from mobile sources. EPA's proposed rule generally adopted the panel's recommendations on regulatory flexibility to minimize impacts on small businesses. The panel recommended that we include hardship provisions in the rule for small refiners that would enable small businesses to apply for an extended compliance date. The panel believed that while all refineries are allowed some lead time before the proposed program begins, they believed that small refiners would be disproportionately challenged. In keeping with this recommendation, the proposed rule included

a four year delay for all small refiners, plus a hardship provision providing additional time in case of extreme hardship, to help mitigate these challenges. The proposal also included numerous other flexibilities for small businesses including provisions that limit small entity certification and testing burden, extend compliance deadlines, and allow hardship-based extensions for gas can manufacturers.

Panels represent only one facet of EPA's full commitment to consider small businesses in the rulemaking process. EPA conducts outreach and seeks accommodations for small entities in regulations to which they will be subject. In the ten years since SBREFA's passage, EPA has issued many regulatory proposals that may have imposed some level of regulatory requirement on at least one small business or community. Most of these did not undergo SBREFA Panel review, but EPA nevertheless worked with small businesses to minimize their burden while meeting the requirements of environmental statutes.

Small business and manufacturers concerns are a key priority for this Administration, but I should also note that EPA has compiled a record of responsiveness to small business from the very first. EPA recognized early on the need to institutionalize small business practices and formally established the Office of the Small Business Ombudsman (SBO) in 1982. The SBO works with EPA personnel to increase their understanding of small businesses in the development and enforcement of environmental regulations. The SBO also serves as a liaison between the small business community and the EPA to promote understanding of Agency policy and small business needs and concerns -- providing a convenient way for small business to access EPA through correspondence and many thousands of phone calls and numerous web site "hits" each year. SBO stays in regular contact with over 45 key national trade associations representing several million small businesses and with state and regional ombudsmen who serve small businesses on the local level.

In addition, EPA has long standing programs and policies designed to recognize the special needs of the small business community and to increase the delivery of information about EPA's regulatory requirements to small business. EPA has a history of developing authoritative materials to aid the regulated community in its compliance efforts. EPA makes these and other related resources readily accessible to small businesses through several channels.

V. Innovations in Environmental Protection

Accelerating the pace of environmental protection while maintaining our nation's economic competitiveness has challenged us at EPA to think creatively and outside our traditional regulatory framework. We are pursuing innovative strategies that can lead us to more results-oriented systems of environmental regulation that harness the growing interest in environmental stewardship. By necessity, our work on innovative approaches for improving environmental results often focuses on small business.

We are exploring innovative approaches to meet that need as efficiently and effectively as possible and within the existing confines of the law. For example, working with industry, academic institutions, environmental groups, and other agencies, we have set up web-based Compliance Assistance Centers that address the requirements of specific sectors, many of which have major small business membership. Each Center provides businesses, local governments, and federal facilities with information and guidance on environmental requirements and ways to save money through pollution prevention techniques. We are also working with small business to explore alternatives to conventional regulations. One example is the Environmental Results Program (ERP), which was first piloted in Massachusetts and is now being implemented in 16 states. This program takes an integrated approach to environmental management, combining compliance assistance, self-certification procedures, and performance measures for certain small

business sectors, such as dry cleaners, printers, and auto body shops, that can be difficult to address with traditional permitting. We've found this to be a smart approach to working with these sectors. In Rhode Island, ERP improved the overall environmental performance of auto body shops by 37 percent while compliance went up by 46 percent. Delaware saw similar results – overall environmental performance for auto body shops improved by 29 percent while compliance increased by 18 percent. Based on these and other results, we're now working other states and small businesses to see if this same approach might be useful in other sectors or settings.

The National Environmental Performance Track is another program that is changing how we regulate. This first-of-its kind federal program rewards facilities that go beyond compliance with regulatory requirements to attain levels of environmental performance that benefit the workforce, communities and the environment. Facilities that earn membership receive public recognition, and regulatory and administrative incentives such as reduced inspections. Small businesses are among the facilities that have been benefitting from the Performance Track program. For example, this year performance partnership members can request expedited CWA permits where their competitiveness in the international marketplace depends on the ability to expand their facility or operate a new facility in a quick time period.

VI. Conclusion

If sensitivity to the needs of small businesses and communities has been important up until now, it will be absolutely critical in the years to come. On behalf of EPA, I want you to know that we are working to create a system that works for small business by providing better and earlier access to the regulatory process, developing alternative approaches to regulations, and increasing the transparency and clarity of our decisions.

In concluding this testimony I would again like to state that I am personally committed to finalizing our remaining reform initiatives. Our attention to the Manufacturing Initiative has resulted in heightened attention to scientific, economic, and policy issues in EPA's action development process and reinforced the importance of working collaboratively with our stakeholders to ensure that the solutions to environmental problems are efficient and effective.

Thank you for the opportunity to testify today. I would be happy to answer any questions that you may have.

Executive Summary

The National Association of Manufacturers (NAM) appreciates the interest of the Subcommittee on Regulatory Reform and Oversight in seeing results from the "List of 76" regulations that the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA) released on March 9, 2005, for agencies to improve. With new leadership at both OMB and OIRA coming into office, this hearing is an important indicator that Congress would like to see an improvement in the regulations cited.

The regulatory burden falls most heavily on the manufacturing sector, so the ability to comply as efficiently as possible with regulatory goals is of particular importance to manufacturers.

The NAM is disappointed that OMB did not include a status report on the List of 76 in the 2005 *Final Report to Congress on the Costs and Benefits of Federal Regulatory Programs*, nor has it posted a status report on its Web site. From our experience, some agencies, such as EPA, are taking this exercise seriously and have taken steps to improve the regulations on the List of 76 while others, notably the Department of Labor, have not demonstrated responsiveness.

OIRA's authority to review and direct agency activity on regulations rests solely on executive orders. OIRA should be given more authority through statute to ensure that agencies comply with the Paperwork Reduction Act, the Administrative Procedure Act, the Information Quality Act and priorities of the President.

COMMENTS OF THE NATIONAL ASSOCIATION OF MANUFACTURERS
BEFORE THE

SUBCOMMITTEE ON REGULATORY REFORM AND OVERSIGHT
OF THE
HOUSE OF REPRESENTATIVES
COMMITTEE ON SMALL BUSINESS

JULY 13, 2006

Chairman Akin and members of the subcommittee on Regulatory Reform and Oversight, thank you for the opportunity to testify before you today on behalf of the National Association of Manufacturers (NAM) about the Administration's call in 2004 for regulations — especially those that affect manufacturing — that could be improved.

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. Three-quarters of the NAM's membership are small and medium manufacturers. Headquartered in Washington, D.C., the NAM has 10 additional offices across the country. Visit the NAM's award-winning Web site at www.nam.org for more information about manufacturing and the economy.

The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth, and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

The manufacturing community — especially smaller manufacturers — welcomes today's hearing. The NAM had planned to do its own survey of agency adherence to the deadlines in the "List of 76" regulations that the Administration released last year for agency action. Given past

experiences, we were concerned that agencies would be allowed to let this project lapse, so congressional attention in seeing results is appreciated. The NAM's concern has been heightened because the leadership of both the Office of Management and Budget (OMB) and OMB's Office of Information and Regulatory Affairs (OIRA) has left since the project began.

The Quality of Regulations Is Important to Manufacturers

The NAM appreciates that the Administration was trying to lend a helping hand to the manufacturing sector when it pursued its Manufacturing Initiative. This was during a particularly tough time for our sector. The recession of 2001 was unique in the post-World War II era because it was the only recession where manufacturing was a lead indicator of problems and also lagged in recovery. Indeed, half of the 6.5 percent downturn in manufacturing production took place before the economy went into recession. Then, during the initial year and a half of growth following the 2001 recession, the manufacturing recovery underperformed the general economic recovery by 34 percent. It took several years for manufacturing to recover; at the time of the call for regulatory improvement suggestions, the manufacturing sector was still struggling.

As part of the Manufacturing Initiative, the Administration, led by the Department of Commerce, held a series of roundtables in 2003 with manufacturers of all sizes. One complaint that the Administration repeatedly heard was the difficulty in complying with regulations. Among a series of recommendations following the roundtables was for OIRA to review federal regulations and make recommendations for improving them.

In its 2004 *Draft Report to Congress on the Costs and Benefits of Federal Regulatory Programs* (*Draft Report*), OIRA asked the public for suggestions on ways to improve federal regulations, especially those that affect manufacturing. While the NAM welcomed this

invitation, and committed itself to make a quality submission to OIRA, many of our members were skeptical. The Administration had gone through a similar exercise in 2002 in which the NAM and a number of our member companies participated. The results of that program were disappointing. The NAM could not identify a single example from its 2002 submission of any regulation that was improved in a significant way. (In all fairness, there were some changes made at the suggestion of other parties.) Because the 2004 effort was part of the Administration's broader Manufacturing Initiative, however, we were assured that the exercise would be productive.

The quality of regulations is of particular importance to the NAM and its membership, which made the barely noticeable results from 2002 all that more disappointing. According to a recent report by the U.S. Small Business Administration ("The Impact of Regulatory Costs on Small Firms," September 2005), the average annual regulatory compliance cost per employee for manufacturing firms is $10,175, versus $5,633 for firms in all sectors. The per-employee annual regulatory compliance cost for manufacturers with fewer than 20 employees is more than two-and-a-half times higher than it is for manufacturers with 500 or more employees. For manufacturers with fewer than 20 employees, the annual figure is $21,919, compared to $8,748 for large firms. Manufacturers with between 20 and 499 employees bear an annual per-employee cost of $10,042 for regulatory compliance. Regulations particularly hit manufacturers because this sector bears a disproportionate share of environmental and workplace requirements.

It should also be noted that the NAM did not view either the most recent nor the 2002 call for regulatory improvement nominations as an opportunity for a "regulatory rollback." Rather, we have viewed the efforts as opportunities to make compliance easier. And that should be the goal of a successful regulatory program. While we can debate how high or low a standard

should be during the promulgation process, once that decision is made the agencies should not place roadblocks in the path of regulated entities as they try to meet the standards of the regulation. In addition, if a standard no longer makes sense then the agency should consider changing it or eliminating it.

As we move on to the next generation of regulating, thought should be given to emphasizing incentives and disincentives as a reward or punishment for voluntary compliance with public policy goals. That said, the subcommittee should be aware that there is a new generation in charge of business. Its attitude toward regulatory agencies can be characterized in the testimony of a member of the NAM Board of Directors who testified before the Senate Committee on Governmental Affairs in the 1990's that if EPA, OSHA or other regulatory agencies can help him make his factory safer for the environment and for workers then he definitely wants to know, especially if it can be done in such a way that he can remain competitive with global competitors. After all, he went on to tell the committee, it is his kids who play in the playground near his plant and swim and kayak in the river that runs past it; he also would run into an injured worker or, worse, widow, at the pharmacy, grocery and other places. What does not help him to meet regulatory goals is a mound of paperwork and inefficient command-and-control edicts that even his workers question as overkill or just plain ridiculous.

The record should also show that including suggestions for improving regulations is a congressional directive through the "Regulatory Right-to-Know Act" (RRKA), which was enacted as Section 624 of the FY 2001 Treasury and General Government Appropriations Act. The RRKA tells OMB to submit an annual report on the benefits and costs of federal regulatory programs, and to include regulatory improvement suggestion(s) as part of the report.

The NAM's Process

After the 2004 *Draft Report* was released, the NAM's Regulatory Improvement Task Force determined early on to focus on a limited number of regulations where a difference would be noticed by our membership if changes were made.

The NAM solicited its membership for which regulations they thought could most be improved. The NAM is member-led, and its Regulatory Improvement Task Force reviewed the regulations nominated by the full membership, using the criteria set forth by OMB as a guide to the extent possible.

OMB's four criteria were that ". . . (1) a benefit-cost case (quantitative and/or qualitative) can be made for the reform; (2) the agency or multiple agencies have statutory authority to make the suggested change; (3) the reform recommendation gives due consideration to fair and open trade policy objectives; and (4) the rule or program is important."

With a limited amount of time and resources, the task force recognized that in making its selection it could not, in most cases, meet the first criteria set forth in the 2004 *Draft Report*, namely that a benefit-cost case can be made. In assessing the other criteria, however, the task force tried to limit the recommendations to those that did not need a statutory change, would continue or enhance fair and open trade, or were important. The task force realized that the 2004 *Draft Report* used the term "and" prior to the fourth criterion, but in the spirit of the exercise asked OIRA to consider even "nitpicks" that would improve the regulatory environment. In addition, some nominated regulations may have required changes in the regulation's underlying statute. While nothing could be done administratively in these instances, OMB and the agency

involved should have been alerted to the difficulty caused by the statutory language for regulated entities and work with Congress to make the necessary changes.

In its 2004 submission, the NAM expressed disappointment to OIRA that none of its 2002 nominations had been improved. While we acknowledged that perhaps the recommendations submitted did not meet all of the criteria set forth by OIRA at that time, such as a benefit-cost study, OIRA could nevertheless have encouraged the agencies involved to use the opportunity to take actions to correct, update and otherwise improve their regulations.

The regulations that the NAM submitted in 2004 are attached to this testimony. As discussed below, Appendix A contains those regulations that the NAM determined were most important for the agencies to improve. Appendix B is a detailed submission on suggestions to make the regulations governing the Family and Medical Leave Act better and more practical. Appendix C is a listing of other small, technical but important changes that the agencies could make to improve manufacturing regulations.

In the text of the 2004 submission, we highlighted one example of a regulation that surely cries out for an update, but it remained unchanged after 2002. This particular regulation is an OSHA rule found at 29 C.F.R. §§1910.106 and 1910.107, dealing with fire standards when using resin in boat building. The *Code of Federal Regulations* (C.F.R.) cites the National Fire Protection Association (NFPA) standards set in 1969. Not surprisingly, the NFPA has updated its standard numerous times in the past three-and-a-half decades. Yet, OSHA refuses — despite being petitioned by regulated entities — to make a simple change in the C.F.R. that would accurately reflect modern fire standards. One can only imagine what OSHA would do to a covered company if it refused to update a Material Safety Data Sheet because everybody who

works with the product knows about the changes to it and it would be just too much trouble to change.

For all intents and purposes, the C.F.R. has the force of law, so the NAM hoped that OIRA would effectively encourage agencies to pay attention to "simple" fixes for the C.F.R. that were submitted. In the OSHA case above, a company technically could be cited for not adhering to 1969 fire standards, for example. Indeed, our understanding from the National Marine Manufacturers Association is that such citations have been issued to its membership on numerous occasions.

Another disappointment was — and is — that nothing had happened on needed changes to the regulations governing implementation of the Family and Medical Leave Act (FMLA) — this despite the fact that the NAM and other organizations submitted very detailed analyses in 2002. In addition, *Ragsdale v. Wolverine Worldwide* (122 S. Ct. 1155 [2002]), the first FMLA case to be heard before the Supreme Court, struck down the Department of Labor's notice requirements as not consistent with the statute. While they were attached to the general submission in 2002, the NAM also submitted its proposed suggestions for making the FMLA more comprehensible and easier to comply with — while not undermining the intent of the statute — under separate cover. In 2004, the NAM resubmitted its FMLA nomination from 2002, as nothing had changed.

On a more positive note, the NAM realizes that OIRA did make some changes as a result of the 2002 call for regulatory improvement nominations. Therefore, in an effort to achieve more success in having the NAM's suggested improvements accepted in 2004, we altered our format. Specifically, the NAM comments highlighted key regulations in need of improvement by listing them separately. These recommendations are those that the NAM Regulatory

Improvement Task Force believed best met the last three of OIRA's criteria and that also would make a difference to the regulatory environment faced by manufacturers as a sector if improved. These nominations are found in Appendices A and B to this testimony. Specifically, they are: the Particulate Matter and Ozone National Ambient Air Quality Standards; the Toxic Release Inventory; the Definition of Solid Waste; Spill Prevention Control and Countermeasures; SARA Title III; the FCC "Do Not Fax" rule; and the Family and Medical Leave Act. The NAM made detailed comments and provided testimony with suggested improvements for the Toxic Release Inventory and submits those documents as Appendices D and E.

The NAM's more specific nominations are in Appendix C. While not as detailed as those in Appendix A or B, the NAM asked OIRA to encourage the agencies involved to take these nominations seriously. While they may not be "important" to the overall economy, they were important enough for the NAM member company to take the time and effort to write them up and nominate them. In addition, NAM member companies — especially smaller manufacturers — have indicated that the true problem of excessive regulation is not really one or two specific regulations, but having to deal and comply with the sheer volume of what could be considered minor regulations.

The List of 76 Regulations

In what has become known as the "List of 76," on March 9, 2005, OIRA released the regulations that it would forward to the appropriate agencies for their specific consideration. Hard deadlines accompanied most of the regulatory improvements.

The NAM issued a press release on March 10 praising OIRA and OMB for taking the first step toward following up on the suggested improvements. We were pleased that five of the

seven regulations that we noted were in most need of reform had been included in the List of 76. The Ozone and Particulate Matter National Ambient Air Quality Standards were undergoing a separate review process so it is understandable why they were not included. We were perplexed, however, that Form R, which is used to comply with Title III of the Superfund Amendments and Reauthorization Act (SARA) was missing from the list.

OIRA made clear that it had consulted with the agencies prior to releasing the list and that the regulations that were included and instructions to agencies reflected those discussions.

In that regard, the NAM encourages the subcommittee to look at Reference Number 153, dealing with an OSHA rule covering flammable liquids, which is apparently based on the nomination by the NAM and the National Marine Manufacturers Association (NMMA) for OSHA to update its fire protection standards used in boat building. This rule was discussed above. Rather than stick with a simple, easy fix to the problem at hand, Reference Number 153 now has OSHA undertaking a "major project to review and update as necessary all of its standards that are based on national consensus standards." This, unfortunately, will allow OSHA to insist when asked that it is indeed working on the resin fire-protection standard, but it will be a long time before it is implemented because reviewing *all* of its consensus standards is such a large and time-consuming project. The NAM encourages OIRA to issue a prompt letter to OSHA to put 29 C.F.R. §§1910.106 and 1910.107 at the top of its list of consensus standards to review since the problem with this rule has been brought to OSHA's attention for more than a decade and it can be fixed easily. Not surprisingly, OSHA has not indicated to either the NAM or NMMA that it needs any additional information in order to improve its consensus standards.

When Representative Candice Miller, chairman of the Regulatory Affairs Subcommittee of the House Committee on Government Reform, heard about OSHA stonewalling on this

regulation from testimony by NAM President John Engler during an April 12, 2005, hearing on the List of 76, she introduced H.R. 3255, the Fire Protection Improvement and Correction Act of 2005. The NAM encourages members of this subcommittee, and other members of the House, to cosponsor Chairman Miller's bill if you share her concerns about OSHA's continued intransigence on a regulation that should be easy to improve.

Because OMB has not created a centralized list for tracking the status of what improvements, if any, have been made to the regulations on the List of 76, the NAM can only relay to you which regulations we have been contacted about.

On this score, the NAM would like to applaud EPA as an agency that is taking this exercise seriously. Granted, more than half of the rules included on the List of 76 come under EPA, but the agency has contacted the NAM for additional information on a number of regulations that we nominated for improvement. These include Reference Numbers 30 (Document AP-42); 42 (Changing Hazardous Waste Rules To Encourage Recycling); 52 (Paperwork Burden of the Toxic Release Inventory Program); 83 (Leak Detection and Repair); and 86 (Method of Detection Limit). In addition, EPA proposed improvements to lead reporting burdens under the Toxic Release Inventory, but the House has passed an NAM-opposed amendment as part of the FY2007 Interior Appropriations bill to deny funding for the revised rule.

We also understand from speaking with EPA that it is working on other rules nominated by the NAM even though we may not have heard from anybody at the agency. One example is an improvement to its forms. In the past, EPA forms were in WordPerfect, even though most of its constituency uses Word. Our understanding now is that EPA forms have been converted to

Word. Previously, regulated entities had to do the conversion themselves, adding man-hour burdens to the forms that EPA did not count.

The "Do Not Fax" rule issued by the Federal Communications Commission, which would have placed onerous recordkeeping requirements for businesses of all sizes, was placed on the List of 76 even though it needed a statutory change that would clarify what Congress intended for the definition of existing business relationship. The NAM is pleased to note that Congress responded by passing the Junk Fax Prevention Act (P.L. 109-021), which the President signed into law on July 9, 2005.

The NAM has also been contacted by both the Department of State and the Commerce Department's Office of Industry Analysis for additional information on Reference Number 175 (Duty Drawback). This regulation governs refunds for duties on imported products when the imported product is either destroyed or exported as part of another product. The paperwork is so burdensome that many companies eligible for the refund choose to forego reimbursement rather than fill out the forms. OIRA indicates in its summary of the regulation that a statutory change is likely necessary to make the process of receiving a refund more streamlined. Any support that members of this subcommittee could give if legislation is submitted to correct the problems with this regulation would be appreciated.

In addition, we understand from another nominator that the Food Safety and Inspection Service of the Department of Agriculture held hearings on the listeria rule (9 C.F.R. 430) and that changes were made to help small, and especially very small, companies subject to the regulation.

The NAM has not heard from other departments or agencies regarding regulations on the List of 76 that were nominated by the NAM. Most notable is the Department of Labor with

respect to the FMLA. The changes nominated by the public for the regulations governing this statute were so extensive that OIRA listed them as Reference Numbers 134-137, 139, and 141-144. The OIRA summary noted that "Commenters recommended reform of almost every aspect of FMLA." The Employment Standards Administration (ESA) responded to OIRA that its December 2004 Regulatory Plan and Regulatory Agenda "announced [ESA's] intention to publish a proposed rule in 2005 that will revise FMLA regulations to address issues raised by the Supreme Court's decision in [*Ragsdale*] and the decisions of other courts." The ESA failed to note in its response that the "decisions of other courts" are in direct conflict with each other, which is one reason why the FMLA regulatory scheme is in desperate need of an overhaul. The NAM's member companies are confused and would welcome clear guidance on what they should be doing. We are well past 2005, and there is no sign that new rules governing the FMLA will be proposed anytime soon.

OIRA Needs More Authority

OIRA only has statutory authority over the paperwork generated by agencies. Its regulatory authority is governed by various executive orders, most notably E.O. 12866. Some have criticized OIRA as being too powerful. Far from it. This exercise demonstrates that OIRA needs statutory authority in order to ensure that it can carry out regulatory mandates both from Congress and the President. There has to be a more efficient way than enacting a special statute, as in the case of OSHA and 29 C.F.R. §§ 1910.106 and 1910.107, to compel an agency that has dug in its institutional heels to make a regulatory change as simple and obvious as updating an antiquated fire standard. Any such changes, however, need to be subject to the Administrative Procedure Act and other public notice-and-comment measures.

Conclusion

On behalf of the manufacturing community, the NAM thanks the Administration for paying attention to the needs of this important economic sector. In particular, we have welcomed the effort to improve regulations that affect manufacturing. We have been very pleased by EPA, in particular, for its outreach and other efforts to make procedures for complying with its substantive regulations more practical. The NAM hopes that the next leadership for both OMB and OIRA remain committed to ensuring that all agencies respond to the entire list of regulations that they were asked to review for improvements. We are concerned, however, that some agencies, most especially OSHA, will try to "wait out" public attention to this project. We are therefore appreciative that this subcommittee, along with Rep. Miller's Subcommittee on Regulatory Affairs, has indicated a willingness to let the agencies involved know that there is congressional interest in having the agencies carry out OIRA's directive to completion.

The NAM is very disappointed that OMB did not include a status report on where the List of 76 stands in its 2005 *Final Report*. In our comments for the 2006 *Draft Report*, the NAM will reiterate this disappointment since such public disclosure is the only way that recalcitrant agencies will understand that they will be exposed for refusing to comply with the OMB directive. With new leadership coming on-board at both OMB and at OIRA, it would be helpful if this subcommittee, along with Chairman Miller's subcommittee, were to let OMB know that you expect this project to remain a priority and to provide the committees — and the public — with a user-friendly format to tracking progress (including providing reasons if in the end changes were deemed either not necessary or not in the public interest).

Again, Mr. Chairman, thank you for this opportunity to testify. I would be happy to respond to any questions.

Appendix A

Agency: Environmental Protection Agency (EPA)

CFR Citation: 40 CFR 372, Toxic Release Inventory, Lead Rule

Regulation:

Lowers the reporting threshold for Lead to 100 lbs/year. The lowered threshold and cancellation of burden reduction streamlining measures was based on inappropriate use of the Persistent Bioaccumulative and Toxic (PBT) criteria. If a facility uses more than 100 lbs/year, it must file Form R.

Reason for Modification:

The lead rule dramatically lowered the reporting threshold for lead and lead compounds under the Toxic Release Inventory (TRI) from 25,000 lbs (over 12 tons) to 100 lbs in 2001. The new threshold is too low, forcing a disproportional number of businesses to file Form R. During the first reporting year (2001) using the lowered lead threshold, 8,561 Form Rs were filed for lead and lead compounds. Over eighty-five percent of these forms were filed by the manufacturing sector, yet this same sector was responsible for only six percent of reported releases. The filing increase is due, in part, to the elimination of the *de minimis* exemption. Previously, reporting facilities with less than one percent of lead could disregard the reporting requirement, helping to keep down administrative costs associated with tracking minute quantities. With the new rule, the *de minimis* exemption was dropped, requiring more facilities to file Form R.

The 2001 Lead Rule has added an extra burden to manufacturers, particularly small businesses. Manufacturers believe that the EPA has grossly underestimated the cost of compliance for industry, particularly small businesses. In particular, the EPA has unnecessarily increased the reporting burdens by eliminating the burden reduction measures designed specifically to streamline reporting for small business with small releases. In the rule, EPA specifically disallows the use of Form A, which was designed to simplify reporting for entities with small releases. Additionally, the EPA eliminated the *de minimis* exemption, which allowed reporting facilities to exclude detailed and costly calculations, tracking and reporting for materials containing less than one percent of lead.

Manufacturers believe that existing Toxic Release Inventory burden reduction options should be made available to lead reporters including the use of a simplified Form A, *de minimis* and range reporting. In addition, we recommend that a new simplified Form NS be created for those many small manufacturing operations that reported negligible lead release in a Form R filing (less than 10 pounds). It is also highly recommended that the EPA consider raising the lead reporting threshold. A 100 lbs. threshold requires too many reports from manufacturers who collectively are the source of only six percent of the reported releases, and further strains the manufacturing community.

The NAM submitted testimony on the TRI lead rule to the House Committee on Small Business on June 13, 2002. On February 3, 2004, the NAM submitted comments to the EPA on improvements to the TRI Program. Both documents are attached in Appendices D and E.

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Agency: Environmental Protection Agency (EPA)

CFR Citation: Resource Conservation and Recovery Act; 40 CFR 260-261 and 261.2 (a,b & c)

Regulation:

Recycling is considered a component of the definition of "discarded." Many chemicals that could be beneficially reused are not due to RCRA permit and standards requirements, instead they are disposed of by incineration or landfilling. There is a cost of not reusing available materials and a cost of disposing of the available reusable materials.

Reason for Modification:

Recycled materials that are classified as hazardous waste are subject to extensive, and excessive, regulatory controls designed for waste materials destined for disposal. The current regulation causes an increased use and dependence on new materials, squanders beneficial resources and increases societal costs associated with managing these materials. The EPA should revise the definition of "solid waste," limiting it to materials that are truly discarded (*i.e.*, disposed of, thrown away or abandoned). Any legitimately recyclable materials should be excluded from the definition of solid waste to encourage both recycling and the use of recycled materials. This change would be beneficial both to the overall environment by decreasing the need for new raw materials and to the regulated community by decreasing cost and other compliance burdens.

Agency: Environmental Protection Agency (EPA)

CFR Citation: SARA Title; 40 CFR 313

Regulation:

SARA 313 is submitted annually to the EPA and requires estimates of a facility's emissions to air, water and land, as well as off-site transfers or discharges to Publicly Owned Treatment Works, of chemicals specifically listed by the EPA. The intent of this rule was to provide the community with knowledge about the compounds that could be released from industrial facilities in their neighborhoods.

Reason for Modification:

SARA 313 Form R has grown. Today, besides providing estimates of emissions to the environment, a facility has to provide estimates of how much energy recovery, recycling and "source reduction" it had in the previous year, and project how much it is planning to do in the next two years. The facility must also describe its treatment processes and its removal efficiencies. The cost to generate this information in extra man-hours outweighs any potential benefit to the EPA.

Agency: Environmental Protection Agency (EPA)

CFR Citation: Spill Prevention, Control and Countermeasures (SPCC) Plans – Risk Management Plan (RMP) 40 CFR 112 and 67 FR 47062, July 17, 2002

Regulation:

"A facility is not regulated under SPCC . . . if due to its location, the facility could not reasonably be expected to have a discharge of oil to navigable waters. This determination must be based solely upon consideration of the geographical and location aspects of the facility and must exclude consideration of man-made features such as dikes, equipment or other structures, which may serve to restrain, hinder, contain, or otherwise prevent a discharge." (40 CFR 112.1 (d)(1)(i)). "To allow consideration of man-made structures (such as dikes, equipment, etc.) to relieve a facility from being subject to the rule would defeat its preventive purpose. Because manmade structures may fail, thus putting the environment at risk in the event of a discharge, there is an unacceptable risk in using such structures to justify relieving a facility from the burden of preparing a prevention plan. Secondary containment structures should be part of the prevention plan." 67 FR 47062, July 17, 2002.

In contrast, RMPs (40 CFR 68), which must be developed by companies using certain flammable and toxic substances, take man-made features into account. The RMP's must include a hazard assessment, a prevention program and an emergency response program. Facilities may consider passive mitigation systems (including man-made structures) in performing "the analysis of worst case provided that the mitigation system is capable of withstanding the release event triggering the scenario and would still function as intended." 40 CFR 68.25 (h)

Reason for Modification:

Under the current SPCC rules, if a facility invested capital to construct containment systems to prevent oil from reaching a river and/or waterway, the facility must ignore its investment and assume that the spill prevention system does not exist. SPCC should be modified to allow facilities to consider man-made structures under SPCC as is consistent with the RMP's. This would protect the environment, provide an incentive for facilities to invest in containment structures and reduce the burden on facilities with little potential of a release into U.S. waters.

The following is suggested as a possible fix for 40 CFR 112.1(d)(1)(i): "Any onshore or offshore facility that, due to its location, could not reasonably be expected to have a discharge as described in paragraph (b) of this subsection. This determination must be based solely upon consideration of the geographical and location aspects of the facility (such as proximity to navigable waters or adjoining shorelines, land contour, drainage, etc.) This determination may allow for the consideration of passive mitigation systems (such as dikes, equipment, or other structures) that may serve to restrain, hinder, contain, or otherwise prevent a discharge as described in paragraph (b) of this section, when determining reasonable potential for oil to reach navigable waters. The passive mitigation system must be capable of containing the oil release and still function as intended."

Agency: Environmental Protection Agency (EPA)

CFR Citation: 40 CFR Parts 50/51

Regulation: National Ambient Air Quality Standards (NAAQS) for Ozone and Fine Particulate Matter ($PM_{2.5}$) under the Clean Air Act (CAA)

Reason for Modification:

In 1997, the Environmental Protection Agency (EPA) established a National Ambient Air Quality Standard (NAAQS) for fine particulate matter ($PM_{2.5}$) for the first time and revised its ozone standard. As required by the CAA, the EPA is currently reviewing the PM and ozone NAAQS. This process occurs in three phases: Criteria Document (CD), Staff Paper (SP) and Rulemaking. The CD represents a compilation and scientific assessment of all the health and environmental effects information available. The SP contains staff recommendations to the EPA Administrator regarding any revisions to the standards to protect public health and welfare and is based on the scientific information found in the CD. Based on the scientific assessments and the recommendations of the Clean Air Scientific Advisory Committee (CASAC), the EPA Administrator decides whether it is appropriate to revise the standards.

NAAQS standards, particularly those for ozone and $PM_{2.5}$, set ambient concentration limits for criteria pollutants that areas must meet, or else face very onerous controls. Although the nation's air quality has steadily improved for more than 30 years, a new, more stringent, 8-hour ozone standard is scheduled to be implemented in spring 2004 and a new, more stringent, $PM_{2.5}$ standard is scheduled to be implemented by year-end 2004.

Many urban areas fail to meet the new ozone standard and many of these areas are expected to be in nonattainment for the new $PM_{2.5}$ standard as well. The resulting more stringent controls requirements are expected to result in increased costs for both existing and planned stationary sources, as well as the potential for more expensive fuels for mobile sources. The EPA modeling predicts that a number of major metropolitan areas will not be able to submit approvable State Implementation Plans to the EPA in 2007 that demonstrate attainment by their prescribed deadlines. Major sources in such areas will face CAA sanctions costing millions of dollars annually. These areas will also face the loss of federal highway dollars.

There is little or no harmonization between the NAAQS attainment deadlines and when the EPA's modeling shows these areas coming into attainment. Furthermore, there is little or no harmonization between NAAQS attainment deadlines and existing federal control measures for transport and cleaner engines and cleaner fuels, the full benefits of which will not be seen until the 2015-2025 timeframe. For example, most areas will have an attainment deadline for the new 8-hour ozone standard by 2010, yet the full impact of emissions reduction from the proposed Interstate Air Quality Rule will not be seen until 2015.

The NAAQS attainment deadlines must be realistic and harmonized with existing federal controls expected to achieve significant emission reduction benefits in the 2015-2020 timeframe. EPA should not place states in the untenable position of facing federal CAA sanctions as the result of unrealistic deadlines and the lack of reductions from federally regulated sources.

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Longer term, the "Clear Skies" approach to regulating emissions (*i.e.,* results-oriented, multi-pollutant, regional, market-based) should be pursued with a vision of eventually replacing the existing patchwork of confusing and conflicting rules. In addition, the EPA should rigorously review the ozone and $PM_{2.5}$ NAAQS based on all sound, peer-reviewed science and adjust them only if warranted by the record.

Agency: Federal Communications Commission (FCC)

CFR Citation: 47 CFR Part 64, Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, 68 Fed. Reg. 44,143 (July 25, 2003), effective Jan. 1, 2005.

Regulation:

Prohibits any person or entity, including for-profit companies and nonprofit tax-exempt associations, from sending an unsolicited "advertisement" to a fax machine. The only exception is where the recipient has "granted the sender prior express invitation or permission to deliver the advertisement, as evidenced by a signed, written statement that includes the facsimile number to which any advertisements may be sent and clearly indicates the recipient's consent to receive such facsimile advertisements from the sender."

Reason for Modification:

The FCC's rule mandates new and ongoing paperwork requirements if companies and associations are to continue to be able to send routine information by fax to their customers and members.

The Commission substantially underestimated the number of U.S. businesses that will be burdened with these new recordkeeping requirements and failed to provide OMB adequate notice of the sizeable increase in information collections required under the new fax rules. It also substantially underestimated the cost of compliance for businesses and trade associations.

The FCC eliminated the "established business relationship" exception, meaning that a business may not send faxes with any advertising content to its own customers — even in response to a customer's request — without first obtaining written, signed permission. These requirements take away the flexibility and freedom that companies and associations need to voluntarily communicate with one another by fax. The rule imposes substantial financial penalties and the threat of litigation for those who fail to create and maintain the required paperwork, including small businesses.

Since OIRA concerns can be overridden by a majority vote of FCC Commissioners, the NAM encourages OMB to work directly with the Commissioners and their staff members to alleviate the expected overly heavy burden that the information collection requests and other requirements of the updated rule are likely to impose.

NAM Comments to OMB on FMLA

May 28, 2002

John Morrall
Office of Information and Regulatory Affairs
Office of Management and Budget
NEOB Room 10235
725 17th Street, N.W.
Washington D.C. 20503

Dear Mr. Morrall:

On behalf of the National Association of Manufacturers and its members, we would like to recommend that the Family and Medical Leave Act's (FMLA) implementing regulations and associated non-regulatory guidance be reviewed under OMB's request for comments on the costs and benefits of federal regulations. The National Association of Manufacturers is the nation's largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states. Headquartered in Washington, D.C., the NAM has 10 additional offices across the country.

Specifically, the Department of Labor's (DOL's) regulation, and subsequent interpretations, regarding the definition of "serious health condition" under the FMLA should be reviewed. In addition, the regulations and interpretations of "intermittent leave" issues as well as the notification and recordkeeping requirements should also be reviewed, particularly in light of the Supreme Court's decision in Ragsdale v. Wolverine Worldwide. We would also draw your attention to wage and hour opinion letters that, while technically non-binding guidance have, in effect, and without benefit of notice and comment, usurped the regulations.

1. Definition of "Serious Health Condition" 29 C.F.R. 825.114

When the FMLA passed, Congress covered both leave for the birth or adoption of a child as well as medical leave (for the individual or an immediate family member) for serious health conditions. Congress made clear that the term "serious health condition" was not meant to cover short term illnesses where treatment and recovery are brief and such conditions fall within even modest sick leave policies. Nevertheless, DOL broadly defined what constitutes a serious health

condition when it promulgated it definition of serious health condition at 29 C.F.R. 825.114. The expansive way in which the regulation was written has been further stretched beyond recognition by nonregulatory guidance, specifically, wage and hour opinion letters that DOL has subsequently issued without benefit of public notice and comment. As a result the FMLA, which began as a statute meant to protect jobs for new parents and those who are seriously ill, has turned into a national sick leave law which would be barely recognizable to its drafters. Moreover, employers and employees are left with no discernable guidance on what does or does not constitute a "serious health condition." Many NAM members have articulated that they don't have difficulty interpreting what constitutes a "serious health condition" because "just about everything is covered, especially if a doctor says it is covered." This unacceptable "status quo" is clearly inconsistent with the statute.

On April 7, 1995, DOL issued wage and hour opinion letter number 57 which stated that "the fact that an employee is incapacitated for more than three days, has been treated by a health care provider on at least one occasion which has resulted in a regimen of continuing treatment prescribed by the health care provider does not convert minor illnesses such as the common cold into serious health conditions in the ordinary case (absent complications)." Just a year and a half later, on December 12, 1996, DOL issued opinion letter number 86. That opinion letter stated that wage hour opinion letter 57 expresses an "incorrect view" with respect to the common cold, the flu, ear aches, upset stomachs, minor ulcers, headaches other than migraines, routine dental or orthodontia problems, periodontal disease etc. and that if "any of these conditions met the regulatory criteria for a serious health condition, e.g. an incapacity of more than three consecutive calendar days and receives continuing treatment e.g. a visit to a health care provider followed by a regimen of care such as prescription drugs like antibiotics, the individual has a qualifying 'serious health condition' for purposes of FMLA."

In effect, the issuance of this later opinion letter has superceded the regulation itself and has become the standard in enforcement actions and before the courts. If an employee has a three day absence, has been to a doctor and has received a prescription, no matter what the underlying cause-- from a cold to cancer-the employee is entitled to FMLA leave and all of the rights it confers.

The resulting confusion to employers and employees should be fixed immediately, first by DOL rescinding wage and hour opinion letter 86 and restoring the meaning of the word "serious" to serious health conditions protected by the FMLA. DOL should also institute rulemaking to determine whether its current regulation defining serious health condition is consistent with the statute.

2. Intermittent Leave 29 C.F.R. 825.203; 825.306; 825.307; 825.308

Specific applicable regulations:

825.203 -- Leave may be taken intermittently. Examples include cases where employees or their family members have serious health conditions which require periodic care by a Health Care

Provider ("HCP") and in cases where the employee or family member is incapacited even if he/she does not receive treatment by a HCP.

825.306 -- Employers can request medical certifications. With respect to intermittent leave, employers can ask HCP's to provide the likely duration and frequency of episodes of incapacity.

825.307 -- Employers cannot generally question the adequacy of certifications. If an employee submits a complete certification, the employer cannot request any additional information from a HCP. An HCP representing the employer, however, can contact the employee's HCP for clarification.

825.308 -- Employers cannot generally request recertifications of medical conditions until the minimum duration specified by the HCP on the original certification has passed.

DOL's intermittent leave regulations have also been problematic for NAM members for a number of reasons. First, Congress drafted the FMLA so that employees could take leave in increments of less than one day (for example, for chemotherapy or radiation treatments). The regulation provides that leave may be counted "to the shortest period of time that the employer's payroll system uses to account for absences or use of leave, provided it is one hour or less." Since many employers track in increments of a small as six minutes, the task of accounting for and tracking intermittent leave is a significant administrative burden. This is especially the case when coupled with the broad definition of "serious health condition" which means that employers are keeping track of a large number of partial days for serious and non-serious conditions alike. Allowing employers to track intermittent leave in larger increments (such as by the hour or half day) would ease the cost and paperwork burden while ensuring that those employees who need intermittent leave are granted such leave. Redefining what constitutes a serious health condition will also reduce the number of absences and conditions under which an employer must track intermittent leave.

Unfortunately, because of the way the regulations have been written and interpreted, intermittent leave can be misused by employees, and employers have little recourse. For example, an employee may have his HCP certify that he needs intermittent leave for migraines. The HCP lists the duration as "indefinite," or "lifetime." With respect to the frequency of the episodes of incapacity, the HCP writes "unknown." The employee is then free to take every Friday afternoon off for the rest of his career due to migraines, even though he/she is not receiving any treatment on those afternoons. Another example may involve an employee who has his HCP certify that he needs intermittent leave for high blood pressure. Again, there is no duration or frequency specified, but the HCP does indicate that the purpose of the leave is for the team member to go to the doctor when his/her pressure is high. The team member takes off every Monday for high blood pressure and the employer has no way of knowing whether he has been to the HCP or not. These problems are further exacerbated by the certification provisions and the limitations placed on employers in verifying illnesses.

Revising the regulations so that HCP's provide the duration and frequency of the leave would be beneficial. Alternatively, where the duration of leave is not specified, permitting employers to

authorize leave for an initial period of 30 -90 days, with recertification required upon expiration of the initial leave period would ease employers' burdens. Although HCP's cannot always say with certainty the frequency of absences, without additional information from the medical provider, employers are at a disadvantage in terms of attempting to adequately staff and schedule their operations. Moreover, the regulations should allow employers to ask employees to provide evidence that they received treatment if they are off work on intermittent leave for periodic treatments, e.g., the blood pressure example. Perhaps the regulatory change that would most effectuate the purpose of the statute is to relax the regulations on employers' ability to contact HCP's. As the above discussion illustrates, there are many circumstances under which employers need additional information from HCP's, not just "clarification."

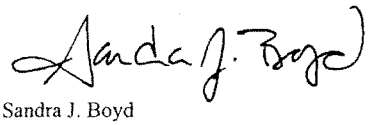
Employers want to be able to provide legitimate intermittent leave to employees but they also need to have adequate information so that they can properly staff their operations. Moreover, employers ought to be able to verify that an employee has an illness that requires intermittent leave and be able to understand the ramifications of that illness. Employers must also be able to institute proper absence control policies and to ensure that the use of leave is legitimate, a proposition that is difficult under the current intermittent leave regulations taken together.

Conclusion

It is important, in order to fulfill the purpose of the FMLA, to alleviate the current interpretive and legal confusion which discourages companies from offering or expanding beneficial programs, including paid leave. DOL's interpretations have especially penalized companies which have gone beyond the FMLA's requirements. This problem, which manifests itself throughout DOL's FMLA regulations, was recognized by the Supreme Court when it recently struck down DOL's notice requirements in Ragsdale vs. Wolverine Worldwide.

Vague, confusing and contradictory regulations and guidance do no allow employers to administer the FMLA's requirements with confidence and certainty. A thorough review of DOL's FMLA regulation, specifically those regulations that define serious health condition, intermittent leave and notice, is in order.

Sincerely,



Sandra J. Boyd
Assistant Vice President, Human Resource Policy
National Association of Manufacturers

Appendix C- Recommendations to OIRA for Regulation Modifications

Dept.	Title/CFR Code	Regulation	Reason for Modification
Agriculture; Food Safety and Inspection Service	*Listeria* Rule 9 CFR 430; FSIS Directives 5000.1, 5400.5, 8080.1, 10,200.1 and 10,240.4.	The *Listeria* rule regulates meat production to avoid the transmission of listeriosis, which is induced by *L. monocytogenes*.	*L. monocytogenes* are found in more than just ready-to-eat meats. They can also be found in your home, on your pets, in restaurants and in your general environment. The cost of this regulation to Industry is proving to be much higher than FSIS estimates. FSIS estimates $1,600 per year, but the cost of compliance is closer to $12,000. NAM members, particularly small businesses, would appreciate FSIS reviewing the costs associated with the *Listeria* rule, increasing the estimated compliance costs to a more reasonable figure.
Commerce; NOAA	Proposed Rule on "Coastal Zone Management Act Federal Consistency Regulations" (Fed. Reg., June 11, 2003)	Change existing rules concerning "Federal Consistency" and state participation in consistency determinations for coastal siting and energy development activities.	Proposed rules need to be changed to reduce the time available for NOAA to consider appeals of an initial consistency ruling from 270 days to 120 days. Delete proposed provisions that imply new environmental evaluations are needed before Commerce makes decision on consistency appeal. Tighten proposed language to limit state opportunities to use the consistency review process to simply prolong consideration. Encourage a Memorandum of Agreement between NOAA and MMS regarding responsibilities, application of the "effects test," and on streamlining project permitting. Eliminate "conditional concurrence" provision (section 930.4) policies that enable states to demand extraneous actions in exchange for agreement. Redress the improper application of the "chain of causation" theory (applied though section 307c) to avoid overly broad interpretation of impacts of "activities." These process modifications are needed to reduce the delays and other unnecessary burdens currently hindering final decision in CZMA consistency reviews, thereby meeting the goals of Ex. Orders 13211 and 13212 (May 18, 2001) regarding expediting energy project permitting and reducing burdens on energy supplies.
U.S. Customs	Customs Valuation; 19 CFR	Requires the computing of the "value for duty." Calculations are based on accounting procedures that do not resemble nor are applicable to other accounting areas of a company, thereby adding complexity to the process.	Currently, the value of an imported product is calculated by finding the sum of the following items: 1) cost of production of U.S. components; 2) the freight cost of transporting them to a foreign assembly or production facility; 3) the value of U.S.-produced tools or dies amortized over the number of items that can be expected to be produced over the life of the tool; and 4) other miscellaneous requirements referred to as "assists." These calculations require a separate recordkeeping system. It is proposed that the value for duty calculations be aligned with GAAP standards and based on values that are already required for inventory purposes, greatly reducing the administration costs for manufacturers.

U.S. Customs	Duty Drawback; 19 CFR 191 Subpart E	Drawback is the refund of Customs duties, certain Internal Revenue taxes and certain fees that have been paid to U.S. Customs at the time of importation. The refund is administered after the exportation or destruction of either the imported/substituted product or article that has been manufactured from the imported/substituted product.	The Duty Drawback paperwork is so time consuming that some member companies forego the process because the administrative costs associated with going through the process are higher than the amount they can claim. It is recommended that the recordkeeping requirements be standardized, saving manufacturers significant amounts of money and time.
EPA	Maximum Achievable Control Technology (MACT) Standards	These standards have overlapping requirements, thereby duplicating compliance efforts. For example, RCRA subpart BB under 40 CFR 264 overlaps with Leak Detection and Repair (LDAR) programs of the MACT standards. Furthermore, there are more than six distinct LDAR programs and hybrids that apply to various MACTS, including 40 CFR 63 subpart H, 40 CFR 63 sub GGG, 40 CFR 63 sub JJJ, and 40 CFR 63 sub I.	The overlapping regulations require lots of extra paperwork to be filed. The MACT standards mentioned should be reviewed so that only one LDAR program is required for any given plant.
EPA	MACT- 40 CFR 63 sub GGG (pharmaceutical); 40 CFR 63 sub JJJ (paper and web coating)	The Pharmaceutical MACT sets standards for pharmaceutical processes and there is debate whether a condenser is part of the process or if it should be classified as an air pollution control device. The paper and other web coating MACT requires agency case-by-case approval for any control device if there is not a Sulfur Recovery Unit (SRU) or an oxidizer.	Pharmaceutical MACTs are interpreted differently, even by EPA enforcement officers. This causes confusion in recordkeeping and reporting, generating more administrative costs to keep it all organized and compliant. The condenser should be interpreted as part of the manufacturing process as it is so integrated into the process rather than interpreted as an air pollution control device. The paper and web coating MACT is limiting as it requires an exhaustive process to receive approval to use different technologies that also meet the hazardous air pollutant (HAP) control standards. It is suggested that the EPA allow companies the flexibility to utilize any appropriate control device that will meet the standard of greater than ninety five percent HAP control, instead of imposing requirements on which devices to use.
EPA	Comparable Fuels Exclusion (CFE); 40 CFR §§ 261.4(a)(16) and 261.38	CFE excludes from RCRA hazardous wastes that can be and are burned as fuels, and that are not more hazardous than the fossil fuels that facilities would otherwise use.	This rule conserves finite fossil fuel resources, in addition to allowing hazardous wastes to be managed with equal safety but at a lower cost. EPA should expand the use and utility of the CFE by promulgating enhancements to the existing rule. The analytical requirements should be reduced and the analytical problems associated with demonstrating qualification should be resolved. The EPA should also adopt a flexible compliance demonstration for non-halogenated organic constituents that can be shown to be destroyed in well-operated, efficient combustion systems.

EPA	Leak Detection and Repair Regulations (LDAR) 40 CFR parts 60/61 and 63	Aims to reduce or eliminate Volatile Organic Compound (VOC) or Volatile Hazardous Air Pollutant (VHAP) emissions from certain process equipment leaks. Equipment leak standards specify certain monitoring and maintenance practices intended to reduce or eliminate these leaks and the resultant fugitive emissions. These emissions are monitored by Method 21.	Using Method 21 to monitor emissions requires an operator to visit and screen each regulated component to determine if it is leaking. This process is labor intensive, expensive and may not accurately represent the magnitude of a specific leak as it only measures hydrocarbon drawn in through the sample leak. Method 21 usage in a refinery with over 200,000 components can exceed $1,000,000, annually, for the LDAR program. There is new technology, optical imaging, that can identify leaking components within sight of the imager, leading to a more accurate and less labor intensive emissions reading. The EPA should phase out Method 21 and adopt a more technologically-advanced emissions monitoring process.
EPA	Clean Air Act; Operating Permits (Title V); 40 CFR Part 70	All major and some minor stationary sources have to file for operating permits under Title V of the Clean Air Act. The permits are to record all federally applicable requirements that apply to that source.	This program has grown considerably, becoming complex and costly. States have also adopted permitting programs, further adding to the confusion. The EPA should review Title V, taking into consideration Title V's original intent compared to the current process industry goes through in order to comply with this regulation. The goal of the rule revision should be to reduce costs and clarify language to make permitting easier and the actual permit language more concise.
EPA	TSCA - Export Notification; 40 CFR 707, Subpart D	Companies are required to notify EPA when exporting substances or products that contain chemicals listed on the TSCA Export Notification 12(b) list. Currently, there is no low-level cut-off for this notification.	Since there is no low-level cut-off for the notification, many minor substances or product ingredients notifications are filed, creating large amounts of paperwork. To remedy this, EPA should adopt a low-level cut-off for Export Notification under TSCA 12(b).
EPA	Clean Water Act; 40CFR 316 (b)	This regulation forces utilities to build dry cooling towers in an effort to reduce the amount of water needed for cooling.	This regulation will force significant expenditures that will be passed on to customers with little or no environmental benefit in water rich regions. The water conservation intent of this regulation may make sense in more arid regions, such as the Southwest, but in water abundant areas, such as the Great Lakes, this regulation becomes troublesome. We encourage the EPA to review this regulation and its applicability to different ecological regions.

EPA	New Source Performance Standards Subpart GG for Stationary Gas Turbines 40 CFR Part 60.334 (b)(2)	Requires monitoring of sulfur and nitrogen content of fuel being fired in gas turbines.	There is negligible sulfur and little nitrogen in natural gas, thus the NAM recommends that the rule be repealed. The challenging part is that reports are due even if there were no excess emissions. In addition, for sources covered by Title V permits, the requirement should be modified to conform with Title V monitoring and compliance reports, *i.e.*, if there are excess emissions they would be reported under the Title V deviation reports and not a separate NSPS report.
EPA	Water Effluent Guideline; 40 CFR 414	The current rule sets mass-based effluent limits by multiplying average process wastewater flow times at regulated concentrations. If a company implements a water conservation project, it will be penalized when the permit is renewed; mass limits will be reduced since the average flows will go down but the regulated concentration is not adjusted.	Permittees should retain mass limits when NPDES permits are renewed when process wastewater flows are reduced for purposes of water conservation. If process wastewater flows are decreased for other reasons, the mass limits can be adjusted per the current rule.
EPA	Safe Drinking Water 40 CFR 141; Great Lakes Initiative (GLI) Standard for Mercury	The GLI contains standards for surface water affecting effluent standards including mercury. The standards at issue are the GLI water column standards of 1.3 ppt for human health and 1.6 ppt for wildlife.	These standards are problematic as they are based on a false assumption that there is a linear constant relationship between inorganic mercury in the water column and organic mercury in fish. In the GLI, EPA is attempting to limit the organic levels in fish by regulating the inorganic mercury concentration in the water column. In the rest of the country, however, EPA only has a standard for fish. The GLI water column has caused POTW and industry to go to great efforts to reduce inorganic mercury levels in NPDES discharges with no demonstrated benefit after a number of years of effort. EPA should re-evaluate its approach contained in the GLI to create a standard that reflects nationwide policy.

EPA	Reporting of Releases in Excess of Reportable Quantity; 40 CFR 302 and 40 CFR 355- Associated with Thermal NOx Emissions	40 CFR 302.4 lists nitrogen oxide and nitrogen dioxide as CERCLA hazardous substances with a Reportable Quantity (RQ) of 10 pounds. 40 CFR 355 Appendix A also lists both materials with a Reportable Quantity of 10 pounds. The RQ is set too low for combustion sources such as flares, which are used to control VOC emissions.	Increase the RQ for nitrogen oxide and nitrogen dioxide to 100, 1000, or 5000 pounds for combustion sources. This will greatly reduce the reporting burden on owner/operators and the administrative burden on the NRC, state and local reporting entities.
EPA	Clean Water Act - Method Detection Limit/Minimum Level (MDL/ML)	Requires laboratory analytical procedure to determine chemical content.	MDL/ML procedure used for establishing low-level detection of chemical constituents result in a high level of "false positives." This data is used for compliance determinations and may inaccurately characterize discharger effluents as being non-compliant. These procedures are currently being re-evaluated, but the agreed upon assessment approach is not being followed by the EPA. The EPA's Technical Support Document confirms that the MDL/ML approach is unsuitable for compliance determinations, but it is anticipated that the agency will recommend that the process remain significantly unchanged. The continued use of the existing MDL may subject dischargers to possible fines and imprisonment due to inaccurate test results.
EPA	Superfund Alternative Program PL 99-499, 100 Stat. 1613 (1986). Guidance document interpreting authority of OSWER 9208.0.18. Revised response selection and settlement approach for Superfund Alternative Program (SAP) sites	The guidance encourages EPA Regional Offices to evade requirements for listing a site on the National Priority List (NPL) and arbitrarily select solvent companies to clean up sites regardless of actual risk to the public and regardless of the company's accountability at the site. The program abrogates the responsibility of EPA Headquarters to assure that Superfund assets are spent on the highest priority sites, and EPA's administrative reforms that mandate an attempt to achieve fairness in assigning cleanup liabilities.	The Superfund Alternative Program (SAP) should be eliminated as it essentially creates a "shadow" NPL without following the same process for listing a site on the NPL.
EPA	National Environmental Policy Act (NEPA) 40 CFR part 1500 to 1508	NEPA requires governing agencies to oversee land and resource management plans and environmental documentation for developing projects or creating and permitting of new facilities.	NEPA has become entangled with state, local and private interests, thereby creating much confusion for producers and manufacturers. It has been successful in requiring federal agencies to review the environmental consequences of their actions and has brought the public into the decision-making process, but the NEPA implementation process is full of delays due to inadequate federal staffing and funding. This adversely affects site permitting and project development. This, in turn, inhibits industry's ability to conduct business.

EPA	Office of Air Quality PS- AP-42	Requires reporting of chemical-specific emissions factors.	AP-42 does not provide emission factors for all source plants for all industries, thus more accurate emission estimates are made through use of alternative emission factor sources. AP-42 also lacks a needed statement on every page that site-specific data are preferable to category-wide average emission factors for regulatory applicability and permitting applications. AP-42 should be modified to allow more comment by industry as the current process is too long and the EPA has been non-responsive to suggestions for improvement and uses outdated source test results. Also, the Technology Transfer Network posting of AP-42 emission factors are used and interpreted differently by state and local regulatory agencies, leading to misinterpretations and inaccurate applications.
EPA	FIFRA 40 CFR 167.85 Form #3540-16	Requires annual reporting of pesticide production for registration of pesticides and pesticide devices (like filters) for registered facilities.	Form #3540-16 imposes an extraneous administrative cost as it requires the reporting of how many pesticide devices and filters are produced. Also at issue is the definition of pesticide devices, which is too broad. For example, the definition is so broad that companies have reported on filters that had no relation to pesticides- and it took close to 25 man-hours to complete the forms, not the EPA estimate of two hours. The definition of pesticide devices should be reviewed and the time for filling out the forms should be re-evaluated. In addition, the NAM suggests that form #3540-16 and other federal compliance forms be made available electronically in several formats. Otherwise, EPA – and other agencies – need to factor in conversion in estimating the time it takes to complete the form.
FAA	14 CFR Part 121 Air Carrier supplier rule	This rule requires that the employees of any supplier to an air carrier must have a drug and alcohol testing program.	This standard is not applied to foreign counterparts, giving U.S. companies a disadvantage when supplying items to air carriers.
Fish and Wildlife Service (Interior)	Endangered Species Act (ESA) 50 CFR 1711 and 1712; 50 CFR part 402, Interagency Cooperation	ESA permits citizens to nominate additions to the threatened and endangered list without requiring scientific data or analysis.	There is no qualification requirements nor scientific data required to nominate species for the ESA. This has hindered land management planning and permitting, making it difficult for and even inhibiting industry to conduct business. It is proposed that public hearings should be required on list additions and that specific criteria be developed to ascertain which species should be added to the list. Fish & Wildlife Service needs to work with Congress to tighten the statute so that it uses mainstream science as nomination criteria.
Health and Human Services; CMS	Medicare Title II, Section 301	Medicare Secondary Payment Law requires collection or recovery of alleged overpayments to Consumer Credit Collection agencies that do not have a time limit.	Medicare should only use subcontractors that deal professionally with former employers of alleged fraud perpetrators. The program should ensure that its debt-collection subcontractors stay well within the bounds of FTC-sanctioned practices, especially when dealing with innocent third parties, such as former employers. A time limit of ten years for contacting former employers should be imposed to alleviate employers having to research decade-old claims.

Labor - Office of Federal Contract Compliance Programs		When doing contract work with the government, contractors have to fill out compliance surveys. These surveys are required for every contract that that company may have with the government.	To simplify the government-contractor compliance surveys, it is suggested that the government create company profile codes, which identify the characteristics of a company. For example, the surveys ask questions about companies to determine if it is minority owned, a small disadvantaged business, etc. This profile code could then be used in lieu of filling out a complete survey for every government contract.
Labor - OSHA	Lead Annual Retraining 1910.1025 (L)	After initial employee training, OSHA requires annual retraining sessions.	The initial lead training should be required, with a follow-up in 6-12 months, but the annual retraining should be substituted for experience. For example, if someone working in and/or around lead is able to pass a test, then that employee should be exempt from the 8-hour retraining sessions.
Labor - OSHA	Lead 1910.1025(L); Bloodborne Pathogens annual retraining 1910.1030 (g)(2); Respirators Retraining 1910.134 (k)(10); Hearing Conservation Retraining 1910.95 (k)(2); Asbestos Retraining 19109.1001(j)(7)(ii)	Require 40-hour training sessions and 8-hour annual retraining.	These retraining sessions are too time-intensive. Similar to Lead Retraining regulations (above), manufacturers would like retrainings be performance based. If someone passes the test, then that employee should be exempt from completing the retraining. If an employee is new and/or does not pass the test, then they should go through the retraining, but making every employee go through retraining causes losses in productivity and is costly without much additional undue benefit.
Labor-OSHA	Flammable and combustible liquids standards; 29 CFR 1910.106 and 29 CFR 1910.107	Provides fire safety standards for the technology required for working with flammable and combustible materials.	Cites, and incorporates by reference, the National Fire Protection Association (NFPA) standards set in 1969 for spray application of flammable and combustible liquids. These OSHA regulations are long overdue for an update and need to reflect current technology available to boat manufacturers. For example, OSHA should update these regulations to use NFPA 33, Chapter 17, 2003 edition standards. Even more preferable is for OSHA to refer to the most up-to-date NFPA standard.
Labor-OSHA	Draft Model Training Program for Hazard Communication; http://www.osha.gov/SLTC/hazardcommunications/index.html	Designed to help business train employees who work with and/or around hazardous substances.	The general audience of this model training program is not clear, is it for small or large businesses? The current format and detail of the information in this program is overwhelming to a small business audience. Some of the recommended procedures in this guidance document may prove to be too complicated or involved for smaller businesses with limited resources. For example, risk analysis and the development of checklists are many times beyond the capabilities and resources of smaller employers. As a majority of small business owners may not know where certain referenced documents can be found, it would be helpful to have more information on how to obtain some of these resources mentioned throughout the document, like the Hazard Communication Standard and OSHA's Voluntary Training Guidelines. It would also be helpful to business to have more information as to where to obtain some resources identified in Appendix B Sources of Help and References. For example, it should list Web sites of government agencies and other applicable offices. We recommend that OSHA develop a reduced and simplified approach to the model training program with the input of small businesses. For more detail, pleas the comments of the Specialty Graphic Imaging Association (SGIA).

Labor-OSHA	Material Safety Data Sheets (MSDS); Hazard Communication Standard; 29 CFR 1910.1200	Companies must submit MSDS's to convey the hazard information to their downstream customers. All employers with hazardous chemicals in their workplaces must have labels and MSDSs for their exposed workers, and train them to handle the chemicals appropriately.	MSDS's should have higher quality standards. Poor quality of any input MSDS increases the cost and diminishes the quality of the output MSDS for a finished product. It also increases the risk of unintended employee health and safety exposure.
Labor; Mine Safety & Health Administration		Requires initial training of 20 hours and 8 hours annual retraining for all drivers working in the mining industry	The definition of what is "mining" is too expansive. For example, clay and shale are covered, but removal is similar to digging a shallow building foundation. Dump truck drivers haul the raw material to a stockpile near the manufacturing plant. Drivers moving just "mined" clay and/or shale should not be required to sit through the same trainings as those drivers working for deep surface mines as the clay drivers do not have the same degree of hazard. Clay and shale drivers should be exempt from training required for drivers who work in deep mines.
State	International Traffic in Arms Regulation; 22 CFR 120-130; Form DSP-5 Application for Permanent Export of Defense Articles. Technical Assistance Agreement.	ITAR requires application for DSP-5 for permanent export of defense articles for each individual purchase order required for end-items, components, accessories, attachments, parts, firmware, software and systems. ITAR also requires that a compnay have a Technical Assistance Agreement before a U.S. company can discuss the technical details of a potential solution with either a foreign company or even non-U.S. citizen employees of international operations.	Once a license is approved a company should not have to resubmit paperwork for each additional purchase for the same part. ITAR should not be applied to lower level parts that go into system. Foreign counterparts do not have the same regulations and are better able to compete in the global marketplace. This regulation is particularly time consuming and costly to small business, as they tend not to have export control departments.
DOT; National Highway Traffic Safety Administration (NHTSA)	Reporting of Information and Documents About Potential Defects in Trailers – Early Warning Reporting (EWR) requirements; 49 C.F.R. Part 579	Requires manufacturers of vehicles (including small-to medium-sized trailers under 26,000 lbs. gross vehicle weight rating [GVWR]) whose yearly production of vehicles for sale in the United States is 500 or more in a particular vehicle category to report comprehensive information to NHTSA.	Reporting threshold for small- to medium-sized trailer manufacturers is set at an inappropriately low level (500 units). This level provides no meaningful exemption for small businesses. NHTSA should re-evaluate the EWR burdens for manufacturers of small-to medium-sized trailers (such as boat trailers) under 26,000 lbs. GVWR because of the high reporting burden and limited increase in safety provided by this rule.
DOT; NHTSA	FMVSS 108 - Federal Motor Vehicle Safety Standard No. 108	"Lighting, reflective devices, and associated equipment," which sets forth minimum safety performance standards applicable to all motor vehicles and automotive lighting equipment in the United States. At issue is NHTSA's enforcement of the imported non-compliance product clause.	Standard 108 has been amended frequently since its adoption more than thirty years ago. These amendments coupled with the many interpretations by NHTSA make Standard 108 difficult to understand and to comply with. Standard 108 is important but is in need of revision to develop a more clear and concise rule. Updating the rule to reflect changes in vehicle lighting systems will enhance lighting safety and decrease confusion among complying companies.

DOT; NHTSA	Transportation Recall Enhancement Accountability Documentation (TREAD) Act	Regulates vehicles, trailers and requires periodic reports to the NHTSA on a variety of information to indicate the existence of potential safety defects and to advise NHTSA of foreign safety recalls and other safety campaigns. Allows Secretary to expedite a manufacturers' plan to remedy defect(s) and manufacturers must have a plan to reimburse owners who incur cost of remedy before notification. Allows Secretary to update rules on FMVSS for tires.	Small businesses are hit hard by the enhanced reporting forms, costing an estimated $250,000 for one manufacturer to complete. Increase the number of trailers manufactured for coverage from 500 to a more significant amount such as 5,000 before requiring a company to comply with detailed (*i.e.*, non-fatal/injury) incident reporting. NHTSA should review the application of the TREAD Act to vehicles that are strictly used off road and that are placed on other trailers when being transported.
DOT; NHTSA	FMVSS 208 (49 CFR 571.208)	Crash performance requirements that are intended to assure occupant protection in the event of a crash. New amendments require equipping seats with extra sensors in front passenger seats. The sensors react to the occupant's weight and disable the airbag if it is under a certain weight. There is also a low-risk deployment option for airbags, but it has been passed over.	The sensors are costly and are purchased by outside safety products manufacturers. To comply with this new regulation is costing one company up to $41 million. Technology has improved on the smart airbags (airbags that deploy based on the severity of the accident), which significantly reduced injuries during a trial run. Usage of the smart airbags should be implemented not only to cut down on sensor costs to manufacturers but also to provide an equally safe option for the front passenger seat.
DOT Federal Motor Carrier Safety Administration (FMCSA)	Parts and Accessories Necessary for Safe Operation - Brakes/ 49 CFR 393.48	Provides minimum requirements for all motor vehicle brakes.	Outdated brake rules need to be amended to permit the limited lawful use of "surge brakes" on small-to medium-sized trailer and tow-vehicle combinations since they meet the federal regulatory requirements for stopping distance and holding on a 20 percent grade and have a record of safety. Trailers with surge brakes can be used by consumers but not for commercial uses (such as where a marina owner would transport a boat for a boat owner for repair). The mandated electric brakes are not workable in conditions where the trailer would be submerged in water such as in a boat trailer. FMCSA has ignored requests to initiate a rulemaking.

Appendix D

Testimony

Jeffrey Marks
Director, Air Quality

On behalf of the National Association of Manufacturers

Before the Subcommittee on Regulatory Reform and Oversight, Committee on Small Business

on "The TRI Lead Rule: Costs, Compliance and Science"

June 13, 2002

TESTIMONY OF THE
National Association of Manufacturers
to be submitted to the record of the

Subcommittee on Regulatory Reform and Oversight
House Committee on Small Business

June 13, 2002

The National Association of Manufacturers (NAM) appreciates this opportunity to present written testimony to the House Committee on Small Business, Subcommittee on Regulatory Reform and Oversight regarding the Toxic Release Inventory (TRI) Lead Reporting Rule. The NAM is the nation's largest industrial trade association. The NAM represents 14,000 member companies (including 10,000 small and mid-sized companies) and 350 associations serving manufacturers and employees in every industrial sector and all 50 states.

The NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth. Accordingly, the NAM has a vested interest in the TRI rules, as they will affect a broad array of industry owners and operators, particularly small businesses. Our comments will address those general issues of the TRI Lead Reporting Rule of concern to the manufacturing community.

On Jan. 17, 2001, the Environmental Protection Agency (EPA) published a final rule reducing the "manufacture, process or otherwise use" reporting threshold for lead and lead compounds under the TRI program to 100 pounds – a reduction by a factor of 250 in the case of facilities that "manufacture or process" lead and by a factor of 100 in the case of facilities that "otherwise use" lead. This action was taken based on the EPA's view that "lead and lead compounds are PBT (persistent, bioaccumlative, toxic) chemicals." As a result, any amount of lead or lead compounds present in a mixture or trade-name product must be counted toward the

reporting threshold, no matter how low the concentration of lead in the mixture may be. The combined effect of reducing the reporting threshold and eliminating the de minimis exemption will subject perhaps tens of thousands of new facilities to the burdens of 1) making "manufacture, process or otherwise use" threshold determinations for lead and lead compounds; and, 2) preparing and filing annual TRI reports when the 100-pound threshold is exceeded.

Executive Summary

The NAM believes a number of serious scientific concerns exist with respect to the TRI Lead Reporting Rule that remain unresolved. Of specific concern are the EPA's questionable scientific approach to applying PBT criteria to metals and inorganic metal compounds; whether the EPA's determination of lead as a PBT under that approach is appropriate; and, whether the EPA's lowering of the lead reporting threshold to 100 pounds is warranted under that determination. Accordingly, on April 26, 2001, the NAM urged the EPA to charge the Science Advisory Board (SAB) with the task of thoroughly reviewing these issues in ample time for the EPA to reconsider the rule, as appropriate, prior to the July 1, 2002, deadline for filing these onerous reports. With this deadline now approaching in a few short weeks [by this testimony] we are again urging the agency to defer the implementation of the rule's reporting deadline until these issues, and others, are resolved. The SAB review would represent a meaningful step toward resolving some of the scientific uncertainty about the rule.

In addition, the NAM has been urging the EPA to formally consider concerns that would have been expressed by small businesses, had they had full opportunity to participate in the rule's formulation. The July 1, 2002, deadline should, at the very least, be extended by a year, as

the EPA has not provided adequate compliance assistance to regulated entities with respect to the new rule, as has been repeatedly promised by the agency.

The final rule subjects potentially tens of thousands of new facilities to the burdens of determining whether they manufacture, process or use 100 pounds of lead, and if so, they must prepare and file annual TRI reports. The costs associated with these new requirements will be very substantial and may threaten the ability of certain small businesses to continue operating in the United States. The EPA's TRI Lead Reporting Rule does little to protect our environment, yet mandates unnecessary and unwarranted regulatory burdens and costs on those small businesses.

Scientific Concerns

The scientific validity of the application of the EPA's PBT chemical methodology to evaluate the health and environmental hazards of metals has not been agreed upon. In fact, the Residual Risk Subcommittee of the SAB has stated that classification of metals as PBT is problematic, since their environmental fate and transport cannot be adequately described using models for organic contaminants. In the final rule, the EPA itself requests external scientific peer review from the SAB on "the issue of how lead and other as yet unclassified metals, such as cadmium, should be evaluated using the PBT chemical framework." Despite the EPA's own misgivings about the applicability of the PBT approach, the agency nevertheless proceeded to lower the TRI lead-reporting thresholds from 25,000 or 10,000 pounds to 100 pounds, leaving the scientific review, if ever, to occur well after the effective date of the rule (originally Feb. 16, 2001, but deferred until April 17, 2001)

Congress also has voiced its concerns about the scientific justification for the rule. On July 26, 2000, a bipartisan group on the House Committee on Science wrote to then-EPA Administrator Carol Browner, urging the EPA "to seek independent peer review and refer the question of the scientific appropriateness of applying PBT criteria to metals to the SAB before deciding whether to include metals." Similarly, former Science Committee Chairman James Sensenbrenner (R-WI) expressed this same concern in a Jan. 3, 2001, letter to the Office of Management and Budget (OMB) urging OMB to block the rule until such SAB review is completed.

According to EPA Administrator Christine Todd Whitman, "scientific analysis should drive policy. Neither policy nor politics should drive scientific results." The NAM agrees wholeheartedly. As the NAM testified in a March 27, 2001, hearing before the House Committee on Government Reform, "a number of rules that were hurried through the promulgation process in the final days of the last Administration suffered from demonstrable deficiency in these essential qualities of responsible rulemaking. As a result, some recently finalized rules could require huge expenditures even for modest – let alone any genuine – protection of human health, the environment and worker safety." As the NAM noted in the March 27 testimony, the TRI lead-reporting regulation is such a rule. Earlier, on March 1, 2001, the NAM and more than 70 trade associations representing almost every sector of U.S. business, wrote to EPA Administrator Whitman urging that the EPA "suspend or otherwise stay the effectiveness of the TRI lead threshold reduction rule until the SAB completes its review of this important scientific issue and the results of that review can be assessed." In addition, as mentioned above, the NAM sent its own letter to the EPA on April 26, 2001, urging the agency

to charge the SAB with a broad review of the PBT issue, as well as to revise the onerous TRI rule should revisions be appropriate in light of the SAB analysis.

Small Business Concerns

In addition to failing to wait for an SAB review of the scientific underpinnings of the rule, the EPA ignored its procedural obligations under the Small Business Regulatory Enforcement Fairness Act (SBREFA). The rule suffers from a questionable agency evaluation of the impact on small business, as the EPA engaged in virtually no small business consultation before publishing the proposed rule. Senator Christopher Bond (R-MO), the chairman of the Senate Committee on Small Business, in an October 1999 letter to the EPA, raised strong objections to the EPA's neglect of SBREFA requirements when proposing the rule. Subsequent attempts at small business outreach came too late to meet the SBREFA goals. On April 24, 2001, the Senate Committee on Small Business held a hearing on the effectiveness of SBREFA, at which the General Accounting Office testified that the EPA ignored more than 30 industry groups' concerns about the rule when it asserted that the rule would not have a "significant impact" on small entities. Also on April 24, the House Committee on Government Reform explored the burdensome paperwork requirements presented by the lead rule.

Notwithstanding the fact that the EPA moved the effective date to April 17, 2001, the reporting obligations under the rule were nevertheless still retroactive to Jan.1, 2001, an onerous requirement unprecedented in the history of the TRI program. However, in May 2001, the EPA appeared to recognize the need for help for small businesses with respect to the Lead Reporting Rule. In a May 25, 2001, Office of Environmental Information (OEI) letter, the EPA stated that the TRI program "is actively developing a guidance document that will assist regulated

entities to comply with the new lead rule. A primary objective of this guidance is to help reduce burdens imposed by the rule. Development of this guidance has been given high priority, and the guidance is expected to be finalized and made available by October of 2001." Despite the good intentions offered by the OEI, the guidance, which was not issued until the end of Spring 2002, was neither effective nor timely in helping small businesses to comply.

First, the guidance document was not issued until the end of January 2002, 13 months after the date on which facilities were required to begin recording data. Meanwhile, small businesses were subject to substantial new reporting obligations throughout the entire calendar year 2001 without the assistance necessary to carry out the reporting. Second, small businesses, including first-time filers, were being forced to reconstruct data back to the beginning of January 2001 without the benefit of the promised guidance. Third, the guidance document, once finally released, was long, confusing and incomplete. Other problems with the document included unclear exemptions, out-of-date and misleading reference materials and poorly publicized compliance workshops. On Feb. 22, 2002, 43 trade associations representing small businesses, including the NAM, sent a letter to Administrator Whitman advising the agency to defer the implementation of the TRI lead rule's reporting requirement from July 1, 2002, to July 1, 2003, for the reasons cited above.

The EPA has estimated that the cost of reporting lead and lead compounds during the first year will be up to $7,700 per facility, and more than $4,000 each additional year. However, this does not include the cost of any testing to ensure lead does not exist in trace amounts in each of the raw materials, processes and products manufactured or disposed. The rule would have significant impact on all manufacturers with trace amounts of lead in the raw materials they use, manufacturer or dispose. The presence of lead in any materials used in large-enough amounts

may require testing and reporting. At a minimum, manufacturers will have to analyze whether or not they need to report.

While the EPA says that testing is not required to meet the due diligence aspects of reporting, it is difficult to envision a circumstance where precautionary testing would not be required. The costs of reporting lead is also on top of the costs already incurred by industry in reporting other toxic releases at their facilities. The burden of reporting will, in many cases, entail hiring people, contracting consultants and spending many additional hours deciding whether the facility used 100 pounds of lead, and then reporting it if they do.

Conclusion

The final rule subjects potentially tens of thousands of new facilities to the burdens of determining whether they manufacture, process or use 100 pounds of lead, and if so, preparing and filing annual TRI reports. The costs associated with these new requirements will be very substantial and may threaten the ability of certain small businesses to continue operating in the United States. The NAM represents more than 10,000 small and mid-sized businesses, so it knows that small business is the economic backbone of our country's workforce and continues to be a major source of job creation. The NAM also knows the serious commitment of small businesses and their workers to protecting the air, water and land in their neighborhoods. The EPA's TRI Lead Reporting rule does little to protect our environment, yet mandates unnecessary and unwarranted regulatory burdens and costs on those small businesses.

Overall, we are pleased with the way that this Administration has chosen to proceed with its review of those rushed rulemakings in the final weeks of the previous Administration by looking at these issues on a case-by-case basis. In addition, we thank EPA Deputy Administrator

Linda Fisher for meeting with trade association representatives on May 10, 2002, to discuss small business concerns with the EPA's compliance assistance activities on TRI lead reporting. We are also pleased by this committee's personal commitment to honest scientific analysis as a prerequisite to policy-making. In that connection, we hope that this committee will be committed to encouraging the EPA to revise the onerous TRI Lead Reporting rule should revisions be appropriate in light of subsequent scientific assessment. The TRI Lead Reporting rule is a clear candidate for further independent scientific peer review and should not be fully implemented until this review is completed.

Thank you for this Committee's attention to this important matter. If you have any questions, or would like the opportunity to discuss this issue more fully, Jeffrey Marks, the NAM's Director of Air Quality, would be the appropriate person to contact at the NAM. He can be reached at (202) 637-3176.

Appendix E

Comments

On Toxic Chemical Release Reporting; Community Right-to-Know; Notice of On-Line Dialogue (Docket Number TRI-2003-0001)

By the National Association of Manufacturers

Submitted to the Environmental Protection Agency on
February 3, 2004

COMMENTS OF THE
NATIONAL ASSOCIATION OF MANUFACTURERS
to the
ENVIRONMENTAL PROTECTION AGENCY
regarding
DOCKET NUMBER TRI-2003-0001
on
TOXIC CHEMICAL RELEASE REPORTING; COMMUNITY RIGHT-TO-KNOW; NOTICE OF ON-LINE DIALOGUE

Introduction

In September 2002, the Environmental Protection Agency (EPA) initiated a Stakeholder Dialogue process to identify improvements to the Toxics Release Inventory (TRI) program that would reduce the burden on reporting facilities. According to the EPA, the goal of the dialogue is to "reduce burden associated with TRI reporting while at the same time continuing to provide valuable information to the public consistent with the goals and statutory requirements of the TRI program."

On November 5, 2003, the EPA published in the *Federal Register* a Notice of Availability and Request for Public Comment on its "Toxic Chemical Release Reporting; Community Right-to-Know; Notice of On-Line Dialogue" (*hereinafter*, Dialogue). In conjunction with the notice, the EPA published on its Web site a paper describing several burden reduction options for public comment. The EPA is requesting comment on the following options:

1. Higher reporting thresholds for small businesses;
2. Higher reporting thresholds for a category of facilities or class of chemicals with small reportable amounts;
3. Expanded eligibility for the Form A Certification Statement;
4. Creation of a new "No Significant Change" Certification statement;
5. Use of Range Reporting for Section 8 of the Form R; and
6. Other options for burden reduction.

The National Association of Manufacturers (NAM) submits these comments in response to the EPA's Dialogue. The NAM is the nation's largest industrial trade association, representing 14,000 member companies (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states. The NAM has a vested interest in the Dialogue's burden reduction options, as these options may influence regulatory decision-making affecting a broad array of industry owners and operators, particularly small businesses of various kinds. The NAM is also concerned that the EPA's recent underestimation of the TRI compliance burden is giving Congress and the public the incorrect impression that the TRI is a "low-cost/high-value" program.

Background

The TRI is a publicly available EPA database that contains information on toxic chemical releases and other waste management activities reported annually by certain covered industry groups as well as federal facilities. This inventory was established under section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA) of 1986 and expanded by section 6607 of the Pollution Prevention Act (PPA) of 1990. Under the TRI program, covered facilities are required to report quantities of TRI chemicals recycled, combusted for energy recovery and treated on- and off-site. Covered facilities must meet the following criteria:

- The facility has 10 or more full-time employee equivalents (*i.e.*, a total of 20,000 hours or greater);
- The facility is included in a certain Standard Industrial Classification (SIC) code;
- The facility manufactures, processes or otherwise uses any EPCRA section 313 chemical in quantities greater than the established threshold in the course of a calendar year.

Unfortunately, the TRI reporting forms have strayed from their original goals, increasing the burden of reporting while failing to provide corresponding benefits. These burdens are particularly difficult for small businesses.

Option 1 - Higher Reporting Thresholds for Small Businesses

The EPA's first suggested option for reducing burden on the regulated community is to modify the reporting thresholds for small businesses. Small businesses often bear a disproportionate burden for complying with regulatory requirements. Small businesses often lack the staffing needs and resources necessary to devote to reporting, recordkeeping and regulatory compliance activity. Accordingly, the EPA is considering providing small businesses with higher reporting thresholds.

The NAM certainly supports all attempts to reduce the burden of the TRI program on the small-business community. Small and medium manufacturers comprise one of the most vital sectors of the economy. Understanding the critical role these businesses play in our economy and developing laws and policies to enhance their competitiveness are imperative. They account for about half of private-sector output, employ more than ½ of private-sector workers and provide about ¾ of the net new jobs each year. Small and medium manufacturers comprise approximately 95 percent of all manufacturing firms and employ about half of all manufacturing employees; account for 37 percent of all manufacturing receipts—more than $1 trillion a year; pay their workers 20 percent more than employees in other types of small businesses; and export increasingly more each year. Though smaller businesses provide extraordinary benefits to society, they also contend with extraordinary challenges. Large increases in basic costs, such as energy and

regulatory mandates, are not easily funded. Only by cutting costs and increasing productivity are they able to stay in business when costs rise.

Small and medium manufacturers share a disproportionate regulatory burden, according to the Small Business Administration, and that burden is increasing. They are increasingly subject to substantial new reporting obligations without the assistance necessary to carry out the reporting. Small businesses, including first-time TRI filers, are being forced to reconstruct data without the needed benefit of appropriate guidance. Guidance documents, when available, are sometimes long, confusing and incomplete. Other problems include unclear exemptions, outdated and misleading reference materials and poorly publicized compliance workshops. In many cases, the burden of reporting entails hiring people, contracting consultants and spending many additional hours deciding whether a facility used a certain amount of toxic chemicals, and then reporting it if it did.

Option 2 - Higher Reporting Thresholds for a Category of Facilities or Class of Chemicals with Small Reportable Amounts

The EPA's second option for reducing TRI burdens on the regulated community is to modify the reporting thresholds for a category of facilities and/or class of chemicals with small reportable amounts. The EPCRA clearly gives the EPA authority to delete industry sectors from TRI coverage. This option would be attractive to NAM member companies that release very low amounts of toxic chemicals, but must undergo the annual burden of TRI reporting even though they present little or no risk to public health or the environment.

The NAM believes this option would reduce the reporting burdens for a number of facilities, which must undergo the annual burden of TRI reporting despite having very low releases of toxic chemicals to the environment. Removal of facilities reporting minimal releases would improve the quality of the TRI database by focusing on releases that represent a real risk to the public welfare.

For example, releases of lead to the environment by industry, in general, are virtually insignificant. The lowered reporting threshold for lead significantly increased the reporting burden on industry, but has resulted in little additional data. In 2001, the first reporting year under the lowered reporting threshold for lead, 8,561 Form Rs were filed for lead and lead compounds. More than 85 percent of these forms were filed by the manufacturing sector, yet this same sector was responsible for only six percent of reported releases. In fact, the median release of lead to the environment for all reporters is one pound.

The NAM continues to believe that a number of serious scientific concerns exist with respect to the TRI lead reporting rule than remain unresolved. Of specific concern are the EPA's questionable scientific approach to applying PBT [persistent, bioaccumulative, toxic] criteria to metals and inorganic metal compounds; whether the EPA's determination of lead as a PBT under that approach was appropriate; and whether the

EPA's lowering of the lead reporting threshold to 100 pounds is warranted under that determination.

The lead reporting rule subjects potentially tens of thousands of new facilities to the burdens of determining whether they manufacture, process or use 100 pounds of lead, and if so, preparing and filing annual TRI reports. The costs associated with these new requirements are substantial and may threaten the ability of certain small businesses to continue operating in the United States. As the NAM represents more than 10,000 small and mid-sized businesses, it knows that small business is the economic backbone of our country's workforce and continues to be a major source of job creation. The NAM also knows the serious commitment of small businesses and their workers to protecting the air, water and land in their neighborhoods. The EPA's TRI lead reporting rule does little to protect our environment, yet mandates unnecessary and unwarranted regulatory burdens and costs on those small businesses.

The NAM urges the EPA to closely consider the comments of individual companies and industry-specific trade associations on this option and to delete those industry sectors from TRI coverage that demonstrate insignificant releases from their facilities. The NAM also recommends that the EPA raise the lead reporting threshold for manufacturing facilities.

Option 3 - Expanding Eligibility for the Form A Certification Statement

The EPA's third option for reducing TRI burdens on the regulated community is to expand eligibility for use of the Form A Certification Statement in lieu of the more detailed and extensive Form R. Although the burden reduction associated with filing Form A instead of Form R is often small because facilities still have to undertake detailed calculations to determine eligibility for Form A, the NAM agrees with the EPA that expanding the eligibility and use of Form A warrants serious consideration by the agency.

However, many companies feel that submission of Form A instead of Form R carries heightened risk of enforcement. These facilities believe that use of Form A leaves them vulnerable to EPA enforcement for failure to file should it be determined that they were not eligible to report under Form A. The EPA notes that there are many facilities that are eligible to use Form A, but do not. In order to rectify this situation, the EPA needs to eliminate the legal barriers to use of the Form A.

The EPA should also modify the "annual reportable amount" criterion to reflect only reported releases to the environment and not the waste management activities currently included, such as recycling and energy recovery. The purpose of the TRI program is to provide information regarding "releases to the environment." Chemicals released from recycling, energy recovery and other waste management activities should not be included in TRI reporting thresholds as they are not released "to the environment

The EPA should also allow Form A to be used for lead releases. As evidenced by the large number of facilities reporting lead releases of only one pound or less, use of Form A makes more sense than the more burdensome Form R.

Option 4 - Creating a New "No Significant Change" Certification Statement

The EPA's fourth option for reducing TRI burdens on the regulated community involves the development of a new form that would allow facilities to certify to "no significant change" in TRI reporting as measured against a designated baseline year. Facilities that qualify for this "no significant change" certification would be relieved of their obligation to complete either the Form R or Form A Certification Statement. While this option has the potential to reduce reporting burdens for a number of facilities, the definition of "no significant change" will have a considerable effect on the number of eligible facilities.

The NAM supports the idea of creating a "no significant change" certification statement, so long as the "no significant change" determination is easy to make and the required statement is simple. If facilities need to go through all of the calculations necessary for a Form R or complete a complicated form, they are likely to continue using Form R. In addition, the certification statement must be an acceptable substitute for the required Form R and its use should not trigger enforcement and liability policies for failing to file a Form R. As an added benefit for this option, a certification of "no significant change" would allow users to quickly find that no significant changes in releases have occurred at a specific facility without having to review and compare data from year to year.

Option 5 - Use of Range Reporting for Section 8 of Form R

The EPA's fifth option for reducing TRI burdens on the regulated community is to allow for use of range reporting in Section 8 of the Form R. Because the EPA currently allows range reporting for non-PBT chemicals in Sections 5 and 6 of the Form R, the NAM believes that the use of range reporting should be utilized in Section 8 as well. Allowing range reporting provides facilities with extra comfort and flexibility in making reliable estimates.

Option 6 - Other Options for Burden Reduction

The EPA is seeking comment on any other burden reduction options in addition to those discussed in the Dialogue paper. For example, the agency considered an option that would afford reporting relief to those facilities that report zero releases on their Form R reports. The very existence of a significant number of TRI reports for zero releases is indicative of the extent to which the TRI program fails to achieve its goals in an efficient way that reduces risk to the environment and the public. The goal of burden relief should be to simplify and reduce the number of calculations, recordkeeping and reporting that is required without reducing the value of the TRI program. Clearly, the EPA should eliminate reporting for chemicals with zero-release quantities. The NAM strongly urges

the EPA to reconsider the value of zero-release reports. The NAM recommends that the EPA determine the number of zero-release reports that the agency receives, assess their practical utility and consider eliminating the obligation to file them.

The extensive use of guidance in the TRI program has the effect of imposing additional requirements on the regulated community. Although the purpose of guidance should be to clarify reporting requirements, the EPA has often relied on guidance to change the program and significantly increase the burden of TRI reporting. The issuance of guidances outside the proper notice-and-comment rulemaking process sometimes results in more expansive reporting than previously required. The NAM recommends that the EPA minimize changes to guidance documents in order to reduce the burdens of reviewing, assessing and applying the changes to facility reporting. The NAM also recommends that the EPA refrain from making changes to guidance documents that have the potential to expand reporting requirements. The formal rulemaking process should be used instead for the purpose of expanding reporting requirements.

Finally, the NAM recommends that the EPA reinstate the *de minimis* exemption for persistent, bioaccumulative, toxic (PBT) chemicals. Attempting to identify and quantify quantities below *de minimis* levels is impractical and does not produce meaningful data for public use. The elimination of this exemption has required many facilities to calculate or estimate the total volumes of chemicals that make up a minute portion of a material processed, manufactured or otherwise used. Because of the very low thresholds for PBT chemicals, it is a great burden to report low levels of actual releases. As just one example, the TRI burden has dramatically increased for many facilities due to the elimination of the *de minimis* options for lead.

Conclusion

The EPA should take this opportunity to truly examine the costs, benefits and burdens involved with the TRI program and to commit to reducing the reporting burdens, especially as they pertain to small businesses. The NAM appreciates the opportunity to comment on the Dialogue and looks forward to working with the EPA to implement these improvements to the TRI program. If you have any questions, or would like the opportunity to discuss this issue more fully, Jeffrey Marks would be the appropriate person to contact at the NAM. He can be reached at (202) 637-3176 or jmarks@nam.org.

STATEMENT OF VERONICA VARGAS STIDVENT
ASSISTANT SECRETARY FOR POLICY

U.S. DEPARTMENT OF LABOR

BEFORE THE

SUBCOMMITTEE ON REGULATORY REFORM AND OVERSIGHT
COMMITTEE ON SMALL BUSINESS

U.S. HOUSE OF REPRESENTATIVES

July 13, 2006

Chairman Akin 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*.

As I stated before the committee a little over a year ago, the Department takes seriously its responsibility to protect worker safety and health, retirement security, pay, and equal access to jobs and promotions. As 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, we have revised or eliminated regulations and considered and adopted new rules and new approaches that ensure strong protections for workers without imposing unnecessary and costly burdens on the economy.

OMB began soliciting public suggestions for reform of specific regulations with its 2001 Report to Congress on the Costs and Benefits of Federal Regulation. Additional and expanded requests were included in OMB's 2002 and 2004 reports to Congress. The

2004 report, which was particularly interested in reforms addressing burdens on small and medium-sized manufacturers, identified 39 "nominations" for the Department of Labor. Following discussions with the Department and input from the Small Business Administration's Office of Advocacy and the Department of Commerce's Office of the Assistant Secretary for Manufacturing and Services, OMB published its report on manufacturing, which included 11 reform nominations for the Department of Labor that were considered to have potential merit and justified further action. (Note that the Family and Medical Leave Act (FMLA) nomination combined 9 separate nominations addressing FMLA in the 2004 OMB report.)

In addition to FMLA, the 11 Department of Labor reform nominations included 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 the nominations since the hearing in April 2005.

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

OSHA took into account and addressed many issues raised by small businesses in its final Hexavalent Chromium standard published on February 28, 2006.
Several major changes were made to the proposed rule as a result of OSHA's analysis of comments and data received from the Small Business Regulatory Enforcement Fairness Act (SBREFA) panel and stakeholders during the comment periods and public hearings.

The final standard incorporated many of the recommendations from the SBREFA panel and other stakeholders, including an extended, 4-year compliance period for

engineering controls, an exemption for employers with objective data demonstrating very low exposure levels, and flexible exposure monitoring requirements. In addition, based on OSHA's feasibility findings, the final standard includes a higher PEL than the one proposed.

OSHA recognized the impact that the hexavalent chromium standard would have on small businesses and gave serious consideration to all comments and data submitted to the rulemaking record. OSHA also held discussions with the Department of Commerce to ensure that business competitiveness concerns were adequately addressed in the context of both the domestic and international market effects. In addition, OSHA is developing outreach and guidance materials to assist small businesses in implementing the new standard. For example, OSHA is developing a compliance directive that outlines how the final standard will be enforced, a small entity compliance guide that explains the requirements of the standard in plain language and provides resources for compliance assistance, as well as an engineering and work practice control guide to assist employers in achieving the new PEL. OSHA is also conducting specialized training for its Compliance Assistance specialists that will focus on areas that may be the most problematic for small businesses.

Coke Oven Emissions Standard. Two commenters recommended that the standard be revised to account for new technology and that medical monitoring be reduced. One commenter specifically recommended that OSHA finalize the changes to the Coke Oven Emissions Standard proposed in Phase II of OSHA's Standards Improvement Project.

In last year's testimony I noted that in January 2005, OSHA published the Phase II final rule, which streamlined several provisions of the coke oven emissions standard, including reducing 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. OSHA has not taken any further action on the coke emissions standard. However, if commenters still have issues of concern, they can raise them as suggestions in response to the Advance Notice of Proposed Rulemaking on Phase III of the Standards Improvement Project that is soliciting input on subjects to be addressed.

Permanent Labor Certification. One commenter was critical of the 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, thus making the employer application process straightforward, less expensive, and more customer friendly. Prior to the regulation, ETA had estimated that the backlog cases under the permanent labor certification program would have taken 6-10 years to complete. The

cases have now been consolidated into two centers and are slated to be completed by September 2007.

Hazard Communication/Material Safety Data Sheets (MSDS). Several commenters indicated 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 and will be completed in 2007. In addition, OSHA has submitted for OMB review an Advanced Notice of Proposed Rulemaking addressing 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 standardized format for material safety data sheets as well as standardized label requirements.

OSHA has also worked with the National Institute for Occupational Safety and Health (NIOSH) to develop model Material Safety Data Sheets for a set of frequently-found, high-production or especially hazardous chemicals. OSHA will make this peer-reviewed information available to its compliance and consultation staffs and will post the information on its public web site in 2007. These personnel will utilize the data to ensure the accuracy and consistency of information on MSDSs for these chemicals during their site visits to the nation's workplaces.

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.

The Department met its obligation to provide OMB with a report on training requirements by May 2005. The report noted that OSHA does not require separate training programs for each standard that requires 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*. 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.

OSHA also will include questions regarding its training requirements in an Advance Notice of Proposed Rulemaking for Phase III of its Standards Improvement Project. These questions will solicit input from the public on approaches to achieve consistency of terminology, amount of training and the frequency of retraining in the Agency's safety and health standards. In addition, OSHA will ask the public to identify training requirements in its standards that overlap or duplicate requirements in other agencies' standards.

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 2007. The Agency is considering issuing two products. One would be a final version of the model training program proposed in 2004, and the other would be a simplified approach for small businesses.

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. 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 has developed a guidance document on the selection and use of slings, which is currently under review, and which it plans to issue in 2006. This document would make it clear that slings meeting the newer ANSI/ASME standard are acceptable.

Guardrails Around Stacks of Steel. One commenter (the American Iron and Steel Institute) 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.

The Department met its obligation to provide OMB with a report on the guardrail requirements by May 2005. The Department's report noted that OSHA is currently conducting a rulemaking on its Walking and Working Surfaces standard, and will consider the guardrail requirement as part of that rulemaking. It also stated that the agency had contacted the commenter to discuss OSHA's plans and that the commenter supported addressing the issue in the Walking and Working Surfaces rulemaking.

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

The Department met its obligation to provide OMB with a report on the ladder and stairway requirements by May 2005. . The report stated that this issue also would be considered as part of OSHA's rulemaking on the Walking and Working Surfaces standard. It also stated that the agency had contacted the commenter and that the commenter supported including a flexible policy for ship stairs in the final rule.

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 2001, 2002, and 2004. In addition, Congress has held a number of hearings 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 some provisions of the FMLA regulations.[1]

The Employment Standards Administration continues to review the issues raised by the Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.*, as well as other court decisions, and the possibility of revisions to the FMLA regulations remains an item on the Department's regulatory agenda. OMB's 2005 report to Congress offered an updated schedule on the FMLA nominations, stating that Department of Labor will report to OMB on our plans in January, 2007. This continues to be our plan. No final decisions have yet been reached as to what, if any, changes might actually be proposed.

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[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 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).

If changes are proposed, the public will be provided ample opportunity to comment through the formal notice and comment rulemaking process.

Mr. Chairman, this concludes my update of the status of the referred regulations. I would be glad to respond to any questions you may have.

STATEMENT OF WILLIAM L. KOVACS
VICE PRESIDENT
U.S. CHAMBER OF COMMERCE
AT A HEARING BEFORE THE
SUBCOMMITTEE ON REGULATORY REFORM AND OVERSIGHT
U.S. HOUSE OF REPRESENTATIVES
TITLED
"AN UPDATE ON ADMINISTRATION ACTION
TO REDUCE UNNECESSARY REGULATORY BURDENS
ON AMERICA'S SMALL MANUFACTURERS"
JULY 13, 2006

Chairman Akin, Ranking Member Bordallo, and members of the subcommittee, thank you for inviting me here today to testify about the administration's efforts to reduce unnecessary regulatory burdens on small manufacturers. I am William Kovacs, Vice President of the Environment, Technology, and Regulatory Affairs division at the U.S. Chamber of Commerce. The U.S. Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. More than 96% of the U.S. Chamber's members qualify as small businesses.

The U.S. Chamber is concerned about the cost and quality of federal regulations, and believes firmly that every federal agency should periodically review and assess the continued need for, and relevance of, the rules it promulgates and enforces. Many attempts have been made to ensure this review occurs, but none have been successful. As a result, the regulatory process has become intractable. In 2005, approximately **4,000** new regulations were issued by federal agencies, and the *Federal Register* exceeded **73,000 pages**.[1] Currently, there are more than **110,000 regulations** in existence,[2] and every one of these regulations must be followed by the businesses they are imposed upon. Since 1995, more than **44,000** new final rules have been issued. The annual cost to implement the nation's regulatory system exceeds the amounts collected from individual income taxes![3]

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[1] *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, by Clyde Wayne Crews, Vice President for Policy and Director of Technology Studies at the Competitive Enterprise Institute (June 28, 2006).
[2] John D. Graham, Administrator of the Office of Information and Regulatory Affairs, Testimony before the Subcommittee on Energy Policy, natural Resources, and Regulatory Affairs, U.S. House of Representatives (Nov. 17, 2004).
[3] *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, supra, pg. 6. The amount of individual income taxes collected in 2005 was $894 billion, and the amount of corporate income taxes collected was $226 billion.

Moreover, the cost of federal regulations to the public is estimated to be as high as **$1.13 trillion**[4]—a cost which equals almost half the amount of last year's entire federal budget![5] And the impact of federal regulations is especially severe on small businesses. For example, the annual cost of all federal regulations is, on a per employee basis, $7,647 for firms with fewer than 20 employees—nearly **45% higher** than the $5,282 for companies with 500 or more employees.[6]

In addition, the number of paperwork burden hours—hours spent by businesses in preparing paperwork imposed by federal regulations—has skyrocketed. Last year alone, the number of paperwork burden hours imposed on the public exceeded an extraordinary **10.5 billion hours**—the highest in history—and 2.5 billion hours more than just two years ago.[7]

Efforts to revise or rescind unnecessary or overly burdensome regulations have taken many forms. Most recently, the Office of Management and Budget accepted nominations from the public for regulations that are particularly onerous or unclear, and as such, make compliance more difficult or more costly or both. These efforts have met with limited success.

In my testimony today I want to make three key points:

1) OMB's public nomination process lacks transparency. In order to be effective, agencies must be forthcoming about what is being done with the nominations after they are referred to the agency by OMB.

2) Repeated attempts have been made over the years by administrations, Congress, and agencies alike to compel a periodic review of federal regulations so that unnecessary regulations could be eliminated, but these efforts have been unsuccessful due to a lack of agency involvement.

3) Without some form of enforcement mechanism—whether it be judicial review, budget reductions, etc.—it is unlikely that any change will occur in the current regulatory reform process.

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[4] *The Impact of Regulatory Costs on Small Firms*, Report RFP No. SBHQ-03-M-0522, by W. Mark Crain, Lafayette College, for The Office of Advocacy, U.S. Small Business Administration (Sept. 2005).
[5] *Budget of the United States Government, Fiscal Year 2005,* Office of Management and Budget. Accessible at: http://www.whitehouse.gov/omb/budget/fy2005/.
[6] *Ibid*, footnote 2, page 5.
[7] *Paperwork Reduction Act: New Approaches Can Strengthen Information Collection and Reduce Burden*, U.S. Government Accountability Office Report, GAO-06-477T, pg. 7, Washington, DC (Mar. 8, 2006).

I. OMB'S PUBLIC NOMINATION PROCESS LACKS TRANSPARENCY

It goes without saying that the current Bush Administration has made great strides toward strengthening the analytic foundation of **new** federal regulations through better regulatory impact analyses, improved information quality and risk assessments, and more systematic peer review. The Bush Administration has also devoted significant effort to the reform and improvement of **existing** regulations, as demonstrated by OMB's recent regulatory reform nomination process. Nevertheless, agencies continue to issue regulations at a record pace, imposing overwhelming compliance costs on the public.

OMB sought to identify regulatory reform suggestions through a direct public nominations process. OMB's authority to require a periodic review of existing regulations stems from authority granted by Congress under the Regulatory Right-to-Know Act.[8] The Regulatory Right-to-Know Act requires OMB to issue an annual report to Congress on the costs and benefits of regulations, and to include recommendations for regulations to reform. OMB has candidly acknowledged that "while broad reviews of existing regulations have been required [under previous and existing Executive Orders], they have met with limited success."[9] For this reason, OMB stated that it would establish a "modest process" for accepting public nominations of agency rules to review and improve:[10]

- In 2001, OMB requested nominations of regulations "that if rescinded or changed would increase public welfare by either reducing costs or increasing benefits."[11] The response was immediate, as OMB received 71 reform nominations from a variety of stakeholders and academic institutions. Of these, 23 were designated by OMB as "high priority" reform candidates and forwarded to the respective federal agencies for action.

- In 2002, OMB requested public nominations of burdensome regulations and guidance documents to reform, rescind, or revise. OMB received some 1,700 comments from a broad cross-section of interested parties. The nominations encompassed some 316 individual regulations and guidance documents across 55 federal agencies.

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[8] 31 U.S.C § 1105 note, Pub. L. 106-554, § 1(a), (Dec. 21, 2000).
[9] *Stimulating Smarter Regulation: 2002 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local, and Tribal Entities,* Office of Management Budget, 2002, Pages 70-71.
[10] *Ibid.* Page 71.
[11] *Making Sense of Regulation: 2001Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local, and Tribal Entities,* Office of Management Budget, 2002, Page 4.

- Finally, in 2004,[12] OMB specifically requested nominations of regulations and paperwork burdens that had a negative impact on manufacturing (especially those negatively impacting small and medium-sized businesses). In response, OMB received 189 nominations from 41 stakeholders. Of these nominations, 76 regulations were identified as possible candidates for reform, and agencies were again asked to take action.

Yet for each year OMB accepted public nominations, it is unclear whether any real progress has been made toward reform. OMB's nomination process is intended to give the regulated public an opportunity to recommend specific regulations for reform or rescission directly to the federal government. This novel and unprecedented approach to reform was welcomed by the public as real progress in the fight against unreasonably burdensome and costly regulations.

The U.S. Chamber was an active participant in this nomination process. Indeed, the U.S. Chamber was optimistic that this process would be a productive and useful tool for reducing unnecessary regulation. As such, the Chamber worked diligently with several of its member companies to identify potential candidates for reform, to quantify the economic impact of the regulations, and to submit them to OMB. In 2002, the U.S. Chamber submitted 26 nominations for reform, and in 2004 it submitted 21 more.[13] Ten of the regulations the U.S. Chamber submitted in 2004 were actually duplicates from 2002, for no other reason than it appeared no action had previously been taken by the agencies.

And therein lies the problem. While the OMB nomination process appears valuable on its face, it suffers from three fatal deficiencies: (1) the entire review process lacks transparency; (2) OMB and the agencies fail to provide the public with timely updates about the status of reform nominations; and (3) OMB is powerless if an agency refuses to act.

For example, OMB provided an update on the 2001 "high priority" nominations in its final 2003 report, but the update included only a few brief sentences about each nomination, making it difficult to know how the nominations

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[12] OMB did not request public nominations of reform candidates in 2003, but rather sought comment on its revised Circular A-4, *Regulatory Analysis*, for conducting regulatory impact analysis.

[13] The U.S. Chamber of Commerce's 2002 nominations can be found in its *Comments on the Office of Management and Budget's Draft Report to Congress on the Cost and Benefits of Federal Regulations*, (May 28, 2002), accessible at: http://www.whitehouse.gov/omb/inforeg/comments/comment32.pdf. The U.S. Chamber of Commerce's 2004 nominations can be found in its *Comments on the Office of Management and Budget's 2004 Draft Report to Congress on the Cost and Benefits of Federal Regulations*, (May 20, 2004), accessible at: http://www.whitehouse.gov/omb/inforeg/2004_cb/19.pdf

were being reviewed, what transpired in the review process, what the status was with respect to the completion of the process, or whether the change recommended by the public was being implemented at all. Even worse, by the time OMB issued the report the information was completely outdated and useless to rely upon. The information provided about the active 2002 nominations suffered from the same deficiencies, and ultimately lead to duplicate nominations of the same regulations in subsequent years.

While it is possible that agencies are making progress on the 2001, 2002, and 2004 reform nominations, the public remains completely unaware of this fact. To illustrate this point, consider that last year the U.S. Chamber contacted its member companies that had submitted nominations to OMB to see if they were aware of the status of their nominations. **More than 70%** said they were unaware of agency action related to their nominations, much less whether any meaningful reform was underway![14] After the time, effort, and expense that these companies expended on identifying potential regulations for reform, it was not surprising to find most of them utterly frustrated with the entire reform process. Most felt as if they had simply wasted their time.

It is imperative for OMB and the agencies to be more forthcoming about the status of reform nominations. The simplest and most effective solution to this problem would be a **publicly accessible Web site** that would allow companies to track the status of their nominations. At a minimum, the Web site should include the name of the regulation, the agency assigned to reforming it, the type of reform being undertaken, an estimated time of completion, and an agency contact person. This solution would also be compatible with the president's E-Government Initiative, which aims to provide citizens with improved information and services through technology.

In addition, OMB should require that a separate index of active regulatory reform nominations be included in the semi-annual *Unified Agenda of Federal Regulatory and Deregulatory Actions* (Unified Agenda), as has been done with Section 610 reviews. (See attached.)

Until the transparency of the regulatory reform process is improved it will never be the catalyst for regulatory change.

[14] Companies almost uniformly expressed frustration at being unable to track the status of their reform nominations through an online database. They claimed that they would be less concerned that the process was taking a long time to complete—so long as they knew progress was being made at all.

II. REPEATED ATTEMPTS HAVE BEEN MADE OVER THE YEARS TO REQUIRE A PERIODIC REVIEW OF REGULATIONS SO THAT UNNECESSARY REGULATIONS COULD BE ELIMINATED, BUT THESE EFFORTS HAVE BEEN UNSUCCESSFUL

OMB's regulatory reform process was only the most recent in a long line of attempts to stem the growing cost, complexity, and burden of federal regulations. Many of these attempts have required federal agencies to periodically evaluate the continued benefit and value of federal regulations. These efforts are commonly referred to as regulatory "look back" requirements and have been initiated through a variety of forms.

For example, over the years, presidents have issued executive orders requiring federal agencies to periodically review existing regulations and determine whether they should be modified or eliminated. While well intentioned, none of these presidential efforts resulted in the systematic review, identification, or elimination of burdensome or outmoded federal regulations.[15] As proof, nearly all of the items listed in the spring 2006 edition of the *Unified Agenda of Federal Regulatory and Deregulatory Actions*[16] (Unified Agenda) involve new regulatory proposals, rather than reviews of existing ones.

The use of statutory authority has fared no better. The most widely cited "look back" requirement for federal agencies is Section 610 of the Regulatory Flexibility Act of 1980 (RFA).[17] Section 610 of the RFA specifically requires each federal agency to develop a plan for the periodic review of regulations that have, or will have, a significant economic impact on a substantial number of small entities. The purpose of the review is to determine whether each rule should be reformed, rescinded, or revised (consistent with the objectives of the underlying statute) to minimize its impact on small entities.

Under the Section 610 review process, each federal agency must publish annually in the *Federal Register* a list of the existing rules that it plans to review in the

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[15] In the first annual report on Executive Order 12866 released in November 1994, OIRA Administrator Sally Katzen noted that bureaucratic incentives make such review a difficult undertaking. While the "lookback" process had begun under E.O. 12866, she said, "it had proven more difficult to institute than we had anticipated....[A]gencies are focused on meeting obligations for new rules, often under statutory or court deadlines, at a time when staff and budgets are being reduced; under these circumstances, it is hard to muster resources for the generally thankless task of rethinking and rewriting current regulatory programs." *Stimulating Smarter Regulation: 2002 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local, and Tribal Entities,* supra at fn. 9, page 71.

[16] See, http://ciir.cs.umass.edu/ua/Spring2006/databases.html.

[17] 5 U.S.C. Sec. 601 et seq.

coming year.[18] Agencies are required to describe the rules, note why they are needed, and invite public comment on them. The agencies must consider the continued need for the rule; any complaints/comments received from the public about the rule; the rule's complexity; whether it overlaps, duplicates, or conflicts with other rules; and any conditions that have changed since the rule's adoption. Section 610 also requires that all rules in existence in 1980, the time the law became effective, must be reviewed within 10 years (i.e., January 1, 1991), and that any new rule must be reviewed within 10 years of the date it becomes effective.

Like the presidential efforts to require federal agencies to review and eliminate outmoded regulations, Section 610 has been widely perceived as ineffective for reviewing existing regulations. When the Government Accountability Office (GAO) conducted a series of studies on agency compliance with Section 610, it concluded that Section 610 has been the "weakest and least utilized provision" of the RFA. Specifically, GAO noted that while several agencies have consistently indicated that they plan to issue dozens of rules each year with a significant impact on small entities few intend to conduct any 610 reviews.[19]

The Congressional Regulatory Review Act, enacted as part of the Small Business Regulatory Enforcement Fairness Act of 1996,[20] provides Congress with a 60-day window to reject final rules issued by federal agencies. But this process was intended as a stop-gap measure for Congress. It was not intended to be used as a method for conducting regulatory reviews.

The unfortunate truth is that regulatory reform does not appear to be a top priority for federal agencies. Whether limited by time, money, or resources, agencies have been unable or unwilling to perform this much needed task.

III. WITHOUT AN ENFORCEMENT MECHANISM, ANY SIGNIFICANT CHANGE IN THE CURRENT REGULATORY REFORM PROCESS IS UNLIKELY

The U.S. Chamber believes that it is important to require every federal agency to periodically review its existing regulations to assess their continued benefit and value. This vital effort must be strengthened, however, in order to ingrain the practice of periodic review into federal agency procedures.

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[18] While Section 610 does not require federal agencies to use the Unified Agenda for these notices, most agencies do so because it is a convenient way to compile and publish this information.
[19] *Reexamining Rules: Section 610 of the Regulatory Flexibility Act*, Congressional Research Service Report, (Updated March 11, 2005).
[20] Small Business Regulatory Enforcement Fairness Act of 1996, Public Law No. 104-121.

Currently, OMB is powerless to compel action from federal agencies. The only effective way to ensure that periodic regulatory reviews occur is to create some form of enforcement mechanism. This enforcement mechanism could take several forms. For example, Congress could mandate that agencies—already required by the RFA to undertake regulatory reviews—make regulatory reviews an essential component of their overall mission. If an agency failed to conduct comprehensive regulatory reviews, Congress could reduce an agency's annual budget. Another option would be allowing third parties (citizens) to bring a private cause of action to compel an unresponsive agency to conduct regulatory reviews. This may prove to be the more effective alternative.

The benefit of an enforcement mechanism is obvious. First, it would promote accountability by forcing agencies to consider the real-world impacts of existing regulations on the public. Second, it would provide the regulated community with some recourse to address those regulations that are particularly onerous or burdensome.

The U.S. Chamber firmly believes that true regulatory reform will not occur until a sufficiently stringent enforcement mechanism is in place. A codified enforcement mechanism would serve to hedge against any changes in the administration, since agency reform efforts are often subject to change with each new administration's personnel and priorities. The U.S. Chamber sees this as one of the most important steps Congress can take in the fight to regain control of the regulatory process.

CONCLUSION

The long-standing debate over regulatory reform will not end today. The U.S. Chamber strongly believes that the regulatory reform process is critical to ensuring that regulations are sound, balanced, and cost-effective. Congress must not abandon its oversight role in this area, and the U.S. Chamber applauds this subcommittee for this hearing today.

The U.S. Chamber is grateful for the opportunity to present its views and recommendations about this important topic.

Section 610 Review Index

A. INDEX TO ENTRIES THAT AGENCIES HAVE DESIGNATED FOR SECTION 610 REVIEW

Section 610(a) of the Regulatory Flexibility Act (5 U.S.C. 601) requires each agency to have a plan for the periodic review of its rules that have a significant economic impact on a substantial number of small entities. Each agency must publish annually in the Federal Register a list of the rules that it plans to review in the next year. Some agencies use the Unified Agenda to fulfill this requirement. Those agencies indicate such entries by appending "(Section 610 Review)" to the titles. Some agencies have also indicated completions of section 610 reviews or rulemaking actions resulting from completed section 610 reviews.

The following index lists the regulatory actions for which agencies included this designation. The Sequence Number (Seq. No.) of the entry identifies the location of the entry in this edition. For further information, see the Regulatory Information Service Center's Introduction in part II of this issue.

Seq. No.	Title
	USDA
56	Animal Welfare: Marine Mammals; Nonconsensus Language and Interactive Programs **(Rulemaking Resulting From a Section 610 Review)**
57	Tuberculosis in Cattle; Import Requirements **(Section 610 Review)**
64	Standards for Permanent, Privately Owned Horse Quarantine Facilities **(Section 610 Review)**
66	Importation of Plants for Planting; Establishing a New Category of Plants for Planting Not Authorized for Importation Pending Risk Assessment **(Rulemaking Resulting From a Section 610 Review)**
67	National Veterinary Accreditation Program **(Rulemaking Resulting From a Section 610 Review)**
71	Gypsy Moth; Interstate Movement of Regulated Articles **(Section 610 Review)**
82	Plant Pest Regulations; Update of Current Provisions **(Section 610 Review)**
92	Revision of the Nursery Stock Regulations **(Completion of a Section 610 Review)**
	ED
768	Assistance to States for the Education of Children With Disabilities; Preschool Grants for Children With Disabilities; and Service Obligations Under Special Education—Personnel Development **(Section 610 Review)**
	HHS
854	Medical Devices; Current Good Manufacturing Practice (CGMP) Final Rule; Quality Systems Regulations **(Section 610 Review)**
855	Package Size Limitation for Sodium Phosphates Oral Solution and Warning and Direction Statements for Oral and Rectal Sodium Phosphates for Over-the-Counter Laxative Use **(Section 610 Review)**
856	Over-the-Counter Drug Products Containing Analgesic/Antipyretic Active Ingredients for Internal Use: Required Alcohol Warning **(Section 610 Review)**
	Status of Certain Additional Over-the-Counter Drug Category II and III Active

857	Ingredients **(Section 610 Review)**
858	Medical Devices: Classification/Reclassification; Restricted Devices; Analyte Specific Reagents **(Section 610 Review)**
859	Amended Economic Impact Analysis of Final Rule on User Labeling on Natural Rubber-Containing Medical Device **(Section 610 Review)**
860	Financial Disclosure by Clinical Investigators **(Section 610 Review)**
861	Beverages: Bottled Water **(Section 610 Review)**
862	Food Labeling; Nutrient Content Claims: Definition for "High Potency" and Definition of "Antioxidant" for Use in Nutrient Content Claims for Dietary Supplements and Conventional Foods **(Section 610 Review)**
938	Lowfat and Skim Milk and Lowfat and Nonfat Yogurt Products, Lowfat Cottage Cheese: Rev. of Stand. of Ident.; Food Lab., Nutrient Cont. Claims for Fat, Fatty Acids, and Cholesterol Cont. of Foods **(Section 610 Review)**
966	Home Health Agency (HHA) Conditions of Participation (CoPs) (CMS-3819-P) **(Section 610 Review)**
1008	Hospital Conditions of Participation: Laboratory Services (CMS-3014-IFC) **(Section 610 Review)**
1032	End Stage Renal Disease (ESRD) Conditions for Coverage (CMS-3818-F) **(Section 610 Review)**
1034	Hospice Care Conditions of Participation (CMS-3844-F) **(Section 610 Review)**
1036	Organ Procurement Organization Conditions for Coverage and Recertification (CMS-3064-F) **(Section 610 Review)**
	DOJ
1815	Nondiscrimination on the Basis of Disability in Public Accommodations and Commercial Facilities **(Section 610 Review)**
1816	Nondiscrimination on the Basis of Disability in State and Local Government Services **(Section 610 Review)**
1829	Commerce in Explosives (Including Explosives in the Fireworks Industry) **(Rulemaking Resulting From a Section 610 Review)**
	DOL
1932	Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models; Labor Attestations Re H-1B1 Visas for Chile and Singapore **(Section 610 Review)**
1938	Plan Assets-Participant Contributions Regulation (610 Review) **(Section 610 Review)**
1978	Excavations **(Section 610 Review)**
1980	Lead in Construction **(Section 610 Review)**
	DOT
2063	Certification Procedures for Products and Parts **(Section 610 Review)**
2227	Organizations, Functions, and Procedures **(Completion of a Section 610 Review)**
2245	Hazardous Materials: Requirements for UN Standard Cylinders **(Rulemaking Resulting From a Section 610 Review)**
	TREAS

2287	Conditional Release Period and Customs Bond Obligations for Food, Drugs, Devices, and Cosmetics **(Section 610 Review)**
	EPA
3002	Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7) **(Section 610 Review)**
	PRESIDIO
3505	Management of the Presidio **(Completion of a Section 610 Review)**
	SBA
3546	Small Business Size Regulations **(Completion of a Section 610 Review)**
3547	8(a) Business Development/Small Disadvantaged Business Status Determinations **(Completion of a Section 610 Review)**
3548	Government Contracting Programs **(Completion of a Section 610 Review)**
3549	HUBZone Program **(Completion of a Section 610 Review)**
	FCC
3703	Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991; CG Docket No. 02-278 **(Section 610 Review)**
3704	Rules and Regulations Implementing Section 225 of the Communications Act (Telecommunications Relay Service); CG Docket No. 03-123 **(Section 610 Review)**
	FRS
3911	Regulation: H — Membership of State Banking Institutions in the Federal Reserve System; and Regulation: Y — Bank Holding Companies and Change in Bank Control, Capital Appendices **(Section 610 Review)**

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July 27, 2006

BY HAND AND FACSIMILE

The Honorable Todd Akin
House Committee on Small Business
Subcommittee on Regulatory Reform and Oversight
Rayburn House Office Building, Room 2361
Independence Ave. & S. Capitol Street, S.W.
Washington, D.C.

RE: Follow-Up To Subcommittee Hearing on "An Update on Administration Action to Reduce Unnecessary Regulatory Burdens on America's Small Manufacturers"

Dear Mr. Chairman:

I write on behalf of the Utility Solid Waste Activities Group ("USWAG") – a trade association of approximately 80 investor-owned electric utilities and trade associations – to thank you for conducting the Subcommittee hearing on July 13, 2005, regarding the status of the Administration's action to reduce regulatory burdens on America's Small Manufacturers as identified in OMB's 2005 Report on Regulatory Reform of the U.S. Manufacturing Sector (the "Thompson Report"). Two of USWAG's important trade association members – the National Rural Electric Cooperative Association ("NRECA") and the American Public Power Association ("APPA") – are comprised of many small businesses that serve the critical role of providing reliable and cost-effective electricity to millions of customers throughout the United States.

USWAG also wanted to use this opportunity to provide an example of the problem identified in the testimony of Mr. William L. Kovacs, Vice President for the U.S. Chamber of Commerce, regarding the lack of accountability and transparency by the responsible federal agencies in responding to the recommendations in the Thompson Report. As Mr. Kovacs testified, the problem is that the parties who submitted regulatory reform nominations have had little, if any, communication with or feedback from the responsible federal agency regarding the agency's plans for responding to the reform nominations. This is precisely the problem confronting USWAG, which recommended that OMB include the PCB remediation waste regulatory reform issue in the Thompson Report (Thompson Report Reference No. 33). Unfortunately, however, this recommended reform has "fallen off the table" as USWAG has not heard from the U.S. Environmental Protection Agency ("EPA" or "Agency") in over a year regarding how it intends to address this matter. It is important to USWAG members – including in particular the many small businesses comprising NRECA and APPA – that EPA be held accountable to respond to this issue in a prompt manner. The current regulatory regime

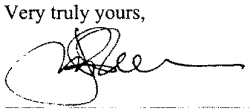
involving the management of PCB remediation wastes is resulting in the needless expenditure of significant resources by thousands of small businesses.

Specifically, USWAG's regulatory reform recommendation involves correcting EPA's position that that only a *subset* of PCB remediation wastes containing < 50 ppm PCBs – the general regulatory cut-off under TSCA – can be disposed of in a qualified municipal solid waste landfill ("MSWLF"). EPA inexplicably makes this cost-effective option available only if the waste is cleaned up under a particular regulatory option, while the ***identical*** waste cleaned up under other permissible options must be disposed of in much more costly TSCA-licensed disposal facilities. Regulating identical wastes differently makes no sense from an environmental or risk perspective. It results only in regulated entities – including many small businesses – spending large sums of money from tight operating budgets to dispose of wastes with extremely low levels of PCBs in costly TSCA landfills, even though EPA has *already* determined that such wastes can be safely disposed of in less costly MSWLFs.

EPA held a public hearing on this issue in July 2005. Virtually every organization commenting on this issue agreed with USWAG that EPA should either clarify its regulations to make clear that all < 50 ppm PCB remediation wastes can be managed in qualified MSWLFs or to amend its regulations to bring about this commonsense result. However, since that hearing which was held a year ago, this issue has remained unresolved and many small businesses continue to incur inordinately high costs to dispose of low-risk PCB remediation wastes in costly TSCA landfills.

USWAG urges your Subcommittee to follow-up with OMB and EPA to request a prompt and transparent resolution of this issue. We appreciate your Subcommittee's continued interest and commitment to holding federal agencies – including EPA – accountable for fulfilling the recommendations set out in the Thompson Report.

Very truly yours,



James R. Roewer,
Executive Director
Utility Solid Waste Activities Group

cc: Christopher Szymanski

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