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IMPEDIMENTS TO JOB CREATION IN MICHIGAN

HEARING

BEFORE THE

SUBCOMMITTEE ON GOVERNMENT OPERATIONS

OF THE

COMMITTEE ON OVERSIGHT
AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

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IMPEDIMENTS TO JOB CREATION IN MICHIGAN

Tuesday, May 6, 2014

HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON GOVERNMENT OPERATIONS
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
Washington, D.C.

The subcommittee met, pursuant to call, at 9:05 a.m., in Plymouth Township Hall, 9955 N. Haggerty Road, Hon. John L. Mica [chairman of the subcommittee] presiding.

Present: Representatives Mica and Bentivolio.

Staff Present: Mark D. Marin, Deputy Staff Director for Oversight; Katy Rother, Counsel; Sarah Vance, Assistant Clerk.

Mr. MICA. Good morning. I would like to call this hearing of the United States House of Representatives Committee on Oversight and Government Reform hearing to order. This morning we have the subcommittee field hearing of the Government Operations Subcommittee. I would like to welcome everyone. We are here at the request of my colleague, the gentleman from Michigan, Mr. Bentivolio, and this is one in a series of hearings we are holding around the country.

The responsibility of the Oversight and Government Reform Committee is to secure several fundamental principles. First, Americans have the right to know that the money the government takes from them is well spent. And second, Americans deserve an efficient and effective government that works for them. The Oversight and Government Reform Committee is to ensure that these rights and responsibilities of the government are upheld.

It is absolutely essential in our system to have accountability. We have committees that have jurisdiction for creating different government programs. We have committees that appropriate and fund programs. Our particular responsibility is overseeing how those programs are working, how they operate and function in the best interests of the American people, and how their funds are spent.

It is also good to be here in Plymouth. I want to thank the township for hosting us in this beautiful facility. I thank Congressman Bentivolio for inviting us and participating today in this hearing.

I might tell folks that this is probably the first congressional hearing that has been held in Plymouth. Maybe there have been others; I don't know about them. This is the first I know of.

This is not a town hall forum. We do have a very formal schedule, and that is the order of our business. A complete record of this hearing is made. It will also be transcribed, and it is for official

purposes. So those who have been invited to testify this morning will do so. They will do so also under oath. We will introduce that panel shortly.

The order of business is I will give an opening statement. I will yield to Mr. Bentivolio for his opening statement. We will also keep the record open. We don't have our full subcommittee membership with us today, but members will be entitled for a designated number of days to submit statements for the record.

I might say, too, for the public and officials and others who are attending, if you would like to participate in contributing to the hearing, you are welcome to ask through your representative, in this case Mr. Bentivolio, that your statement be submitted for the record. It would have to be done through a member of Congress.

So that is the order of business we will conduct ourselves in. And again, I thank people for attending. Thank you for the invitation. Good to be with you here.

The first thing that I want to do is, again, talk about why we are here and what the subject is. Today I think it is important that we look at not just the laws that are passed in Washington, but laws creating agencies impact us in that the agencies produce regulations, and that is their authority under law.

In addition to the laws that we pass, we are now seeing the proliferation of rules and regulations coming out of agencies at an unprecedented pace. Those regulations do have very serious impact on the creation of jobs, the expansion of the economy, and also the ability for people to live and realize the American Dream because they all have an impact, a cost, and specifically we will see in this hearing some consequences in what happens in expanding jobs.

According to the Congressional Research Service, between 2009 and 2012 the Obama Administration finalized more than 13,000 regulations. Last year alone, more than 3,500 new regulations were added to the books. By the Administration's own estimates, major regulations issued in 2012 added almost $20 billion in annual costs to the American economy.

Annually, Federal regulations cost the American economy a staggering $1.8 trillion. As the Competitive Enterprise Institute puts it, if it were a country, the U.S. regulations would account and be responsible for that particular activity being the 10th largest economy in the world.

The growing regulatory state is particularly a concern for small business. According to the United States Chamber of Commerce, almost 45 percent of small businesses identify over-regulation and economic uncertainty as their most significant challenges.

According to the National Federation of Independent Businesses, government regulations are the single most important problem facing small businesses. Oftentimes people think that big corporations are the primary employers in the United States. In fact, it is small business that is the biggest employer, and also the biggest job creator.

So there is a concern, and that concern is warranted about the proliferation of these regulations. Last year, Federal agencies published proposed and final rules that, by the Administration's own estimates, would cost the American economy $112 billion.

In the Obama Administration, Federal regulators have finalized rules that, in total, cost the economy again almost half-a-trillion dollars.

So these are some of the facts that we want to make certain are part of the record. We are going to hear from several witnesses today. We have four witnesses, and I will introduce them shortly.

I also want to pay attention and recognition to Mr. Lewis K. Uhler, who is President of the National Tax Limitation Committee. I met him just a few minutes ago. He has come all the way from California to attend this hearing, and his organization, the National Tax Limitation Committee, focuses on some of the issues like we are discussing here today.

So it is nice to see folks from Plymouth, from Michigan, all the way from California who are concerned about the direction of regulations and the cost of doing business and making America go and grow. So, I am very pleased to welcome him and all of you again.

I thank Mr. Bentivolio, and I will yield now to the gentleman from Michigan for an opening statement.

Mr. BENTIVOLIO. Good morning. I want to start by thanking the chairman for holding this hearing in the wonderful 11th District of Michigan and for the opportunity to hear directly from business leaders about how the Federal Government is impacting the business environment. Thank you to the witnesses who are here to speak with us today.

We are speaking about Federal regulations today because Federal regulations have the potential to significantly impact businesses and communities. The impact of regulations is often good. In my lifetime, the need for appropriate regulation has been made apparent from damage to our homes, families, and environment from a handful of bad actors.

Not far from here, industrial pollution led to multiple fires on the Cuyahoga River in Ohio. In the 1970s, the nation was shocked by the tragedy of ineffective toxic chemical disposal at Love Canal in New York. Importantly, as a nation, we acted.

In the 1960s, we passed the Clean Air Act and the National Environmental Policy Act. In the 1970s, we passed the Clean Water Act and the Occupational Health and Safety Act. When faced with serious concerns, we put in place many appropriate and effective regulations that protect our families, our workers, and our environment because clean water, healthy children, and safe work environments are important to all of us.

But it is also important that we strike a balance. Affordable homes, steady employment, and the ability to provide for our families are important. Regulating for the sake of regulating only harms our families and our workers. As I walk around our community, I see "For Sale" and "For Lease" signs instead of "Help Wanted" signs.

Unemployment in Michigan has been above the national average for more than a decade. According to the Heritage Institute, EPA regulations are expected to cost the nation more than 600,000 jobs by 2023. Michigan will lose more than 15,000 jobs in the manufacturing industry alone. The manufacturing industry faces some of the highest regulatory burdens in our nation, and the 11th Congressional District has the second-highest number of manufac-

turing jobs. We can't afford these regulations. We can't afford to lose jobs because the EPA doesn't know when to quit.

Last year, the EPA proposed three regulations that, in total, will cost the economy more than $50 billion. If we keep going like this, we will regulate America out of business.

Currently, there are many proposed Federal regulations that, if finalized, will threaten the survival of many Michigan small businesses, which will result in job losses. Today we will hear from those business leaders who are on the front lines, drowning in the sea of new and potential regulations. I look forward to the perspectives of those with real experience and knowledge about the impact of Federal action.

Thank you, and I yield back.

Mr. MICA. I thank the gentleman.

The next order of business will be I am going to introduce our witnesses.

Before I do that, I want to state for the record that members may have 7 days to submit opening statements for the record.

Without objection, so ordered.

And again, I welcome our witnesses who volunteered. We didn't have to subpoena any of you today, which is good. Thank you for being part of our hearing today. In just a minute I will swear you in and you will be sworn before the committee.

I don't know if anyone has testified before, but we ask you to try to limit your presentation and testimony to 5 minutes, an oral presentation to the subcommittee. If you have lengthy material or additional information you would like to be made part of the record, we will be glad to do that through requests. That is sort of the rules of procedure.

Today we have Mr. Chris Fisher. He is President and CEO of the Associated Builders and Contractors of Michigan.

Welcome.

We have Ms. Janet Kaboth. She is the President and CEO of Whitacre Greer Company.

We have Mr. Lenahan, President of the Resource Recovery Corporation of West Michigan.

Our fourth and final witness is a constituent of Mr. Bentivolio, and I will defer to him to introduce that witness.

Mr. BENTIVOLIO. Thank you.

It is my honor to welcome Mr. Richard Kligman here today in his capacity as President of Superb Custom Homes.

Thank you for being here today, all of you.

Mr. MICA. Thank you, Mr. Bentivolio.

Now, if our witnesses will rise, please, raise your right hand.

[Witnesses sworn.]

Mr. MICA. Let the record reflect that all of the witnesses answered in the affirmative.

Again, I welcome each of you, good to have you participate. As I said, if you have a long statement, we will ensure that through request it is in its entirety will be part of the record, but we would like you to try to summarize in 5 minutes. That will give us a chance to go through everyone. We will hold the questions until afterwards. Then Mr. Bentivolio and I will submit some questions for your response.

So, we will start first with Mr. Fisher. He is President and CEO of Associated Builders and Contractors of Michigan.

Welcome, sir, and you are recognized.

WITNESS STATEMENTS

STATEMENT OF CHRIS FISHER

Mr. FISHER. Thank you, Chairman Mica. Welcome to Michigan, and thank you for the invitation to be here today. My name is Chris Fisher with ABC of Michigan. We are a statewide trade association working in partnership with chapters representing firms who perform work in the commercial and industrial construction sectors of our state.

Today I would like to focus on a few labor issues by drawing a contrast between what states like Michigan have been doing on the state level by enacting commonsense reforms and contrast that a little bit with what we are seeing in the Federal Government, where we have seen a rather onerous and one-sided, big-labor-driven agenda that is clearly not working.

I will begin by taking, for example, in 2009, when President Obama issued Executive Order 13502 to encourage Federal agencies to require what is called a Project Labor Agreement, or PLA, on Federally-funded construction projects. Very simply, a PLA is a special interest handout designed to only award construction contracts to unionized contractors and their unionized workforce. There is nothing wrong with unionized companies getting a contract, but it is wrong when you have a special interest monopoly that denies that open competition and gives everybody a fair shot.

So PLAs commit the expense of two important things that this committee and Congress should be very concerned about, equal opportunity and fiscal accountability. PLAs deny U.S. businesses and workers equal opportunity by prohibiting the 85.9 percent of the United States workforce that chooses not to be affiliated with a union from accessing work opportunities for public construction projects that are funded by their own tax dollars.

PLAs also then discourage fiscal accountability because when you erode the competitive bid process like this, the ability for public procurement to reap the benefits of fair and open competition is diminished. The result, as studies have found, is that public construction costs escalate by as much as 10 to 20 percent on these projects that are subject to PLAs.

Now, what we would suggest is that instead the Federal Government needs to follow the lead of Michigan and some 20 other states that have eliminated union-based favoritism in contracting by treating all workers and businesses, union and non-union alike, with the dignity that they deserve. This committee has jurisdiction over legislation introduced by Representative Andy Harris from Maryland, H.R. 436, the Government Neutrality in Contracting Act, which would prevent the Federal Government from further engaging in these unfair and costly procurement practices.

Simply put, it is wrong to rip off taxpayers while denying citizens because of their labor status the opportunity that they deserve to work on public projects.

PLAs are not the only example of Federal regulations run amok. The out-of-control National Labor Relations Board, or NLRB, has continually pursued a one-sided agenda instead of doing what its core purpose is, which is maintaining a balanced approach on behalf of both labor and management.

The latest issue of concern is the NLRB's proposed ambush election rule. This rule is aimed to dramatically shorten the amount of time between when a union files a representation petition and when an election takes place to as few as 10 days. The harmful impact of this is that it therefore limits the ability of workers to gather information and facts as they weigh the important decision surrounding whether or not their company should be unionized or not.

The National Labor Relations Board shouldn't be discouraging workers to get the facts necessary to make an important decision. Contrast this with states such as Michigan, where we have instead passed pro-worker reforms that enable workers to gather the information they need to make these decisions. Michigan passed Right To Work recently, and indeed we support the ability of workers to gather the information they need to make a decision and not be forced to join a union as a condition of employment.

Finally, OSHA is likewise a concern. Take, for example, OSHA stating that non-union workers are able to now—or that union officials are able to do worksite inspections for companies that are potentially targeted. Having an organizer, a community organizer on a job site raises questions about the actual intent of that union organizer. And, for that matter, it raises questions about what is OSHA doing in this arena to begin with. It is not germane to its cause of workplace safety.

Here in Michigan, however, we have agreements with OSHA and partnerships with OSHA where we work cooperatively to promote worker health and safety, and indeed this is the way we should do things federally.

So, Mr. Chair, these are just a few examples of some of the issues that we are seeing on the regulatory labor end of things. What we are doing in Michigan is working, and we encourage the Federal Government to do the same. We have gained construction jobs every year over the past three years in Michigan. Construction worker incomes have increased year after year after year, and we think that the states are laying down a pretty good framework for the Federal Government to follow, and we would encourage this committee and others to act.

So, with that, I would be happy to answer any questions later on, Mr. Chair, and thank you.

[Prepared statement of Mr. Fisher follows:]

Testimony of Chris Fisher
Associated Builders and Contractors of Michigan
House Committee on Oversight and Government Reform
Subcommittee on Government Operations
May 6, 2014

Chairman Mica and members of the committee, thank you for the opportunity to be here today. My Name is Chris Fisher and I am president of Associated Builders and Contractors (ABC) of Michigan. ABC of Michigan is a statewide trade association working with 1000 construction firms that employ 25,000 men and women who work in the commercial and industrial construction industry in Michigan. Nationally ABC has 70 chapters representing nearly 21,000 construction firms.

Here in Michigan and across the United States ABC helps members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which they work. ABC member contractors employ workers whose training and experience span all of the 20-plus skilled trades that comprise the construction industry.

The vast majority of our contractor members are classified as small businesses. Our diverse membership is bound by a shared commitment to the principles of the merit shop philosophy in the construction industry - nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

Today I would like to focus on a few labor issues by drawing a contrast between states like Michigan that have been making common sense reforms, compared to the federal government where an onerous and one-sided Big Labor-driven regulatory agenda is clearly not working.

The issue of government-mandated project labor agreements (PLAs) draws a distinct contrast between successes in states like Michigan and failures at the Federal level.

In 2009, President Obama issued Executive Order 13502 to encourage federal agencies to require PLAs on federally funded construction projects in excess of $25 million. A PLA is a special interest handout designed to award construction contracts exclusively to unionized contractors and their all-union workforces.

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Absent the economic benefits of competitive bidding, government-mandated PLAs are known to increase construction costs between 10 percent and 20 percent. The result is that these federal PLAs drive up costs for American taxpayers while unfairly discriminating against the 85.9 percent of U.S. construction workers who have chosen not to affiliate with a labor union.

In Michigan, on the other hand, the Governor and Legislature have taken the opposite approach by standing up for all businesses and workers and passing a law stating that all construction workers—union and nonunion alike—deserve fair treatment. The result is equal opportunity for everyone instead of political favoritism. Michigan taxpayers are also guaranteed the fiscal accountability they deserve through openness and integrity in the public construction competitive bidding process.

The Federal government needs to follow the lead of Michigan and 20 other states by eliminating union-based favoritism in contracting and treating all workers and businesses equally regardless of whether or not they are affiliated with a labor union. This committee has jurisdiction over a bill introduced by Rep. Andy Harris from Maryland, H.R. 436, The Government Neutrality in Contracting Act, which would prevent the government from further engaging in these unfair procurement processes.

Unfortunately, PLAs aren't the only example of federal regulations attempting to pick winners and losers based on union affiliation.

The out-of-control National Labor Relations Board (NLRB) has continually pursued a one-sided agenda that is entirely biased towards Big Labor instead of maintaining an even-handed and balanced approach on behalf of both labor and management.

The latest issue of concern is NLRB's proposed "Ambush" Election Rule. This rule would dramatically shorten the amount of time between when a union files a representation petition and when an election takes place – to as few as 10 days. This impedes employers' ability to pass along facts and information to employees as they weigh the important decision of whether or not their company should be unionized.

Construction employers find it particularly concerning that the Ambush Election proposal requires employers to submit their employees' personal contact information, including email addresses and phone numbers, to union organizers, raising distinct privacy concerns.

It is disturbing, moreover, that the NLRB has not even bothered to justify any of the proposed changes.

Whereas the Federal government seems determined to push as many workers into a union as possible, states like Michigan have instead passed pro-worker reforms like right to work that give individual workers more choices and the ability to know their rights surrounding important issues like union representation. Indeed, ABC supports

right to work because it empowers an individual to make a decision on whether or not to join a labor union instead of being forced to pay union dues and/or fees as a condition of employment.

Finally, the Occupational Safety and Health Administration (OSHA) is unfortunately another example of federal government regulations run amuck.

OSHA lately seems more interested in promoting a radical labor agenda instead of focusing on issues that are germane to its core purpose – safety and health. Take for example a letter of interpretation dated February 21, 2013, released by OSHA stating that nonunion employees can authorize an individual "affiliated with a union or a community organization" to act as their representative during agency-sanctioned inspections and other enforcement situations. Allowing a union organizer to enter the worksite of employers that are targeted for possible unionization raises serious questions about the intentions of the union organizer – and for that matter, the intentions of OSHA in promoting interference in the existing employer-employee relationship.

Fortunately, it doesn't need to be this way. In Michigan, we in the construction industry have been able to form alliances with MIOSHA and work cooperatively to promote worker health and safety for the benefit of our workforce and our industry. This cooperative approach is the way it ought to be, and is refreshing compared to the sometimes hostile approach we are seeing by Federal OSHA.

Here in Michigan we are able to see first-hand that our approach to labor policy—as opposed to the current federal government approach—is working. Over the past three years the Michigan construction industry has not only gained jobs every year, but construction worker incomes have likewise increased every year. ABC urges this committee to stand up for common sense by following the lead of states like Michigan to sensibly reform regulations – benefitting our industry, our workforce and the overall construction economy.

Once again, Mr. Chairman, we appreciate the opportunity to be here today and would be happy to answer any questions you or other committee members may have.

Mr. MICA. Thank you, Mr. Fisher.

Let me recognize Janet Kaboth. She is the President and CEO of Whitacre Greer Company.

Welcome, and you are recognized.

STATEMENT OF JANET KABOTH

Ms. KABOTH. Thank you very much for the opportunity to come today. My name is Janet Whitacre Kaboth. I work for a company called Whitacre Greer, and we have been manufacturing clay products in northeastern Ohio since 1916. The company currently is owned by my brother, my sister and myself, and we are the fourth generation of my family to own and operate the company.

I am here on behalf of my company and my industry. The many peaks and valleys of the brick industry is well demonstrated by the clay products industry here in Michigan, where in 1911 there were as many as 138 clay product manufacturing facilities. Currently there are seven, with only one brick plant. What has happened here has happened all over the country.

Whitacre Greer is a small niche product manufacturer that produces fire brick for the inside of masonry fireplaces and paving brick. You have probably walked on our paving brick in places like Pennsylvania Avenue in D.C., Greenfield Village here in Michigan, and Joe DiMaggio Children's Hospital in Hollywood, Florida.

Our mission is to modernize our facility in order to succeed for the next 100 years. We have just begun the second of several phases in this modernization process.

Our industry is committed to doing the right thing for our employees, vendors, customers, and communities. However, as we continue to struggle to come out of the Great Recession, we need to be sure our limited resources are being used on the most important issues that will provide some benefit for every dollar spent.

Today I am going to talk about two upcoming regulations, the air toxic standard being developed by EPA, known as the Brick MACT, and the proposed revisions to the silica Permissible Exposure Limit, or PEL, being considered by OSHA. Compliance with either of these regulations threaten the continued existence of many small companies in our industry. Compliance with both of these rules at the same time will devastate our already-depleted industry.

This leads to my constant question regarding the regulatory development process: Is anyone looking at the cumulative cost of these regulations on an industry? If these regulations would save lives of our workers or our neighbors, it would be worth it. However, in both cases, the regulatory authority has data that show the benefit of these regulations is minimal or non-existent for the brick industry.

The Brick MACT, which will be proposed in August, was originally promulgated in 2003. Our industry complied in 2006 by installing 80 of the 100 controls now in existence at a cost of over $100 million in capital and operating costs. But in 2007 the courts vacated the rule. Now the EPA is using the performance of these new controls to establish even lower limits for the upcoming rule. For many brick companies, this would require them to replace the controls installed to comply with the first MACT.

We have used EPA's own air dispersion models and actual stack parameters to clearly demonstrate that even under the worst conditions, 99 percent of our emissions would be less than 40 percent of what EPA considers safe, and most would be less than 10 percent. We have spoken with EPA about this data but have received no feedback as of yet. We hope EPA is considering this health-based approach. However, the EPA has indicated the potential that even if they consider the health-based approach, control of the remaining 1 percent of emissions could still cost our industry essentially the same as controlling the other 99 percent.

EPA's estimates put the potential cost of this regulation at more than $188 million per year. That represents 22 percent of our gross industry revenue in 2012. Whitacre Greer's share of that cost is estimated to be $5 million, which is 50 percent of our current net worth.

In September of last year, OSHA proposed provisions to the current PEL for silica. This reduction was proposed as a one-size-fits-all type of regulation that is typical for OSHA. OSHA estimates costs for this rule to average $38,000 per year, annualized over a 10-year period, for a brick plant. This is 15 to 18 times greater than OSHA's estimate for the average cost in general industry. Industry experts estimate that OSHA is underestimating this cost by as much as 20 to 50 times.

OSHA has been provided a significant set of studies conducted over the last 75 or more years demonstrating that the silica found in the brick industry has a different effect on the body compared to silica in other industries. OSHA acknowledges separately the reduced incident rate of our industry and the much higher cost. However, they do not put those two pieces of data together to consider our industry separately. For each brick plant to comply will require an investment of $906,000 in the first year. This is the amount of cash that I need for compliance; therefore, the amount that is important to me, as opposed to the annualized amount.

Practically speaking, compliance with both these regulations would require me to obtain a loan for $6 million to add equipment that would not reduce our costs, improve our product, increase our sales, or provide any health benefits for our employees or our neighbors. It would be impossible for us to obtain a loan of this size that would not provide us with any benefits at all in the current banking environment.

The cost of compliance with both regulations at the same time would put us out of business, and we are probably not the only brick company in this situation.

In both cases, EPA and OSHA have the flexibilities to meet their obligations without destroying our industry. We just don't know how to make them use those flexibilities, to take the time to do it right, not just do it quickly, and avoid a one-size-fits-all approach that will destroy an industry.

I would like to think that after 100 years of providing good employment, paying taxes, and being a responsible corporate entity, that someone in our government could look at the cumulative effect of regulatory compliance and help us protect our workers, our neighbors, and our environment, but still allow us to exist.

Thank you.

[Prepared statement of Ms. Kaboth follows:]

Statement for Committee on Oversight and Government Reform, Subcommittee on Government Operations on May 6, 2014 in Plymouth Michigan

My name is Janet Whitacre Kaboth. I am the President, CEO and Chairman of the Board of Whitacre Greer Company. Whitacre Greer has been manufacturing clay products since 1916 in Northeastern Ohio. The Company has been owned and operated by my father's family, the Whitacre family, since its beginning and currently is a Woman Owned business. We operate a manufacturing facility in Alliance Ohio that employs approximately 80 people. We manufacture firebrick for the inside of masonry fireplaces and paving brick. You have probably walked on our paving brick in places like Pennsylvania Avenue sidewalks in Washington DC from the Capital to the White House, Greenfield Village here in Michigan or at Joe DiMaggio Children's Hospital in Hollywood Florida.

All the jobs at our facility have a steady paycheck with good health insurance (each employee pays 10%), a 401 (k) where all employees receive 4% of their annual wages regardless of any individual contribution and a profit sharing plan where 25% of the plant profit is split equally among all employees. Many of our employees have never graduated from high school and would have difficulty finding other employment without significant training. We are currently offering to pay the cost in full for any employee that desires to obtain more training in any area. We also offer a state recognized apprenticeship program. We value our employees and have spent a great deal of time and effort over the last few years to improve our operations and make our company a good place to work. We try very hard to be a good employer and a good neighbor in our community.

My job as President, CEO and as one of the owners of the business is to ensure to the best of my ability that Whitacre Greer Company is prepared to succeed for the next 100 years. We are a very small company within the industry, with only one plant that has two kilns. We focus our sales on smaller niche markets within the industry. We are beginning the second of several phases in order to modernize our production facility to allow us to continue to exist long term. We have limited financial resources and try to focus these resources on areas that will provide us with the most improved results.

I am here on behalf of my company and my industry. The brick industry has had many peaks and valleys through the years. This is well demonstrated by the clay products industry here in Michigan where in 1911 there were as many as 138 clay product manufacturing facilities in Michigan and currently there are 7, with only one brick plant. What has happened in Michigan has happened all over the country. The companies like mine that continue to operate have been in business for close to 100 years or more. Our industry has changed greatly over these many years due to changes in product lines, economic impacts and market conditions, but also due to regulations that have been passed that can make it difficult to stay in business.

Our industry is committed to doing our share and we are committed to doing the right thing for our employees, our vendors, customers and communities. However, as our industry continues to struggle to come out of the Great Recession, we like all industry have limited resources. It is

imperative that these limited resources be used judiciously and on the most important issues. It is important that there is some benefit to every dollar spent.

There currently are many regulations that affect my plant and my industry and there will be more in the coming years, but I am going to focus on only two upcoming regulations today- the air toxics standard being developed by the US EPA and the proposed revisions to the silica permissible exposure limit, or PEL, being considered by the US OSHA. Compliance with either these proposed regulations threaten the continued existence of many small companies in our industry. Compliance with both of these rules, at the same time, will devastate our already depleted industry. This leads to my constant question concerning the regulatory development process, is anyone looking at the total cost of all these regulations on an industry?

If these regulations would save lives- of our workers or our neighbors- it would be worth it. However, in both cases, the regulating authority has data that show that the benefit of these regulations is minimal or non-existent for the brick industry.

The EPA's air toxics rule, aka the Brick MACT, which will be proposed in August, is the second time the EPA is trying to create a rule for our industry. They promulgated a rule in 2003, our industry complied in 2006, but in 2007 the courts vacated the rule. Our industry was in compliance with that rule when it was thrown out- and had installed approximately 80 of the 100 controls that now exist in our industry.

We estimate that over the past 10 years our industry has spent over 100 million in capital and operating costs as a result of that vacated MACT. Now the EPA is using the performance of those new controls to establish even lower limits for the upcoming rule. For many brick companies this would require them to replace the controls installed in order to comply with the first MACT.

EPA has data provided by our industry that shows that over 99 percent of the emissions from our kilns are pollutants that are called threshold pollutants, meaning that EPA has established concentrations that are not detrimental to human health or the environment. We have used EPA's own air dispersion models, using actual stack parameters, to clearly demonstrate that even if we emitted at our full capacity, the concentrations outside the worst facility on the worst day would be less than 40% of what EPA considers safe, and most would be less than 10%. We have spoken with EPA about this data, but have received no feedback as of yet. We hope EPA is considering this health based approach. However, the EPA has indicated the potential that, even if they consider the health based approach for the threshold pollutants, the control of the remaining 1% of emissions could still cost our industry essentially the same as controlling the threshold pollutants. That makes no sense.

EPA's own estimates put the potential cost of this regulation each and every year at more than $188 million. That represents 22% percent of our gross industry revenue in 2012. Whitacre Greer's share of that cost is estimated to be $5 million- 50% of our current net worth.

In September of last year, OSHA proposed revisions to the current PEL for silica. This reduction was proposed as a "one-size fits all" type regulation that is typical for OSHA.

OSHA estimates costs for this rule to average $38,000 per year annualized over a ten year period for a brick plant. This is 15 to 18 times greater than OSHA's estimate for the average cost in general industry. Data gathered prior to the Great Recession from the proposed regulation show the profit percentage for the brick industry to be 4.41% and the annualized cost for compliance would be 8.05% of profits. Actual financial results from Whitacre Greer plant operations since 2002 show our average profit for this time frame is 1.06% and the annualized costs from OSHA represent 33% of this average profit. Industry experts estimate that OSHA is underestimating the costs by as much as 20 to 50 times.

OSHA has been provided a significant set of studies conducted over the last 75 or more years demonstrating that the silica found in the brick industry has a different effect on the body compared to silica in other industries. OSHA even acknowledges the reduced incidence rate of our industry. They also acknowledge, but separately, the disproportionate costs. However, they do not put those two pieces of data together and consider our industry separately when demonstrating that this rule is justified.

Compliance with the proposed silica regulation will require the installation of engineering controls and other items in the first year. OSHA estimates the cost of these items to be $906,530 in the first year for Whitacre Greer, as opposed to the annualized amount that OSHA uses. This is the amount of cash I need to have for compliance, therefore the amount that is important to me as opposed to the annualized amount.

Even using OSHA's (probably underestimated) numbers, I calculated that given the current bank lending environment, I would be unable to borrow the first year capital costs needed. Practically speaking, compliance with both these regulations would require me to obtain a loan for $6,000,000 to add equipment that would not reduce our costs, improve our product or increase our sales. Additionally there would be no health benefits for our employees or our neighbors. It would be impossible for us to obtain a loan of this size that would not provide us with any benefits at all. The cost of compliance with both regulations at the same time would put us out of business, and we are probably not the only brick company in the situation.

In both cases, the Acts that direct EPA and OSHA to develop these rules, and the court decisions that have come about since these Acts, have the flexibilities contained within them to allow EPA and OSHA to meet their obligations without destroying our industry. We just don't know how to make them USE those flexibilities. To take the time to do it right, not just to do it quickly, and avoid a "one size fits all" approach that will destroy an industry.

I would like to think that after almost 100 years of providing good employment, paying taxes and being a responsible corporate entity that someone in our government could look at the cumulative effect of regulatory compliance and help us protect our workers, our neighbors and our environment, but still allow us to exist.

Mr. MICA. Thank you for your testimony.

We will now go to Mr. Michael Lenahan. He is the President of Resource Recovery Corporation of West Michigan.

Welcome, sir, and you are recognized.

STATEMENT OF MICHAEL LENAHAN

Mr. LENAHAN. Thank you, Chairman Mica and Representative Bentivolio, for inviting me here today. My name is Michael Lenahan, and I am testifying on behalf of the American Foundry Society. The American Foundry Society is the predominant trade association of the metal casting industry in North America. Foundries manufacture engineered parts called castings, which are made by pouring molten metal into a mold. Most of the time these molds are made out of sand. Examples of metal castings that you may be familiar with are engine blocks, manhole covers, artificial knee joints, and the Liberty Bell.

The U.S. foundry industry employs approximately a quarter of a million people, but 80 percent of those foundries employ 100 people or less. We are comprised primarily of small businesses. Many of the companies that supply foundries are also small businesses, and I run one of those businesses.

My testimony today really boils down to one thing and one thing only: anything that takes time away from the efficiency of managing a small business can be crippling. Small businesses simply do not have the resources to dedicate to tasks that are non-productive.

In order for any business to thrive, there must be time for the management of that business to do three things: one, focus on enhancing what they do well; two, improve productivity; three, expand offerings and grow the business. When management has time to look ahead and focus on improvement, they typically increase productivity and expand. This often results in the hiring of more employees. When management does not have time to focus on these things, they mark time and wait for the next crisis. For many businesses, the next crisis is addressing the latest regulation. Regulations and, more specifically, regulatory changes or new regulations consume massive quantities of managerial time and resources.

From my viewpoint, there are five major problems that I see with Federal regulations. One, there are far too many new regulations. Two, many new regulations or modifications to regulations appear to be created or modified with minimal or no thought as to how they will impact a business. Three, many regulations are improperly conceived or misapplied and provide little to no measurable benefit. Four, new regulations have a cost, a cost that is often ignored or dramatically understated by those writing the new regulations. Five, new regulations create uncertainty, which limits a business in their ability to plan.

I have three brief examples that I would like to reference as part of my testimony today as to how regulations impact small business and job creation.

The first example highlights OSHA's new Crystalline Silica Standard. I am submitting a copy of the foundry industry testimony given at the March 28, 2014 hearing with OSHA and the

U.S. Department of Labor. In the interest of time, I would like to briefly explain in layman's terms the basics of this new rule.

This new rule will reduce the permissible exposure limit for silica from 100 micrograms per cubic meter to 50 micrograms per cubic meter. What does 50 micrograms per cubic meter look like? Take a packet of artificial sweetener and distribute it across a football field at the height of 13 feet. That is what that looks like.

As mentioned, foundries utilize sand, primarily made of silica, to make the molds which define the shape of the castings they produce. A foundry of this football field area size could be utilizing upwards of 10,000 tons of sand in annual production. As a reference point, it would take 400 semi dump trucks lined up bumper to bumper for approximately four miles.

OSHA's new silica rule would require all foundries not meeting the 50 microgram standard to put in engineered controls, basically massive high-quality filtration equipment, within the facility to get the foundry into compliance. On the surface, this may seem like an acceptable idea until you dig a little deeper.

First, the vast majority of experts on the subject believe foundries will fail to meet the standard even if they use the best technology money can buy. Second, to provide some perspective, the level of cleanliness required to meet the new standard is more stringent than what the National Aviation and Space Administration, NASA, requires for silica in one of their laboratory clean rooms. Lastly, the new rule does not allow employers to provide workers with personal protective devices until after it proves that the installed engineering controls cannot meet the standard. In other words, this regulation says spend the money on extremely expensive engineering controls whether they work or not, and only after you prove it does not work can you distribute personal protective equipment to your employees.

The logic behind this approach is flawed at the most basic levels. How many successful strategic initiatives involve choosing the most expensive and most likely option to fail first? This would be like forcing a public school district to purchase jet airplanes to transport school children because statistics show it is a safer mode of transportation than buses. Practical application of this idea would be more costly and not as safe. Eventually they would go back to buses, but only after they broke the bank on buying airplanes.

This may sound like a ridiculous comparison. However, you will see in the executive summary of the attached testimony that this is not the most effective way to protect workers. You will also see that OSHA has omitted some costs and grossly underestimated the overall cost to implement this new rule, $44 million per year versus $2.2 billion.

I think I am running out of time here, but I will make quick mention of NSPS Subpart UUU, which is the rule that was never intended to be applied to the foundry industry. This rule, we know it was not meant to be applied to the foundry industry because we got to the author at EPA and he said it was never meant to be applied. So we spent time chasing our tails on a rule that was never meant to be applied to us, spent money with attorneys, spent money working together as an industry, and it is for something

that will never gain any environmental benefit, nor was it meant to be applied to us.

Thank you for your time.

[Prepared statement of Mr. Lenahan follows:]

Testimony for US Congressional Hearing

Committee on Oversight and Government Relations, Subcommittee on Government Operations

Michael Lenahan, American Foundry Society

May 6, 2014

Chairman Mica, ranking member Cummings, members of the Committee on Oversight and Government Relations; thank you for the opportunity to testify at today's field hearing on the impact of federal regulations on small businesses and job creation in Michigan.

My name is Michael Lenahan and I am testifying on behalf of the American Foundry Society. The American Foundry Society is the predominant trade association of the metal casting industry in North America. Foundries manufacture engineered parts, called castings, which are made by pouring molten metal into mold. Most of the time, these molds are made out of sand. Examples of metal castings that you may be familiar with are engine blocks, man-hole covers, artificial knee joints, and the Liberty Bell.

The US foundry industry employs approximately a quarter of a million people, but 80% of our foundries employ 100 people or less. We are comprised primarily of small businesses. Many of the companies that supply foundries are also small businesses. I run one of those small businesses.

My testimony today really boils down to one thing and one thing only: anything that takes time away from the efficiency of managing a small business can be crippling. Small businesses simply do not have the resources to dedicate to tasks that are non-productive.

In order for any business to thrive, there must be time for the management of that business to do three things:

1. Focus on enhancing what they do well.
2. Improve productivity.
3. Expand offerings and grow the business.

When management has time to look ahead and focus on improvement, they typically increase productivity and expand. This often results in the hiring of more employees. When management does not have time to focus on these things, they mark time and wait for the next crisis. For many businesses, the next crisis is addressing the latest regulation. Regulations, and more specifically, regulatory changes or new regulations, consume massive quantities of managerial time and resources.

From my viewpoint, there are five major problems that I see with federal regulations.

1. There are far too many new regulations.
2. Many new regulations or modifications to regulations appear to be created or modified with minimal or no thought as to how they will impact a business.
3. Many regulations are improperly conceived or misapplied and provide little to no measurable benefit.

4. New regulations have a cost, a cost that is often ignored or dramatically understated by those writing new regulations.
5. New regulations create uncertainty which limits a business in their ability to plan.

I have three brief examples that I would like to reference as part of my testimony today as to how regulations impact small businesses and job creation.

The first example highlights OSHA's new Crystalline Silica Standard. I am submitting a copy of the foundry industry testimony given at the March 28, 2014 hearing with OSHA and the US Department of Labor. In the interest of time, I would like to briefly explain in layman's terms the basics of this new rule. This new rule will reduce the permissible exposure limit (PEL) for silica from 100 micrograms per cubic meter to 50 micrograms per cubic meter. What does 50 micrograms per cubic meter look like? Take a packet of artificial sweetener and distribute that across a football field with a height of 13 feet.

As mentioned, foundries utilize sand (made primarily of silica) to make the molds which define the shape of the castings they produce. A foundry of this football field area size could be utilizing upwards of 10,000 tons of sand in annual production. As a reference point, it would take 400 semi dump trucks lined up bumper to bumper for four miles to contain 10,000 tons of sand.

OSHA's new silica rule would require all foundries not meeting the 50 microgram standard to put in engineered controls, basically massive high quality filtration equipment, within the facility to get the foundry into compliance. On the surface, this may seem acceptable until you dig a little deeper. First, the vast majority of experts on the subject believe foundries will fail to meet the standard even if they use the best technology money can buy. Second, to provide some perspective, the level of cleanliness required to meet the new standard is more stringent than what the National Aviation and Space Administration, NASA, requires for silica in one of their laboratory clean rooms. Lastly, the new rule does not allow employers to provide workers with personal protective devices until <u>after</u> it proves that the installed engineering controls cannot meet the standard. In other words, this regulation says; "spend the money on extremely expensive engineering controls whether they work or not, and only after you prove it does not work can you distribute the personal protective equipment to your employees."

The logic behind this approach is flawed at the most basic of levels. How many successful strategic initiatives involve choosing the most expensive and most likely to fail option first? This would be like forcing a public school district to purchase jet airplanes to transport school children because statistics show it is a safer and faster mode of transportation. Practical application of this idea would be more costly and not as safe. Eventually they would go back to buses, but only after they broke the bank on buying airplanes.

This may sound like a ridiculous comparison. However, you will see in the executive summary of the attached testimony that OSHA's new silica regulation is not the most effective way to protect workers. You will also see that OSHA has omitted some costs and grossly underestimated the overall cost to implement this new rule ($44 million per year versus $2.2 billion).

A second example of federal regulations impacting small business and job creation is the New Source Performance Standard Sub-Part UUU. This standard was meant to be applied to the mining industry and specifically to operations that dry sand. This standard was not meant to be applied to foundries. How do we know this? We know this because our industry spoke directly with the author that wrote the rule at EPA. We only spoke to this individual after the rule was being misapplied by regulators at some of our foundries.

This is a case of the right hand not working with the left hand despite overwhelming evidence from the source that enforcing this regulation was a total mistake. Companies in our industry, including mine spent thousands of dollars to hire attorneys and have special testing done. We also spent hundreds of hours meeting to discuss our strategy if our businesses were targeted or fined by those enforcing this rule. Perhaps the greatest irony is that this rule if enforced would have provided no environmental benefit. The resources spent to educate ourselves, track down the truth, and prepare for a legal battle took valuable resources away from other operational priorities.

Finally, federal regulations do not only hurt the private sector. Sometimes they take resources away from doing something positive. For the last five years, the foundry industry has been waiting for the EPA to finalize a risk assessment that was completed by the US Department of Agriculture showing that foundry sands could be recycled and utilized safely in top soils. This independent research, funded by taxpayers, shows that these materials pose no greater threat to the environment than do native soils. These findings are significant relative to our industry's ability to recycle our materials, thereby reducing costs, reducing waste, and creating a potentially new revenue source. It is frustrating to think that resources allocated to enforcing Subpart UUU could have been directed to finalize this risk assessment. This delay has slowed the conservation of natural resources, diverted otherwise recyclable materials to landfills, and stunted opportunities for job creation.

It is clear that rules and regulations are important to the well-being of our society. I am not advocating a society where rules and regulations do not have their place. However, we need to find a way to reduce the regulatory burden on everyone by only promulgating rules that make sense. Regulations come at a cost to small business and limit our ability to be creative and grow. If we want small businesses to thrive in this country, regulatory reform must be part of the equation.

Thank you.

Mr. MICA. Thank you for your testimony.

We will now turn to Mr. Kligman. He is the President of Superb Custom Homes.

Welcome, and you are recognized, sir.

STATEMENT OF RICHARD KLIGMAN

Mr. KLIGMAN. Thank you, Chairman Mica and Congressman Bentivolio. On behalf of more than 140,000 members of the National Association of Home Builders, my name is Richard Kligman, and I am a builder from Plymouth, Michigan and serve as President of Superb Custom Homes.

Housing services are a great example of an industry that would benefit from smarter and more sensible regulation. According to a study concluded by the NAHB, government regulations account for 25 percent of the price of a single-family home. NAHB economists recently performed an analysis looking at the number of households in Michigan that would no longer qualify for a mortgage due to compliance with the latest building codes. New building codes would increase the incremental construction cost for a typical residence by $2,532. The base price of a typical new one-story home in Michigan is $121,040. Two-thousand-five-hundred-and-thirty-two dollars may not seem like a lot in the big picture, but the study indicates that 31,106 Michigan households would be priced out and denied the opportunity of home ownership.

I believe this example illustrates just how impactful over-regulation can be, as many of the regulations being discussed will be significantly more costly to implement than $2,500. The bottom line is unnecessary regulatory costs hurt real people right here in Michigan. I would like to highlight a few of those regulations that are of concern.

"Waters of the United States" proposed rule. The Environmental Protection Agency and the U.S. Army Corps of Engineers recently proposed a rule redefining the scope of waters protected under the Clean Water Act. The proposed rule falls well short of providing the clarity and certainty our industry seeks. This rule will increase Federal regulatory power over private property and will lead to increased litigation, permitting requirements, and lengthy delays for any business trying to comply.

These changes will not improve water quality, as much of the rule improperly encompasses water features that are already regulated at the state level. The proposed rule establishes broader definitions of existing regulatory categories such as tributaries, and regulates new areas that are not jurisdictional under current regulations. For any small business trying to comply with the law, the last thing it needs is a set of new, vague, and convoluted definitions that only provide another layer of uncertainty.

OSHA crystalline silica rulemaking. OSHA's proposed rule to control crystalline silica is the most far-reaching regulatory initiative ever proposed for the construction industry. Crystalline silica is a basic component of soil, sand, and granite, and is found in numerous building materials.

OSHA is proposing an 80 percent reduction in the permissible exposure limit, PEL, for respirable silica dust. OSHA has not ex-

plained how a drastically lower PEL will effectively reduce the number of silica-related illnesses and deaths.

NAHB believes OSHA should withdraw the proposed silica regulation until it can demonstrate that the proposal is technologically justified, economically feasible, and that it can be applied and understood in the real world of residential construction. OSHA's proposal describes control methods that will ultimately cost the industry $3 billion annually.

Federal involvement in local building energy codes. Building energy codes such as the International Energy Conservation Code, IECC, are used across the country to establish minimum standards for building energy efficiency. The codes are developed by private entities but then adopted by state and local governments. The Department of Energy participates in this process. While they do not develop the codes themselves, they are authorized to provide technical assistance.

NAHB has serious concerns that this has been broadly interpreted to allow DOE to advocate for or against certain proposals. Homebuyers are willing to pay more for lower utility costs, but according to our data, buyers need a 14 percent return on investment, which corresponds to a seven-year payback. The 2012 version of the IECC has such significant cost increases it would take the average family 13.3 years just to break even on required mandates. For half of the State of Michigan, the payback period is actually 16.1 years.

Some companies and advocacy groups are now pushing Michigan to adopt this onerous and expensive code because it benefits their business, treating certain products favorably. The Home Builders Association of Michigan is trying to find a reasonable solution.

OSHA's fall protection standard. OSHA changed its residential construction fall protection regulation. OSHA rescinded its interim fall protection guidelines, which set out a temporary policy that allowed employers engaged in certain residential construction activities to use alternative procedures instead of conventional fall protection such as guardrail systems, safety net systems, and personal fall arrest systems for any work that is conducted six feet or more above lower levels.

OSHA has not provided specific guidance regarding how it will interpret this standard or how builders are expected to comply in determining when the use of conventional fall protection is considered infeasible or its use creates a greater hazard. Builders have little assurance that their actions will meet OSHA's requirements and could be saddled with costly fines or citations even though they are making good-faith efforts to comply.

OSHA's fall protection regulation should be reviewed under Executive Order 13563, Improving Regulation and Regulatory Review, to help make it more effective and less burdensome for small businesses, exactly as envisioned by the President.

In conclusion, I appreciate the opportunity to share the thoughts of my trade association, the National Association of Home Builders, on Federal regulations impacting small businesses and job creation in Michigan. NAHB is not against appropriate, balanced regulation. Our members understand that regulation is needed—for ex-

ample, to protect the nation's water supply and limit a child's exposure to lead paint.

Regulations that are workable and sensible, where the rules are easily understood and applied, could be the type generally supported by our industry. Unfortunately, our industry is participating in several rulemaking processes, some of which I have highlighted, where agencies avoid well-established policies of the Administration Procedures Act and neglect the safeguards of the Regulatory Flexibility Act in the interest of promulgating rules for self-serving political gain.

Thank you.

[Prepared statement of Mr. Kligman follows:]

Testimony of

Richard Kligman
Superb Custom Homes
Plymouth, MI

On Behalf Of the
National Association of Home Builders

Before the
United States House of Representatives
Committee on Oversight and Government Reform
Subcommittee on Government Operations

Hearing on
"Impact of federal regulations on small businesses
and job creation in Michigan"

On behalf of the more than 140,000 members of the National Association of Home Builders (NAHB), I appreciate the opportunity to submit this testimony. My name is Richard Kligman and I am a builder from Plymouth, Michigan, and serve as President of Superb Custom Homes. A third generation builder, I received my builder's license in 1993. We generate work for hundreds of suppliers and subcontractors and are engaged in custom home building and renovations. I also serve as a Director for the National Association of Home Builders, am on the Board of Directors and a Regional Vice President of the Michigan Home Building Association, and the Past President of the Home Builders Association of Southeastern Michigan.

NAHB represents members involved in a wide variety of activities, including the development and construction of single-family for-sale housing; the development, construction, ownership, and management of affordable and market-rate multifamily rental housing; and the development and construction of light commercial properties. Since the association's inception in 1942, NAHB's primary goal has been to ensure that housing is a national priority and that all Americans have access to safe, decent and affordable housing, whether they choose to buy or rent a home.

The growth potential in the home building industry is particularly important because few industries have struggled more during the Great Recession than construction. The decline in home construction was historic and unprecedented. Single-family housing production peaked in early 2006 at an annual rate of 1.8 million homes, but construction fell to 353,000 homes per year in early 2009, an 80% decline in activity. A normal year driven by underlying demographics should see 1.4 million single-family homes produced. If home building were operating at a normal level today, there would be millions of more jobs in home building and related trades, and smart regulation can help unleash that growth.

Our impact on the economy is more than just jobs. Buyers of new homes and investors in rental property add to the local tax base through business, income and real estate taxes, and new residents buy goods and services in the community. NAHB estimates the first-year economic impacts of building 100 typical single family homes includes $28.0 million in wage and net business income, $11.1 million in federal, state and local taxes, and 297 jobs. In the multifamily sector, the impacts building 100 typical rental apartments includes $10.8 million in wages and business profits, $4.2 million in federal, state, and local taxes, and 113 jobs. As an industry, we have finally turned the corner and are contributing to, rather than subtracting from, Gross Domestic Product growth and an improving labor market. Any effort to advance our nation's housing recovery is smart economic policy.

Home building is a complex and highly regulated industry. Costs for certain regulatory actions are borne by these small businesses in the form of land, planning, and carrying costs, which ultimately arrive in the market as a combination of higher prices and lower output for the industry. Housing serves as a great example of an industry that would benefit from smarter and more sensible regulation. According to a study completed by NAHB, government regulations account for 25% of the price of a single-family home. Higher costs mean fewer sales, and as output declines, jobs are lost and other sectors that buy from or sell to the construction industry also contract.

Home buyers, especially first-time buyers, are particularly price sensitive. As builders, we are acutely aware of how even minimal price increases can lock thousands of buyers out of the new home market. To illustrate the effect, I want to refer to an analysis recently conducted for Michigan by NAHB's economists. In this case, we were looking at the number of households that would no longer qualify for a mortgage due to compliance with the latest building codes. The analysis determined that the new code requirements would increase the incremental construction costs for typical residences by $2,532. The base price of a typical new one-story home in Michigan is $121,040. $2,532 may not seem like a lot in the big picture, but the study indicates that 31,106 Michigan households would be priced out and denied the opportunity of homeownership. While we are not here to discuss building codes, I believe this example illustrates just how impactful overregulation can be, and we believe that many of the regulations being discussed will be significantly more costly to implement than $2,500. The bottom line is unnecessary regulatory costs hurt real people, right here in Michigan.

I would like to highlight a few of those regulations that are of concern.

"Waters of the United States" Proposed Rule:

On April 21, 2014, the Environmental Protection Agency and U.S. Army Corps of Engineers ("the agencies") proposed a rule redefining the scope of waters protected under the Clean Water Act (CWA). For years, landowners and regulators alike have been frustrated with the continued uncertainty over the scope of federal jurisdiction over "Waters of the United States." By improving the CWA's implementation, removing redundancy, and further clarifying jurisdictional authority, it can do an even better job at facilitating compliance and protecting the aquatic environment.

Unfortunately, the proposed rule falls well short of providing the clarity and certainty the construction industry seeks. This rule will increase federal regulatory power over private property and will lead to increased litigation, permit requirements, and lengthy delays for any business trying to comply. These changes will not improve water quality, as much of the rule improperly encompasses water features that are already regulated at the state level.

The agencies assert that the scope of CWA jurisdiction is narrower under the proposed rule than under current practices and that it does not assert jurisdiction over any new types of waters. This is simply not accurate. In reality, the proposed rule establishes broader definitions of existing regulatory categories, such as tributaries, and regulates new areas that are not jurisdictional under current regulations, such as adjacent non-wetlands, riparian areas, floodplains, and other waters.

The proposed changes provide no additional protections for these newly jurisdictional areas as many already comfortably rest under state and/or local authority. The agencies intentionally created overly broad terms so they have the authority to interpret them as they see fit. For any small business trying to comply with the law, the last thing it needs is a set of new, vague and convoluted definitions that only provide another layer of uncertainty.

The CWA was designed to strike a careful balance between federal and state authority. This has proven to be a difficult task, and to some extent, the efforts of the courts to provide clarity have only added to the uncertainty. However, the courts have been clear on one issue: there is a limit

to federal jurisdiction of waters. In fact, the Supreme Court has twice affirmed that both the U.S. Constitution and CWA place limits on federal authority over intrastate waters. While many were optimistic that this rule would finally translate the Court's directives to a workable framework, the proposed rule instead is a marked departure from past Supreme Court decisions and raises significant constitutional questions.

While many aspects of the CWA are vague, it is clear that Congress intended to create a partnership between the federal agencies and state governments, to protect our nation's water resources. Congress states in section 101 of the CWA that "[f]ederal agencies shall co-operate with state and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resource." Under this notion, there is a point where federal authority ends and state authority begins. The rule proposed by the agencies blatantly ignores this history of partnership and fails to recognize that there are limits on federal authority.

States have successfully regulated their own waters and wetlands for years. States takes their responsibilities to protect their natural resources seriously and do not need the federal government to assert jurisdiction. In fact, every state has the authority to exceed federal law, so long as there is a compelling reason. If you looked around the country you would find that many states are protecting their natural resources more aggressively than when the CWA was enacted.

Construction projects rely on efficient, timely, and consistent permitting procedures and review processes under CWA programs. Developers are generally ill-equipped to make their own jurisdictional determinations and must hire outside consultants to secure necessary permits and approvals under CWA programs. Delays often lead to greater risks and higher costs. If the rule is finalized in its current form, the ability to sell, build, expand, or retrofit real estate projects will suffer notable setbacks, including added cost and delays for development and investment.

Specifically for the "other waters" category, builders will be at the mercy of the agencies. Builders will have to request a jurisdictional determination from the agencies to ensure they are not disturbing land near an aggregated water. Consequently, an increase in the number of jurisdictional determinations requests, across all industries, will result in greater permitting delays as the agencies are flooded with paperwork.

Michigan has a unique permitting system because the state has the authority to administer Section 404 of the CWA. In most states an applicant must submit their 404 permit application to the Corps; however, Michigan applicants generally submit permitting requests to the Department of Environmental Quality. The state-administered 404 program must be consistent with the requirements of the federal CWA. While we may comply with the CWA differently in Michigan; the consequences of this rule will be the same.

Many federal statues tie their approval/consultation requirements to those of the CWA, i.e. if one has to obtain a CWA permit, he/she must also obtain others. If more areas are considered jurisdictional, more CWA permits will be required. More federal permitting actions will trigger additional statutory reviews – by agencies other than the permitting agency – under laws including the Endangered Species Act, National Historic Preservation Act, and National

Environmental Policy Act. Project proponents do not have a seat at the table during these additional reviews, nor are consulting agencies bound by a specific time limit. Lengthened permitting times will include an increased number of meetings, formal and informal hearings, and appeals. These federal consultations are just another layer of red tape that the federal government has placed on small businesses and it is doubtful the agencies will be equipped to handle this inflow.

OSHA Crystalline Silica Rulemaking

Occupational Safety Health Administration (OSHA) recently proposed a comprehensive and complicated new regulatory structure for the control of crystalline silica in the construction environment. The proposed rule is potentially the most far-reaching regulatory initiative ever proposed for the construction industry.

Crystalline silica is ubiquitous in construction. It is a basic component of soil, sand, and granite and is found in numerous building materials. Crystalline silica can be disturbed by a number of construction activities such as: mixing mortar; cutting brick/block; tuck pointing; sawing, grinding, or drilling concrete; and sanding/finishing drywall joints.

The current respirable silica Permissible Exposure Limit (PEL), or the maximum amount of silica dust to which a worker may be exposed to during an 8-hour shift of a 40-hour week, is 250 micrograms per cubic meter of air. Employers are required to ensure that employees are not exposed to silica levels above the PEL by using administrative or engineering controls. However, protective equipment (e.g., respirators) or other protective measures may be used to keep workers' exposure below the PEL whenever implementing controls are not feasible.

OSHA is proposing an 80% reduction in the Permissible Exposure Limit (PEL) for respirable silica dust. In addition to the significantly reduced PEL,OSHA's proposal includes requirements for regulated areas or written access control plans, prohibitions on work practices on construction sites such as compressed air, dry sweeping, and dry brushing, medical surveillance, respiratory protection, training and hazard communication, and recordkeeping.

OSHA has not explained how a drastically lower PEL/action level will effectively reduce the number of silica-related illnesses and deaths. The agency itself has admitted a failure to properly enforce existing standards, while the CDC has reported a 93 percent drop in silica-related deaths between 1968 and 2007.

Additionally, NAHB believes OSHA should withdraw the proposed silica regulation until it can demonstrate that the proposal is technologically justified, economically feasible, and that it can be applied and understood in the "real world" of residential construction. OSHA's proposal prescribes control methods that contradict existing safety practices and **will ultimately cost the industry $3 billion dollars annually.**

Federal Involvement in Local Building Energy Codes

Building energy codes, such as the International Energy Conservation Code (IECC) are used across the country to establish minimum standards for building energy efficiency. The codes are

developed by private entities, but are then adopted by state and local governments. The Department of Energy (DOE) participates in this process. While they do not develop the codes themselves, they are authorized to provide "technical assistance." NAHB has serious concerns that this has been broadly interpreted to allow DOE to advocate for or against certain proposals.

Over the last few years, the industry has seen some negative trends in code development leading to less choice and decreased value to the consumer. First, there has been a move towards using a more prescriptive approach – mandating the use of certain products or techniques. Unfortunately, some businesses have realized that by inserting specific products into the IECC, they can require the use of their products and increase their profits. Instead of allowing the builder to make decisions in the interest of the buyer – based on personal preferences, cost, behavior, etc. – the IECC, in some instances, dictates how to build and what products to use.

DOE has supported such efforts in the past, including measures to give preferential treatment to foam sheathing over wood products. The Department also sought to delete measures aimed to promote flexibility in the IECC – one such provision allowed builders to trade off energy measures - wall insulation, for example, provided they installed more efficient mechanical equipment. The same net energy use would be maintained, but the builder would have more design and construction options. Unfortunately the Department was successful and this was removed from the code in 2009.

Another unfortunate trend is the attempt to mandate further energy use reductions, without real consideration of economic costs. I know how valuable energy savings can be to a consumer, but some of these products and technologies come with a significant upfront cost. Energy savings measures mandated by these codes must weigh costs with savings.

According to an NAHB market report, "What Home Buyers Really Want," buyers are willing to pay more for lower utility costs, but according the data, buyers need a 14 percent return on investment, which corresponds to a 7-year payback period. The 2012 version of the IECC had such significant cost increases that it would take the average family 13.3 years just to break even on required mandates. That is the national average. For half of the state of Michigan, the payback period is actually 16.1 years. Some companies and advocacy groups are now pushing Michigan to adopt this onerous and expensive code because it benefits their business, treating certain products favorably. The Home Builders Association of Michigan is trying to find a reasonable solution.

NAHB is supporting soon-to-be introduced legislation that would reign in DOE by reestablishing their original role as a "technical advisor," increasing transparency in the process and ensuring that the codes are more cost-effective. I believe these reforms will help to create a more fair development process that allows for all voices to be heard and I hope you can support us in this effort.

Please keep in mind that the energy code is not an "option" for buyers looking for a more efficient home. Rather, this is a requirement for every single home in that jurisdiction – including low-income housing and homes for first-time homebuyers. The energy code is a baseline for all homes. Energy efficiency tax credits, such as the section 25C and 45L credits,

stand out as examples of this better approach. In contrast, increasing housing costs for all homebuyers will have the unintended consequence of reducing housing affordability and driving lower cost buyers into older, less-efficient housing.

EPA's Lead Renovation, Repair and Painting Rule (RRP)

Amendments and changes to the EPA's Lead Renovation Repair and Painting rule (RRP) have seriously constrained our businesses. The final rule, which took effect April 22, 2010, requires renovation work that disturbs more than six-square feet in a home built before 1978 to follow new lead-safe work practices supervised by an EPA-certified renovator and performed by an EPA-certified renovation firm. Poor development and implementation of the rule by EPA has resulted in considerable compliance costs and has hindered both job growth and energy efficiency upgrades in older homes.

The first important change to the RRP was finalized on July 6, 2010, and eliminated a consumer's ability to waive compliance requirements if no children under six or a pregnant woman resides in the home. Not only does this change further restrict a consumer's choice about critical renovation work in older homes, but it also dismantles everything EPA originally included in the original 2008 RRP rule to ensure that it was not overly costly to small businesses. As a means of regulatory flexibility, the EPA allowed homeowners in pre-1978 homes that do not have young children or a pregnant woman residing in the home to waive a contractor's compliance obligations, or "opt out" of the RRP. The EPA stated that the inclusion of the "opt out" provision decreased the number of homes subject to the RRP from 77.8 million down to 37.6 million. Furthermore, EPA states that the removal of the "opt out" costs an additional $507 million for small businesses in the first year alone.

Without even giving the original rule a chance to work, the EPA immediately amended it by removing the "opt-out", thereby taking away a key measure that made it easier for homeowners to absorb the regulatory impact.

According to the U.S. Census Bureau's American Community Survey, approximately 38,317,131 owner-occupied housing units built before 1978 do not have a child under six living there. This is roughly 88.5% of all the housing stock in the U.S. built before 1979. With the removal of the "opt out" provision, those homeowners no longer have the option of foregoing the costs of compliance with RRP when hiring a professional remodeler to work on an older house. For the small contractors, these additional costs have to be passed onto the consumer which increases the chances a consumer will hire another, likely uncertified, contractor to do the work, or worse, do the work themselves and actually increase the likelihood of disturbing lead-based paint. The restoration of the "opt out" provision would allow households that do not have young children or pregnant women the chance to undertake professional renovation work – most frequently energy efficiency upgrades – without facing compliance costs for a regulation that legitimately does not apply to anyone in the household.

In addition to incorporating the "opt out" to reduce the number of homes subject to RRP, the 2008 RRP also relied on the existence of a accurate test kit that, at the time the rule was enacted, was not available. Under the rule, if a pre-1978 home is tested and the results indicate there is no

presence of lead-based paint, the contractor can bypass RRP compliance. This is a reasonable component to the rule, but it also hinges on the existence of an accurate testing kit.

In drafting the rule, the EPA claimed that an accurate test kit would be commercially available by September 1, 2010. As a result, they explicitly rejected other options to reduce the cost of the regulation because of the anticipated test kit. The new test kit (Phase II) was to supposed to replace the first version (Phase I), which EPA acknowledges has a significantly high false-positive result rate, with false positive rates ranging from 47%-78%.

EPA said it was committed to having more accurate kits, thereby reducing the number of false positives and saving costs on RRP compliance. In fact, EPA's cost calculations rely upon the availability of the Phase II kits beginning in September 2010. As of today, 4 years after the EPA thought they would be on the market, Phase II test kits are still not available. To make matters worse, the EPA has no estimate as to when they will be available.

Although EPA is still allowing contractors to use Phase I test kits, the entire benefit of having better kits that would reduce the compliance costs for small businesses has been entirely overlooked. After months of informal pleas to EPA to adjust the RRP to account for the substantially higher compliance costs, NAHB formally petitioned EPA to undertake a rulemaking and develop a revised economic analysis on September 27, 2010. The EPA has never responded to NAHB's petition however, they recently informed us that they are no longer working to develop an improved test kit. With inaccurate and overly-sensitive test kits, and the removal of the "opt out," there is little opportunity for relief for remodelers undertaking renovation work in pre-1978 homes. Given the unreliability of commerically available lead testing kits, NAHB believes EPA should delay the rule's effective date.

Regulatory Barriers to Housing Production Credit

Despite signs of improvement in recent months, many home builders continue to deal with a significant adverse shift in terms and availability on land acquisition, land development and home construction (AD&C) loans and builders with outstanding loans have faced numerous challenges. Lenders are reluctant to extend new AD&C credit or to modify outstanding AD&C loans in order to provide more time to complete projects and pay off loans. Lenders themselves often cite regulatory requirements or examiner pressure on banks to shrink their AD&C loan portfolios as reasons for their actions. While federal bank regulators maintain that they are not encouraging institutions to stop making loans or to indiscriminately liquidate outstanding loans, reports from NAHB members in a number of different geographies continue to suggest that bank examiners in the field have adopted a more aggressive posture.

While the home building industry is no longer experiencing the dramatic declines in the outstanding stock of AD&C loans that immediately followed the economic downturn, there still exists a lending gap between home building demand and available credit. Since the beginning of 2007, the dollar value of the pace of single-family permitted construction is down 39 percent. During this same period, home building lending for AD&C purposes is down 78 percent. This lending gap is being filled by other sources of capital, including equity investments from non-

depository institutions and lending from other private sources, which may generally offer less favorable terms for home builders than traditional AD&C loans.
The home building industry is predominantly made up of small businesses and these companies have traditionally relied on community banks for AD&C loans. With regulatory pressures unfortunately still impacting the cost and availability of construction credit, congressional action is needed to help open the flow of credit to home builders. Without such action, there can be no sustainable housing recovery, which has major implications for our nation's ability to recover from the economic downturn.

NAHB appreciates the efforts of Representative Gary Miller (R-CA) and Carolyn McCarthy (D-NY) for introducing The *Home Construction Lending Regulatory Improvement Act of 2013 (H.R. 1255)* that would address several regulatory barriers to sound construction lending, and looks forward to working with congress to advance regulatory reform in this area. Going forward, it does not seem likely that community banks will again resume the levels of AD&C lending previously undertaken unless some form of secondary market outlet is created to allow these institutions to sell their AD&C output and obtain liquidity for additional lending.

NAHB is also very supportive of H.R. 1553, the *Financial Institutions Examination Fairness and Reform Act* introduced by Representative Shelley Moore Capito (R-WV) and Representative Carolyn Maloney (D-NY), that would provide new standards for bank examinations. Of particular note to the home building industry, such new standards would specify that a commercial loan (including AD&C loans) cannot be placed in nonaccrual status solely because the collateral has deteriorated in value. Additionally, the legislation would clarify that a new appraisal is not required on a commercial loan unless an advance of new funds is involved.

Last July, H.R. 1553 was incorporated into H.R. 2767, the *Protecting American Taxpayers and Homeowners Act of 2013 (PATH Act)*. While there are policy elements of the PATH Act that NAHB supports, we strongly oppose the legislation because of its lack of federal support for housing. NAHB looks forward to working with congress to advance key elements of our AD&C credit crisis legislative agenda.

OSHA's Fall Protection Standard

In December 2010, OSHA changed its residential construction fall protection regulation. OSHA rescinded its Interim Fall Protection Guidelines, which set out a temporary policy that allowed employers engaged in certain residential construction activities to use alternative procedures instead of conventional fall protection, such as guardrail systems, safety net systems, or personal fall arrest systems, for any work that is conducted six feet or more above lower levels. Returning to the original fall protection standard has proven to be challenging because OSHA has not provided specific guidance regarding how it will interpret the standard or how builders are expected to comply in determining when the use of conventional fall protection is considered infeasible or its use creates a greater hazard. Given these uncertainties, builders have little assurance that their actions will meet OSHA's requirements, and could be saddled with costly fines or citations even though they were making good faith efforts to comply. We believe OSHA's fall protection regulation should be reviewed under Executive Order 13563, "Improving Regulation and Regulatory Review," to help make it more effective and less burdensome for small businesses, exactly as envisioned by the President.

In conclusion, I appreciate the opportunity to share the thoughts of my trade association, the National Association of Home Builders, on federal regulations impacting small businesses and job creation in Michigan. While I focused my testimony on regulations that concern our industry, NAHB is not against appropriate, balanced, regulation. Our members understand that regulation is needed, for example, to protect the nation's water supply and to limit a child's exposure to lead paint. Regulations that are workable and sensible - where the rules are easily understood and applied - could be the type generally supported by our industry. Unfortunately, our industry is participating in several rulemaking processes, some of which I have highlighted above, where agencies avoid well-established policies of the Administrative Procedures Act and neglect the safeguards of the Regulatory Flexibility Act, all in the interest of promulgating rules for self-serving political gain.

Mr. MICA. Well, I thank you, and I thank all of our witnesses. Interesting testimony.

It was interesting to start with Mr. Fisher, and he talked about Executive Order 13502, and we just ended up with Mr. Kligman, who was talking about Executive Order 13563, 61 executive orders in-between we didn't even get to hear about.

Interesting testimony today, and some tough consequences proposed by some of these regulations.

What I thought I would do is I am going to go through some of the testimony that was provided by each of you, a few questions.

First, Mr. Fisher, the project labor agreement provision that you talked about, you said that Michigan had eliminated that. When did Michigan eliminate that?

Mr. FISHER. Michigan, Mr. Chair, eliminated the ability to have a government-mandated PLA in 2011 with the Fair and Open Competition Act. What it simply states is that all workers, union and non-union alike, that you can't be discriminating against based on your decision to affiliate or not affiliate with a labor union, and it meant that all workers have the opportunity to access work opportunities on public construction projects.

Before, you would have a special-interest-driven mandate that would state that only a contractor that is signatory to a PLA, which is a form of a collective bargaining agreement, would be able to perform that work.

Mr. MICA. Now, is that only on state projects?

Mr. FISHER. It would be state, local ——

Mr. MICA. Because you are still subject to the Federal edict.

Mr. FISHER. But unfortunately, we can't get out from under the Federal edict, and that is the problem.

Mr. MICA. Right.

Mr. FISHER. Is this Federal regulation ——

Mr. MICA. So one solution might be, where a state does allow by state law the elimination of the project labor agreement requirement, that they be allowed to proceed with implementation of the Federal. Would that be a possible solution?

Mr. FISHER. That would be a possible solution. However, here in Wayne County, in the county to the north, Macomb County, where there is the Selfridge Air Force Base, for example, if there is a Federal contract there, that is completely under the jurisdiction of the Federal Government, or an interstate highway that is under the jurisdiction of the Federal Government, the Federal Government can still discriminate against workers and businesses in a local area based on labor affiliation.

So we also think that the Federal Government should, in fact, enact a fair and open competition law to, again, protect taxpayers and workers so that everybody could have an equal opportunity to pursue work in their communities.

Mr. MICA. You said the disparity could be 10 to 20 percent. Do you have any anecdotal information as to the effect of Michigan's provision?

Mr. FISHER. I do, in fact. I think one great example is in the shadow of the state capital in Michigan, in Lansing, a new city market was built subject to a PLA. It wasn't necessarily an expensive city market project. I think from start to finish it was about

$3 million. It was let out to bid under a project labor agreement, and the result was that the project came in entirely out of budget, to the tune of, I believe, 25 percent over budget, and the city market wasn't able to be built until they re-bid the entire project, opened up the bidding process, allowed everybody to participate, and then once you had the benefits of fair and open competition, and only then, was the project able to be on budget and finally get completed.

Mr. MICA. Aside from the labor issue that you mentioned, you talked a bit about OSHA, and we have heard some others refer to OSHA and their overreach. How can we ensure protection of workers without some of the Federal interference through OSHA? You said you have what sounded like a fairly good relationship and cited some of it as a model. How does that work? Are you just getting volunteer cooperation with OSHA, or is this something that can be a template for others to adopt? I have never heard of this before. Maybe you can explain it better.

Mr. FISHER. Yes, I would be happy to, Mr. Chair. Michigan, under OSHA, is what is called a delegated state, and OSHA does have a provision that allows a state to handle the health and safety functions of OSHA, to administer it under the belief that government that is closest to home can govern best, that federally we don't need to necessarily be as hands-on if a state is able to, as long as they comport with all of OSHA requirements. Michigan is one of the states that is able to do that.

Mr. MICA. So is the state enforcing the OSHA requirements?

Mr. FISHER. Correct.

Mr. MICA. Okay.

Mr. FISHER. So what we have been able to do by having a partnership that is closer to home, closer to the Michigan-based construction industry, is form alliances. We are right now in the process of forming an ABC and OSHA alliance, and it is geared towards that key, core role of OSHA, which is to promote worker health and safety and use a fact-based approach to methods that actually work.

Mr. MICA. Is this done just by an agreement with the state and OSHA?

Mr. FISHER. Yes.

Mr. MICA. Okay. I am not that aware. Everyone thinks all the members of Congress know all the programs, but this delegation authority is under law. Is it just certain designated states by law, or can any state ——

Mr. FISHER. A state applies to Federal OSHA and is able to do so, and Michigan ——

Mr. MICA. Okay. And do you know how many states participate on this basis?

Mr. FISHER. I would be happy to get that to you. I don't know.

Mr. MICA. Okay. I think that would be interesting. Maybe the staff could add that in the record.

Mr. MICA. But that is an interesting concept. I don't see why it couldn't be further applied. If Michigan can do it, certainly it could be a model for other states. I don't know how many others do that, devolving to the states some of this responsibility. A lot of what we do at the Federal level is duplicative, not only in enforcement and

regulation but a whole host of areas, permitting, where we could be much more efficient.

But thank you for bringing that to light and to the committee. We can look at that, too, and maybe consider expanding some of those provisions in future law.

Okay, Ms. Kaboth. You produce those bricks that we walk on?

Ms. KABOTH. I do. Not alone, though. But, yes, we do.

Mr. MICA. That is interesting. You talked about, again, some of the regulations, the cost to you would be $6 million, with no apparent benefit. What would happen if they force you to do this?

Ms. KABOTH. Well, we would have to close.

Mr. MICA. How many people do you employ?

Ms. KABOTH. We employ 80 people.

Mr. MICA. Eighty people? And you have been in business it sounds like a long time?

Ms. KABOTH. Yes, since 1916. We are getting ready for our 100th anniversary.

Mr. MICA. That is great.

Ms. KABOTH. Most brick companies are like us. It is not an industry that most people want to join because the capital costs are very great, the return is really not wonderful. Most of the companies are long-time family-owned businesses like ours.

Mr. MICA. Is there a lot of competition in the industry?

Ms. KABOTH. There is. However, that is why we specialize in the niche markets. That is the only reason why we are even still here. We don't have the resources to compete with the big companies, so we stick with the paving brick, the fire brick for fireplaces, a place where we have been able to thrive. We do a lot of custom work.

Mr. MICA. Now, will that just narrow the competition by you going out of business, or is there foreign competition? Are there other sources for ——

Ms. KABOTH. There is no foreign competition, really. Brick is too heavy to import. The costs would be much too high for the freight. If we would be gone, it would reduce the choices for a lot of places. We are a very high-end, customized product, and we supply a lot of universities and colleges. So they would just have to find someone potentially who could do what we do, and there aren't many left.

Mr. MICA. And the silica rule you talked about was the same one that everyone is talking about?

Ms. KABOTH. Yes.

Mr. MICA. There is nothing different, it's just the difference in the impact on each of you, and particularly devastating to your operations.

Ms. KABOTH. Well, and it is not just for the cost. I have been with Whitacre Greer for 35 years, and we have never had one person be ill from silica. I mean, that is part of our industry statement, that we have studies for over 75 years that our employees just don't get silicosis. So it is ridiculous to have a rule that is just so expensive that isn't going to help anybody.

Mr. MICA. Have you employed other means of protection of the workers?

Ms. KABOTH. We do. We have a number of things we do to reduce the dust overall in our facilities, and most facilities are very good

at that. But to get to the level that OSHA is requesting is, to be honest, almost impossible, even with the engineering controls and everything else they want you to do.

Mr. MICA. Mr. Lenahan, was it you who testified about the amount that is allowed in a space laboratory, I guess it was?

Mr. LENAHAN. Yes. Actually, the standard is cleaner than the NASA clean room, which is a reference point I think we all think of, a clean room and how clean that environment would be. And to have an industrial plant that handles tens of thousands of tons of material ——

Mr. MICA. When these rules come out and you have an opportunity to be heard on them, do you feel that is adequate? Are they listening? Has there been opportunity, do you think, to be heard?

Mr. LENAHAN. I can answer that if no one wants to step in.

Mr. MICA. Go ahead.

Mr. LENAHAN. The second rule that I mentioned there was Subpart UUU, which was an A rule. It was never meant to be applied to the foundry industry. We were not given an opportunity to provide information on the rule because ——

Mr. MICA. Even though you were impacted, were you noticed?

Mr. LENAHAN. No.

Mr. MICA. You were not?

Mr. LENAHAN. No.

Mr. MICA. Okay.

Mr. LENAHAN. And that was one of the dilemmas. We wound up going back to EPA. We said we were never—this was never meant to apply to us and we never had an opportunity during comment period, never were identified, and then when we got to the author of the rule he said, no, you guys never should have been included in this rule. This was for industrial sand production, not for foundries.

Mr. MICA. And you are not currently under that mandate, or are you?

Mr. LENAHAN. We are. It is actually one of those things ——

Mr. MICA. Even though they said that you weren't noticed and it wasn't intended to apply, they have made no exception?

Mr. LENAHAN. That is correct. The right hand a lot of times does not know what the left hand is doing.

Mr. MICA. Sounds typical in Washington.

Mr. LENAHAN. And the enforcement arm of EPA—I want to be delicate in how I say this, but I don't think they are really concerned about that sometimes. We have an ability or a capability to enforce on this whether it was meant to apply to you or not and, doggone it, we might just do that.

Mr. MICA. Now, had you written your members of Congress on this issue? You have?

Mr. LENAHAN. Yes.

Mr. MICA. And the senators, too?

Mr. LENAHAN. Yes, and I go typically to Washington, D.C. at least once a year as part of a contingent from the metal casting industry, and this was a Hill issue last year at our government affairs conference.

Mr. MICA. And how does that affect you in competition or price or whatever? What is the impact?

Mr. LENAHAN. Unlike my colleague to the right, we are impacted heavily by offshore competition. Metal casting facilities since I entered the industry in 1987, there were 5,000 domestic foundries, and now there are about 1,900. The reason for most of that is because regulations have pushed the foundries outside of the U.S.

Mr. MICA. And, of course, all of them are complying with these high standards when they manufacture or produce foundry activities outside the United States?

Mr. LENAHAN. Absolutely ——

Mr. MICA. Are products coming in very well manufactured and adhered to with the highest standards?

Mr. LENAHAN. We don't see that, and I will give you one real quick example. A friend of mine was grilling in his backyard and dropped a cast iron piece of his grill and it broke on the ground, and we knew that the grill parts came from China. He is a metallurgist, and he knew immediately what the problem was. He took the grill sample in to the spectrometer at the foundry, shot it, and found there was 40 times the amount of arsenic in that cast iron grill than there was in the domestic castings we were making onshore. So we see things like cast iron skillets that are made offshore, as compared to lodge manufacturing ——

Mr. MICA. So we have no control over those products that are coming in.

Mr. LENAHAN. There are no controls.

Mr. MICA. What is the biggest competition? Is it China?

Mr. LENAHAN. China is probably still the largest competition. Probably what concerns me more than anything on that is that we make a lot of military parts, and we can't be dependent upon a country that may or may not be friendly at the moment to manufacture some of those parts.

Mr. MICA. Foreign source.

Mr. LENAHAN. One of my customers made all the engine blocks for the landing craft that landed on the beaches in Normandy. If we didn't have those guys back during World War II, we might all be speaking German right now.

Mr. MICA. So 1,900 left out of over 5,000?

Mr. LENAHAN. That is just in ——

Mr. MICA. Probably the employment would be pretty significant. Maybe we lost 30,000, 50,000 jobs?

Mr. LENAHAN. I would say closer to 350,000 jobs.

Mr. MICA. Oh, wow. So a very significant impact. It seems like there should be some way we could require certification of some of those products that were produced under the same standards. We are just talking now about certain and limited standards. If we got into some of the labor requirements and other regulatory regimes that we impose, we probably couldn't import much of anything from those countries. Would you say?

Mr. LENAHAN. I think the biggest thing that our folks tell us is we want predictability in what we can expect down the line. We don't have any problem competing on a level playing field.

Mr. MICA. But it is not level.

Mr. LENAHAN. It is not level. When currency is under-valued by 40 percent, they are pegging their currency to our currency, we know it is not level. When we see castings coming into the United

States that are cheaper than what the raw materials cost, we know it is not level. We know there is supplementing going on there.

Mr. MICA. So you have gone from 5,000 to 1,900 foundries. Are we continuing to see the decline, or do you think the worst is over?

Mr. LENAHAN. There is a little bit of stabilization, and I think one thing to remember is the guys who are running these businesses now, they are the cream of the crop. They are bright, smart, solid business people. They have had to be to survive. The next round of attrition will come with the new silica rule. There will be people who will pack up their tents. They are small businesses. They are going to say "I can spend my money to fight something that is not going to work, or I can pack up my tent and protect my family." I think we will lose a bunch of businesses that way.

Mr. MICA. Well, you point out the difficulty of surviving. I mean, we are here close to Detroit, and we have seen how competition in manufacturing has driven a lot of business overseas, almost caused the collapse of some of our businesses, particularly in the automotive industry over the years. But there are survivors, 1,900 in your business. I was very pleased to drive by the Ford operations on my way in and seeing that they are also surviving. But it is very tough, especially when you have the rules and regs stacked against you.

Mr. LENAHAN. If I could make one other brief comment?

Mr. MICA. Yes.

Mr. LENAHAN. People assume that our industry is a dirty industry, heavy industry, and we are not. Our plant runs on renewable energy to actually clean the foundry sands, to repurpose them, and the foundries that we work with today, what is leaving their back door is being recycled at a rate of over 90 percent. So anything that they are discarding is going out at 90, 95 percent. The best households in the United States with regard to recycling are 20, 25 percent. So I think that is something also to remember.

These are jobs that are important. They are actually green jobs. A lot of the products that we are making are from recycled materials also. That washing machine you put on your front lawn to discard, that is being re-melted and repurposed into a casting.

Mr. MICA. Very good.

Mr. Kligman, you talked about the new avenue the Administration is taking to change the definition of Federal involvement in water and the definition of wetlands and its impact. That is kind of interesting because I chaired the Transportation Committee and served as the Republican leader for a number of years, always trying to keep this at bay. People don't understand the significance of unraveling the current definition, which only gives the Federal Government authority over navigable bodies of water. It would unravel all kinds of rulings, interpretations, and dramatically expand the involvement of the Federal Government, probably put a lot of your folks out of business.

What are you all doing to weigh in on this with the Administration? The route they are taking now is the regulatory route, and we haven't been able to do anything in Congress. But what actions are you taking? I know you are testifying today.

Mr. KLIGMAN. Yes, sir, and I can have our staff provide you with

Mr. MICA. Have you written in on the rule, the proposed rule?

Mr. KLIGMAN. I don't have specific knowledge on that. I do have Forcewall, who is our legislative affairs representative. If you are interested in ——

Mr. MICA. I would like to know, and I would like to know if you have submitted either to the Secretary and to your representatives.

The problem we have is there are so many new people in Congress, too, who don't understand the implications of this change. They have gone down the avenue of trying to change this legislatively, and it failed. Now they are coming in the back door through regulation.

But the consequences are pretty dramatic. You get the Federal Government into this area, it is not just a question of them having a new regulatory regime and an expansion of it, but you are changing years and years of law, litigation, rulings, which would all unravel, and you would put all kinds of real estate at risk in the future.

But I appreciate your being with us, but I think it is important that you and every state organization, and even individuals, weigh in on this, because you are going to get slammed pretty hard if this goes into effect.

I think we have now carried probably 168 bills that are just sitting in the Senate. They won't move any of them, and some of them, when they pass these regulations, the only way to undo them—well, there are two ways. One is through the Congress passing a law. Well, we can pass all we want in the House, and they sit in the Senate and nothing happens.

The second is through court, and they very cleverly—I don't know if you watched this. They packed the Federal District Court of Appeals in Washington. Part of the reason that we had this brouhaha in the Senate about going to 51 votes rather than 60 votes for approval of some of the appointments was directed at packing the District Court of Appeals. It had a 4–4 sort of balanced approach of judges, and the Obama Administration, the President added three new judges there to pack the court. So if you can't pass a law to overturn the regulation, your recourse as an organization, an individual, even folks in Congress could go to court. But most regulations are promulgated from the Federal level in Washington, and your venue of recourse is the Federal District Court of Appeals. So once you pack that, which they have done, they have succeeded in negating the 60-vote rule. They have appointed the three judges. Now you have no other recourse because they cut off your judicial recourse.

So we are reaching a pretty serious situation in trying to stem the tide of some of these rules. This one is particularly ominous for the future of real estate building, a whole host of areas that could be very dramatically impacted. So I would just encourage you, and if you do have something you could provide to the committee in what you have done, I would like to see a copy of that, because we can also use that, and hopefully you are contacting your senators, too.

Mr. KLIGMAN. Sir, if I may?

Mr. MICA. Yes.

Mr. KLIGMAN. On your point, on a practical basis as well, if you had a ditch, for example, that filled up with spring rains here in Michigan for a month or two months a year, that could be categorized as a tributary.

Mr. MICA. Well, I have heard everything—a puddle in the backyard, pools.

Mr. KLIGMAN. Right. And then the permitting involved, and the time and exposure, it is not manageable.

Mr. MICA. Well, again, it is the responsibility of Congress to try to change the law, but the votes aren't there right now. Again, we don't have recourse through the courts.

You talked about the impact of $2,500 per home and actually pricing 3,100 people in Michigan out of that. Can you elaborate a little bit more?

Mr. KLIGMAN. Well, we can provide the study for your review. But as costs are impacted nationwide, but particularly here in Michigan where we had such a prolonged downturn in the economy and it was devastating to the housing industry as well, the consumers are still very sensitive to cost. We, as a small volume builder, I still feel tremendous downward pressure on pricing from the consumers. And as we have costs going up, the question is who is willing to absorb them. If the consumer is not, then it either prices them out of the home or as a business person I have to make a choice of saying, okay, I am going to absorb that cost. But if I don't have margins and my risk goes up, I can hire fewer people, create less job opportunities. So there is a direct correlation with cost and affordability, opportunities for people and job creation.

Mr. MICA. If you could provide us a little bit more detail ——

Mr. KLIGMAN. Certainly.

Mr. MICA.—for the record on the basis of your estimates there.

Then finally, I think you talked about the OSHA Fall Protection Rule 13563. Now, has that gone into effect?

Mr. KLIGMAN. The standard is now being in effect. Yes, sir.

Mr. MICA. And that is anything over 6 foot?

Mr. KLIGMAN. Six foot from the lower level. And where it becomes impractical, I can give you just a couple of quick examples. If you had a low-pitched garage roof, your personal fall protection system requires you to tie off over your head. You can be standing at the edge of the roof and not have anything over your head with a low-pitched roof. So the code would require that you build a guardrail around the perimeter, and the cost and time involved to do that would be greater and more expensive than the tear-off for the roof. So again, the consumer is negatively impacted with that.

Mr. MICA. Well-intended idea, but from a practical implementation ——

Mr. KLIGMAN. But on a practical level ——

Mr. MICA.—it is costly.

Mr. KLIGMAN. Yes, sir.

Mr. MICA. It is not that effective.

Mr. KLIGMAN. Yes. And trusses, as well. You know, you need a tie-off point. OSHA is suggesting that you assemble all the trusses on the ground and get a large crane to carry it up, and that is not typical on residential construction. I have a 40-foot-wide lot I am building a house on right now. I don't have physical room to assem-

ble trusses on the ground. And even if I could get the crane and the client was willing to pay for that extra fee. So there are times when it is just not practical.

Mr. MICA. All right. I appreciate your testimony.

I want to yield now to Mr. Bentivolio.

Mr. BENTIVOLIO. Thank you very much, Mr. Chairman.

Mr. Kligman, I want to clarify. If you order trusses—I am pitching this. I used to be in the home-building business. So you have trusses. The crew will lift them up, or you will have a crane lift one at a time. You will set them in place. You will put stringers to hold them in place and straighten them horizontal; correct?

Mr. KLIGMAN. Correct.

Mr. BENTIVOLIO. Twenty-four inches on center, 18 inches on center, something like that. So right now, though, you are telling me, if I understand this correctly, you have to lift up all those trusses to ——

Mr. KLIGMAN. To comply, they are requiring a tie-off point, and you don't have that to start. So they are saying assemble it down and bring it all up in one ——

Mr. BENTIVOLIO. You get pre-made trusses, right?

Mr. KLIGMAN. Correct, and there is conventional frame as well. But for a pre-made example, correct.

Mr. BENTIVOLIO. Okay. So the pre-made trusses are already assembled. You put them up one at a time?

Mr. KLIGMAN. Correct. But even to start and to be working up there, you are not able to meet the requirements at that point. So it is kind of a chicken-and-egg kind of scenario. So with strict conformance, even despite trying to make best efforts, there is risk that you are not conforming, and some of their solutions or proposed solutions aren't practical for our industry and are very cost prohibitive.

Mr. BENTIVOLIO. So what would you do in conventional framing? You put the ridge board up and then you ——

Mr. KLIGMAN. Really, again, it comes back to a challenge of compliance at inception, at commencement, and it becomes very difficult to comply under certain circumstances.

And again, the association and my company as well, we are all in favor of safety, and it is important, and our trades feel the same. However, we are trying to be practical in that approach as well.

Mr. BENTIVOLIO. Mr. Lenahan, correct?

Mr. LENAHAN. Yes.

Mr. BENTIVOLIO. You said there were 5,000 foundries in the United States, and we have quite a few small foundries here in Michigan, especially in the 11th Congressional District and on Haggerty Road. There are a couple of companies that have a small foundry for making prototypes; correct?

Mr. LENAHAN. I am not familiar with that particular operation. But the 5,000 number is what there were domestically in 1987. Now there are about 1,900.

Mr. BENTIVOLIO. And what concerns me is a personal experience. A military vehicle, an N–270 rocket launcher transmission was manufactured in a foreign country, and they delivered the transmissions to be installed in these vehicles, and then after I think it was less than 25 miles in travel time the transmission failed, and

we knew it was going to fail before they replaced them. They said it was made from cheap steel.

What is the difference between—I don't understand. What is cheap steel versus American-made, Michigan-type steel?

Mr. LENAHAN. If you picture any kind of molten metal, it is made with speck, almost like a cake mix. So there are certain elements in the metal that add strength. I have seen other examples where brake rotors, for example ——

Mr. BENTIVOLIO. Brake ——

Mr. LENAHAN. Brake rotors on your car that keeps your car from stopping, when those are not made to a certain specification, if they are made from the wrong flavor, for example, of iron or steel, whatever, but in the brake rotors case iron, the brake, due to the coefficient of friction, will not stop, and we have seen brake rotors that have come over that have been counterfeited with a company name in Wisconsin that would not actually stop a vehicle. So we see problems like that as well. That is not something that has been seen just once.

Mr. BENTIVOLIO. And those foundries, those small foundries that make prototypes and some of our parts, actually are encased—that heating thing is encased with a fire brick that your company makes. Is that right?

Ms. KABOTH. We used to, yes.

Mr. BENTIVOLIO. I am trying to look at this from a national defense point of view, because this used to be the arsenal of democracy. Welcome to Michigan. This used to be, and it really concerns me. We have lost a lot of machinists in the last 10 years because of the recession. We are not training people for these very important jobs, because once you make a casting and the sand comes out and you re-use that sand—is that correct?

Mr. LENAHAN. Correct.

Mr. BENTIVOLIO. Okay. But once the casting is made, you then send it to a machinist.

Mr. LENAHAN. Usually, yes.

Mr. BENTIVOLIO. And he has specific requirements and specifications he has to machine that down, and we are losing those, too. So we are actually not only losing, because of these regulations that are forcing businesses out of business—our national defense becomes at risk, right?

Mr. LENAHAN. That is correct.

Mr. BENTIVOLIO. Very good.

Mr. LENAHAN. And those are not businesses that you can just start up in 30 or 60 days.

Mr. BENTIVOLIO. Right. It is a lot of money to invest in a foundry.

Mr. LENAHAN. Not to mention permitting.

Mr. BENTIVOLIO. Not to mention ——

Mr. LENAHAN. Permitting, back to regulations again.

Mr. BENTIVOLIO. The uncertainty associated with Obamacare is a concern for many people across the country. What are you hearing from your employees and members of your business community?

Can we start one at a time?

Mr. Fisher, would you like to begin?

Mr. FISHER. I would be more than happy to, Congressman. The Affordable Care Act, Obamacare, has been a detriment. In our industry, we are in the process of conducting a statewide survey on that very issue. And, in fact, most of our member companies have responded that it is having a negative effect not only on their companies, but I think it is important to remember that there is a trickle-down effect, if you will.

So in the construction industry, we build for clients, and when asked has Obamacare affected your clients, nearly 100 percent of our membership have responded yes, it is affecting their client base. So that, therefore, by affecting their client base, it means that those companies are maybe not able to expand as they would like. But it also means that our companies in the construction industry are likewise not able to access some work opportunities, and it is all because, again, of Federal regulations.

So we are seeing it, and I think it is important to remember that it affects more than just what is on the surface and that there is this domino effect as well from Obamacare, as well as any other regulation that it has.

Mr. BENTIVOLIO. Ms. Kaboth?

Ms. KABOTH. So far, we have not had a direct result or a direct impact from Obamacare. However, I expect one in a few years in the price of our medical insurance. We provide very good insurance for all of our employees. We pay 90 percent, they pay 10 percent, and our rates so far have not gone up. However, I don't believe that the mandate has been in effect long enough for it to really affect our rates. Now, in the next two to three years, I expect our rates to go up dramatically, and that will seriously impact our operating costs, but how much is anybody's guess at this point.

Mr. BENTIVOLIO. Uncertainty again.

Ms. KABOTH. Yes.

Mr. BENTIVOLIO. Mr. Lenahan?

Mr. LENAHAN. Over the last four years, the cost to cover an employee and his family or her family, $800 per month to $1,777 per month, and that is with the reduction on the co-pay for pharmacy, from $20 to $40 per prescription. So, a substantial increase, and that impacts our ability to hire people.

Mr. KLIGMAN. And personally as a small-volume company, we subcontract the majority of our work. So I don't have as profound an effect personally. However, speaking with some of our suppliers and subcontractors that have direct employees, we are seeing similar feedback to what people have testified to, that either they are increasing their deductible amount, which is a burden on the employee, or they are taking additional costs on the prescription side.

Mr. BENTIVOLIO. Can we talk a little bit about the uncertainty? A lot of people don't seem to understand it. When I talk to my constituents, they may be employed, but for a business owner, we often are asked to provide a business plan, and those business plans require forecasting for the next three years, right? Am I correct? In a business plan. So how does that uncertainty affect your business plan for the next three years when it comes to these regulations, as well as some of the additional burdens placed on businesses, both small and large? That uncertainty, how does that really affect you? Can you talk a little bit about that, that uncertainty?

Mr. KLIGMAN. Mine personally, I look at our positioning of land acquisition, commencement of inventory homes if we don't have a custom buyer at that time, and without a clear path looking forward, or at least some sense of improvement and continuity and not restrictive burdens and greater impact to cost, it is difficult to make those investments. It is a high-risk, highly leveraged business, and high exposure, and without the ability to comfortably forecast returns and to make hiring decisions, to generate job opportunities for all of the suppliers and subcontractors that impact housing, uncertainty is a huge weight.

Mr. BENTIVOLIO. Do you build spec homes primarily?

Mr. KLIGMAN. We do.

Mr. BENTIVOLIO. So you build them in a subdivision? You build maybe two or three models?

Mr. KLIGMAN. That was prior to the downturn when we were more geared as a subdivision builder. We would buy large groups of lots, put up a model and several inventory. We have gone through our inventory in the subdivisions. We are now kind of acquiring vacant land or tear-downs on an as-come basis because our market was so devastated there weren't new developments being put in, and as we kind of bled out the existing inventory, now we are in a little bit of a holding pattern which, again, negatively impacts the current supply-demand curve.

Mr. BENTIVOLIO. And you build for a specific price point, right?

Mr. KLIGMAN. A range, but yes. It tends to be more the upper end for our company personally.

Mr. BENTIVOLIO. And if I understood you correctly, you said $2,500 for ——

Mr. KLIGMAN. For a $121,000 home.

Mr. BENTIVOLIO. It adds $2,500, which is quite a bit of a downpayment to somebody.

Mr. KLIGMAN. It is.

Mr. BENTIVOLIO. Very good.

Mr. Fisher, you mentioned the NLRB's ambush election rule. Are you aware of any other instance where a Federal regulation requires a company to provide private information about employees to a separate private organization?

Mr. FISHER. No, and I thank you, Mr. Chair, for bringing that up. For brevity's sake, I didn't highlight that aspect. Indeed, this requires—the NLRB is requiring employers to hand over personal information about their workforce and their workers. This includes emails, other type of contact information, and it doesn't necessarily have to be a company email, even a private email. And one has to question why is this even being promoted.

Well, it is clear that the Federal Government is doing this because there are entities out there that want employee information for any number of purposes, in this case probably to try to contact those employees to try to encourage them to make a decision one way or the other when it comes to labor organizing. It is very rare. It is unprecedented.

I would also add that not only are they doing this, the Federal Government or the NLRB has yet to even provide a justification as to why this proposed rule is being proposed, which brings up sig-

nificant concerns about proper promulgation of any rule at the Federal level.

Mr. BENTIVOLIO. So if I understand this, you just said that the Federal Government is requiring you to turn over private emails, employee information; correct?

Mr. FISHER. Yes, sir.

Mr. BENTIVOLIO. We can't get that from them on some other things.

Mr. FISHER. Without a justification as to why it is being proposed.

Mr. BENTIVOLIO. Say that again?

Mr. FISHER. Without providing a justification as to why this proposal even exists in the first place.

Mr. BENTIVOLIO. It seems to be a problem. The government can get from us all the information about our lives, but we can't get simple emails on other issues that this committee is dealing with.

Can we talk about what role do acquisition land development and home construction loans have on the home-building industry? Can you elaborate a little more on that, Mr. Kligman?

Mr. KLIGMAN. Absolutely. So, from a personal example, our company used to have a revolving line of credit with several different lending institutions, and as we either financed for our buyers or built inventory homes, we would cycle through and create productivity.

That has effectively gone away. That leaves the option of either if you have the ability to finance out-of-pocket to produce and create jobs and work and opportunity, great, but the majority of the builders don't, and therefore they are forced to either be forced out of the game or look at alternative lending solutions, private investors, and effectively you are paying premiums, higher points, higher interest rates, and effectively acquiring a partner in the project where margins are already compressed, and it creates greater challenge and high risk.

Mr. BENTIVOLIO. I remember some time ago in that business actually teaching school. We had asked my students to go out and do some research on all the various departments that a builder has to associate with or come in contact with before they even begin building a home. You might help me out here. Not only do you have to secure a building permit, you have to get a land use permit; correct?

Mr. KLIGMAN. That is correct.

Mr. BENTIVOLIO. In some communities, they want to know the R factor for windows.

Mr. KLIGMAN. Energy calculations, soil erosion permitting. Yes, there is quite a variety.

Mr. BENTIVOLIO. Okay. So if you put a 2-by-4 exterior wall, you put four inches of insulation, the R value is 11 I think?

Mr. KLIGMAN. Correct.

Mr. BENTIVOLIO. It is 11. And that has been like that for how long?

Mr. KLIGMAN. I am a third-generation builder, so as long as I have been involved.

Mr. BENTIVOLIO. As long as I remember, too. If you go 2-by-6, it is R19?

Mr. KLIGMAN. You can increase the R value depending on that.

Mr. BENTIVOLIO. So here we have something we have been doing traditionally, or builders have been doing traditionally for three generations of builders, and the government now wants you to fill out a form, and they are a couple of pages long, if I am not mistaken.

Mr. KLIGMAN. They are, and they have limited the options of creating the same net result by using alternative methods, increasing the efficiency of your furnaces if the window R value—so different efficiency products that you can effectively choose. There are companies that are trying to legislate their products into the industry and force change so that it benefits their company, which again creates a burden on the consumer and forces people out of housing opportunities.

Mr. BENTIVOLIO. And also, the homebuyer could buy a less expensive home if they didn't have to buy all this energy efficient

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Mr. KLIGMAN. Correct.

Mr. BENTIVOLIO. And over a period of time if they want to improve the efficiency of their home, and as their finances permit, they can improve their situation; correct?

Mr. KLIGMAN. Correct. And with the current code having a 13-year payback, that is quite a bit longer than the average consumer is going to stay in their home and ever see the value of that.

Mr. BENTIVOLIO. And can you talk about some of the other paperwork? I know it was about this thick a pile, and a lot of different agencies, right?

Mr. KLIGMAN. Yes. And the different municipalities will have subcontracted out to agencies just to manage that, which again drives up permitting costs. Mr. Lenahan had communicated earlier sometimes the left hand doesn't talk to the right hand. In government we see that in our governmental agencies just to process a permit where there is no accountability for coordination of the different agencies that are managing that process. The length of time to process is extended, which impacts cost and increases uncertainty as well.

Mr. BENTIVOLIO. Very good.

Mr. Chairman, do you have more questions?

Mr. MICA. Thank you.

Let me go to Mr. Kligman again. The lead renovation repair painting rule, EPA has issued a requirement on a certified EPA renovator and that work must be conducted by an EPA-certified firm. Now, that probably is well intended, and any renovations to a house built before 1978 must comply.

I am told that the practical implications are quite different because the biggest percentage of folks are not using qualified individuals. What is happening as a result of that rule from your experience? Could you tell us?

Mr. KLIGMAN. Sure, and that is a great question. So the majority of the homes constructed before 1978, over 38 million, 88 percent of those homes do not have the targeted at-risk group that this rule was written for, which is pregnant women with children under 6. So the purpose of that rule is to protect that group. The majority of the homes prior to that time do not have that, and EPA removed

the opt-out ability for a homeowner to say I am not in this target group, I don't feel I am at undue risk, and I choose to forego the expense and cost associated with going through this process.

What effectively happens is if I provide a proposal and I am following the regulations, there is a cost impact to that that is significant, not only in dollars but in time as well to manage that, and there were people that aren't as committed to that, or the homeowners will choose to pull their own permits and try and do it themselves and circumvent the regulation, or they will pull their own permit and try to bring in a contractor on the back end and it penalizes the companies that are trying to accommodate a rule that doesn't really add value to the consumer.

Mr. MICA. I have some information that a survey conducted by the National Association of Remodeling Industry shows that 77 percent of the homeowners are avoiding the rule by either doing the work on their own or hiring non-certified contractor fly-by-night operators or underground contractors. So that is pretty much the case?

Mr. KLIGMAN. I believe it is.

Mr. MICA. The practical effects of some of these rules and regulations don't have the results they intended, it appears.

Regarding the OSHA silica proposed rule, there are several of you that have spoken to this. Any suggestions for OSHA on how to improve the rulemaking process?

I guess Mr. Lenahan is—contact people that may be affected?

Mr. LENAHAN. I would be glad to comment on that. I think forming alliances is a great idea with industry and regulatory folks. We have had alliances in the past that have produced good results, not an OSHA example but a U.S. EPA example. The U.S. EPA eliminated a sector strategies program several years back where industry and agency could get together and talk about, hey, this is a rule that is going to kill us, and here is why it is going to kill us, and there were people from the agency that would actually sit down. They would come out here to the facilities. They would take a look at what you were doing to gain an understanding, and then they would take that back to D.C. and explain that this is why this is bad.

I think it did a couple of things. I think it helped transfer information that was good, but it also let the folks at the agency know that we weren't the bad guys, and then we saw them the other way also.

What we have now is really much more of a command and control relationship with OSHA and EPA, and I think we need to get back to where we actually are working together. None of us here, employers, want to do anything but protect our workers. They are our most valuable asset. They are our friends. They are our neighbors. They are our community members. We want them all to go home every day. We want them to lead good lives. It is irritating or frustrating when you feel that people don't understand that.

Mr. MICA. Does anyone else want to comment?

Mr. Fisher?

Mr. FISHER. Yes, Mr. Chairman. I would just add that one thing that we have seen that is frustrating is that there is not always

a demonstration of need that is fully articulated, or even fully researched. There needs to be a demonstration of need.

Whenever OSHA promulgates a rule, it needs to—the decision-making process needs to be fact based and science based. It can't simply be based on picking winners or losers because there is a group that you may want to support for something, again, that is not germane to employee health or safety. There are regulations in which there could be special interests that profit or something like that, and we need to make sure we avoid that.

And then I would just add, and it was hinted upon, is having that cooperative approach, working together, as opposed to a sometimes hostile approach. In other words, the carrot versus the stick we think seems to work very well because you have all stakeholders who are at the table who can really work together for the benefit of that core purpose of OSHA, which is health and safety, fact based, science based.

Mr. MICA. Ms. Kaboth?

Ms. KABOTH. I would just like to add I agree with both gentlemen. It would be nice to see more individualized effort by OSHA for every industry. Instead of just making a sweeping pronouncement saying everybody has to cut their exposure by half, to look at each industry and say, okay, what do we need to do here that really will improve things. That kind of cooperative effort I think would be very well received by business in general.

Mr. MICA. Very good.

At the conclusion here, I will first yield to Mr. Bentivolio to see if he has any final questions or a statement. And also to our witnesses, if there is anything that we haven't questioned you on or that you would like to bring up before this part of the hearing.

Mr. Bentivolio, did you have any other questions or comments?

Mr. BENTIVOLIO. Mr. Fisher, you mentioned that OSHA allows union representatives to accompany OSHA inspectors on work sites. How do business owners feel about this relationship between government agency and unions?

Mr. FISHER. Yes. Thank you, Mr. Chairman. In February of 2013, an interpretation letter by OSHA stated that for enforcement action, that now a union representative or a community organizer could come onto the job site of the company, a company that is potentially subject to unionization, to participate in that walk-through, in that inspection, or even in jobsite sanctions. If you have a union organizer that is attempting to infiltrate a company and interfere with the employee-employer relationship, it draws a distinct and definite concern about what the actual intentions of that person accompanying the OSHA inspector are, and it can certainly be disruptive, and there is no need for it.

OSHA, since the 1970s, has never done this, and suddenly there is this rule of interpretation that allows for this unprecedented interference. Again, the actual intentions do come into question when this occurs.

Mr. BENTIVOLIO. Intimidation.

Regulations sometimes make no sense. Thousands of jobs lost, homes priced out of the market or beyond the reach of some people because of some regulations or additional paperwork to comply with regulations that builders have been doing for three genera-

tions. I don't understand why people, when they see a 2-by-4 wall, they should be asking what is the insulation in the walls, right? But they don't see that, do they? And you have to go through—let's see. If you have a wetland in the back, even if it is temporary during construction, you have to put up an erosion fence?

Mr. KLIGMAN. There is soil erosion and soil protection and fence protection requirements depending on wetlands, and sometimes it has to be delineated because again for short periods of time it may not be defined as a wetland but an inspector will say "I want you to hire an expert and prove it."

Mr. BENTIVOLIO. Do you know all the regulations for home building?

Mr. KLIGMAN. No, I don't.

Mr. BENTIVOLIO. Do you have any idea how many regulations there are for home building?

Mr. KLIGMAN. I can't speak to that. One of our members is very active in the codes, but he has brought in the code book that used to be used and the stack that is used now. I will speak from my perspective as a professional. Unless that were your full-time focus, to just study the codes, as opposed to being a business person and creating job opportunities and providing services to consumers—and we have a long tradition of very happy homeowners—it is impossible.

Mr. BENTIVOLIO. And for the record, when he said what the regulations used to be, he held his thumb and ——

Mr. KLIGMAN. He actually had an old code book.

Mr. BENTIVOLIO. Maybe three-eighths thick, three-eighths of an inch to stack, and I think you signified about a foot-and-a-half high, right?

Mr. KLIGMAN. It is significant.

Mr. BENTIVOLIO. I think that is it. I would like to thank all the witnesses for coming today and offering your testimony.

Mr. MICA. Well, thank you again, Mr. Bentivolio, for inviting us to Plymouth, Michigan, and for the opportunity to conduct this hearing and hear from these witnesses.

I had one sort of general last question for all of you. In 2013, the Office of Information and Regulatory Affairs, office of the OMB, the Office of Management and Budget, they released a draft report discussing the benefits and costs of Federal regulations, and they found in part that burdensome regulations can impose significant costs on business. In the report it stated—and let me quote from it—"If they are not carefully designed, regulations can also impose significant costs on businesses, potentially dampening economic competition and capital investment."

That release and that statement said what it just said. I would like to ask you, do you feel that this Administration has pursued and adopted regulations that are carefully designed, or do you feel that they harm the economic competition and capital investment?

We will go right down the pike, just for the record.

Mr. FISHER. I will take a stab at that, Mr. Chair. I don't think that they have been carefully designed in particular. When a Federal agency is in the process of promulgating a rule without providing justification for that rule, there is absolutely no room for that, and it is burdensome.

You stated in your opening comments that EPA regulations have a $50 billion, with a B, price tag, just for EPA alone. To put that into perspective, that is more than the entire operating budget of the State of Michigan, and that is $50 billion worth of economic activity, $50 billion worth of potential growth and job creation that is not otherwise being put into the economy.

So there is a price tag, and it can be detrimental, and we do have to be absolutely careful and deliberate about what we do to make sure that regulations are sensible and needed.

Thank you, Mr. Chairman.

Mr. MICA. Again, the general question, Ms. Kaboth.

Ms. KABOTH. I listen often to politicians say we need to get more manufacturing jobs. However, all the regulations that I have had to comply with since I became president in 2005 are all designed to put me out of business. The regulations don't want you to manufacture. Nobody wants you near them. Obviously, I have to believe what I have to comply with. But I would say, yes, that the policies

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Mr. MICA. You said 2005.

Ms. KABOTH. 2005. Sorry.

Mr. MICA. Well, that transcends several administrations. Has it gotten better or worse?

Ms. KABOTH. It has gotten worse, it definitely has gotten worse. Well, they have gotten a lot more expensive to comply with. There were many early on that were just a matter—and for us, we don't have nearly the paperwork as you have with building a house because we don't add on very often. It is too expensive and we can't afford it. But there were more regulations, but they weren't as damaging.

Mr. MICA. And didn't potentially put you out of business?

Ms. KABOTH. Right.

Mr. MICA. Mr. Lenahan?

Mr. LENAHAN. I would say look at the data, and the data shows that four of the top five years for regulation generation have happened under the Obama Administration. One of the five is under the Bush Administration.

Mr. MICA. They seem to be coming out day and night.

Mr. LENAHAN. The data would reflect that.

Mr. MICA. Mr. Kligman?

Mr. KLIGMAN. I echo the sentiments, and it does seem that there is a disconnect between the promulgation of some of these rules and the practical application and nature and the impact and detriment to job growth and the economy and opportunity.

Mr. MICA. Well, I want to thank all of our four witnesses. Again, Mr. Bentivolio, he is a great breath of fresh air in Congress. He comes from a business background.

I am not an attorney. Actually, I was a developer. In the days I did projects, I could go into city hall in the morning, get the permit in the afternoon. Now I think the last project I was involved in it took six months to do the permitting, and it just went on and on. So it has gotten pretty tough to do business, stay in business.

And then the practical application. You see the lead, well-intended regs, but then the consequences, people find a way to avoid

that cost and maybe endanger themselves. We may be endangering more people the way we are doing this.

It is interesting, too, to see that nobody seems like they are trying to avoid compliance. It is just a matter of a cooperative and directed effort and something that can be built on common sense, and also looking at the final results, which is so important that you want to achieve. Particularly, I will use Mr. Lenahan's foundry quote in many future speeches when he testified today that we have gone from 5,000 to 1,900 in many of those jobs. Activity and employment and economic opportunities have gone beyond our shores. That is very sobering. I was way underestimating. He said 350,000 jobs. That is a serious impact.

I saw the jobs report this past week. We went down in numbers to 6.3, but then I saw almost a million people left the workforce. We have fewer people actually working than we have had in 25 years, something like that, a phenomenal decrease, which makes us less competitive, a less skilled workforce and many people becoming more reliant on the government either in retirement or—and then some of the things that have passed that have encouraged part-time rather than full employment. People are struggling now with two and three jobs. They are not sure of their employment. If the brick factory goes down, that is 80 people and a century of conducting honest and productive business. Very sad.

As I drove in I saw a lot of vacant properties, which is maybe back to do another hearing on those. But you become concerned when you see the decline in good-paying jobs, employment, expansion of businesses, too many of them boarded up or closed down.

I have learned some things here hopefully we can take back. Mr. Bentivolio is on the Small Business Committee, which is so important to this community, the state, and the country, and trying to keep those folks in business and employing people and expanding.

But again, very informative, a fairly brief hearing. But we will make this part of the record. If there is additional information that we will submit either from witnesses, we may have additional questions we will submit to you, or additional information, and if you have constituents and others that want to submit things.

Without objection, the record will be kept open for a period of 7 legislative days.

There being no further business before the Subcommittee on Government Operations, this hearing is adjourned. Thank you.

[Whereupon, at 10:50 a.m., the subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

The Dodd-Frank Act: A Regulatory Impediment to Job Creation

To: Oversight and Government Reform Committee of the United States House of Representatives, Subcommittee On Government Operations

By: James E. Tompert, Esq.
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May 15, 2104

INTRODUCTION

I am writing in response to the invitation by Congressman John Mica, at the conclusion of the hearing on May 6, 2014 before the Subcommittee on Government Operations of the House Oversight and Government Reform Committee ("Committee"), to submit written comments on the subject of regulatory impediments to job creation. Since the testimony during the hearing was primarily about the adverse impact of government regulations on the construction business, the focus of these comments is on the adverse impact of the regulations issued pursuant to the Dodd-Frank Act.

I am an attorney with offices in Troy, Michigan, and a resident in the Congressional District of Congressman Kerry Bentivolio, a member of the Committee. In 1981 I graduated from the University of Michigan Law School, and thereafter until 2009, practiced law in Washington, D.C. In 2010, I moved back to Michigan to open my own law practice. During the course of my legal carrier I have represented numerous banks, financial institutions and a wide variety of other businesses in Washington, D.C., Maryland, Virginia and Michigan. I am intimately familiar with the Dodd-Frank Act, and have given presentations and written articles on the Act and its regulations. I am not submitting these comments on behalf of any bank or financial institution, nor have I been retained to do so. Instead, these comments are based upon my legal experience during the last thirty

years and familiarity with the provisions of the Act and its regulations.

As explained below, the regulations issued pursuant to the Dodd-Frank Act will substantially increase costs for bank and financial institutions, serve to further consolidate the banking industry and create uncertainty, all of which will restrict access to credit, and thereby create a regulatory impediment to job creation.

BACKGROUD

On July 21, 2010, President Obama signed the Dodd-Frank Act, entitled the "Dodd-Frank Wall Street Reform and Consumer Protection Act," into law. Treasury Secretary Tim Geithner described the Act as "the most sweeping set of financial reforms since those that followed the Great Depression," and indeed it is.

The Act was the joint product of Senate Banking Committee and House Financial Services Committee. Although the Act became effective upon enactment, most of its provisions did not go into effect until regulations mandated by the Act are issued, and will continue to be monitored by the Congressional Committees.

The scope of the Act is enormous. It is approximately 1,250 pages long, is divided into 16 different titles and is very complicated. It created 9 new federal agencies, called for the issuance of hundreds of new federal regulations, mandated the issuance of 67 government studies, required at

least 22 periodic reports by various government agencies and has caused a paradigm shift in the operations of banks and financial institutions.

The major provisions of the Act which affect banks and financial institutions are as follows. Title I of the Act creates a Financial Stability Oversight Council, which is mandated to identify and address systemic risks posed by large complex financial firms and make recommendations to the Federal Reserve for increasingly strict rules for capital, leverage, liquidity and risk management. The Council is able to approve, with a 2/3 vote, a decision by the Federal Reserve to require a large complex company to divest some of its holdings if it poses a grave threat to the financial stability of the United States.

Title II provides for the liquidation of covered financial companies and creates a liquidation procedure to unwind failing financial companies that pose a systemic risk to the financial stability of the United States.

Title III transfers powers to the Comptroller of the Currency, the FDIC and the Federal Reserve Board of Governors, and abolishes the Office of Thrift Supervision. The amount of deposits insured by the FDIC is increased from $100,000 to $250,000.

Title VI codifies a modified version of the "Volcker Rule," named after Federal Reserve Chairman Paul Volcker, by amending the Bank Holding Company Act, subject to new regulations. It limits banking entities to

owning no more than 3% of the total ownership interest in a hedge fund or private equity fund. The total amount of a banking entity's interest in a hedge fund or private equity fund cannot exceed 3% of the Tier 1 capital of the entity. It also provides for "countercyclical" capital requirements, so that capital levels increase during times of economic expansion and decrease during times of contraction.

Title VIII tasks the Federal Reserve to create uniform standards for the management of risks by systemically important financial institutions.

Title IX calls for increased regulation of credit rating agencies and asset-backed securitization. Banks are required to retain at least 5% of the credit risk associated with assets that back non-exempt asset-backed securitizations.

Title X creates a Consumer Financial Protection Bureau ("CFPB"), which is an independent agency housed at the Federal Reserve, led by a director appointed by the President. The Bureau has vast rule making authority governing virtually all financial entities, banks and non-banks, that offer consumer financial services or products. It also has authority to examine and enforce regulations for banks and credit unions with assets over $10 billion, all mortgage-related businesses, i.e., lenders, servicers, mortgage brokers and foreclosure relief companies, and large non-bank financial companies, debt collectors and consumer reporting agencies.

Banks with assets of less than $10 billion will be examined by the bank regulators. Title X also consolidates consumer protection responsibilities currently handled by the Office of the Comptroller of the Currency, Office of Thrift Supervision, FDIC, Federal Reserve, National Credit Union Administration and FTC.

Title XI requires the Federal Reserve to establish prudent standards for the institutions it supervises, that include risk-based capital requirements and leverage limits, liquidity requirements, overall risk management requirements, credit exposure requirements, and concentration limits. The Federal Reserve may require supervised institutions to "maintain a minimum amount of contingent capital that is convertible to equity in times of financial stress."

Title XIV concerns mortgage reform and anti-predatory lending. It calls for residential mortgage loan origination standards, prohibition on steering incentives, minimum standards for mortgages, disclosures for residential mortgage loans and enforcement authority by State Attorney Generals. It establishes an of Office of Housing Counseling, mandates appraisal requirements and amends the Real Estate Settlement Procedure Act ("RESPA"), Truth In Lending Act ("TILA") and Equal Credit Opportunity Act ("ECOA").

Each of the foregoing provisions of the Act however are not

self-effectuating. Instead, they were designed to be implemented, in major part, by the promulgation and enactment of extensive government regulations. During the last four years since the Dodd-Frank Act was enacted, government regulators have drafted more than 200 new regulations to implement its provisions. As stated in a recent article in the Washington Post on February 7, 2014, "local banks say this is the year they'll feel the most impact," of the Dodd-Frank regulations. The complexity of the regulations issued to date is staggering. For instance, the new Volker Rule is 800 pages long. The Supervision and Examination Manuel for the CFPB is 924 pages, which does not include additional CFPB Mortgage Origination Procedures Examination Procedures, Mortgage Servicing Examination Procedures, Education Loan Examination Procedures, RESPA Procedures, TILA Procedures, Mortgage Service Requirements, Short-term and Small Dollar Lending Procedures, ECOA procedures and Debt Collection Examination Procedures, all of which consist of thousands of pages of additional procedures and regulations.

Unfortunately, and to make matters even worse, the new regulations issued to date only account for about half of the regulations contemplated by the Dodd-Frank Act. The remainder are still being drafted to be issued in the near future.

REGULATORY IMPEDIMENT TO JOB CREATION

In today's economy the biggest obstacle to creating more jobs is the inability of small businesses and entrepreneurs to obtain capital. The best way for small businesses and entrepreneurs to do so is for the government to create a better economic environment, with less regulation. Recently, however, I have encountered numerous small businesses and entrepreneurs who have complained about their inability to finance their operations and hire new employees. In addition, I recently spoke to an accountant who is a principal in an established accounting firm in Southeastern Michigan and he said that this a common complaint from his small business clients.

Unfortunately, the regulations issued under the Dodd-Frank Act have made it more difficult for banks to increase lending services to finance job creation. At the outset, it is clear that numerous government agencies have incurred, and will incur, extraordinary costs in their implementation of the Dodd-Frank regulations. As Congressman Joe Walsh, Chairman of the House Committee on Small Business, stated in his Opening Statement before a hearing on the Dodd-Frank Act on June 16, 2011:

> According to the GAO it will cost $1 billion to implement this new law. It will **drain $27 billion job creating funds from the economy over ten years** and require hiring more than $2,600 new full-time federal government employees.

Emphasis supplied.

In addition, it is a simple fact that each new regulation, or change in

an existing regulation, increases the cost of doing business by the regulated industry. As such, the Dodd-Frank regulations have increased, and will continue to increase, the cost of doing business for banks and financial institutions. There are significant compliance costs, first, to interpret and understand the new regulations, which by itself is an enormous task, and then, to comply with their terms and conditions. Using the Volcker Rule as an example, it would literally take a Staff Compliance Officer at least several weeks just to read and understand the new regulation! The same is true for the CFPB procedures and regulations. The increased costs of compliance will have to be absorbed by the larger banks, ultimately resulting in additional costs to consumers, while they are likely to cause many smaller banks, community banks and credit unions to go out of business. In this regard, I noticed that on July 18, 2013, Tanya Marsh, Associate Professor of Law at Wake Forest University, submitted written comments to the Committee entitled "Regulatory Burdens: The Impact of Dodd Frank on Community Banking," on behalf of the American Enterprise Institute, in which Professor Marsh stated that "[f]or some community banks, the regulatory burdens imposed by Dodd-Frank will be the straw that breaks the camel's back, forcing them out of business." In addition, on June 15, 2011, Mark Sekula, Executive Vice President and Chief Lending Officer of the Randolp-Brooks Federal Credit Union, on behalf of the National Association of

Federal Credit Unions, in a copy of his written testimony submitted to the House Small Business Committee, Subcommittee on Economic Growth, Capital Access and Tax, stated his concerns about the impact of the Dodd-Frank Act on small business lending by credit unions, which are prevalent in the State of Michigan. Since Professor Marsh and Mr. Sekula expressed their concerns, bank consolidation has continued and an increasing number of community banks have gone out of business, which further restricts lending to small businesses.

In addition to increased costs of compliance, the Dodd-Frank regulations have caused uncertainty in the banking industry. As Ronald Paul, Chairman and Chief Executive Officer of Eagle Bank was quoted in the Washington Post Article referenced above: "It creates a very confusing situation for the entire industry." This is especially so since there are approximately another 200 regulations that are still in the process of being drafted, which is a staggering figure. It is very difficult for any business to operate in an environment of uncertainty. In the banking industry, uncertainty raises credit risks, increases the possibility of litigation, and makes it more difficult to hedge against risks, which, as a consequence, restricts lending. Managing this onslaught of additional regulation, coupled with understanding all the new regulations that have recently been issued, will be a significant, if not an impossible, challenge for any bank or financial

institution. Also, it is a little known fact that the average bank has only about 40 employees. There is simply no way that a bank with approximately 40 employees can keep up the demanding crush of paperwork created by of the new regulations and the regulations to be issued in the near future.

Accordingly, it is incumbent upon Congress, the Committee and the other Congressional Committees mentioned above, to thwart this onslaught of regulations on the banking industry. This can be done in multiple ways, including a legislative moratorium on new regulations, a requirement that before any regulation can go into effect it subject to a cost/benefit analysis, legislation that establishes a bipartisan commission to lead the CFPB, a restriction on the authority of the CFPB to write new regulations, and other appropriate legislation.

I appreciate your consideration of these comments.

Before the

Occupational Safety and Health Administration

United States Department of Labor

March 28, 2014

Comments of Thomas J. Slavin, CIH, CSP, CSHM, CPEA on

Proposed OSHA Rule for

Occupational Exposure to Respirable Crystalline Silica

Docket No. OSHA 2010-0034, 78 Fed Reg. 56274 (September 12, 2013)

Executive Summary

Good Afternoon. I am Tom Slavin, certified industrial hygienist, certified safety professional, and certified safety and health manager, with Cardno ChemRisk in Chicago, IL. I have been associated with the foundry industry for more than 30 years, much of that time as corporate safety and health director for Navistar, a manufacturer of trucks and engines with multiple foundries. I am here as Chair of the 10Q Safety and Health Committee of the American Foundry Society (AFS) to talk about the OSHA proposed rule for respirable crystalline silica.

In this proposed rule, OSHA has failed to meet its obligation to show that the rule is reasonably necessary and appropriate. **In particular, [CHART - T1] OSHA has failed to establish evidence of a significant health risk below the current PEL, has failed to use best available evidence in its health assessment, has failed to show technological feasibility of meeting the proposed PEL, has failed to consider exposure variability, has failed to show technological feasibility of accurately measuring exposures at the proposed PEL, and has failed to show economic feasibility of the proposed PEL.** Moreover, several specific provisions of the proposed rule are unworkable, unnecessary, and unwise.

1. OSHA has failed to establish significant health risk below the current PEL.

OSHA has failed to show a need for a new standard with a lower PEL, and has not established a significant risk of silicosis or other disease at exposures below 100 $\mu g/m^3$. OSHA goes to great lengths to manipulate data and models to try to establish theoretical estimates of disease, despite clear evidence to the contrary. Empirical data documents a more than 90% decline in silicosis mortality from 1968-2010. This is documented in other submissions to the docket and is clearly shown by Figure I-1 in the Preliminary Quantitative Risk Assessment (PQRA) and updated in this chart. [CHART – T2] The PQRA undertakes a discussion of possible underreporting of cases, but underreporting does not affect the trend. Whatever reporting issues may exist would apply consistently to all years and do not affect the conclusion that there is a clear and dramatic downward trend in silicosis deaths.

Current silicosis cases are likely attributable to higher past exposures or to more recent exposures above the current PEL. There is a 15-25 year latency period for the development of silicosis, so current cases reflect much higher past exposures from 25 to 50 years ago. As discussed below, during that time exposures to silica have declined substantially and the evidence demonstrates that trend is continuing. A continuing decline in silicosis cases is thus expected, especially with strict adherence to the current PEL. [CHART –T3]

Moreover, **OSHA has ignored evidence of a threshold for health risks at or above the current PEL, evidence indicating that there is no need for a lower PEL**. Comments to the docket prepared by Dr. Peter Valberg and Dr. Christopher Long[1] conclude that OSHA's analyses of the occupational data as to respirable crystalline silica exposure fail to adequately consider the weight of evidence for a response threshold, which is supported by results from animal toxicology studies, mechanistic analysis, and epidemiologic studies.

The Valberg-Long comments noted that **the linear dose-response model used by OSHA, was not capable of finding a threshold even though one is evident from the data**. A review of

[1] Comments on OSHA Proposed Crystalline Silica Rule by Peter Valberg and Christopher Long, on behalf of the U.S. Chamber of Commerce, dated January 27, 2014.

epidemiological data by Dr. Peter Morfeld[2] concluded that when exposures are consistently maintained at or below 100 $\mu g/m^3$, there are no excess risks of silicosis, lung cancer, renal diseases or non-malignant respiratory diseases.

Thus, **OSHA has not only failed to establish evidence of a health risk below the current PEL, but there is clear evidence that no such risk exists. The clear downward trend of silicosis cases related to past exposures should continue given more recent declines in exposure. Any other diseases associated with excess exposure to respirable crystalline silica should follow a similar trend. AFS believes that enforcement of the current PEL will continue to reduce residual disease.**

2. OSHA has failed to use best available evidence in its health assessment.

In developing its health risk conclusions, OSHA has failed to consider the weight of evidence from animal toxicology studies, mechanistic analysis, and recent epidemiologic studies. **OSHA has ignored many relevant studies and epidemiologic models, and exhibited numerous biases in its analysis, calling into question the results of its health assessment. [CHART- T4]**

OSHA's risk assessment is based on a selective reading of the literature, particularly for foundries. In a 2011 position paper entitled Lung Cancer and Foundry Workers, the Industrial Industries Advisory Council reviewed 30 relevant foundry epidemiology studies.[3] The PQRA analysis includes only 7 of those 30 foundry studies and gives them little consideration.

Two other important studies by the UK Health and Safety Executive are discussed in the AFS written comments. One is a 2003 study on silica carcinogenicity hazard assessment[4] and the other

[2] Comment of Dr. Peter Morfeld on Epidemiological Issues Related to OSHA's Proposal of an Occupational Health Standard for Crystalline Silica, dated February 7, 2014 and submitted to OSHA-2010-0034
[3] The study is available at: http://iiac.independent.gov.uk/pdf/pos_papers pp29.pdf.
[4] Health and Safety Executive (2003). Respirable Crystalline Silica – Phase 2. Carcinogenicity. Hazard Assessment Document EH75/5.

is a 2002 study on silica potency and exposure response.[5] These HSE reports note that evidence suggests the existence of a threshold, and that exposures to RCS insufficient to cause silicosis would be unlikely to lead to an increased risk of lung cancer. **More than 40% of the references cited by the HSE in these two studies are omitted by OSHA's review. OSHA's scientific review is, in a word, incomplete.**

[CHART – T5] Experts who have reviewed OSHA's health risk analysis have identified numerous biases and flaws, including study selection bias, where OSHA rejected studies that did not fit its hypothesis; data selection bias, where OSHA's analysis excluded the highest exposure group from a study because it did not fit its hypothesis; model selection bias, where a model was selected to produce a particular result; model uncertainty bias, where one specific model is assumed to be correct; model over-fitting bias; confirmation bias; specification errors; investigator bias; and threshold smoothing and shifting bias.

[CHART T6] **Perhaps the most obvious example of OSHA's bias can be found in the selection and use of epidemiologic data from the Vermont Granite Shed Worker studies. This chart summarizes relevant features of two studies of the same worker population. OSHA selects an earlier study by Attfield and Costello[6] over a later and more complete study by Vacek.[7] The Vacek study had more workers, more lung cancer cases, longer follow-up, better exposure data, and more accurate status determination than the Attfield and Costello study.**

OSHA's review of health effects and analysis of information is far from comprehensive, particularly with respect to foundry information, and omits many relevant references and reviews. To borrow from Dr. Cox's comments, "OSHA simply announces its own beliefs *ex cathedra*, or repeats the judgments of others with whom it agrees, without providing a rational, independently

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[5] Health and Safety Executive (2002). Respirable Crystalline Silica – Phase 1. Variability in fibrogenic potency and exposure-response relationships for silicosis. Hazard Assessment Document EH75/4.
[6] Attfield M, Costello J (2004) Quantitative Exposure-Response for Silica Dust and Lung Cancer in Vermont Granite Workers. Am J Ind Med 45:129-138
[7] Vacek PM, Verma DK, Graham WG, Callas PW, Gibbs GW (2011) Mortality in Vermont Granite Workers and Its Association with Silica Exposure. Occup Environ Med 68:312-8

verifiable derivation for its conclusions." In summary, **OSHA not only has failed to use, but has in fact, rejected best available evidence in its health assessment**.

3. **OSHA has failed to show technological feasibility of meeting the proposed PEL.**

OSHA has failed to show technological feasibility of meeting the proposed PEL. Foundries have been diligently working on silica dust control for decades. AFS has provided numerous support materials, and silica dust control has been a frequent topic at national, state and local foundry meetings for many years before OSHA even existed. Foundries have willingly invested billions of dollars to put in place a vast array of control measures which have succeeded in protecting employees and nearly eliminating the risk of silicosis in the American foundry workplace. Investment in new control measures continues as technology evolves. **Despite extensive, expensive and sincere efforts, consistent compliance with the current PEL - which OSHA proposes to cut in half – has not proven feasible in many foundries.**

[CHART – T7] There are three aspects of technological control feasibility that I will address here. The first point is that the examples that OSHA uses to try to establish evidence of feasibility, actually demonstrate the opposite. Second is that the control capability of the solutions OSHA presents is greatly overstated. Third, OSHA's analysis of feasibility is directed at the wrong control target, a much easier target that is far different than the control target that employers face with the proposed rule. A fourth aspect of technological feasibility will be presented by Mr. Robert Scholz. He will explain how OSHA has failed to incorporate concepts of exposure variability and confidence in its assessment and how its analysis of sampling results is flawed and fails to support its conclusion of feasibility.

[CHART T-8] **The PEA's foundry specific references fail to support OSHA's feasibility conclusions.[8] To the contrary, the references actually demonstrate that controls are often unsuccessful at achieving control for even the current PEL, cost much more than the OSHA**

[8] Appendix 2 – AFS Review of Foundry References in OSHA Preliminary Economic Assessment, 2014.

estimates, are more difficult, and take more time to implement than the proposed standard allows. In our written comments we provide a detailed review of the 18 references used by OSHA to create 26 success scenarios in the PEA. Several of the references document installation of numerous iterations of engineering controls to try to achieve compliance.[9] In some cases, contrary to the assertion of feasibility in the PEA and as detailed in the review, all of these efforts could not achieve compliance with even the current PEL. In other cases, results only approaching compliance were actually achieved.

[CHART T9] In the PEA OSHA uses a single data point, or one set of samples on one particular day, to assert continuous control capability for that foundry. OSHA then extrapolates that assumption to the entire foundry industry. For example, **OSHA cites a single sample result of 42µg/m^3 in one reference (Ref N in Appendix 2) as evidence of feasibility of the proposed PEL for abrasive blasting operators. However, the reference contains a March 7, 1966 letter from the OSHA Area Director to the employer, referring to that very same sample result, cautioning that "It is reasonable to expect that on any particular day an overexposure to silica could occur." The Area Director is referring to overexposure to the current PEL. Thus, if the sample result cited in the PEA cannot be used as evidence of compliance with even the current PEL,[10] it cannot, therefore, be used to demonstrate control for the much lower proposed PEL.**

The situations described by OSHA in the PEA are not representative of the entire industry and results cannot be extrapolated. The references demonstrate reduced exposures for only a specific set of circumstances. However, OSHA takes the percent reduction applicable to a specific example and assumes the same capability for every other foundry. [CHART T10] For example, on page IV-170 of the PEA OSHA notes that a 69% reduction in cleaning finishing operator exposure occurred in one foundry that installed downdraft ventilation. Using this isolated example, and without demonstrating continued performance, OSHA assumes that the exposures of

[9] Appendix 2 – AFS Review of Foundry References in OSHA Preliminary Economic Assessment, 2014.
[10] Appendix 2 – AFS Review of Foundry References in OSHA Preliminary Economic Assessment, 2014.

all of the cleaning and finishing operators exposed above the proposed PEL can be reduced by 69% with this control. However, many foundries already use this control technique, so it is not appropriate to assume a 69% reduction for those workers. Moreover, controls are usually chosen for optimum applicability to a specific operation and results are sure to be less successful in operations where that control is not as applicable.

OSHA compounds this error by assuming additive effectiveness. In the same example *OSHA adds another 67% reduction for pre-cleaning,* concluding that the combination of two controls are independent and will together produce a 90% reduction in exposure. There are three problems here. First, **silica exposures in cleaning and finishing are not usually due to dirty castings, but to burned in sand that is not removed in precleaning. Secondly, most foundries already preclean castings before cleaning and finishing operations**, so the reduction would not apply. Thirdly, assuming additive effectiveness flies in the face of industrial hygiene experience.

OSHA goes on in the example to subtract an additional 38 $\mu g/m^3$ from the assumed exposures by assuming reduced background silica level, another assumption that runs counter to industrial hygiene experience. **OSHA then concludes that feasibility with the proposed PEL is thereby demonstrated by this combination of three reductions. There is no basis for concluding that the degree of success achieved in one isolated situation can be replicated to other dissimilar operations. And the assumption of fully additive benefits of multiple controls is simply without foundation or merit.**

An examination of the references shows that data points are taken out of context. The references contain clear evidence that compliance with even the current PEL is often not even achievable with confidence, that engineering controls are more expensive, and that controls take longer to implement than allowed by the proposal. Finally, it should be pointed out that *of the 11 foundries that could be identified in the OSHA case studies to demonstrate feasibility, 5 are no longer in business.*

[CHART T11] OSHA's technological feasibility assessment assumes that the simplistic controls it describes are capable of much greater control than is warranted. Dust control, especially at such low exposure levels as the proposed PEL is challenging and complex. **One gram of respirable silica sand – about the same amount of dust as in an artificial sweetener packet – would be enough to generate an exposure above the proposed PEL throughout a space the size of a football field and 13 feet high.** A typical foundry operating in a space that size may use more than a thousand tons of silica sand each year.

Many of the OSHA feasibility and cost assumptions are based on simple concept drawings from the ACGIH ventilation manual which are little changed from the 1951 first edition and were in use by the Michigan Department of Health before that. They are concept drawings meant to be used as a starting point for design. Moreover, these drawings were not designed for the proposed PEL, or even specifically for silica control.

Ventilation drawings are a valuable industrial hygiene tool, but require adaptation and enhancement. For example, in the case of the muller hood and LEV control for sand system (muller) operator listed in the PEA (page V-A-13, V-A-50), foundry experience demonstrates that to apply this concept exhaust CFM must be increased to avoid "puffing" when material is added to the muller. In addition, exhaust rate in the ductwork must be sufficient to avoid caking and plugging of the ductwork due to clay and moisture.

Dust levels at the proposed PEL approach clean room concentrations. As shown here [CHART – T12] the dust levels associated with an ISO 9 level clean room could exceed the proposed PEL. A clean room design (e.g., smooth surfaces, constant climate control, no open doors, vestibules for entry and exit, and no movement of material handling equipment) is simply not possible in a foundry environment processing hundreds of tons of molten metal, hundreds of tons of sand, thousands of cores, molds and metal castings. The application and costs of clean room equipment, processes and construction features, plus the cost of designing for environmental and process variation, accounting for supply air, and continuous maintenance are not contemplated in the controls described by OSHA in the PEA. The requirements are such that entire facilities will have to be rebuilt to an impossible design specification. OSHA's feasibility and cost assessment fails to account for these factors.

OSHA's feasibility analysis uses the wrong target for compliance, considering controls feasible if exposures are ever able to achieve compliance. However, when enforcing standards, OSHA uses a non-compliance model to cite employers for a violation if one sample EVER exceeds the PEL even if the average exposure is below the PEL. Employers must use a compliance model to implement control to a level such that the average exposures are far enough below the PEL that exposures are NEVER above the PEL despite sample variability. This chart [CHART – T13] compares the concept of feasibility as used in the PEA with the concept used by foundry managers and engineers to attempt to achieve compliance. *Often the average that must be maintained is less than one half the PEL.*

4. OSHA has failed to consider exposure variability.

A serious problem with OSHA's assessment of technological and economic feasibility is the lack of appreciation of exposure variability and its implications. Evidence of OSHA's failure to appreciate the relevance of exposure variability is found not only in the PEA, but in questions 15a, 16 and 17 of the NPR, which refer to achieving levels below the proposed PEL "most of the time." "Most of the time" is not a valid measuring stick for assessing compliance, as viewed in the context of OSHA's enforcement activities. Mr. Robert Scholz, one of the world's foremost experts on foundry environmental controls is here today to describe work he has done to characterize the variability of exposures in foundry jobs and the implications of that work on this proposed rule.

BOB SCHOLZ

Tom Slavin (Continued)

In enforcement situations OSHA uses a non-compliance model to cite employers for a violation if one sample ever exceeds the PEL, even if the average exposure is below the PEL. Employers must use a compliance model to implement controls to a level such that the average exposures are far enough below the PEL that exposures are almost never above the PEL despite sample

variability. Often the average that must be maintained is below one half the PEL and possibly below one fourth. OSHA's economic and technological feasibility analysis is based on a wholly inappropriate compliance target that renders its conclusions meaningless for this rulemaking.

5. **OSHA has failed to show technological feasibility of accurately measuring exposures at the proposed PEL.**

OSHA has **failed to show technological feasibility of measuring exposures** at the proposed PEL. OSHA's selective use and misinterpretation of data from its Salt Lake City laboratory omits consideration of numerous types of errors associated with sampling and analysis of respirable crystalline silica. The sampling and analytical error associated with respirable silica measurement at the proposed PEL is much greater than calculated by OSHA.

[CHART – T14] **OSHA's estimate for analytical error is based on performance with pure quartz, without factoring in the effect of interferences associated with real world samples and PAT samples.** OSHA's test samples use reference materials directly applied to the filter, not filters subject to sampling or sample preparation such as acid washing. Samples were analyzed together, possibly using the same calibration curve and possibly by the same analyst. There is no measure of inter-laboratory variation and possibly no intra-laboratory variation. OSHA's 10% estimate for analytical error appears to be based on a calibration exercise, rather than an overall error estimate of all potential sources of analytical error.

The sampling bias of 5% that OSHA uses in the PEA applies to the pump flow rate only. *ASTM standard D4532 for respirable dust sampling includes additional errors for sampling, weighing and method bias which are not included in OSHA's error estimate. Errors associated with cyclone performance alone as discussed in the PEA document can be from 10% (PEA page IV-22) up to 20% (PEA page IV-43).*

A review of sampling and analytical error (SAE) by Cardno ChemRisk based on a more complete characterization of error sources found the SAE to be between ±31% to ±54%.[11] OSHA's conclusion that *its own* lab can analyze correctly, but that every other laboratory must improve to match OSHA's performance within two years, is troubling on two counts. First, it seems to be an unwarranted disparagement of professional laboratories. Second, it creates problems for foundries seeking accurate exposure measurements as the basis for critical and costly compliance decisions. **If accurate data is not available for two years, then engineering controls should not be required until after that data is available.** This of course presumes, erroneously, that the controls center on a target which is feasible.

6. OSHA has failed to show economic feasibility of the proposed PEL.

[CHART T15] OSHA vastly understates costs for the foundry industry to comply with the proposed silica standard. OSHA's preliminary economic assessment (PEA) is seriously flawed in its methodology, omits many substantial costs, and seriously understates the costs to comply with the proposal.

An independent economic analysis shows the proposal would result in incremental annual costs of $2.2 billion for the foundry industry. A summary of annual costs for foundry sectors based on the URS and Environomics report is shown here [CHART – T16]. ***URS and Environomics concluded that compliance with the proposed PEL would result in annual costs equivalent to 9.9 % of foundry revenue and 276% of foundry profit.*** The independent URS analysis applies more accurate unit costing to OSHA's model and includes some missing costs, but does not completely correct for the major methodological errors nor include all of the missing costs.

[11] Comments of Cardno ChemRisk on OSHA's Discussion of the Adequacy of Sampling and Analytical Methods for Measuring Respirable Crystalline Silica at Exposure Levels of 25 and 50 $\mu g/m^3$. Submitted by American Chemistry Council's Silica Panel to Docket No. OSHA-2010-0034.

OSHA's $44 million cost estimate is woefully inadequate. The independent reanalysis estimates costs at $2.2 billion. [CHART - T17] OSHA's mistakes include the way OSHA discounts costs, fails to recognize higher marginal costs for controlling to lower levels, uses the wrong control target, makes incorrect assumptions in its per-worker cost methodology, understates unit costs, and omits other costs entirely. Let me describe some of the most significant errors.

Discounted cost – The methodology used by OSHA in the PEA discounts costs associated with employees exposed above 100 $\mu g/m^3$. For general industry, OSHA calculates that two thirds of exposed workers (81,000 out of 122,000) are above the current PEL. [CHART – T18] This example from the PEA shows how the discounting works. The estimated cost of controls for sand system operators is $923,000, but because two-thirds of exposed workers are above 100 $\mu g/m^3$ the costs are reduced to only $307,000. There are three errors in this approach. First, **OSHA's exposure estimates are based on old and biased data which overstates the percent of workers in the over-100 $\mu g/m^3$ category and the discounted cost.** OSHA's exposure estimated are based on enforcement data from 1979-2003. Data provided in our comments demonstrate a substantial reduction of exposures over time which OSHA fails to consider. Moreover, data from enforcement are not representative of average exposures. There is a tendency for compliance officers to sample employees whose exposure is perceived to be the highest. Follow up sampling tends to be focused where problems have been found, so the sample data base is further skewed toward higher exposures rather than a non-biased statistical sample. Thus, OSHA's sample data are not random and are not statistically representative.

As an aside, it is interesting to note that **"representative sampling" in the proposed standard is redefined to mean the highest exposures** [section (d)(1)(iii)].

The net effect of this overestimation of exposures is to improperly assign a larger share of compliance costs to the over-100 $\mu g/m^3$ category and not count them. In the case of sand system operators, OSHA discounts two-thirds of the compliance costs. However, our written comments show that these proportions should be reversed. Thus, **correcting the exposure overestimation error would significantly increase costs attributed to the proposal, doubling costs in this example.**

A second error with this approach assumes that no controls will be needed for workers exposed below the proposed PEL. However, as pointed out in the earlier discussion of variability, many workers who are exposed at or below the proposed PEL on any given day will be exposed above the PEL on another day. **Foundry exposure variability data establish that the cost of compliance with OSHA's proposal should include controls for employees exposed above one half or even one fourth the proposed PEL.**

The third problem with this approach is the assumption, which I will turn to next, that no additional cost is required to reduce exposures by one half, from 100 to 50 $\mu g/m^3$.

Marginal cost - The underlying theories that the agency utilizes for its economic model contradict basic economic theory by failing to acknowledge the higher marginal control costs associated with much more stringent levels of dust control needed to attempt to achieve a lower PEL. This is a critical and fundamental methodological error. That assumption is inconsistent with the well-known economic concept of diminishing returns.

This chart [CHART – T19] contrasts OSHA's economic model with real world foundry experience and conventional economic theory. There is no basis for the assumption that the cost for controls is the same regardless of exposure level. Foundry experience is that achieving lower dust exposure levels costs more, often exponentially more. In some cases no technology is on the horizon that would even achieve the proposed PEL regardless of cost.

An analogy to OSHA's marginal cost control assumption – an assumption which triggers substantial cost underestimation --would be cooling a room on a very hot summer day. A certain amount of cooling may be obtained by opening windows but there are limits to the effectiveness of that control. Installing fans may achieve a lower temperature, but is also subject to limitations. *Achieving the desired temperature may require air conditioning, improving insulation, and closing the windows. Using the logic in the PEA, OSHA would assume that the initial engineering control approach (opening windows) is capable of achieving any desired temperature with no additional cost or control measures.* In fact, there is an increasing marginal cost associated with achieving the lower temperatures. Moreover, the ultimately effective solution may require removal of the initial control.

This analogy applies to many dust control situations, especially when comparing traditional ventilation solutions to clean room control techniques. *More stringent reduction targets demand supply air engineering, precise control of process variables, customization of off the shelf solutions, increased maintenance, and other factors that require higher costs. Frequently, an engineering control proves to be a failure* from a performance or process interference standpoint and must be demolished and replaced with a different solution. [CHART T20]

Another reason for higher marginal cost to achieve lower exposure levels is that multiple control strategies are often required to attempt to achieve a lower level. Employers faced with various strategic options logically choose to implement the least expensive alternative that will provide effective control, and then add control measures as required until satisfactory performance is achieved. Those additional measures almost invariably are increasingly expensive. ***OSHA's flawed linear approach to estimating control costs fails to recognize that the most costly control measure options are generally reserved for the last phase, after less expensive control options prove to be inadequate.***

Using the room cooling example above, it is common to try the low cost solutions (open window and fans) before implementing the more expensive options (insulation and air conditioning). **Applying the approach used in the PEA to the room cooling analogy from above, OSHA would consider opening a window to be a feasible control to achieve a room temperature of 50 degrees year round if that temperature could be achieved by opening a window in winter. Further, OSHA's economic assessment methodology would include the minimal costs for opening a window, and would exclude costs for fans or air conditioning.**

The incorrect assumption of equal cost for higher and lower exposure controls has a major impact on costs estimated by OSHA in the PEA. This effect can be seen in the sand system operator example shown here. [CHART – T21] **When costs of controls to achieve a 50% lower exposure level are increased by a factor of 5, (a conservative ratio based on foundry**

experience[12]) the costs attributed to OSHA's PEL proposal increase about 13 times, from $307,704 to $4,004,000.

This example illustrates the magnitude of the error in cost estimates due to this fundamental error in methodology. It is important to point out that the foundry costs developed by the URS and Environomics do not include a correction factor for higher marginal costs. *The URS and Environomics analysis used the OSHA model with corrected unit costs and more realistic assumptions, but did not include a factor to correct the marginal cost error.*[13] ***The actual costs would be several times higher if a marginal cost factor were included.***

Control target and variability - OSHA's assertion of feasibility and compliance cost estimates in the PEA are based on a much different exposure control target than would be required under the proposed rule. In the PEA, OSHA ignores variability and control confidence and considers control feasible if exposures are ever below the PEL.

As explained by Mr. Scholz, real world compliance requires reducing the mean exposure far enough below the PEL to assure compliance with some level of confidence. [CHART – T22] These foundry data from Mr. Scholz's study show that while average exposures are lower than the proposed PEL, the 84% confidence level comprising 16% of exposures are above the current PEL. Foundry data demonstrate that the mean must be much less than half the PEL to achieve 84% confidence of compliance. This level would still not be enough to avoid citations for non-compliance. OSHA's assessment of cost must consider the fact that engineering design control targets must be much lower than the PEL to be confident of compliance.

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[12] In an unpublished 2013 AFS survey of U.S. foundries, it was estimated that the attempt to lower respirable silica exposures by 50% would increase engineering control costs by 8 to 10 times.

[13] URS confirms in its report OSHA's numerous methodological errors, including failure to account for the non-linear costs associated with each incremental reduction in silica concentrations. URS takes a purposefully conservative approach in its analysis, only correcting cost estimates in limited specific cases where controls could be specifically identified and documented within the short response time allowed by OSHA to develop comments. URS elected not to include a marginal cost factor, so as to demonstrate that even in the absence of this important factor OSHA's PEA dramatically understates the costs that would be triggered if the proposed PEL came into force.

It is important to point out **that the foundry costs developed by URS do not fully account for the lower control levels needed to account for exposure variability while attempting to comply with the proposed PEL.** The URS analysis used the OSHA model with corrected unit costs and more realistic assumptions but did not determine costs necessary to bring mean exposure levels to below one half, and perhaps to below one fourth of the proposed PEL. *Both OSHA and URS/Environomics costs would be much higher if exposure variability were factored into costs.*

Per worker estimation - Another methodological problem with OSHA's analysis in the PEA is the per-worker cost approach. [CHART – T23] This approach divides control costs by the number of workers using them, typically 4. This approach misinterprets data and substantially underestimates costs. **For example, if only 1 out of 4 workers in a particular process and job category is overexposed, OSHA assumes that the one worker can be identified and isolated. Given exposure variability, it may well be that all four workers are overexposed one fourth of the time. Therefore, the engineering control will need to be installed to protect all workers for the process.**

OSHA's estimates are often incorrect. For the sand system example above, OSHA divides the $5,599 annual cost estimate for muller ventilation by assuming 4 workers per control resulting in a per-worker cost of $1,400. The per-worker cost is grossly understated because the number of workers is overstated and the number of controls is understated. Many foundries have fewer than 4 muller operators. Moreover, *most foundries have more than one muller to accommodate different and incompatible molding and core chemistries; some have automated mullers which still need control. By assuming one muller per foundry and dividing the cost of controls by 4 OSHA substantially understates real world costs.*

The per-worker approach is particularly misleading for small and very small operations where workers perform multiple functions. ***In cleaning and finishing castings, for example, a single employee often finishes the casting and must work with fixed large diameter pedestal grinders, a cut-off saw, hand grinders and chipping tools. Each of these operations requires special local exhaust ventilation and this must be provided for several work stations used by the single employee. In those cases it is essential to calculate costs on the basis of number of controls per***

worker, not number of workers per control. In the PEA, OSHA understates costs for very small operations by as much as 10 times due to this methodological error alone.

Underestimated Costs. OSHA substantially underestimates unit costs for controls. A detailed review of OSHA's cost estimates is included in the AFS written comments.[14] Many assumptions and unit costs are not appropriate. [CHART – T24] ***In the PEA OSHA calculates the cost of ventilation at $5.33 per CFM. This is well below EPA guidance and foundry experience of more than $20 per CFM for exhaust and an additional $7 per CFM for make-up air.*** Moreover, many costs associated with ventilation, such as engineering, air modeling and permitting are not included in the $27 per CFM figure.

Other assumptions that contribute to OSHA's cost underestimate are that foundries have only one muller, only 200 feet of 2 ft. wide conveyor, one sand hopper, bucket elevator and screen. The shake out area and ventilation rates that OSHA assumes for very large castings are only appropriate for medium sized castings. In application after application, exhaust volumes assumed are too low for effective dust control.

[CHART – T25] In the PEA OSHA lists the costs of a HEPA vacuum for a foundry at $3495 initial cost. This is for a 15 gallon Nilfisk vacuum. Foundries deal in tons of sand, not gallons. A HEPA vacuum for a foundry would cost $45,000 (for a 40 HP Duravac unit with a 2 cubic foot capacity) plus another $10,000 to $15,000 for hoses and connections.

Missing Costs. *OSHA's feasibility assessment identifies numerous purported controls that inexplicably, OSHA omits from its economic assessment.* [CHART – T26]

- Substitution of non-silica sand (V-A-51). The foundry industry uses 3 million tons of silica sand per year. *Non-silica substitutes – which from a manufacturing standpoint are not satisfactory – cost $650 to $1300 more per ton than the $85 per ton typical for silica sand. Thus the annual cost for this one proposed but uncosted control could exceed $2 billion for the material cost alone, without adding costs for process changes.*

[14] Appendix 3 – AFS Review of OSHA Preliminary Economic Analysis Cost Estimates and Data for Foundries, 2014.

- Pneumatic sand handling systems (V-A-51). These systems are not applicable to all foundries, but if used by 25% of affected foundries (a reasonable assumption), would cost $150 million.
- *Pre-cleaning before beginning maintenance activities would increase unscheduled production downtime and add $300 million in annual costs.*
- Professional cleaning costs and associated downtime (V-A-52). The thorough professional cleaning assumed by the PEA feasibility analysis would cost $1 per square foot of foundry floor area plus $400 million per year in downtime.
- Automation of a knockout process (V-A-53) could cost more than $1 million per project.
- *Physical isolation of pouring and shakeout areas (V-A-52), described in the example used by the PEA, required process reconfiguration and cost several million dollars for that facility.*
- Other missing cost categories include precast refractories, Didion drum to clean scrap for furnace operators (V-A-52), non-silica cores and core coatings (V-A-52), low silica refractories, automated abrasive blast pre-cleaning of castings for finishing operators (V-A-54) and wet methods (V-A-54).

All of these controls have limitations on applicability and effectiveness. Nevertheless they are essential to OSHA's foundry feasibility determination, and may be required by OSHA enforcement personnel, so their cost must be included in OSHA's analysis. Several of these omitted cost items, by themselves, exceed the $44 million annual cost estimate for all proposal related costs.

The costs we have been discussing are for controls that OSHA mentions in its feasibility discussion but omits from its economic discussion. [CHART – T27] There are other common foundry operations that OSHA omits from both feasibility and economic discussions. Some of these foundry operations are among the most challenging to control. The following operations are critical processes for many foundries:

- **Cut-Off Saws** (both swing saws and fixed saws) where the surface velocity of the wheel, and therefore the dust discharged from the wheel can be in excess of 12,000 fpm. This is a value far greater than the capture velocity of the best slotted high efficiency capture hoods.
- **Powder Burning Torch Cutting** where the velocity of the cutting powder is very high and when cutting a concave surface silica control has proven to be extremely difficult.
- **Gas Torch Cutting** (oxygen or other gases) which is similar to the problems experienced in the control of powder burning.
- **Air Arc Operations** used for the removal of excess metal from castings and is similar in control problems to the types of gas torch and powder burn operations described above.
- **Chipping & Grinding in Large Casting with Internal Cavities**. For chipping and grinding of large castings with internal cavities which cannot be exhausted, in some cases (ingot molds, large pumps, etc.) it is necessary for the operator to crawl inside the casting with portable finishing tools. This operation, like furnace relining, has defied the best attempts of design engineers to achieve control to the level of the existing PEL, even utilizing multiple control methods including portable hoods, wetting, and general ventilation.

Other missing costs include several aspects associated with ventilation systems. Dust controls must often be located a long ways away from baghouses, requiring extensive ductwork. OSHA does not include the cost for such ductwork, nor for the engineering design or installation costs. In addition, OSHA's analysis does not address the fact that some foundries may not be able to obtain a permit to install additional ventilation due to EPA's PM2.5 standard requirements. In many cases, foundries which are operating under a grandfathered permit may be stymied in the attempt to add ventilation. In others, a small increase in exhaust will trigger an expensive upgrade to best available control technology (BACT). Because of its case by case nature, the cost associated with EPA compliance cannot be determined for the foundry industry as a whole. However, in AFS's written comments a realistic scenario is provided where the OSHA proposal could trigger

annualized costs of over $6 million for a single facility. This scenario will apply in several situations and must be considered in OSHA's economic assessment.

These costs associated with items in this section are not included in the PEA, nor for the most part, in the URS reanalysis that corrected unit cost data but followed much of the OSHA methodology and assumptions. *The URS analysis is a very conservative estimate of foundry cost impacts.* ***Including the missing costs associated with the OSHA proposal would by itself easily double the $2 billion URS estimate of costs. Correcting other deficiencies, such as the marginal cost error, accounting for exposure variability or correcting the per-worker approach assumptions would each also double the estimate.***

The impact of the 50% reduction in the PEL will be disproportionately felt by small businesses which are the heart of the U.S. foundry industry, a fact inadequately addressed in OSHA's economic assessment. **The higher impact on small foundries is driven by at least two factors. First, many of the unit costs, such as ventilation, depend on scale for pricing**. For example a 100,000 CFM baghouse serving multiple exhaust points will have a lower cost per CFM than a 10,000 CFM baghouse. **Second, the per-worker methodology divides costs by an assumed number of workers in a job category. Small and very small foundries not only have fewer workers available to spread the cost over, but have workers performing tasks in multiple job categories requiring controls.**

7. Several specific provisions of the proposed rule are unworkable, unnecessary, and unwise.

Specific provisions of the proposed standard, insofar as they impact the U.S. foundry industry, are discussed in the AFS written comments.[15] We highlight a few of them here. [CHART – T28]

Exposure Monitoring - *Automatic quarterly or semi-annual monitoring when there has been no change in operations is punitive and without benefit. While it is important to measure and*

[15] Appendix 1 - AFS' Responses to 87 Questions Posed by OSHA, 2014.

quantify exposure to respirable crystalline silica, once that assessment has been made and validated there is no justification to resample if operations remain unchanged. Monitoring methods should include alternatives that are less intrusive and more likely to provide useful information. Real time monitoring and area mapping are more likely to produce information that can be used to identify dust sources and design controls. Repetitious full shift sampling provides no useful information, is a wasteful use of health and safety resources, and is burdensome and unnecessarily dangerous to employees who must wear heavy and awkward equipment during the sampling session.

Regulated Area – The regulated area requirement is unreasonable, unworkable, unnecessary and very costly. The requirement is based on 8 hr. TWA exposures of workers who are often not confined to one specific area, so basing the regulated area on an 8 hr. TWA exposure is unworkable. For example, **a maintenance worker who has an exposure above the PEL may work in many areas of the plant including the office. It does not make sense to turn the office into a regulated area because the maintenance worker spent some time there on the day of sampling. The only practical way to administer the provision as written would be to designate the entire operation a regulated area and require all employees - including clerical workers - to wear respirators, even if only the maintenance worker is exposed above the PEL.** This is a clearly unreasonable consequence of the regulated area requirement.

The costs associated with regulated areas are understated and incomplete. The time to set up the area is estimated at **7 hours** as a one-time cost. Unless the entire facility is designated as a regulated area, exposure monitoring and changes in controls will require redefinition of areas. Administration, notification and enforcement may bring the set up time to **10 days** per year compared to the PEA estimate of **7 hours**.

The term "grossly contaminated" is not defined and is unnecessary. Clothing has been demonstrated to not be a significant contributor to exposure, as shown in the Research report (Appendix 5) attached to our written comments, which provides the only real data that addresses

the issue.[16] Consequently, this provision is unnecessary. Moreover, the proposal applies to respirable silica, while the "grossly contaminated" phrase refers to much larger visible particles.

Costs associated with the requirement to change clothing or clean clothing where deemed to be "grossly contaminated" are also unreasonably low. *Foundries use 3,000,000 tons of sand per year and some of that gets on clothing. OSHA assumes that 10% of workers in regulated areas will be affected; a better estimate for foundries would be 90%.*

Because of the time involved in changing (and donning and doffing pay issues) or vacuuming (8 minutes) when leaving the regulated area for breaks or to use the restroom, many employers will choose to use a blow down booth with a 30 second cycle time. These are about $11,000 to install, not counting operating costs, and will accommodate about 4 workers each in a tolerable time scheme. There is also a related and unaccounted-for lost productivity cost as workers queue up for the unnecessary blow down.

In summary, **the regulated area provision is unreasonable, unworkable, unnecessary and vastly more costly than currently estimated.** Inclusion in the proposed standard appears arbitrary and capricious and it should be deleted.

Exposure Less Than 30 Days – The proposal unreasonably requires engineering controls for exposures of less than 30 days per year. A 30 day exemption is necessary. First, the exemption would accommodate operations which are rare or unusual. Many foundries operate on a job shop basis and do not produce the same product every day. ***It is often not possible to install ventilation designed for an operation that runs one or two days per year and then remove or idle that ventilation in order to run other jobs. A 30-day exemption may mean the difference between accepting the job and doing the work in the US or refusing the job and watching it move offshore.***

Second, it is not possible to install engineering controls for many infrequent, uncontrollable, and often unpredictable operations. For example, maintenance of a baghouse may be performed once a

[16] Appendix 5 - American Foundry Society - Expert Report on Dust on Uniforms, Gary E. Mosher, CIH, Exponent, February 2012.

month. Repair of a sand system leak may occur twice a year. An exemption, such as the 30 day exemption being discussed, needs to be included in the standard for such tasks.

Third, an exemption would be a practical approach to begin to deal with exposure variability in the foundry industry. Thus, for example, an employer might be able to determine that a worker whose mean exposure level was one half the PEL might be expected to exceed the PEL for less than 30 days per year (with respiratory protection).

Sweeping and Compressed Air – The prohibition on sweeping and compressed air use is unclear and unreasonable. The proposed standard section (f)(3)(ii) contains the qualifier: "where such activities could contribute to employee exposure to respirable crystalline silica that exceeds the PEL." Yet the wording of question 66 of the OSHA proposal contains no such qualifier. It is also not clear what is deemed to "contribute" to exposure. **As question 66 demonstrates, regardless of the intent of the standard developer, some compliance officers will likely interpret this as a blanket prohibition on all sweeping and compressed air use in a workplace where even one person is exposed above the PEL.**

A ban on mechanical cleaning and sweeping in the foundry would require the vacuuming of hundreds of tons per week in many foundry operations. *Green sand molding especially requires the use of a substantial excess of sand for each mold produced, to ensure proper mold filling and compaction and therefore ensure a quality casting. The systems are designed to provide for the return of this excess sand for recycled use to prevent excessive solid waste. Existing systems have been designed to facilitate the mechanical movement of much of this sand onto conveyors and other return systems. Attempting to vacuum this amount of damp sand with a 15 gallon portable vacuum -- or any vacuum system --is not feasible.*

Some molding processes utilize floor grates for molders to sweep excess sand into under floor conveyors. It is also common to install brushes on automated equipment to keep sand out of sensitive machine components. Some core machines are designed with a sweeper arm to allow an effective seal when parts come together as part of the machine cycle. This prohibition, whether or not intended to apply to these situations, is unworkable for those operations.

The proposed rule would potentially ban operator-driven power sweepers from use in the foundry. This would be a major setback in control since in both foundries and other metallurgical industries power sweepers have been proven to substantially reduce the release of fugitive dust from aisles and other vehicle traffic areas. This dust otherwise becomes part of the cross contamination in many facilities. **Operator-driven floor sweepers cannot be replaced with wet sweepers in foundry applications because the quantity of material handled and presence of resin and clay would gum up the sweeping mechanism with sludge.** Investigation to date has not identified any available units that can replace the powered sweepers common to the foundry industry.

Compressed air is used for many processes in the foundry. These include critical functions in automated machinery. Compressed air is used to clear core machine patterns between cycles. *In many core machines, vacuuming would require the operator to place part of his or her body in the point of operation, thereby creating a safety hazard.* Prohibiting compressed air could mean prohibiting all pneumatic equipment, including pneumatic sand transfer equipment recommended by the PEA as a means to achieve feasible control. The language could make it impossible to run much of a foundry's equipment.

Compressed air is sometimes the only feasible method to clean complex cores and castings. Other options are either unsafe or ineffective. To produce a quality product, it is necessary to remove all sand from the casting, and the only method available to achieve the level of cleanliness required is compressed air. A specific prohibition on compressed air will make it impossible to meet minimum quality standards.

To make final molds, several cores are often assembled in a flask and partially surrounded by additional sand. This final mold must be blown with compressed air to drive off any loose sand, or the final part will be damaged. The molds are often made by layers assembling several interlocking cores, creating cavities at all angles, including under some of the cores. A vacuum cannot possibly reach all of the spaces required to be cleaned. Vacuuming can also cause damage to molds that are now cleared of contamination through compressed air.

It is not feasible to use wet methods; this would damage the equipment and create a safety hazard due to water accumulation on the surrounding floors. Wet methods create additional problems of sludge, incompatibility with some core resins, and increased risk of explosion where contact with molten metal is possible. This explosion hazard can occur with moisture in a concrete floor even if the surface appears dry. Water on the floor also poses a slipping hazard. In addition, some foundries are not allowed to have floor drains anywhere in their facility due to permit restrictions from the local authorities and EPA. Drying the floors after wet sweeping, or any other use of water, would be impractical.

Moisture is a critical factor in molding sand process control. Adding water to processes would require extra conditioning of recycled sand and would require more energy, cost, and EPA permitting obstacles.

Compliance Methods – *Many critical foundry processes are especially difficult to control at the current PEL. Knockoff and grinding are two. Shakeout of large castings is another.* OSHA's planned reliance on the "hierarchy of controls" structure requires employers to adopt the OSHA-preferred control measures -- feasible product substitution, feasible engineering controls and feasible administrative controls. If, despite the use of all feasible "OSHA-preferred" control measures, an employer is unable to reduce exposure levels down to the proposed PEL, the employer would then be required to provide respiratory protection to reduce exposure. The employer would need to continue to implement controls to reach the new PEL, even though the respiratory protection, by itself, would have been adequate to reduce exposure.

OSHA's preference for controls other than respirators is based on a policy that was adopted decades ago, and fails to take into account changes in respirator technology that have resulted in improved performance, improved reliability, improved worker acceptance and increased protection. The policy mistakenly assumes a superior reliability of engineering controls and ignores the very real limitations associated with design capability, maintenance and human interaction in assuring their efficacy.

Foundries often provide air supplied hoods or PAPR devices to protect workers. Those devices also provide additional eye protection, and in some cases temperature relief, and are the most effective

control solution. It should not be necessary for foundries to expend excessive amounts of capital to invest in engineering controls with no additional health or safety benefit to employees.

OSHA should provide objective criteria for feasibility that can be applied to enforcement cases before installing several iterations of expensive and ineffective controls. In many foundry enforcement cases, iterations include controls suggested by OSHA's experts from Salt Lake City before OSHA becomes satisfied that no additional controls are available. This is a lengthy and wasteful process. It would be helpful to have some objective criteria for feasibility rather than just the Area Director and OSHA technical experts "running out of ideas."

Compliance Dates and Regulatory Conflicts –The proposed compliance period fails to account for the substantial time required for a comprehensive engineering evaluation of the overall silica exposure at the facility and the design of a proposed engineering control system. The engineering phase alone for a 10,000 cfm or larger system typically takes 4 to 6 months -- longer for large or complex exposure problems. This issue is further complicated by the fact that the current national economy has substantially reduced the number of firms offering these environmental services, and all of the affected foundries will be competing for these limited services. The compliance period also fails to take into effect the fact that to attempt to meet the proposed PEL with local exhaust ventilation would require custom control equipment (primarily baghouses) which are not stock items and are custom built for each application. These control systems typically require a minimum of 2 to 4 months for manufacture after the completion of the engineering specifications and submission of an order. This period is significantly longer for specialized or large orders.

Because many of the controls involve additions or changes to ventilation systems, OSHA must recognize the additional time required for modelling and permitting by state or federal EPA authorities. ***The proposed one year compliance period is totally unrealistic. In some states, the mandatory permitting requirement for both new and modified systems requires up to 18 months, and this does not include the design and modelling work necessary to prepare the permit application, or the construction and installation time after approval.*** For foundries which have a Title V permit, the approval includes an additional time period for the US EPA to review and make

comments, and if the facility is subject to the federal Prevention of Significant Deterioration (PSD) or Lowest Achievable Emission Rate (LAER) rules the permit approval can take an additional 6 to 18 months for the detailed review and approval necessary.

Finally, it is unreasonable to require foundries to base critical cost decisions - that place the business at risk - upon inaccurate data. The proposed standard provides two years for laboratories to provide accurate data but requires employers to install controls within one year. If accurate data is not available for two years, then engineering controls should not be required until after that time.

8. CONCLUSION

[CHART T29] OSHA has not shown that silica exposures associated with a PEL of 100 μg/m^3 present a significant risk of material health impairment or that reducing the PEL to 50 μg/m^3 would substantially reduce any such risk that might exist. Likewise, OSHA has failed to meet its burden of proving that the proposed PEL of 50 μg/m^3 would be both technologically and economically feasible for the foundry industry, and OSHA's proposal almost uniformly fails to adopt control measures which are cost effective. Nor has OSHA made any supportable showing that the proposed PEL of 50 μg/m^3 and action level of 25 μg/m^3 can be reliably measured with an acceptable degree of accuracy and precision.

The cost of the proposal alone on the foundry industry will be at least 9.9% of industry revenue and 276% of industry profit, and as explained above these costs are significant understatements. In its current form, OSHA's proposal will have a devastating impact on the majority of the foundry industry and its employees. It will significantly increase costs, slow down job hiring, eliminate many foundry jobs, and undermine our industry's ability to compete in the global marketplace. It will drive a substantial portion of the foundry industry out of business, or out of the country.

Foundries are under great competitive pressure and are unable to simply pass on the costs associated with this proposal to our customers. For a significant number of foundries, the

rulemaking will be the final straw that destroys their whole business and the jobs of thousands of employees.

Instead of unnecessarily throwing a beleaguered industry of predominantly small business into turmoil by slicing in half a PEL that has triggered successful workplace protection, OSHA should:

- Change the formulaic PEL for RCS exposure in foundries to a simple value of 100 $\mu g/m^3$;
- Work with employers to improve compliance with this newly adopted PEL of 100 $\mu g/m^3$; and,
- Work with EPA to allow expansion of ventilation systems to reduce employee exposures under currently permitted criteria.

For their part, foundries, as they have been doing for decades, will continue efforts to reduce exposures to below the PEL of 100 $\mu g/m^3$.

Thank You.