businesses are critically important partners with large multinationals. Regulations that impose requirements, mandates and new costs on big business, also affect the health of thousands upon thousands of small businesses – as suppliers *and* consumers.

Washington's apparent disconnect regarding the costs and impact of intrusive government regulation on American business and the economy is alarming. SBE Council is hopeful that your work to shed light on burdensome regulation and its effect on job creation and healthy economic growth will restore balance and accountability in this most critical area. If not, business investment and growth – along with job creation and U.S. competitiveness – will continue to suffer.

Regulations and Proposed Initiatives of Concern to SBE Council

SBE Council suggests that the Committee first focus on reforming and paring back recently enacted laws whose implementation will inflict long-term damage on the U.S. economy. In addition, there are regulatory proposals in the pipeline that will vastly harm small businesses and their ability to create jobs. The specifics are listed below.

Patient Protection and Affordable Care Act (PPACA)

During the debate over the Patient Protection and Affordable Care Act (PPACA), the new health care law was portrayed as an effort to reduce health care, health coverage and taxpayer costs. The early outcomes of its implementation show it is accomplishing none of this. The law is already leading to decreased choices for consumers (as small competitors leave the market), and we now know that most small business employees will not be allowed to "keep the health coverage they currently have." Health coverage costs continue to go higher. And, disturbingly, the politically connected, favored and powerful are receiving waivers from the stringent regulations.

SBE Council supports full repeal of PPACA. We have long advocated an approach that encourages competition, leads to more affordable prices and expands upon what is working in the marketplace (like Health Savings Accounts). As an alternative to full "repeal and replace," we encourage the Committee to address these specific regulatory provisions in PPACA as they will vastly raise small business costs, lead to job loss and reduce choices in the marketplace:

Expanded 1099 Reporting Mandate (Section 9006): Repeal the provision. There has been no justification offered for imposing this paperwork nightmare on America's small businesses. Its implementation will lead to staggering compliance costs and job loss.

Individual Mandate: Repeal the mandate. America's self-employed cannot afford the government-designed plans that are taking shape, and certainly cannot afford the tax penalty imposed if they fail to comply with the mandate.

Employer Mandate: Repeal the provision. Real health care reform would focus on affordability rather than punishing business owners for not providing a benefit they cannot afford. In addition, as it is now structured, the mandate encourages businesses to drop coverage. Even proponents have to admit this outcome is perverse.

Grandfathering Rule: Change the existing rule (currently designed to kick all health care plans out of grandfathered status) through legislation. A new definition would reflect the true spirit and intent of the term "grandfather status" which is this: All health care plans in place prior to the date of enactment of the PPACA will be protected – as promised – and consumers will be able to keep the plans they currently have, without condition.

Medical Loss Ratio Rule: Change existing rule, through legislation. Repeal it. Small to mid-size insurers are leaving the marketplace as a result of the inflexible nature of the regulation, which means less competition and fewer choices for small business owners and consumers. SBE Council also fears that the rule will lead to the loss of various consumer-directed health plans, which are becoming more popular with small businesses and the self-employed.

The Regulation Abolishing "Mini-Medical" Plans: Repeal it. These plans play an important role in the health insurance marketplace, and are coveted by those who use them. HHS has granted numerous waivers to companies, unions, and health insurers regarding these plans, which proves they hold an important niche in the marketplace. Small business owners require more options in the marketplace, and mini-med plans offer some entrepreneurs who lack rich resources the opportunity to provide a coverage option.

Federal Government Procurement

Since our founding in 1994, SBE Council has been working to make the federal government procurement system more accessible for small business owners. Recent actions and proposals by the Obama Administration have the potential to set small business owners back in their efforts to bid on and access government contracts.

Project Labor Agreements (PLAs): Prohibit government-mandated PLAs through legislation (Government Neutrality in Contracting Act). In April 2010, President Obama finalized Executive Order 13502, which encourages and authorizes the use of union-only PLAs on federal construction projects. Union-only PLAs restrict competition by requiring that a contract be awarded only to companies who agree to collective bargaining and union hiring. Taxpayers lose under PLA's, as well as small to mid-size firms who can't compete under such schemes. Federal government procurement rules require a competitive bidding process, and PLAs run counter to the rules of fairness, transparency and best value for taxpayers.

"High Road Initiative": The Obama Administration has been working on an initiative that would grant competitive advantage to government contractors whose salaries and benefits meet labor standards established by the federal government. If implemented, the initiative would put

small business contractors at a competitive disadvantage in the federal procurement space and drive taxpayer costs higher. Any such initiatives must be stopped and/or challenged by Congress.

3 Percent Withholding Mandate: Repeal it. The mandate, advanced as part of Section 511 of the Tax Increase Prevention and Reconciliation Act of 2005 (P.L. 109-222), will increase government costs and bureaucracy at all levels (local, state and federal); raise costs for taxpayers; restrict cash flow for small firms; and drive small business owners away from the government procurement marketplace. The bottom line is that the withholding mandate on government contractors will cost much more than the $7 billion it slated to bring in over a five year period.

Micromanagement of the Workplace by the Federal Government

Injury and Illness Prevention Program (I2P2) – "OSHA's highest regulatory priority": The U.S. Labor Department believes they do not have enough resources to ensure that businesses are complying with all federal workplace regulations. Therefore, they are embarking on a "Plan/Prevent/Protect" regulatory initiative which, according to their words, "Employers and others must 'find and fix' violations — that is, assure compliance — before a Labor Department investigator arrives at the workplace." According to Labor, businesses "must understand that the burden is on ***them*** to obey the law, not on the Labor Department to ***catch them*** violating the law." Got that? So, they are replacing "catch me if you can" with "Plan/Prevent/Protect." Meaning, they will require regulated entities to develop extensive, time-consuming internal processes that will serve as a "check" on how they are complying with compliance. In SBE Council's reading of the massive regulatory initiative, employers and workers will be highly engaged in developing plans and policing their own workplace to ensure compliance with all DoL regulations. For example, beyond health and safety compliance, it is reported that employers would work with employees on documenting job classifications, identifying who is "exempt" or an independent contractor and why, and hold training sessions to make sure everyone understands the differences of these classifications. Obviously, this effort to fully micromanage every American workplace would be a nightmare for small business owners. The proposed rule has not been released, but SBE Council urges the Committee to conduct immediate oversight on "Plan/Prevent/Protect" as it appears the Department is creating a monstrous scheme that is impracticable for small business owners.

OSHA's Proposed Interpretation Regarding Noise Exposure: OSHA published a new "Proposed Interpretation" of the term "feasible administrative or engineering controls" as used in the

Occupational Noise Exposure Standards for General Industry and Construction. The Proposed Interpretation will require employers to implement costly engineering or administrative controls, even if they have an excellent hearing conservation program. SBE Council believes that OSHA cannot change its Prior Interpretation without undertaking a formal rulemaking process. OSHA is portraying the Proposed Interpretation as an enforcement interpretation, thus circumventing the notice-and-comment process. SBE Council encourages the Committee to challenge OSHA in its approach as we believe it can be challenged under the Paper Reduction Act, the Regulatory Flexibility Act, Executive Order 13272, and the Small Business Regulatory Enforcement Fairness Act. Office of Management and Budget (OMB) review is also required as it surpasses the $100 million economic impact threshold and involves a novel legal or policy issue.

Energy and the Environment – EPA Accountability, More Energy Production and Development

Environmental Protection Agency: The general regulatory thrust of the Administration with regard to energy and the environment will lead to less energy, higher energy prices, a disincentive to manufacture in the U.S. and massive job loss. Our energy sector is being forced into a regulatory vice -- caps and restrictions are being imposed on how much America can use and produce, while excessive regulation on energy use and the industry are driving costs higher. Anti-energy activists in the regulatory bureaucracies seem accountable to no one. Unfortunately, small business owners and their workforce will bear the brunt of higher costs and widespread job loss if initiatives at the Environmental Protection Agency move forward.

SBE Council encourages the Committee to bring accountability to the EPA. We support the use of preemption or the CRA in overturning specific rules especially where the EPA has not conducted statutorily-required analyses (it has refused in some instances). From EPA's set of rules on electric power generators to greenhouse gas (GHG) regulation, to its reconsideration of the National Ambient Air Quality Standards for Ground-Level Ozone to "Boiler MACT" industrial emission standards, to its decision to allow the use of 15 percent ethanol motor fuel blend (E15) and more, the agency has put the U.S. economy on a disastrous course. Energy drives business and the economy – it all starts with energy. If not stopped, the EPA's ruinous regulatory course will undermine economic recovery, and cause long-term economy-wide pain for consumers, workers and small business owners.

Energy Development and Production: The U.S. has been blessed with abundant natural resources to support our growing energy needs. Unfortunately, the oil and natural gas sector is getting mixed signals from the federal government in regards to the future of offshore drilling and development in general. More than 7 million jobs in small businesses are supported by the oil and natural gas industry, but new restrictions and general uncertainty threaten these businesses and their workforce. In addition, hundreds of thousands of new jobs can be created if the federal government develops a more rational and stable policy toward domestic energy development. This is a critical area where regulators and policymakers in the Administration must be challenged.

Dodd-Frank Financial Overhaul Legislation

New regulations being proposed (and to be pursued) under the auspices of Dodd-Frank have the potential to further restrict access to, and raise the cost of, capital and credit. Proposed Federal Reserve rules regarding interchange fees and forthcoming Consumer Financial Protection Bureau (CFPB) regulations, for example, could make a currently challenging problem much worse for small business owners.

CFPB and Small Business: The new CFPB is required to determine whether proposed regulations will negatively impact entrepreneurs' ability to access affordable capital and credit. The CFPB infrastructure is now being developed, which is a good time for the Committee to determine how they will address this small business requirement in the rule-making process. Because the Obama Administration strongly opposed the inclusion of this requirement in the Dodd-Frank bill, SBE Council believes the CFPB must be closely monitored to ensure this small business protection is taken seriously by those building the bureau, and developing regulations to implement Dodd-Frank.

Miscellaneous: Regulatory Actions and Activities

SBE Council is generally concerned about the uptick in investigations on small business by federal regulatory agencies and departments. There is a proper balance that must be achieved between the use of investigations and enforcement (I&E) and working with business to educate about the law to ensure compliance. We do know there is an uptick on the I&E front as evident by budgetary priorities, new I&E hires, reports of investigatory outcomes and the regulatory thrust and agenda in general. Oversight by the Committee in terms of focusing on the priorities of the department and agencies, and their rationale for increased hires (for example) aimed at I&E will keep the federal government accountable in achieving a balanced approach between enforcement, education and helping business attain compliance with the law. SBE Council has outlined some areas below, as well as forthcoming proposed rules to keep an eye out for.

Uptick in Investigations Regarding "Misclassified" Individuals: More resources have been allocated within the Labor Department and the Internal Revenue Service (IRS) to investigate "misclassified" individuals. There appears to be a focus on small businesses as it is easier and quicker to audit smaller firms. As is now stands, the 20-point Independent Contractor (IC) law is arbitrary which means two investigators could audit a small firm and come out with two different conclusions as to whether a firm has misclassified an IC or not. The IRS is in the process of developing a new rule for long-term independent contractors, and SBE Council is concerned that the goal of this effort – along with the uptick in investigations – is to discourage the use of independent contractors. The solution is to change the outdated 20-point test to a more modern, streamlined approach.

Shift at Labor Department – Emphasis on Compliance: A robust shift has been underway at Labor, a move away from voluntary compliance to investigations and enforcement. For example, DoL's Wage and Hour Division budget has increased to hire 288 new inspectors (which has already grown from 731 in 2009 to 894 in Q1 in 2010). Other budget features include the addition of 130 safety and health inspectors, 25 whistle-blowers, and 20 full-time employees to "restore" OSHA's rule-making capabilities. There is also the move away from "Opinion Letters" to "Administrator Interpretation." Regulatory initiatives and activities have pointed to a more confrontational posture with business, which SBE Council hopes does not replace constructive engagement.

Expanded 1099 Reporting for Rental Property Owners: Repeal the provision. Tucked in the Small Business Jobs Act of 2010, this provision mandates that (beginning in 2011) recipients of rental income from real estate will be subject to the same information-reporting requirements as taxpayers engaged in a trade or business. Similar to the broader expanded 1009-MISC reporting mandate in PPACA, owners of real property who receive rental income will be required to issue a 1099 for payments totaling $600 or more during the course of the year for any expenses related to their rental properties. The provision includes payments made to plumbers, carpenters or exterminators in the course of generating rental income.

Chairman Issa, SBE Council appreciates the opportunity to provide input to the Committee. We look forward to providing additional ideas and solutions that will help move the U.S. economy back to strong levels of growth and job creation. Our organization and its members have additional issues of concern not outlined in this letter, and we will follow up in future communications.

SBE Council appreciates your leadership. We look forward to working with you on advancing policies that promote entrepreneurship and strengthen U.S. competitiveness and our economy.

Sincerely,

Karen Kerrigan
President & CEO

Society of Plastics Industry Response

With respect to EPA and the Toxic Substances Control Act (TSCA), key regulatory activities affecting the plastics industry include chemical action plans, the polymer exemption rule and inventory update reporting. Other regulatory actions concerning air and waste are also a concern.

As many are aware, chemical action plans are one of the EPA's newer approaches to using existing authorities for chemicals management. The plans are intended to outline risks that specific chemicals may present, and identify the steps EPA is taking or may take to address those concerns. SPI is the industry lead in responding to the plan for long-chain perfluorinated chemicals (PFCs), and has members interested in plans for other chemicals. Industry and EPA also continue to work together in an industry-initiated stewardship program. But given EPA concerns, the Agency could seek a ban on the manufacture, import and use of these PFCs in the US. A key industry concern is that in the past, as EPA is aware, stricter regulation in the US and other developed countries of one of these PFCs led to a shift in production elsewhere – changing the landscape of global competitiveness.

EPA also amended the "polymer exemption rule" last year to exclude certain perfluorinated chemicals. The exemption was intended to encourage the manufacture of safer polymers by reducing certain reporting burdens and allowing EPA to focus on substances expected to pose higher risk. Now, for the perfluorinated chemicals no longer eligible for the exemption, those who intend to manufacture or import them must complete a process that can be lengthy and disruptive to the supply chain, or to obtain another exemption. The change was made because EPA believes that it can no longer conclude that the excluded polymers "will not present an unreasonable risk to human health or the environment," even though EPA has not made an actual finding of "unreasonable risk."

Specific chemicals aside, the plastics industry also shares in the regulatory challenges facing US manufacturing more broadly. Examples:

- TSCA inventory update reporting (IUR). EPA has yet to finalize a rule that proposed significant changes for industry, and presently expects industry to be ready to report starting June 1. EPA may require submission of information that could be difficult to obtain, require use of a reporting system that raises concerns, and change reporting criteria to impact more businesses and confidential business information. EPA has not adequately demonstrated why it needs this data, that IUR is the appropriate way to collect it, and has not tailored the proposal to minimize the burden to the regulated community (or to the agency itself, for that matter).
- Burn-off ovens and Commercial and Industrial Solid Waste Incineration Units (CISWI). EPA proposed a rule for emissions from these sources. SPI's key interest is burn-off ovens, which should remain exempt. Their use in the industry is for cleaning machined parts – not for solid wastes, and not by combustion or incineration – so used this way, they would be inappropriately regulated under the proposal.

On the OSHA front, key concerns include proposed rulemakings regarding combustible dust, consultation agreements and walking-working surfaces; the forthcoming activity on injury and illness prevention programs (I2P2); and the now withdrawn but not forgotten proposals concerning MSD recordkeeping requirements and occupational noise.

For the proposed rule for combustible dust, SPI has expressed concerns with issues including: the definitions and need for clarity, sampling and testing of dusts, employee training, different methods to control dusts, and compliance assistance from OSHA. Combustible dust is a complex issue, with a number of factors that have to be present for an explosion to actually occur. The potential requirements for businesses to comply with OSHA's proposed rule can be significant in terms of cost and changes to existing facilities, and some are already experiencing difficulty with testing methods. There is also concern with related activities ongoing within the National Fire Protection Association, and the potential adoption or incorporation of "consensus" standards.

OSHA has also proposed changes to its On-site Consultation Program and Safety and Health Achievement and Recognition Program (SHARP) procedures. Consultation offers assistance to small and medium-sized businesses, some of which achieve "SHARP" status and exemption from certain OSHA inspections – an exemption OSHA seeks to remove. We would rather see OSHA consider ways to optimize its resources to provide compliance assistance programs and better support employers who proactively seek help in improving workplace safety. OSHA's current proposal instead presents a deterrent to participation in such programs.

With respect to walking-working surfaces, OSHA's proposed rule contains vague and broad requirements more than actual requirements to address specific hazards. While this may provide some flexibility for employers, it may also leave uncertainty as to whether they have actually achieved compliance with the standard, and could leave them vulnerable to citations during inspections if hazards are not well-defined, requirements are unclear, and compliance becomes subjective. In the plastics industry, the fall-protection provision also presents concerns, given the difficulty working around or on certain equipment for routine maintenance.

There has been much discussion but no proposed rule yet for Injury and Illness Prevention Programs (I2P2); as expressed during stakeholder meetings, there are concerns as to how a new requirement would relate to existing OSHA standards, the impact on small businesses, how the actual scope and requirements of a rule could impact a company's existing programs, the anticipated costs and benefits, and what kind of support OSHA will provide. There is also concern that this could be used to introduce broad requirements to capture ongoing rulemakings, such as for combustible dust, or other standards/requirements where OSHA has not gained traction.

SPI is also monitoring activity following withdraw of OSHA's proposed interpretation of occupational noise and its proposed rule concerning recording/recordkeeping of musculoskeletal disorders (MSDs). On noise, OSHA proposed an interpretation in such a way that requirements to protect employees from occupational noise – even if existing controls were sufficiently doing so – could be expanded almost regardless of cost, with limited flexibility, and outside a formal rulemaking process. On the MSD recordkeeping, this would require significant resources for employers without key fundamentals, such as a broadly accepted definition for MSDs.

USTELECOM

THE BROADBAND ASSOCIATION

WALTER B. MCCORMICK, JR.
President and Chief Executive Officer

January 26, 2011

The Honorable Darrell E. Issa
Chairman
Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman:

Thank you for your recent letter soliciting our views concerning existing and proposed regulations and the current rulemaking processes of the Federal Communications Commission ("the Commission"). USTelecom represents innovative broadband companies ranging from some of the smallest rural telecoms in the nation to some of the largest companies in the U.S. economy. Our members offer a wide range of advanced broadband services, including voice, internet access, video, and data, on both a fixed and mobile basis. What unites our diverse membership is our shared determination to deliver broadband services to all Americans – regardless of their location.

Currently the Commission has before it a number of proceedings that, upon their resolution, could provide our member companies with important regulatory certainty. Many of these proceedings involve issues upon which there is little or no dispute about the appropriate Commission action. For example, USTelecom has filed a petition asking the Commission to eliminate costly equal access requirements for small telephone companies, just as it had previously done for larger companies. The Commission requested public comment on our petition and no opposition was filed. We look forward to the Commission's final action on the issue.

In other proceedings, there is broad agreement that Commission action is essential to providing businesses with the policy direction necessary to make investment and expansion decisions, even if there remains some lack of consensus on specific details. For example, at the very top of the list is the need for Commission action to update and rationalize its existing rules relating to intercarrier compensation and universal service. Changes to the current mechanisms are necessary in light of the changing competitive landscape and technologies in this industry. Indeed, the Commission launched a broad notice of rulemaking to address many of these issues in 2001. It will be impossible to reach 100% national broadband buildout without an efficient and effective universal service program and sensible reform to the Commission's regulatory framework for payments between and among carriers. We understand the Commission will be issuing an NPRM on intercarrier compensation in the near future. But while universal service distribution decisions are expected to be included in that NPRM as well, contribution issues will not be addressed there – and so we hope the Commission will be moving forward on that element of universal service reform in the near future.

While these are complex and difficult issues to resolve, there are some related, interim issues affecting intercarrier compensation the Commission can address immediately. Traffic pumping, phantom traffic, and payment for IP-traffic are each before the Commission, and there is widespread consensus that action on these issues is important and need not await resolution of the larger and more complicated questions in the anticipated NPRM. Indeed, the Commission's own National Broadband Plan recommended action on these items. We believe the FCC has a sufficient record and ample jurisdictional authority to deal with each of these issues right now.

Mr. Chairman, thank you again for providing us an opportunity to share our views. USTelecom looks forward to continuing to work with the Committee in its important work of easing regulatory impediments to job creation.

Sincerely,

Walter B. McCormick, Jr.

Walter B. McCormick, Jr.

cc: The Honorable Elijah Cummings
The Honorable Fred Upton
The Honorable Henry Waxman
The Honorable Greg Walden
The Honorable Anna Eshoo

WINDOW & DOOR
MANUFACTURERS ASSOCIATION
WDMA

January 10, 2011

The Honorable Darrell Issa
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Issa:

On behalf of the Window & Door Manufacturers Association, we would like to thank you for the opportunity to identify existing or proposed regulations that are negatively impacting job growth in our industry. WDMA is a national trade association representing the leading producers of commercial and residential doors, windows, and skylights for domestic and export markets. Our members sell to distributors, dealers, builders, remodelers, architects, contractors and homeowners.

Along with our building industry association colleagues, we have already raised our concerns about the detrimental impact of the U.S. Environmental Protection Agency's (EPA) *Lead: Renovation, Repair and Painting* Rule and its proposed amendments in a separate joint industry letter. However, there are two other issues we would like to bring to the attention of the Committee.

Department of Energy Involvement in ICC Energy Code Development

Specifically, we urge your attention to actions by the Department of Energy (DOE) that interfere with the private-sector development of energy efficiency codes for commercial and residential buildings.

Legislation introduced in the last Congress called for DOE to review revisions to model energy conservation codes and standards to evaluate the energy savings over previous codes. Moreover, the proposed legislation specified percentage-based increases in energy efficiency to be implemented by state and local governments with DOE oversight. While the legislation passed the House, it was never considered by the Senate. Yet, DOE has taken an active role in promoting these objectives, unsanctioned by Congress, in their participation in the International Code Council's model code development process.

During the recent development of the 2012 edition of the International Energy Conservation Code (IECC), a model energy conservation code for commercial and residential buildings adopted by nearly all states, DOE reported that its proposed revisions to the code would improve energy savings by 30.6% relative to the 2006 IECC. Despite repeated requests, DOE did not explain how it calculated its savings estimate and leveraged pending legislation heavily as the need for approval of its proposed revisions. WDMA believes that DOE must make public its technical assumptions and methodologies to ensure that all stakeholders have equal access to the information and are able to have a full, open and informed dialogue.

WDMA, fellow stakeholders, and consumers will be adversely affected if energy efficiency requirements are adopted without confirmation that they are based upon concrete, scientifically supported information.

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Without the opportunity to review underlying assumptions, the industry faces great uncertainty in planning to respond to new energy efficiency requirements. As manufacturers of energy efficient building products who have already experienced significant job loss due to the housing and construction downturn, our manufacturers can ill afford additional uncertainty. We hope that you will consider reviewing DOE's activities to determine whether steps can be taken to ensure a more open, transparent and collaborative process for industry to work with DOE in their development of proposed amendments to the IECC and other model energy codes and standards which DOE actively influences.

OSHA Noise Reduction Proposal

The Occupational Safety and Health Administration (OSHA) has proposed a new regulatory action that would add millions of dollars in new compliance costs for manufacturers. OSHA has announced its plans to change its official interpretation of workplace noise exposure requirements and enforcement. Under OSHA's proposal, employers would be required to use extensive "engineering and administrative controls" to protect employees from loud workplace noises instead of primarily using effective personal protective equipment like earplugs. The Agency has proposed redefining the existing standards to require employers to perform any changes that are "capable of being done" regardless of the effectiveness of current procedures.

OSHA's current approach to noise control requirements have proven to be effective in protecting employees from hearing loss. According to the Bureau of Labor Statistics, the number of hearing loss incidents have decreased by almost one-third over the last five years alone. Should this proposal be implemented, most manufacturers would be forced to make sweeping changes to their workplaces -- including diverting resources away from jobs toward costly new practices and equipment -- even if mechanisms are already in place to protect employees from loud noises.

WDMA is very concerned that OSHA is attempting to make these changes outside of the formal rulemaking process. According to OSHA's plan, these changes must be adopted regardless of the costs, unless an employer can prove to the Agency that making such changes will "put them out of business." This proposal would significantly increase costs and uncertainty, limit employer flexibility and cost jobs, and it certainly merits review by your Committee.

Thank you for the opportunity to submit these issues for your consideration, and we look forward to working with the Committee in the 112th Congress. If you have any questions, please feel free to contact me at (202) 367-1280 or mobrien@wdma.com.

Sincerely,

Michael P. O'Brien

Michael O'Brien, CAE
President & CEO

vc-p.

Center for Regulatory Effectiveness

C R E

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December 24, 2010

Congressman Darrell E. Issa
Ranking Member
Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, DC 20515-6143

Dear Congressman Issa:

The Center for Regulatory Effectiveness (CRE) appreciates the opportunity to assist the Committee on Oversight and Government Reform in identifying regulatory programs that have negatively impacted job growth. We are limiting our response to those rules for which we have a detailed working knowledge of their shortcomings. We are in a position to provide additional details if you wish.

A. CMS Competitive Bidding Program

The Centers for Medicare and Medicaid Services' (CMS) competitive bidding program for durable medical equipment (DME) is a regulation that will be directly responsible for destroying thousands of small businesses and the associated jobs. CMS admittedly "expect[s] that this final rule will have a significant impact on a substantial number of small suppliers." Results from the Round 1 Rebid confirm that most existing home medical equipment suppliers will lose all Medicare business in the affected areas.[1]

It is important to recognize that many of the job losses are not inherent in competitive bidding itself, but rather in the way in which CMS implemented the program. Importantly, CMS received a letter, signed by over 160 economists including two Nobel laureates, detailing specific problems with the way CMS conducted the bidding program.[2] The inefficiencies and lack of transparency in the bidding process ultimately displace existing home medical equipment suppliers and thousands of associated jobs. Notably, CRE has received hundreds of calls from Medicare recipients across the country who are scared and angry that they will lose trusted home medical equipment providers because of CMS' bidding program. You can hear the voices of Medicare recipients opining on CMS' program on our competitive bidding discussion forum, http://www.thecre.com/Forum/.

[1] http://www.thecre.com/blog/wp-content/uploads/2010/11/cramton-change-in-market-structure.pdf
[2] http://www.thecre.com/blog/wp-content/uploads/2010/09/stark-letter.pdf

B. NOAA/NMFS Gulf of Mexico Take Rules

In 2004, Minerals Management Service[3] petitioned NOAA's National Marine Fisheries Service (NMFS) to promulgate rules under the Marine Mammal Protection Act for the oil and gas industry's use of seismic air guns to explore for oil and gas in the Gulf of Mexico. The purpose of these rules is to impose conditions on seismic exploration in the Gulf of Mexico that prevent any unacceptable effects on marine mammals, such as whales. NOAA/NMFS has not yet proposed any of these rules.

The oil and gas industry does not oppose Gulf of Mexico take rules. Moreover, the industry wants NOAA/NMFS to publish the rules soon, because the rules will provide certainty and protection against NGO attacks. However, environmental NGOs have a track record of demanding and litigating for seismic rules (as well as Navy sonar rules) that are impossible to comply with. If NGOs succeed in having NOAA/NMFS or a court implement seismic rules, then oil and gas exploration will shut down in the Gulf of Mexico. This result would cause a substantial loss of jobs throughout the Gulf area and throughout the rest of the United States. It would also increase the United States dependence on foreign oil.

C. EPA Endocrine Disrupter Screening Program

The Endocrine Disruptor Screening Program is EPA's response to a statutory requirement in the Food Quality Protection Act and the Safe Drinking Water Act Amendments in 1996. These amendments require that EPA screen pesticide chemicals for their potential to produce effects similar to those produced by the female hormones (estrogen) in humans. They give EPA the authority to screen certain other chemicals and to include other endocrine effects. In October 2009, after years of wasteful effort and millions of tax dollars spent, EPA produced a list of pesticide chemicals to be tested and list of 11 tests to be used in a so-called Tier 1 test program. Companies that fail the Tier 1 tests will have to conduct Tier 2 tests, which don't exist yet. The Tier 2 tests will determine whether the chemicals will be further regulated or perhaps even banned.

The cost of performing the EDSP tests will not likely cost many jobs, but the test results might. Failing these tests could result in a product ban or regulations so stringent that persons involved in their manufacture could lose their jobs. Farmers who depend on these pesticides might be unable to produce a profitable crop. These adverse consequences would be unacceptable, because most of the EDSP tests are unreliable. Many of the tests are new, and many of them did not pass peer review for their accuracy and reliability. Therefore, jobs could be lost on the basis of tests that have not been demonstrated to be adequate for their intended use.

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[3] On May 19, 2010, Minerals Management Service was reorganized. The relevant agency is now the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE).

D. Conclusion

As a nationally recognized clearinghouse for methods to improve the federal regulatory process, CRE is very well acquainted with the significant impact and costs the regulatory framework can have on the U.S. economy. Accordingly, CRE is pleased to learn that the Committee on Oversight and Government Reform will be examining this essential issue.

CRE is pleased to have the opportunity to identify existing and proposed regulations that negatively impact job growth for the Committee on Oversight and Government Reform. CRE welcomes the opportunity to assist the Committee in the future as it considers the impact of these and other regulations on U.S jobs. Should you have any questions or require additional information, please contact me at (202) 265-2383.

Sincerely,

Jim Tozzi
Member, Board of Advisors

Regulatory Process Reform Opportunities for 2011

The 112th Congress is overwhelmed by anecdotes of Executive branch regulation run amok. Many stories will be true and relief of some sort will be justified. Attending to them individually, however, would miss three larger points:

1. Congress has enough expertise for oversight on few specific regulations. Overseeing the breadth and depth of regulations issued by any single Federal agency requires expertise well beyond Congress's oversight capacity. Agencies will always muster greater expertise than Congress. For them, regulation is a full-time job.
2. Even the most ill advised regulation has its advocates. Some of the most persuasive advocates will be rentseeking businesses that profit from regulation. NGOs will defend regulations by appeals to sympathetic beneficiaries. These appeals can succeed even when benefits never materialize.
3. Ill advised regulation is not random, but rather the product of agency or abuse of or noncompliance with administrative procedures. These procedures were established to protect the public, but they no longer work for the benefit of the American people.

Reducing the propensity of agencies to issue bad regulations requires broad process reform. This paper outlines six areas in which Congressional oversight of administrative procedures can achieve long-lasting benefits.

Where helpful, examples are provided from the Environmental Protection Agency (EPA) and the Patent and Trademark Office (PTO). I chose these two agencies for two reasons. First, both agencies routinely issue regulatory actions that impose billions of dollars annually in costs. Second, EPA regulations are notoriously controversial but PTO regulations are not. PTO regulations would be highly controversial if the Office did not systematically evade administrative laws and Executive branch procedures.

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1. Paperwork Reduction Act*

The Paperwork Reduction Act (PRA) is the most important procedural statute that hardly anyone has ever heard of, yet it was enacted 30 years ago. Federal agencies do not educate the public about it. OMB's Office of Information and Regulatory Affairs (OIRA) is responsible for enforcing the PRA, but OMB is too aloof by culture and temperament to engage the public. Agencies evade the spirit of the law by publishing incomprehensible notices and withholding information critical for informed comment. Agencies say they minimize paperwork burden, but they do so simply by grossly underestimating it. OIRA tolerates this because its officials would rather devote resources to Executive Order 12,866 review and other activities.

Agencies are forbidden from imposing paperwork burdens that have not been approved by OMB, and the PRA has extraordinarily powerful public protection provisions (44 U.S.C. § 3512, 5 C.F.R. § 1320.6). In principle, but not always in practice, these protections ensure that agencies minimally obey the law.

The PRA's purpose is to minimize Federal paperwork burden. Each agency is required to have an independent office tasked with this function; few if any are actually independent. OIRA has ample authority to disapprove information collections where paperwork costs (i.e., *"burden"*) exceed social benefits (i.e., *"practical utility"*). It doesn't exercise this authority much; disapprovals are rare. PRA compliance is reminiscent of an old joke about why labor productivity in the Soviet Union was so bad: "The State pretends to pay us, so we pretend to work." The PRA is similar: OMB pretends to enforce the law, so agencies pretend to comply.

Some agencies (e.g., the Environmental Protection Agency) are very good at complying with the <u>form</u> of the PRA's requirements but much less often comply with its <u>substance</u>. OMB has approved virtually every paperwork requirement EPA imposes. But EPA systematically understates actual burden. For example, attention has been focused recently on the burdens on industrial facilities resulting from EPA's Title V Greenhouse Gas Tailoring Rule (75 Fed. Reg. 31,514). EPA claims this is "a burden relief rule" that "does not impose any new requirements..." Given the text of the law, EPA cares about securing OMB approval; demonstrating the value of this information or accurately estimating burden, never mind minimizing it, matters not at all.

Other agencies (*e.g.*, the Patent and Trademark Office) are simply dismissive of their PRA responsibilities. The Patent Office has never bothered to seek OMB approval for perhaps billions of dollars in annual paperwork burdens related to applying for and prosecuting a patent application. Legally, the USPTO cannot enforce these requirements. But in practice it has no difficulty at all, because the PRA's strong public protections fall apart when the public seeks to enforce a right or obtain a benefit from an agency that can hold that right or benefit hostage.

Inattention to the PRA may be the proximate cause of reports that paperwork burdens have exploded in recent years. In the debate over the health care law, which in §9006(b) requires a Form 1099-MISC be filed for every purchase over $600, paperwork burdens were ignored. All eyes were on the JCT's estimated 10-year revenue gain of $17.1 billion. Yet paperwork burden could exceed JCT's projected gain in tax revenue. Also, no one examined whether the IRS could actually process these additional 1099s, which is an essential prerequisite for practical utility under the PRA (44 U.S.C. § 3502(11)["the ability of an agency to ... process such information in a timely and useful fashion"]).

GAO recently told Congress that revenue gains would exceed costs. However, this conclusion is dubious. GAO's cost estimates were based on a sample size of <u>nine</u>.

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* 44 U.S.C. § 3501 *et seq.*

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2. Information Quality Act*

In 2000 Congress directed OMB to more aggressively exercise its authority to improve the quality of information disseminated by Federal agencies. OMB's 2002 guidelines required each agency to establish its own implementing guidelines. Agency guidelines were to include administrative procedures whereby the public could seek and obtain correction of information failing to meet OMB's quality standards. OMB required agencies to establish pre-dissemination review procedures to minimize the dissemination of erroneous information. Virtually every Federal agency met the October 1, 2002, deadline. (The Department of Homeland Security remains the most notable violator.)

My review of all 193 petitions submitted FY2003-10 shows that agencies routinely violate their most elementary procedures. Most agencies committed to respond within 60 days. Agencies met that goal less than 30% of the time; the <u>average</u> response time was 200 days. Petitioners often found agency responses unsatisfying. An unknown number simply gave up, but about a third took advantage of the right to an independent administrative appeal. On average, agencies took another 197 days to respond. One reason so few appeals have been filed is that agency responses to appeals do not appear to be genuinely independent. Some petitions and appeals have languished for years.

This chart shows how average response time varies across Federal agencies for Requests for Correction (*i.e..* initial) petitions and Requests for Reconsideration (*i.e.,* appeals). The number in square brackets is the <u>agency's</u> definition of a "timely" response. Only the Treasury Department has met its goal, and the Labor Department has been close.

How Agencies Compare

Worst Performers
Average Days to Respond

Agency	RFC Avg/IQG	RFR Avg/IQG
ACE	860 [60]	--- [60]
DOE	247 [60]	--- [60]
DOC	240 [60]	162 [60]
USDA	239 [60]	147 [60]
EPA	184 [90]	340 [90]
HHS	177 [60]	386 [60]
CPSC	100 [60]	--- [60]

Best Performers
Average Days to Respond

Agency	RFC Avg/IQG	RFR Avg/IQG
TREAS	12 [60]	--- [60]
DOL	78 [60]	106 [60]

Includes all agencies where N ≥ 2.

REGULATORY CHECKBOOK

Agency nonfeasance results from the absence of judicial review and Congressional oversight. To date, petitioners have secured only a partial review on the merits in Federal court, and only once, in *Prime Time v. Vilsack*, 599 F.3d 678 (D.C. Cir. 2010).

Meanwhile, Congress has not conducted any oversight. This is strategically important for regulatory reform, because many major regulations rely on information that is wildly out of sync with applicable quality standards (most notably, objectivity). For example, several controversial recent EPA regulations depend on egregiously biased portrayals of scientific information that has been subject to petitions for correction. Agency responses have largely avoided the merits. The Courts' willingness to defer to Agency expertise would be tested if EPA had to respond honestly to information quality challenges.

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* Pub. L. 106-554, Sec. 515; 44 U.S.C. § 3516 note.

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3. Executive Order 12,866*

OMB has performed centralized regulatory review since 1981, when President Reagan issued Executive Order 12,291. Executive Order 12,866 significantly reduced the scope of OMB review and muddled the review principles. The Obama administration planned at the outset to make major changes to these procedures and principles. About 200 persons and organizations responded to its unprecedented and curious request for public comment. Rumors of the impending release of a revised Executive Order have circulated multiple times since Summer 2009. (The Executive Order released with considerable fanfare on January 18, 2011, is not the one that has been anticipated. Stripped of its promotional dressing, this EO has very little new content and leaves existing procedures intact.)

In his comment letter to OMB, then-Ranking Member Issa noted, "Any change in this directive should be approached with caution and with an eye towards improving regulatory effectiveness while minimizing regulatory burden." He proposed a dialogue on modernizing regulatory review that emphasized such things as information quality ("[t]he need for accuracy, objectivity and transparency in the analysis of potential risks"), and enhanced procedural transparency (OMB should "rate[] the quality of the analysis supporting all major regulations").

The Obama Administration has not <u>formally</u> changed the review process or its substantive criteria, and insight about what <u>*informal*</u> changes have occurred is hard to come by. Nonetheless, there is ample evidence that the <u>intensity</u> of OMB review has declined significantly. In 2009, half OMB's 593 reviews were completed in 29 calendar days or less. For the 125 economically significant rules OIRA reviewed—those draft rules that agencies acknowledge have effects exceeding $100 million in any one year—half of OIRA's reviews were completed in 24 calendar days or less. OMB completed more than 20% of these nominally high-intensity reviews in 10 calendar days or less. Twenty-six rules (nine of them major) were reviewed in one day or less. Six rules were published in the Federal Register before they were reviewed.

Congress needs a clear picture of the regulatory process to inform possible procedural changes. One proposal that has been discussed extensively is the REINS Act. As written, however, the REINS Act could leave Congress relying solely on self-interested agency estimates of benefits, costs, and other effects. There would be neither the time nor a mechanism for agency estimates to be independently reviewed. Congress might want to learn OMB's opinions, but it is virtually certain that the President would never allow this.

Congress also would have to rely on agencies (or OMB) to correctly designate rules as "major." In 2009, OMB reviewed 468 draft regulatory actions not classified as economically significant (i.e., "major").

- How many of them had economic effects exceeding $100 million, but were incorrectly classified to avoid being labeled as "major"?
- How often has an agency succeeded in evading the "major" rule designation by dividing a very expensive rule into multiple small rules?

No one knows the answer to either question, but as written the REINS Act would unintentionally exacerbate both problems.

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* 58 Fed. Reg. 51735, Sep. 30, 1993.

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4. Good Guidance Practices[*]

Agencies have gravitated to issuing guidance in lieu of regulation, and in principle this could be a favorable trend. Unfortunately, agency affinity for guidance often appears to be less motivated by a desire for regulatory flexibility than an interest in avoiding the procedural and analytic requirements of rule making. For example, EPA has implemented through guidance its controversial suite of risk assessment practices, which have extraordinary regulatory impacts. The Patent and Trademark Office publishes without public comment or regulatory analysis thousands of pages of guidance in its Manual of Patent Examining Practices. It even enforces unpublished internal memoranda. Some of the PTO's guidance (*e.g.*, restriction practice in Chapter 800) unambiguously conflicts with both law and regulation.

In response to these latter trends, in 2007 OMB issued a government-wide directive on Good Guidance Practices ("GGP"). This action stirred partisan but not substantive controversy; every administration has quietly reviewed selected guidance documents. In 2009, President Obama revoked President Bush's Executive Order 13,422, removing OMB's authority to review major guidance documents. The extent to which OMB reviewed guidance from 2007-09, or continues to do so informally, cannot be readily determined from public information. When OMB reviews guidance, no record is established in its public database.

Interestingly, President Obama left the GGP in place. The GGP requires each agency to create a web page listing every significant guidance document and noting which ones are in force, superseded, or rescinded. These web pages would be extremely valuable to each agency's regulated community, which otherwise has to expend extraordinary resources simply finding these documents and figuring out which ones (if any) might apply. Predictably, EPA is a leader in procedural compliance. On the other hand the Patent and Trademark Office simply refuses to implement the GGP. EPA's GGP web pages include a well-functioning index and a web-based search utility. PTO has one web page with about 20 links, many well-known omissions, no search capability, and no way to distinguish between operative, superseded, and expired documents.

The GGP also restates two very important substantive provisions of the Administrative Procedure Act. First, agencies choosing to issue guidance generally must avoid binding the public with regulatory language such as "shall," "must," "required," and "requirement." No one has systematically researched whether they comply. Second, the GGP requires agencies to enforce any limits they choose to place on their own personnel so long as regulated parties are not disadvantaged. Regulated parties, whether they are dealing with the EPA or the PTO, often say that language in guidance that appropriately restricts the government's exercise of discretion is ignored, but language that inappropriately restricts the public is enforced as if it were regulatory.

Congressional oversight on GGP compliance would act as a brake on the misuse of guidance and provide welcome insight and predictability about actual agency practice. This also would draw attention to the extent that agencies have complied with its procedural requirements. Some agency heads are likely to be embarrassingly unfamiliar with the GGP. Inquiries directed to the regulated community could yield a bountiful list of guidance documents that are not properly disclosed or do not adhere to the sustentative requirement that they exclude regulatory language.

[*] 72 Fed. Reg. 3432 (Jan 25, 2007.

5. Presidential Initiatives

A. *Open Government Initiative*[*]

On January 21, 2009, President Obama issued a memorandum directing Federal agencies to establish "an unprecedented level of openness" based on a "system of transparency, public participation, and collaboration." It took OMB nearly a year to organize this initiative, and the product of that effort is not substantial.

Agencies' duties under the Directive are actually quite limited. They must take certain actions only "[t]o the extent practicable and subject to valid restrictions." Their main task is to establish an Open Government Web Page from which "at least three high-value data sets" would be made public. Agencies can be expected to choose to highlight databases based on strategic considerations. EPA, for example, uses its Open Government Web Page to make it easier to access information the Agency has long promoted. In contrast, the Open Government Web Page of the Patent and Trademark Office is bereft of content.

Congressional oversight of agency performance even of these limited efforts would be worthwhile, as would a review focusing on the timidity of the Open Government Directive itself. It would be useful to learn which databases agencies are *declining* to make public.

B. *Scientific Integrity*[†]

In early 2009 President Obama issued another memorandum stating, "[s]cience and the scientific process must inform and guide decisions of my Administration" because "[t]he public must be able to trust the science and scientific process informing public policy decisions." The president directed his subordinates not to interfere with science ("Political officials should not suppress or alter scientific or technological findings and conclusions"), and to ensure that scientific information is fully disclosed ("If scientific and technological information is developed and used by the Federal Government, it should ordinarily be made available to the public").

The president directed the Office of Science and Technology Policy (OSTP) to "ensur[e] the highest level of integrity in all aspects of the executive branch's involvement with scientific and technological processes" by developing "recommendations for Presidential action designed to guarantee scientific integrity throughout the executive branch." The deadline for OSTP to implement this directive was July 7, 2009.

OSTP Director Holdren finally issued his implementing memorandum on December 17, 2010—17 months late. The memorandum, which piggybacks on the Open Government directive, is exclusively hortatory (agencies *should*, never *shall*) and is subject to unlimited agency discretion (data and models underlying regulatory proposals and policy decisions need be disclosed only "where appropriate"). The president's prohibition against interference is not actually binding ("political officials <u>should</u> not suppress or alter scientific or technological findings"); however, "public affairs officers" may alter findings "in no circumstances."

The Scientific Integrity Directive is subtly weaker than Bush Administration policy. OMB's 2005 peer review guidelines required agencies to select peer reviewers "based on expertise, experience and skills." The new Directive says reviewers should be "qualified."

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[*] 74 Fed. Reg. 4685, Jan. 21, 1009; Orszag Memo M-10-06, Dec. 8, 2009.

[†] 74 Fed. Reg. 10671, Mar. 11, 2009; Holdren Memorandum, Dec 17, 2010).

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The directive invites agencies to "[e]stablish principles for conveying scientific and technological information." It does not mention OMB's 2002 Information Quality Guidelines, which established binding principles that agencies appear not to follow seriously.

Each Administration is accused of allowing policy and politics to interfere with science, and White House officials are especially susceptible to the temptation. Two recent incidents, both involving the Mississippi Canyon Block 252 ("Deepwater Horizon") blowout, implicate Assistant to the President for Energy and Climate Change Carol Browner. On August 4, 2010, Browner publicly claimed that more than 75% of the oil was "gone." She based this on a NOAA report that had not yet been peer reviewed, which she interpreted in an extremely favorable and misleading, way. In the other case, Interior Secretary Salazar tasked seven external experts recommended by the National Academy of Engineering to peer review a DOI report on drilling safety recommendations. This report they reviewed did not include a drilling moratorium. But Browner or someone on her staff added the moratorium recommendation to the report's Executive Summary, plus text implying that the peer reviewers agreed with it. They did not, for both procedural reasons (they had not reviewed the recommendation) and substantive ones (they considered the recommendation unscientific).

In response to Congressional complaints, the Interior Department's Acting Inspector General reviewed the incident and delivered the weakest of exonerations, agreeing that Administration officials misled Congress and the public but that they did not seem to intend to do so. Interestingly, she did not consider the matter a question of scientific integrity, as the external reviewers did, but one of Information Quality Act compliance. She concluded that DOI had not "definitively violated the IQA" because only the Executive Summary had been tampered with. (It is a *prima facie* violation of applicable information quality guidelines—and scientific integrity—to add anything to an executive summary that is not contained in, is different from, or conflicts with the document being summarized.)

Yet it is not surprising that this IG report is so weak. IGs usually operate independently of agency and White House officials, but increasingly they are drawn into supporting Administration programs and policies (*e.g.*, estimates of "jobs saved" reported by Recovery.Gov). Some IGs have become vulnerable to termination for political reasons (*e.g.*, Gerald Walpin). The author of the DOI IG report was a career civil servant appointed in an acting capacity. It is unreasonable to expect genuine independence in such a case.

Nevertheless, scientific integrity in the Federal government remains a serious problem worthy of Congressional oversight—even if President Obama's directive was misguided and OSTP's implementing memorandum is tepid. The issue that Congress can deal with establishing a clear line between science and policy, which has become blurred beyond recognition. Sometimes, political will have the high moral ground because many Federal scientists strive to embed their personal policy views within ostensibly scientific work. Political officials are right to object to this practice. When they do, however, they can expect to be accused of political interference with science—especially by the very Federal scientists who seek to usurp officials' legitimate authority.

Finally, Congress sometimes makes matters worse by asking scientists to opine on policy, which many scientists are happy to do. This results in a predictably left-liberal bias in Federal policymaking because members of the academy have a well-documented left-liberal tilt. It may be impossible to prevent scientists from giving their opinions. Nonetheless, Congress could achieve major regulatory reform simply by insisting that they strictly separate scientific data and analysis from policy advice.

From: Fred Smith [mailto:FSmith@cei.org]
Sent: Monday, January 03, 2011 6:39 PM
To: Moore, Kristina
Cc: Amanda France
Subject: Follow up to Rep. Issa's inquiry

Dear Representative Issa:

I'm pleased to respond to your request for suggestions on regulations harmful to our economy. To date, those seeking to examine the appropriate role of government have focused on taxation and spending. Congress should continue to scrutinize those burdens on the economy. However, we at the Competitive Enterprise Institute have spent 26 years focusing on the less salient, the hidden burdens, arising from the growth of the regulatory state. Hearings to ensure that regulations receive the same critical attention of these more "honest" forms of intervention are overdue. If the people are able to see *for whom the regulatory bell tolls*, the opportunity to liberate our economy, and thus stimulate economic growth, will be greatly enhanced. One hopeful sign is that Tea Party activists, who supported many members of the new freshman class, have done much to increase public awareness of the costs of regulation and have called for reform. We propose you undertake the following investigations in the House Committee on Oversight and Government Reform.

Energy

Shortly after his election, President Barack Obama said: "Cap and trade was just one way of skinning the cat; it was not the only way. It was a means, not an end. And I'm going to be looking for other means to address this problem." Congress should investigate these "other means," as the Obama Administration pursues energy rationing without any Congressional involvement. The proposed regulations will depress investment, destroy jobs, raise energy prices for consumers, drive energy-intensive manufacturing jobs abroad, and create perpetual economic stagnation.

- **Runaway regulation under the Clean Air Act.** In regulating greenhouse gas emissions, the Environmental Protection Agency (EPA) is trying to pick and choose which provisions of the Clean Air Act it wants to implement. But that is not how the Clean Air Act was set up. Under the Act, regulation under one section trips regulation under multiple other sections. Even if EPA tries to avoid this outcome, environmental pressure groups have already filed several lawsuits to compel the agency to begin regulating greenhouse gas emissions under other sections. Unless Congress intervenes, every building larger than a single-family dwelling likely will become subject to carbon controls in the near future.
- **EPA's administrative cap-and-trade power grab.** The EPA plans to propose greenhouse gas emissions control technology standards for power plants in July 2011 under the Clean Air Act. One of the primary options the EPA is reportedly considering is a cap-and-trade program. The fact that even the Democratic-controlled 111th Congress refused to enact a cap-and-trade program appears not to matter to Climate Czar Carol Browner or EPA Administrator Lisa Jackson. The EPA's authority under the Clean Air Act requires clarification and the agency's unilateral actions require investigation.
- **De facto moratorium on American oil and gas production.** Political decisions by Interior Secretary Ken Salazar and his appointees have led to a steep decline in domestic

oil and gas production on federal lands and offshore areas. Production is already down and will almost certainly decline further. The extent of these cancellations is not fully apparent because they have been done piecemeal. An investigation is needed to put all the pieces together and thus show the damage done—and being done—to America's domestic oil and gas industry.

- **Attack on Appalachian coal mining.** On April 1, 2010, the EPA announced and immediately implemented rules for regulating a new "pollutant" under the Clean Water Act in order to stop new (and even existing) surface coal mining projects in central Appalachia. This is already a huge threat to West Virginia and Kentucky and will also probably impact Virginia and Pennsylvania. However, there is no reason to believe that the new salinity standards can be confined only to central Appalachia or applied only to block surface coal mines. The fact that any surface disturbance can increase salinity in nearby streams means that environmental pressure groups and NIMBY activists can file suit in federal court, under the Clean Water Act, to require the new standards to be applied nationwide. Thus, a threat to one region will almost certainly spread if Congress does not act to stop it.
- **Locking up federal lands.** The amount of federal land managed under the Multiple Use and Sustained Yield Act has been shrinking since the 1960s, as lands have been placed in one category of special environmental protection or another. Many of these withdrawals have been done by Congress through the creation of new Wilderness Areas, new National Wildlife Refuges, etc. However, more and more lands are being designated administratively without any Congressional involvement or by abusing existing laws such as the 1906 Antiquities Act. Huge productive resources—hard rock minerals, oil and gas, timber, coal—are thereby being placed off limits. Inventories of the resources that have been removed from potential use need to be undertaken and hearings should be held.
- **CAFE gone wild.** The 2007 anti-energy bill mandated higher Corporate Average Fuel Economy (CAFE) standards for new cars and light trucks. The Obama administration granted California's request for a waiver under the Clean Air Act and implemented the new CAFE standards on a faster schedule than Congress had required. But even before the 35.5-miles-per-gallon fleet average takes effect in the 2016 model year, the EPA has started to push for progressive improvements in fuel economy that will lead to a 47- to 62-miles-per-gallon standard by 2025. This insanity must be stopped before taxpayers are facing a much wider federal bailout and takeover of the auto industry.

Finance

- **Debit card interchange fees set by the Federal Reserve**. On December 16, 2010, the Federal Reserve issued regulation implementing the Durbin Amendment to the Dodd-Frank financial reform law, which puts controls on the interchange fees retailers pay to process debit cards. The amendment—favored by some of the nation's largest retailers—requires the Fed to "establish standards" to assess whether interchange fees are "reasonable and proportional to the cost." However, the Fed's proposed rule goes way beyond what the Durbin Amendment requires. If implemented as proposed, merchants will never pay more than 12 cents for any customer's transactions, whether it's for $1.00 or $10,000. Yet the costs of processing debit cards will not go away. They will simply be shifted to the community banks and credit unions that issue debit cards and ultimately on to consumers. There are efforts underway in Congress to delay or repeal the Durbin

Amendment, and even soon-to-be former House Financial Services Committee Chairman Barney Frank (D-Mass.), criticized the Fed on CNBC for setting the fees "too low." Ideally, Congress should repeal the Durbin Amendment. Short of that, it should require the Fed to justify the rates it has set.

Labor

Having failed to enact some key items in their legislative agenda—including the misleadingly named Employee Free Choice Act (EFCA)—into law, organized labor and the Obama administration have indicated that they will seek to make an end run around Congress by imposing pro-union labor organizing rules through the regulatory process, mainly through the National Labor Relations Board (NLRB) and National Mediation Board (NMB). Congress should resist any such attempts.

- **National Labor Relations Board.** The NLRB is considering allowing remote electronic voting (E-Voting), which would allow unions to conduct organizing elections via phone or the Internet. The NLRB says it wants to keep the voting secret, but it would not be difficult for a union organizer using a laptop computer or some other mobile device to pressure an individual worker to vote for the union. The NLRB is also considering expedited elections, which essentially would function as ambush elections. Employers would have very little time to respond to union organizing campaigns, which gives the union a significant advantage.
- **National Mediation Board.** The NMB recently amended the Railway Labor Act (RLA), which regulates labor relations for railways and airlines, to skew voting rules in unions' favor. Under the previous interpretation of RLA voting rules, which dated back to 1934, a union needed to get a majority of all members in the bargaining unit to vote for unionization. Under the new interpretation, unions only need to get a majority of votes cast, which can lead to a union being certified as the monopoly bargaining agent for a group of employees with only a minority of those employees having voted for the union. For example, if a union tries to organize a company that has 1,000 employees and on the day of the election only 500 vote, the union would need only 251 votes to win.

Congress should demand from both the NLRB and NMB a thorough explanation of the policy changes they are pursuing. For changes which the agencies have already enacted, Congress should restore accountability through a resolution of disapproval under the Congressional Review Act of 1996, which allows Congress to review—and, when needed, repeal—agency-promulgated rules. Even if not all CRA resolutions succeed, they can force lawmakers and regulators to account for the costs of the rules they impose on the rest of us. It would be even better still for new regulations to meet this kind of scrutiny on a routine basis.

Tech and Telecom

America's thriving information technology and telecommunications sectors face a serious threat from Washington. Proposals to enact unwarranted, destructive regulations enjoy substantial support among Democrats in Congress, yet these rules threaten domestic job creation and U.S. consumers. The high-tech sector's most serious threats come from two agencies, the Federal Trade Commisstion (FTC) and Federal Communications Commission (FCC), led by pro-regulation Obama appointees Jon Leibowitz and Julius Genachowski, respectively.

- **Federal Communications Commission.** In late December, the FCC voted 3-2 along party lines to pass a net neutrality rule—the so-called "Open Internet" order—forbidding Internet Service Providers from engaging in many kinds of pro-competitive broadband traffic prioritization, discrimination, and tiering—despite the D.C. Circuit Court's April 2010 *Comcast Corp. v. F.C.C* ruling, which held that the agency lacked the statutory authority to enforce net neutrality. Regulatory uncertainty will continue to shroud the Internet marketplace until Congress or the courts clarify the FCC's proper role in broadband governance. A legal challenge to the FCC's net neutrality rule will likely take many years, so it is imperative that Congress act swiftly to amend the Communications Act to explicitly strip the FCC of authority to regulate the network management practices of Internet Service Providers. Short of that, Congress should hold hearings to examine the weak rationale behind the FCC's Open Internet order. Chairman Julius Genachowski should be asked why his agency declined to defer to the Department of Justice's antitrust division, which concluded in early 2010 that spectrum liberalization, not new regulation, was the most desirable policy lever for spurring greater broadband competition.
- **Federal Trade Commission.** The FTC is proceeding down a path of harmful regulation in the context of Internet privacy and information collection. The agency has yet to propose a formal rule, so prompt congressional action could prevent it from proceeding further. In December 2010, the FTC's Bureau of Consumer Protection issued a report on the state of consumer privacy, in which it advocated the creation of a "Do Not Track" list and called on Congress to enact privacy legislation regulating the collection of consumer information. Some FTC officials are reportedly considering moving forward with new regulations based on the agency's report. Congress should bar the agency from imposing prescriptive new mandates on firms that collect information about individuals. Existing enforcement mechanisms, combined with evolving common law standards, are well equipped to handle privacy threats as they surface. These flexible mechanisms, unlike detailed federal regulations, tend to evolve along with technology. Congress should demand that Consumer Protection Bureau head David Vladeck and FTC Chairman Jon Leibowitz demonstrate the prevalence of actual—not speculative—consumer harm that existing mechanisms cannot adequately address before establishing any new rules.

Let me conclude with a suggestion that you consider an oversight series of hearings on the ways in which technological progress has been diverted from an increasingly consumer-friendly path to one designed to please regulators. Once upon a time, Americans were generation that each new generation of products would outperform—and be less expensive than—its predecessor. Now we find the popular incandescent light bulb made illegal, larger cars penalized, dishwashers made to clean poorly as they use less energy, and toilets that must be flushed more than once. We have diverted the skills of our most creative entrepreneurs into delicate balancing acts between satisfying the approval of regulatory overseers and the desire to sell a quality product at an affordable price. We need to reverse this trend, and bring back to *all* sectors of our economy the innovative spirit that is emblematic of our frontier sectors—including the Internet, software, and gaming. An oversight hearing noting the design, cost and maintenance problems that emerge when political interests replace individual choice would do much to dramatize the dangers of the nanny regulatory state. It would offer an excellent opportunity to communicate to the American public the need to rein in the regulatory state.

The above listing of issues provides for a good start to take on the challenge of bringing the size and growth of government under control. However, it is only a start. We look forward to working with you and your colleagues in the near future to help bring the principles of limited government back to our nation's capital.

Sincerely,

Fred

Fred L. Smith, Jr.
President, Competitive Enterprise Institute
1899 L St NW, Floor 12, DC 20036
Direct: 202.331.2275
http://cei.org/

POLICY ASSOCIATION®
The Association of Chief Human Resource Officers

January 5, 2011

The Honorable Darrell Issa
Chairman
House Committee on Oversight and Government Reform
U.S. House of Representatives
2157 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Issa:

On behalf of the HR Policy Association and in response to your request for a list of concerns regarding job killing regulations, I am forwarding to you a recent paper our Association published entitled "A New Approach to Employment Regulation in the 21st Century." The paper highlights, from an employers' perspective, many of the regulations and regulatory processes that impede economic growth and job creation in the United States.

I hope this paper will be useful to you as you revisit regulations impacting employment in America. If you have any questions, please do not hesitate to me at 202-789-8670. Thank you for your consideration.

Sincerely,

Jeffrey C. McGuiness
President & CEO

A New Approach to Employment Regulation in the 21st Century

The Views of Chief Human Resource Officers Regarding Formulating and Maintaining Contemporary Employment Policy

August 16, 2010
10-121

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About the Association

HR Policy Association is the lead organization representing chief human resource officers of major employers. The Association consists of more than 300 of the largest corporations doing business in the United States and globally, and these employers are represented in the organization by their most senior human resource executive. Collectively, their companies employ more than 10 million employees in the United States, nearly 9 percent of the private sector workforce, and 20 million employees worldwide. They have a combined market capitalization of more than $7.5 trillion. These senior corporate officers participate in the Association because of their passionate interest in the direction of human resource policy. Their objective is to use the combined power of the membership to act as a positive influence to improve public policy, the HR marketplace, and the human resource profession. For more information visit www.hrpolicy.org

Executive Summary

The following paper describes a new approach to regulation being called for by the Chief Human Resource Officers of more than 300 large companies employing in the aggregate over 20 million people globally. A significant part of the responsibility of a corporate Chief Human Resource Officer is to ensure the company's compliance with a host of employment, labor, benefits, safety, privacy and other laws and regulations governing the workplace and the relationship between employers and employees.

What we are seeking is a new approach to employment policy that includes a broad reexamination of existing laws and regulations by policymakers and the stakeholders that results in a full understanding of their impact on economic growth and then ensures the continuation of protections that are needed and relevant to today's workplace in a way that does not impact negatively on economic growth in the United States.

Seven Recommendations for a New Approach to Employment Regulation

1. Policymakers need to put the same energy into reexamining employment laws and regulations already on the books as they do into enacting new ones.
2. The process of reexamining existing laws and regulations should be done in a non-adversarial manner that brings together the key stakeholders to develop consensus recommendations.
3. Consideration needs to be given by Congress in formulating a rigorous analytical process to be used in enacting new employment legislation and regulation that asks a series of detailed questions regarding the impact of the legislation on the competitiveness of employers, the manner in which protections are provided employees, and the process by which the objectives of the laws are achieved.
4. For all new laws and regulations, policymakers should first invite the stakeholders to form a consensus among themselves on the best approach.
5. All new employment laws and regulations should be preceded by an Employee Retention and Hiring Cost Analysis that examines the impact of the proposal on preservation and creation of American jobs.
6. Employers should be able to maintain uniform human resource policies in all fifty states through a broad federal preemption of state employment laws.
7. The use of private litigation to enforce federal employment laws should be minimized or eliminated.

Introduction

During the decades immediately following the Second World War, the United States experienced unprecedented economic growth that, for a while, far outpaced that of the rest of the world. With little fear of losing ground to economic competitors outside our borders, the employment regulatory scheme established during the New Deal was significantly expanded during the last half of the 20th Century. This resulted in a highly complex scheme of mandates, restrictions, and reporting requirements, covering the American workplace that was further reinforced and expanded by the burgeoning growth of employment litigation encouraged by monetary penalties and liability contained in these regulations. This trend continued even as competition to America's dominant economic position emerged globally.

With the 21st Century upon us and America struggling to climb out of the Great Recession, as many of its global competitors recover far more rapidly, we believe that the time has come to rethink the fundamental assumptions and principles the United States has followed regarding the role of government in the workplace. Congress and the administration are currently considering a vast array of proposals to expand that role to an even greater extent. However, we would suggest instead a close examination of what is already in place with an eye towards improving its relevance and workability in the contemporary work environment, instead of strict enforcement of laws that are no longer relevant to the way people live and work.

This by no means suggests the current employment policy regime be dismantled. If a law or regulation is succeeding in providing a needed protection or securing a fundamental right in an economically sound matter, it should be retained. The fundamental problem is that most workplace laws that were placed on the books decades ago have never been reconsidered even though the workplace has changed dramatically. In fact, a unique aspect of employment laws is that they virtually never sunset. In sharp contrast, most federal spending programs expire after four or five years, forcing Congress to reconsider them on a regular basis to ensure that they are still viable. True, Congress rarely allows these laws to expire, but in being forced to reconsider them, refinements are made, with some aspects being expanded and others being contracted or even abandoned. While the results are anything but perfect, at least the most obvious needs are addressed—often by consensus of all affected parties.

No such reexamination takes place when it comes to employment regulation. Laws and regulations are placed on the books without any built-in mechanism for reexamination or improvement. If anything, they become more complex and difficult for employers to navigate through the addition of layers of regulations and interpretations by the courts. To make matters worse, few of these laws are preemptive, leaving the states free in most cases to impose additional layers of requirements that in many cases conflict with the requirements imposed by other states or even the federal law itself.

As the United States seeks to regain its former economic strength, a necessary component of this effort must be a reconsideration of how the employment relationship is regulated. Historically, a particular Congress or administration is considered to be successful only if it passes new laws or issues new regulations increasing workplace requirements and adding compliance burdens and liabilities for employers.

We believe the time has come for the nation to ask whether the effort to achieve a just society can be done in a manner that does not result in higher unemployment and an uncompetitive business environment. The purpose of this paper is to seek to begin a dialogue with federal policymakers on this critically important subject.

In the course of the paper, we raise a number of questions and suggest guidelines for the debate. It is worth noting that many of these examples are drawn from a law written in the 1930s to address the workplace of that era—the Fair Labor Standards Act. Perhaps no other law on the books better illustrates what happens when laws are not subjected to the same kind of critical reexamination and reinvention that American businesses have learned is necessary for the long-term survival and success of any enterprise.

The Economic Recovery and Factors Associated with Job Creation

Given the current economic situation, an examination of employment regulation policy is particularly critical because the ability of employers to compete on a global scale is unequivocally tied to the workplace and the laws and regulations that shape it. While the precipitous economic decline that produced the Great Recession may have been arrested, the number of payroll jobs is still 7.4 million below the level that preceded the downturn. Further, there are more than five unemployed Americans for every job opening.[1] Attempts to jump-start the recovery have involved massive federal expenditures coupled with sweeping policy changes touching virtually all areas of the economy. However, we are deeply concerned that existing employment policy—and the direction it appears to be heading—is undermining these efforts because of its impact on U.S. competitiveness, innovation, and employment growth.

The Costs of Regulations. The comprehensive structure of U.S. workplace laws, regulations, and taxes plays a role in virtually every decision by an employer with respect to hiring, promotions, terminations, scheduling, sharing of data, use and design of facilities, changes in operations, and location of work. All of these laws and policies have a cost, and with each additional mandate or tax, another cost is layered onto employment decisions.

Thus, the ability of employers to add new jobs to the economy depends to a large extent on the costs associated with those jobs. This is not just a question of the dollar amounts involved in wages and benefits. It also includes numerous other factors that influence the decision by an employer as to whether it is economically feasible to even continue an existing position, let alone add new ones. When it comes to workplace regulation, these factors include, among other things:

- the administrative costs associated with compliance with a law or regulation, including the tracking and recordkeeping associated with the data needed to demonstrate compliance;
- the time spent by human resource officers, supervisors, managers, and company leadership in planning and ensuring compliance with each workplace rule;
- the legal costs associated with establishing protocols to ensure compliance while maintaining continuous internal auditing to make certain that these protocols are being followed;
- the potential legal costs for addressing complaints and, ultimately, litigation as well as defending against enforcement actions brought by the government or private parties where allegations of noncompliance are involved (including the costs of settlement where the expense of defending such actions may exceed the potential liability); and
- the inability to achieve savings or competitive advantages as a result of restrictions that preclude the development of more efficient and productive workplace policies and procedures, even where they may be to the mutual benefit of both the employer and the employees.

As policymakers continue to strive for a full economic recovery, it is essential that they consider the interplay between the goals of adding and restoring jobs and the costs of employment regulation associated with each job.

The Current Regulatory Climate

Employers are deeply concerned about the relationship between government and business and the extent to which it becomes highly adversarial in the employment policy context. The most significant driver of the American economy for the past two centuries has been the ability of the private sector to create economic opportunities and jobs. Yet, we see a disturbing trend in the recent regulatory climate that instead seems to view employers as a malevolent force that must constantly be placed under severe restraints. There appears to be a general belief among many policymakers that, absent strong governmental enforcement schemes, employers will not treat employees fairly and will take advantage of them. There is no question that there have been many instances over the years of certain companies taking actions that harmed employees, and it can be said that to some extent, business has brought this mindset on itself. However, the political system in the United States is such that public policy results in the sins of the bad actors being punished by foisting harsh regulatory schemes on all employers, regardless of their past behavior.

Association members believe that instead of continuing the adversarial relationship between government and business, particularly at a time of high unemployment, the government should try to work with employers to help create both jobs and the conditions for their placement in the United States. This can be manifested in numerous policy areas, including education, training, tax, and trade policy. Yet, when it comes to employment regulation, this is not the message they receive from the repeated statements and threats by government officials that employers should expect far stiffer enforcement of existing employment laws coupled with even tougher measures and mandates. What is needed instead are statements pledging a partnership with business to create new markets and long term employment opportunities.

A Reexamination of Employment Policy

With this in mind, we seek a broad re-examination of the impact of the nation's regulatory structure covering the workplace and the employment relationship. We need to ask whether the nation has reached a tipping point where the nation's labor, employment, and benefit laws have become so complex, burdensome, and difficult to administer that they have become both counterproductive and job killers. In addressing this issue, we must recognize that many of these laws—with the Fair Labor Standards Act of 1938 being a prime example—were formulated in a period when the workplace was significantly different than today, and there was less concern about goods and services being performed outside our borders under different, and often more flexible, regulatory schemes.

General Consensus on Fundamental Rights and Protections. We wish to emphasize that we are not suggesting a race to the bottom that abandons fundamental employment protections. Indeed, the vast majority of laws regulating the workplace address legitimate concerns, and they rest upon a set of core principles that nearly all people believe should be part of the employer-employee relationship. For example, there is a broad consensus that:

- Employees should be treated with respect by employers.
- Employees should not be taken advantage of by employers.
- Employees should not be discriminated against in hiring, compensation, advancement, and termination using inappropriate factors or criteria.
- Employees should not have to fear or suffer from bodily harm in their workplace that is reasonably preventable.
- Employees should be able to form a union and engage in collective bargaining if they choose to do so in an atmosphere free of coercion by either the employer or union organizers.

Although there will always be a small minority of employers that will try to take advantage of their employees just as there will always be a small minority of employees who will try to take advantage of their employer, it is important to recognize that the vast majority of employers understand that running a workplace that lacks respect for employees, fair compensation, essential health and safety protections, and non-discriminatory treatment ultimately becomes a self-defeating practice that results in a loss of competitive edge.

Traps for Well-Intentioned Employers. The frustration employers have with the existing regulatory regime is that it often takes overly prescriptive approaches that, if not adhered to in a very careful manner, can result in "gotcha" penalties for employers who had no intent to either violate the law or take advantage of their employees. Indeed, "one size fits all" prescriptions can inhibit the employer's ability to accommodate both its employees' needs as well as its own in a mutually satisfactory manner. Thus, as is often the case under the 1938 Fair Labor Standards Act, companies and their employees find themselves having to force the workplace into a construct designed solely to comply with the law.

The problems employers confront in complying with workplace regulations are further exacerbated by the potential for costly litigation. The United States is one of the few nations that provides for enforcement of many of its employment laws through private actions before juries, frequently resulting in significant monetary damages. Even employers who are in compliance with the law spend a considerable amount of time and resources dealing with nuisance lawsuits driven by the plaintiffs' bar. All too frequently, these suits are filed with the objective of shaking the employer down for a settlement in return for withdrawing the case. And after the lawyers take their cut of the settlement for both fees and "expenses," plaintiffs are often left with crumbs. In the case of class actions which are now available for most employment laws, the problem is compounded as lawyers often walk away with huge fees while individual plaintiffs may only receive a modest share of the recovery. It should come as no surprise that the United States, among all the industrialized nations, has the highest number of lawyers per capita.[2]

Making a Bad Situation Worse: Pending Legislative and Regulatory Initiatives

Despite the megaload of existing employment regulation, both Congress and the current administration are considering a plethora of proposals that, rather than fixing existing problems, would add to the costs of employment by mandating new benefits and/or creating new layers of regulation. Among others, these proposals include:

- **The Paycheck Fairness Act,** which would ignite a new explosion of litigation by establishing unlimited jury awards of compensatory and punitive damages for pay discrimination claims and setting a precedent for the same change in all other discrimination laws, while making it easier to prevail in such actions even where the employer used non-discriminatory factors such as experience, productivity and education;
- **The Healthy Families Act,** which would directly add to the costs of employing American workers by mandating paid sick leave policies—covering all full-time and part-time employees—that would extend well beyond the policies of most large and small businesses;

- **The Employee Free Choice Act**, which is designed to unionize more workplaces though so-called "card checks" that deny employees the ability to adequately assess the pros and cons of unionization and exercise their choice in an un-coerced confidential manner, while having government-appointed arbitrators decide the wages, benefits and all other terms and conditions of employment in newly-unionized workplaces;

- **New Wage and Hour Reporting Requirements,** which the Department of Labor has announced will be proposed in 2010, that would invite employees and independent contractors to pursue litigation against companies based on disputes as to whether they are exempt or non-exempt under the arcane, antiquated rules that define those exemptions;
- **Proposed EEOC regulations implementing the Americans with Disabilities Act Amendments,** which would create confusion and disruption in the workplace by broadening ADA coverage to include minor impairments that then obligate the employer to provide a "reasonable accommodation" in scheduling or other important workplace policies;
- **The Working Families Flexibility Act,** which would insert the federal government in the decision between an employer and employee on the scheduling and location of work by regulating how the employer responds to those requests and generating litigation where they are denied in whole or in part; and
- **The FOREWARN Act (S. 1374/H.R. 3042),** which would expand the employer's requirement to provide advance notice of layoffs by lowering the threshold to include smaller events and increasing the amount of notice from 60 to 90 days, further taxing the employer's ability to predict relatively minor fluctuations in workforce needs.

What is most troubling is that these major policy changes, and numerous others, are being considered on a piecemeal basis, with little consideration for the broader perspective of how they would collectively add to the costs of employment, which are already significant under existing requirements.

A Prime Example of Regulatory Failure: The 1938 Fair Labor Standards Act

Of all employment laws and regulations that are out of synch with today's workplace, the prime example is the Fair Labor Standards Act (FLSA), enacted in 1938 during the Great Depression. On its face, the FLSA is a very simple and meritorious attempt to protect employees against exploitation and "sweatshop" working conditions. The dual purpose of the law is to provide a minimum wage (currently $7.25 per hour) and ensure that workers who are not otherwise exempt are paid time-and-a-half overtime for hours worked in excess of forty in a given workweek. The most common exemption, is for "white collar" employees who must be paid a salary. Unfortunately, these simple concepts have been translated into countless vague and inconsistent rules and exceptions that are increasingly out of step with the times.

Examples of Problems. Employers regularly deal with following kinds of situations forced by the statute's inflexibilities:

- Work schedules are carefully designed to avoid excessive overtime. Thus, even if employees would prefer to work eight days in a row, with six days off in a row, the employer cannot afford such a schedule because it would involve at least two full days of overtime.
- Because employers fear that FLSA violations will occur because of employees engaging in work that is not being tracked, they impose restrictions on the use of social media outside of working hours. Thus, nonexempt employees are discouraged or prohibited from checking emails off-hours due to the risk of not reporting their time worked. In occupations such as off-site repairmen where the use of Blackberries or other personal digital assistants (PDAs) is essential, some employers require the employee to keep these at one of the employer's locations, picking it up and dropping it off there, regardless of the location of site visits.
- The law creates disincentives toward engaging nonexempt employees in trouble-shooting and decision-making:
    - When something goes wrong on a shift and the current shift needs to call someone on the prior shift, the administrative burden of reporting the "time worked" for the prior-shift employee's six-minute phone call discourages the contact.
    - Nonexempt employees may be routinely excluded from off-site meetings or trips which could be beneficial to them and the company because of the administrative difficulty of determining

what time is compensable and the actual cost, once determined. For example, a group of exempt engineers may decide to have an off-site retreat to improve the design of a product. Even though the non-exempt draftsmen may not be essential to the meeting, the engineers may want to include them so that they have a better understanding of the direction of the project and because they are viewed as part of "the team." Yet, because of uncertainties for nonexempt employees surrounding extension of the workday, paying for travel time to and from the meeting, whether any meals served before the meeting are considered "on the clock" and so forth, the company may have a policy of not including "non-essential" employees in such meetings.

- In team situations where nonexempt employees are actively involved in deciding how the work is to be performed, the employer often has to discourage them—to the point of imposing discipline—from engaging in "after hours" discussions with their co-workers or engaging in any other work, such as writing a proposal for addressing a particular problem.

Such division of employees based on job classification is increasingly out of sync with corporate cultures which depend on team-work. Further, the inability to participate in off-hours or off-site events stunts the career growth of nonexempt employees who lose the benefit of these activities.

- Nonexempt employees are often at a disadvantage when their employers offer non-work-related events during the workday for employees to participate in, such as Earth Day celebrations, diversity network events, corporate United Way campaign events, and so forth. In 24/7 operations, these events will always be taking place during the working hours of some segment of the workforce. Thus, in order to participate, those nonexempt employees must be compensated for that time and are thus less likely to get management support for participating as fully as exempt employees, including being able to serve as leaders or organizers.

- Employers are discouraged from paying bonuses and other forms of incentive pay to nonexempt employees because the law requires such amounts to be included in the employees' rate of pay for purposes of calculating overtime. For example, an employer may want to extend pay-for-performance incentives to nonexempt employees by offering annual incentive payments for achieving certain performance targets. However, payment of the incentive will require recalculation of overtime pay for the year. Moreover, when making the decision to provide such incentives, the employer often doesn't know how much overtime the employees will work, thus preventing an accurate projection of costs. To avoid this administrative complexity and potential legal exposure, some employers simply conclude that they are not going to extend incentive pay programs to nonexempt employees.

- At a time when upgrading the skills of American workers is a priority, employers are discouraged from offering optional training to their employees because the FLSA regulations require that employees be paid for the time spent during the training unless it is "not directly related" to their jobs, even though they are not being required to take it. For example, an employer may provide training for a new software program that only certain of its computer programmers will use. Clearly, the employer should pay for the training time for those employees. However, other programmers may wish to also learn the program to broaden their expertise. Yet, the employer may decide not to offer it to them because its lawyers say it may be viewed as "directly related" to their jobs.

The FLSA Workplace. In considering the FLSA, it is important to understand the state of the American workplace when the 1938 law was enacted. The Depression-era workplace was characterized by:

- a fixed beginning and end to both the workday and the workweek in most American workplaces;
- with the exception of certain occupations (*e.g.*, repairmen and truck drivers), the performance of the vast majority of work taking place <u>in</u> the workplace because of the lack of communications technology allowing the performance of jobs from remote locations;
- a far more stratified and predictable designation of occupations, as compared to today's workplaces where there is a greater blurring of distinctions and a more rapid evolution of job descriptions; and
- a greater preponderance of manual labor because of the relative absence of technology and mechanization that transformed the way work is performed today.

The FLSA was passed at a time when Ford Motor Company was making Model A's on its production line with considerable manual labor and relatively very little automation. With technology and robotics, today's production workers use their minds and computers to an extent that was beyond the imagination of science fiction writers in the Depression.

Today, in fact, the entire concept of work is changing as the United States moves from a manufacturing to a service economy that is highly dependent on technology and much more mobile. Yet, the basic structure of the FLSA has never been fundamentally reexamined. The FLSA and its regulations simply have not kept pace with the changes in the workplace. The FLSA was enacted in 1938 and, though it has been amended in a noteworthy manner 17 times, those amendments have, for the most part, been limited to expanding coverage to specific categories of employees and increasing the minimum wage, while occasionally addressing very narrow aspects of the law.[3] Even though the minimum wage seems to generate far greater attention in public policy discussions, most of the difficulties created by the FLSA fall under the overtime requirement. As a result, there is a tremendous amount of litigation brought by the plaintiffs' bar exploiting the differences between Depression-era regulations and 21st Century workplace practices.

A considerable share of the friction within the FLSA arises from the "white collar" regulations, which have created numerous difficulties in figuring out which employees are subject to overtime requirements and which are exempt. In 2004, the Bush Administration updated the regulations defining the white collar exemptions.[4] However, the revised regulations continue to cause compliance difficulties and generate significant litigation because of the continuing evolution of the workplace. Meanwhile, despite predictions that the changes would result in six million Americans losing overtime,[5] no studies have been offered since to verify that this happened. Moreover, our own informal contacts with our members indicate that, if anything, most employees whose status changed in the wake of the regulations were shifted from exempt to nonexempt.

Explosion of Litigation. The problems in complying with the FLSA are exacerbated by the fact that that the statute provides not only for enforcement by the Department of Labor, but also by private actions. As a result, the private bar has taken advantage of the law's lack of clarity by pursuing highly lucrative class actions against employers who struggle to ascertain what is required. Thus, the number of FLSA lawsuits has quadrupled from about 1,500 per year in the early 1990s to over 6,000 in 2009,[6] and this does not count the number of cases brought under state laws which often vary from the federal law. Faced with the uncertainties of the law, companies often settle these cases, with a median settlement cost of $7.4 million for federal cases and $10 million for state cases.[7]

Lack of Preemption. On top of all the problems created by the federal wage and hour laws, additional inflexibilities and complexities are created by state laws, which are not preempted as long as they are more "protective."[8] Thus, California has significantly narrower criteria for which employees are exempt from overtime. For example, in order to be considered an exempt computer employee in California, an individual must perform duties involving the exercise of discretion more than 50 percent of the time in each work week and earn at least $79,050 annually.[9] Under federal law, there is no discretion requirement, the exemption is measured over a longer period of time and is not based on a hard-and-fast percentage test, and the employee needs to earn $23,660 annually. Thus, two different employees, one working in California and another working in another state for the same company, may be subject to entirely different scheduling and compensation schemes even though they are performing exactly the same kind of work.

In addition, states may provide varying definitions of the workweek or other factors determining when overtime must be paid. In California, most employees must be paid overtime for any hours worked in excess of eight in a single day, regardless of how many hours he or she works the rest of the week. In addition, an employer must provide a 30 minute meal break during which the employee is relieved of all duties, unless the job requires the employee to be on duty during meals, such as a security guard at a remote location.[10] Thus, a nonexempt employee must be forced by the employer to take a half-hour lunch break, even if the employee would prefer a working lunch that would enable him or her to leave work a half hour earlier. In situations where nonexempt employees work closely with exempt employees, this is yet another situation where the wage and hour law creates divisions in the workplace.

The Fair Labor Standards Act is not the only dysfunctional employment law on the books, but any attempt to revamp our workplace regulatory scheme should begin with it.

Recommendations for a New Approach to Employment Regulation

We are proposing a new attitude towards employment regulation, one that would provide basic protections without posing a threat to job growth, recognizing that without employment in the first place, the protections are a moot point. The following is a seven step process that would be the foundation of this new attitude.

1. Policymakers need to put the same energy into reexamining employment laws and regulations already on the books as they do into enacting new ones.

Employment laws, unlike most other statutes, rarely expire or sunset, which results in the unfortunate trend of these laws remaining static and not being adapted to changes in technology, the workplace, or work practices. And when they are amended, lawmakers simply add new layers of regulation without reviewing what is already in place. Rather than discouraging employers from keeping or adding employees in the United States by adding new costs and regulatory burdens, policymakers should instead examine the requirements and mandates already on the books and assess each law on a regular basis going forward. We are not suggesting that most employment laws and regulations should be repealed. In many instances, that would not be wise. However, very few laws currently in place are free of components that are either counterproductive, vague, unduly prescriptive, or in conflict with other laws or consensual policy objectives.

2. The process of reexamining existing laws and regulations should be done in a non-adversarial manner that brings together the key stakeholders to develop consensus recommendations.

As part of the reexamination process, we recommend the establishment of a task force for each major employment law currently on the books, with equal representation by employers and employee advocates whose mission is to recommend how to improve the law in a manner that achieves the needed protections without impeding employment growth. Ideally, each task force would reach a consensus on solutions addressing deficiencies that both sides recognize are needed. Even where consensus is not reached, the process itself would identify for policymakers deficiencies raised by those affected by the law as well as areas where the law is working properly.

3. Consideration needs to be given by Congress in formulating a rigorous analytical process to be used in enacting new employment legislation and regulation that asks a series of detailed questions regarding the impact of the legislation on the competitiveness of employers, the manner in which protections are provided employees, and the process by which the objectives of the laws are achieved.

Far too often, the exclusive focus of policymakers is actions taken by scofflaw employers with deplorable human resource practices, even though they are typically a small minority of all employers. The resulting law and regulations are exclusively focused on correcting those deficiencies, with little regard for their impact on employers with more typical, desirable practices. To ensure a broader perspective, we recommend that policymakers establish a formal process whereby policymakers conduct a comprehensive analysis of all aspects of a new law or regulation such that the objectives are achieved with the full understanding of the implications of the proposal on all stakeholders. Such questions that would be a part of that analysis would be the following:

- Are the regulations contemporary?
- Are the regulations readily understandable by all those affected by them?
- Can the regulations be easily and consistently applied and enforced?
- Is there sufficient flexibility in the rules such that employers can accommodate the need for family friendly policies without running afoul of the law?
- Are the rules consistent with what today's employees genuinely want and need while providing sufficient protections for low-wage workers?
- What is the objective of the regulatory requirement, and what is the best way to achieve that objective without causing undue disruptions to employers?
- Can the regulations account for changes and do they allow for changes in the use of technology, the workplace, and employee lifestyles?
- Can the requirements be applied consistently across the 50 states and in the counties and cities of those states?
- Do policymakers and regulators fully understand the consequences of the regulatory scheme they have designed before it has been implemented?
- Do the rules demand information that employers do not have or cannot easily obtain without incurring new costs?

- Do the regulations contain any elements or requirements that unnecessarily create ill will among employees?
- Do regulations impose requirements that are not contained in the statute?

4. <u>For all new laws and regulations, policymakers should first invite the stakeholders to form a consensus among themselves on the best approach.</u>

Under the current system, Congress usually moves employment legislation at the behest of one or more interest groups in a highly adversarial manner, with the bill reflecting the approach most desired by those groups. Upon enactment of the new legislation, a federal agency is typically authorized or required to issue regulations implementing the new law, resolving ambiguities and providing the regulated parties greater detail as to what is required. In issuing these regulations, the agency must then typically follow the Administrative Procedures Act (P.L. 79-404) which generally requires public participation in the rulemaking through various notice and comment procedures. Employment legislation is generally no different in this regard. However, as long as the regulatory agency follows the specified steps in the APA, there is no mechanism for guaranteeing that all affected parties play a meaningful role. This is exacerbated by the fact that the agency employees—both political appointees and career—do not necessarily have "real world" experience to inform the rules they write.

Few American employers would hold up European workplace laws, with their focus on job protection at the expense of job mobility and growth, as examples to be followed. However, there is one component of the European Union's system that deserves a closer look. Articles 138 and 139 of the European Community Treaty (EC) give both business and labor—the so-called "Social Partners"—a right to preempt all European Commission proposals by agreeing upon their own jointly-drafted rules. The Commission is required to allow the parties nine months to reach a "framework agreement," and may only proceed if either party decides not to exercise its right of preemption or if the parties fail to reach agreement within that time frame.[11]

Though the details of the social partners' preemption system are embedded in the highly unique European Union system of governance, the concept itself is transportable. Indeed, a recent example of a similar approach took place in the United States during consideration of the Americans with Disabilities Act Amendments Act of 2008 (ADAAA; P.L. 101-336). After a bill with broad bipartisan support was strongly opposed by employers, Congressional leaders asked the business community and disability rights groups to meet and seek an alternative they could both support. At the time, the legislation was being driven by certain court decisions interpreting the ADA that most agreed would or should not be allowed to stand because they narrowed the definition of "disability." However, employers were concerned that Congress would go much farther in seeking to overturn those decisions, effectively deeming virtually every minor impairment a covered "disability." Thus, the task of the groups was to find a way to reverse the court decisions with a scalpel, not a meat cleaver.

The result of the negotiations was an evenly balanced approach, ultimately passed by Congress as the ADAAA, which reversed the decisions but avoided disruption of the workplace by ensuring that the "reasonable accommodations" employers would have to provide under the ADA would be limited to those severe conditions the ADA was originally intended to address. Significantly, the legislation passed the House by a vote of 402 to 17, and unanimously by the Senate. Unfortunately, as if to further make the case for a consensus-based approach, the Equal Employment Opportunity, without first seeking consensus among the parties, proposed implementing regulations that, in the view of the business community completely undermined the compromise which had been reached.[12] As this is being written, the final regulations have yet to be issued.

We recognize that the European social partners-style approach may not work in all instances when it comes to legislation. The dynamics of the American legislative process are such that it is rarely clear that a particular piece of legislation will become law. Nevertheless, we would encourage Congress to follow the ADAAA model in all future employment legislation.

Regulations, however, are far more amenable to this process. Once a law is passed, regulations are a virtual certainty, and the affected parties know that, unless they reach agreement, a regulatory scheme may be imposed that bears little or no resemblance to workplace realities and may become subject to years of litigation.

Currently, the process of "negotiated rulemaking" is rarely used and is typically limited to highly technical areas such as environmental rules where much of the process is driven by scientific data. Yet, the experience in passing the ADAAA shows that workplace rules are also amenable to negotiated solutions. Thus, any new employment legislation enacted henceforth by Congress should require the agency charged with promulgating regulations to first give employers and other constituencies a reasonable period of time to achieve a consensus approach before acting on its own. If a consensus is achieved, the agency should be required to adopt it as agreed upon by the parties. This new approach to employment regulations could either be achieved on an *ad hoc* basis as a component of all new laws or, better yet, it could be achieved through amendment to the APA that would apply generically to all new employment regulations.

5. All new employment laws and regulations should be preceded by an Employee Retention and Hiring Cost Analysis that examines the impact of the proposal on preservation and creation of American jobs.

Currently, before issuing regulations, the agencies are required by a number of laws to perform various analyses of economic impact, paperwork burdens, cost-benefit ratios. and so forth. However, none of these required analyses specifically address the impact of employment regulations on the costs of hiring and retaining employees. At a time when unemployment is above 9 percent and likely to stay at that level for a long time to come, we believe that this series of economic analyses required for all new legislation should include something like an Employee Retention and Hiring Cost Analysis that would examine the following:

- the administrative costs associated with compliance;
- the costs entailed in time spent ensuring compliance by human resource departments and other levels of management;
- the legal costs associated with establishing protocols coupled with regular audits to ensure compliance;
- the potential costs of defending against and/or settling litigation and enforcement actions, recognizing that even employers who diligently comply with the laws are subjected to these; and
- lost efficiency, productivity and competitive advantage denied by precluding the development of certain workplace policies and procedures.

6. Employers should be able to maintain uniform human resource policies in all fifty states through a broad federal preemption of state employment laws.

One of the most successful federal employment policies has been the broad preemption by the Employee Retirement Income Security Act (ERISA) of state and local laws regulating self-insured employer-provided health insurance. This has saved employers and their employees considerable sums by enabling large employers with multi-state operations to provide uniform benefits across the country, and thus avoiding administrative costs that would be involved in seeking to micromanage differences among thousands of jurisdictions.

As has been done under ERISA and the National Labor Relations Act, federal policymakers should recognize that employment policy is a national concern, and federal laws should serve as both a floor and a ceiling. Since state and local laws have proliferated in a number of areas, most prominently wage and hour and employment discrimination, we fully recognize the political obstacles to dismantling these laws by applying preemption to existing statutes. However, at a minimum, any new enactments should include preemption as a standard feature. In addition, Congress could create a far more competitive economic environment if multi-state employers were only subject to federal labor, employment, and benefit laws.

7. The use of private litigation to enforce federal employment laws should be minimized or eliminated.

The proliferation of nuisance lawsuits exploiting areas of uncertainty in the laws has become a major economic drain, stifling economic growth. At the very least, this should be contained by retaining "make whole" remedies (*e.g.,* reinstatement, back pay, etc.) as the exclusive remedies where they now exist as such, while retaining the current $50,000 to $300,000 cap on compensatory and punitive damages for discrimination claims. An even more ideal solution would be to restructure existing enforcement schemes along the lines of the National Labor Relations Board, where the Board's General Counsel has the exclusive ability to consider allegations of labor law violations, dismiss those that are without merit, and prosecute those that are. The NLRB's track record is by no means perfect, but this procedure has precluded the kinds of shakedowns by plaintiffs' lawyers that have occurred under other laws.

Conclusion

Our objective in providing these recommendations is, as much as anything, to shift the debate on employment regulation policy to ensure a broader perspective and recognition of its impact on the United States' competitive posture in the world. We hope these are received in the spirit in which they are offered. Ultimately, a dialogue is what we seek.

Endnotes

[1] Applied Economic Strategies, estimate based on the latest available Bureau of Labor Statistics data.
[2] American Bar Association, Council of European Lawyers and other sources.
[3] See 54 Stat. 615 (1940), 61 Stat. 64 (1947), 63 Stat. 910 (1949), 69 Stat. 711 (1955), 70 Stat. 1118 (1956), P.L. 87-30 (1961), P.L. 88-38 (1963), P.L. 89-601 (1966), P.L. 93-259 (1974), P.L. 95-151 (1977), P.L. 99-150 (1985), P.L. 101-157 (1989), P.L. 104-26 (1995), P.L. 104-188 (1996), P.L. 105-334 (1998), P.L. 106-202 (2000), and P.L. 110-28 (2007).
[4] 69 Fed. Reg. 22122, April 23, 2004.
[5] Ross Eisenbrey, "Longer Hours, Less Pay - Labor Department's new rules could strip overtime protection from millions of workers," Economic Policy Institute, Briefing Paper #152, July 14, 2004.
[6] U.S. Courts, Annual Report of the Director, Table C-2A, various years.
[7] Samuel Estreicher and Kristina Yost, "Measuring the Value of Class and Collective Action Employment Settlements: A Preliminary Assessment, New York University School of Law, Working Paper No. 08-03, January 2008.
[8] 29 U.S.C. 218.
[9] California Labor Code Section 515.5.
[10] Even in those instances, there must be a written agreement for an on-the-job paid meal period that is revocable by the employee at any time. California Code of Regulations, Title 8, §11040.
[11] See Keller & Darby (ed.), International Labor and Employment Laws,, Volume 1, 1-39-41 (BNA, 2003).
[12] See letter from Michael D. Peterson, Associate General Counsel and Director, Labor and Employment Policy, HR Policy Association, to Mr. Stephen Lleweleyn, Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, transmitting the Association's views on the proposed ADAAA regulations (Nov. 19, 2009), available at http://www.hrpolicy.org/downloads/2009/09-147%20HR%20Policy%20Assn%20Comments%20on%20Revisions%20to%20ADA%20Regulations%20with%20Appendix.pdf

MERCATUS CENTER
George Mason University

From the Desk of Richard Williams, Ph.D.

January 5, 2011

Via Staff E-mail (Kristina.Moore@mail.house.gov)
The Honorable Darrell Issa, Chairman
House of Representatives
Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, D.C. 20515-6143

Dear Representative Issa:

Thank you for the opportunity to provide the House Committee on Oversight and Government Reform with information regarding the Mercatus Center's research on the relationship between regulations and the U.S. economy and potential improvement to the regulatory process. As a university-based research center, the Mercatus Center works to bridge the gap between academic research and public policy problems. For over 20 years, scholars at the Mercatus Center have been studying regulations, and we continue to pursue research in this area.

The following letter and attachment constitute a brief response to your written request of December 8, 2010. They are based on a review of the economics literature on regulation. My colleagues and I would be happy to provide additional information as you consider the committee's priorities in this important area. The attached review finds that there are several ways in which regulations affect U.S. investments, jobs, and the economy. The three most important areas regulation affects are uncertainty, competitiveness, and the cost of doing business.

- Uncertainty: When there is uncertainty about demand, factor costs, or access to capital, businesses may decide to wait for more certainty before they invest in new projects and employees.

- Competitiveness: To the extent that U.S. regulations are more onerous than those of competing countries, firms may choose to relocate production to those countries thereby eliminating employment in the United States.

- The Cost of Doing Business: Expenditures on regulatory monitoring and compliance reallocate jobs from the production of goods and services demanded by consumers in the marketplace to regulatory compliance and may factor into decisions not to start businesses.

While the above have implications for employment and the overall economy, the economic literature suggests that the effect of regulations is likely small at the macro level. However, at the micro level, the effect of regulations on job creation and sustainability of particular businesses can be great. That is, regulations may not affect the overall quantity of jobs in the economy, but they will make certain jobs too costly to create or sustain.

Given the indisputable cost of regulation and the effect regulation has on international trade, it is essential that proposed regulations achieve meaningful social benefits in excess of the costs of implementing them.

There is much room for improvement in the regulatory process, and effective oversight can help ensure that regulations meet the following standards for sound policy:

- There is evidence, supported by sound science, of a significant and systemic social problem (not just a potential problem) i.e., a market failure, a government failure or an overriding social need, that the regulation will address;
- There is evidence (again, supported by sound science) of at least one solution that will solve a significant part of the problem; and
- The agency has a solution that is worth the costs and will not put the United States at a competitive disadvantage.

Three sources of information can help identify rules that may not satisfy the above criteria and signal possibly problematic rules.

1. The Mercatus Regulatory Report Card analyzes the quality and use of sound economic analysis for proposed rules.

2. Input into Agency Rulemaking by the International Trade Administration (ITA) of the Department of Commerce details ITA's concerns about the potential effect of a rulemaking on jobs and competitiveness.

3. Data Quality Act challenges—administrative challenges to the scientific basis for rules under the Data Quality Act—often indicate when poor science has been used to support regulatory claims.

Bad policy happens for many reasons. Public Choice economics has shown that, where there are problems with rules, regulators may be satisfying the interests of specific actors (e.g., themselves, activists, regulated industry) rather than advancing the welfare of the general public. Despite much progress since the passage of the Administrative Procedures Act more than 60 years ago and subsequent congressional amendments and executive orders, it is still far too easy to advance special interests without satisfying the basic tenets of quality regulation. Effective oversight can challenge regulations that are at odds with the public interest and do not satisfy the minimal criteria necessary for quality regulations, and understanding regulatory incentives is absolutely necessary to the creation of institutions focused on the pursuit of effective regulations.

Sincerely,

Richard A. Williams, Ph.D.
Director of Policy Research

MERCATUS CENTER
George Mason University
BRIDGING THE GAP BETWEEN ACADEMIC IDEAS AND REAL WORLD PROBLEMS
MERCATUS RESEARCH

THE IMPACT OF REGULATION ON INVESTMENT AND THE U.S. ECONOMY [*]

Richard Williams

Director of Policy Research

The total cost of regulation in the United States is difficult to calculate, but one estimate puts the cost at \$1.75 trillion in 2008.[1] Total expenditures by the U.S. government were about \$2.9 trillion in 2008. Thus, out of a total of \$4.6 trillion in resources allocated by the federal government, 38% of the total is for regulations.

If regulations always produced goods and services that were valued as highly as market-produced goods and services, then this would not be a cause for alarm. But that is precisely what is not known. In fact, there is evidence to the contrary for many regulations. Where regulations take resources out of the private sector for less valuable uses, overall consumer welfare is diminished. For example, if regulations address minor risks (such as *de minimus* risks from pesticide residues), the additional resources used to address those risks are not used by consumers to address major risks privately, for example, buying safer cars.

Regulation also impacts the creation and sustainability of jobs. For example, regulation can create regulatory compliance jobs at the expense of jobs that are more highly valued by the market (i.e., consumers). Economists refer to this as the misallocation of resources—when capital and labor are directed to less productive or unproductive uses. This can have very real consequences for the economy. For example, when government instituted policies to increase homeownership, people were encouraged to make larger investments in housing than they otherwise would have made. The capital to produce those homes—many of which are now in default and are selling at rock bottom prices—might have been used more productively, purchasing education or saving for retirement.[2]

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[*] *The ideas presented in this document do not represent official positions of the Mercatus Center at George Mason University.*

[1] Nicole V. Crain and W. Mark Crain, "The Impact of Regulatory Costs on Small Firms," *Small Business Research Summary*, No. 371 (Washington, DC: Small Business Administration, 2010), http://geoffdavis.house.gov/UploadedFiles/The_Impact_of_Regulatory_Costs_on_Small_Firms.pdf.

[2] For a very good discussion of this see Russell Roberts, *Gambling With Other People's Money: How Perverted Incentives Caused the Financial Risk* (Arlington, VA: Mercatus Center at George Mason University, 2010), http://mercatus.org/sites/default/files/publication/RUSS-final.pdf.

From an economic perspective, however, it is important to note that the total number of jobs can be a misleading measure of the costs and benefits of regulation. Bad policies can increase total jobs, and good policies can decrease total jobs.[3]

EFFECTS OF REGULATION ON INVESTMENT AND JOBS

There are several possible avenues for regulations to affect investment and, ultimately, jobs.

Uncertainty: First, investment may be temporarily withheld when there is uncertainty about the size and scope of new regulatory initiatives. This is particularly true for investments that cannot be easily reversed (i.e., reselling capital for its purchase price). Investment in new capital is inevitably accompanied by the hiring of new labor. For firms that must rely on a constant source of financial capital (i.e., smaller firms), one current source of uncertainty is how the new financial rules will affect their abilities to borrow. About 1/3 of small firms rely on regular borrowing to finance capital.[4]

Competitiveness: Regulations also can affect jobs by forcing new investment to move overseas where the investment is subject to less onerous regulations.

Competition and Entry: Regulations that impose large start-up costs on businesses, such as licensing and permitting, may create a "wedge" that prevents new firms from entering an existing industry, which can reduce competition in that industry.

Direct Creation of Jobs: Firms must reallocate resources, including new hires, in order to comply with regulations. The resources utilized to comply with regulations will not be utilized for other productive activities. The net effect on employment is difficult to estimate for any particular regulation. The key question is whether or not the resources that go to compliance are producing a mix of goods and services that consumers value more as compared to what they give up.

Empirical Analysis of Regulation, Investment, and Jobs

A quick review of the empirical literature on the relationship between regulations and employment suggests that, at the macro level, any effects are likely to be small, although probably negative. For example, Cole and Elliott found, "Environmental regulation costs are not found to have a statistically significant effect on employment..." in the United Kingdom between 1980 and 2003.[5]

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[3] One reason that employment is not a good policy goal is that technological progress, which is key to keeping the country competitive, often reduces employment in particular industries. Technological improvements mean that more outputs will be produced more cheaply with fewer inputs including labor. Between 1880 and 1930, the number of labor hours to produce 100 bushels of corn (on 2 ½ acres) was reduced from 80 to 20. By 2002, 100 bushels of corn could be produced on less than 1 acre. A law banning tractors or mechanical harvesters could increase employment dramatically, but it would also lower productivity, reduce farmers' income, and increase food prices dramatically.

[4] William C. Dunkelberg and Holly Wade, *NFIB Small Business Economic Trends* (Washington, DC: National Federation of Independent Business, 2009), http://www.nfib.com/Portals/0/PDF/sbet/SBET200912.pdf. About 1/3 of small firms rely on regular borrowing to finance capital.

[5] Matthew A. Cole and Rob J. Elliott, "Do Environmental Regulations Cost Jobs? An Industry-Level Analysis of the UK," *The B.E. Journal of Economic Analysis & Policy* 7, 1 (2007).

This will not be the case at the micro level, however, where specific industries may see large productivity decreases and ultimately relocate overseas. The clear effect of regulation, then, is not in the total number of jobs lost or created but in the composition of the workforce—the types of jobs that are lost or created.

Job creation and sustainability are intimately linked with investment, and regulation can have a significant impact on investment. Below we explore in more detail the effects of regulation on uncertainty and international competitiveness and their relationship to investment and jobs.

Uncertainty

Two types of uncertainty can affect decisions by firms to invest: (a) uncertainty about demand for their products (demand uncertainty) and (b) uncertainty about factor costs (labor and capital) (factor uncertainty). Major regulations—such as those recently authorized regarding financial services, health care, or greenhouse gas rules—can affect both demand and factor uncertainty.

As the United States tries to recover from the Great Recession, one key type of factor uncertainty is whether firms will have access to credit in the future. Uncertainty about access to credit has a greater impact on firms, small firms in particular, that need continuous access to credit in order to finance investments. On the other hand, the new Dodd-Frank financial services bill may have created a new kind of uncertainty for large firms with any financial activities. If they are designated as "too big to fail," federal oversight may control their operations. This generates uncertainty about future business operations and potential profits.

To the extent that manufacturers are uncertain about upcoming changes in the legal and regulatory environments, they are unable to assess the likelihood of positive returns on investment and react by either holding assets in cash, at least temporarily, or finding other, more certain investment environments. The effects of uncertainty are well stated by Richard Fisher of the Federal Reserve Bank of Dallas:

> Operating a business under conditions of excessive uncertainty is like playing a game when you don't know the rules. Without rules, it is impossible to develop a strategy or playbook. Business leaders are forced to call a time-out: They remove their players from the field and anxiously wait on the sidelines until they have a better idea how to play the game. Too much uncertainty can create economic stasis as more and more decisions get delayed, retarding commitments to expansion of payrolls and capital expenditures and slowing the entire economy.[6]
>
> How will the landscape be sculpted by the new Bureau of Consumer Financial Protection, and how will potential conflicts between this bureau and other financial regulatory agencies be managed? What will come of the Treasury's study, as mandated by the act, of Fannie Mae and Freddie Mac? What capital requirements and eventual exemptions in over-the-counter derivatives transactions will be established?[7]

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[6] Richard W. Fisher, "Random Refereeing: How Uncertainty Hinders Economic Growth (With Reference to Lucky Puppies, Pepper...and Salt, Lawrence Summers and Thomas Jefferson)" (Remarks, Greater San Antonio Chamber of Commerce, San Antonio, TX, July 29, 2010), http://dallasfed.org/news/speeches/fisher/2010/fs100729.cfm
[7] Ibid.

Irreversible investments are those investments in capital whose resale value will be less than the price paid. As an outgrowth of his dissertation, Ben Bernanke, currently chairman of the Federal Reserve Board, wrote about the effects of uncertainty on irreversible investments:

> The key observation is that, when individual projects are irreversible, agents must make investment timing decisions that trade off the extra returns from early commitment against the benefits of increased information gained by waiting. In an environment in which the underlying stochastic structure is itself subject to random change, events whose long-run implications are uncertain can create an investment cycle by temporarily increasing the returns to waiting for information.[8]

Other research supports Bernanke's observations. Empirically, using volatility of stock market returns, Leahy and Whited used panel data on 600 U.S. manufacturing firms over the period of 1981 to 1987 and found that uncertainty in returns had a significant negative effect on investment that was irreversible.[9]

Bulan also explores the types of investments that are irreversible. He finds that if uncertainty affects an individual firm, as opposed to the entire industry, there can be as much as 1/3 less investment by the firm.[10] He provides a table that tries to highlight investments that are more likely to be irreversible and hence likely to be more affected by an uncertain regulatory environment. Types of irreversible investments include office and industrial buildings, specialized machinery, electrical equipment, aircraft, and farm buildings and equipment.[11] Firms in these types of industries are likely to need more regulatory certainty over a longer period than others. In addition, Rosenberg found that idiosyncratic uncertainty for Finnish firms reduced both investment and labor demand and had a larger impact on smaller firms and on more diversified firms.[12]

Uncertainty has more to do with future regulations than proposed or existing regulations. Various tools, such as the semi-annual Unified Agenda of Federal Regulatory and Deregulatory Actions and the annual Regulatory Plan that has statements of agency priorities, offer some help. But these tools indicate mainly what the government plans to do in the coming year. Planning horizons for irreversible investments usually have much longer timeframes. Informal signals about possible new regulations and taxes may contradict statements in the unified agenda and regulatory plan. Longer-run priority lists with commitment to sound analysis that will inform policy may be helpful in offsetting some of the uncertainty. A movement in this direction would reduce the number of regulations, have longer periods from the final rules to compliance, and more constant regulatory plans. In the absence of these kinds of changes, capital will always be seeking higher returns, and companies will wait only so long for certainty. Eventually, overseas markets may look more attractive.

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[8] Ben S. Bernanke, "Irreversibility, Uncertainty, and Cyclical Investment," *Quarterly Journal of Economics* 97, 1 (February 1983): 85–106 .

[9] Leahy, John V., and Toni M. Whited, "The Effect of Uncertainty on Investment: Some Stylized Facts," *Journal of Money, Credit and Banking*, XXVIII (1996): 64–83.

[10] Laarni T. Bulan, "Real Options, Irreversible Investment and Firm Uncertainty: New Evidence from U.S. Firms," *Review of Financial Economics: Special Issue on Real Options,* 14 (2005): 255–279, http://people.brandeis.edu/~lbulan/RFE.pdf.

[11] Ibid.

[12] Matts Rosenberg, "Does Uncertainty Affect Investment and Labor Demand? (working paper, Swedish School of Economics and Business Administration, August 2002), http://dhanken.shh.fi/dspace/bitstream/10227/165/2/471-951-555-735-6.pdf.

International Competitiveness

The federal regulatory system is one key factor in determining whether investors continue to invest in the United States. In tough economic times, it should be expected that countries would seek to reform their regulatory systems to compete for international capital. To the extent that U.S. regulations are more onerous than those in other countries—particularly countries that offer similar property rights and infrastructure—the United States risks losing investment capital and jobs.

In the World Bank Doing Business rankings, the United States fell from number one in highest quality regulatory systems a few years ago to number four in 2010, behind Singapore, New Zealand, and Hong Kong (http://www.doingbusiness.org/). In the 1980s, the United States was one of only four countries to require that regulatory impact analysis be done before major regulations could be issued. Now all 30 countries in the OECD, as well as the EU itself, have such programs. Many countries have wider coverage than ours. The 2010 World Bank *Doing Business* study reported that 287 reforms in 183 countries made it easier to do business. The United States, however, did not implement one reform. One might argue that the United States has not suffered an absolute decline in regulatory quality, but it has suffered a relative decline.

Research by Stewart distinguishes between two different kinds of regulation and their effects on international competition: product regulation (e.g., product liability rules, pesticide regulation, taxes on lead content in fuels) and process regulations (e.g., mine reclamation laws, liability for hazardous waste cleanup). He concludes that process regulations are likely to make domestic firms less competitive internationally than product regulations, which he asserts can be more easily harmonized between countries.[13] This, of course, assumes that countries will harmonize these regulations. He concludes that nations that have "more stringent regulatory and liability laws" like the U.S. have a disadvantage as new industrial facilities will locate where compliance costs are lower. He adds that the problem is worse where there are "relatively rigid, legalistic command-and-control" types of regulations.[14]

Competitiveness between countries due to their regulatory regimes can be similar to competition between U.S. states. One report shows that California "lost 79,000 manufacturing jobs between 2003 and 2007, while seven other states with a meaningful percentage of U.S. manufacturing gained 62,000."[15] "Part of the problem," according to the senior managing economist at the (Milken) Institute, "is that regulations change so often in California that it's difficult for companies to plan. The state enacted an average of 15 changes in labor law each year from 1992 to 2002, four times more than state legislatures averaged

[13] Richard B. Stewart, "Environmental Regulation and International Competitiveness," *Yale Law Journal*, 102 (1993): 2039–2106.

[14] Ibid, 2056–57. The Congressional Budget Office studied the effects on productivity from environmental regulation in the mid 1980's. They found "no statistical evidence"... to support the contention that environmental regulation has hampered the efficiency of the U.S. economy in the aggregate." However, they did find that the type of environmental regulation, that is, how flexible the standard (e.g., performance standards versus control over technology) can affect economic performance. Congressional Budget Office, *Environmental Regulation and Economic Efficiency* (Washington, DC: Congress of the United States, 1985), http://www.cbo.gov/ftpdocs/94xx/doc9460/85-CBO-007.pdf.

[15] Alana Semuels, "Losses of factory jobs in California blamed on regulation," *Los Angeles Times* (June 23, 2009), http://www.latimes.com/business/la-fi-factory23-2009jun23,0,3441163.story.

nationwide."[16] This type of effect would also certainly be a problem at the national and international level.

THREE KEY FACTORS FOR QUALITY REGULATION

Regulations can and do affect employment through their effects on productivity, uncertainty, competition, and compliance. Regulation's largest effect is on the composition of U.S. production between market-demanded goods and regulatory goods. Increasing employment to produce regulatory goods that are not as highly valued as market goods raises the risk of a misallocation of resources, which will leave the United States less competitive than other countries. Three factors are key to achieving quality regulations:

- There is evidence, supported by sound science, of a significant and systemic social problem (not just a potential problem), i.e., a market failure, a government failure or an overriding social need, that the regulation will address.
- There is evidence (again, supported by sound science) of at least one solution that will solve a significant part of the problem.
- The agency has a solution that is worth the costs and will not put the United States at a competitive disadvantage.

When examining federal rulemaking processes and specific regulations, we suggest three sources of information to help identify regulations that do not satisfy the above stated criteria.

1. The Mercatus Regulatory Report Card,
2. The International Trade Administration of the Department of Commerce, and
3. Administrative challenges to agency evidence and data under the Data Quality Act.

Mercatus Regulatory Report Card

For the last two years, the Mercatus Center has evaluated the quality and use of economic analysis in the promulgation of economically significant proposed regulations—those for which the costs or benefits are projected to be $100 million or more.[17]

Every president since President Nixon has used an executive order to require agencies to conduct and consider economic analysis before making a decision on whether to promulgate a new regulation. If the information is incomplete or of poor quality, at a minimum it shows that that agencies are ignoring the president's instructions. Given the value of economic analysis in improving regulation, when agencies fail to conduct quality analysis, there is a higher risk the rulemaking process will yield lower quality regulatory policy.

We use three assessment criteria to evaluate rulemakings for the Regulatory Report Card:

1. Openness: How easily can the informed layperson find the analysis, understand it, and verify the underlying assumptions and data?

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[16] Ibid.
[17] The Regulatory Report Card can be found at www.Mercatus.org/reportcard.

2. Analysis: How well does the analysis define and measure the outcomes or benefits the regulation seeks to accomplish, define the systemic problem the regulation seeks to solve, identify and assess alternatives, and evaluate costs and benefits?
3. Use: How much did the analysis affect decisions in the proposed rule, and what provisions did the agency make for tracking the rule's effectiveness in the future?

Within those three categories, we selected four questions that will help to identify regulations that may not meet the standards for sound regulations and therefore deserve further scrutiny.[18]

1. Systemic Problem: How well does the analysis identify and demonstrate the existence of a market failure or other systemic problem the regulation is supposed to solve?

   If an agency scores poorly on this, there is no evidence that the agency is addressing a real social problem as opposed to regulating for other reasons.

2. Alternatives: How well does the analysis assess the effectiveness of alternative approaches?

   If an agency has not identified and analyzed a number of approaches, it may mean the agency has settled on an approach without ever knowing if there are more effective ways to solve the problem.

3. Benefit-cost analysis: How well does the analysis assess costs and benefits?

   If an agency has done a poor job on this, it may mean that the there is no theory or evidence that the regulation will solve the problem or do so at a reasonable cost.

4. Net Benefits: Did the agency maximize net benefits or explain why it chose another option?

   If an agency cannot or chooses not to explain why it has not chosen the option that maximizes net benefits for society, the agency may have ignored the evidence that its analysis has produced.

For each of the above four questions (as for all questions in our Report Card), we used a six-point scoring scale (see Table 1) to determine how well the agency did in its regulatory analysis. Each question was scored by at least two reviewers.

Table 1: Regulatory Scorecard Scoring Scale

Score	Criteria
5	Complete analysis of all or almost all aspects, with one or more "best practices"
4	Reasonably thorough analysis of most aspects and/or shows at least one "best practice"
3	Reasonably thorough analysis of some aspects
2	Some relevant discussion with some documentation of analysis

[18] As the report card is updated as new rules are proposed, additional rules may be added to this list.

1	Perfunctory statement with little explanation or documentation
0	Little or no relevant content

If an economically significant regulation scores poorly (a "2" or lower) on all four questions, it becomes a reasonable candidate for further review. Table 2 below shows regulations that scored a "2" or worse on each of these four questions. A score of "2" reflects only some relevant discussion with some documentation of analysis. A score of "1" indicates the agency merely offered an assertion with no supporting analysis or data, and a zero indicates that the topic was not even discussed.

Table 2: Poorly Scoring Rules on Four Questions

Rule Title	Agency	Pub Date	Systemic Problem	Alternatives	Benefit-Cost Analysis	Net Benefits
Hazard Communications Standard	Department of Labor	9/30/2009	2	1	2	1
This proposed rule would modify OSHA's existing Hazard Communication Standard to conform with the UN Globally Harmonized System of Classification and for safety data sheets.						
Renewable Fuels Program	Environmental Protection Agency	5/26/2009	1	1	2	1
With this proposed rule, the Environmental Protection Agency is enacting the requirements of the Energy Independence and Security Act of 2007 (EISA).						
Cranes and Derricks in Construction	Department of Labor	10/9/2008	2	2	2	2
OSHA is proposing a rule to protect employees from the hazards associated with hoisting equipment when used to perform construction activities.						
Refuge Alternatives for Underground Coal Mines	Department of Labor	6/16/2008	1	2	2	2
The Mine Safety and Health Administration (MSHA) is proposing requirements for refuge alternatives in underground coal mines and the training of miners in their use.						
HIPAA Electronic Transaction Standards	Health and Human Services	8/22/2008	1	2	2	1
This rule proposes to adopt updated versions of the standards for electronic transactions originally adopted in the regulations entitled, "Health Insurance Reform: Standards for Electronic Transactions."						

Table 2: Poorly Scoring Rules on Four Questions (cont'd)

Employment Eligibility Verification	Federal Acquisition	6/12/2008	1	2	2	1
The rule proposes to amend the Federal Acquisition Regulation (FAR) to require that certain contracts contain a clause requiring that the contractor and subcontractor utilize the E-Verify System to verify employment eligibility of all newly hired employees of the contractor or subcontractor and all employees directly engaged in the performance of work in the United States under those contracts.						
Modifications to the HIPAA Privacy, Security, and Enforcement Rules	Health and Human Services	7/14/2010	0	0	1	0
The purpose of these modifications is to implement recent statutory amendments under the Health Information Technology for Economic and Clinical Health Act (''the HITECH Act'' or ''the Act''), to strengthen the privacy and security protection of health information, and to improve the workability and effectiveness of these HIPAA Rules.						

International Trade Administration

Another source of information on the potential regulatory impact on competitiveness and jobs is the list of rulemakings commented on by the International Trade Administration (ITA) of the U.S. Department of Commerce. The ITA "consults with U.S. industry and regulatory agencies to assess the impact of proposed domestic and international regulatory policies that affect U.S. industry's competitiveness and the expansion of U.S. exports."[19] The ITA publishes a list of proposed rulemakings by federal agencies for which it offers input at http://trade.gov/mas/ian/industryregulationmasinput/index.asp. Although the website does not detail specific concerns raised by the ITA, the rulemakings in which the ITA has expressed an interest are listed in Table 3.

Table 3: International Trade Administration (Department of Commerce) Manufacturing and Services Input into Federal Rulemaking Process

Proposed Rules

EPA's National Ambient Air Quality Standards for Ozone

Final Rules

DHS' Importer Security Filing Rule

OSHA's Worker Exposure to Hexavalent Chromium Rule

Acropora Critical Habitat Rule

Americans With Disabilities Act

Container Security Initiative

Corporate Average Fuel Economy Standards

Definition of Solid Waste

Electronic Stability Control System Safety Standards

Enhanced Airworthiness Program for Airplane Systems

Ephedrine, Pseudoephedrine, and Phenylpropanolamine Requirements

Global Harmonization Standard

Green Sturgeon Critical Habitat Rule

Industrial Boilers Maximum Achievable Control Technology

[19] http://trade.gov/competitiveness/index.asp

Lead National Ambient Air Quality Standards

Lithium Batteries Rule

Mandatory Reporting of Greenhouse Gases Rule

New Conservation and Management Measures and Resolutions for Antarctic Marine Living Resources Under the Auspices of CCAMLR

Occupational Exposure to Beryllium

Occupational Exposure to Crystalline Silica

Real ID Act

Renewable Fuel Standards (I) and (II)

Rules of Origin

Safety Standards for Cranes and Derricks

Side Impact Protection Safety Standards

Smalltooth Sawfish Critical Habitat Rule

Spill Prevention, Control, and Countermeasure Rules (I) and (II)

Tailpipe Greenhouse Gas Emissions Standards

Transportation Worker Identification Credential

Transporter Continuous Operation

Western Hemisphere Travel Initiative [20]

Data Quality Act

The Data Quality Act, passed in 2001, requires federal agencies to ensure and maximize the "quality, utility, objectivity, and integrity" of information disseminated by the agencies. Each federal agency has produced its own guidelines demonstrating how it intends to comply with this law. There have been some substantive challenges to data, but agency responses are commonly slow, in contradiction to their own guidance.[21] The purpose of the act is to ensure that agencies utilize reliable data and evidence. The current statute does not provide for judicial review of agency decisions. The lack of more substantive penalties for presenting poor data may have limited the challenges that have been offered so far. Though some

[20] http://www.trade.gov/mas/ian/industryregulationmasinput/index.asp

[21] For a discussion on how this law affected EPA early on, see Nina Hardman "Impact of the Data Quality Act on Decisionmaking at the Environmental Protection Agency" (major paper, Virginia Polytechnic Institute and State University, Blacksburg, VA, 2006), http://nr.ncr.vt.edu/major_papers/Nina_Hardman.pdf.

challenges may be spurious, Data Quality Act challenges may offer the best list available of possible problems with evidence used to support proposed regulations. A list of data quality petitions can be found at the Center for Regulatory Effectiveness website, http://thecre.com/quality/petitions.html.

CONSIDERATIONS FOR THE FUTURE

Congress has not engaged in a comprehensive review of regulatory processes and standards since the passage of the Administrative Procedures Act in 1946. As a result of subsequent laws and executive orders, there is a somewhat more transparent process as well as more analysis. However, there is room for much improvement.[22] As Wray points out, "The Government Accountability Office (GAO) asserts that a thorough review of the regulatory process is particularly timely now because of the long-term fiscal imbalance facing the United States."[23]

First, analysis from the Mercatus Regulatory Report Card shows that, for many economically significant regulations, the quality of regulatory analysis is generally low, varies widely, and has not improved much between the last two administrations.[24] This condition exists despite decades-old requirements to conduct in-depth economic analysis and use it in decision making. What's more, although the Office of Information and Regulatory Affairs exercises at least some check over executive branch agencies' quality and use of analysis, no such check exists for "independent agencies." Some, such as the Securities and Exchange Commission, do some economic analysis, but many do not, and there is no mechanism for oversight of those that do.

Second, a key concern that has surfaced from the Mercatus Regulatory Report Card is that many agencies provide no evidence that they use the analysis they produce. This occurs despite the fact that Executive Order 12866 has a fairly easy test to meet: agencies are required to show that costs are "justified" by benefits. One study found that many agency economists felt that their analysis was at best ignored or, at worst in some cases, they were ordered to come to the "right" conclusion.[25] Potential solutions to this problem are discussed below.

Third, it is not clear whether the Data Quality Act in its present form—because it is too new or because there have not been that many challenges—ensures that agencies present high-quality evidence. However, it is clear that challenges to data quality begin with the agency and end within the executive branch. There is no challenge beyond the executive branch. Some consideration might be given to either judicial or congressional oversight of data challenges.

Fourth, the General Accounting Office and others have highlighted the problems associated with "ensuring outcome-oriented performance measurement and accountability for individual rules."[26] Ultimately, if agencies are to assess whether a regulation has achieved its objective, the agencies must

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[22] See for example, http://mercatus.org/publication/assessing-quality-regulatory-analysis.

[23] Henry Wray, "Performance Accountability for Regulations," *21st Century Regulation: Discovering Better Solutions for Enduring Problems* (Arlington, VA: Mercatus Center at George Mason University, 2007) 23, citing U.S. Government Accountability Office, *Regulatory Reform: Prior Reviews of Federal Regulatory Process Initiatives Reveal Opportunities for Improvements* (Washington, DC: GAO, 2005) 11.

[24] Ibid.

[25] Richard Williams, "The Influence of Regulatory Economists in Federal Health and Safety Agencies" (working paper, Mercatus Center at George Mason University, 2008), http://mercatus.org/publication/influence-regulatory-economists-federal-health-and-safety-agencies-0.

[26] Henry Wray, "Performance Accountability for Regulations," *21st Century Regulation: Discovering Better Solutions for Enduring Problems* (Arlington, VA: Mercatus Center at George Mason University, 2007) 23 and Scott Farrow, "Improving the Regulatory Process Throughout its Life Cycle: Nine Recommendations to a New Administration," *21st Century Regulation: Discovering Better Solutions for Enduring Problems* (Arlington, VA: Mercatus Center at George Mason University, 2007), 37.

begin with clear, outcome-oriented objectives. All regulations should articulate outcomes, such as the number of childhood asthma cases prevented by an environmental regulation, rather than inputs or activities, such as the number of people "protected" (i.e., covered by) the regulation. Next, they should have measurable targets with timeframes for achievement of those targets. In many cases, this also should include an end point that indicates when a problem can be considered "solved." Achievement of these goals should be a major determinant of an agency's budget.[27]

Fifth, even having sound economic analysis available to decision makers in bureaucracies does not necessarily change the incentives within those agencies. Golden writes, "...beginning with the New Deal era in Washington and the behavioral era in the social sciences, scholars identified a variety of factors that led them to believe that the career bureaucracy was insufficiently responsive to elected presidents."[28] A number of incentives might cause agency decision makers to go a different direction than that desired by the president or Congress. In some cases, personal philosophies will dominate decisions—whether those are pro- or anti-business or anti-capitalism. In some cases, decisions are made just to reduce pressure from the media or political pressure. Some decisions are intended to reward specific stakeholders, whether businesses or activists. Finally, some are taken to build up a bureaucratic empire or simply attain promotion. Congress can help to keep agencies on track by taking a more active role in monitoring regulations to ensure that bureaucracies follow the spirit as well as the letter of the law.

With the above in mind, a number of things can be done to improve the regulatory process, including:

1) Require that all agencies, including independent agencies, conduct economic analysis (including effects on international competition). Also require that all analyses must be approved by the Office of Management and Budget. Further, in order to be certain that decision makers (and other interested parties) have access to the data, models, and conclusions of these analyses, they should be published at least six months prior to the issuance of the proposed regulation.
2) Ensure that all regulations are tied to Government Performance and Results Act goals. Require agencies to track progress in meeting those goals. Tie agencies' budgets to their success or failure rates.
3) Consider reforms that require Congress to exercise more oversight over regulations, which may also include conducting independent economic research.

Finally, there is the issue of too many federal rules overall. The *Federal Register* contains all rules, proposed rules, presidential documents, and notices. In 2008, there were 31,879 of these.[29] Since 2002, each annual addition has contained more than 70,000 pages.[30] These pages are dense. For a person to keep up, she would need to read every page, the equivalent of one person reading 400 novels per year.[31] By contrast, the first volume of the *Federal Register*, published in 1936, was 11 pages long.[32]

Final rules are codified in the *Code of Federal Regulations (CFR)*. In 2009, these rules were published in 226 books, which took 163,333 pages.[33] There is no prioritization, and there is no way to search by type

[27] Three Mercatus scholars—Maurice McTigue, Henry Wray, and Jerry Ellig—will outline how regulatory agencies should be held accountable for results in a forthcoming book to be published by Taylor and Francis.
[28] Marissa Martino Golden, *What Motivates Bureaucrats? Politics and Administration During the Reagan Years* (New York: Columbia University Press, 2000), 4.
[29] http://www.federalregister.gov/learn/fr_facts.pdf.
[30] Ibid.
[31] This calculation assumes that each page in the *Federal Register* is about twice the length of the page of a paperback novel and that the average novel has around 350 pages.
[32] Ibid.
[33] Ibid.

of industry to see which rules apply to which industries. The language is also dense. (See the appendix of the rules for the quality of green beans for an example.) Assuming an individual could read and comprehend the *CFR* at a rate of about 5 minutes per page and could read for 10 hours a day, it would take nearly 4 years to read the entire *CFR*.

The penalties for not knowing what is in the *CFR* are huge. As one author put it, "Failure to learn of and conform to regulations can have serious legal consequences, including criminal penalties. Failure to find the cheapest way to conform can be expensive. Failure to learn of proposal for new laws or regulations and to participate in hearings and use other channels to help shape their final form can bring permanently higher costs or loss of markets. So can failure to foresee changes in laws and regulations and to take timely action in advance to minimize losses or maximize gains from the change."[34]

The federal government has been adding rules since the very first regulatory agency and, with a few notable exceptions, not subtracting many.[35] Many studies from different branches of social science find perverse effects from having too many rules. Hwang and Lin report that "if information load keeps increasing and finally exceeds the capacity of decision makers, information processing will cease being increased. Instead, decision makers will decrease information processing as they experience a phenomenon termed 'information overload.'"[36] Another author identified a problem with additional rules in the nuclear power industry: "Regulators and industry officials come to view conformity or compliance with the rules rather than actual performance indicators as the measure of safety. So much time and attention are devoted to these surrogate measures of safety ('complying with the regulations') that the larger goal of such regulation is frequently neglected."[37] Hale cites railway, nuclear, and chemical industries, where he analyzes the attempt to turn humans into robots where "rulebooks continually grew and never diminished." This practice ends up making staff into "habitual and professional violators of rules, just to get their work done."[38]

One interesting approach to solving the problem may come from other areas, particularly the creation of a mechanism similar to that used by the Base Realignment and Closing Commission (BRAC). Mercatus scholar Jerry Brito has analyzed why BRAC succeeded and found that it was politically feasible for members to vote for the principle of closing bases, but not for particular base closures.[39] BRAC allowed members to vote mostly on the principle, not on the specifics, by grouping bases together and requiring an up or down vote on the group. Establishing a BRAC-type commission for every major area of federal regulation might provide an objective mechanism for identifying and eliminating regulations that are no longer necessary or as effective as needed.

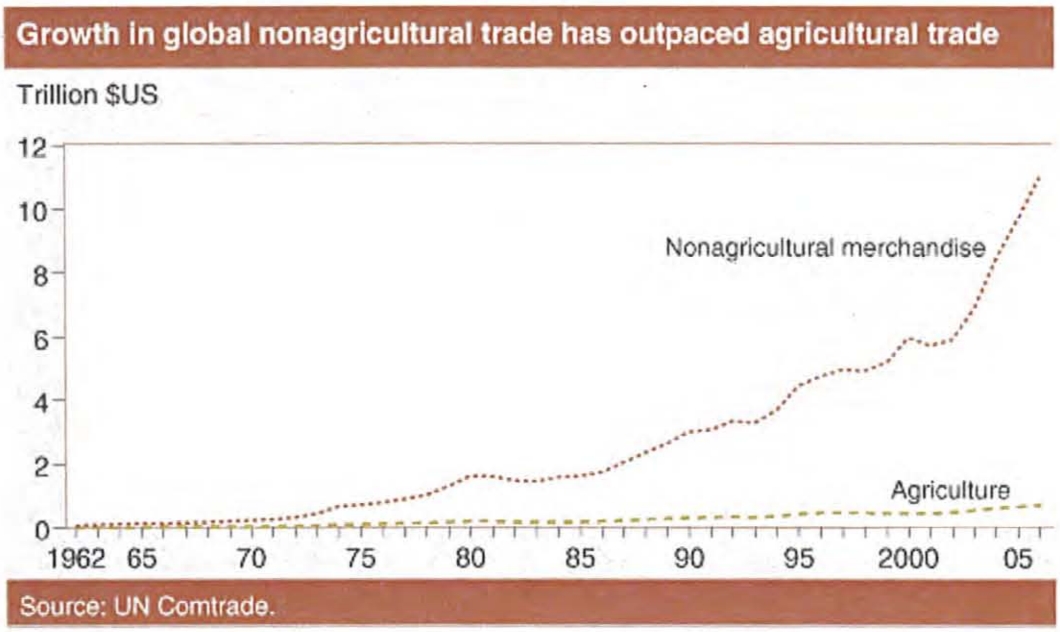
CONCLUSION

Federal regulations govern every aspect of our lives and affect nearly every major business decision. Yet, for most Americans, both the costs and the benefits of regulations are hidden. Many of the historical reasons for regulation, such as information failures, are dissipating in a modern world dominated by web-based communication. As evidenced by the recent financial crisis and the last several decades of study,

[34] Edward Fulton Denison, *Accounting for Slower Economic Growth: the United States in the 1970's* (Washington, DC: The Brookings Institution, 1979), 130.
[35] Airline deregulation was on notable exception.
[36] Mark I. Hwang and Jerry Lin, "Information Dimension, Information Overload and Decision Quality," *Journal of Information Science* 25 (1999): 213.
[37] Jack N. Barkenbus, "Is Self Regulation Possible?" *Journal of Policy Analysis and Management* 2 (1983): 578.
[38] Andrew Hale, "Railway Safety Management: The Challenge of the New Millennium," (keynote address, Occupational Safety & Health Conference of the Union Internationale des Chemins de Fer, Paris, France, September 1999), 7-8.
[39] Jerry Brito, "The BRAC Model for Spending Reform," *Mercatus on Policy* 70 (February 2010), http://mercatus.org/publication/brac-model-spending-reform.

government failures are as real, and can impose just as severe consequences, as market failures. If the United States is to remain competitive, it must not waste society's valuable resources. Ultimately, it is not a victory if there is a temporary growth in jobs, but those jobs produce goods and services that prevent the United States from being internationally competitive. Other countries have been looking carefully to reduce their regulatory burdens.[40] As international trade grows (see Chart 1), the United States cannot afford to shackle itself with rules that are inefficient or ineffective.

Chart 1: Growth in International Trade



Source: Anne Effland et al. "World Trade Organization and Globalization Facilitate Growth in Agricultural Trade," *Amber Waves* 6 (June 2008): 26, http://www.ers.usda.gov/AmberWaves/June08/Features/WTO.htm.

[40] The EU15 project is an example. "In the wake of worst economic downturn since the Great Depression, the importance of effective regulation has never been as obvious as it is now. EU15 aims to stimulate debate on regulatory policy and how to do it better, to bring about real reform that improves lives." *http://www.oecd.org/document/24/0,3746,en_2649_34141_41909720_1_1_1_1,00.html*

APPENDIX

Standard of Quality for Green Beans

21 CFR Part 155, Subpart B Section 120

(b)*Quality*. (1) When tested by the method prescribed in paragraph (b)(2) of this section:

(i) In the case of cut beans and diagonal cut beans under paragraphs (a)(2)(iii) (*c*) and (*d*) of this section and mixtures of two or more optional forms under paragraph (a)(2)(iii)(*g*) of this section, not more than 60 units per 340 g (12 oz) drained weight are less than 13 mm (0.50 in) long: *Provided*, That where the number of units per 340 g (12 oz) drained weight exceeds 240, not more than 25 percent by count of the total units are less than 13 mm (0.50 in) long.

(ii) In case there are present pods or pieces of pods 10.7 mm (27/64-inch) or more in diameter, there are not more than 12 strings per 340 gm (12 ounces) of drained weight which will support 227 gm (one-half pound) for 5 seconds or longer.

(iii) The deseeded pods contain not more than 0.15 percent by weight of fibrous material.

(iv) There are not more than 10 percent by weight of blemished units of which amount not more than one-half may be materially damaged by insect or pathological injury. A unit is considered blemished when the aggregate blemished area exceeds the area of a circle 3 mm (1/8in) in diameter. Materially damaged means that the unit is damaged to the extent that the appearance or eating quality of the unit is seriously affected.

(v) There are not more than 8 unstemmed units per 340 g (12 oz) drained weight.

(vi) The combined number of leaves, detached stems, and other extraneous vegetable matter shall not average more than 3 pieces per 340 g (12 oz) drained beans.

(2) Canned beans shall be tested by the following method to determine whether they meet the requirements of paragraph (b)(1) of this section:

(i) Determine the gross weight of the container. Open and distribute the contents of the container over the meshes of a U.S. No. 8 circular sieve with openings of 2.36 mm (0.0937 in), which has been previously weighed. The diameter of the sieve is 20.3 cm (8 in) if the quantity of contents of the container is less than 1.36 kg (3 lb) and 30.5 cm (12 in) if such quantity is 1.36 kg (3 lb) or more. The bottom of the sieve is woven-wire cloth that complies with the specifications of such cloth set forth in "Official Methods of Analysis of the Association of Official Analytical Chemists," 15th ed. (1990), vol. 2, p. xii, Table 1, "Nominal Dimensions of Standard Test Sieves (USA Standard Series)," under the heading "Definitions of Terms and Explanatory Notes," which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from the AOAC INTERNATIONAL, 481 North Frederick Ave., suite 500, Gaithersburg, MD 20877, or may be examined at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to:*http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.* Without shifting the material on the sieve, incline the sieve 17 to 20deg. to facilitate drainage. Two minutes after drainage begins, weigh the sieve and the drained material. Record in grams (ounces) the weight so found, less the weight of the sieve, as the drained weight. Dry and weigh the empty container and subtract this weight from the gross weight to obtain the net weight. Calculate the percent of drained liquid in the net weight.

(ii) Pour the drained material from the sieve into a flat tray and spread it in a layer of fairly uniform thickness. Count the total number of units. For the purpose of this count, loose seeds, pieces of seed, loose stems, and extraneous material are not to be included. Divide the number of units by the drained weight recorded in paragraph (b)(2)(i) of this section and multiply by 340 to obtain the number of units per 340 g (12 oz) drained weight.

(iii) Examine the drained material in the tray, weigh and record weight of blemished units, count and record the number of unstemmed units; and, in case the material consists of the optional ingredient specified in paragraph (a)(2)(iii) (*c*), (*d*) or (*f*) of this section, count and record the number of units which are less than 13 mm (0.50 in.) long. If the number of units per 340 g (12 oz.) is 240 or less, divide the number of units which are less than 13 mm (0.50 in.) by the drained weight recorded in paragraph (b)(2)(i) of this section and multiply by 340 to obtain the number of such units per 340 g (12 oz.) drained weight. If the number of units per 340 g (12 oz.) exceeds 240, divide the number of units less than 13 mm (0.50 in.) long by the total number of units and multiply by 100 to determine the percentage by count of the total units which are less than 13 mm (0.50 in.) long.

(*a*) Divide the weight of blemished units by the drained weight recorded in paragraph (b)(2)(i) of this section and multiply by 100 to obtain the percentage by weight of blemished units in the container.

(*b*) Divide the number of unstemmed units by the drained weight recorded in paragraph (b)(2)(i) of this section and multiply by 340 to obtain the number of unstemmed units per 340 g (12 oz.) of drained weight.

(iv) Remove from the tray the extraneous vegetable material, count, record count, and return to tray.

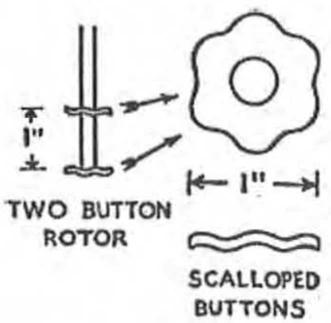
(v) Remove from the tray one or more representative samples of 99 to 113 g (31/2to 4 ounces) covering each sample as taken to prevent evaporation.

(vi) From each representative sample selected in paragraph (b)(2)(v) of this section, discard any loose seed and extraneous vegetable material and detach and discard any attached stems. Except with optional style of ingredient specified in paragraph (a)(2)(iii)(*b*) of this section (pods sliced lengthwise), trim off, as far as the end of the space formerly occupied by the seed, any portion of pods from which the seed has become separated. Remove and discard any portions of seed from the trimmings and reserve the trimmings for paragraph (b)(2)(viii) of this section. Weigh and record the weight of the trimmed pods. Deseed the trimmed pods and reserve the deseeded pods for paragraph (b)(2)(viii) of this section. Remove strings from the pods during the deseeding operation. Reserve these strings for testing as prescribed in paragraph (b)(2)(vii) of this section. In the case of pods sliced lengthwise, remove seed and pieces of seed and reserve the deseeded pods for use as prescribed in paragraph (b)(2)(viii) of this section.

(vii) If strings have been removed for testing, as prescribed in paragraph (b)(2)(vi) of this section, test them as follows:

Fasten clamp, weighted to 250 g (8.8 oz.), to one end of the string, grasp the other end with the fingers (a cloth may be used to aid in holding the string), and lift gently. Count the string as tough if it supports the 250 g (8.8 oz.) weight for at least 5 seconds. If the string breaks before 5 seconds, test such parts into which it breaks as are 13 mm (1/2in.) or more in length; and if any such part of the string supports the 250 g (8.8 oz.) weight for at least 5 seconds, count the string as tough. Divide the number of tough strings by the weight of the sample recorded in paragraph (b)(2)(v) of this section and multiply by 340 to obtain the number of tough strings per 340 g (12 oz.) drained weight.

(viii) Combine the deseeded pods with the trimmings reserved in paragraph (b)(2)(vi) of this section, and, if strings were tested as prescribed in paragraph (b)(2)(vii) of this section, add such strings broken or unbroken. Weigh and record weight of combined material. Transfer to the metal cup of a malted-milk stirrer and mash with a pestle. Wash material adhering to the pestle back into cup with 200 cc of boiling water. Bring mixture nearly to a boil, add 25 cc of 50 percent (by weight) sodium hydroxide solution and bring to a boil. (If foaming is excessive, 1 cc of capryl alcohol may be added.) Boil for 5 minutes, then stir for 5 minutes with a malted-milk stirrer capable of a no-load speed of at least 7,200 rpm. Use a rotor with two scalloped buttons shaped as shown in exhibit 1 as follows:



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Transfer the material from the cup to a previously weighed 30-mesh monel metal screen having a diameter of about 9-10 cm (31/2to 4 in.) and side walls about 2.5 cm (1 in.) high, and wash fiber on the screen with a stream of water using a pressure not exceeding a head (vertical distance between upper level of water and outlet of glass tube) of 152 cm (60 in.), delivered through a glass tube 7.6 cm (3 in.) long and 3 mm (1/8in.) inside diameter inserted into a rubber tube of 6 mm (1/4in.) inside diameter. Wash the pulpy portion of the material through the screen and continue washing until the remaining fibrous material, moistened with phenolphthalein solution, does not show any red color after standing 5 minutes. Again wash to remove phenolphthalein. Dry the screen containing the fibrous material for 2 hours at 100 deg. C, cool, weigh, and deduct weight of screen. Divide the weight of fibrous material by the weight of combined deseeded pods, trimmings, and strings and multiply by 100 to obtain the percentage of fibrous material.

(ix) If the drained weight recorded in paragraph (b)(2)(i) of this section was less than 340 g (12 oz.), open and examine separately for extraneous material, as directed in paragraph (b)(2)(iv) of this section, additional containers until a total of not less than 340 g (12 oz.) of drained material is obtained. To determine the number of pieces of extraneous vegetable material per 340 g (12 oz.) of drained weight, total the number of pieces of extraneous vegetable material found in all containers opened, divide this sum by the sum of the drained weights in these containers and multiply by 340.

(3) Determine compliance as specified in 155.3(b) except that a lot shall be deemed to be in compliance for extraneous plant material based on an average of all containers examined.

(4) If the quality of the canned green beans or canned wax beans falls below the standard of quality prescribed by paragraph (b)(1) of this section, the label shall bear the general statement of substandard quality specified in 130.14(a) of this chapter, in the manner and form therein specified; but in lieu of the

words prescribed for the second line inside the rectangle the following words may be used, when the quality of canned green beans or canned wax beans falls below the standard in one only of the following respects:

(i) "Excessive number very short pieces", if the canned green beans or canned wax beans fail to meet the requirements of paragraph (b)(1)(i) of this section.

(ii) "Excessive number blemished units", if they fail to meet the requirements of paragraph (b)(1)(iv) of this section.

(iii) "Excessive number unstemmed units", if they fail to meet the requirements of paragraph (b)(1)(v) of this section.

(iv) "Excessive foreign material", if they fail to meet the requirements of paragraph (b)(1)(vi) of this section.

ABOUT RICHARD WILLIAMS

Richard Williams is the Mercatus Center's Director of Policy Research. Prior to joining the Mercatus Center, he served as the director for social sciences at the Center for Food Safety and Applied Nutrition in the Food and Drug Administration for 27 years. He also served as an advisor to the Harvard Center for Risk Analysis and taught economics at Washington and Lee University. Dr. Williams is a U.S. Army veteran who served in Vietnam.

Dr. Williams is an expert in benefit-cost analysis and risk analysis, particularly associated with food safety and nutrition. He has published in *Risk Analysis* and the *Journal of Policy Analysis and Management* and has addressed numerous international governments, including the United Kingdom, South Korea, Yugoslavia, and Australia.

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The Heritage Foundation
LEADERSHIP FOR AMERICA

January 11, 2011

The Honorable Darrell Issa
Chairman, Committee on Oversight
and Government Reform
B350A Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman,

This is in response to your letter of November 15, 2010, requesting "assistance in identifying existing and proposed regulations that have negatively impacted job growth." We share your concern over the growing burden of regulation and commend your efforts to address this critical issue. This letter is submitted consistent with applicable law, including section 1602(8)(B)(viii) of title 2 and section 4911 (d)(2)(A) and (B) of title 26 of the United States Code.

As you point out in your letter, the burdens of regulation on Americans have increased at an alarming rate. Based on data from the Government Accountability Office, we have calculated that an unprecedented 43 major new regulations were imposed by Washington in fiscal year 2010, with costs topping $26.5 billion (net of the small amount of deregulation that took place)—more than any other year for which records are available.

The list that follows identifies 20 regulations we consider to be especially threatening to economic growth, job creation, investment, and innovation. The items listed are grouped by subject, and the order does not indicate any ranking of priority. This should not be considered a comprehensive list of needed regulatory reforms.

1. Individual Health Insurance Mandate

The "individual mandate," slated to take effect in 2014, is the cornerstone of the Patient Protection and Affordable Care Act (PPACA) adopted by Congress last year. It requires all U.S. citizens to obtain health insurance or face financial penalties imposed by the Internal Revenue Service—a fine that escalates from $95 or 1 percent of taxable income in 2014 to $695 or 2.5 percent of taxable income in 2016. Subsidies to purchase coverage will be provided to those who meet generous income eligibility requirements.

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Experience with similar schemes at the state level indicates that the individual mandate will not solve the dilemmas created by the uninsured. However, the subsidies required to fulfill the mandate will impose a massive economic burden on taxpayers. But the most pernicious effects extend well beyond the economic. Never before has the federal government attempted to force Americans to purchase a product or service, and a multitude of legal challenges to this provision have been filed. To allow this regulatory overreach to stand would undermine fundamental constitutional constraints on government powers and curtail individual liberties to an unprecedented degree.

2. Employer Health Insurance Mandate

The "employer mandate," slated for 2014, is also a key element of the PPACA. It requires companies with 50 or more employees to provide health benefits or face a penalty of $2,000 per employee.

Although several years away from taking effect, the employer mandate already shows signs of prompting unintended consequences. A number of major corporations are considering dropping health care coverage—the premiums for which are escalating under other provisions of the law—in favor of paying the penalty. Either way, the employer mandate constitutes a major new tax on business, the costs of which will be borne by workers and consumers in the form of lower wages, job losses, and higher prices for goods and services.

3. Insurer Coverage Mandates

The new health care statute imposes a multitude of coverage dictates on private insurers, including coverage for dependent children through the age of 26, no co-pays or deductibles for preventive services, no coverage exclusions for pre-existing conditions, no annual or lifetime limits on coverage, and a prescribed share of premium revenues that must be devoted to patient care expenses. Starting in 2014, the law also requires the following services to be part of a basic plan: "ambulatory patient services; emergency services; hospitalization; maternity and newborn care; mental health and substance use disorder services, including behavioral health treatment; prescription drugs; rehabilitative and habilitative services and devices; laboratory services; preventive and wellness services and chronic disease management, and; pediatric services, including oral and vision care."

Taken together, these coverage mandates will substantially raise the cost of insurance, thereby denying consumers and employers opportunities to customize affordable coverage. The insurance mandates also impose a rigid standard of care that will prove less flexible in adapting to advances in medicine and the changing needs of patients.

4. Consumer Financial Protection Bureau Regulations

The Consumer Financial Protection Bureau, to be established pursuant to the Dodd–Frank financial regulation bill, will wield ill-defined powers to create and enforce regulations on all kinds of consumer-oriented financial products, including loans, mortgages, and credit cards. Although ensconced within the Federal Reserve, the bureau will act independently.

The bureau is charged with protecting consumers from "unfair, deceptive and abusive" business practices. These terms are vague. While *unfair* and *deceptive* have been defined in other contexts (such as Federal Trade Commission regulation), the word *abusive* is almost completely undefined and would thus grant the bureau an inordinate amount of regulatory discretion.

At the same time, a regulatory crackdown on the terms and conditions of financial products will ultimately reduce the options available to consumers. And for many consumers, especially those with lower incomes or impaired credit histories, this will make credit more expensive and harder to obtain.

The bureau's semi-independent status is also problematic. Lacking accountability and seemingly any direct understanding of how its actions could affect the industry's financial viability, the new bureau is far more likely to act in arbitrary fashion, swayed by the whims of the political appointees who will wield the regulatory power. That means a lot less of the regulatory certainty that otherwise engenders private sector investment and job growth.

5. Debit Card Interchange Fee Regulation (the "Durbin Amendment")

The new financial reform law requires the Federal Reserve to regulate the fees that financial institutions may charge retailers for processing debit card purchases. The statute calls for such "interchange" fees to be "reasonable" and "proportional" to the cost of processing debit card transactions—whatever that is.

The prospect of more costly debit card transactions is already prompting financial institutions to hike fees on a variety of credit instruments. Consumers are also likely to face higher interest rates and reduced credit options.

6. Proxy Access Rules

These regulations, also from the Dodd–Frank law, require firms to include board nominations (and proposed ousters) submitted by either an individual shareholder or a shareholder group in the proxy materials they assemble and distribute to shareholders.

At its most fundamental, this regulation presumes that government regulators know better than corporate officers and shareholders how to establish governance procedures. And rather than allow corporate officers and shareholders to customize procedures to their unique circumstances, the proxy access dictate ignores the vast differences among firms.

Proponents claim that the new rules will enhance shareholders' rights. But there is no constitutional "right" to proxy access. Instead, the rule undermines state law rights of shareholders to establish corporate governance procedures. The real beneficiaries of the regulation are activists and special interest groups who will now be able to manipulate proxy access to focus attention on social and political causes at the expenses of the legitimate business concerns of the stockholders. It will also make it easier for predator takeover groups to demand that the company purchase their stock holdings at a high premium or face a hostile takeover attempt.

The rules also invite habitual meddling by regulators in the access disputes that will inevitably arise. They have already prompted litigation.

7. Credit Card Regulation

The 2009 CARD act imposes federal restrictions on the terms and conditions of credit card services by limiting when interest rates may be increased on existing balances, requiring financial institutions to lower the interest rates of consumers whose rates had been increased when they pay their bills on time for six months, requiring a 45-day notice period for significant changes in credit card terms, mandating a 21-day pay period for credit card bills, prohibiting assessment of over-limit fees unless the cardholder agrees to allow transactions to go through rather than be denied, and requiring gift cards and gift certificates to remain valid for at least five years.

By restricting the ability of financial firms to cover credit risks, the regulations have already caused higher interest rates and annual fees and lower credit limits, especially for moderate income borrowers. These actions further diminish the access to credit that is necessary for small business investment and job growth. As noted by bank analyst Meredith Whitney, "Small businesses primarily fund themselves through credit cards and loans from local lenders. … Those same consumers that regulators are trying to help are actually being hurt by a vast reduction in available credit."

8. Phase-Out of Incandescent Light Bulbs

The Energy Independence and Security Act of 2007 imposed stringent efficiency requirements that effectively phase out the incandescent bulbs upon which the world has relied upon for more than a century.

Proponents of the phase-out tout the supposed energy-saving attributes of costly compact fluorescent bulbs. LED lighting is also gaining favor. But rather than eliminate incandescent bulbs, consumers ought to have a choice among all types of lighting the market has to offer. Consumer choice and competition will ultimately determine the type of bulbs best suited for various applications and family budgets.

The light bulb regulation is also a job-killer, leading to the closure of the last American light bulb factory. (The vast majority of fluorescent bulbs are manufactured in China.)

9. Appliance Energy Standards

During the past three decades, Congress has imposed a multitude of energy efficiency standards for a host of appliances, including:

Battery chargers and external power supplies,

Ceiling fans and ceiling fan light kits,

- Central air conditioners and heat pumps,
- Clothes washers and dryers,

- Cooking products,
- Dehumidifiers,
- Direct heating equipment,
- Dishwashers,
- Furnace fans,
- Furnaces and boilers,
- Fluorescent and incandescent lamps,
- Fluorescent lamp ballasts,
- Plumbing products,
- Pool heaters,
- Refrigerators and freezers,
- Air conditioners,
- Torchieres, and
- Water heaters.

In effect, efficiency standards allow government to control how we clean our clothes, cook our food, wash our dishes, and light, heat, and cool our homes. No longer do consumers exercise the freedom to balance appliance performance against cost. In many cases, the efficiency standards increase the price of appliances by more than consumers will recoup from energy savings.

Taxpayers also pay heavily through tax credits provided to manufacturers for producing energy-efficient appliances. Depending on the efficiency of the model and the date of manufacture, dishwasher manufacturers can claim a tax credit of $45 to $75 for every new unit. The credit for residential or commercial clothes washers ranges from $75 to $250 per unit and for refrigerators from $50 to $200 per unit.

It is also worth noting that consumers actually increase energy consumption when the cost of using electricity declines (i.e., greater efficiency). And, by forcing R&D to focus on energy efficiency, investment in other product innovations suffers.

10. Corporate Average Fuel Economy (CAFE) Standards

New fuel efficiency standards set by the National Highway Traffic Safety Administration and the Environmental Protection Agency (EPA) require automakers to attain a fleet-wide average fuel economy level of 34.1 miles per gallon (mpg) by model year 2016[1] for passenger cars, light-duty trucks, and medium-duty passenger vehicles. The new regulation—running some 300 pages—will dictate specific fuel efficiency standards by model type, weighted by sales volume. This will require significantly greater investment in re-engineering.

Justification for CAFE has evolved over time from ending "dependence on foreign oil" to reducing air pollution to mitigating global warming. No matter the intent, problems with the regulation abound. To the extent the standards increase sticker prices, consumers are more likely to hold on to older, less fuel efficient vehicles. A host of research also documents that increased fuel efficiency, by lowering the cost of driving, actually increases travel—thereby negating at least some of the supposed environmental effects. CAFE standards have also undercut the domestic auto industry by forcing production of unprofitable (and less popular) small cars in order to offset the fuel efficiency ratings of larger, more profitable models. But most troublesome of all is the fact that CAFE standards have resulted in tens of thousands of deaths by constraining production of larger, more protective vehicles.

11. EPA Endangerment Finding

The basis for the EPA's regulation of carbon dioxide is the agency's "finding" that so-called greenhouse gases are "air pollutants" actionable under the Clean Air Act. In the 2007 case *Massachusetts v. EPA*, the U.S. Supreme Court ruled that such gases fall under agency purview and within the scope of the act. Legislative history says otherwise.

The EPA has acknowledged that the endangerment finding and concomitant regulations will, for the first time, impose costly requirements on millions of businesses and other "facilities," including apartment buildings, office buildings, and even churches. Farmers will also be entangled in the costly regulations. Overall, cumulative gross domestic product losses could reach nearly $7 trillion by 2029, and annual job losses could exceed 800,000 in several years.

Aside from being costly, the "finding" is factually wrong. There is no scientific consensus on the theory of anthropogenic climate change, and significant evidence to the contrary exists. The agency's endangerment "finding" is all the more suspect given evidence of alleged fraud and deception in the very source documents the agency relied upon to reach its conclusions.

12. Tailpipe Rule

The EPA's new limits on carbon dioxide (CO2) emissions require automakers to achieve a fleet-wide average of 50 grams of CO2 per mile by 2016 for passenger cars, light-duty trucks, and

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[1]The EPA has established a slightly more stringent fuel efficiency standard (35.5 mpg) to limit emissions of carbon dioxide, which are directly related to the amount of fuel burned. However, because the EPA will award emissions reduction credits for improvements to air conditioning systems—credits that National Highway Traffic Safety Administration (NHTSA) is barred from awarding—the two standards are equivalent.

medium-duty passenger vehicles. Emissions of CO2 are directly related to the volume of fuel burned. Consequently, the emissions standard equates to a fuel efficiency standard of 35.5 mpg.[2]

The EPA estimates that the emissions crackdown will add about $1,000, on average, to sticker prices by 2016. Consumers are thus more likely to hold on to older, more polluting cars. Whether consumers will realize cost savings from greater fuel efficiency depends on a host of variables, including vehicle type, local temperatures, and driving habits. Having established the emissions restrictions on mobile sources, the agency is now authorized to impose CO2 controls on all manner of "stationary" sources, ranging from the corner bakery to office buildings.

13. Renewable Fuel Standards (RFS)

The RFS constitute national quotas on the volume of "renewable fuels," including corn, sugarcane and cellulosic ethanol, bio-diesel, and biomass that must be blended into transportation fuel. The 2010 RFS was set at 12.95 billion gallons and is slated to increase to 36 billion gallons by 2022. For the first time, quotas have been established for specific categories of renewable fuels based on projected reductions of greenhouse gas emissions. Of particular note, the EPA raised the cap on ethanol, a fuel that is more costly, less efficient, and more polluting than gasoline.

The RFS represents a massive subsidy by consumers for the "renewables" industry. Without these subsidies, there is little demand for more costly fuel blends. Moreover, government dictates on the nation's fuel mix are driven by political considerations more than environmental economic outcomes. For example, the artificial demand created by the quotas, in conjunction with subsidies, creates powerful incentives to convert sensitive forest land into agriculture; less productive farmland is also utilized with increased use of agricultural chemicals. Shifting farmland from food crops to corn for renewables is also projected to increase food costs by $10 per person per year—or $40 for a family of four, according to the EPA.

14. The Community Reinvestment Mandates

In response to claims of widespread unjust discrimination in lending ("red-lining"), Congress in 1977 enacted the Community Reinvestment Act (CRA), which required regulated depository institutions to demonstrate that they serve the "convenience and needs" of the communities in which they do business. Under the act, all banking institutions insured by the Federal Deposit Insurance Corporation must undergo an evaluation to determine compliance based on 12 assessment factors.

CRA is based on the obsolete concept of brick-and-mortar bank branches as the only providers of deposit and loan services in their geographic areas. In reality, regulators count all online

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[2]The NHTSA has established a slightly less stringent fuel efficiency standard (34.1 mpg). Because the EPA will award emissions reduction credits for improvements to air conditioning systems—credits that NHTSA is barred from awarding—the two standards are equivalent.

deposits when calculating a bank's lending obligations—even when the online customer lives outside the bank's service area.

CRA also discourages banks from locating branches in or near lower-income neighborhoods, since that would automatically bring that neighborhood into the bank's assessment area. As a result, low- and moderate-income workers may actually have even less access to needed financial services.

15. Section 404 Financial Reporting Requirements (Sarbanes–Oxley)

Section 404 of the Public Company Accounting Reform and Investor Protection Act of 2002 (Sarbanes–Oxley) requires publicly traded companies to undertake both internal and external audits of financial reporting systems and submit reports describing the scope and adequacy of its procedures to the Security and Exchange Commission (and distribute the findings to investors and include it in the firm's annual report).

The regulation was prompted by the accounting failures of Enron and WorldCom, as well as the prosecution and subsequent dissolution of accounting giant Arthur Andersen. According to the Institute of Internal Auditors, Section 404 is intended to provide "a level of comfort with respect to the reliability of future financial statements assuming there is no significant change in the quality of the system of internal control."

However, compliance with Section 404 has imposed significant costs on firms that likely outweigh the benefits of the additional reporting—particularly for smaller companies and companies of any size that are considering going public. To some extent, this reflects the shift of responsibility for internal financial controls from the chief financial officer to the chief executive officer and the resulting heightened caution in financial oversight. External auditors are likewise questioning every detail of financial accounting, performing far more extensive and complex audits than ever before.

16. Network Neutrality

The Federal Communications Commission (FCC) on December 21 adopted "network neutrality" regulations in defiance of both Congress and a federal appeals court. The new rules restrict how Internet service providers such as Comcast or Verizon manage the digital transmissions flowing through their networks. The new rules would hobble the ability of network owners to efficiently manage traffic flows and chill the investment needed to keep the Internet growing. The end result: a slower and less dynamic Web. In addition, the rules give the government a role in deciding how content is treated on the Web, potentially threatening the free flow of information.

17. FCC Media Ownership Rules

The FCC enforces a variety of limits on ownership of media outlets. Among these are a ban on joint ownership of a newspaper and broadcast station in the same market, limits on the number of local stations owned by a network, and limits on the number of stations in a market that can be owned by the same firm. The FCC is required by law to review these rules every four years and recently started its latest quadrennial review.

Most of these rules are decades old, dating back as far as 1941. The media world, however, has changed dramatically since that time. Rather than relying on a limited number of broadcast stations and newspapers, consumers today enjoy hundreds of channels offered by a multitude of service providers, and—increasingly—virtually unlimited information sources on the Internet. At the same time, many traditional sources of information—newspapers in particular—have lost their dominance, with many facing bankruptcy.

In such a world, ownership restrictions on media outlets make little sense. Any competitive problems that may arise can be addressed under existing antitrust law enforced by the Department of Justice and the Federal Trade Commission.

18. FCC Merger Review Authority

Under current law, the FCC must approve all transfers of radio spectrum licenses and telecommunications operating certificates. For practical purposes, this means that mergers and acquisitions involving broadcasters and telecommunications firms must be approved by the FCC. Such transactions, however, are also thoroughly reviewed by antitrust authorities at either the Federal Trade Commission or the Department of Justice. This redundant review has been defended on the grounds that the standard used by the FCC—whether the merger serves the "public interest, convenience, and necessity"—is different than that applied by antitrust authorities, which is focused on market competition.

In most cases, however, the primary issue in the FCC review, despite the different standard, is consumer choice and competition. This makes the FCC's review redundant; it does not add anything to the analysis of antitrust authorities. It does, however, impose delays on time-sensitive business transactions.

The "public interest" standard allows the FCC to consider broader issues than competition. But what exactly those issues are is ambiguous. While concepts such as "diversity" and "universal service" have been cited, the "public interest" standard itself is notoriously vague and arbitrary. As a result, the FCC wields almost unlimited discretion in reviewing mergers, which allows the agency to use merger review to promote its own pet causes. Although mergers are rarely rejected outright, the FCC frequently imposes extensive conditions on a merger, routinely including service restrictions or mandates only tangentially related to the merger.

Most recently, for example, the FCC has been considering the proposed merger of Comcast and NBC. Even though the two firms largely do not compete against each other, the commission is looking to condition its merger approval on regulation of NBC TV programming sales and impose mandates on how Comcast sells broadband Internet service.

19. Dairy Price Controls

U.S. consumers pay inflated prices for dairy products due to a variety of federal programs that manipulate the supply and demand of dairy products. The Department of Agriculture, for example, issues "Milk Marketing Orders" that set the milk prices that processors must pay based on the products they make. Dairy farmers in each of the 10 government-drawn regions then split the proceeds—effectively constituting a cartel.

To maintain demand for dairy products—and thus higher prices—the government also purchases cheese, butter, and nonfat dry milk through its Price Support Program.

The program adds up to huge wealth redistribution from consumers and taxpayers to dairy farmers. Not only are the costs of dairy products higher, but so too are the prices for every product made with dairy ingredients.

20. Sugar Protectionism

The byzantine system of price supports and subsidies for domestic sugar production dates to 1789, when the U.S. first imposed tariffs on sugar imports. Tariffs remain in place, along with government-backed loans to sugar processors that require repayment only if the price of sugar exceeds a floor price set by the Department of Agriculture. Inflated sugar prices are also maintained by production quotas (a.k.a. "marketing allotments"), while in some instances, the government pays processors to dump inventory to reduce supply, thereby maintaining higher prices. Most recently, the 2008 farm bill authorized the government to purchase "excess" sugar imports that would otherwise dilute the market share of domestic suppliers. The "excess" imports are sold—at a loss—to ethanol producers.

These various schemes are responsible for steep declines in U.S. industries that utilize sugar in their products. They are drawn instead to Canada, where sugar prices are less than half that in U.S., while they're a third cheaper in Mexico. Consequently, for each job in sugar production "saved" through subsidies and price supports, nearly three confectionary manufacturing jobs are lost as American companies relocate abroad, according to the Department of Commerce.

Please feel free to contact us for additional information.

Sincerely,

James Gattuso

James Gattuso
Senior Research Fellow in Regulatory Policy

Diane Katz

Diane Katz
Research Fellow in Regulatory Policy

ConocoPhillips

Red Cavaney
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January 5, 2011

The Honorable Darrell Issa, Chairman
United States House of Representatives
Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, DC 20515-6143

Dear Chairman Issa:

This letter is in response to the Committee on Oversight and Government Reform's request for regulatory information that negatively impacts the economy and jobs, dated December 10, 2010. We appreciate the Committee's desire to understand the current oil and natural gas industry's regulatory state.

As requested, ConocoPhillips is providing a list of existing and proposed regulations that we believe can negatively impact jobs in our industry. Individual regulations are categorized by major disciplines, but they are not listed in any particular order.

While the attached list of regulations is significant in scope, it is not a complete list of all federal regulations with which the company must comply. We also note that state and local regulations add further complexity to our business. Consequently, ConocoPhillips seeks to ensure that regulations are constructive and effective, while avoiding duplication or conflict to the greatest extent possible.

ConocoPhillips remains committed to continued engagement with the United States House of Representatives on this important matter and I trust you will find our response useful as the Committee begins to examine regulations that negatively impact the economy and jobs. Thank you for this opportunity to present ConocoPhillips' concerns and we will follow up with a more informative summation of federal regulatory challenges in the near future.

Yours sincerely,

Red Cavaney
Senior Vice President
Government Affairs

cc: The Honorable Edolphus Towns

ConocoPhillips

ConocoPhillips has identified the following existing and proposed regulations that can negatively impact the economy and job growth:

Financial Reform

- Disclosure of payments by resource extraction issuers to the U.S. Securities & Exchange Commission
- New Commodity Futures Trading Commission definitions of specific financial transactions
- Commodity Futures Trading Commission registration and regulation of 'Swap Dealers' and 'Major Swap Participants'

Environmental & Climate Change

- Revisions to National Ambient Air Quality Standards, intending to tighten current ozone standards, would necessitate further regulatory actions by individual states and have far-reaching effects on the economy and jobs
- Potential regulation of oil & gas exploration and production operations under New Source Review, Prevention of Significant Deterioration and Maximum Achievable Control Technology
- Prolonged uncertainty on emission control technologies and work practice requirements associated with New Source Performance Standards updates are delaying refinery projects
- Delays and changes to proposed Maximum Achievable Control Technology requirements affecting refinery heaters and boilers
- Permitting greenhouse gases (GHGs) from stationary sources through existing Clean Air Act regulations that were designed for traditional air pollutants, including the New Source Review Prevention of Significant Deterioration, Title V, New Source Performance Standards and other regulations (also referred to as the GHG Tailoring Rule)
- Mandatory greenhouse gas reporting rules for exploration and production operations requiring detailed inventory and reporting of emissions, including fugitive methane emissions
- Interpretation of Outer Continental Shelf air pollution compliance within 25 miles of States' seaward boundaries
- Development of new rules under the Clean Water Act for cooling water intake structures at existing refineries and other facilities
- Altered permitting under the Safe Drinking Water Act when diesel is used in hydraulic fracturing operations
- Reconsideration of exemptions under the Resource Conservation and Recovery Act for hazardous wastes associated with exploration and production operations
- Potentially significant changes to major stationary source determinations which affect permit requirements for exploration and production activities (ie. withdrawal of Wehrum memo)
- Increasing proposals for determinations and listings of additional endangered and threatened species and adding climate change affects on habitats to existing criteria for consideration
- Impact of the Council on Environmental Quality's published guidance to federal agencies on how to evaluate the effects of climate change/greenhouse gases, and consider opportunities to mitigate them, under National Environmental Protection Act reviews
- Expansive information request from refineries under Risk and Technology Review protocols to assess remaining risk of hazardous air pollutants and consider further technology improvements

ConocoPhillips

Oil & Gas Exploration and Production

- Bureau of Land Management instruction memorandum significantly modifies existing leasing policies and effectively restricts or delays access for oil and gas development
- Bureau of Land Management directive designating areas having wilderness characteristics as "wild lands" which could place more federal lands with oil and gas resource potential off-limits to development
- Awaiting Bureau of Land Management's implementation of inspection fee program for current oil and gas leases based on the number of active and inactive wells
- Numerous regulations on new offshore procedures by the Bureau of Ocean Energy Management Regulation and Enforcement, including but not limited to the Drilling Safety Rule, Oil Spill Prevention Plans, Safety and Environmental Systems Rule and Worst Case Discharge Calculations, are causing permitting and development delays
- Council on Environmental Quality's guidance requiring federal agencies to review and seek public input on previously approved actions erodes the efficiencies of categorical exclusions to comply with the National Environmental Policy Act
- Occupational Safety and Health Administration's proposed reinterpretation of noise standards to require "technically feasible", rather than "economically feasible", engineering controls
- New regulations on air emissions from portable and temporary sources

Fuel Standards

- Potential for overlaying a national Low Carbon Fuel Standard in addition to the existing Renewable Fuel Standard with both standards being extraordinarily challenged technologically and economically.
- Premature waiver of 10% ethanol blending limit in gasoline, allowing up to 15% by volume, inadequately protects consumers from vehicle and equipment malfunctions and distorts the fuel supply chain which is already highly fragmented

Peter H. Lawson
Vice President
Government Relations

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January 12, 2011

The Honorable Darrell Issa
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Issa:

Thank you for your December 8, 2010 letter inviting Ford to identify regulations that negatively impact the economy and jobs in the automotive industry.

As the Alliance of Automobile Manufacturers (Alliance) has explained in a letter dated January 11, the auto industry's key concern is the need for a single national program regulating motor vehicle fuel economy and greenhouse gas (GHG) emissions. At present, there are regulations in place that enable us to have a single national program for the 2012 through 2016 model years. At the state level, however, an effort is underway to promulgate state-specific motor vehicle GHG standards for 2017 and beyond. If such state regulations go forward, it would be contrary to the national interest in maintaining a single national program for motor vehicle fuel economy and GHG standards.

Background: "One National Program"

Since the 1970s, the National Highway Traffic Safety Administration (NHTSA) has been setting nationwide Corporate Average Fuel Economy (CAFE) standards for vehicles sold throughout the U.S., pursuant to the Energy Policy and Conservation Act (EPCA). In 2007, the Supreme Court held in *Massachusetts v. EPA* that greenhouse gases such as carbon dioxide (CO_2) are pollutants subject to regulation by EPA under the Clean Air Act (CAA). This decision created the basis for regulatory coordination between NHTSA and EPA. The primary greenhouse gas emitted by automobiles is carbon dioxide (CO_2), and the amount of CO_2 emitted by automobiles is directly proportional to the amount of fuel consumed. Thus, standards regulating CO_2 emissions from automobiles are essentially fuel economy standards by another name.

NHTSA and EPA are in a position to coordinate their efforts and develop harmonized federal fuel economy and GHG standards. In fact, they have already done so in a joint rulemaking published in May, 2010, setting vehicle fuel economy and GHG standards for the 2012-2016 model years. This joint rulemaking, which we refer to as "One National Program," enables manufacturers to build a single fleet of vehicles that meets both the NHTSA and EPA standards and that can be sold nationwide.

The Problem: State Regulations That Would Interfere With "One National Program"

Our paramount concern is that California may set competing 2017-2025 vehicle GHG standards that would be enforced by individual states or groups of states. If enacted and enforced, such state regulations would 1) undermine the One National Program framework, and/or 2) result in a single state setting national policy with respect to fuel economy and GHG emissions.

In 2004, the California Air Resources Board (CARB) adopted state-specific GHG standards for motor vehicles covering the 2009-2016 model years. These standards differed in structure and stringency from the federal CAFE standards, and they would have applied only to vehicles sold in California and states adopting the California program. The California GHG standards were eventually adopted by some thirteen other states as well. The enforcement of these state-specific standards would have had a detrimental impact on the auto industry, and the 8 million jobs it directly supports, by forcing manufacturers to comply with incompatible state and federal GHG regulations.

The Alliance, the Association of International Automobile Manufacturers, the National Automobile Dealers Association, and various individual dealers pursued litigation in several jurisdictions to overturn state vehicle GHG standards on the grounds that they are preempted by EPCA, which specifically prohibits state laws and regulations "related to" fuel economy standards. This litigation was at the appellate stage when the Obama Administration intervened to broker a temporary solution to the problem. In May 2009, President Obama announced a compromise establishing One National Program, in order to avoid a confusing patchwork of fuel economy and GHG regulations. Under the compromise, EPA and NHTSA agreed to conduct a joint rulemaking to establish 2012-2016 CO_2 standards and fuel economy standards that align with each other—these are the May 2010 federal standards already mentioned above. In addition, California agreed to modify its regulations to provide that compliance with the 2012-2016 federal requirements will constitute compliance with the California GHG regulations for California and other states that adopted California's requirements. As a condition to achieving One National Program, automobile manufacturers were required to dismiss the litigation challenging the state GHG standards. The compromise held promise that the One National Program approach would become the established framework for setting motor vehicle fuel economy and GHG standards for the future.

The One National Program announcement did not address model year 2017 and beyond. Unfortunately, California seems to be taking steps toward developing a new set of state-specific GHG standards that would take effect beginning with the 2017 model year. CARB has indicated that proposed new state GHG regulations covering model years 2017-2025 will be issued in the spring of this year, well in advance of the process underway at NHTSA and EPA, and the Board is planning to hold a hearing on these regulations in April.[1]

[1] In order to be enforceable, any new GHG rules adopted by California would need to receive a waiver of preemption from EPA pursuant to Section 209 of the CAA. The 2009-2016 California GHG rules received such a waiver of preemption from EPA in June 2009, although they are not being enforced against manufacturers complying with the federal standards during the 2012-2016 model years.

Ford believes it is essential that the One National Program framework be maintained for establishing vehicle fuel economy and GHG emission standards. Limiting greenhouse gas emissions is a policy issue that requires national solutions. State-specific vehicle GHG standards would be inherently incompatible with federal standards and would subdivide the U.S. market for motor vehicles. The potential impacts and costs of such standards include the following:

- Adversely impacting automotive-related employment in states not adopting the California standards
- Forcing dealers in affected states to restrict, ration, or eliminate sales of selected models
- Forcing manufacturers to reduce or eliminate production of selected models
- Reducing the selection of vehicles available to consumers in affected states

A reasonable and effective single national program is the best way to preserve U.S. jobs, avoid economic harm, and protect consumer choice. If California moves ahead with motor vehicle GHG regulations for 2017-2025, it would harm these important national interests.

Sincerely,

Peter H. Lawson
Vice President
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December 31, 2010

The Honorable Darrell E. Issa
Ranking Member
House Committee on Oversight and Government Reform
2157 Rayburn HOB
Washington, DC 20515

Dear Ranking Member Issa:

We are writing in response to your letter of December 8, 2010, which expressed the interest of the House Committee on Oversight and Government Reform ("Committee") in learning more about impacts from certain government regulations, and particularly those of the Obama Administration's United States Environmental Protection Agency ("USEPA").

Congressman Issa, your interest in this effort is to be lauded, and we appreciate your reaching out to help hard working Americans in the private sector, such as the 3,000 employees of Murray Energy Corporation, a coal mining company, whose jobs and lives are being destroyed by Mr. Obama and his out-of-control, radical USEPA and his appointees to it.

It is a disaster to see our jobs eliminated in the coal mines for little or no environmental benefit. Our people only want to work in honor and dignity, and Mr. Obama and his USEPA bureaucrats are attempting to destroy the use of coal and the lives of their families. Coal supplies fifty percent (50%) of the electricity generated in America, and coal-fired electricity is about one-third (1/3) of the cost of electricity produced from any other source. We are going to see people on fixed incomes, poor families and manufacturers of world competing products severely and adversely impacted.

In order to assist in the work of your Committee, here are the primary regulations or undertakings by Mr. Obama and the USEPA, both existing and proposed, that are negatively impacting the domestic coal industry, or soon will:

1. USEPA Endangerment Finding and Green House Gas Regulations

2. Clean Air Transport Rule Implementation

3. Clean Water Act Permitting Flaws (Sections 402 and 404)

4. Coal Combustion Residuals (Coal Ash) Proposed Ruling

5. Maximum Achievable Control Technology Implementation for Power Plants

6. Promulgation of Proposed Emissions Standards for Petroleum Refineries and Fossil Fuel Power Plants

7. National Ambient Air Quality Standards ("NAAQS") for Ozone Implementation

8. NAAQS for Particulate Matter Ruling

9. Secondary NAAQS for NO_2 and SO_x Regulation

We have also attached a document that describes most of these regulatory problems with the Obama USEPA and rules that it is promulgating illegally and without any Congressional oversight.

Your correspondence also requests input on how to reform specific regulatory proposals by the USEPA and Mr. Obama. One of the first proposals planned by the USEPA is to move forward with implementation of the Clean Air Transport Rule, which must include changes that allow for more time for United States companies to comply along with the creation of a clear interstate trading system to lessen the significant costs that would otherwise affect millions of ratepayers in a number of states. This is just one example, and the attachment to this letter more fully explains the problems and some solutions and why the involvement of Congress is so important at this time.

Again, Ranking Member Issa, thank you for this opportunity to share some of our thoughts about specific regulations that are in place, or are being planned, that disastrously affect the coal industry and related parts of the energy sector. America, our industry and jobs, are under siege by Mr. Obama and his USEPA. They must be stopped immediately. I, personally, am here to continue to help this effort and you in any possible way.

Sincerely,

MURRAY ENERGY CORPORATION

Bob Murray

Robert E. Murray
Chairman, President and Chief Executive Officer

REM:jas
Attachment

MAJOR ISSUES AFFECTING THE COAL INDUSTRY

The Facts About Coal: In the United States, coal provides nearly 50% of the country's electricity supply, powering over 600 electric power plants. Coal is the most abundant fossil fuel produced in the United States with coal currently being mined in 26 states across the nation. Approximately 95% of the coal used in the United States is used for generating electricity. Coal is also used as a basic energy source in steel production, cement manufacturing, and in the paper industry. Its affordability and abundance, and the important American jobs it supports, will continue to make coal a vital domestic resource for decades.

The Attack on Coal: Over the last two years, the nation's coal industry has been the target of a calculated effort by the Obama Administration, the EPA and others to force utilities and manufacturers to abandon coal as a fuel source with the objective of eliminating the use of coal (and the coal industry) in the very near future. The coordinated attacks on the industry are focused on every aspect of coal use: from the mining and processing of coal, to the use or burning of coal, to the storage of residual coal ash from boilers. These reckless and shortsighted efforts will seriously jeopardize the reliability of the nation's electrical grid and are being undertaken without regard for what is in the best interests of the nation and without consideration for the hundreds of thousands of direct and indirect jobs that will be lost if such efforts succeed.

Below are some of the most important issues affecting the coal industry, its partners, and consumers today.

Issue 1: EPA Regulations and Rulemakings

Description: At this time, there are several significant and complex regulations that are either currently in effect or that have been proposed by the EPA concerning the regulation of Greenhouse Gases (GHGs) and other regulations under the Clean Air Act that will have a serious impact on the coal industry. A few of the most important include:

- **EPA Endangerment Finding** - In December 2009, the EPA released its Endangerment Finding for GHGs followed quickly thereafter by the EPA's release of the Tailpipe Rule, Tailoring Rule and Timing Rule in 2010. These actions by the EPA are part of an EPA effort to develop and implement a costly economy-wide GHG regulatory scheme completely without the oversight or involvement by any state government or the U.S. Congress. These actions by the EPA represent an unprecedented expansion of EPA authority beyond its historical role of protecting the environment to now attempting to control the United State's economy by picking and choosing which businesses and industries survive and prosper and which businesses and industries are eliminated. It is important to note that the Endangerment Finding relied nearly exclusively on climate reports compiled by the Intergovernmental Panel on Climate Change (IPCC) although the accuracy and scientific integrity of IPCC's assessments and reports has been called into doubt by the release of materials from the University of East Anglia's Climatic Research Unit. The controversy over evidence tending to show that the IPCC assessments lacked a valid, scientific foundation has been referred to as "Climategate." The States of Alabama, Virginia and Texas along with several organizations, including the U.S. Chamber of Commerce, are participating in lawsuits challenging the Endangerment Finding and related regulations.

- **<u>EPA Transport Rule</u>** – In July 2010, the EPA proposed the so-called Transport Rule to replace the EPA's 2005 Clean Air Interstate Rule (CAIR) in a wholesale manner. Once finalized, the Transport Rule will restrict the interstate transport of power plant emissions by significantly limiting emissions from coal fired electric generation units within 31 midwestern, southern and eastern states plus the District of Columbia. The Transport Rule is part of a suite of regulatory actions by the EPA aimed at curbing emissions from coal-fired power plants through the elimination of the use of coal for the generation of electricity. The Transport Rule will also result in the shuttering of a number of coal-fired power plants thereby placing the nation's electrical grid at risk. The EPA projects that the <u>annual</u> direct costs to the power sector of complying with the Transport Rule will be \$2.8 billion – a figure that grossly underestimates the actual costs. Many believe that CAIR is sufficient to achieve the same reductions in emissions as the Transport Rule in a more balanced, practical and less costly manner that does not seek to penalize and eliminate the coal industry.

- **<u>EPA's National Ambient Air Quality Standards (NAAQS) for Ozone</u>** – The EPA has announced proposed revisions to the NAAQS for ozone. The proposed ozone standards are more stringent and will result in new nonattainment area designations across the United States that will impact the coal industry by preventing both expansion of existing projects and investment in new projects thereby impeding job creation. Additionally, the EPA's proposal for a stricter ozone standard will slow down economic growth, diminish the international competiveness of U.S. industries and drive down U.S. energy supplies. The new more stringent standards could cost hundreds of rural American counties, and those counties that have a strong manufacturing base, millions of dollars in fines.

✓ **<u>Action:</u>** We urge members of Congress to take a close look at how the foregoing regulations and proposals will impact their constituents. The EPA is using the Clean Air Act to aggressively place controls on all sectors of the U.S. economy. In particular, we request that Congress first pass legislation imposing a moratorium on EPA's actions to allow time to complete detailed studies and analyses of the cumulative effects of EPA's

Endangerment Finding, Transport Rule and related regulations on the United States' economy, including impacts to jobs, the electrical grid, individual industries, and ultimately the American people. In addition, any regulation of GHGs must allow for interstate trading of credits and the extension of the regulatory deadlines to ensure existing technologies can meet pollution limits at a reasonable cost. In Congress, recent bipartisan efforts in both the House and Senate sought to either remove the EPA's authority to regulate GHGs under the Clean Air Act (authored by Senator Murkowski/ Representatives Pomeroy and Peterson) or to put these regulations on hold for two years (authored by Senator Rockefeller). Similar legislation should be introduced in the 112th Congress and deserves continued bipartisan support. Detailed oversight of all of the EPA regulations and their impact on jobs must be conducted.

Issue 2: Congressional Cap-and-Trade Legislative Efforts

- **Description:** In June 2009 during the 111th Congress, the House of Representatives passed H.R. 2454 (Waxman-Markey Bill) which would have created a GHG cap and tax system across the entire economy. However, this effort was not considered by the Senate because it became clear to many Members that the legislation was rife with potential for abuse and would have cost consumers in the midwest and other states thousands of dollars a year on their electricity bill. Still, the Obama Administration's EPA continues to move forward with efforts to illegally and unilaterally, without Congressional authority, develop and implement a new nationwide GHG regulatory scheme. These unbalanced and short-sighted actions by the EPA have the potential to cause severe economic harm to the country through the destruction of jobs, elimination of entire industries, and large increases in energy costs across the nation.

✓ **Action:** We support the introduction of legislation in the 112th Congress to impose a moratorium on the EPA's actions to allow time to complete detailed studies and analyses of the cumulative effects of EPA's Endangerment Finding, Transport Rule and related regulations on the United States' economy, including impacts to jobs, individual industries, the electrical grid, and ultimately the American people. More importantly, given the tremendous nationwide ramifications of implementing a new GHG regulatory scheme, we support the principle that the decision of whether or not to implement such a scheme should be left to the United States Congress – not an unelected body such as the EPA. Accordingly, a moratorium on the EPA's actions is required in order to allow time to complete the detailed analyses of the cumulative effects of the EPA's actions over the last two years. The resulting data and information can then be used to inform the national debate as to the need and/or structure of any GHG regulatory scheme.

Issue 3: Clean Water Act Section 402 and 404 Permits

- **Description:** Clean Water Act Section 402 permits govern the discharge of pollutants into waters of the United States while Section 404 permits allow for the placement of dredge and fill material in waters of the United States. The ability to obtain Section 402 and Section 404 permits in a timely and predictable manner is an absolute necessity for conducting all types of coal mining activities - underground mining, surface mining, and coal cleaning and preparation operations. Starting shortly after the Obama Administration took office in early 2009, the EPA undertook to significantly alter the process for the issuance of both 402 and 404 permits. Even though Section 404 permits are issued by the U.S. Army Corps of Engineers with the EPA historically having a limited role in the Section 404 permitting process, the EPA objected to several proposed mining projects leading to extreme delays or outright permit denials. Further, even though the Clean Water Act grants each state in the first instance sole regulatory authority to promulgate water quality standards to be applicable within individual states, the EPA has attempted to develop and apply its own water quality standards in direct violation of the Clean Water Act. These actions by the EPA have effectively created a moratorium on the issuance of Section 402 and Section 404 permits for coal mining operations in the Appalachian states, particularly Ohio, West Virginia and Kentucky. In fact, the EPA is now holding up over two hundred Section 402 and Section 404 permits and have been doing so in some cases for over a year.

✓ **Action:** Each Section 402 and Section 404 permit request has its own unique and technical aspects that require review. Still, arbitrarily putting a hold on hundreds of legitimate permit applications is putting thousands of hardworking Americans on the sidelines in a struggling economy. If there are mine operations and miners that are affected in your state, it is important that you encourage the EPA to stop its effort to impose its own guidelines and regulations on the Section 402 and 404 permitting processes in violation of the Clean Water Act and to move forward with its permit reviews without undue delays. The Obama Administration's EPA is hiding behind the claim that they are "still reviewing the permits" in an effort to delay the permitting process and increase costs significantly for coal companies with the ultimate objective of forcing coal companies to abandon coal mining projects altogether which will lead to the eventual destruction of the coal industry in the United States.

Issue 4: Coal Ash Regulation

Description: The combustion of coal at power plants produces several residual materials that together are often referred to as "coal ash." Electric power plants typically dispose of coal ash in impoundments situated near the plant. Coal ash also has beneficial uses in other industries. For example, coal ash is used by coal companies in mining and reclamation activities, including use of coal as for mine reclamation and subsidence control, soil additives, neutralizing acid mine drainage, road stabilization, and other beneficial uses. In June 2010, the EPA published a proposed rule that would regulate the disposal of coal ash from electric utilities and independent power producers under the Resource Conservation and Recovery Act (RCRA). The EPA has suggested two options for regulating coal ash under RCRA. The first, regulating coal ash under Subtitle C of RCRA, would classify coal ash as a "hazardous waste." Regulating coal ash under Subtitle D of RCRA would classify the material as non-hazardous waste. Subtitle C classification would have many negative impacts for the coal industry, electric utility industry, and a number of other industries leading to increased costs for energy and durable goods to the consumer. Labeling coal ash as a hazardous waste will also make the material much less attractive to the important recycling industry. Today, 43% of all coal ash is re-used, often to produce road base materials, concrete, cement, and wallboard. Declaring coal ash, which has been used safely for decades, as "hazardous" not only hurts the coal and utility industries but also the road builders and home builders, further destroying the economic recovery.

✓ **Action:** Earlier this year, a bipartisan group of Members of Congress opposed the regulation of coal ash as a hazardous waste under Subtitle C of RCRA. You should support the effort to avoid regulation of coal ash as a hazardous waste and encourage the EPA to work with individual states to develop an appropriate framework for the regulation of coal ash as a non-hazardous waste that is protective of public health and continues to promote the recycling and beneficial use of coal ash. In addition, you should support a determination that the federal Office of Surface Mining is the proper agency for issuing any new federal regulations governing the use or storage of coal ash at coal mining and reclamation operations.

Issue 5: Renewable Electricity Standard

Description: In the last few Congresses, legislation has been introduced (commonly called the Renewable Electricity Standard, or RES) that requires a specific percentage of electricity to be produced from renewable sources of energy. Definitions of what can qualify as "renewable" vary slightly but include wind, solar, geothermal, tidal, and small hydropower resources. Recent efforts have passed the House of Representatives that would have mandated 15% of the U.S. energy portfolio come from renewable sources by the year 2020, with a portion of that percentage coming from energy efficiency improvements if necessary. The Senate Energy and Natural Resources Committee also moved similar legislation, but it did not see action on the Senate floor. Currently, the total domestic electricity powered by renewable resources in the United States is around 7%. Mandating an RES of the levels considered by Congress will result in shifting energy inputs to less affordable or efficient options, resulting in drastically higher prices for consumers. Further, it creates winners and losers at the state level based upon the electricity generating capabilities of each individual state. There is also the potential for action in Congress on a "clean energy standard," which includes clean coal and nuclear power as eligible sources to achieve an energy portfolio mandate.

✓ **Action:** Any RES distorts the market and picks winners and losers for domestic energy production. In addition, over twenty-five states, including Ohio, New Jersey, Texas and Minnesota, have already adopted their own RES tailored specifically to their own needs and generating capabilities. As a result, establishing a new federal RES standard would be duplicative in many cases making a one-size-fits-all approach at the national level counter-productive, costly, inefficient and unfair to many states. Going forward, unrealistic and costly federal government mandates should be opposed so as not to place new costs on the backs of American consumers.

Issue 6: Clean Coal Technology

Description: Since the passage of the Clean Air Act Amendments in 1990, there have been a number of clean coal technology advancement efforts, meaning technology that reduces the pollutants associated with the burning of coal. There are already more than $12 billion in clean coal technology research projects underway across the United States. One of the most commonly discussed large-scale clean coal technologies is carbon capture and storage (CCS). The goal of CCS is to capture carbon dioxide (CO_2) at industrial sources such as coal burning power plants. The CO_2 is compressed and then injected and stored below ground in geologic formations. There are three large CCS demonstration projects operating in the U.S., but it is important to note that the procedure has not been applied to any large-scale electricity generation projects thus far due to a number of infrastructure, cost, and legal impediments.

✓ **Action:** Significant funding is required in order to make necessary advancements in CCS, as the technology is not ready for commercial applications. Various studies have indicated that around $8 billion in necessary research and development funds is needed over the next 15-20 years to approach commercial deployment of CCS. As such, it is important that no GHG emission reduction programs or regulations take effect which assumes CCS will be available in the near term. For example, climate legislation proposed in the last Congress required that emissions reductions by coal burning power plants start in 2013 - which is a minimum of ten years before CCS would be available. The authors of the legislation claimed the CCS provisions in the legislation would save coal jobs, but the reality is the jobs would have completely disappeared long before the CCS technology would be available.

Conclusion: It is clear that the EPA is consistently exceeding the boundaries of its legal authority in the slew of rules, actions and strategies undertaken or put forth by the agency in the last two years - while simultaneously interfering with processes and issues that are the responsibility of other federal agencies. These recent rules, actions and strategies are clearly part of a deliberate and calculated attempt by the Obama Administration to force electric utilities to abandon coal as a fuel source by making it too expensive for utilities to burn coal – all without any regard for the enormity of the destructive consequences such actions will have on the nation's economy and the coal industry. Accordingly, assertive steps must be taken in Congress to conduct pointed, thoughtful oversight of the EPA with regard to these actions and rules and their impacts on coal mining, manufacturing, power producers, the agricultural sector, thousands of small businesses, and millions of American consumers. The first step in this process is for Congress to pass legislation imposing a moratorium on EPA's actions to allow time to complete detailed studies and analyses of the cumulative effects of EPA's Endangerment Finding, Transport Rule and related regulations on the United States' economy, including impacts to jobs, individual industries, the electrical grid, and ultimately the American people. In addition, funding for EPA and other federal agencies bent on creating stacks of burdensome regulations should also be decreased, resulting in savings to taxpayers while bolstering the economy.

Roaring Springs Water

Listing of existing and proposed regulations which will negatively impact our business:

-Ongoing attack on BPA with new studies by NIH in progress, despite the continued evidence from many studies done around the world showing no serious health risks associated with use of BPA in packaging

-The new Healthcare law which at this time it is impossible to calculate the long term increased cost impact, but it will be significant

-OSHA plans to reverse decades-old policy regarding noise standards. Currently, employers may use effective personal protective equipment (PPE) like earplugs rather than extensive engineering and administrative controls that involve noise –dampening technologies for machines and work scheduling to protect employees from excessive levels of noise. The Agency has announced it will reinterpret noise control standards to now require employers to reduce noise levels in the workplace through any possible engineering and administrative overhauls that are "capable of being done" – instead of accepting the use of devices like earplugs – regardless of costs. The Agency has further indicated that it plans to enforce these changes by instructing OSHA inspectors to cite employers with OSHA violations should they fail to make the required changes.

-The proposed Employee Free Choice Act (Card Check) which has been discussed for several years.

-The false and misleading claims by the Environmental Working Group relating to Labeling on bottled water

TOYOTA

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January 10, 2010

Honorable Darrell E. Issa
Chairman
Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, DC 20515-6143

Dear Chairman Issa:

Thank you for your December 10, 2010 letter regarding regulatory issues facing Toyota and the automobile industry.

Toyota has a long history of leadership in fuel economy and has the highest fleet fuel economy of all full-line automobile manufacturers in the U.S. market. This is a result of our leadership in developing and commercializing not only our revolutionary hybrid technology, but also a myriad of other, less visible, improvements to vehicle powertrains and design. Toyota very much intends to keep investing and innovating to provide the best fuel economy possible, consistent with consumer desires. Furthermore, many of these investments are taking place in the United States. Toyota's impact in the United States includes 10 manufacturing facilities with additional vehicle development and sales facilities, direct employment exceeding 28,000, and direct investment exceeding $18 billion.

Toyota is committed to manufacturing vehicles where we sell them. However, in order for automakers to continue to invest in the development and manufacture of vehicles that meet consumer expectations at an affordable price, it is important to maintain strong focus on regulatory consistency, clarity, simplification and feasibility in order to minimize the cost of regulation.

New vehicle fuel economy and greenhouse gas regulations require major investments in advanced powertrain technology and vehicle design, and represent perhaps the most significant and expensive regulations facing our company and our industry. Nonetheless, Toyota continues to support a regulatory approach to improving fuel economy and reducing greenhouse gas emissions. In 2009, Toyota supported the joint regulatory program for fuel economy and greenhouse gas emissions established by the National Highway Traffic Safety Administration (NHTSA) and the Environmental Protection Agency (EPA) for Model Years 2012-2016. As part of the agreement, the State of California agreed to take certain steps to harmonize AB1493, a California state law to regulate greenhouse gas emissions from vehicles, with the federal program. We continue to support this agreement, which avoided a massive challenge of conflicting and overlapping regulatory requirements for the industry. Working together, the U.S. will be on the cusp of achieving the levels established for Model Year 2020 in the 2007 Energy Independence and Security Act (EISA) four years before the date in that statute.

Recently, EPA, NHTSA, and California have embarked on an effort to regulate fuel economy/greenhouse gases for Model Years 2017-2025. Even though projecting this far in the future involves highly speculative judgments regarding consumer desires, fuel prices and available technologies, Toyota and other manufacturers have agreed to work with the federal and State agencies to try to develop a national program to follow the one in place for MY 2012-2016.

Without a single national fuel economy program for motor vehicles, Toyota is concerned that industry may very well be confronted with a repetition of the untenable situation it faced in 2009 as a result of the unintended consequences of differing regulatory standards. California is targeting final approval of its standards as soon as April, 2011, while EPA and NHTSA have identified numerous outstanding issues that need to be resolved before setting their standards, and are targeting Fall of 2012. On the current course, the potential exists for both federal and state-by-state standards to apply side-by-side, each essentially regulating the same vehicle attribute -- fuel economy/greenhouse gases.

This potential would create an unworkable patchwork of regulations because adoption of the California greenhouse gas rules by other states actually results in different state-by-state stringencies depending on customer preferences and the resultant product mix sold in each state. As an example, although Toyota offers for sale the same vehicle models nationwide, buyers in different states have particular geographic tastes (e.g., buyers in states with more rural areas purchase more SUVs and in those states with urban areas which lean toward more fuel efficient passenger cars). A national program allows manufacturers to balance these market differences, allows flexibility among dealers and avoids a morass of state-by-state product and technology plans, distribution nightmares, difficulty meeting consumer needs and other severe complications. Variations such as these make it difficult, at best, for any manufacturer to conduct business, meet stricter fuel economy standards and meet the needs of our customers. Clearly, the actions for the MY 2017-2025 period should not lead to this type of result. A single national approach is an absolute necessity for the automobile industry.

Another factor that should be considered is that the authority of NHTSA, EPA and California to regulate fuel economy and greenhouse gases derives from different legal sources which can conflict if not addressed. Such conflicts further complicate the regulations, add unnecessary costs, and could hinder manufacturers' ability to comply. While there are several examples, we raise one as an illustration. Under EISA, NHTSA's authority to set standards is limited to five years. This statutory time frame may conflict with the Agencies' stated intent to develop standards now that cover MYs 2017-2025. Toyota suggests that EISA's 5-year maximum window for establishing standards makes sense here. To the extent standards are established for a longer time period (e.g. through MY25) a mid-course review should be established so that all parties have the opportunity to review the projections and assumptions made at the time the standards are initially set, and make necessary adjustments based on changing conditions in the future. Finally, Toyota suggests that the standards setting process must consider the underlying legal frameworks of the differing statutory schemes and harmonize the differences that do not help improve fuel economy but add more compliance costs.

Another significant concern to Toyota is the recent EPA approval of higher amounts of ethanol in gasoline for Model Year 2007 and newer vehicles. Moving from E-10 to E-15 represents a 50% increase in the alcohol content of the fuel above the level these vehicles were designed to accept. Unfortunately, the data used by EPA in connection with this decision does not adequately consider the effect this change will have on our legacy fleet, and we cannot recommend the use of the fuel to our customers. Industry organizations are contesting this EPA action in litigation.

Toyota supports the use of higher amounts of ethanol in motor fuel if this is done on a prospective basis, rather than the retroactive manner in which EPA has proceeded. If proper leadtime is provided to vehicle manufacturers, petroleum refiners and marketers, the use of higher amounts of ethanol could be accommodated without exposing millions of owners of existing vehicles to potential problems with their vehicles due to use of a fuel their vehicles were not designed to use. In support of a long-term solution, and to avoid a continually moving ethanol blending target, Toyota stands ready to develop E-20 compatible vehicles in the future. This is provided adequate lead time is given to phase-in such vehicles, that measures are developed to prevent misfueling in legacy vehicles not designed to use fuel greater than E-10, and that action is taken to ensure that E10 gasoline remains available in the market for legacy vehicles that were designed for such fuel.

Toyota looks forward to working with you, your committee and other committees on these important issues.

Sincerely,

Thomas J. Lehner
Vice President,
Government & Industry Affairs

CHARLOTTE
PIPE AND FOUNDRY COMPANY

February 1, 2011

The Honorable Darrell Issa
Chairman, House Committee on Oversight and Government Reform
2347 Rayburn House Office Building
Washington, DC 20515

Dear Representative Issa:

Charlotte Pipe and Foundry is a 110 year-old, family-owned business in Charlotte, NC. We make cast iron and plastic pipe and fittings for plumbing systems – all our products are proudly made in the U.S. We employ more than 1,350 hard-working Americans and we have not had a forced lay-off in more than 35 years – even during this four-year depression in residential and commercial construction, we have kept our people working (albeit at reduced hours) with full benefits. We feel strongly about taking care of our associates – our greatest asset.

However, North Carolina has not fared as well. The state has lost 250,000 jobs since the start of the recession, hitting a record-high unemployment rate of 11.2% last year. Yet, EPA and other agencies feel now is the time to impose new rules and regulations that will hurt job-creators struggling to emerge from the recession.

For example, EPA's proposal to further tighten the National Ambient Air Quality Standard (NAAQS) for ozone to 60 or 70 parts per billion. Typically, EPA waits at least five years before revising standards, but the agency is re-opening the standard after it was tightened from 84 to 75 ppb in 2008. A preliminary analysis by North Carolina's Department of Environmental and Natural Resources shows that the proposed limits will push every metropolitan area in the state out of attainment, placing the estimated $90 billion compliance cost squarely on the backs of manufacturers, oil refiners and utilities. (Mobile sources of ozone – by far the largest sources – tend to be filled with voters and therefore are typically exempted from bearing the direct costs of compliance.)

Particulate matter (PM 2.5) standards are also under review by the EPA. PM 2.5 limits are currently set at 15 ppb. New levels being considered are between 12 - 14 ppb – which are approaching background levels. For example, naturally-occurring levels in rural Oakboro, NC (where we were considering building a new more energy-efficient foundry) are at 12.8 ppb. Clearly we cannot locate a plant on the area of real estate we own and meet these background levels. Even if the standards remain unchanged, we have only a window of 2.2 ppb to work with. Instead of the 450 acres we own, we would need 4,500 acres of land on which to build to comply.

Finally, while Cap and Trade may be dead, the EPA's plan to regulate GHGs under the Clean Air Act will have the same net effect. Allowing the EPA to proceed is to allow unelected bureaucrats to usurp the will and authority of the Congress. Attempts to impose carbon restrictions via a "clean energy" standard and the use of costly renewables also have the same net effect – dramatically higher energy prices from carbon-free sources which will add millions of dollars to our operating costs, making it extremely difficult for us to compete with Chinese imports already at a labor, subsidy, currency, safety and environmental cost advantage. The last of our manufacturing base will likely disappear – and our Company will have a very difficult time surviving as well.

Thank you for your consideration of these important issues. Preserving our manufacturing base in a matter of national security and we hope you will fight unnecessary burdens placed on those who put America to work.

Sincerely,

Bradford Muller
Vice President, Marketing

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AdvaMed
Advanced Medical Technology Association

January 10, 2011

Chairman Darrell Issa
House Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, DC 20515-6143

Dear Chairman Issa,

Thank you for your letter dated December 29, 2010 concerning existing and proposed regulations that affect the medical technology industry.

As you know, AdvaMed (or the Advanced Medical Technology Association) is the largest medical technology trade association in the world. AdvaMed members range from the largest to the smallest medical technology innovators and manufacturers of medical devices, diagnostic products and medical information systems that are transforming health care through earlier detection, less invasive procedures and more efficient treatments. AdvaMed members produce nearly 90 percent of health care technology purchased annually in the United States, and more than 50 percent of products purchased globally.

Additionally, the medical technology industry is an important manufacturing industry and a driver of current and future U.S. economic growth. The industry employs more than 400,000 Americans directly, with total direct and indirect employment exceeding two million. Between 2005 and 2007, the industry created 70,000 new jobs in America, a workforce growth of 20 percent in just two years. Medical technology jobs are good-paying jobs, with wages exceeding those for the work force as a whole by 40 percent and exceeding average wages in other manufacturing industries by 22 percent. Medical technology is one of the few American manufacturing industries that consistently exports more than it imports, and exports doubled between 1998 and 2008, to $33 billion annually.

While today the U.S. is the recognized world leader in medical technology, its continued leadership is by no means assured. A number of factors, including current and proposed U.S. regulations and aggressive efforts by foreign competitors to attract medical technology investment, threaten to undermine U.S. leadership and competitiveness. If

America fails to lead in medical technology in this century of the life sciences, America's long-term future as the world's most powerful economy will be jeopardized.

However, there are specific steps that can be taken to preserve America's leadership in the medical technology industry. These steps include making the support of innovation a priority across all federal agencies that affect medical care and research; reforming the FDA review process for medical devices to ensure a consistent, predictable process for approving safe and effective medical devices; ensuring that Medicare payment policies support medical innovation; establishing a vigorous trade policy that supports export growth and provides a level playing field for U.S.-based manufacturing; implementing strategic tax policies to promote economic growth and job creation; and supporting and incentivizing the American research and development infrastructure. The future potential for American economic growth driven by medical technology is great, and taking these steps would maximize future job creation opportunities.

As you know, the medical technology industry is very heavily regulated and beneficiaries of government programs like Medicare and Medicaid are important consumers of our products. As a result, the ability of the U.S industry to continue to be a world leader and a generator of good jobs and economic growth is heavily dependent on the wisdom of Federal policies and regulations. Forthcoming regulations that could have the most significant impact on the medical device industry are those concerning FDA regulation of medical devices, implementation of the medical device tax, health delivery system reform, and transport of components of medical devices. It is essential that federal policy in these areas promote an environment that fosters innovation and job creation.

Again, thank you for contacting us on this topic. I welcome the opportunity to speak with you further on these and other issues, and look forward to working with you to advance job creation in the U.S. medical technology industry.

Sincerely,

Stephen J. Ubl
President and Chief Executive Office
AdvaMed

AIA
AEROSPACE INDUSTRIES ASSOCIATION

January 21, 2011

Congressman Darrell Issa (R-CA)
Chairman
Committee on Oversight and Government Reform
2157 Rayburn House Office Bldg
Washington DC 20515

Dear Chairman Issa:

Thank you for the opportunity to provide a list of concerns that AIA has with existing and proposed regulations that would negatively impact the economy and jobs. We have tried to focus on those items that are of the greatest concern. Some of these issues stem from legislation that has been enacted and could have significant negative consequences for our industry.

The first set of matters fall within the procurement process internal to the Department of Defense. These follow Secretary Gates' request for ideas from industry on how to best achieve efficiencies at DOD and make funding available to support the war fighter. Fair acquisition policies are needed to maintain a competitive defense acquisition environment and a healthy defense and aerospace industrial base. In order to maintain a competitive industrial base, the government must develop contracting and financial policies that encourage and reward good performance, promote fairness and stability, incentivize cost savings and establish balanced and equitable risk-reward financial relationships. Attached you will find a summary of the recommendations we provided to Secretary Gates.

Another area of significant concern is the pending implementation of the three percent tax withholding on all government contracts. This rule will negatively impact industry cash flow, which is particularly onerous for our small suppliers who face a challenging environment to secure financing. It also is expected to cost the taxpayers several billion dollars as a result of increased costs and decreased competition. This was outlined in the report the Department of Defense submitted to Congress, which estimated that the cost to that department alone would exceed $17 billion. Attached you will find a paper detailing our specific concerns.

Best regards,

Marion Blakey

Marion C. Blakey

Attachments

Aerospace Industries Association of America, Inc.
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AEROSPACE INDUSTRIES ASSOCIATION

August 17, 2010

WAYS TO REDUCE COSTS IMMEDIATELY

INTRODUCTION

Fair acquisition policies are needed to maintain a competitive defense acquisition environment and a healthy defense and aerospace industrial base. In order to maintain a competitive industrial base, the government should develop contracting and financial policies that encourage and reward good performance, promote fairness and stability, incent cost savings, and establish balanced and equitable risk-reward financial relationships.

In response to Under Secretary Carter's call[1] for ideas to restore affordability and productivity in defense spending, AIA provided 97 initiatives[2] that will reduce costs. From that list, AIA has selected several that can be accomplished within current DoD authorities.

RECOMMENDATIONS

Problem Statement: The type of contract DoD uses often does not incent cost savings.

Annual contracts require repetitive negotiations and audits. They do not encourage investment in cost saving technologies or changes in process because there is no expectation of profiting from the savings.

While consuming $105 billion of the DoD's budget, weapon system readiness remains unacceptably low as the Department continues to use the personnel intensive, massed logistics support policies of the past. This situation contributes to increasing backorders, slow supply chain responsiveness, poor asset visibility, and slow customer response times.

There has been a steady erosion of the streamlined approach to commercial item acquisition. The definition of "commercial item" has been narrowed and over 50 requirements have been added to Federal Acquisition Regulation Part 12 contracts.

Recommendations:

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[1] Memorandum for Acquisition Professionals, Subject: Better Buying Power: Mandate for Restoring Affordability and Productivity in Defense Spending, June 28, 2010.

[2] DoD Efficiency Initiative: Aerospace and Defense Industry Input to DUSD(IP), July 26, 2010.

1. Propose additional multi-year procurements.
2. Increase the use of long term performance- and outcome-based product support contracts.
3. Expand the definition of commercial products to include defense products with competitive direct commercial sales to foreign governments and buys "of a type" and use commercial-type contracts for commercial items.

Savings: The use of multi-year procurements allows industry to strike more favorable deals with subcontractors and encourages industry to make investments that reduce future costs. Administrative costs for annual proposals, audits, fact finding, and negotiations are also reduced. Multi-year procurement savings can exceed 10 percent. The General Accountability Office reported[3] that the median multi-year procurement savings for aircraft candidate programs in the 1980s was 10.7 percent and in the 1990s-2000s was 7.2 percent.

Performance- and outcome-based product support contracts provide incentives to increase measurable capability rates while decreasing costs. The OSD Product Support Assessment Team reported that performance-based logistics agreements have saved or avoided over $1 billion in cost. Comparing FY04 to FY09 dollars per flight hour for one large aircraft platform shows a 28 percent decrease in cost while maintaining an 84-85 percent mission capable rate.

The benefits of employing commercial item acquisition processes are many and widely recognized. The DoD Inspector General's office identified the benefits of commercial acquisition in its audit report, D-2006-115, Commercial Contracting for the Acquisition of Defense Systems, September 29, 2006. Expanding the definition of commercial items allows companies to gain the benefits of using Federal Acquisition Regulation Part 12, so that the government can receive state-of-the-art technology without the delays attendant to its own development process and at a market tested price that compensates producers for their own investments, the costs of which are spread over a considerably larger customer base. Sales to foreign customers are highly competitive, so DoD should be able to use pricing on such contracts in lieu of certified cost or pricing data when it buys the same product. Cost data can be obtained for changes from the equipment sold overseas.

Problem Statement: The current proposal and negotiation process is lengthy and cumbersome and often results in unfairly low returns for contractors.

Contracting Officers assume a reasonable price can only be based on the submission of voluminous cost data – even for commercial items where data may not be available in the form demanded and for items with several lots of production history. Contractors have had to submit extensive amounts of cost data for the C-17 (63,000 pages), F-22 multi-year (94,000 pages), and F-18 (20,000 pages) even though all three aircraft have extensive incurred cost history. Such extensive data submissions take time and effort to compile and review which protracts procurement lead times, increases overheads, and wastes the time of people who could be employed more productively.

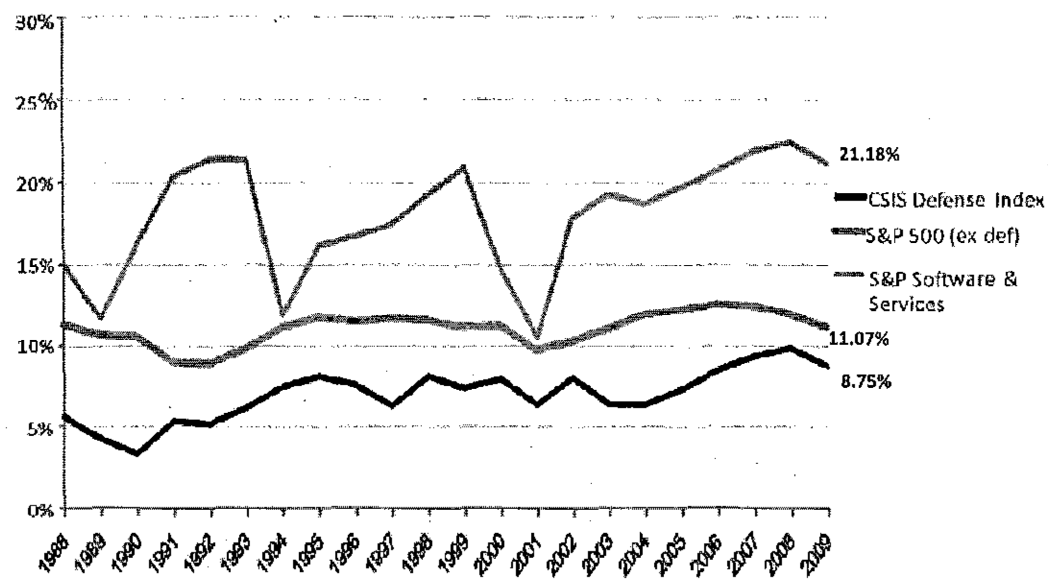
Forward pricing rate agreements were instituted to save the time of having to negotiate rates for each contract and so that experts could deal with the unique issue related to rates. Lately, the government has stopped negotiating forward pricing rate agreements, leaving rates to each individual negotiator. This results in significantly longer negotiations and increased costs in

[3] General Accountability Office, GAO-08-298, "DEFENSE ACQUISITIONS: DOD's Practices and Processes for Multiyear Procurement Should Be Improved," February 2008, Table 3.

personnel time while at the same DoD anguishes because contracts are not being definitized timely. For some companies rate agreements have not been completed in over a year and one major prime contractor has no rate agreements in place at its largest locations.

Defense industry profitability lags significantly behind its industrial peers. Earning a fair return allows the industry to compete for needed resources, provide economic value to its investors, cover legitimate business costs, and continue to provide the best defense systems in the world. In February 2009, the Institute for Defense Analysis, under contract to the Department of Defense, released a report, "Defense Department Profit and Contract Finance Policies and Their Effects on Contract and Contractor Performance." The report states that the margins for the defense industry are lower than companies in other sectors. The recent history depicted in the following chart demonstrates that the Defense Industry has had the lowest profit performance (operating margins) of any major industry.

Defense Industry Operating Margin—the Lowest Returns Amongst Its Peers



Source: Bloomberg; analysis by CSIS Defense-Industrial Initiatives Group
Notes: (1) CSIS Defense Index comprises 34 publically-traded companies with majority of revenues derived from defense business.
(2) For the S&P 500 CSIS obtained historical data for the period 1988-2009 for the constituents as of July 2010.

For many years DOD has used the Weighted Guidelines to develop profit positions on negotiated contracts. Recently, DoD has arbitrarily cut profits that are offered, often citing the need to save money for DoD or because contractors do not deserve profit on subcontracts.

Recommendations:

1. Reduce the volume of cost or pricing data for all proposals, especially for those where such data does not already exist or for re-procurements when no significant changes have occurred.
2. Re-institute timely enterprise-wide rate negotiation and use of forward pricing rates.
3. Eliminate serial reviews of contractor proposals prior to negotiation.
4. Reinvigorate the use of weighted guidelines to develop profit objectives. Recognize contract technical difficulty and contractor cost saving initiatives.

Savings: Significant reductions are expected on proposal preparation cost and the time required proposing and negotiating contracts. This will result in reductions in number of people involved in the contracting process and a reduction in bid and proposal costs.

Arbitrary and unfair profits on contracts that result in low returns prevent contractor investments and ultimately result in a weakened defense industry, as was seen in the early 1990s as a result of unfair DoD policies.

Problem Statement: The oversight process makes multiple, sometimes contradictory, demands on contractors that drive up overhead costs.

Agencies in the Department of Defense are providing different interpretations of policy that cause contractors who have common systems, to make agency-specific adjustments. For example, DCAA uses its internal control audit planning summary (ICAPS) ratings as a measure of a contractor's system compliance. Lack of consistent policy interpretations result in determinations of inadequate proposals due to immaterial fact finding questions and adverse audit reports for contractor failure to supply unavailable information. Sometimes paper records are stored at a central storage facility and retrieval of the paper record cannot be made within the time frame demanded by the auditor. It is not clear to the contractor, or often to the government officials, where responsibility, accountability, and authority lie when conflicts take place. Such conflicts can delay contract award and drive up costs.

Recommendations:

1. Combine multi-agency compliance reviews.
2. Establish a single point DCMA/DCAA authority at major primes to drive commonality and consistency.
3. Base audits on materiality and risk.

Savings: Quality can be improved through policy collaboration and discussions of technical requirements, selection of acceptable estimating methodologies, and early disclosure of audit findings allowing faster correction of problems. Reductions can be achieved in the number of people supporting reviews, in resolving differences, and in responding to requests for information. Costs can also be reduced in bid and proposal costs and in financing costs incurred while payment actions are being held for government audit.

CONCLUSION

Higher savings can be achieved by the adoption of more significant efficiencies in the following areas:

- Export control reforms (already underway).
- Eliminating non-value added unique requirements that can be identified through an updated Coopers & Lybrand-like study and convening a joint government-industry cost reduction team.
- Requirements reform and stability.

We are working to develop additional, specific recommendations that we will provide to DoD by mid-September.

Prepared by: Richard Sylvester, VP Acquisition Policy, 703-358-1045

AEROSPACE INDUSTRIES ASSOCIATION

DOD EFFICIENCY INITIATIVE
AEROSPACE AND DEFENSE INDUSTRY INPUT TO DIRECTOR(IP)

The ability of the defense industrial base to produce the best military equipment at the best value for taxpayers is dependent on several important factors. Below are a number of initiatives that Aerospace Industries Association and its more than 300 members endorse for consideration.

<u>Streamline Export Control</u>

There are key aspects of export control reform that relate directly to acquisition and program management which DoD can and should address in real time. Adoption of export control reform enables effective global development, production and sustainment efforts; it supports effective program management; it permits more effective, focused use of U.S. Government resources to review/authorize exports. Export reform also eliminates inefficiencies and avoids the need for hundreds - if not thousands - of licenses for predictable and repetitive transactions between the same parties under the same program.

- Designate an overall "lead" senior official to coordinate internal export control policy and processes, and to act as primary point of contact with industry.
- Re-structure DoD's technology disclosure review processes to ensure timely decisions and a transparent appeals process. Specifically, Policy and AT&L should present to the Secretary of Defense a set of joint recommendations within 45 days, to include the following:
  - Designation of a "lead" or "co-leads" to manage and coordinate processes.
  - Requirement that Services identify needs not less than 90 days in advance of requiring a disclosure decision.
  - Consolidation of duplicative review boards and coordinate all DOD tech review processes - LO/CLO, Service disclosure policies (TTSARB, TTSARP, TopLine) and ENDP - to review requests concurrently and respond to requests within 60 days with a written Memo of Action.
  - Enforcement of consistent policies and timelines for each committee (regarding submissions, deliberations, escalation, communication of outcomes), and ensure appropriate oversight of compliance at Under Secretary/Military Service level.
  - Adequate staffing to meet mandated committee deadlines.
  - Sixty day debrief and appeal process for industry to engage with Service sponsors.

- Process for reconciling divergent outputs at the DepSecDef level. Issue final instructions within 15 days of a final determination on the appeal.

- Adopt a new, comprehensive program licensing management model and work with Department of State and industry to develop such a model within 60 days.
  - Key elements -
    - The model would identify categories of Technologies, Systems, Components, Hardware
    - Define/tailor protection requirements for each category.
    - Pre-qualify non-US companies for each category.
    - Each company responsible for its own ITAR compliance.
  - A specific Licensing Plan, based on the model, would be developed and adopted at program inception; failing that, as soon thereafter as is practicable.
  - The program Licensing Plan should allow for a single authorization to cover all transactions within a defined scope (technology, participants), other than those involving the most sensitive technologies.
  - Once an authorization is approved and Congress notified, no further approvals should be required for transactions covered within the scope of the authorization.
- Continue the review and reform activities of the Arms Transfer Technology Release Senior Steering Group (ATTRSSG) and encourage an open consultation with industry as it forms its recommendations.
- Expedite the Section 1248 report on commercial satellites and support legislative fixes that will level the global playing field for U.S. commercial satellite manufacturers.

Promote Efficient Use of Government and Contractor Resources

A recent Price Waterhouse Coopers study indicated that defense industry productivity as measured by revenue per employee increased 8.51% annually from 2000 to 2008 compared to 5.15% annually for the companies in the Dow Jones Industrial Average. Adding the recession year of 2009, the defense industry still achieved average productivity increases of 8% over this time period. However, additional productivity increases could be achieved by increasing the efficiency of Government and contactor resources.

Improve Processes and Procedures

- Simplify the contracting process.
  - Reduce bid and proposal costs by reducing the volume of cost and pricing data.
    - Raise the Truth in Negotiation Act threshold to more accurately reflect the impact of inflation.
    - Clarify within FAR 15.404-39b), 15.404-4(a), and Table 15-2 that contractors are not required to generate cost or pricing dat in order to comply with the Truth in Negotiations Act.
    - Petition Congress to repeal the condition added by Section 817 of the FY03 NDAA (Pub. L 107-314) (and delete DFARS 215.403-1(c)(4)(A)(1)) in order to restore a PCO's judgment as to the level of "other than cost or pricing data" sufficient ot arrive at a fair price.
      - Example: Under the current TINA threshold of $650,000, a recent major production proposal with a Bill of Material (BOM) consisting of 92,011 line items, there were 170 suppliers required to provide cost or pricing data which in turn also required the completion of detailed supplier cost analysis by the contractor. If the threshold were raised to a level of $1.012M, then the number of suppliers would be reduced to only 131

suppliers which would still provide detailed coverage of approximately 93% of the BOM. On other production proposals the number of suppliers would be reduced from 127 to 99 with 88% BOM coverage and from 23 to 16 with 84% BOM coverage. Data indicates that using either prior purchase order history or a current supplier quotation reduced by historical decrement factors yields the same degree of estimate accuracy versus the results of the detailed cost analysis.

- Example: FAR 15.404-3.(b) and FAR Table 15-2 Section II.A are often cited as the "requirement" to obtain supplier quotes, supporting supplier cost and pricing data and performing detailed supplier cost analysis prior to submitting a prime contract proposal. However, other sections of FAR (notably 15.403-4(a); FAR 2.101 Definitization of Cost and Pricing Data; and FAR Table 15-2 Note 1) cite that a contractor's obligation under TINA is met when all cost or pricing data reasonably available prior to price settlement has been properly disclosed. While industry acknowledges that FAR 15.404-3(c) requires suppler proposals, supporting cost and pricing data be obtained and detailed analysis be completed prior to subcontract award, the only obligation under TINA is to provide this information prior to prime contract price settlement, and only to the extent the data exists prior to this date. This position is supported by case law in ASBCA No. 16458, Paceco, Inc. as well as multiple citations within FAR. The current government position is having the unintended consequence of significantly increasing the time and cost required to prepare initial proposals and updates.
- Recent proposal page counts for long-term production items were as follows: C-17 FY08 proposal (63,000 pages); F-22 MY (94,000 pages); F-18 (20,000 pages).
- Example: For multi-year proposal cost estimation, DCAA expects LTAs to be split out from non-LTA buys, with only the costs of the non-LTA buys allowed to be escalated through the use of Global Insight indices. This requires considerable additional work on the part of contractor cost estimators. Global Insight indices are developed using a mix of both LTA and non-LTA buys, so the blend of contractor LTA and non-LTA buys should also be escalated using the indices for both.

o Reinstitute timely enterprise-wide negotiation and use of forward pricing rates, rather than each contracting officer negotiating rates, and include contractor's global cost reduction targets/goals.
  - Example: There are instances where this has not been completed for over a year which delays impacted our ability to complete negotiations and in some cases bid on efforts.
  - Example: In 2007, 50% of a major contractor's largest locations had negotiated FPRAs. Today, that company has no FPRAs.

o Establish a working group to determine improvements to weighted guidelines.
  - Reinvigorate the use of the DOD Weighted Guidelines (WGL) model, process, and analysis while making improvements that allow for the Government to create the desired motivation in contractors and recognize the value of their contributions.
  - Consistently provide for adequate recognition of contractor's efforts associated with subcontract management and subcontract performance as part of the program performance and technical risk factors of the Weighted Guidelines Model that are not adequately covered today.

- Provide for greater weight and emphasis given to the Cost Efficiency Factor, particularly as it relates to internal productivity improvements that reduce costs that a contractor implements using its own funding. In addition, the Cost Efficiency Factor should recognize the Contractor's use of its own funds that help and assist the Government during funding gaps over the course of the program to ensure its success, e.g. procurement of long lead material to protect Government's desired schedule; program start up pending final release and execution of the contract, etc.
- Revisit the adequacy of all WGL ranges and factors and relate these better to risk. In particular revise those associated with contract type and give more consideration (higher factor) for FP development effort and immature technology risks.
- Revisit FAR 15.404-4 and DFAR 215.404-71 for any improvements or clarifications that need to be made resulting from the updates to the WGL model. In particular, would recommend a rebalancing of the three profit factors. Would recommend that less emphasis be placed on Facilities capital employed and more on cost efficiency.

o Leverage established supply schedules, corporate agreements, and forward pricing rate agreements to eliminate redundant negotiations.
o Focus negotiations on total cost savings, not on reducing individual elements of cost, some of which have already been incurred.
  - Example: On the Air Force Corporate Contract (a multi-year/multi-item contract) a "Market Basket" pricing approach is utilized. This approach ensures unit price integrity in years when part numbers are not forecasted and also keeps prices low based on supply chain management efficiency
o Eliminate requests for unnecessary information.
o Increase the use of parametric estimating.
o Conduct subcontract analysis within the Government.
  - Example: Based on data that one company tracks as part of its cost analysis workflow tool and some conservative assumptions, it would take an average of 194 days from the time it receives an RFP from the customer until the time it completes all cost analyses from suppliers on its larger production programs. This does not include the time it would take for each tier of the supply base to complete their cost analyses of their suppliers exceeding the TINA threshold. If two tiers of suppliers need to complete cost analyses prior to completion of the prime level supplier analyses, it is estimated that another 122 days would be needed in the proposal cycle time for a total of 316 days. This assumes 1st tier suppliers have a similar cycle time as the company and subsequent tiers are not as complex. Adding a requirement for lower level tiers in the supply chain would further increase this already unrealistic and unaffordable situation.
o Reduce reporting and flow-down requirements for subcontractors.
  - Example: Requiring executive compensation reports for subcontractors which are privately-held will increase workload and costs.
  - Example: The Federal Acquisition Regulation (FAR) interim rule on subcontractor and executive compensation reporting requirements will drive increases in workload and costs.
  - Example: Reevaluate security restrictions imposed by contract – apply precision and focus in defining the type and nature of unclassified data that must be protected and the methods for protecting it. Leaving open-

end requirements and overly broad definitions in place drives up cost – perhaps unnecessarily. Avoid over-classification of information.

- Example: Avoid CONUS and onerous place of performance clauses unless absolutely necessary to meet defined security or other mandated objectives.
- Example: Weekly Earned Value Measurement and variance reporting is required on some programs and it drives tremendous cost and noise into the management system. Weekly EVM is not recommended by EVM experts for many good reasons.
- Example: There are now instances of CSDR requirements on Fixed Price Production programs where this is not a requirement to have a CPR. With no CPR requirement there is nothing for the Government to reconcile to the data to. This requirement can be time consuming and difficult to provide in some systems.
- Example: The ACRN billing structure versus the Clin structure has prevented us from billing and receiving payment in cases and has led to reporting complexity.
- Example: Some of our government customers do not understand the mechanics of cost type contracts and Earned Value and are imposing requirements that become unmanageable.
- Example: The authorized unpriced work (AUW) process adds cost - especially when the customer gives direction to proceed with the work but does not communicate (and/or know) what the work scope is. This creates a rework and opens up areas for audit findings, which creates its own workload in responding to CARs.

o Maximize use of single contracting method for multiple customer requirements (e.g. BOA, Tri-Services, etc. agreements).
  - Example: USDC EGI Multi-Services agreement currently has five (5) US Govt. End Users under one agreement. This requires negotiations with only one US Govt. Contracting Officer resulting in fewer procurement solicitations and reduced negotiation cost and cycle time.
  - Example: This results in one set of Ts&Cs versus having to negotiate individual terms with each of the 5 US Govt. Agency End Users.

o Maximize use of on "Best Value" Procurement versus FAR Part 15.
  - Example: This allows for the competitive award to be based on "Best Value" which takes into account other factors in addition to cost/price for award determination such as technical, past performance, schedule, etc.

o Utilize ALPHA Contracting when feasible.
  - Example: A large strategic D&S contract successfully implemented ALPHA contracting primarily to reduce cycle time and the cost of contracting. This resulted in eliminating "serial" activities with "concurrent" activities thus reducing fact finding, re-proposal and negotiation costs and cycle time.

– Evaluate/reconsider domestic preference requirements.
– Reinforce the legal boundaries of the Buy American Act with prime contractors – BAA does not impose a requirement below the "component" level (i.e., it only applies to items that go "directly" into the end product).
– Reconsider the BAA evaluative penalty level – NASA and other buying commands only impose a 6% evaluative penalty – DoD imposes a 50% penalty (effectively stating that they will pay a 50% premium for domestic end products).

- Enforce the BAA as it was drafted – it applies only to contracts for product – R&O contracts are services and should not be subjected to the rigors of BAA..
- Make use of the available exceptions to BAA as outlined in the DFARS (e.g., the exception for spare and replacement parts provided by the original foreign manufacturer).
- Revise the FSG structure as it applies to the Trade Agreements Act – it makes little sense, for example, to give "engine accessories" a TAA exception to BAA requirements, but not "engine components."

- Work pro-actively with industry to determine when solicitations include anti-terrorism technologies (ATT). For solicitations that are determined to include ATT, pro-actively request a pre-qualification designation notice from DHS.
- Follow current regulatory guidelines for allowable costs.
  - Minimize contract-by-contract negotiation of allowable cost categories.
  - Reinstitute timely enterprise-wide negotiation of forward-pricing rates.
  - Make certain industry interest costs allowable to encourage efficient funding of contracts.
- Restore direct billing.
- Return to a preference for commercial items, processes, and practices.
  - Reduce the number of unique clauses imposed on FAR Part 12 contracts.
    - Example: The number of "federal-unique" clauses that can be imposed in a FAR Part 12 prime contract has grown to about 50 provisions (FAR 52.212-5).
  - Expand the definition of commercial product to include defense products with competitive direct commercial sales to foreign governments.
  - Add flexibility to the definition of "commercial item" to allow DoD to buy innovative products that do not yet have substantial commercial sales.
  - Revise FAR 52.212-4 Alt I to allow commercial time and materials based on commercial labor rates to allow non-traditional contractors to support DoD.
  - Promote Government personnel understanding and consistent application of commercial item criteria by updating and reissuing the Commercial Item Determination Handbook.
    - Example: Inconsistent understanding and application of the FAR Part 2 commercial item definition among Contracting Officers leads to items being inappropriately eliminated from consideration and suppliers exiting the process.
    - Example: Regulations and DoD guidance is sometimes ignored by Contracting Officers. In 2006 the C-17 Program Office took the position that nothing on the aircraft was commercial, without regard to the regulations or guidance.
    - Example: The "of-a-type" category of commercial item is often misunderstood by Contracting Officers.

Rationalize Government and Contractor Infrastructure

- Provide incentives for closing and combining contractor facilities and close inefficient government facilities.

Increase the Use of Performance- and Outcome-Based Product Support Strategies

- Require sustainment and life-cycle cost modeling.

- Increase reliance on commercial supply chains.
    - Example: DLA adopted commercial supply chains for pharmaceuticals, food, clothing, fuel, bottled gas, shop materials, and tires. These efforts reduced inventory and improved customer delivery times 2-4 days. For naval aviation tires, the commercial supply chain provides 100% availability, delivery to Iraq in 55 hours, a 75% reduction in inventory, and $46M in savings. If expanded across all DLA items, costs could be reduced by $2.8B to 3.7B per year.
- Re-evaluate in-sourcing policies based on independent cost-benefit analysis.
- Eliminate low-priority and redundant Government services/activities and consolidate shared services.

Improve the Acquisition Workforce Skills and Training

- Focus on training, skills development, and knowledge transfer.
- Include industry as partners in providing training.

<u>Eliminate Government-Unique Processes and Procedures</u>

The 1994 study, "The DoD Regulatory Cost Premium: A Quantitative Assessment," popularly known as the "Coopers & Lybrand Study," measured the total cost associated with the DoD regulatory environment and determined that DoD was paying an 18% cost premium. Since the Coopers & Lybrand report was published, additional requirements have been added to the regulatory environment. There are a number of actions that DoD should take to eliminate Government-unique processes and procedures and reduce the cost premium. Those actions include the following:

- Create a rapid acquisition process and adopt the best practices for all acquisitions.
- Restore materiality and good judgment in audits and eliminate non-value-added audit content.
    - Restore materiality.
        - Example: One of our member companies indicates that the increase in audit requirements has caused his company to increase its compliance staff by 20%.
        - Example: DCAA is holding up a $200M billing for one of our companies because the auditor wants an original receipt for a $120 vendor invoice.
        - Example: DCAA has issued findings that are in contradiction with Generally Accepted Accounting principles and common industry practices that do not have any adverse impact to the Government. Using GAAP for asset lives, using longer payment terms instead of taking early-payment discounts, and using electronic systems instead of 3-way invoice match are all examples of findings where Honeywell was required to undertake expensive and lengthy studies to prove no harm to the government.
        - Example: EVM Joint Surveillance Reviews (JSRs) have grown to meet DCMA driven requirements and the reviews can take upwards of a week each month at certain locations while also increasing follow up support and action closure as well. The reviews require support by the Program Teams and EVM Compliance Officers. The required support is impacting estimates as this cost was not previously estimated on these programs.

    - Example: DCMA is consistently adding reviews and requests for information outside of the EVM JSR process (like the 14-point schedule assessment, trip-wire assessments, etc.). These requests take time to perform as well as respond to any questions or findings. We have to respond to the violation of percentages that are defined as goals which may or may not be valid (especially in the 14-point assessment).
    - Example: Redundancy in audits is taking place. We have provided the same or similar data at different times to different DCAA auditors because they either won't talk to each other, or do not want to rely on an onsite auditors finding, or believe they haven't adequately performed their job if they don't get the original data and do the review themselves.
    - Example: DCAA audits keep coming and they do not seem to close out. There have been threats of penalties for not adequately supporting.
    - Example: We are reviewed by the local DCMA as well as our customer's DCMA which is adding more requirements to the process. Some of those requirements have specifically violated the ANSI standard (i.e., you can never have retro changes – retro changes are not a good idea but the standard allows for retro changes under specific conditions). DCMA should not be imposing requirements over and above the criteria.
    - Example: The EVMS validation process and requirements are not clearly defined which may result in ongoing reviews to meet expectations or excessive cost to implement to an expected requirement in order to pass.
  - Reduce the amount of time to plan and perform contract audits.
    - Example: On the Air Force Corporate Contract, "one pass" (alpha) pricing was utilized. In "one pass" pricing, a team of Government pricing personnel consisting of contracting officers, price analysts, and representatives of the Defense Contract Audit Agency and the Defense Contract Management Agency met with Honeywell staff to negotiate prices based on the cost data contained in the Honeywell's approved cost accounting and estimating systems. This approach reduced the need for proposal updates which in turn lowered administrative costs and administrative lead times. Alpha contracting would have helped minimize the audit issues experienced on SPLS II.
  - Reduce bid and proposal cost by eliminating full assist audits when only rate audits are requested.
    - Example: When Prime Contractors request a simple rate audit for Honeywell proposals, DCAA is regularly launching full cost & pricing audits instead. – causing unwarranted delays and unnecessary expense.
    - Example: the work hours of Honeywell cost estimating/pricing staff is now approximately 50% supporting audits instead of working on new proposals.
  - Re-institute the use of IPTs to allow for iterative discussions regarding technical requirements, basis of estimate work scope, selection of estimating methodologies, and early disclosure of audit issues.
  - Develop a method for a Government agency to assess and grant, if applicable, contractor self-oversight. This is to include criteria, conditions, and performance for when self-oversight should be revoked.
  - Clearly define the responsibility, accountability, and authority between DCAA and DCMA.

- Use the Sarbanes-Oxley requirements to certify business systems for publicly-traded firms.
- Update the 1994 Coopers & Lybrand study on the cost premium for unique requirements. Coopers & Lybrand found an 18% cost premium from Government-unique requirements.
- Convene a joint industry/DoD team to identify and eliminate unnecessary, no- or low-value-added processes and procedures.
    - Example: DCAA is requiring that test equipment Bill of Materials (BOMs) be added into the consolidated BOM for proposals for cost estimating purposes, even though parts for test equipment are typically procured in a different time frame and cannot actually be combined with the rest of the BOM for volume discounts.
    - Example: CMMI requirement: Most contractors consider CMMI as a competitive advantage and therefore have achieved CMMI; however, it drives unnecessary assessment costs in some cases.
    - Example: Some development programs would benefit, in innovation, cost and quality, if there was allowance for tailored/flexible quality management systems (not mandate AS9100 or ISO9001).
    - Example: Mission Assurance requirements such as Technical Operating Reports should be flowed as guidelines that can be met with contractor or industry best practices.
    - Example: Recently stood-up EVM Center uses the Level II CAR as the form to document all findings.
    - Example: Liberal DCMA interpretations/definitions at some sites cause Level II CARs to be written. This results in contractor Root Cause Analysis (RCA) and Corrective Action (CA) for some minor non-conformance.
    - Example: Some DCMA commands are considering writing a contractor CAR for every CAR written against one of its suppliers.
    - Example: Unnecessarily conservative Critical Safety Item (CSI) designation approaches create CSI lists larger than necessary. In 2009, the C-17 program, a mature program, the CSI list was expanded as much as 30% with no known deterioration in delivered quality.
    - Example: Conformity designation, on development programs, is more subjective than necessary and therefore often results in a conservative approach. On the Italian Tanker program, for example, conformity designation (number of parts requiring conformity process) was inflated due to conservative approach.
    -
- Simplify/combine multi-agency compliance reviews.
    - Example: Lack of consistent interpretations is resulting in determinations of inadequate proposals due to unresolved immaterial fact finding questions, adverse audit reports due to failure to supply information that is not available and has never been previously provided, inconsistent determinations on the adequacy of information supporting commercial item determinations. Contractors typically deploy common processes across the enterprise. DCAA uses its ICAPs ratings as a measure of contractor's "ticketed" system compliance. The inconsistencies sited above results in differing ICAPs ratings between contractor locations notwithstanding the contractor's use of common processes.

- Develop cross-agency adaptations of modern contractor practices, including virtual documents and staff located away from manufacturing sites
  - Example: A Honeywell proposal cost volume was created by an estimator located in Puerto Rico, though the manufacturing was done at various U.S. mainland sites. DCAA could not determine whether the proposal should be audited in Puerto Rico, in Florida, or in Arizona – and the proposal validity expired before the audit was conducted.
  - Example: One DCMA office issued a CAR to Honeywell, requiring that Honeywell proposals be audited at the location where the estimator sits, though the proposal was for a system manufactured at another site. At the same time, DCAA is requiring in-person audits at the manufacturing site, regardless of where the estimator is located. Using telephone and on-line meeting technology, DCAA and DCMA personnel should be able to work with an estimator at any location to conduct their audit.
  - Example: DCAA is requiring review of original paper documents, though Honeywell records are primarily electronic, and paper copies may be stored at many different locations.
- Restrict agency-unique rulemaking that drives inefficiencies and costs and allow for public comment on policies that affect industry.
  - Example: Military Departments and Defense Agencies have instituted different requirements for resolving conflicts-of-interest.
  - Example: DCAA direction on Forward Pricing Rates (Memorandum PSP73.5.1.A/2010-020 dated June 4, 2010); DCAA audit treatment of supplier cost absent completion of cost analysis (Memorandum PSP 730.5.1 dated June 30, 2009); recent unpublished DCAA audit practice requiring that Contractor Enterprise cost reduction challenges/goals be reflected in FPRP/FPRA (versus disclosed in accordance with TINA requirements); recent unpublished Buying Command and DCAA practice of requiring 100% of proposal Bill of Materials for suppliers over the TINA threshold to have current quotes and Cost Analysis reports included in the initial proposal. Each of these and other "policy" guidance was issued with no prior coordination with industry and in many cases the issued policy overturned decades long industry practices that were successfully used in the contracting process.

Improve Requirements Definition and Ensure Requirements and Program Stability

Instability and unpredictability make it difficult for businesses to plan operations efficiently, to forecast hiring needs, and to invest in modernization of facilities and innovative technologies. Among the greatest cost drivers are major changes in requirements during program performance. Some actions to be taken to achieve stability include:

- Adequately define requirements at the outset of a contract, based on cost/schedule/performance trades.
  - Limit supplementation by use of key system attributes.
  - Maximize the use of Configuration Steering Boards to manage requirements changes.
  - Clarify FAR 15.603(c)(5) to define a "known agency requirement" as a point in time when requirements and budgets are identified and validated by an approved requirements document to minimize the costs of unsolicited proposals.

        - Example: On the Air Force Secondary Power Logistics Solution (SPLS) Contract, an Integrated Process Team (IPT) consisting of Air Force and Honeywell personnel was used from the beginning of the program to determine a defined product/service. This approach reduced the need for proposal updates which in turn lowered administrative costs and administrative lead times. Honeywell recommends the use of Joint Integrated Process Teams whenever possible.
- Adequately fund undefinitized contracts or annual contract increments.
- Expand the acquisition workforce human capital plan to include human capital associated with requirements definition and management in the Military Departments and Defense Agencies and allow use of the acquisition workforce development fund for hiring, training, and retaining personnel for requirements definition outside of OUSD(AT&L) and Military Department contracting and oversight organizations.
- Improve communications with industry on emerging requirements.
    - Institute quarterly DoD Executive Level II meetings with Industry CEOs to share information on emerging requirements, technology capabilities, and industrial requirements.
- Establish performance metrics for translating defined requirements into effective contracts
    - Performance-based approaches
    - Improved cost estimating
    - Effective competition
    - Appropriate contract types
    - Appropriate contract lengths
    - Effective contract management
- Lower the threshold for savings and award additional multi-year contracts to promote stability, lower procurement solicitation, fact-finding, re-proposal, and negotiation cycle-time.
        - Example: One company has a five year production plan for a DoD program that is funded one year at a time.
        - Example: One product requires only 26 units over the program life. DoD is buying two units in year one, no units in year two, and eight units in year three. If bought together, the cost would be $1M less.
        - Example: One contractor received a requirement for four units of spares two months after delivering a 43 unit buy. If bought in a single lot, DoD would have saved over $120,000.
        - Example – A large four (4) year long term firm-fixed price contract with a Prime Contractor for US Government. and Commercial launch vehicle products resulted in performing one (1) versus four (4) separate fact finding and negotiation sessions, thus reducing negotiation costs and cycle time.
- Stabilize production rates and limit the variation in quantity provisions to reasonable quantities that do not impact the supply chain.
- Establish fact-based, true-cost baselines for budget stability.
    - Use cost-as-an independent-variable (CAIV) methodologies to maintain the cost baseline.
    - More widely use the Special Termination Cost clause in DFARS 252.249-7000 to restrict termination liability to specific bounds to free up allocated funds for more productive uses.
    - Sparingly use payment withholds based on risk and harm to government.

- Support repeals of the 3% payment withhold imposed by the "Tax Increase Prevention and Reconciliation Act of 2005" (Pub. L. 109-222).

Unintended Impacts of Policy Decisions

The Federal Government creates policies intended to advance worthwhile goals. Often these policies have secondary impacts on contractors that drive up costs. We recommend that DoD champion a requirement that future regulations be accompanied by a cost-benefit statement so decision makers will know the cost impact of the new requirement and able to make an informed judgment about the costs and benefits of implementation. Some policy decisions with unintended consequences include:

- DoD wants increased competition, but bid and proposal costs are being cut. B&P costs increase as contractors submit more proposals.
- DoD wants to accelerate innovation and encourage entry of new competitors, but RFPs often insist on the contractor providing its technical data and software developed at private expense, thus undermining the incentive for contractor innovation.
- DoD wants increased productivity brought about by increased automation and capital expenses, yet DoD negotiators are arbitrarily reducing overhead costs and placing a premium on direct labor in profit negotiations.
- DoD wants to reduce or eliminate profit on major subcontracts. Continuance of this behavior will affect "make or buy" decisions and encourage prime contractors to vertically integrate, with unintended consequences for the industrial base.
- DoD wants to benefit from increased cash flows, but the 3% mandatory withhold on payments reduces cash flow and drives costly development of new systems and processes for DoD and contractors. In 2008 DoD estimated the cost of compliance with the withhold mandate to be $17 billion over the first five years. Including state and local governments and industry, that cost increases to $75 billion.
- DoD does not adequately fund undefinitized contracts or annual contract increments, thus forcing use of contractor funds with interest unallowable. Nevertheless, DoD wishes to take back profit when it does provide cash flow advantages. This appears to be an inconsistent initiative.

Prepared by: Ric Sylvester, VP Acquisition Policy, 703-358-1045

Alliance OF AUTOMOBILE MANUFACTURERS

January 11, 2011

The Honorable Darrell Issa
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Issa:

Knowing of your interest in assessing the impact of existing and proposed regulations on job growth, the Alliance of Automobile Manufacturers (Alliance) would like to take this opportunity to offer our views on this subject. We welcome the Committee's initiative to examine this critical issue and explore potential regulatory reforms that may stimulate the economy and spur job growth. As discussed in more detail below, our key concern is the potential for state regulations that would undermine the ongoing effort to develop a single national program for motor vehicle fuel economy standards in the 2017-2025 model years (MY).

Auto manufacturing is a cornerstone of the U.S. economy, supporting 8 million private-sector jobs, $500 billion in annual compensation, and $70 billion in personal income tax revenues. The automotive sector's ability to continue to add jobs and contribute to the health of the U.S. economy depends on regulations that provide clarity and certainty, without pricing our customers out of the market or preventing them from choosing vehicles that meet their diverse needs. To that end, the single most important regulation facing automakers today is the upcoming joint rulemaking that will establish fuel economy/greenhouse gas (GHG) emissions standards for MY 2017-2025.

Congress has long recognized the competing interests that require careful balancing in setting fuel economy standards. As a result, the National Highway Traffic Safety Administration (NHTSA) is required by law to set maximum feasible fuel economy standards taking into account the impact of standards on the economy and jobs. This is because fuel economy standards are by far the most expensive regulations automakers face; the 2012-2016 standards are estimated to cost more than $50 billion, and the 2017-2025 standards are likely to be significantly more expensive.

Manufacturers have been working to make ever more fuel efficient vehicles affordable for consumers; today, more than 160 models are on sale that achieve 30 miles per gallon (mpg) or greater on the highway. But consumers ultimately will decide what types of vehicles succeed or fail in the marketplace, based on the cost of ownership and other factors. For instance, in spite of considerable media focus on advanced technology vehicles and many new hybrid electric vehicle entrants into the marketplace, consumer purchases of hybrid and battery electric vehicles made up less than 3% of vehicles sold in the U.S. in 2010. If consumers do not buy the vehicles that manufacturers are required to produce, sales will fall, production will slow and manufacturers will be forced to eliminate jobs. It

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is imperative – and possible – to promote economic growth and consumer vehicle choice while improving energy security.

Also important, for many reasons, is avoiding a patchwork of state and federal standards. State-specific motor vehicle GHG regulations would subdivide the U.S. market for motor vehicles, forcing manufacturers to alter and potentially restrict the mix of vehicles that they can sell in particular states, which in turn would harm the dealers and consumers in those states. Consumers' needs vary throughout the country based on geography, climate and local and regional economies. Allowing automakers to achieve compliance on a nationwide-averaged basis will help preserve consumer choice. Additionally, a single set of federal, nationwide requirements would significantly reduce compliance complexity and costs. Finally, and especially relevant to the issue of jobs, only the federal government can balance nationwide the need to reduce oil consumption and emissions with the preservation of a vital manufacturing sector that is a cornerstone of a productive national economy.

Last May, automakers committed to engage constructively with NHTSA, the Environmental Protection Agency (EPA), and other stakeholders, including the California Air Resources Board (CARB), to develop a single national standard for MY 2017-2025. In the summer of 2010, EPA, NHTSA and CARB officials conducted a series of joint meetings with automakers, parts manufacturers, non-governmental organizations (NGOs) and others to gather information for the MY 2017-2025 timeframe. This work culminated in EPA and NHTSA issuing a "Notice of Intent" (NOI) to conduct a joint rulemaking and an "Interim Joint Technical Assessment Report" (TAR).

Although CARB representatives participated in the meetings leading up to the NOI and TAR, and had a role in preparing these documents, it appears that CARB intends to pursue the development of its own separate rules for MY 2017-2025 light-duty vehicles. Shortly after the NOI and TAR were issued, CARB indicated that it would finalize California-specific 2017-2025 light-duty vehicle GHG emission regulations early this year – *more than a year ahead of the federal rule.*

Such unilateral action by California is of great concern to us; in particular, a rushed effort toward a state rulemaking is not in the spirit of a collaborative effort to develop a single national program for fuel economy/GHG standards. The current federal rulemaking process is still in the early stages. The NOI and TAR cite numerous instances where additional analysis is needed, including on critical issues such as the costs of advanced vehicle technologies and the potential impacts on motor vehicle safety and the broader economy and jobs. That work is ongoing and is not expected to be completed before September 2011. So, there is no reason at this stage for CARB to initiate its own regulatory process in advance of the federal regulatory process.

Congress has expressly prohibited states and municipalities from adopting or enforcing laws or regulations "related to" fuel economy standards. An effort by a single state to become the nation's *de facto* regulator of fuel economy standards, using authority originally granted by Congress to regulate smog-forming emissions, is wholly inconsistent with Congress's prohibition. A single state cannot appropriately or adequately consider the consequences of its actions on critical national interests such as jobs, the economy, costs to consumers, motor vehicle safety, or consumer acceptance of the types of vehicles that their standards would require manufacturers to make. For example, in setting state-specific regulations, CARB does not need to take into account their effect on the auto industry in other states or even on the national economy. CARB is a state agency whose sole focus is on California's environmental agenda. CARB does not need to take into account the economy or jobs in states like Michigan, Ohio, Kentucky, Missouri, Texas, Alabama, Indiana, Oklahoma, Wisconsin, North Carolina, or other states with significant auto industry-related employment. And it is not required to consider factors like highway fatalities on U.S. roadways. Thus, California should be fully engaged in the effort to establish an effective and workable national program, rather than regressing to a California-only approach.

Finally, under the Clean Air Act, California may establish emissions standards only when the EPA Administrator grants California a waiver to do so. Section 209(b) of the Clean Air Act prohibits a waiver if the Administrator finds that California does not need separate regulations to meet compelling and extraordinary conditions, or if the Administrator finds that the California regulation is not consistent with federal standards set under Section 202(a) of the Clean Air Act. It is highly doubtful that California could demonstrate a need for separate state-level GHG regulations to meet "compelling and extraordinary conditions" once EPA and NHTSA have nationwide standards in place for 2017-2025.

At the federal level, it is critical that standards carefully balance the important national interests of reducing oil use and GHG gas emissions while supporting continued economic growth and jobs. Great uncertainties for the 2017-2025 timeframe remain, and though some are acknowledged in the NOI and TAR, neither document suggests a process for satisfactorily addressing them. For the upcoming rulemaking, the federal government must develop a more integrated process that takes into account factors upon which greater vehicle efficiencies depend, such as infrastructure, fuels and fuel quality, and consumer acceptance.

The Alliance is concerned that the NOI and TAR systematically underestimate the costs of the proposed standards and overstate the benefits to consumers. In several key areas, the agencies' analysis departs significantly from a recently completed study by the National Academies of Sciences (NAS). For example, the NAS estimates costs of more than $3,000 per vehicle to achieve fuel economy levels of 40 mpg by <u>2035</u>, while the NOI estimates costs of $1,000 (or less) to achieve 47 mpg by 2025, ten years earlier. Similarly, the NOI and TAR assume that all of the efficiency gains are converted into fuel economy; in other words no advances in performance, comfort or safety technologies can occur in the 2017-2025 timeframe. The NAS analysis is based on a much more realistic scenario that roughly 50% of efficiency gains will go to increase fuel economy, while the remaining 50% will offset other important new features.

In addition, the NOI and TAR cost estimates of the MY 2025 scenarios for the entire new vehicle fleet range from $770 to $3,500 per vehicle. The agencies also estimate a consumer fuel savings range from $5,000 to $7,400 during the life of the vehicle. However, a recent Center for Automotive Research (CAR) analysis calculates fuel economy costs to be from $4,190 to $6,435 per vehicle and a lifetime fuel savings of only $1,690 to $2,693. The CAR analysis shows a 10.2% net vehicle price increase at 41.7 mpg and a 22.3% net vehicle price increase at 60.1 mpg. According to CAR's analysis, such a steep price increase could depress light vehicle sales by 25% and result in a loss of as many as 220,000 automotive jobs.[1]

While the NOI and TAR represent a good start for the continuation of the program for MY 2017-2025, it is clear that much work remains before new standards are proposed. The Alliance remains committed to working constructively with EPA and NHTSA – and California – to develop a national rule based on sound science and assumptions that fairly reflect the cost of technology and consumers' willingness to pay for advanced technology. We are confident that a rigorous analysis and

[1]McAlinden, S. 2010, "Calculating the Net Cost or Price to the Consumer", *CAR Breakfast Briefing Series: The U.S. Auto Industry and the Market of 2025*, Ypsilanti, MI, Ann Arbor Marriott Ypsilanti at Eagle Crest, pp. 30-45.

a fair and open process will lead to standards that will deliver significant environmental and energy security benefits for the entire nation without negatively impacting the economy or jobs.

We appreciate the opportunity to provide input on the impact government regulation has on the economy and job growth and we would encourage the Committee to review the proposed EPA and NHTSA MY 2017-2025 fuel economy/GHG gas regulations in conjunction with this examination. It is in the best interests of the economy, jobs, and consumers in the U.S. for all stakeholders to work together towards a single national program that is both effective and workable. It would be inconsistent with this approach for California to move forward unilaterally with its own rulemaking.

While the 2017-2025 standards are our top priority, the industry is also facing new federal regulations in a variety of areas, including mid-level blends of ethanol, fuel economy labeling, and rearward visibility. These rules have the potential to impose significant additional costs on the car buying public, and therefore also bear careful scrutiny. The Alliance is working closely with the appropriate agencies to minimize any negative impacts that could be associated with these rules. We will keep the Congress informed as the process moves forward.

We trust the information we have provided will be helpful. A similar letter has been sent to Chairman Upton. Please contact me if you or your staff have any questions or need any additional information. Thank you for your consideration.

Sincerely,

Shane Karr
Vice President
Federal Government Affairs

cc: The Honorable Elijah Cummings

January 10, 2011

The Honorable Darrell E. Issa, Chairman
House Committee Oversight and Government Reform
2157 Rayburn House Office building
Washington, DC 20515-6143

Re: AAMA Response to Committee on Oversight Request: EPA Regulations Impact

Dear Chairman Issa,

The American Architectural Manufacturers Association congratulates you on your appointment as Chairman to the House Committee on Oversight and Reform, and thanks you for the opportunity to discuss the impact of the Environmental Protection Agency's July, 2010 promulgation of **EPA-HQ-OPPT-2005-0049 - Lead; Amendment to the Opt-out and Recordkeeping Provisions in the Renovation, Repair, and Painting Program (LRRP).** This decision continues to prevent the recovery of the extremely hard-hit U.S. construction and renovation industries and the manufacturers that serve it.

AAMA represents more than 250 North American window, door and skylight manufacturers and industry related suppliers. Collectively, AAMA member companies are responsible for a workforce of approximately 100,000 employees. AAMA also developed "Installation Masters," the country's preeminent window installers training program. As such, our interests are strongly tied to all aspects of the home and commercial build and renovation industries.

Prior to the publication of the Final Rule, the original LRRP mandated certain requirements for work on pre-1978 constructed homes which housed children under the age of six and pregnant women. The home renovation industry fully complied with the revised and costly requirements for renovation work practices; training, dust sampling requirements and accreditation.

This original EPA ruling allowed an "opt-out" provision for homeowners residing in pre-1978 constructed homes with no children under the age of six or pregnant women (at risk population) within the residence. This opt-out provision, limited the enforcement of this costly EPA rule to only those pre-1978 homes with at risk population residents.

Following a 2008 lawsuit filed by a special interest group, the EPA agreed to include several new provisions with the LRRP. One of which, resulted in the promulgation of **Lead; Amendment to the Opt-out and Recordkeeping Provisions in the Renovation, Repair, and Painting Program (LRRP)**, which removed the original LRRP "opt-out" provision and immediately, and significantly increased the cost of home renovations across the country.

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The Honorable Darrell E. Issa, Chairman
House Committee Oversight and Government Reform
2157 Rayburn House Office building
Washington, DC 20515-6143

Re: AAMA Response to Committee on Oversight Request: EPA Regulations Impact

Prior to the EPA's decision to impose this final rule, SBA Advocacy issued the attached notice to Administrator Jackson, strongly discouraging the removal of the opt-out provision, based on a severely underestimated implementation cost analysis and the *inclusion* of unreliable lead studies coupled with the *exclusion* of more reliable data.

The SBA also pointed out that the EPA "*...failed to perform needed outreach and failed to examine seriously several regulatory alternatives that would minimize the small business burdens while achieving the same regulatory goals.*"

The AAMA membership joined other building product trade organizations in vehement opposition to the implementation of this ruling. The EPA, GBO and House and Senate Committees were provided with documentation confirming the severely underestimated field costs provided by the EPA, the EPA's lack of preparation on rule implementation, and the unreliability of the EPA required lead testing kits.

Several members of the House and Senate sent letters to Administrator Jackson requesting the EPA NOT proceed with the removal of the "opt-out" provision...

"At a time when the economy is seriously deflated and the national unemployment rate is looming near 10%, our nation cannot afford to further distress businesses and families by mandating these particular policies," Boehner wrote in a March 31 letter to EPA administrator Lisa Jackson. "I strongly urge you to consider re-visiting this issue to determine how to protect consumers from the hazards of lead-based paint without increasing costs and harming businesses and consumers."

With complete disregard toward documented concerns related to the removal of the provision, the EPA promulgated the final rule. The fenestration industry witnessed an immediate and significant impact on sales as a direct result. As renovators began to inform homeowners of the additional remodeling costs now associated with renovations, window sales in some parts of the country plunged by 20%.

Construction workers, among the first and hardest hit by the housing crisis and subsequent recession, continue to be turned away by homeowners who cannot afford to make necessary renovations due to the increased costs associated with LRRP compliance.

As stated earlier, the EPA is now considering additional provisions to the LRRP. Considering the mammoth costs associated with the implementation of each new provision, it is suspected that EPA is introducing each proposal separately in order to avoid providing Congress and OMB with the cumulative cost to small business and homeowners.

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The Honorable Darrell E. Issa, Chairman
House Committee Oversight and Government Reform
2157 Rayburn House Office building
Washington, DC 20515-6143

Re: AAMA Response to Committee on Oversight Request: EPA Regulations Impact

In addition to the economic downturn of the past 30 months which has had a severe impact on workers in all aspects of the homebuilding and remodeling industry, the addition of LRRP compliance costs have proven to add substantially to the chronic unemployment of U.S. construction workers and layoffs within U.S. home retrofitting products manufacturing companies.

AAMA and its membership, through past collaboration with EPA and other energy and environmental governmental agencies, have proudly been at the forefront of addressing environmental and energy-impacting issues in the U.S., and we fully support the intent of the original LRRP to safeguard the EPA-deemed "at-risk" segment of the population from lead exposure. However, mandating these practices to all pre-1978 housing stock based on questionable studies and grossly underestimated implementation costs, exhibits a clear abuse of EPA's authority.

Thank you for the opportunity to submit information on the industry impact of recent and proposed rulings of the Environmental Protection Agency. Should you have any questions or comments or require additional information, I can be reached at 330-242-1916 or rwalker@aamanet.org.

Sincerely,

Richard Walker
AAMA President and CEO

Sincerely,

Richard G. Walker
AAMA President and CEO

cc: The Honorable Edolphus Towns, Ranking Member

attachments: May 21, 2010 GAO Major Rule Report
April 28, 2010 EPA Website Response to Cost Question
November 27, 2009 SBA Advocacy Letter to EPA

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B-319689

May 21, 2010

The Honorable Barbara Boxer
Chairman
The Honorable James M. Inhofe
Ranking Member
Committee on Environment and Public Works
United States Senate

The Honorable Henry A. Waxman
Chairman
The Honorable Joe Barton
Ranking Member
Committee on Energy and Commerce
House of Representatives

Subject: *Environmental Protection Agency: Lead; Amendment to the Opt-Out and Recordkeeping Provisions in the Renovation, Repair, and Painting Program*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Environmental Protection Agency (EPA), entitled "Lead; Amendment to the Opt-Out and Recordkeeping Provisions in the Renovation, Repair, and Painting Program" (RIN: 2070-AJ55). We received the rule on April 28, 2010. It was published in the *Federal Register* as a final rule on May 6, 2010. 75 Fed. Reg. 24,802. The final rule is effective July 6, 2010.

The final rule revises the Lead Renovation, Repair, and Painting Program (RRP) rule that was published in the *Federal Register* on April 22, 2008. The final rule eliminates the "opt-out" provision that currently exempts a renovation firm from the training and work practice requirements of the rule where the firm obtains a certification from the owner of a residence that no child under age 6 or pregnant woman resides in the home and the home is not a child-occupied facility. The final rule also requires renovation firms to provide a copy of the records demonstrating compliance with the training and work practice requirements of the RRP rule to the owner and, if different, the occupant of the building being renovated or the operator of the child-occupied facility. In addition, the final rule makes minor changes to the certification, accreditation, and state authorization requirements.

Enclosed is our assessment of EPA's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review of the procedural steps taken indicates that EPA complied with the applicable requirements.

If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Robert J. Cramer
Managing Associate General Counsel

Enclosure

cc: Nicole Owens
Director, Regulatory
Management Division
Environmental Protection Agency

ENCLOSURE

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
ENVIRONMENTAL PROTECTION AGENCY
ENTITLED
"LEAD; AMENDMENT TO THE OPT-OUT AND
RECORDKEEPING PROVISIONS IN THE RENOVATION,
REPAIR, AND PAINTING PROGRAM"
(RIN: 2070-AJ55)

(i) Cost-benefit analysis

EPA performed a cost-benefit analysis in conjunction with the final rule. The benefits of the final rule result from the prevention of adverse health affects attributable to lead exposure from renovations in pre-1978 buildings. The adverse health affects include impaired cognitive function in children and several illnesses in children and adults, such as increased cardiovascular outcomes (including increased blood pressure, increased incidence of hypertension, cardiovascular morbidity, and mortality) and decreased kidney function. EPA determined that annualized benefits from the final rule may range from approximately $870 million to $3.2 billion assuming a discount rate of 3 percent, and $920 million to $3.3 billion assuming a discount rate of 7 percent.

The costs of the final rule result from removing the opt-out provision and requiring firms performing renovation, repair, and painting work for compensation in housing previously eligible for the opt-out provision to follow the training, certification, and work practice requirements of the Lead Renovation, Repair, and Painting (RRP) rule. In addition, the final rule adds recordkeeping requirements that will increase costs of renovations in all target housing and child-occupied facilities. EPA estimates that the final rule will cost approximately $500 million in the first year, with the cost expected to drop to approximately $300 million per year starting with the second year, when improved test kits for detecting the presence of lead-based paint are assumed to become available. Training for renovators and workers and certification for firms working in housing previously covered by the opt-out provision is estimated to add approximately $50 million per year to the cost, and requiring renovators to provide owners and occupants with copies of the recordkeeping required to document compliance with the RRP rule training and work practice requirements costs approximately $30 million per year, with about two-thirds incurred in housing that was previously eligible for the opt-out provision.

(ii) Agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603-605, 607, and 609

EPA prepared a final regulatory flexibility analysis for the final rule. EPA determined that the vast majority of the entities in the industries affected by this rule are small, and that the rule will affect approximately 289,000 small entities. EPA determined that an estimated 101,000 small businesses could be affected by the removal of the opt-out provision, with average impacts of 1.10 percent of revenues. EPA further determined that an estimated 189,000 small entities could be affected solely by the additional recordkeeping requirement, with incremental cost impacts ranging from 0.0001 percent to 0.08 percent of revenues. Combining the removal of the opt-out provision with the new recordkeeping requirements, a total of 289,000 small entities could be affected by the rule, including 266,000 small businesses with average impacts of 0.4 percent, 17,000 small non-profits with average impacts of 0.0005 percent, and 6,000 small governments with average impacts of 0.0001 percent.

The removal of the opt-out provision will also affect an estimated 75,000 non-employer renovation contractors, with an average cost to such contractors estimated to be $1,193 apiece, which represents 1.3 percent to 4.7 percent of reported revenues, depending on the industry sector. The new recordkeeping requirement is estimated to affect approximately 96,000 additional non-employer renovation contractors, with an average estimated cost of $42 apiece, which represents 0.05 percent to 0.17 percent of reported revenues, depending on the industry sector.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

EPA determined that this final rule contains a federal mandate that may result in expenditures that exceed $100 million by the private sector in any one year, but will not result in such expenditures by state, local, and tribal governments in the aggregate.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

EPA published a notice of proposed rulemaking on October 28, 2009. 74 Fed. Reg. 55,506. EPA received comments on the proposed rule and responded to those comments in the final rule. 75 Fed. Reg. 24,802.

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

The final rule contains information collection requirements that are subject to Office of Management and Budget (OMB) review under the Paperwork Reduction Act. EPA has submitted the requirements to OMB for approval, and they have been assigned OMB Control Number 2070-0155. EPA determined that the information collection requirements may affect training providers as well as firms that perform renovation, repair, or painting for compensation. EPA estimates that the total respondent burden for training providers and certified firms from the final rule will average approximately 1,647,000 hours per year during the 3 years covered by the information collection request.

Statutory authorization for the rule

The final rule is authorized by sections 402(c)(3), 404, 406, and 407 of the Toxic Substances Control Act, codified at 15 U.S.C. §§ 2682(c)(3), 2684, 2686, and 2687.

Executive Order No. 12,866 (Regulatory Planning and Review)

The final rule was determined by EPA to be significant under Executive Order 12,866 and was reviewed by the Office of Management and Budget.

Executive Order No. 13,132 (Federalism)

EPA determined that the final rule does not have "federalism implications" because it will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

http://toxics.custhelp.com/cgi-bin/toxics.cfg/php/enduser/std_adp.php?p_faqid=6660
Last updated on Wednesday, April 28, 2010

Pollution Prevention and Toxics

Frequent Questions

Answer ID
6660
Last Updated
04/22/2010 03:38 PM

How much will it cost contractors to comply with the RRP Rule?

Question

How much will it cost contractors to comply with the Renovation, Repair, and Painting (RRP) Rule?

Answer

Information collected by EPA for the purposes of the rulemaking indicates that many contractors already follow some of the work practices required by the rule, such as using disposable plastic sheeting to cover floors and objects in the work area. These estimates do not include the costs of those practices.

EPA estimates that the costs of containment, cleaning, and cleaning verification will range from $8 to $167 per job, with the exception of those exterior jobs where vertical containment would be required. This includes:

- Costs of equipment (for example, plastic sheeting, tape, HEPA vacuums and tool shrouds – the equipment varies by job).
- Costs of labor (for example, the time required to perform cleaning and cleaning verification).

In addition to work practice costs, your costs will include training fees and certification fees. The costs include:

- Training costs to individual renovators working in pre-1978 housing or child-occupied facilities who must take a course from an accredited training provider (cost is set by the training provider; estimated to be about $200 for a 5-year certification).
- Certification costs to firms to obtain certification from EPA ($300 fee to the U.S. Treasury for a 5-year certification. (This fee is required by law to cover program administration).

How well did this answer your question?

○ 100% ○ 75% ○ 50% ○ 25% ○ 0% Submit Rating

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- Does the RRP rule apply to simple painting activities that occur when rental properties turn over?
- If a general contractor hires a subcontractor to work at a renovation site, does the subcontractor need to be a certified firm if the subcontractor does not disturb any paint?
- Must my firm be certified if we are performing a renovation that started in March but will not be completed until June 2010?
- Does the RRP Rule require a certified state lead inspector or risk assessor, who does not do renovation work, to become a certified renovation firm in order to take dust wipe samples?
- Is the fee for firm certification waived for self- employed individuals or landlords?

Back to Previous Document

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Advocacy: the voice of small business in government

November 27, 2009

By Electronic Mail

Document Control Office (7407 M)
Office of Pollution Prevention and Toxics (OPPT)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Amendment to the Opt-out and Recordkeeping Provisions of the Lead Renovation, Repair and Painting Program (LRRP); Docket ID Number EPA-HQ-OPPT-2005-0049

Dear Administrator Jackson:

The U.S. Small Business Administration's (SBA) Office of Advocacy (Advocacy) is pleased to submit the following comments on the U.S. Environmental Protection Agency's (EPA) proposed amendment to eliminate the "opt-out" option in the Lead Renovation, Repair, and Painting Program (LRRP) Rule promulgated in April 2008. The current LRRP rule is designed to reduce exposure to lead hazards created by renovation, repair, and painting activities that disturb lead-based paint. This proposal would result in an EPA estimated increase of costs on regulated firms from $800 million (current LRRP) to $1.3 billion (LRRP with new proposal) in the first year of compliance.

The current LRRP rule establishes requirements for renovation work practices; training renovators and dust sampling technicians; certifying renovators, dust sampling technicians, and renovation firms; and accrediting providers of renovation and dust sampling technician training. The proposed rule would eliminate the current opt-out for renovation jobs where no children under six years old or pregnant women reside.(1)

Advocacy supports EPA's effort to impose reasonable minimum work practice standards, including clean-up standards that will ensure protection of the health of young children and pregnant women. However, Advocacy opposes the expansion of this expensive rule to extend to dwellings of persons above the age of six (including nonpregnant women). This proposed change would almost double the cost of the current rule, without any serious examination of whether there will be additional benefits due to the expansion of this regulation. Furthermore, EPA failed to include the cumulative impact of eliminating the "opt-out" option from the current rule, and two additional costly future rulemakings. Nor did EPA consider alternatives that would address these multi-billion dollar cumulative impacts. By segmenting these rulemakings, EPA reduces the apparent costs of each individual rulemaking and overlooks the serious consequences to small businesses, job creation and housing affordability in America.

Given the much lower level of exposure of older children and adults, EPA could retain the existing rule, or limit the new rule to providing notification to the owners and providing a checklist for lead-safe practices for the renovator to complete. Alternatively, EPA could simply prohibit the several lead dust generating practices that were prohibited or restricted in the current LRRP rulemaking, thereby capturing most, if not virtually all, of the benefits anticipated by this rule, without the additional regulatory baggage of the remainder of the rule.(2) In addition, EPA should seriously consider extension of the compliance date for any opt-out changes to assure adequate training capability and lower costs to small businesses. In short, EPA can substantially alter this proposed rule and preserve substantially all of the benefits in a variety of ways.

Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The RFA, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),(3) gives small entities a voice in the rulemaking process. For all rules which will have a significant economic impact on a substantial number of small entities, EPA is required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives. Moreover, Executive Order 13272,(4) requires Federal agencies to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. The agency must include, in any explanation or discussion accompanying publication in the Federal Register of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule.

Background

SBREFA Panel

In developing the predecessor proposed LRRP rule, EPA convened a Small Business Advocacy Review Panel in accordance with the requirements of SBREFA to obtain advice and recommendations about how the proposed rule might affect small entities. The panel included representatives from EPA, Advocacy, and the Office of Information and Regulatory Affairs within the Office of Management and Budget and was assisted in its work by several small entity representatives (SERs) of the various entities that potentially would be subject to the rule. The panel met in 1999 and reviewed various regulatory options developed by EPA, but did not address the series of regulatory changes now being considered by the agency.(5)

EPA issued a final LRRP rule in April 2008. The LRRP rule applies to "target housing," defined in section 401 of the Toxic Substances Control Act (TSCA) as any housing constructed before 1978, except housing for the elderly or persons with disabilities (unless any child under age 6 resides or is expected to reside) or any 0-bedroom dwelling. The final rule also applies to housing where a pregnant woman resides.

Consent Decree

In a consent decree reached with public interest groups, EPA committed to a series of rulemakings where it will consider establishing additional requirements potentially involving billions of dollars in increased costs over several years. In our view, none of these planned changes are likely to produce any significant benefits to society. EPA has agreed to issue the following proposals over a period of time: (1) eliminating the opt-out, (2) applying the Housing and Urban Development (HUD) clearance test(6) to these renovation activities, and (3) expanding the LRRP requirements to commercial and other non-residential buildings.

When EPA completed the current LRRP, these same requirements were considered and squarely rejected by the agency as offering no significant benefits and inconsistent with the Toxics Substances Control Act (TSCA). Yet, EPA committed to these new rulemakings, and did so without consulting with small businesses, our office, and without benefit of convening a SBREFA panel to address the potential impact of these new requirements. By EPA's own estimate, these rules would add hundreds of millions of dollars in annual costs to small firms.(7)

Regulatory Flexibility Act

Under the Regulatory Flexibility Act, and Executive Order 12866, EPA is required to examine the costs and benefits of regulatory alternatives. In tbis case, EPA failed to perform needed outreach and failed to examine seriously several regulatory alternatives that would minimize the small business burdens while achieving the same regulatory goals. Further, there is no new science that EPA relies upon to make changes to the opt-out rule, and its re-evaluation of the science and tbe projected benefits is unconvincingly thin in its endeavor to demonstrate that real benefits to society will accrue.

EPA's proposal attempts to add environmental protection by extending application of these comprehensive regulatory requirements to more renovation activities. Advocacy is concerned that removal of the opt-out option will result in more, not less, lead contamination because it will lead to unregulated renovation by homeowners and disreputable firms, rather than better performance by regulated firms.(8)

Proposal Inconsistent with TSCA

In the original April 2008 final rule, EPA stated, "[i]n addition, EPA made a concerted effort to keep the costs and burdens associated with this rule as low as possible, while still providing adequate protection against lead-based paint hazards created by renovation activities. Indeed, as part of this rulemaking EPA has, as directed by TSCA section 2(c) considered the environmental economic and social impacts of this rule."(9) The agency also previously recognized that "[i]n the Senate report on Title X, Congress noted the need 'for a flexible, targeted approach for protecting children from exposure to lead hazards while maintaining housing affordability.'"(10) This statutory framework provided the legal rationale for the 2008 opt-out provision.

In the current proposal, the agency again declares in the preamble that "... EPA has also taken into consideration the environmental, economic and social impact of today's proposed rule as provided in TSCA § 2(c)."(11) Yet, unlike the approach in the 2008 rule, EPA makes no further mention of this requirement in the remainder of the 2009 preamble or anywhere in the extensive Economic Analysis, and provides no factual basis for its declaration. The agency's legal obligation is not discharged merely by mentioning the applicable legal standard. This strongly contrasts with the 2008 final rule preamble, where the TSCA provision is significantly addressed and applied.(12)

Advocacy believes that the proposed rule imposes substantial burdens on small businesses, home owners and building owners, without any significant expectation of addressing real lead hazards, in contravention of TSCA, the underlying statute.

Discussion

I. The Evidence of Risk to Young Children from Renovation Activity is Weak; Evidence of Benefits to Older Children and Adults is Merely Speculative.

As we pointed out in our earlier comments on the proposed LRRP,(13) Advocacy believes that while some renovation activities can generate significant amounts of lead dust that could pose a human health hazard, there is not sufficient evidence that renovation activities by private contractors or building owner personnel, as opposed to homeowners, contribute to an increased risk of elevated blood levels (EBL) in children. EPA's final rule relies on both the Phase III study(14) and two New York State Department of Health studies(15) to show a relationship between renovation activities and children's health. The Phase III study was addressed in the SBREFA panel report. While these studies provide some evidence that renovation by homeowners (or sloppy work by contractors) can result in EBL, they do not provide evidence that the proposed procedures will enhance public health. Advocacy believes that the evidence in fact shows that private contractors (i.e., professional renovators) subject to reasonable cleanup standards, including the "no visible dust or debris" standard, do not create additional health hazards. Since the evidence was so weak for young children, it is much weaker for older children and adults who do not ingest lead dust from the floor, windowsills or soil.

Further, while EPA states that the phase III study shows that children subject to remodeling were 30 percent more likely to have EBLs than other children, there is not a significant correlation when the sample was limited to the persons regulated by this rule - namely apartment building owners, apartment building staff, and professional contractors. On the other hand, renovations involving relatives and friends not residing in the household (i.e., those not subject to this rule) showed the highest correlation with EBL. Based on the foregoing, Advocacy is still concerned that the final LRRP rule could unnecessarily raise costs and drive homeowners from using professional contractors (renovators), who work more carefully, to inexperienced and untrained individuals. The current LRRP rule would also encourage do-it-yourself work by untrained individuals, which could actually endanger children's health, not improve them. Now, EPA proposes to vastly increase the cost of this rule, with only the hope that some benefits might accrue.

Finally, EPA cited two additional references in the LRRP final rule to demonstrate that EBL is associated with renovation. However, the first study by the New York State Department of Health, found that 6.9 percent of the children had EBL, and this was associated with renovation. Unfortunately, this study is not reliable since it did not compare the 6.9 percent EBL with a control group of New York households that had not undergone renovation within the two year period.(16) Given the large magnitude of residences studied that undergo renovation each year, Advocacy does not believe that this figure reveals a relationship witb renovation activities.