GREENHOUSE GASES

- EPA Greenhouse Gas (GHG) Regulation Under the Clean Air Act: Effective January 2, 2011, EPA's regulation of GHGs from stationary sources under the Prevention of Significant Deterioration (PSD) and Title V programs breaks with long standing precedent for biomass carbon neutrality and treats the combustion of biomass identically to the combustion of fossil fuels. EPA chose to treat biogenic emissions the same as emissions from fossil fuel in the Tailoring Rule. Two-thirds of the energy needs of forest products mills are met through wood biomass residuals. Counter to Administration objectives, EPA's treatment of biogenic emissions ignores the renewability of the resource and stymies investment in renewable energy.

- EPA Greenhouse Gas Mandatory Reporting Rule: Facilities must report their 2010 GHG emissions beginning April 1, 2011. Unlike other regulations, EPA has not allowed facilities to propose alternative methods for calculating emissions or allowed *de minimis* emissions levels under which reporting is unnecessary. This inflexibility makes the rule more expensive to implement than is necessary. EPA has also proposed to make public individual company inputs to GHG emissions calculations which are traditionally considered confidential business information.

WATER

- Florida Nutrient Standards: Despite the fact that the State of Florida was making significant progress establishing its own nutrient standards, EPA recently promulgated extremely stringent numeric nutrient criteria for nutrients (nitrogen and phosphorous) for certain Florida waters based on a methodology that is not scientifically defensible. EPA has indicated it views the Florida rule as national precedent. Stakeholders have estimated compliance with the rule will cost billions of dollars and will require expenditures for cleaning up waters that are not impaired.

- Analytical Method for Polychlorinated Biphenyls (PCBs). Polychlorinated biphenyls (PCBs) are a "legacy" pollutant; production of which was banned by Congress and EPA decades ago. However, PCBs in extremely low levels are ubiquitous in the environment. EPA has proposed an analytical test method that purports to measure in the very low range of parts per quadrillion, which is below the national EPA standard. Once the method is final and dischargers must use it for compliance, many dischargers will find PCBs in their effluents at levels found in the environment. This will ultimately lead to permit limits with which compliance will be either impossible to achieve, or unreasonably expensive.

- Chesapeake Bay Total Maximum Daily Load (TMDL). At the end of 2010, EPA issued the final TMDL for the Chesapeake Bay. A TMDL is a calculation of the maximum amount of a pollutant that a water body can assimilate and still maintain water quality standards. As part of the TMDL process, EPA usurps the states' traditional role of TMDL implementation by threatening heavy-handed measures if certain clean up milestones are not met, such as "backstop" actions that would require forest products facilities to meet water discharge levels for certain pollutants that are beyond the limits of existing technology and therefore likely unachievable.

WASTE

- Coal Combustion Residuals. EPA has proposed to regulate coal combustion residuals from the electric utility industry as either hazardous or non-hazardous solid waste. Although the forest products industry would be exempt under the current proposal, states have indicated they would not differentiate between utility and non-utility residuals. EPA could regulate these materials under the non-hazardous waste provisions and modify the proposal to make those requirements consistent with the degree of harm posed by such residuals. Further, strict regulation under the hazardous waste regulations is not necessary to address the risks posed by coal combustion residuals. The forest products industry, and other industries, will pay increased electricity costs passed on by utilities, if EPA chooses the hazardous waste option.

WORKPLACE HEALTH & SAFETY

- Combustible Dust. OSHA issued an advance notice of proposed rulemaking on combustible dust in October, 2009. Complying with the new rule could potentially cost the forest products industry and numerous other industries many millions of dollars in capital expenditures and higher operating costs without materially improving worker safety. To be most cost-effective, AF&PA believes that combustible dust regulations should primarily rely on performance-based approaches rather than proscriptive standards and that engineering controls should only be required for new facilities or if major renovations are made to existing facilities.

- Noise Enforcement. OSHA issued a notice on October 19, 2010, indicating that it plans to change its official interpretation of workplace noise exposure standards. Until now, OSHA allowed the use of "personal protective equipment" such as ear plugs and ear muffs as the first means of reducing workplace noise exposure to acceptable levels. Now, the Agency is reinterpreting an existing rule to say that companies will need to use administrative changes and engineering controls as a first line of defense. According to the notice, these changes must be adopted regardless of the costs unless an employer can prove that making such changes will "put them out of business" or severely threaten the company's "viability." AF&PA believes that OSHA's new enforcement policy disregards costs and is at odds with the common-sense hearing protection approaches that have been used successfully for decades.

FIBER SUPPLY

- Endangered Species Act: The Fish & Wildlife Service (FWS) is placing overly burdensome requirements upon potential habitat for listed species. For instance, the Spotted Owl recovery plan is restricting activity on lands that *may* be suitable habitat for the Spotted Owl, irrespective of whether the Owl is present in that region. The new Draft Plan rejects the current strategy which is based on the assessment that the owl can be recovered by establishing a network of Late Successional Reserves (LSR's) on federal lands. No supporting scientific analysis was given, and the FWS

is calling for the protection of all owl sites and all high quality spotted owl habitat on all lands regardless of ownership. This Draft Plan has the potential to shutter mills and destroy jobs as fiber supply from both federal and private lands is constrained.

- NEPA CEs: Management of Forest Service lands where there aren't significant environmental impacts could be achieved in a more cost effective and timely manner if Categorical Exclusions (CEs) permissible under the National Environmental Policy Act (NEPA) were used for forest health maintenance projects such as beetle kill and wildfire prevention. Increasing the use of CEs would allow the Forest Service to offer additional timber without an increase in appropriated dollars, thereby helping assure an adequate supply of fiber for our mills.

In most cases identified above, significant capital investment will be required for equipment needed to meet the regulation that would otherwise go to growth in manufacturing capacity and the attendant production of jobs. The suite of potential clean air regulations alone could prevent any new expansion or upgrade of existing forest products industry facilities in the U.S.

Again, thank you for the chance to provide input on regulations impacting the U.S. forest products industry. We are happy to provide additional information to you and your staff and look forward to working with the Committee.

Sincerely,

Donna Harman

Donna Harman
President & Chief Executive Officer

Cc: The Honorable Elijah Cummings, Ranking Member

American Gas Association

DAVID N. PARKER
President and CEO

December 29, 2010

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

Dear Chairman-Elect Issa:

The American Gas Association (AGA) appreciates your concern about the impact of existing and proposed regulations on the economy and jobs. You have raised serious questions about the volume and impacts of recent regulatory activity. In response to your request, however, we would like to work with our members in the New Year to evaluate whether there are regulations that have negatively impacted job growth at natural gas distribution utilities. We have generally found that the Environmental Protection Agency (EPA) and other agencies have been willing to work with us to resolve the largely technical problems we have identified so that the rules achieve public policy goals without imposing unnecessary burdens on our members.

AGA supports sensible, cost-effective regulations that promote health, safety and environmental protection in a manner that also fosters economic growth and prosperity. We believe this can be accomplished when an agency reaches out to stakeholders early in the process to learn about the affected industry and how a regulatory program that is workable and effective might be designed. That is probably the most important suggestion we can make to improve the regulatory process. Congress can help in this regard by allowing EPA and other agencies sufficient time to develop rules with less haste and more time for obtaining input from experts in the affected industry *before* the agency drafts a proposed rule.

For example, Congress gave EPA just nine months to draft the mandatory greenhouse gas reporting rules. Given the hasty process, it is not surprising that there were several unintended problems in the reporting rules for natural gas utilities that could have imposed tremendous costs on home and business customers, without any real environmental benefit. To their credit, EPA responded to our comments and revised the rule. EPA is similarly working to resolve unintended problems in the recent "Subpart W" greenhouse gas reporting rule for the natural gas industry. Given that this rule becomes effective in 2011, EPA and the industry must work out these issues "on the fly" through interpretive Q&A guidance, technical corrections and further rules changes – at the same time that the industry must set up programs to comply with the rule in 2011.

We look forward to working with you and your staff in the 112th Congress to further this discussion.

Sincerely,

David N. Parker

Cc: Chairman Edolphus Towns

American Iron and Steel Institute

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Thomas J. Gibson
President and Chief Executive Officer

January 10, 2011

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

Dear Chairman Issa:

On behalf of the American Iron and Steel Institute (AISI), I am pleased to respond to your inquiry regarding existing and proposed regulations that negatively impact the economy and jobs. AISI is the trade association representing U.S. and North American steelmaking companies. We are comprised of 24 member companies, including integrated and electric arc furnace steelmakers, and 140 associate and affiliate members who are suppliers to or customers of the steel industry. AISI's member companies represent approximately 80 percent of both U.S. and North American steel capacity.

Steel and other manufacturing industries are the backbone of our economy. A strong manufacturing sector creates significant benefits for society, including good-paying jobs, investment in research and development, critical materials for our national defense, and high-value exports. Both the Environmental Protection Agency (EPA) and the Occupational Health and Safety Administration (OSHA) have in place, and have proposed, multiple new regulations that will create competitive disadvantages to U.S. industry and endanger manufacturing jobs. AISI appreciates this opportunity to comment on some of the most problematic regulations to the steel industry.

EPA

AISI has long identified environmental stewardship and commitment to sustainability as part of our industry's strategic plan and our vision for the future. As a result of this commitment, we are aggressively seeking ways to reduce our environmental footprint even while producing the advanced and highly recyclable steel that our economy demands. The industry has reduced its energy intensity by 30% since 1990, while reducing its greenhouse gas (GHG) emissions by 35% over the same time period. In fact, the American steel sector is recognized as having the steepest decline of total air emissions among nine manufacturing sectors studied in EPA's 2008 Sector Performance Report.

Over the past two years, the EPA has undertaken an extensive regulatory agenda, proposing a substantial number of new regulatory initiatives in a number of program

areas, including air, water, toxic chemicals, and solid waste. AISI currently interacts with the EPA on more than 40 environmental rules that may have significant impacts on steel manufacturers. Many of these new regulations will create permitting obstacles for investment in new and renovated facilities and impose significant additional costs on domestic steel producers as well as other energy intensive industries. Even though the steel industry has a history of demonstrated leadership in meeting and exceeding environmental requirements, the simultaneous development of multiple new environmental regulatory proposals across several program areas at the federal and state levels have the potential to limit continued industry advancement, while endangering critical manufacturing jobs. Below are some of the more significant regulatory issues that threaten the restoration or preservation of manufacturing jobs.

Greenhouse Gas Regulations

EPA is moving forward this month with economically-damaging actions to regulate GHG emissions from most steel producing facilities. EPA's regulation of GHG emissions under the Clean Air Act will be very costly to the domestic steel industry, prevent it from making new investments that would allow the industry to grow and add jobs, and undermine efforts at promoting economic recovery. The unprecedented speed of EPA's efforts to regulate GHGs under the Clean Air Act threatens nationwide permitting gridlock and serious economic disruption exactly when our economy is struggling to regain its balance. Regulating GHG emissions under the Clean Air Act will create disincentives to invest, potential for new project construction delay, and increased litigation risk.

Climate change is a global problem that can only be addressed effectively on a global basis. EPA's proposal to regulate GHGs from stationary sources under the Clean Air Act will not address the global dimension of the climate change issue, but will place significant new burdens on steel manufacturers in the United States. This will unilaterally raise operating costs, which will place our American steel manufacturers at a competitive disadvantage, while allowing overseas competitors to continue to increase their emissions. The result would be limited environmental gain, but significant economic challenges, including further elimination of valuable American manufacturing jobs, especially for energy-intensive trade-sensitive industries.

In December, EPA released two documents intended to guide state regulators and industry in the implementation and compliance with these regulations: the Prevention of Significant Deterioration (PSD) and Title V Permitting Guidance for Greenhouse Gases (Guidance Document) and Available and Emerging Technologies for Reducing Greenhouse Gas Emissions from the Iron and Steel Industry (Technical Document). Both of these documents have only heightened industry's concerns with the regulations.

These EPA documents did not reflect the true status of existing and emerging technologies for the industry. In particular, due to dramatic reductions in energy usage in recent years, iron and steel plants have limited opportunities for incremental energy

efficiency improvements until new breakthrough technologies are developed. The Technical Document states that the iron and steel industry can further reduce energy use by 27% for integrated mills and 53% for electric arc furnaces plants. These estimates are extremely unrealistic. This is primarily because several of the technologies identified in the Technical Document have already been adopted by the industry. For example, many integrated facilities already control coal moisture, utilize pulverized coal injection, and have improved blast furnace control systems. Similarly, many electric arc furnaces commonly employ foamy slag practices, oxy-fuel burners, insulation of furnaces, and walking beam furnaces. Thus most of the projected gains in efficiency have already been achieved by the steel industry. Also, as a general matter, most steel companies, whether integrated or electric arc furnace-based, employ sophisticated preventive maintenance programs and energy monitoring and management systems.

EPA's efforts to broaden PSD permitting to include GHGs and refocus Best Available Control Technology (BACT) standards on energy efficiency present not only significant challenges (as noted above), but also an opportunity. Through this process, EPA has the opportunity to address some of those challenges by streamlining the PSD permitting and BACT process. Given the agency's acknowledged interest in advancing energy efficiency projects, it should seize this opportunity to shape not only the BACT process itself, but also the PSD threshold applicability determination process to avoid ensnaring energy efficiency projects that have demonstrated environmental benefits.

Boiler MACT Proposed Rules

EPA's set of proposed rules for industrial boiler Maximum Achievable Control Technology (Boiler MACT) would not only have an adverse impact on the domestic steel industry, but would create unintended environmental harm. These EPA proposed rules are for emissions standards for: (1) area source industrial, commercial and institutional boilers (Area Source Boiler Rule); (2) major source industrial, commercial, and institutional boilers (Major Source Boiler Rule) and; (3) commercial and industrial solid waste incineration units (CISWI Rule).

Currently, iron and steel manufacturers use byproduct gases from coke ovens and blast furnaces to fuel plant boilers that produce steam, electricity, and other thermal energy. Utilization of the process gases as a fuel allows the recovery of energy otherwise wasted, and offsets consumption of fossil fuels, in particular natural gas. This entire practice increases the overall energy efficiency of steel production facilities, reduces GHG, criteria and hazardous air pollutant emissions, and is a vital tool for promoting our nation's energy independence and global competitiveness.

Unfortunately, the benefits of steel industry process gas recovery would be lost as a result of the manner in which EPA's proposed Boiler MACT rules would treat byproduct gases at steel plants. If steel industry boilers are subject to the proposed "Gas 2" standards, the industry will be incentivized to flare off the process gases to meet environmental and safety requirements and use more natural gas to run the boilers that are needed. EPA

estimates that it will cost companies $600 million to place controls on the approximately 75 coke oven gas fired boilers that would be subject to the proposed rules. In the alternative, companies could flare the coke gas and use natural gas as a substitute which would cost $300 million. Flaring process gases and using more natural gas will result in increased steel industry GHG and hazardous air pollutant emissions, as well as more energy consumption. These undesirable energy and environmental results run counter to the desired effect of the Boiler MACT proposed rules. AISI presented this issue to EPA and provided some workable alternatives, and we are awaiting EPA's response.

It should be noted that, in response to comments and concerns raised by both industry and Members of Congress, EPA recently requested an extension of the court-ordered deadline for implementing these new Boiler MACT rules – from January 16, 2011 to April 13, 2012 – in order to allow the agency to reconsider the proposed rules in light of the comments received. AISI, along with other industry associations, has filed a response with the court in support of EPA's request for delay in the deadline. We agree with EPA that the substantial additional time is necessary to adequately review the thousands of substantive comments that have been filed on the proposed rules and to revise the proposals accordingly. The deadline extension will provide EPA sufficient time to conclude the process with rational and defensible rules.

National Ambient Air Quality Standards (NAAQS)

The Clean Air Act requires EPA to set and periodically review NAAQS for six especially widespread pollutants, including ozone and sulfur oxides. The EPA is in various stages of reviewing all six standards, which impacts the ability of manufacturers to plan future operations and investments. In issuing a new sulfur dioxide standard, EPA outlined a new approach for designating nonattainment areas that will rely on modeling, which is a significant shift in policy and is inconsistent with the Clean Air Act. The sulfur dioxide standard is now being challenged by industry and several states in federal court and is subject to petitions to stay and reconsider the standard. With respect to the ozone standard, EPA is slated to issue a final standard in 2011. The Manufacturers Alliance recently released a study showing that setting a new 8-hour ozone ambient air standard at the bottom of the range proposed by EPA (60 ppb) would cost over $1 trillion per year between 2020 and 2030 and decrease the GDP by more than 5% and lead to 7.3 million job losses by 2020.

Economic impact due to the NAAQS for sulfur dioxide and nitrogen dioxide and related EPA implementation and modeling guidance will be significant. The flawed modeling tools and guidance policy will lead to more portions of the country being designated "unclassifiable" or "nonattainment." In many cases air permits for new construction or facility modernization projects will be stalled or projects cancelled because of these modeling tools and guidance policy, ultimately limiting economic growth and job creation. The modeling tool is not suited to simulate atmospheric chemical reactions, nor is it capable of accurate prediction of 1-hour concentrations. In sum, the tools simply are

not capable of doing the job accurately and will be a significant impediment to economic revival.

We believe EPA should not require states to make their sulfur dioxide §107(d) designations using emission modeling. EPA should also delay implementation of the NAAQS for sulfur dioxide and nitrogen dioxide until accurate modeling tools are developed. Other NAAQS standards should not be promulgated until there is adequate public discourse, and until scientifically valid modeling tools for each pollutant are determined to be accurate for the new short term standard and implementation guidance developed.

Water Issue Regulations

AISI tracks numerous water quality rules that are in various stages of development including an impending EPA proposal to regulate cooling water intake structures for the purpose of protecting aquatic life. The rule, previously promulgated but remanded by federal court order, would have required companies to make significant investments to redesign or replace existing intake structures. AISI is working with a multi-industry group to interact with EPA to provide information that hopefully will lead to a more reasonable rule based on application of site-specific best professional judgment as opposed to stringent uniform standards.

OSHA

AISI recognizes that it is a policy priority of the federal government to ensure safety and health at industrial workplaces, a critical goal shared by the steel industry. AISI members place the highest priority on occupational health and safety (OHS) matters because it is imperative that their valuable workers remain safe and healthy. They have made substantial efforts to decrease the number and frequency of workplace incidents and continue to work through AISI to share information and best practices to meet their shared goal of improving occupational safety and health.

The Department of Labor and OSHA leadership have proposed a multifaceted regulatory agenda that includes several items of interest to the domestic steel industry. Our experience has demonstrated that cooperative efforts among company management, employees, and government can help maximize safety and health. However, regulations that are not promulgated with real transparency and stakeholder involvement or are not based on thorough cost-benefit analysis may misdirect priorities and create unnecessary costs for employers that prevent optimum workplace safety and health benefits from being realized. Furthermore, OSHA's increased enforcement measures can be counterproductive to achieving optimal benefits. Regulations should be directed to those hazards that address shared health and safety goals of the industry, employees, and OSHA, and not create unnecessary costs that prevent these benefits from being realized.

Noise Policy Reinterpretation

OSHA has proposed to change its enforcement policy on noise limitations to require use of feasible engineering controls before permitting use of personal protective equipment. The proposed change would require every steel facility to install economically "feasible" engineering and administrative controls to reduce employee noise exposure before relying on hearing protectors, a reversal of decades of agency precedent and policy. OSHA is defining "feasible" as "capable of being done without threatening the viability of the company." Under the proposed OSHA rule, the employer would carry the burden of proof to demonstrate the economic infeasibility of controls. This is a shift in the burden of proof from previous OSHA regulations adopted pursuant to Section 6(a) of the Occupational Safety and Health Act of 1970. For capital intensive companies and industries that need capital for modernization to remain globally competitive and that are under continuous pressure to increase productivity, forcing the retrofit of engineering controls and/or decreasing productivity by requiring the use of additional person-hours through administrative controls, may threaten our global competitiveness.

Recording Musculoskeletal Disorders (MSDs)

OSHA has proposed a rule requiring employers to record musculoskeletal disorder (MSD) injuries separately from other injuries and illnesses on their OSHA 300 forms. The steel industry, as well as others in the business community, is concerned that OSHA may use the MSD data to issue general duty clause violations in the absence of a national ergonomics standard. Using this data to initiate a new rulemaking for an ergonomics standard that is substantially similar to the original would contravene the Congress' invalidation of the original ergonomics standard pursuant to the Congressional Review Act.

Combustible Dust

OSHA continues to hold stakeholder meetings in advance of proposing regulations on workplace combustible dust management. Because of the nature of some steelmaking processes, these regulations have the potential to disrupt existing operations and force AISI members to adopt costly and unnecessary engineering controls. As such, we have proposed to OSHA that it limit the scope of its anticipated combustible dust rule to materials that are likely to explode when ignited and to consider the cost and economic feasibility of relocating existing dust collection equipment outside building structures. Doing so will result in an OSHA proposal that appropriately addresses substances of concern without creating a misrouted and costly regulatory burden on the steel industry.

Injury and Illness Prevention Program

OSHA has proposed requiring that every employer adopt a uniform federal injury and illness prevention program (I2P2) to reduce injuries and illnesses. However, the agency has also suggested that adoption of the I2P2 will allow it to support alleged violations for

conditions that are currently not subject to any specific OSHA standard or rule. Based on current injury and illness data, there is no evidence that state plans with such a rule have actually improved their injury and illness rates compared to states that have not adopted such a rule. AISI members have had effective injury illness programs for decades and are concerned that a uniform federal standard would adversely affect existing programs. They are also concerned that OSHA will use the I2P2 rule to "double dip" when proposing citations and fines for hazards both covered and not covered by a specific OSHA standard.

Permissible Exposure Limit (PEL) Update Process

OSHA has invited the public to submit candidate chemicals for consideration in expedited PEL update process. It also announced that its standards and guidance staff are considering various approaches to such an update. AISI asked OSHA to hold open tripartite meetings to develop such a process in the agency's initial stakeholder meeting. But, to date, the agency has published only a listing of chemicals but not the organizations or individuals who made the specific recommendations. Updating PELs will affect every steel manufacturer as well as most of the manufacturing sector. As OSHA moves forward, the PEL update is clearly a process that must be transparent and involve the major affected stakeholders, viz., employers, employees and the government.

On-Site Consultation Program

OSHA has published a notice of proposed rulemaking for the agency's on-site consultation program that will give the agency greater flexibility to inspect worksites undergoing an on-site consultation visit or participating in the Safety and Health Achievement Recognition Program (SHARP). OSHA also seeks to initiate an enforcement inspection at a worksite when allegations of potential workplace hazards or violations are received from a state or local government, the media, and "other" sources. Current policy permits OSHA to terminate on-site consultation visits and to inspect SHARP sites only when an imminent danger exists, a fatality or catastrophe occurs, or pursuant to a worker complaint. OSHA is also proposing to shorten the initial exemption from programmed inspections for employers in the SHARP to one year from two years. This proposal is of concern to the steel industry, as it may discourage employers from participating in this successful program and, therefore, have a negative effect on workplace safety.

* * *

Thank you again for soliciting the domestic steel industry's input on the critical issue of how regulations may impact the economy and jobs. As detailed above, there are a number of regulations from both EPA and OSHA that, if not implemented correctly and appropriately, could limit the steel industry's global competitiveness, investment, and job growth in coming years.

AISI believes that the Congress should conduct a comprehensive oversight program of environmental and occupational health and safety regulatory development activities and initiatives. In particular, such a program should examine the impact of EPA and OSHA regulatory agenda on jobs and industrial competitiveness. Included in such an effort should be greater emphasis on cost/benefit analysis of proposed regulations at the EPA and OSHA, as well as greater transparency and industry access to the regulatory development process at the agencies.

AISI looks forward to working with you and the House Committee on Oversight and Government Reform on these and other issues in the 112th Congress.

Sincerely,

Thomas J. Gibson

American Land Title Association

Our concerns surround Dodd-Frank implementation, especially regulations under RESPA; FTC's regulation of the "Red Flags" rule; and the 1099 reporting requirement under the healthcare law.

Continuing Uncertainty Surrounding Dodd-Frank Implementation

The Dodd-Frank Act was signed into law on July 21, 2010, as P.L. 111-203. Despite being over 2,000 pages estimates are that over three-fourths of the provisions of the Act need some regulatory action before they can be implemented. The uncertainty created by these over 200 rulemakings make it difficult to effectively operate in the current market place.

Other organizations can discuss the impact rulemakings related to the Truth in Lending Act and other mortgage provisions has on the mortgage origination process, our comments focus on effect the Act's provisions related to the Real Estate Settlement and Procedures Act. This Acts provisions call into three categories (1) the Act's combined mortgage disclosure requirements, (2) the shifting of RESPA regulation over to the Consumer Financial Protection Bureau (CFPB) and (3) the Act's new penalty provisions related to RESPA.

You may be aware that on November 17, 2008, the United States Department of Housing and Urban Development (HUD) published its "Rule To Simplify and Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs" (the "RESPA Rule")[1]. This rule presented sweeping changes and new concepts to RESPA compliance and caused implementation concerns for all areas of the real estate financing and settlement process. Over the course of 2009 HUD staff made great efforts to address the myriad of concerns presented by stakeholders. The result was that many "workarounds" by lenders and other settlement service providers were necessary to fill the void left by the rule. Unfortunately, such actions resulted in a lack of consistency among processes and compliance. While HUD recognized the need for clarification, regulatory guidance has not been forthcoming. Currently, the industry has just begun to get comfortable with the requirements of the new RESPA rule.

Throughout 2009 and 2010, HUD and ALTA spent a significant amounts of time and resources to educate and clarify the provisions of the RESPA Rule for industry stakeholders and our members.

Despite all these efforts and costs, the Act included section 1302(f) requiring the CFBP requiring new "rules and model disclosures that combine the disclosures required under the Truth in Lending Act and sections 4 and 5 of the Real Estate Settlement Procedures Act of 1974, into a single, integrated disclosure for mortgage loan transactions." Thus the Act requires a new RESPA regulation only one year after the current regulations when into effect.

While the combination of these forms into a single simplified disclosure may be a worthy endeavor, we are concerned that the frequent changes to regulation will caused serious unintended consequences for consumers and the industry. These frequent changes can have a serious impact on a consumers understanding of one of the more complicated financial transactions in their lives. Further, our members spent significant amounts of time and money in training, education and technological implementation of the RESPA Rule. Upon implementation of a new combined form, virtually all of that time and money will be rendered worthless. Care should be taken to minimize the frequency of such changes such that a certain amount of familiarity with the process can be achieved.

The Act also shifts regulation for RESPA and other consumer financial laws to the new CFPB. While housing regulation of these laws under a single roof may have some positive benefits, early indications are that there is little transition of personnel from HUD to the CFPB. This loss of institutional memory and practice could create gaps in RESPA regulation and implementation.

Section 1055 outlines new reliefs and penalties available to courts and the CFPB for a violation of a consumer financial law, including RESPA. These penalties include steep fines and drastic reliefs such as rescission or reformation of contracts. Despite promulgating these serious penalties, the Act fails to offer guidance on when these penalties are appropriate. The potential for a disproportionate penalty for a RESPA violation could drastically alter the mortgage and housing markets. If a minute RESPA violation could lead to a rescission of the entire transaction then real estate transactions could be delayed costing consumers significant monies.

Insufficient Guidance on the Federal Trade Commission's Red Flags Rule

In November 2007, the FTC proposed its "Red Flags Rule," requiring that certain entities develop and implement written identity theft prevention and detection programs to protect consumers from identity theft. The Red Flags Rule requires "creditors" and "financial institutions" with covered accounts to implement programs to identify, detect, and respond to the warning signs, or "red flags," that could indicate identity theft. The Red Flags Rule did not specifically state whether escrow accounts maintained by title agents to facilitate settlement were subject to the Red Flags requirements.

Despite delaying the enforcement of this rule until January 1, 2011 the FTC has remained intentionally vague and has refused to give specific guidance about what business are covered and what programs are sufficient to meet the burdens of this rule. Although there are no criminal penalties for failing to comply with the Red Flags Rule, financial institutions or creditors that violate the Rule may be subject to civil monetary penalties of up to $3,500 per violation. Further, because identity theft threats change, programs must describe how they will update it to consider new risks and trends.

The result is the FTC has produced a complicated regulation that requires industry to implement costly and ever changing compliance practices.

Overly Burdensome 1099 Requirements

Section 9006 of the Patient Protection and Affordable Care Act requires that all businesses file a 1099 form with the Internal Revenue Service for each vendor for whom they pay $600 or more per year. This overly burdensome and unnecessary provision will be particularly onerous on the local small business that make up the land title industry. These business owners will need to institute new record-keeping methods related to payments to vendors and hire extra lawyers and accountants to comply with the requirement, inhibiting their ability to increase hiring when the economy improves.

Winslow Sargeant, Chief Counsel for Advocacy U.S. Small Business Administration highlight the burdens this requirement places on small businesses during his testimony before the U.S. Senate Committee on Small Business and Entrepreneurship. Sargeant stated the, "The information reported on a Form 1099, such as the Tax Identification Number (TIN) of a vendor, is different from the information usually maintained and tracked by businesses. As a result, all-new internal controls will need to be implemented to determine if the expanded Form 1099 requirement is triggered and this information will need to be saved. Most small businesses do not have specific personnel available to create and manage such a system, and the costs of compliance will be daunting." He concluded that by urging Congress to repeal this onerous obligation. We echo these concerns.

API input on proposed BOEMRE guidance document

API is pleased to provide the following comments to BOEMRE leadership in an effort to help develop a guidance document that will provide as much clarity as possible across all of the outstanding issues related to offshore operations and permitting. One overarching issue that continues to puzzle the industry is one not included in the list of items to be addressed. The question concerns the decision making process within BOEMRE. Industry continues to struggle with inconsistent guidance from various BOEMRE offices and personnel, and that begs the question as to what level of BOEMRE approval is required (e.g. Regional or Headquarters) for various plans and permits. ***Any clarity that can be provided on this issue would be appreciated.***

BOEMRE provided the following list of items that will be addressed in the guidance document. API comments are provided below each item:

- **Interim Safety Rule**
  The comment period for the interim final rule remains open until December 13, 2010. We are still reviewing the rule and preparing comments for submittal as part of the administrative comment period process.

  Changes to API RP language
  However, we wish to highlight a particular area of concern presented by the Interim Safety Rule, namely, the impact and unintended consequences of changing the substantive meaning of the API Recommended Practices ("RP's) incorporated by reference by converting all of the "should's" to "must's." Making this change will serve to create contradictions and eliminate options effective for addressing diverse situations. There are unintended consequences associated with changing the meaning of the RPs from "should" recommendations to "must dos".

  Clarification is needed on what is actually intended and what will be required. Operators need to be able to use engineering judgment to suitably and safely address particular circumstances presented by a certain proposed activity. Changing the actual substantive meaning of the RP's by a sweeping conversion of all of the "should's" to "must's" without due consideration and evaluation and regardless of circumstances presented is not prudent and poses a significant problem.

  Waivers/Departures
  What is the BOEMRE's position on waivers? Will the BOEMRE grant waivers for situations where full compliance with the new requirements would create a less safe situation? Also, when considering the discussion above on changing language in RPs, the number of departure requests is potentially huge, and the BOEMRE should prepare for the impact on resources that the likely requests for authorized departures will impose on its ability to review and process permit applications.

  Training
  Please provide any guidance on additional expectations (above the current requirements) in the area of well control training.

- **NTL-10 Compliance – corporate compliance statements and subsea containment**
  In general, we feel that the requirements found in this NTL, to demonstrate access to subsea containment resources and to provide a statement of compliance covering a broad breadth of regulations, constitute substantive new requirements which should be subject to the established rulemaking process. Specific areas where we request additional clarity are as follows:

Compliance Statement

It is problematic to require a statement of compliance with a rule—the Interim Safety Rule—that is still subject to a comment period. ***Please provide guidance on how companies should respond to a request for compliance to a rule that has not been finalized?***

Response Requirements

The NTL states that the "BOEMRE will be evaluating whether each operator has submitted adequate information demonstrating that it has access to and can deploy containment resources that would be adequate to promptly respond to a blowout or other loss of well control," but it does not identify what "adequate" is.

- ***Will the BOEMRE clarify the standards by which an acceptable oil spill response plan will be judged?***
- ***What are the required operational and Source Control Team personnel required to comply with regarding the NTL?***

Near Term Capabilities

- ***Can operators take into account their total response capability which includes both subsea containment and surface cleanup capabilities?***
- ***How will BOEM treat subsea containment equipment that may need to be disconnected during storms?***
- ***Please confirm that subsea containment can be covered by OSRP as long as WCD is lower than OSRP rate.***

Continued Compliance

One concern that we have is that operators not only must comply with current regulations, but may also need to be in compliance with as yet unknown regulatory changes. NTL No. 2010-N10 requires that a statement of compliance be submitted with each application for a well permit (APD).

- ***What must an operator certify with respect to subsea containment compliance?***
- ***Will an operator be required to be in compliance with a change made to a regulation or an NTL released after approval of the APD?***
- ***Will an operator be required to be in compliance with a change made to a regulation or an NTL released after spud of the well?***
- ***Clarification on when compliance statements are required – submitted with initial APDs and APMs rather than each permit revision, modification or deviation to permit made as needed during ongoing operations.***

- **Inspections**

APD approval

Although inspections are not legally required prior to APD approvals being granted, as confirmed by recent legal challenge (see ENSCO vs. Salazar), in fact, approvals are being delayed due to inspections being mandated. We can understand and respect the desire to conduct inspections, but when due to weather or other concerns the inspections are delayed, this should not impact the approval process. One approach to address this concern would be to institute a nominal time period during which any inspections would need to occur. ***Please provide any additional ideas on ways to make this process more efficient.***

BOP testing

While we have no issue with the requirement that BOEMRE personnel witness BOP inspection and testing, potential delays are a concern given the costs associated with deepwater operations.

- ***Will companies be required to hold up drilling operations to allow BOEMRE personnel to witness BOP inspections and other work?***
- ***How does the BOEMRE suggest operators minimize the amount of time associated with waiting on BOEMRE personnel to arrive at the rig? For example, if an operator can guarantee that the BOP will be available for inspection on a certain date; will the BOEMRE guarantee that inspection personnel will be available on that date?***

Inspections during ongoing operations

- ***How will inspectors carry out inspections of ongoing drilling and completion operations without distracting from safe operations?***

- **NTL-06 and WCD Calculations**

Worst Case Discharge

Industry needs clarity on a "consistent" methodology to calculate the WCD. Currently the BOEMRE's guidance on worst case discharge calculation is prescriptive and resource intensive to both calculate (operator) and review (BOEMRE). One company reports that the effort associated with the calculation and documentation of the worst case discharge (WCD) for BOEMRE review has averaged 170 man hours per document as compared to the average burden hours per respondent of 15 hours identified in NTL No. 2010-N06.

Alternative calculation methods

We believe the approach can be simplified while maintaining the intent of NTL No. 2010-N06. A number of alternative methods have been proposed including a tiered approach and a standard methodology presented by the Society of Petroleum Engineers (SPE):

- ***Is the BOEMRE open to considering alternate methodologies, and if so, how can Industry submit suggestions for consideration?***
- ***Please provide any guidance on why a tiered approach is or is not acceptable.***
- ***Please answer whether or not the SPE guidance is the "approved" methodology by BOEMRE? If it is not, what methodology should be utilized?***
- ***Please provide guidance on what method BOEMRE is using to determine WCD.***

We request greater transparency in the BOEMRE's process, data inputs and output values associated with the calculation of WCD rates. If the goal is to assure that a reasonable WCD rate is estimated for each well to be drilled in the GoM, we do not understand the BOEMRE's reluctance to share their methodology, inputs and results with operators.

Process improvements

Operators appear to have to call Plan Administrators in the BOEMRE to determine if an NTL No. 2010-N06 document has or has not been approved instead of receiving a notice per 30 CFR 250.233. ***Could the BOEMRE confirm how it is informing operators of the status of their WCD calculations?***

Sidetracks and other low-risk activities

Due to the low risk nature of the activities, BOEMRE exempted side-tracks, well abandonments, well completions, well work-overs, relief wells, and injector wells from the enhanced requirements of NTL

No. 2010-N06 in both the shelf and deepwater. Our understanding of the BOEMRE's rationale was that these excluded well and drilling operations targeting known reservoirs, which have already been penetrated and evaluated, and thus are considered low risk. Hence, NTL No. 2010-N06 requirements were not to be triggered. Also, guidance provided in the NTL No.2010-N06 FAQs expressly excluded activities for which BOEM approved an APD prior to June 18, 2010. ***Is it BOEMREs intent to exclude low risk operations in/from existing well bores, and furthermore not retroactively require NTL-06 compliance for such operations in permits approved before June 18, 2010?***

- **Oil Spill Response Plans**

  Requirements for Approvals

  - ***Is the OSRP approval review incorporating all available tools, technologies, and practices addressing intervention and recovery, Including, but not limited to, cap and collect, cap and contain, mechanical recovery, burning, dispersants (including subsea), and surveillance?***
  - ***What does the BOEMRE view as the primary issues preventing approval of OSRPs submitted to date?***
  - ***Will operators be allowed to continue to operate if they have submitted a new OSRP, but have not received BOEMRE approval of the Plan?***
  - ***Is there the potential for credit against the WCD for natural weathering, natural dispersion, subsea dispersant application, surface dispersant application, and in-situ burn capacity?***

  Response Capability Requirements

  - ***What is considered initial response (within 2 hours) and what is the basis for this requirement?***
  - ***Please clarify the response capacity and timing requirements for surface oil spill response equipment?***
  - ***If 400% response capacity in 60 hours will not be required, what forms the basis of the requirement, the level of resources needed, and the performance expectations? Industry would like a description of the science, technology, and thought process used by BOEMRE to determine these requirements.***
  - ***Please confirm that OSRP will cover NTL-10 subsea containment requirement for each permit assuming WCD is lower than OSRP rate.***

  Subsea Dispersant use

  - ***Please confirm the acceptability of subsea dispersant use to minimize oil at shoreline.***

  Expectations for nighttime surveillance

  - ***Is approval required? What are the equipment requirements? Is any consideration given to limitations to working at night?***

- **Revisions to Exploration Plans/DOCDs and Environmental Assessments**

  The permitting process remains a very confusing, time consuming experience and we have had trouble getting clarity on what is required and when we can expect a response from the BOEMRE to our various submissions.

  - ***Industry needs clarity as to the current BOEMRE process for reviewing these Plans, and the impact of the outstanding Oil Spill Response Plans submitted to BOEMRE by industry but still pending approval due to the containment and response issues discussed previously.***
  - ***In addition, industry needs clarity on the information required for BOEMRE to complete their Environmental Assessments associated with deepwater Exploration Plans and Development***

Plans. This should include clarification on the additional information that is being requested by BOEMRE which is in conflict with the requirements of NTL 2008-G04.

- *What are the primary issues that are preventing the approval of deepwater EPs and APDs?*
- *How long it should it take to receive a response from the BOEMRE after an Operator has submitted an EP or APD?*
- *How is the Environmental Assessment (EA) process being conducted pending resolution of lawsuits filed by environmental organizations? What is the BOEMRE's assessment of the time it will take to reach a resolution?*
- *Do wells which had approved EPs and/or APDs prior to the Deepwater Moratorium require EAs? When will EAs be conducted and how will Operators know when their EA has been scheduled? How long should it take to complete the EA? Can an EP and/or APD be approved pending the EA?*
- *Currently, the BOEMRE allows an operator to move a well location by up to 500 ft which allows an operator to avoid chemosynthetic communities and other seafloor obstructions. Are there changes to when the BOEMRE will require an operator to submit a modified EP or APD? If there are changes, will there be a comment process to allow operators to provide their concerns?*
- *Are there any options for phasing DOCD revisions to allow operators to re-submit and BOEM to evaluate without shutting down existing operations plans*
- *Are sidetrack wells which have been previously assessed for, or categorically excluded, from NEPA compliance being reassessed?*

- <u>Additional Items</u>
  - *Could the BOEMRE provide additional information concerning new rules and regulations which are currently being considered or contemplated as well as an estimate as to when they may be released?*
  - *With regard to the final rule on Safety and Environmental Management Systems, can BOEMRE supply clarification on requirements for demonstrating contractor compliance?*

American Petroleum Institute Response

Regulatory Impacts Request

Climate

On January 2, 2011, the EPA began regulating greenhouse gas emissions from stationary sources under Title I of the Clean Air Act. EPA's stationary source regulation risks significant adverse impacts on investment, expansion and job creation in today's fragile economy, raises significant legal concerns, and places a tremendous regulatory burden on state resources. In order to comply, businesses would need to obtain permits and take measures which are as yet undefined before moving forward with construction and modification. Additionally, many states are facing extreme financial strain even without the added permitting requirements of EPA's regulations.

EPA is also planning to regulate greenhouse gases in a number of other ways. In 2011, EPA is planning to propose New Source Performance Standards (NSPS) for refineries. NSPS for exploration and production operations are currently undergoing a review, with proposal scheduled for January, 2011, and may or may not contain requirements to reduced greenhouse gas emissions.

Revenue Transparency

Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act requires companies registered with the Securities and Exchange Commission (SEC) to report, on an annual basis, payments made to a foreign government or the Federal Government relating to the commercial development of oil, natural gas and minerals.

API supports transparency. However, the current structure of Section 1504 undermines the internationally accepted transparency effort of EITI, places U.S.-listed companies at a competitive disadvantage, and jeopardizes U.S. jobs supporting international oil and gas projects. Section 1504 also raises conflict of laws concerns, and could increase security risks for U.S. citizens working abroad for reporting companies.

Cooling Water

EPA is expected to issue regulations for cooling water intake structures at existing electric power plants and manufacturing facilities, including refineries and exploration and production operations, including platforms. Potential retrofit costs could be significant, and could affect energy supply and reliability.

We also are concerned with the EPA's reconsideration of the National Ambient Air Quality Standard (NAAQS) for ground level ozone. As you know, the Clean Air Act requires that EPA conduct a detailed review of each NAAQS every five years. This review, with extensive process, public input and comment, was last completed for the ozone standard in March 2008. EPA strengthened its existing 0.084 ppm standard to a much more stringent 0.075 ppm, declared that level adequately protective of human health and environment, and commenced preparation for the next five year review. Despite being midway through the ongoing five year NAAQS review process, in January 2010, with no new information, EPA proposed lowering the 2008 standard to within the range of 0.060-0.070 ppm. At any

point in EPA's proposed range, the number of "non-attainment areas" will dramatically increase nationwide. For local communities, a non-attainment designation can mean a loss of industry and economic development; plant closures; loss of federal highway and transit funding; and increased fuel and energy costs. EPA estimates that the cost of the proposed new standard could add as much as $90 billion per year to the already high operating costs of manufacturers, agriculture, and other sectors. Changing the 2008 standard outside of the normal 5-year review process is unfair and unwise to businesses and consumers.

DRAFT Regulatory Impacts on the Oil and Natural Gas Industry

- Offshore

a) The oil and natural gas industry continues to seek clarification and certainty regarding proposed regulations and Notice To Lessee (NTL) requirements established by BOEMRE following the Gulf of Mexico oil spill. The attached document outlines concerns which remain as a result of the current BOEMRE regulatory environment.

b) A National Ocean Policy currently under development within the Administration could seriously impact the energy sector by excluding or restricting operations through implementation of regulatory proposals such as coastal and marine spatial planning (CMSP), an ocean zoning tool based on the notion of an inherent conflict and incompatibility among ocean uses. This policy adds a redundant layer of bureaucracy, creates confusion and unnecessary conflict with existing statutes, and could delay or restrict oil and gas exploration and development, potentially significantly reducing job-related capital expenditures and decreasing our domestic energy supply.

- Onshore

a) The dominant issue that affects operators on public lands in the Intermountain West is the series of efforts under this Administration to close off or to scale back oil and gas leasing. In other words, the impacts on development of publicly owned domestic energy resources on public lands start with administrative decisions not to make them available.

b) The next most significant issue concerns the NEPA process. The length of time that is increasingly required for NEPA reviews at all levels, and the steady efforts to restrict use of less restrictive reviews for oil and gas projects add cost and delay to energy projects, and serve to de-incentivize exploration on public lands and/or in the West. "Energy Leasing Reform" changes that BLM introduced through an instructional memorandum in May, while not yet fully implemented (this is expected second quarter, 2011) are expected to add delay and complexity to the BLM decision processes by which BLM-managed acreage is made available for lease. The restriction on use of categorical exclusions is likely to add costs and review periods for many exploration projects that would hitherto have been approved by categorical exclusion.

c) Emerging potential of use of climate change arguments to limit acreage offered for lease. This issue has yet to take the shape of specific regulations, but the action by the Council on Environmental Quality to affirm inclusion of climate change analysis in the NEPA process points the way toward this possibility.

d) Use of the Endangered Species Act to restrict public lands acreage available for lease or to restrict oil and natural gas operations on those leases. For example, the listing earlier this year of the Greater sage-grouse as "warranted, but precluded" for protection under the Endangered Species Act, because of the large overlap between the sage grouse range and BLM-administered public lands with natural gas potential east of the Great Basin. There remain strong industry concerns that the case has not been made that sage-grouse populations are in the state of peril that one would expect for a species given the "warranted, but precluded" treatment (for example, the species may still be legally hunted in all but one of the states). This is due to concerns that the principal method relied upon to assess sage-grouse populations has methodological flaws. The core issue here is the reliability and objectivity of the science that is offered to support ESA decisions in general (and in the case of the sage grouse in particular), as well as the balance (or its lack) in the consideration of risk factors that may influence sage-grouse populations.

- Upstream Environmental--Exploration and Production Waste

On September 8, NRDC filed a "Petition for Rulemaking" with EPA, challenging the assumptions in EPA's 1988 Regulatory Determination, which concluded that regulating produced wastes from exploration and production operations was not necessary or appropriate. In its recent petition, NRDC requests that EPA reconsider and regulate E&P wastes under Subtitle C of RCRA. Under the 1980 Bentsen Amendment to RCRA, EPA was prohibited from regulating wastes from exploration and production operations until it completed a report to Congress on the status of the wastes' current management and the risk they presented. Then, if EPA were to determine that regulation was appropriate, any such regulation would be required to be approved by Congress before it could become effective.

API is developing a response letter (in coordination with other oil and gas trades) to send to EPA, which should be available by the end of February 2011. API is also undertaking some economic modeling to get a better understanding of the cost impacts of such a regulatory approach in today's dollars. It is possible that much of that work will be concluded by late January.

- Pipeline

The Department of State is currently reviewing the Draft Environmental Impact Statement for the Keystone XL Pipeline that will carry Canadian crude from Alberta to the Gulf Coast of the U.S. Approval of the statement is prelude to DoS's approval of a Presidential Border Crossing Permit for the pipeline. If not approved, the U.S. will not realize the roughly $20 billion dollars of economic stimulus from the project, including more than 15,000 high-wage manufacturing and construction jobs in 2011-2012.

- Oil Sands

US Energy Independence and Security Act (EISA) §526 limits domestic refiners processing of Canadian oil sands by prohibiting the federal government from purchasing fuels derived from unconventional petroleum sources if it has a GHG lifecycle emission greater than emissions from the fuel from the conventional source. It decreases US refiners' competitive position in the global marketplace and regulations posing constraints on oil sands processing in the US limits the potential creation of 342,000 new jobs in the US between 2011 and 2015.

- E15 Waiver

In October 2010, EPA approved a Clean Air Act waiver allowing use of ethanol blends of up to 15% in 2007 and newer light duty cars and trucks. EPA is considering extending the waiver to 2001 and newer light duty vehicles. Significant state and federal regulatory hurdles remain before the E-15 can be introduced in the marketplace. API is concerned that the EPA approval was premature.

The EPA approval was based on limited testing where only catalyst durability was considered. EPA did not take into account the broader, still ongoing vehicle and engine testing performed by the government-industry collaborative Coordinating Research Council on a wide range of vehicle attributes, including the durability of engines, fuel systems, and emission control systems, including On-Board Diagnostics. Any issues with these vehicle systems are a great concern to our customers. In addition to the liability costs for vehicle and equipment repairs, negative consumer experiences with ethanol blended fuels may threaten the success of the Renewable Fuels Standard program.

- Remove redundant air emissions systems at retail gasoline stations

Current regulations require retail gasoline stations and vehicles to capture the same fumes generated when a car is refueled with gasoline. In the early 1990's Congress required stations to install their system (called Stage II vapor recovery) because it was faster to implement and would reduce the amount of fumes that were generated when the vehicle was filled up. The technology successfully met this goal. At the same time, Congress also mandated that the vehicles install vapor recovery systems that would reduce these same fumes (called Onboard Refueling Vapor Recovery or ORVR). Because it is more difficult to upgrade the vehicle design, Congress allowed the auto manufacturers to implement their requirements using a phased-in approach.

Congress recognized that at some point in the future a majority of vehicles would have the ORVR system and thus they gave the EPA the authority to remove the requirements for the gas station system. The EPA has not taken this approach at this time and thus the gas station owner must continue to install new and maintain existing systems that could easily be shutdown in lieu of the much more efficient system that is already installed in the majority of vehicles. The EPA should remove this redundant requirement from the gas station. This action would provide direct savings to the retail station owner by avoiding the costs associated with both of these activities.

Associated Builders and Contractors, Inc.

January 7, 2011

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

Dear Chairman Issa:

On behalf of Associated Builders and Contractors (ABC), a national association with 75 chapters representing 23,000 merit shop construction and construction–related firms with 2 million employees, I appreciate the opportunity to respond to your letter, dated December 8, 2010. ABC is pleased to provide you with information regarding existing and proposed regulations—as well as sub-regulatory actions—that have or will have negative impacts on job growth in the construction industry. In addition, this letter offers suggestions on reforming the federal rulemaking process.

I. Federal Regulations and the Impact on Job Growth

ABC members are responsible for building our country's communities and infrastructure, including schools, power plants and office buildings. Accordingly, they demand the highest level of quality work from themselves and from their subcontractors. Our members understand the value of standards and regulations when they are based on solid evidence and sound science, with appropriate consideration paid to implementation costs and input from the regulated community.

Unfortunately, some of the regulations for our industry impose heavy costs with no clear, or very limited benefit. In many cases, these regulations are based on conjecture and speculation, lacking a foundation in sound scientific analysis. In a few egregious cases, these regulations even circumvent will of Congress and conflict with underlying statutory requirements. Regulations of this kind impose unnecessary and unjustified costs, which, in turn, hinder economic recovery and job growth.

For the construction industry, the negative impact of excessive federal rulemakings exacerbates an already dire situation. Overregulation translates into higher costs, which must be passed on to the consumer in order for firms to remain viable. Higher consumer costs lead to fewer projects, which ultimately impact whether a firm is able to hire additional workers or must make unwanted layoffs.

ABC members and construction workers cannot afford this burden right now. ABC's *Construction Backlog Indicator* (CBI) reported in November that "construction contract activity declined 3.3

percent in September to 6.7 months after falling more than 5 percent in August to 6.9 months."[1] At the same time, the construction unemployment rate began to rise again this fall, approaching an abysmal 21 percent in December.[2]

To promote economic growth, we must free industry from those regulations that create unnecessary and costly bureaucratic layers and institute reforms that will help avert future missteps in the regulatory process. Per your request, please find below an outline of ABC's most pressing concerns in this area.

Government-Mandated Project Labor Agreements

ABC has serious concerns regarding Executive Order (EO) 13502, signed by President Obama in February 2009, and the subsequent Federal Acquisition Regulatory (FAR) Council rulemaking implementing it. The EO and rulemaking strongly encourage federal agencies to require project labor agreements (PLAs) on federal construction projects exceeding $25 million.[3]

Typically, a PLA is a contract awarded only to contractors and subcontractors that agree to recognize unions as the representatives of their employees on that job; use the union hiring hall to obtain workers; obtain apprentices exclusively through union apprenticeship programs; pay fringe benefits into union-managed benefit and pension programs; and obey unions' restrictive and inefficient work rules, job classifications and arbitration procedures.

PLAs are anti-competitive, and serve as a barrier to job growth for more than 85 percent of the construction workforce—the percentage that has decided not to join a labor union.[4] Furthermore, several studies have found that PLAs increase the cost of construction by as much as 18 percent.[5]

ABC applauds your December 13 letter, signed by House Oversight and Government Reform Committee Republicans and additional House Republicans, to the General Services Administration (GSA) regarding the agency's recent policy change to favor the use of PLAs in the bidding process for federal construction projects exceeding $25 million.

Wage Rates under the Davis-Bacon Act

The Davis-Bacon Act is a Depression-era wage subsidy law responsible for mandating so-called "prevailing" wage rates on federal construction projects. Unfortunately, the methodology used by the U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) to determine these wage rates is unscientific, relying on voluntary wage surveys instead of statistical samples. As a result,

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[1] ABC's *Construction Backlog Indicator* (CBI) is a forward-looking economic indicator that measures the amount of construction work under contract to be completed in the future. For more information, see http://www.abc.org/cbi.

[2] *Construction Sector at a Glance: Employment, Unemployment, Layoffs, and Openings, Hires, and Separations*, Bureau of Labor Statistics, December 2010. See http://www.bls.gov/iag/tgs/iag23.htm.

[3] *Federal Acquisition Regulation; FAR Case 2009-005, Use of Project Labor Agreements for Federal Construction Projects*, Federal Acquisition Regulatory Council, April 13, 2010. See http://edocket.access.gpo.gov/2010/2010-8118.htm.

[4] *Union Members Summary*, Bureau of Labor Statistics, January 22, 2010. See http://www.bls.gov/news.release/union2.nr0.htm.

[5] For more information, see http://www.abc.org/plastudies.

Davis-Bacon wage rates are not reflective of actual local wages, and are often inflated.[6] The problems associated with Davis-Bacon wage calculations have been well documented by the Government Accountability Office (GAO) and DOL's own Office of Inspector General (OIG).[7] Studies have shown that the flawed wage methodology and other problems with Davis-Bacon can raise the cost of public construction by 22 percent.[8]

Using inflated Davis-Bacon wage rates makes it almost impossible for smaller businesses to absorb costs, and can result in some small businesses closing their doors.[9] Furthermore, as previously mentioned, the construction industry will be at an even greater disadvantage due to the traditionally low net margins on which its firms operate.[10] ABC has recommended that DOL follow the findings of the 2004 OIG study and explore using alternative data to determining wage rates, including data collected by the Bureau of Labor Statistics (BLS).

Lack of Transparency under the Davis-Bacon Act

Under Davis-Bacon, the job duties that apply to a particular job classification are determined by local practice. For example, a carpenter may hang sheet rock in one area, whereas that work may only be performed by sheet rock hangers in another jurisdiction. Where DOL determines that the prevailing wage rate for a classification is based on a union collective bargaining agreement, the job duties for that classification will also most likely be governed by the union's work rules in that agreement. Generally, union work rules require that only a certain job classification perform certain work. For example, the work rules may require that only an

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[6] The impact of inflated Davis-Bacon wage rates and related red tape can be significant when applied to new programs, including the U.S. Department of Energy's (DOE) Weatherization Assistance Program. The program received $5 billion under the American Recovery and Reinvestment Act (ARRA), and was intended to help low-income families with energy efficient upgrades to their homes. Unfortunately, DOE and GAO reported that far fewer homes would be weatherized in 2010 than anticipated, due to the high costs associated with the mandated use of Davis-Bacon Act prevailing wages that came attached to the funds. See DOE's *Progress in Implementing the Department of Energy's Weatherization Assistance Program Under the American Recovery and Reinvestment Act*, February 2010, at http://ww.ig.energy.gov/documents/OAS-RA-10-04.pdf. See also, GAO's *Recovery Act: Views Vary on Impacts of Davis-Bacon Act Prevailing Wage Provision*, February 2010, at http://www.gao.gov/new.items/d10421.pdf. GAO is also in the process of conducting a study on Davis-Bacon as it applies to all federal construction work.

[7] U.S. Department of Labor, Office of the Inspector General, *Concerns Persist with the Integrity of Davis-Bacon Prevailing Wage Determinations*, Audit Report No. 04-04-003-04-420, 2004, at http://www.oig.dol.gov/public/reports/oa/2004/04-04-003-04-420.pdf. To find evidence of the flaws in Davis-Bacon prevailing wage calculation methodology, one need look no further than the disproportionate amount of jurisdictions across the country in which DOL has found a union wage rate to prevail. Given that unions make up only 15 percent of the workforce nationally, it would suggest there should only be a small fraction of jurisdictions in which union rates prevail.

[8] The Beacon Hill Institute at Suffolk University, *The Federal Davis-Bacon Act: The Prevailing Mismeasure of Wages*, February 2008, at http://www.beaconhill.org/bhistudies/prevwage08/davisbaconprevwage080207final.pdf.

[9] DOL proposed to rescind the current methodology for establishing wage rates for H-2B temporary nonimmigrant workers and replace it with a system emphasizing Davis-Bacon Act wage determinations. The new system, published in the *Federal Register* on October 5, 2010, is estimated to raise H-2B hourly wages in the construction industry by a minimum of $10.65 per hour, per program participant. See, *Wage Methodology for the Temporary Non-agricultural Employment H–2B Program*, at http://edocket.access.gpo.gov/2010/2010-25142.htm.

[10] Construction firms often operate on extremely low net margins. According to the 2009 *Construction Industry Annual Financial Survey*, published by the Construction Financial Management Association (CFMA), an average construction firm's operating margin was only 3.4 percent, with many firms operating at even lower margins.

electrician is permitted to install alarm systems, even though such work is performed by technicians in other jurisdictions.

While each DOL wage determination lists several different classifications of workers (painters, carpenters, laborers, etc.), limited information is available on the actual job duties or union work rules that apply to the classifications. Although the published wage determinations may identify the relevant local union for each of the listed job classifications, where the rate is based on the union's collective bargaining agreement, DOL does not provide detailed information as to whether there are any work rule restrictions attached to those wage rates and, if so, what those restrictions are. DOL's failure to provide such information makes it difficult to determine the appropriate wage rate for many construction related jobs.[11] ABC has repeatedly requested that DOL provide information about job duties that correspond to each wage rate.

"High Road" Government Contracting Policy
According to the White House Middle Class Task Force's February 26, 2010, annual report, the Obama administration is crafting a contracting policy referred to as "High Road," which is believed to be designed to require government procurement officers to determine whether a contractor's record is deemed "satisfactory" in a number of labor relations categories, using criteria subjectively determined by the Obama administration. Such a policy could needlessly cut competition, increase costs, stifle job creation, and delay the delivery of goods and services to the government and the general public. The administration has not set a date for the final version of the proposal to be released; it is possible that the policy could be issued as an executive order in the coming year.

Numerous regulatory and statutory protections already ensure that responsible contractors deliver to the federal government the best possible product at the best possible price. In addition, the federal government has a well-established process to prequalify contractors and screen out bad companies.

Regulations and Policies under "Plan, Prevent, Protect" and "We Can Help" Programs
DOL has launched several rulemakings and policy initiatives being carried out under DOL's "Plan, Prevent, Protect" and "We Can Help" campaigns. Both programs are components of the Obama administration's goal of increased federal control of the private workplace.

- **Injury and Illness Prevention Program:** Referred to as "I2P2" by the Occupational Safety and Health Administration (OSHA), this "pre-rule" stage rulemaking will require all employers, regardless of size, to "find and fix" workplace hazards. Aside from the obvious impact such a requirement could have on small businesses, all employers could find themselves in a never-ending compliance loop as a result of OSHA's rule. Furthermore, if full compliance can never truly be attained, the costs associated with compliance become even greater. OSHA has not announced a projected publication date for this proposal; however, the agency has indicated publicly that I2P2 is its highest regulatory priority.

- **"Right to Know" under the Fair Labor Standards Act:** WHD plans to require that employers provide workers with information about their employment status, including

[11] DOL has refused to publish a memorandum, drafted by the previous administration, in which this issue was raised (see attached memorandum).

exactly how their pay is calculated. In addition, the proposal will likely require that workers classified as independent contractors must receive a "classification analysis" from their respective employer. DOL's fall 2010 regulatory agenda indicates that this proposal will be published in April 2011.[12]

Such records will surely be discoverable during private litigation, which causes a great deal of concern for our members. WHD's proposal comes after several non-regulatory policies implemented by WHD over the past year that emphasize litigation over traditional statutory enforcement, including "Bridge to Justice," an agency-sponsored attorney referral program intended to help facilitate lawsuits involving the Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act (FMLA). Interestingly, no such referral program or support infrastructure exists within DOL for small businesses targeted with frivolous claims involving statutes over which DOL has authority, despite the fact that often, such cases are found to be without merit.[13]

Rules Governing "Persuader" Activity

DOL's Office of Labor Management Standards (OLMS) has been working on multiple proposals to redefine what constitutes "persuader" activity under Section 203(c) of the Labor-Management Reporting and Disclosure Act (LMRDA). According to DOL's fall 2010 regulatory agenda, both rulemakings will be proposed this summer.[14]

ABC and others believe that DOL's proposal will have a significant impact on an employer's rights before and during union organizing campaigns. Much like the provisions of the Employee Free Choice Act (H.R. 1409 and S.560, 111th Congress. Also known as "card check"), the proposal seeks to neutralize employers' voices in their own workplaces during organizing campaigns. These upcoming rulemakings discourage (or prevent entirely) speaking to employees about unions during organizing campaigns, and make it extremely difficult for those same employees to obtain a balanced perspective on the advantages and disadvantages of the union in question—or unionization generally—prior to casting their votes.

Tax Regulations

Under the nation's current tax system, rates are too high and laws are too complex, thus inhibiting the growth of small businesses. ABC supports minimizing the tax burden on American citizens – and the construction industry in particular – to help increase the rate of capital formation, economic growth and job creation.

- **New Form 1099 Requirements:** A provision contained in the Patient Protection and Affordable Care Act (PPACA) will significantly increase the amount of paperwork businesses will have to file with the Internal Revenue Service (IRS). The IRS is expected to

[12] *2010 Unified Regulatory Agenda*, Office of Information and Regulatory Affairs, December 2010. See http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201010&RIN=1235-AA04.

[13] The Equal Employment Opportunity Commission's (EEOC) *Enforcement and Litigation Statistics* provides an illustrative example of the ratio of frivolous claims versus those with merit. See http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm.

[14] *Fall 2010 Unified Regulatory Agenda*, Office of Information and Regulatory Affairs, December 2010. See http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201010&RIN=1245-AA03; and http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201010&RIN=1245-AA05.

release a final rule implementing these provisions in 2012, at which time businesses will have to file a Form 1099 for all vendors to which they pay more than $600 annually for both goods and services.[15]

An ABC member and vice-president of a family-owned small business has indicated that the expanded Form 1099 reporting requirements may force him to hire an additional full-time employee to work in his company's accounting department, which already employs two full-time employees. Because the ABC member works with 1,200 vendors, of which only four or five presently issue a Form 1099, the accounting department will be required to spend countless hours on the increased paperwork filing.

Two years ago, the same ABC member employed 136 employees; however due to the current construction market, he was forced to lay off employees, reducing his staff to 66. Instead of investing in equipment or hiring employees to actually perform in the field, he may be faced with a huge overhead expense of hiring a full-time employee to solely work on this new burdensome mandate. Ultimately, the overhead expense resulting from this new paperwork requirement will have a dramatic effect on the ABC member's bottom line and how he conducts business.

- **Three Percent Withholding:** Section 511 of the Tax Increase Prevention and Reconciliation Act of 2005 (TIPRA) requires that three percent of payments for goods and services made by federal, state and local governments and their agencies be withheld from government contractors and is scheduled to go into effect January 2012.

  The withholding proposed rule (originally issued December 5, 2008, and not yet finalized[16]) is especially onerous for the construction industry because construction contractors typically average a profit margin of 2.2 percent. In addition to withholding 3 percent, construction contractors face retainage between five percent and 10 percent, putting the contractor at an eight percent to 13 percent cash deficit.

  Not only will Section 511 deplete a contractor's profit, but it also will reduce sorely needed operating capital. Eventually, contractors will be forced to raise their proposal price to account for this new financing burden, and the taxpayers' cost of construction will increase. Or worse, small businesses will be driven out of the government contracting market.

Lack of Supportiug Data for Rulemaking; Procedurally Deficient Policymaking

The Obama administration has moved forward with several regulatory and non-regulatory policies without sufficient data to demonstrate their benefit and support their need. In addition, some quasi-regulatory policies are being implemented outside the formal rulemaking process in an effort to circumvent existing checks and balances within the federal regulatory framework.

- **Proposal to Redefine "Feasibility" in Noise Exposure Standard:** Last fall, OSHA announced a proposal to change the definition of "feasible" under its General Industry and

[15] *IRS Notice 2010-51*, IRS Internal Revenue Bulletin, July 1, 2010. See http://www.irs.gov/pub/irs-drop/n-10-51.pdf.
[16] 74 Fed. Reg. at 74082.

Construction Occupational Noise Exposure standards to mean "capable of being done."[17] As proposed, OSHA would be able to cite a company for relying on personal protective equipment (e.g., ear plugs) to protect employees rather than implementing administrative or engineering controls for noise hazards unless the company is able to demonstrate that implementing such controls would put it out of business or threaten its viability.

OSHA has been unable to explain publicly why it feels such a costly proposal is necessary. Furthermore, OSHA has classified this proposal as a "non-regulatory" interpretation, allowing the agency to circumvent crucial aspects of the formal regulatory process.[18] Stakeholders were not given advance notice of the proposal in the spring 2010 regulatory agenda, and it does not require formal notice-and-comment or economic analysis. Public comments on the proposal are due March 21, 2011.

- **Musculoskeletal Disorder Recordkeeping:** OSHA also plans to require that employers report "musculoskeletal disorders" (MSDs) in a separate column from other types of workplace injuries and illnesses on OSHA's Form 300 log books.[19] On the surface, this appears to be a minor clerical revision; however, upon closer inspection, the proposal wrongly groups together a variety of disorders and symptoms that are not necessarily related (even the scientific community has been unable to settle on a reliable definition or cause of most MSDs). The addition of such a difficult-to-define, catch-all category will result in the collection of erroneous data that in turn could justify burdensome workplace controls for injuries and illnesses that may not even be caused by the work environment.

  In addition, the time and cost estimates associated with OSHA's proposal have been grossly underestimated in an attempt to bypass requirements of the federal regulatory process that would have brought increased scrutiny and much-needed economic analyses. The Office of Information and Regulatory Affairs (OIRA) is currently reviewing the proposal before its February 2010 publication.[20] In July 2010, ABC shared its concerns directly with OSHA and OIRA officials.

- **Environmental Rules Targeting the Construction Industry:** In addition to the U.S. Environmental Protection Agency's (EPA) attempts to regulate stormwater runoff from construction sites (which was mentioned in your December 8 letter to ABC), the agency is also attempting to impose additional rules governing lead exposure in the repair and renovation of commercial buildings. As with the stormwater rulemakings, we are concerned that EPA plans to move forward with regulatory action without the requisite data needed to justify such action, and to ensure that any potential rulemaking is not burdensome on impacted industries.

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[17] 75 Fed. Reg. at 64216.

[18] It appears OSHA has determined that its noise proposal is not a formal rulemaking, and therefore the agency believes it does not fall under the authority of the Administrative Procedure Act (APA); the Regulatory Flexibility and Small Business Regulatory Enforcement Fairness Acts (RFA and SBREFA, respectively); or the Unfunded Mandates Reform Act (UMRA).

[19] 75 Fed. Reg. at 4728.

[20] *2010 Unified Regulatory Agenda*, Office of Information and Regulatory Affairs, December 2010. See http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201010&RIN=1218-AC45.

On May 6, EPA issued an "advance" notice of proposed rulemaking (ANPRM) announcing its long-term plans to apply lead-safe work practices to renovations in public and commercial buildings.[21] If the agency does proceed with a rulemaking, EPA plans to issue a proposal by December 2011, and have it finalized by July 2013, with implementation to begin on or before July 2014.

In July 2010, a broad coalition of commercial construction and real estate interests responded to EPA, stressing that the agency consider its limited statutory scope and authority under the Toxic Substances Control Act (TSCA), and complete a congressionally-mandated study of renovation, repair and painting activities in commercial and public buildings, before proceeding with a rulemaking. EPA was also urged to take into account a variety of factors in any lead rulemaking, including varying exposure patterns in different types of buildings, the limited use of lead paint since 1978, and potential impact on other national priorities (such as energy efficiency and job creation). Despite industry's concerns, EPA appears to be willing to move forward in the rulemaking process without the TSCA-mandated data.

Lack of Statutory Authority and Congressional Mandate

The Obama administration has signaled that it will not hesitate to issue administrative alternatives to controversial legislation through the federal regulatory process. Two areas of particular concern listed below.

- **Greenhouse Gas Regulations:** EPA regulations to curb greenhouse gas emissions stand to be highly detrimental to job growth in the construction industry. Although Congress has not taken action on climate change legislation, EPA nevertheless moved forward in 2010, pushing costly and burdensome regulations on business owners. Collectively, these regulations will increase energy and material prices for the construction industry, impeding economic recovery and job creation.

- **NLRB Rulemakings and Decisions:** In recent days, the National Labor Relations Board (NLRB), now staffed with a pro-labor majority, has started to issue formal regulatory proposals—an unusual move for an agency that has historically acted largely as an appellate judicial body. It is relevant to subject matter of this letter as the Board's proposed rules could potentially have a negative impact on job growth in the construction industry.

  On December 22, the NLRB issued regulatory proposal to require employers to post a notice in their workplaces dealing with the National Labor Relations Act (NLRA). In the words of dissenting Board Member Brian Hayes, the proposal "lacks the statutory authority to promulgate or enforce."[22] In addition to its current proposal, the Board is believed to be considering other regulatory action, including shortened time for representation elections, allowing employees to vote electronically (possibly from a remote location), and enabling union organizers (or employees who support a union) to use company email for organizing purposes without regard to discrimination rules.

[21] 75 Fed. Reg. at 24848.
[22] 75 Fed. Reg. at 80415.

Having failed to enact EFCA last Congress, the Obama administration and its allies appear poised to push onto the workforce card check and other job-killing policies through NLRB enforcement and adjudication.

Combined, these items represent an effort to use the federal regulatory process (in lieu of Congressional mandate) to achieve partisan policy aims that ABC believes will be detrimental to the success of our members' businesses.

II. Reforming the Federal Rulemaking Process

With available work dwindling, and unemployment rising once again, the construction industry cannot create jobs when an ever-growing body of unnecessary regulations impose excessive and, at times, crippling costs. Federal rulemakings often carry substantial financial and non-monetary compliance costs that impede businesses' ability to compete. This is especially true for small businesses. Research from a 2010 U.S. Small Business Administration's (SBA) Office of Advocacy study revealed that small businesses are disproportionately affected by federal regulations.[23] The study found that, on average, small businesses face a cost of $10,585 per employee annually to comply with federal regulations. Adding large and mid-size businesses to the equation still totals $8,000 per employee, per year.[24]

ABC strongly supports comprehensive regulatory reform, including across-the-board requirements for agencies (including so-called "independent" agencies) to evaluate the risks, weigh the costs, and assess the benefits of regulations. New rulemakings should contain reasonable sunset clauses, and existing regulations should also be reviewed periodically to ensure that they are necessary, current, and cost-effective. Furthermore, federal agencies must be held accountable for full compliance with existing rulemaking statutes and requirements when promulgating regulations.

REINS Act

In the 111th Congress, ABC supported the Regulations from the Executive In Need of Scrutiny (REINS) Act (H.R. 3765), which you cosponsored. The REINS Act requires Congress to pass a joint resolution of approval before any new major rule (defined as having an impact of $100 million or more) takes effect. ABC believes that H.R. 3765 would have brought greater transparency and accountability to the federal rulemaking process.

As the Obama administration continues to promulgate complex, costly and burdensome regulations, the REINS Act would ensure that Congress is held accountable for the impact that finalized rules have on the business community and the American people. ABC looks forward to the bill's reintroduction in the 112th Congress, and urges you and the members of your committee to support the bill at that time.

Other Reforms

In addition to the REINS Act, other potential solutions for dealing with regulatory burden have emerged recently. For example, in December, Sen. Mark Warner (D-Va) wrote in the *Washington*

[23] Nicole V. Crain and W. Mark Crain, *The Impact of Regulatory Costs on Small Firms*, Small Business Administration Office of Advocacy, September 2010.
[24] *Id.*

Post that relief from excessive regulatory burdens is the key to job growth and economic recovery.[25] Sen. Warner's suggestion to create a regulatory "pay as you go" system—requiring federal agencies to eliminate older regulations in order to introduce new ones—would be a positive and favorable step. ABC looks forward to seeing this and other regulatory reform solutions introduced in the 112th Congress.

####

Thank you for your consideration, and for the opportunity to comment on these important matters. If you or your staff have questions, or require any additional information, please do not hesitate to contact me.

Sincerely,

Sean Thurman
Senior Manager, Regulatory Affairs
Associated Builders and Contractors

[25] Sen. Mark Warner, *Red Tape Relief for a Sluggish Recovery*, Washington Post, December 13, 2010.

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

January 16, 2009

ALL AGENCY MEMORANDUM NO. 205

TO: ALL GOVERNMENT CONTRACTING AGENCIES OF THE FEDERAL GOVERNMENT AND THE DISTRICT OF COLUMBIA

FROM: ALEXANDER J. PASSANTINO
ACTING ADMINISTRATOR

SUBJECT: JOB DUTIES OF EMPLOYEE CLASSIFICATIONS IN DAVIS-BACON WAGE DETERMINATIONS

This Memorandum provides guidance intended to clarify requirements regarding prevailing area job duties for employee classifications referenced in wage determinations issued under the Davis-Bacon Act (DBA). Generally, experienced government contractors are aware of the need to ascertain locally prevailing practices, and do so as a matter of course, before submitting bids and commencing work on Davis-Bacon covered contracts. However, the Department believes that many contractors, employees, and contracting agencies may not be fully aware of the proper assignment of job duties to classifications of laborers and mechanics listed in wage determinations. The guidance contained in this Memorandum is intended to assist to all interested parties in ascertaining their specific obligations under the Act, ensuring that employees are properly classified and paid the full prevailing wage rates to which they are entitled.

The Davis-Bacon and Related Acts, and the implementing regulations at 29 C.F.R. Parts 1, 5 and 7, require that the advertised specifications for covered construction contracts contain a provision stating the minimum wages to be paid the various classifications of mechanics or laborers to be employed under the contract. For reference, attached is a list of all codes used in wage determinations along with an explanation of the codes. The Department of Labor's wage determinations are typically based on surveys of the wages paid on construction projects on different types of construction in a given geographical area, and the determinations are updated periodically. The wage data information is voluntarily submitted by contractors, trade associations, unions, state agencies, and other knowledgeable parties. For each classification of laborer or mechanic, the Administrator's wage determinations set forth the prevailing wage and fringe benefits found prevailing, based upon the wage surveys. Each published wage determination lists many different classifications of workers and, where known, any prevailing area work practices. For example, a wage determination may state that a painter may perform all painting as well as drywall finishing work and taping at the same wage rate, and another wage determination may have separate rates for spraying versus brush painting, drywall finishing and taping. The published wage

determinations, however, often do not identify all of the job duties performed by each of the classifications listed.

On occasion, the data submitted in a survey does not contain sufficient information to issue rates for a particular craft that will be needed in the performance of the contract. Because of this, DBA provisions contain a conformance procedure for the purpose of establishing a wage and benefit rate for missing job classifications. Contractors are responsible for determining the appropriate crafts necessary to perform the contract work. If a classification considered necessary for performance of the work is missing from the wage determination applicable to the contract, the contractor must initiate a request for approval of a proposed wage and benefit rate. See Title 29 C.F.R. Part 5, Section 5.5(a)(1)(ii) and FAR 22.406-3.

An area practice issue arises when there are two or more classifications listed on the wage determination that may perform the same work. Under the Davis-Bacon Act the scope of work covered by a classification must be decided in accordance with the actual prevailing area practice upon which the prevailing wage rate is based. For example, where the wage rates published in a wage determination reflect collectively bargained wage rates that have been found to constitute the prevailing wages for a particular classification in the locality, the proper assignment of work duties for that classification must be determined by the area practice of the parties to the collective bargaining agreement. This long-standing principle was clearly stated by the Wage Appeals Board in the case of *Fry Brothers Corp.*, WAB Case No. 76-6 (June 14, 1977). Conversely, when the wage rates published in a wage determination are non-union, *i.e,* an average of wages paid, then the applicable area practice is based on the practice of non-union contractors in the geographical area. This determination of area practice applies where the actual prevailing wage rate is based on union wage scales, where non-union rates are found to be prevailing, or where there is a mixture of the two for different classifications in the same locality. For information on how the Department conducts area practice surveys to determine what wages are prevailing, including explanations for both how limited surveys and full surveys are conducted, see the Field Operations Handbook, section 15f05, at **http://www.dol.gov/esa/whd/FOH/FOH_Ch15.pdf**. Additional information regarding area practice can be found in the Area Practice subsection of the DBA/DBRA Compliance Principles section of the Department's *Prevailing Wage Resource Book*, which can be found at: **http://www.wdol.gov/docs/WRB2002.pdf**.

Contractors have a duty to make reasonable inquiry, such as to contracting agencies soliciting bids for construction projects covered by Davis-Bacon requirements, or the Department itself, concerning prevailing classification practices that will apply to upcoming projects. Unfortunately, employers may be unaware of their obligation to inquire as to any applicable practices in the application of Davis-Bacon wage determinations; some employers may also be unaware of where to inquire to request clarification concerning unpublished prevailing classification practices. This lack of awareness may lead to misclassifications by employers acting in good faith. The Department or contracting agencies may have to spend resources investigating and/or

litigating such misclassifications, when employees would be properly classified in the first place if there were greater advance notice of these requirements.

In recent years, the Department has taken steps to include in each published wage determination information on prevailing area work practices and/or coded references denoting those unions whose wage rates have been found prevailing for particular job classifications in an area (or that the prevailing wage is non-union). The Department will continue to include specific locally prevailing area practice findings where possible on its wage determinations. The published wage determinations have not, however, explained the purpose of the coded references, *i.e.*, that the job duties of the classification for which the particular union is referenced may be set forth in the collective bargaining agreement with union contractors or available from the parties to the collective bargaining agreement. In an effort to provide more explicit guidance, the Department plans to cross-reference this Memorandum in each wage determination for more detailed guidance on the prevailing area practices work assignment issue as well as the codes and meaning of the codes on wage determinations (see attached).

In addition, although area practice is determined by looking at the work actually performed, where a union rate prevails for a particular classification, it may be helpful to view the underlying collective bargaining agreement. Some may have been submitted as part of the wage survey process, others can be found at **www.dol.gov/esa/regs/compliance/olms/cba/index.htm**. Contractors are reminded, however, that the statements contained in collective bargaining agreements are not dispositive, and that the determination of area practice is based on the actual performance of work. In situations where a contractor or government agency or other stakeholder is confused or unaware of specific prevailing work classification rules or disputes them, the appropriate federal contracting agency labor advisors listed on the Wage Determinations On-Line (WDOL) website at **http://www.wdol.gov/ala.aspx** may be contacted for assistance. In addition, Wage and Hour Division staff are available to respond to inquiries. See **http://www.dol.gov/esa/whd/whdkeyp.htm**. The Department also has a formal process for adjudicating a dispute regarding what local practices actually prevail. See 29 C.F.R. 5.13

There may be occasions when work assignment practices are not stated in published documents, such as collective bargaining agreements (*e.g.*, side letters, jurisdictional memoranda, or other written documents). This is true regardless of whether the prevailing rates are union, non-union, or mixed union/ non-union. In such instances, the affected parties and stakeholders, including labor unions, trade associations, or contractors, should provide the Department with information regarding such work assignment practices in written form. See 29 C.F.R. 1.3. The Department believes the ongoing improvement of Davis-Bacon wage determinations, along with this Memorandum, will improve compliance and prevent potential wasted resources and unfairness to employers, employees, and contracting agencies who may otherwise have to perform post-contract award investigations or hearings to determine proper classification of workers based on prevailing area practice.

The additional transparency contemplated in this Memorandum may take time for the Department to fully implement. With this more explicit guidance, however, the Department expects government contracting agencies that administer Davis-Bacon and Related Act contracts and contractors subject to Davis-Bacon labor standards will immediately be better aware of their responsibilities for complying with applicable prevailing area practices on construction projects covered by the Davis-Bacon and Related Acts. Employees, too, will be better informed of the determination of appropriate classifications and wage rates for the work that they are performing.

Attachment

Davis-Bacon Classification Identifiers (Union and Non-Union)

The body of each wage determination lists the classifications and wage rates that have been found prevailing for the cited type(s) of construction in the area covered by the wage determination. The classifications are listed in alphabetical order of **"identifiers"** that indicate whether particular rates are union or non-union rates.

Many wage determinations contain only non-union wage rates, some contain only union-negotiated wage rates, and others contain both union and non-union wage rates that have been found prevailing in the area for the type of construction covered by the wage determination.

Union Identifiers

◊ An identifier beginning with characters **other than SU** denotes that the **union** classification(s) and wage rate(s) have been found prevailing. The first four letters indicate the international union for the local union that negotiated the wage rates listed under that identifier (see listing below). The four-digit number that follows indicates the local union number.

Example:

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-------------------------------------------------------------
-----
PLUM0198-005 07/01/2007
ST. JAMES PARISH (Northwestern Portion):
                                    Rates          Fringes
PLUMBER (excluding pipe
laying).....................$ 21.64                6.88
-------------------------------------------------------------
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The identifier is PLUM0198-005 07/01/2007. PLUM = Plumbers; 0198 = the local union number (district council number where applicable); and 005 = internal number used in processing the wage determination. The date following these characters is the effective date of the most current negotiated rate.

◊ Special identifiers are necessary for two trades because the same local union number(s) is accompanied by different wage rates in different states. Bricklayers local union numbers are not unique nationwide, but are unique within each State. Similarly, Sprinkler Fitters Local Union No. 699 has negotiated different wage rates in each State within its territorial jurisdiction. Therefore, the identifiers for the Bricklayers unions are in the format "BR + state abbreviation," (referenced below as BRXX), and the identifier "SF + state abbreviation" is used for Sprinkler Fitter Local No. 669's rates.

◊ It is common for many local unions to negotiate wage rates for more than one classification. Where this is done, all the classifications for which that union's wage rates are determined to be prevailing will appear under the identifier for that union.

Example:

The same union may negotiate wage and fringe benefits for painters and glaziers. In such a case, the wage rate for the glazier, as well as that for the painter will be found under an identifier beginning with "PAIN"(if both the union rates were found prevailing for both glaziers an painters). Similarly, users may need to look under an identifier beginning with "CARP" to find not only rates for carpenters, but also those for millwrights, piledrivermen and (marine) divers.

Union Identifier Code Abbreviations

Following are the **identifier codes** used to reference the various craft unions. Examples of classifications for which their local unions commonly negotiate wage and fringe benefit rates are shown in parentheses.

ASBE =International Association of Heat and Frost Insulators and Asbestos Workers

BOIL = International Brotherhood of Boiler Makers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers

BRXX = International Union of Bricklayers, and Allied Craftsmen
(bricklayers, cement masons, stone masons, tile, marble and terrazzo workers)

CARP = United Brotherhood of Carpenters and Joiners of America
(carpenters, millwrights, piledrivermen, soft floor layers, divers)

ELEC =International Brotherhood of Electrical Workers
(electricians, communication systems installers, and other low voltage specialty workers)

ELEV =International Union of Elevator Constructors

ENGI = International Union of Operating Engineers
(operators of various types of power equipment)

IRON =International Association of Bridge, Structural and Ornamental Iron Workers

LABO = Laborers' International Union of North America

PAIN = International Brotherhood of Painters and Allied Trades
(painters, drywall finishers, glaziers, soft floor layers)

PLAS = Operative Plasterers' and Cement Masons' International Association of the United States and Canada
(cement masons, plasterers)

PLUM = United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada
(plumbers, pipefitters, steamfitters, sprinkler fitters)

ROOF = United Union of Roofers, Waterproofers and Allied Workers

SHEE = Sheet Metal Workers International Association

TEAM = International Brotherhood of Teamsters

Non-Union Identifiers

Classification(s) for which the union rate(s) were not determined to be prevailing are listed under an "**SU**" identifier. **SU** means the rates listed under that identifier were derived from **su**rvey data by computing average rates and are not union rates. (The data reported for such a classification and used in computing the prevailing rate may include both union and non-union data. Note that **various classifications**, for which non-union rates have been determined to be prevailing, may be listed in alphabetical order under this identifier.

AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.

December 30, 2010

The Honorable Darrell Issa
U.S. House of Representatives
2347 Rayburn House Office Building
Washington, DC 20510

Dear Congressman Issa:

Thank you for your letter of December 10th, and thank you for taking on this important inquiry.

The construction industry has suffered job loss at a far greater rate than other industries in America. The unemployment rate in construction remains above 18% (double the economy-wide rate). As such, we are very sensitive to rules, regulations and enforcement efforts by federal agencies that seem impractical, imprudent or impossible to comply with.

With that said, we did a quick survey of our members and our own internal experts, and have assembled the attached list of proposals from agencies that seem to meet the criteria you laid out in your letter. The proposals are written in a way that will likely "negatively impact both the economy and jobs."

The list attached to this letter is not an exhaustive list. It is, instead, a quick overview of issues we have been following or agencies we have been working with to help the agency to better understand the construction industry. In some cases, both our advice and expertise were welcome additions to the discussions. In other cases, ongoing efforts to share knowledge between the regulated community and regulators has been stifled by a significant anti-business sentiment that seems pervasive in some agencies.

Thank you again for taking on this important inquiry. This is not an exhaustive list of issues, but is our first, quick overview of agencies' actions which we have concerns about. We look forward to working with you to flesh out any additional information that your committee may need during your investigative process, including information gathering, witnesses for hearings and background information on regulatory initiatives that impact the industry.

Sincerely,

Stephen E. Sandherr
CEO

Enclosures

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U.S. ENVIRONMENTAL PROTECTION AGENCY

Contemplated, Recently Proposed or Issued Rule	Negative Impact to the Construction Industry	Needed Modifications to the Rule	Needed Modifications to the Rulemaking Process - *regulation is arbitrary and capricious, an obuse of discretion, or otherwise not in accordance with the law...*
Effluent Limits for Construction Runoff – EPA has finalized first-time effluent limitations guidelines for the "construction and development industry." The so-called C&D ELG imposes nationwide monitoring requirements and enforceable numeric limits on the amount of sediment that can run off any construction site that disturbs 10 or more acres of land at any one time. It also specifies the exact types of erosion and sediment controls that contractors must use, at a bare minimum, to control stormwater runoff on all construction sites that disturb one or more acres of land. The rule took effect in February 2010 and phases in over four years. The new ELG requirements will be incorporated into federal and state National Pollutant Discharges Elimination System (NPDES) stormwater construction permits upon their next reissuance. In August 2010, EPA filed an unopposed motion in a case before the Seventh Circuit, requesting that the court vacate the numeric turbidity limit, remand that part of the ELG rule to EPA, and hold the lawsuit in abeyance until February 15, 2012, to give EPA time to reevaluate the rule's numeric limit. The court granted EPA's request to remand the rule and to hold the suit in abeyance, but refused to vacate the numeric limit. In November 2010, EPA published a direct final rule to formally stay the numeric limit and associated monitoring requirements for turbidity in the ELG rule because of an error in the way the Agency calculated the limit. EPA plans to propose in December 2010 a "correction rule" for public comment that would revise the current numeric limit of 280 nephelometric turbidity units (NTUs), and then take final action on a revised limit by May 30, 2011.	EPA issued a numeric standard that is excessively costly, difficult to implement, and based on numerous factual errors. In its current form,,the C&D ELG will apply to all land disturbing activities, including construction of highways, streets, bridges, tunnels, pipelines, transmission lines and residential, commercial, and industrial structures. The C&D ELG will also impact the construction activities conducted by state and local governments, as well as how they administer and enforce their existing erosion control & stormwater management programs. EPA admits (as stated in the rule's technical supporting documents) that the estimated costs of compliance (about $953 million per year) are more than twice the estimated benefits. What is more, SBA estimates that EPA's final rule will cost businesses, including small businesses, in excess of $9.7 billion per year. Closure of 10 to 20 percent of the industry has been considered acceptable in past ELG rulemakings. EPA also has not demonstrated that any particular "technology" will universally ensure compliance across the country. (EPA set the limit using data from advanced treatment systems rather than passive treatment systems, the technology chosen for the final ELG.) In the likely event that many construction site operators will be forced to rely on expensive and labor-intensive Advanced Treatment Systems (ATS) as the only viable control technique, the actual cost of compliance at many construction sites will far exceed EPA's estimates and likely put many companies out of business.	A turbidity-based action level approach would be a better option for the reasons below. Under an action level approach, a facility that exceeds a benchmark (action) level must re-evaluate and document the effectiveness of its best management practices to minimize discharges. **A One-Size-Fits-All Numeric Limit Is Not Suitable to Construction.** Numeric limits are not appropriate for construction because wet weather events are highly variable, and sampling techniques do not accurately measure pollutant levels associated with stormwater discharges from construction sites. The high degree of variability in site parameters, regional and site specific rainfall, and erosion and sediment control effectiveness make specification of standard stormwater monitoring requirements impracticable on a national regulation. **A C&D ELG Must Be Adjustable to Site Conditions.** Construction sites are temporary in duration, every changing, and already regulated to prevent discharges of sediment and other pollutants into U.S. waters. A final ELG rule must be sufficiently flexible to allow for proper BMP selection and the use of innovative technologies on construction sites. **Contractors Could Be Fined Despite Following EPA Regulations.** The ELG could subject a contractor to fines and other government action even though the required BMPs have been fully implemented. The inability to accurately collect and measure stormwater samples makes it impractical to use strict numeric limits for compliance purposes. **Storm Water Management Regulations Must Be Administered at State/Local Levels, and Be Based on Best Management Practices.** State and local authorities should retain the ability to tailor stormwater requirements to state/ local conditions, rather than be bound by a rigid and inflexible federal standard.	The public did not have an opportunity to comment on either the data or the methodology used to derive EPA's numeric turbidity standard for construction site, which likely contributed to the series of technical errors. The C&D ELG must use better scientific data. ELGs are being developed despite the fact that there is no scientific data supporting the regulation. EPA also lacks the site-specific data and analyses typically associated with promulgating past ELGs.
Post-Construction Stormwater Requirements – EPA has announced that it will propose and take final action by Nov. 2012 on a first-time national rule that would restrict stormwater discharges from newly developed and	Such new federal requirements will increase the cost of construction and present liability issues concerning the contractor's legal/contractual obligations to the site and the owner after the contractor leaves the site.	EPA must not include design or performance standards to control stormwater discharges from developed sites as part of the current NPDES Construction General Permit program. General contractors are not responsible for designing,	Congress set as a condition precedent to any new designation and subsequent regulatory program that EPA conduct a study pursuant to Section 402(p)(5) and submit it

Contemplated, Recently Proposed or Issued Rule	Negative Impact to the Construction Industry	Needed Modifications to the Rule	Needed Modifications to the Rulemaking Process - *regulation is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law...*
redeveloped sites. EPA plans to propose a regulation to strengthen the national stormwater permit program, including, at a minimum, new design or performance standards to control stormwater discharges from developed sites under the authority of section 402(p) of the Clean Water Act.		financing, operating, or maintaining post-construction stormwater controls. Moreover, EPA should preserve the role that states and localities have traditionally played. States and local authorities should lead the regulation of land and water use, not the federal government. **Existing regulatory programs adequately control post-construction discharges.** Project owners/developers already must consider long-term stormwater management in the planning and design phase of a project, provide incentives (or mandates) for low impact development, require long-term monitoring and maintenance for stormwater facilities, and otherwise address post-construction stormwater management. In addition, EPA regulations currently direct the municipalities to address post-construction stormwater runoff, and many local governments are adding new requirements – or have had post-construction stormwater requirements on the books for years. State and local authorities are in a better position to identify the best practices and techniques to control any erosion or sedimentation that might result from storm water runoff from the developed sites within their borders.	to Congress before proceeding with a specific process for such new regulations set forth in Section 402(p)(6). EPA has not complied with its Congressional mandates here and cannot justify regulating developed land without first meeting the conditions precedent set forth by Congress. Until EPA has fulfilled these statutory requirements, EPA has no basis for pursuing the rulemaking. But even if EPA complies with Congressional mandates and conducts a study, the fact remains that developed land, generally, does not meet the definition of point source discharge to waters of the U.S. and it has not been designated for any regulatory program by EPA through the process set forth by Congress.
Chesapeake Bay Watershed Clean-up Plan – The Clean Water Act requires TMDLs (i.e., clean-up plans) for all waterbodies that do not meet their water quality standards (i.e., impaired waterways). The Bay and its tributaries were placed on the impaired waters list in 1988 for nitrogen, phosphorus, and sediment. A lawsuit is now forcing the prompt development and implementation of a Bay-wide TMDL. The Bay TMDL (draft released in 2010) also is a key part of the strategy developed by federal agencies to meet the President's 2009 Chesapeake Bay Executive Order (EO 13508). The TMDL requires states to develop watershed implementation plans (WIPs) to reduce pollutants from nonpoint (e.g., agricultural runoff) and point sources (e.g., construction site runoff). EPA also is considering adding Chesapeake Bay-specific provisions to the national post-construction stormwater rule	Once final, the Bay TMDL will contain binding water quality standards that must be incorporated into all National Pollutant Discharge Elimination System (NPDES) permits that authorize discharges to the Bay watershed (e.g., construction general [stormwater] permits). Construction contractors who discharge stormwater to the Bay will be required to meet the TMDL limits in their permits. Because EPA has identified development and developed land (including stormwater runoff from construction sites) as a contributor to the poor water quality of the Chesapeake Bay, the Bay TMDL will likely impact new construction in the Bay area in the future. To this end, the draft state WIPs all reference erosion and sedimentation controls and some states may include growth restrictions, low impact development strategies, strict effluent limits, and post-construction stormwater controls. Post-construction controls could include retrofits	Industry maintains that both the data and the modeling program used by EPA to develop the Bay TMDL are flawed. EPA should re-evaluate the loadings in the draft TMDL and address any concerns with the underlying model before finalizing the clean-up plan for the Bay watershed. Alleged flaws in the data and modeling are contributing to concerns that EPA is setting too aggressive timelines and pollution loadings.	The Bay draft TMDL is 2000+ pages and encompasses several sub-TMDLs for various tributaries. EPA has been criticized that the Agency did not provide enough time for the public to comment, especially considering that many small businesses, farms, and home-owners would be impacted by the TMDL.

Contemplated, Recently Proposed or Issued Rule	Negative Impact to the Construction Industry	Needed Modifications to the Rule	Needed Modifications to the Rulemaking Process - *regulation is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law...*
currently in the works (see above). Other states with water quality concerns will look to the Chesapeake Bay TMDL as a guide or model for developing their own discharge pollution limits.	of stormwater controls for existing development, performance standards, tracking and reporting. States may heighten their inspection and enforcement activities. Implementation of the plans will be expensive and some states are entertaining stormwater fees and pollution trading schemes to pay for the TMDL.		
Oil Spill Prevention, Control and Countermeasure (SPCC) Plans – The SPCC amendments finalized by EPA at the end of 2008 took effect in early 2010. Many of these amendments (and other reforms finalized by EPA back in 2006) will ease the compliance burden on construction companies covered by the federal oil spill control regulations, but there are still major inefficiencies inherent to the program. EPA has set a November 10, 2011, compliance deadline for regulated construction sites to prepare and implement SPCC Plans that meet all of the current requirements.	Construction workers use oil in their operations (and in their equipment) and, as a result, they are directly impacted by the SPCC plan requirements contained in the Oil Pollution Prevention regulation. Many construction sites fall within the SPCC thresholds, but do so on a temporary basis that in no way fits within EPA's general perception of a "regulated facility." Unlike a fixed or permanent oil storage site (where the cost to develop and implement an SPCC plan may be distributed over many years), a construction contractor must prepare multiple SPCC plans as jobsites are modified, projects completed, and new projects started. Unlike fixed sites, this requires creating and modifying SPCC plans throughout the year. In addition, some contractors may even need to prepare multiple SPCC plans for the same construction "project." This situation occurs when a contractor temporarily uses off-site locations (either adjacent to the project or some distance away) to perform function that are integral to the larger construction project and both the off-site locations and the construction project site meet the 1,320 gallon threshold.	EPA should amend the SPCC rules to exempt all construction sites in full compliance with a National Pollutant Discharge Elimination System (NPDES) construction storm water permit. The NPDES storm water permit program regulates construction sites one acre or greater, mandating that they implement and develop a stormwater pollution prevention plan (SWPPP) that includes an oil spill prevention component. EPA's SPCC protections are mirrored almost entirely by EPA's storm water permit requirements, at least with regard to their application to the construction industry. EPA should allow SWPPPs to satisfy existing oil spill plan requirements. It is unnecessary and an added cost and paperwork burden to require two separate plans for construction sites with simple and small oil storage. In addition, EPA should exempt asphalt cement (AC) from the definition of "oil." An exemption would be based on the characteristics of AC and the documented low risk of a spill reaching navigable waters. In the event of a spill or leak, AC quickly hardens at outside air temperatures and would not flow beyond the immediate vicinity of the tank or holding silo. A simultaneous rain event would only accelerate the solidification process. The potential for a fire to influence the viscosity of AC is virtually impossible. In the unlikely event that an asphalt spill would reach nearby water, it would not create a sheen. There is no threat of AC contaminating ground water. Moreover, recent National Response Center (NRC) data demonstrate a negligible risk of an asphalt spill ever reaching U.S. waters.	It appears that EPA did not recognize the temporary nature of construction when it determined the economic impact of the SPCC program on small construction businesses.
Nitrogen Dioxide (NO2) National Ambient Air Quality Standards (NAAQS) – EPA Jan. 22 finalized tighter air quality standards for NO2 gas. The revision marks the first time EPA has updated the NAAQS for NO2 in nearly four decades. The **final rule** introduces a new one-hour maximum standard for NO2 at 100 parts per	The more stringent NO2 requirements will be unnecessarily costly and burdensome on states and the regulated community. Currently there are no areas in the United States that are designated as nonattainment of the NO2 NAAQS. With the tighter NO2 NAAQS now on the books, however, some areas will be classified as non-attainment.	EPA should remove the monitoring component from its NO2 NAAQS proposal and wait until the new air standard is implemented before proposing a subsequent rule for monitoring requirements. EPA should also consider a pilot study to determine how roadway monitoring of NO2 would function in the real world before imposing this costly new system.	EPA should let existing air emission/fuel regulations and voluntary programs work before tightening NAAQS rules, especially considering the continual phase-in of new federal engine standards and the recent switch-

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billion (ppb). The agency is also retaining the existing annual standard of 53 ppb. Significantly, EPA also chose to set new, first-time requirements calling on states to monitor and measure NO2 levels near major roads. Cities with at least 500,000 residents must have monitors near roadways, and larger cities and areas with major roads will have additional monitors. Cities with at least 1 million residents will continue with communitywide monitoring. All new NO2 monitors must begin operating no later than January 1, 2013.	States with non-attainment areas will be required to develop "clean-up" plans (State Implementation Plans or SIPs) that identify and implement specific air pollution control measures to reduce ambient NO2 concentrations to attain and maintain the revised NO2 NAAQS, most likely by requiring air pollution controls on sources that emit oxides of nitrogen (NOx). According to EPA, two of the top three categories of sources of NOx emissions are on-road and non-road mobile sources. See also related discussion on revisions to the ozone NAAQS below.		over to exclusively ultra-low-sulfur diesel fuel.
Ozone National Ambient Air Quality Standards (NAAQS) – On December 8, EPA announced that it will postpone until July 2011 the issuance of new NAAQS for ground-level ozone. The revised standards were initially expected by August 31, 2010, and subsequently postponed until the end of December, before this most recent delay. According to EPA, Administrator Jackson will use this extra time to "ask the Clean Air Scientific Advisory Committee (CASAC) for further interpretation of the epidemiological and clinical studies they used to make their recommendation." The original recommendation was to lower the current standard from .075 parts per million to somewhere between .060 to- .070 parts per million.	The lowest standard would hugely increase the number of counties which would have air quality that violates the standard. When an area is designated as a "non-attainment" (NA) area under the Clean Air Act, serious repercussions result immediately. These come in the form of increased costs to industry and businesses, permitting delays and restrictions on expansion, thereby forcing companies to either impose higher prices on their customers or relocate out of the nonattainment area. For construction, equipment owners may face restrictions on the use/and or operation of their off-road diesels, as well as possible federal sanctions such as emissions caps limiting economic development and the loss of federal highway transportation dollars, which can be imposed in a state that fails to develop a suitable State Implementation Plan (SIP). Nonattainment designations under the Clean Air Act may lead to construction bans in geographic areas so designated by EPA, which would have a negative effect on employment, gross domestic product, manufacturing shipments, the completion of critical infrastructure projects, and the delivery of important public services.	EPA should not tighten the 2008 ozone NAAQS at a time when implementation of the current standard is still underway and because of key uncertainties in the underlying science. The existing standard meets the legal requirement of being "requisite to protect the public health," and should not be revised.	EPA admits that it does not have any new scientific studies to support another revision to the ozone standard at this time; rather, the Agency is effectively attempting to second guess its previous 2008 decision. In the absence of innovative scientific evidence, no particular numeric change to the current standard is justified at this time. Any change in an ambient concentration set by a NAAQS standard must be "requisite" to protect human health or welfare, based on a review of updated scientific information. In addition, Congress should amend the Clean Air Act to state that the EPA Administrator should consider costs when setting NAAQS. This would allow the EPA to consider economic tools such as benefit-cost analysis, cost-effectiveness analysis, and risk-analysis in setting NAAQS.
Greenhouse Gas Emission Permitting for Buildings and Facilities – In 2010, EPA finalized a rule to tailor how certain provisions in the Clean Air Act's (CAA) Prevention of Significant Deterioration (PSD) and Title V permitting programs apply to stationary sources that emit greenhouse gas emissions. In the so-	The permitting agencies that administer the PSD and Title V programs will likely become overwhelmed by the vast number of newly-required. This very concern led EPA to adopt the tailoring rule for the Prevention of Significant Deterioration (new construction and major upgrade permits) and the Title V (operating	The CAA is not the appropriate tool to address the nature of greenhouse gas emissions. What is more, now that EPA has moved forward with its mobile source GHG rules [i.e., first-ever harmonized GHG and fuel economy standards for light-duty vehicles for model years 2012 through 2016 and a proposal to apply similar standards to heavy-duty trucks], the	Legislation and programs specifically tailored to address the unique aspects of greenhouse gases would be more effective at reducing those emissions with potentially less harm on the economy, making that a more

Contemplated, Recently Proposed or Issued Rule	Negative Impact to the Construction Industry	Needed Modifications to the Rule	Needed Modifications to the Rulemaking Process - *regulation is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law…*
called "tailoring rule," EPA set higher thresholds and longer phase-in periods before these permitting programs will apply to large and medium GHG sources. However, increasingly more facilities will be regulated in the coming years. EPA has not ruled out the possibility that even the smallest GHG emitters will eventually be covered by the PSD and Title V programs	permits) programs for stationary sources. Without the tailoring rule to modify the thresholds the number of affected facilities would be in the millions. EPA estimates there would be an increase of 140-fold for PSD permits from 280 permits issued each year to approximately 41,000 yearly. More than 6 million newly-regulated facilities would have to obtain Title V permits and the nearly 15,000 existing permits would require revisions. New building construction and major renovations would literally come to a halt as permitting delays add years to project approvals. The tailoring rule alleviated the initial concern by raising the thresholds, but that fix is only temporary. More and more facilities will be required to obtain permits in the coming years.	Agency is obligated to address GHG emission under other sections of the CAA—including permitting programs for commercial buildings and other stationary sources that emit GHGs. Congressional action is needed to stop EPA from using the Clean Air Act to regulate GHG emissions altogether and to come up with any needed alternative legislation. Congress could choose to allow EPA to move forward on mobile source emissions only.	suitable route for future controls than the CAA.
In the coming years, businesses will be reporting their GHG emissions, as per the **Mandatory Reporting of Greenhouse Gas Emissions Rule** (finalized in 2009).	AGC members own and/or operate facilities that could exceed the reporting thresholds (e.g., office buildings, large stationary equipment, and materials processing plants) and are dependent on other potentially regulated facility owners for new work and for materials. As such, the reporting rule, and any future control requirements, could directly affect AGC members' daily operations, their ability to secure future construction work, and the costs of materials, equipment, and fuel used in their construction projects.	On Dec 20, EPA proposed to delay reporting requirements until it can resolve "business sensitivity" issues. Monitoring and measurement activities requirements are to remain. So it will be several years before EPA receives the data that is to inform its rulemaking on greenhouse gas emissions.	These reporting requirements were intended to inform decision-making on GHG policy; however, the agency finalized key regulatory action on GHG emissions before receiving or reviewing the first reports. EPA provided only 60 days for comment and then finalized the rule providing very little time for these facilities to learn how monitor emissions and purchase necessary equipment to start monitoring emissions in 2010. EPA fast-tracked the rule in order for the first reports to be submitted in 2011 (for 2010 emissions).
Black Carbon or "Soot" – There is growing interest in regulating black carbon emissions from many sources. Black carbon is a short-lived greenhouse gas and very localized.	The construction industry would be most impacted by regulation of black carbon emissions from equipment. Based on actions already taken against equipment, contractors could expect retrofit mandates, idling and use restrictions, bid preferences towards newer equipment, etc.	No new rule is needed. Black carbon reductions are addressed through existing regulations that clean particulate matter from air emissions.	N/A
Lead Renovation, Repair and Painting (LRRP) Program – EPA is actively reviewing the lead paint laws that are already on the books for residential renovation and remodeling work and recently issued an advance notice of proposed rulemaking to gather information on whether and how to apply those requirements to	Commercial office buildings are re-painted and "renovated" on a continuous basis as part of on-going maintenance. Given that regulations are triggered in "target housing" if 6 square feet of painted surfaces are disturbed – simply taking residential rules and applying them to commercial buildings will mean a never-ending cycle of lead	In order to regulate RRP activities in commercial and public buildings, EPA would need to show that such activities create a lead-based paint hazard. EPA **must** conduct a study of lead paint hazards in commercial buildings before it can issue regulations on that subject. The agency has no alternative to avoid doing the study, and it cannot simply take a study from the	The Toxic Substances Control Act (TSCA), 15 U.S.C. § 2682(c)-(d), requires EPA to **first** study lead hazards in commercial buildings that arise from renovation and remodeling activities **before** it develops pertinent regulations.

Contemplated, Recently Proposed or Issued Rule	Negative Impact to the Construction Industry	Needed Modifications to the Rule	Needed Modifications to the Rulemaking Process - *regulation is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law...*
public and commercial building renovation and remodeling. This action comes in response to a legal settlement agreement that the Agency made with several environmental and public health advocacy groups. For exterior renovations of public and commercial buildings, EPA must issue a proposed rule requiring lead-safe work practices by December 15, 2011, and must take final action by July 15, 2013. For interior renovations, the EPA must consult with the EPA Scientific Advisory Board (SAB) by September 30, 2011, regarding a methodology for evaluating the risk posed by renovations in public and commercial buildings. If EPA concludes that interior renovation activities do create lead-based paint hazards, then EPA must issue a proposed rule applying specified work practices to such activities within 18 months after receiving the SAB report and must take final action 18 months thereafter.	paint testing, contractor certification, worker training, and comprehensive management practices – all increasing the cost of construction. What is more, in the residential context, it is widely recognized that there are simply not enough certified contractors to perform remodeling activities that satisfy EPA's rules. That problem will be magnified exponentially for commercial buildings. In addition, expanded LRRP rules could likely impose regulatory costs that are so high they would nullify any financial incentives offered for energy efficiency projects, and thereby discourage building upgrades designed to lower power consumption, reduce greenhouse gas emissions, and create green jobs.	residential context and use that as the basis to regulate renovation and remodeling in offices, stores, hotels, industrial sites and other commercial buildings where children largely are not present on a continuous basis.	EPA has never studied lead hazards in commercial space. Its staff and advisors from its Scientific Advisory Board freely acknowledge there is a lack of information on the existence of, and any causal impacts from, lead-based paint hazards caused by remodeling activities in commercial buildings. Congress should compel EPA to complete the commercial buildings study first before it issues pertinent regulations. Moreover, Congress should ensure that such a study is completed and released before the agency promulgates a ***proposed*** set of regulations in the *Federal Register*, anticipated by December 2011.
Lead "Dust Wipe" Testing – EPA on Aug. 6 issued a rulemaking proposal that would require contractors to perform "dust-wipe testing" after most construction activities covered by EPA's Lead RRP rule to show that lead levels comply with EPA's standards. Remodelers would be required to send testing labs samples from surfaces both in the work area and immediately outside it or hire a certified testing specialist to examine the work area. Regulated contractors would also need to provide the results of the testing to the owners and occupants of the building. For some of these renovations, the proposal would require that lead dust levels after the renovation be *below* the regulatory dust-lead hazard standards.	This proposal would add significant liability to construction firms by making the remodeler responsible for lead exposure issues existing in regulated facilities before any work is performed, as well as outside the area in which the renovation work has taken place. Moreover, as the LRRP rule expands to public and commercial buildings (see above), so would the dust-wipe testing requirements. In addition, the costs associated with the lead dust wipe testing and clearance testing requirements would be significant.	Visual inspection along with post-construction cleanup have been extremely effective and should continue as the standard of practice in the industry. The cost of the proposed amendments outweigh the minimal benefits of the new requirements, particularly in light of EPA's conclusions regarding the effectiveness of the existing cleaning verification requirements.	EPA has statutory authority only to suggest guidelines for the conduct of LRRP activities, not to impose work practice standards. EPA has not established that all RRP activities being regulated create lead-based paint hazards and EPA has not conducted a "study of certification" nor has the Agency convened a Small Business Advocacy Review Panel. The proposed amendments are inconsistent with the enabling statute (the Toxic Substances Control Act) because they would eliminate the distinction between abatement and renovation and that EPA has acted in an "arbitrary and capricious" manner because it has failed to consider cost and liability factors in this rulemaking.
Fly-Ash & Other Coal Combustion Residuals - EPA is considering two regulatory options to control the disposal of coal combustion residuals (CCRs) from electric utilities: (1) Regulate	The language in the proposed rule (the re-characterization mechanism) and listing the waste as hazardous (subtitle C option) will create a stigma that could result in curtailing one of the	EPA should make a nonhazardous waste designation for CCRs, thereby ensuring the continued beneficial use of those materials. Industry will not want to use these materials if they are determined hazardous, even	After reviewing the proposed rule, there are still too many unknowns about the future of beneficial use. The proposed rule could be

Contemplated, Recently Proposed or Issued Rule	Negative Impact to the Construction Industry	Needed Modifications to the Rule	Needed Modifications to the Rulemaking Process - *regulation is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law...*
disposal of these residuals as hazardous waste under subtitle C of the Resource Conservation and Recovery Act (RCRA), or (2) Regulate the disposal of these residuals as non-hazardous under subtitle D of RCRA. EPA maintains that it intends to safeguard certain beneficial uses of CCRs. However, language in the proposed rule advocating subtitle C re-characterization upon demolition, or at the end of the recycled material's useful life, effectively eliminates the beneficial use protection.	most widely and successfully recycled products and negatively impact natural resources, landfills and EPA's policy goal of encouraging recycling on a large commercial scale. The construction industry has used CCRs, primarily fly ash, for approximately sixty years in the construction of roads and highways: Portland cement concrete, soil and road base stabilization, flowable fills, grouts, structural fill and asphalt filler. Wet bottom ash and flue gas desulfurization (FGD) wastes also are commouly used in highway construction as base material, flowable fill, embankment fill, and soil and road base stabilization. In the building construction market, fly ash and other CCRs are diverted into floorings, landscape features, insulation, drywall/wall board, mortars and grouts, masonry blocks and building exteriors. Coal combustion residuals also are used as base, backfill, foundations and structural fill materials in building construction.	if EPA adopts a "temporary" non-hazardous status for when they are being used on a construction site. In fact, industries that beneficially use these materials need the confidence moving forward that these materials are <u>not</u> hazardous waste and will not later become hazardous waste simply because the material reaches the end of its useful life (e.g., the demolition and disposal of concrete or wallboard that incorporated fly ash).	considered an Advanced Notice of Proposed Rulemaking where EPA identifies several options and solicits information from the public. In addition, the proposed rule opened the door to many questions regarding beneficial use of these industrial materials. AGC requested additional opportunities to offer comment once EPA has provided a clear proposed regulatory option and information on how it would impact the beneficial use of CCRs.
Termination of Industry Partnerships - In early 2009, EPA terminated a long-standing voluntary program—the EPA Sector Strategies Partnership. For several years, AGC served as the construction industry's representative in this program. Together AGC and EPA sought to find workable solutions to long-standing industry-related environmental challenges, to ease regulatory burdens that impair environmental results, to increase the implementation of environmental management systems by contractors and to measure progress.	The termination of this voluntary program, the denouncing of construction in the EPA's water action plan, and the agency's new budget that focuses on enforcement and the administrative support of new rules --- all demonstrate that this administration is not interested in educating the regulated community or working with industry to improve environmental performance.	N/A	N/A

Government Withholding Relief Coalition

Repeal Section 511 of Tax Reconciliation Act (P.L. 109-222)

Summary of Section 511:
It mandates that federal, state, and local governments withhold 3 percent from payments for goods and services.

- Requires a "tax" withholdings at a rate of 3% on all government payments for products and services made by the federal government, state governments, and local governments with expenditures of $100 million or more
- Impacts payments under government contracts as well as Medicare payments, Farm payments, and grants to for-profit companies (i.e. Invoice for $100, government only pays $97)
- The 3% withheld is allocated toward the company or individual's tax liability
- Applies to all payments starting in 2012 (change made from 2011 to 2012 in P. L. 111-5, the Economic Stimulus bill)
- Imposes significant administrative costs and information reporting requirements on governments and companies
- Three primary areas for additional costs: 1) financing costs due to the decreases in cash flow, 2) annual recurring costs for additional employees, and 3) capital investments to modify financial systems
- Estimated to "increase" revenue by $7 billion from 2011 to 2015, but "raises" $6 billion of that amount in 2011 solely due to accelerated tax receipts and not an actual revenue increase from improved tax compliance
- Generates only $215 million in 2012 and increases slightly in each of the next three years thereafter. DoD estimated costs to be $17 Billion over the first 5 years for DoD alone.

Genesis:
This far-reaching new requirement was inserted as a last-minute revenue raiser into the *Tax Reconciliation Act of 2005* that was signed by the President in May 2006. While supporters argue that imposing withholdings on payments made by Federal, State and local governments will improve taxpayer compliance and reduce the tax gap, this is a withholding on all payments with no relationship to a company's tax liability and doesn't take into account the true ramifications of the requirement.

Ramifications:
There will be a large number of harmful consequences if the provision is not repealed. The provision hurts honest taxpaying businesses while it attempts to find tax delinquents by essentially forcing companies to provide the federal government with an interest-free loan. The 3% withholding significantly affects companies' cash flows. This new requirement is based on revenues from government payments with no relationship to a companies' taxable income. Companies will lose vital funds needed to operate day-to-day activities and will be forced to pass along the added costs to customers or finance the additional amount.

In addition, the costs to Federal, State, and local governments to administer the program will be substantial and the process complicated to implement. The Congressional Budget Office reported that the withholding provision is an unfunded mandate on state and local governments because it exceeds the allowable $50 million annual threshold.

Legislative Change Needed:
Congress should repeal Section 511 of P.L. 109-222 as soon possible.

Contemplated, Proposed or Issued Rule	How it will negatively impact the construction industry	How the rule should be modified	How the rulemaking process should be modified
Injury and Illness Prevention Program - OSHA is developing a rule requiring employers to implement an Injury and Illness Prevention Program. The Agency currently has voluntary Safety and Health Program Management Guidelines, published in 1989	The proposed rule would require employers to establish and frequently update programs to address safety and health hazards that may not be currently regulated.	Remove the requirement for the development of company safety programs that address hazards that are not federally regulated. OSHA should instead provide simple guidelines to the small employer community to develop and implement an effective safety and health program that focus on the regulated hazards that are significant threats in the workplace.	
Occupational Exposure to Crystalline Silica - OSHA announced in the Agency's fall 2010 regulatory agenda to pursue a new comprehensive standard for crystalline silica to require exposure monitoring, medical surveillance, and worker training in 2011.	The proposed rule recommends permissible exposure limits (PEL) of 50µg/m3 or 25µg/m3 which may be impossible to comply with in the construction industry.	Provide realistic/achievable PEL's based on real testing in the industry	
Cooperative Agreements - OSHA proposes to revise its regulations for the federally funded On-site Consultation Program to: a)define sites which would receive inspections regardless of Safety and Health Achievement Recognition Program (SHARP) exemption status; b) allow Compliance Safety and Health Officers to proceed with enforcement visits resulting from referrals at sites undergoing Consultation visits and at sites that have been awarded SHARP status; and c) limit the deletion period from OSHA's programmed inspection schedule for those employers participating in the SHARP program. SHARP is a recognition program that OSHA administers to provide incentives and support for **small**	The proposed rule would eliminate the separation of OSHA's consultation program and enforcement subjecting small employers to enforcement activity while participating in the consultation program, SHARP, or Pre-SHARP status.	This rule will discourage the use of OSHA inspectors for preventative safety audits and will reduce cooperation between OSHA and the regulated industry. It should never be promulgated.	

employers to develop, implement, and continuously improve effective safety and health programs at their jobsites.			
Musculoskeletal Disorders (MSD) Column – OSHA is proposing to change its Recording and Reporting Occupational Injuries and Illnesses regulation. OSHA has reconsidered the need for a 300 Log column for WMSD, and for defining "musculoskeletal disorders" for checking the column.	This rule requires business owners to fill in additional speculative medical information on OSHA log for injuries for which there is no applicable standard. Requires those maintaining the OSHA 300 log to make medical assessments/diagnosis beyond their capabilities. Would also require additional medical costs to accurately assess/diagnose reported conditions to achieve compliance.	This added paperwork burden does not support a standard that has been issued, it should never be promulgated.	
Building Inspectors Partnership- Secretary of Labor Hilda L. Solis sent letters to the mayors of selected cities proposing that OSHA work with and train local building inspectors on hazards associated with the four leading causes of death at construction sites. Under this program, building inspectors would notify OSHA when they observe unsafe work conditions. OSHA would then send a federal agency compliance officer to that jobsite for an enforcement inspection.	This policy provides building inspectors the authority to act as an extension of OSHA enforcement that lacks the specific knowledge and expertise to properly assess construction hazards. The training of the building inspectors as stated in the letters would be merely a 1 ½ hour course which is inadequate to properly educate the building inspectors in the proper identification of the hazards mentioned in the letter. This policy also has the potential for placing additional strain on relationships between building inspectors and contractors.	This policy should never be implemented	
Backing Operations – OSHA is proposing to promulgate a rule regulating backing operations involving construction equipment.	Would require the use of engineering controls (cameras, radar, sonar, etc.) to minimize or eliminate the number of struck-by incidents on construction sites.	Consult with construction industry experts to explore alternatives (best practices, awareness materials, etc.) to the proposal.	
Interpretation of Feasibility: Noise Standards - OSHA proposes to interpret the term *feasible* in these provisions as having the meaning of "capable of being done," or "achievable." *Feasibility* encompasses both economic and	Requires employers to implement costly engineering and/or administrative controls that may prove ineffective. It also imposes liability for a diagnosed hearing injury on a current employer without determining that injury was sustained during time of employment with current employer or even if the injury is work	OSHA should maintain current enforcement policy	This should be considered a significant rulemaking instead of interpretive rulemaking.

technological considerations, but this proposal addresses only economic feasibility OSHA proposes to consider administrative or engineering controls economically feasible if they will not threaten the employer's ability to remain in business or if the threat to viability results from the employer's having failed to keep up with industry safety and health standards. OSHA further intends to change its enforcement policy to authorize the issuance of citations requiring the use of administrative or engineering controls when these controls are feasible in accordance with their interpretation.	related.		
Administrative Policy Change to Penalty Structure - OSHA has implemented several changes to its administrative penalty calculation system. Administrative penalty adjustments have been made to several factors which impact the final penalty issued to employers. The most significant changes are 1) the time frame for considering an employer's history of violations will expand from three years to five 2) the time period for considering the classification of repeated violations will be increased from three to five years; and 3) the 10% reduction for employers with a strategic partnership agreement will be eliminated.	This policy changes how penalties are calculated. It will result in more resources dedicated to vacating citations and penalties, increasing litigation by employers possibly creating a backlog of OSHA cases very similar to that currently being experienced by the Mine Safety and Health Administration (MSHA). However, the current administration believes that higher penalties will have an adequate deterrent effect.	OSHA should maintain the current penalty structure.	

Advisory Committee for Construction Safety and Health (ACCSH) - The ACCSH is a continuing advisory body established by statute that provides advice and assistance in construction standards and policy matters to the Assistant Secretary.	ACCSH is tasked with advising the Assistant Secretary of Labor for OSHA in the formulation of construction safety and health standards and related policy under the Construction Safety Act (CSA) and OSH Act.	Under the new administration, the committee's role/authority appears to have diminished considerably in advising the agency on construction safety and health issues. Frequently, rulemakings and/or policy changes have been initiated or implemented without consulting with the safety and health experts that make up the committee. We believe that for the agency to be successful in their efforts, industry must be involved.	

OFFICE OF MANAGEMENT AND BUDGET (OMB)

Contemplated, Recently Proposed or Issued Rule	Negative Impact to the Construction Industry	Needed Modifications to the Rule	Needed Modifications to the Rulemaking Process - *regulation is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law...*
"High Road" Contracting Reform. The backbone of this initiative would be a revival of Clinton Administration "Blacklisting" Rules overturned by Congress in 2001.	• Would create unreasonable pre-qualification screening that would force perfectly responsible contractors to adopt social policy goals of the administration or be pushed out of the Federal market. • The premise and broad assumptions of the concept of this potential rulemaking could not be further from the truth with respect to the federal construction market. • AGC has long opposed efforts to paint all contractors with a broad brush as suspect, and we have proactively supported procurement reform to improve delivery of federal construction services.	Never get promulgated.	• It is expected that the President would implement this potential rulemaking by Executive Order. The FAR Councils would be ordered to implement the presumed government-wide regulations. The public should have a fair chance to review such a massive sweeping change to the Federal procurement process. • Reform of the federal procurement process should recognize construction's unique melding of industry sectors while ensuring the government is using the most cost-effective method of procurement.
Project Labor Agreements	• Encourages Federal agencies to force open shop contractors to enter into agreement with unions. • This rulemaking has already caused great upheaval in the Federal market, created an environment that is encouraging bid protests, strained relationships between Federal owners and the contracting community, placed Federal agency career procurement personnel under an inordinate amount of political pressure to meet the Administration's expectations to award more PLAs. • These many factors combined has created the potential to push many	Repeal Final Rule issued April 13, 2010.	• President Obama forced this issue by Executive Order in February 2009. Consequently, this rulemaking has already caused great discord amongst the Federal construction agencies. No one agency s implementing the rule the same way as the other. Some agencies, such as GSA, have gone so far as to give a price preference for bids accompanied by a PLA. We believe this is a

Contemplated, Recently Proposed or Issued Rule	Negative Impact to the Construction Industry	Needed Modifications to the Rule	Needed Modifications to the Rulemaking Process - *regulation is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law…*
	contractors out of the Federal market.		violation of the Competition in Contracting Act (CICA) and deserves review. • Congress should also investigate the possible reach the White House may have extended to the Federal agencies with respect to ensuring specific construction projects have PLA mandates.
Buy American – Recovery Act	• ARRA Rules for Buy American is distinct in that it establishes a new definition of "American–made", and applies the requirement to sectors of the construction market that have never had to comply with either of the previous requirements before. • There have always been concerns that other countries would retaliate against violations of U.S. trade obligations and that foreign countermeasures could result in net job losses. Additional U.S. steel production fostered by the Buy American provisions could translate into a gain in the steel industry of around 1,000 jobs. However, if just a small proportion of US exports purchased by public entities abroad was at risk of or outright retaliatory measures, the job loss entailed could total at least 6,500 American jobs.	Repeal Final Rule Issued August 30, 2010	We are concerned that this provision is working its way into other construction-related legislation, creating new regulatory burdens.

COUNCIL ON ENVIRONMENTAL QUALITY (CEQ)

Contemplated, Recently Proposed or Issued Rule	Negative Impact to the Construction Industry	Needed Modifications to the Rule	Needed Modifications to the Rulemaking Process - regulation is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law…
Updated Principles and Guidelines (P&G) for Water and Land Related Resources Implementation Studies	Would substantially revise how the large range of modern water projects—locks and dams, levees, navigation channels, ecosystem restoration, flood risk management, watershed protection, water supply projects – are designed, and constructed. Many of these needed infrastructure projects may never be built if these regulations are promulgated.	• CEQ draft should be scrapped and process restored with U.S. Army Corps of Engineers (USACE), as directed by Congress. • A recent peer review undertaken but the National Academy of Sciences found the CEQ proposed revisions lack clarity, consistency and focus, adding that the draft P&G is filled with ambiguity and is in dire need of substantial revision and clarification.	• The P&G revision was ordered to be undertaken by USACE at the direct order by the Congress when it enacted the Water Resources Development Act (WRDA) of 2007. • Section 2031 of the Act directed the Secretary of the Army (Civil Works) to revise the P&G adopted by the U.S. Water Resources Council in March 1983. • In 2009, CEQ – in direct violation of the will of the Congress -- took control of the P&G revision and expanded the scope to make the P&G revisions apply to all Federal agencies.

January 18, 2010

AMT
The Association For Manufacturing Technology
Over 100 Years of Building Global Productivity

The Honorable Darrell Issa
The United States House of Representatives
2347 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman:

I am writing on behalf of AMT – The Association Technology in reply to your letter dated December 10, 2010. I appreciate the opportunity to comment on the impact of over burdensome regulations on U.S. manufacturers, particularly our smaller companies. Excessive regulations hinder job growth and innovation – key drivers of a prosperous economy. Reining in regulatory costs along with bringing down the structural costs that put U.S. companies at a competitive disadvantage is a guiding principle of AMT's Manufacturing Mandate, a copy of which I am pleased to include with this letter.

AMT represents U.S.-based manufacturing technology companies. Our members provide the tools that enable production of all manufactured goods. In their workplaces and in their products, safety and efficiency are critical elements of the manufacturing process. AMT members value the role our government plays in providing standards for each. Unfortunately, in many cases, regulations are excessive, confusing and so costly that R&D and business development suffer as a result, hindering job growth and stifling innovation.

This is particularly true with regulations originating from the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA), where it is obvious that regulators know little or nothing about manufacturing. Our companies are not consulted for input, and the result is a convoluted set of regulations that make compliance increasingly difficult and costly. In some cases, industry has more input on European Union regulations than on the EPA's. Segments of the manufacturing technology industry must now even deal with the Food and Drug Administration (FDA) which drew the responsibility for regulating lasers. Today, every laser machine has to be registered with the FDA. Talk about bakers regulating the trains – this is the actual application of that old joke!

The overwhelming majority of AMT members are small businesses and the regulatory burden is worst for them. According to a recent study by the Small Business Administration's Office of Advocacy, small manufacturers bear a disproportionate share of the high cost of government regulations. Yet, these companies are looked to as the innovators. They are the businesses that will discover safer, cleaner ways to make things.

The government must take a more focused and deliberate approach in determining how best to implement and distribute the regulatory burden so that manufacturers, particularly small ones, are not competitively disadvantaged. Regulatory reform should be one part of a comprehensive national strategy to help revitalize and

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strengthen our manufacturing sector – a strategy focused on driving innovation and increasing competitiveness. AMT has been working to advance the principals of our Manufacturing Mandate as the place to begin.

AMT's Manufacturing Mandate calls for a coordinated federal manufacturing policy that: 1) incentivizes innovation and R&D in new products and manufacturing technologies; 2) assures the availability of capital; 3) increases global competitiveness; 4) minimizes structural cost burdens, including costly regulatory compliance; 5) enhances collaboration between government, industry, and academia; and 6) builds a better educated and trained "smart force."

The Mandate advocates three major policy objectives to achieve these six goals:

1. Reduce uncertainty and foster innovation – The slow recovery is fueling continued uneasiness over the future. A persistent fear that government will raise taxes and add to the regulatory burden of small manufacturers stifles investment. Retroactive and short-term extensions of incentives help in the very short-term, but not when developing a business plan even five years out. There is also a skilled worker shortage of critical proportion in our industry, at a time when so many Americans are unemployed. Congress and the Administration must come together to address these issues and turn the focus on restoring confidence and encouraging innovation.

2. Enhance coordination and cooperation among agencies/departments – The Manufacturing Mandate supports a consistent, cohesive approach to managing the government's pro-manufacturing initiatives. Duplicate efforts, complicated bureaucracies, and unclear directives waste valuable federal dollars. The Mandate recommends establishing a central manufacturing policy structure within the Executive Branch to develop policy, focus research, and coordinate implementation of the manufacturing mandate strategies.

3. Utilize the existing infrastructure – In this time of strained budgets and high deficits, we must leverage the resources already in place to help accomplish our goals. Existing manufacturing technology communities of Manufacturing Extension Partnerships (MEPs)/economic development centers, manufacturing companies, and academic institutions are excellent places to start., schools and businesses working more closely together can maximize the effectiveness of MEPs, public/private R&D, federal and state technology funding and other government programs and services. Manufacturing technology communities – located across the country – are where innovation and job creation are most likely to occur.

The 112th Congress has the responsibility of ensuring that a competitive manufacturing sector is at the top of our national agenda. Efforts to root out impediments to our success, such as this one by the Oversight and Government Reform Committee, are necessary. I hope we can count on your support for all of the principles outlined in this Manufacturing Mandate. My staff and I welcome the opportunity to meet with you and/or your staff for a discussion of what Congress can do to move manufacturing to the top of our national agenda.

Best regards,

Douglas K. Woods
President

Enclosure

BCFC
Business Coalition for Fair Competition
www.governmentcompetition.org

January 12, 2010

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

Dear Mr. Chairman:

The Business Coalition for Fair Competition (BCFC) is a national coalition of businesses, associations, taxpayer organizations and think tanks that are committed to reducing all forms of unfair government created, sponsored and provided competition with the private sector. BCFC believes the free enterprise system is the most productive and efficient provider of goods and services and strongly supports the Federal government utilizing the private sector for commercially available products and services to the maximum extent possible.

In response to your inquiry of the business community in identifying job killing regulations to roll back, BCFC urges your oversight and investigation into **unfair government competition with the private sector.**

Specifically, *we offer two regulations for your review and oversight*:

1) The March 4, 2009 Obama Administration memo on "Government Contracting" (FR Doc. E9-4938); and
2) OMB Circular A-76 (USC 48 CFR 7.3).

History

As far back as 1932, a Special Committee of the House of Representatives expressed concern over the extent to which the government engaged in activities which might be more appropriately performed by the private sector. The first and second Hoover Commissions expressed similar concern in the 1940's and recommended legislation to prohibit government duplication of private enterprise. However, there was no formal policy until 1955, when the House passed and the Senate Committee reported legislation to require the Executive Branch to increase its reliance on the private sector. Final action was dropped only upon assurance from the Executive Branch that it would implement the policy administratively. Bureau of the Budget Bulletin 55-4 ... was issued in 1955 prohibiting agencies from carrying on any commercial activities which could be provided by the private sector. Exceptions were permitted only when it could be clearly demonstrated in specific cases that the use of the private sector would not be in the public interest. On January 15, 1955, the policy directive issued by President Eisenhower stated: "the Federal Government will not start or carry on any commercial activity to provide a service or product for its own use if such product or service can be procured from private enterprise through ordinary business channels". President Eisenhower's policy has remained on the books for 50 years and endorsed by Republican and Democratic Administrations, in Office of Management Budget Circular A-76, until it was removed by President George W. Bush in 2003.

Each time Congress has authorized a White House Conference on Small Business (1980, 1986, and 1995) – a

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convention of small business men and women who adopt a platform of issues for action by Congress and the executive Branch – unfair government competition with and duplication of the private sector has been a top concern.

In 1980, the first White House Conference on Small Business made unfair competition one of its highest-ranked issues. It said, "The Federal Government shall be required by statute to contract out to small business those supplies and services that the private sector can provide. The government should not compete with the private sector by accomplishing these efforts with its own or non-profit personnel and facilities."

In 1986, the second White House Conference made this one of its top three issues. It said, "Government at all levels has failed to protect small business from damaging levels of unfair competition. At the federal, state and local levels, therefore, laws, regulations and policies should ... prohibit direct, government created competition in which government organizations perform commercial services ... New laws at all levels, particularly at the federal level, should require strict government reliance on the private sector for performance of commercial-type functions. When cost comparisons are necessary to accomplish conversion to private sector performance, laws must include provision for fair and equal cost comparisons. Funds controlled by a government entity must not be used to establish or conduct a commercial activity on U.S. property."

And the 1995 White House Conference again made this a priority issue when its plank read, "Congress should enact legislation that would prohibit government agencies and tax exempt and anti-trust exempt organizations from engaging in commercial activities in direct competition with small businesses." That was among the top 15 vote getters at the 1995 Conference and was number one among all the procurement-related issues in the final balloting.

However, the unfair government-sponsored competition issue has not been a top priority for Congress, or the White House (under either party), for several years.

Not since the President Reagan created a Commission on Privatization has there been a focus on reducing the size of government and transferring to the private sector those Federal activities that are commercially available. The Report of the President's Commission on Privatization, "Privatization: Toward More Effective Government, April 1988, laid a strong foundation, but since it was issued at the end of Reagan's second term, little action was taken. The Small Business Administration's Office of Advocacy conducted a series of hearings and issued a report, "Government Competition: A Threat to Small Business", (March 1980), and "Unfair Competition by Nonprofit Organizations With Small Business: An Issue for the 1980s" (June, 1984). It offered testimony, when requested by the House and Senate Small Business Committees, in 1988 and 1996 and conducted some research on non-profit competition in 1999.

In 1998, Congress enacted the Federal Activities Inventory Reform (FAIR) Act, Public Law 105-270. First implemented by President Clinton, agencies identified were required to conduct an annual inventory of activities that are "commercial" in nature – perform a Yellow Pages Test. The first inventory found more than 850,000 Federal employee positions are commercial, out of a total Federal workforce (not including Postal Service or uniformed military personnel) of 1.8 million. Some 40 percent of the Federal workforce is in commercial activities operated by a Federal executive agency which provides a product or service that could be obtained from a commercial source; including such activities as mapping, computer programming, landscaping, photography, construction, laundry services, printing, auto repair and engineering. These are activities performed by Federal employees in Federal government agencies that duplicate and compete with the private sector, including small business, found in the Yellow Pages on Main Street, USA.

In his first term, President George W. Bush made a good start with his "competitive sourcing" initiative. This activity, a key part of the President's Management Agenda, required Federal agencies to subject commercial activities of the government to market-based competition. Competitive sourcing required agencies to compete

these functions against the private sector, with the provider offering the best value to the taxpayer – regardless of whether that provider is the government employees or a private firm – getting to do the work. Since the government's in-house incumbent had to modernize and economize in order to beat the private sector, the taxpayer wins regardless of whether the work stayed in-house or got contracted.

Competitive sourcing should have been an arrow in the private sector's quiver – not the entire arsenal. Even the modest Bush program has been thwarted by Congress, with restrictions on the FAIR Act and A-76 competitions. The Obama Administration is moving in the wrong direction – it is "in-sourcing" work from private enterprise to government employee performance.

How Does the Government Compete or Facilitate Unfair Competition? The following is a summary of just a few of the ways in which the Federal Government creates or supports unfair government-sponsored competition with the private sector.

Government Competition/Utilization of the Private Sector – More than 850,000 Federal employees are engaged in occupations that are commercial in nature. According to Dr. Ron Utt of The Heritage Foundation, Director of President Reagan's Office of Privatization, if market-based competition were applied to all 850,000 positions, some $27 billion could be saved annually for five years.

Non-Profit Competition – Nonprofit organizations unfairly compete with private, for-profit businesses by engaging in commercial activities, but not paying taxes. This also denies the government revenue. Then-Senate Finance Chairman Grassley and House Ways and Means Chairman Thomas both investigated abuses by non-profit and tax exempt organizations in the 109th Congress, but there was no legislative remedy. From YMCA's competing with private health clubs to credit unions competing with banks to rural electric and telephone cooperatives competing with investor-owned utilities, as well as nonprofit health and life insurance companies, provided special tax status under sec. 501(c) of the Internal Revenue Code, unfairly compete with the private sector. Their special "exempt" treatment is clearly intended for "governmental" activities, rather than commercial. A report by the tax-writing Committee on Ways and Means of the U.S. House of Representatives noted:

> "The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds and by the benefits resulting from promotion of the general welfare." (Unfair Competition: The Profits of Nonprofits, James T. Bennett, Thomas H. DiLorenzo, Hamilton Press, 1989, p. 26)

Policies that prevent nonprofit organizations from engaging in unfair competition (via the tax code) with the private sector should be implemented.

Prison Industries - Federal Prison Industries unfairly compete with the private sector. Provisions in Defense Authorizations bills and Appropriations bills have curbed FPI's mandatory source status. Comprehensive reform passed the House in the 108th Congress (a vote of 350 to 65, November 2003, H.R. 1829, and a bill was reported by the Senate Governmental Affairs Committee, S. 346). In the 109th Congress, the bills are H.R. 2965 and S.749; the House bill passed 362-57 on September 14, 2006). Federal and State prison industries are also opening the commercial market for inmate services. Enactment of FPI reform legislation, create a level competitive playing field, eliminate unfair prison industry advantages, and a prohibit prison industry participation in the commercial market should be a priority.

Universities - Schools of higher education are increasingly venturing away from their core missions of teaching and conducting basic research. Financial pressures, ranging from reduced government funding to pressures to

limit tuition increases have led university presidents to transform academicians into entrepreneurs. Universities are generating revenues from commercial activities to supplement their budgets. Universities enjoy significant advantages over for-profit companies. They are eligible for billions of dollars in grants from Federal and State governments. They often have the ability to secure non-competitive, sole source contracts with government agencies. They pay no taxes. Their overhead – buildings, electricity, even equipment, is already paid for and is provided for "free". Their student labor force is either unpaid or compensated at well below prevailing market wages. They carry no professional liability insurance, do not have to pay unemployment compensation and in many cases are exempt from social security contributions. When universities enter into contracts to perform services, they usually insist on "best effort" clauses, which absolve them of ever completely finishing a project. They are also recipients of millions of dollars in free or discounted hardware and software, donated from vendor firms so that students will learn on their systems, be proficient in their use upon graduation and instill a consumer loyalty that will translate into sales once these students move up in the ranks of their private sector employers. The advantages universities bring to the market make it virtually impossible for private firms to compete. Policies that restrict universities to their education and research missions and prevent unfair competition with the private sector should be enacted.

Bailouts & Government Corporations - The American voter has become angered at the conduct of government-sponsored enterprises and corporations, as well as a variety of bailouts of the private sector. The view that America is a nation based on free market principles is becoming blurred. Whether it is bailouts of the auto industry, insurance companies and banks, or government-run corporations such a Fannie Mae, Freddie Mac, the Corporation for Public Broadcasting, or the Postal Service, to government takeover of student loans and health care, the American people see billions of dollars in losses that make the debt and deficit worse and unsustainable.

Insourcing

On March 4, 2009, the Obama Administration issued a memo on "Government Contracting" (FR Doc. E9-4938), which began the current "insourcing" policy – the conversion of work currently performed by private sector contractor firms to performance by Federal government employees. The memo stated:

> "Government outsourcing for services also raises special concerns. For decades, the Federal Government has relied on the private sector for necessary commercial services used by the Government, such as transportation, food, and maintenance. Office of Management and Budget Circular A-76, first issued in 1966, was based on the reasonable premise that while inherently governmental activities should be performed by Government employees, taxpayers may receive more value for their dollars if non-inherently governmental activities that can be provided commercially are subject to the forces of competition. However, the line between inherently governmental activities that should not be outsourced and commercial activities that may be subject to private sector competition has been blurred and inadequately defined. As a result, contractors may be performing inherently governmental functions. Agencies and departments must operate under clear rules prescribing when outsourcing is and is not appropriate. ... Finally, the Federal Government must ensure that those functions that are inherently governmental in nature are performed by executive agencies and are not outsourced. ... I further direct the Director of OMB, in collaboration with the aforementioned officials and councils, and with input from the public, to develop and issue by September 30, 2009, Government-wide guidance to: ... (4) clarify when governmental outsourcing for services is and is not appropriate, consistent with section 321 of Public Law 110-417 (31 U.S.C. 501 note)."

In June 2010, Senator Robert Menéndez (D-NJ) was asked about the effect insourcing had on small and minority owned business. He said insourcing was "counter-intuitive to the President's goal of creating opportunities in the federal contracting system for diversity." Sen. Menendez concluded, "We already have a much more limited universe than we should, and if [insourcing] is being pursued, then it is only going to erode

what exists, so it doesn't make a lot of sense." ("Procurement pinata out of hispanic reach" *Hispanic Link News Service*, June 21, 2010.)

In August 2010, Defense Secretary Robert Gates said, "We weren't seeing the savings we had hoped from insourcing." ("Insourcing failed, DOD's Gates says. Now what?" *Federal Computer Week*, August 10, 2010.)

According to inventories compiled under the Federal Activities Inventory Reform (FAIR) Act, beginning under the Clinton Administration in 1999, there are still more than 850,000 Federal employees engaged in activities which are commercial in nature. Subjecting these positions to established public-private comparisons can save more than $27 billion annually over the next 5 years. We are concerned that in-sourcing is occurring without such public-private comparisons or cost analysis. In fact, a recent Air Force insourcing effort was reversed when a court challenge was filed noting that no standards for cost analysis were utilized.

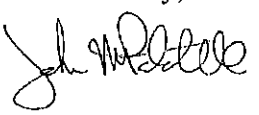
This shift to government performance of commercial activities not only hinders the private sector, including small and minority owned business, but places additional costs on taxpayers during a lengthened period of a steep decline in the nation's economy, a staggering national debt, and a high national rate of unemployment. The government intrusion and competition in the private market that insourcing brings is having a detrimental effect on capital investment and job creation. The insourcing agenda not only impacts private firms, including small and minority owned firms which have lost jobs or have jobs threatened by the insourcing of Federal contracts, but the policy also increases private sector unemployment and shrinks state and local tax revenues.

Conclusion

We suggest your committee work to reverse these trends, advocate an immediate moratorium on insourcing, develop a clear and objective metric for justifying and determining cost-effectiveness of government performance of commercial activities to protect the interest of taxpayers, eliminate bailouts and government performance of activities best left to the private sector, and end direct and indirect government subsidies that impede the ability of a competitive private market to flourish, create jobs, and contribute to society and the quality of live for all Americans.

Finally, your committee should roll back these job killing regulatory policies (FR Doc. E9-4938 and USC 48 CFR 7.3), and help return to the Federal policy, beginning in 1955, that recognizes that real economic growth and job creation is in the private sector, and emphasizes that government should not compete with its citizens, but should rely on the private sector to the maximum extent possible.

Sincerely,



John M. Palatiello, President
Business Coalition for Fair Competition (BCFC)

Business Roundtable

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January 7, 2011

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

Dear Mr. Chairman:

Thank you for your letter requesting Business Roundtable's views on existing and proposed regulations that negatively impact the economy and the maintenance and creation of jobs. We very much appreciate the opportunity to provide input on your Committee's important work in this area.

Business Roundtable long has been concerned about the costs and burdens imposed by the significant growth in government regulations. Regulatory burdens facing U.S. business are rapidly accelerating as a consequence of legislation passed over the previous two years that must now be implemented and by decisions made by regulatory agencies to aggressively expand their regulatory reach. This regulatory tsunami, occurring hastily and at a time when the U.S. economy is struggling to emerge from a deep recession, is hindering investment and job creation. As Ivan Seidenberg, Chairman of Business Roundtable, noted in a June 21, 2010 letter to then OMB Director Orszag, "[v]irtually every new regulation has an impact on recovery, competitiveness and job creation. Often that impact is negative. On an individual basis, most businesses can cope with each new regulation. But the collective impact on the economy is enormous, and often harmful." http://businessroundtable.org/uploads/hearings-letters/downloads/20100621_Letter_to_OMB_Director_Orszag_from_BRT_and_BC_with_Attachments.pdf

Regulations are like hidden taxes. They impose costs that are not readily apparent but are real. Just as the public must pay for government spending programs through higher taxes, they must also pay a high price for regulations – as customers, employees and stockholders. The soaring costs of regulation stifle productivity, wages and economic growth. Regulations also undermine jobs and international competitiveness. Poorly designed and implemented regulations impose costs much greater than their benefits and dampen economic activity.

In 1994, Business Roundtable issued *Toward Smarter Regulation*, which identified growing, poorly designed regulations in the environmental, health and safety areas as significant cost factors to business and our economy and proposed a framework for smarter, more effective regulation. The observations and recommendations contained in this document are just as relevant today as they were in 1994. In particular, Business Roundtable noted that regulations frequently are not well-coordinated among agencies and that the overall cumulative impact of regulations on our economy is not considered or well-understood. Sadly, little progress seems to have been made in the intervening years to establish a more sensible regulatory regime. I am enclosing a copy of this report for your review.

While burdensome regulations affect many areas of our economy, Business Roundtable members have identified three major areas of greatest concern: environmental regulation, financial reform, and health care and retirement benefits. In these areas, the potential regulatory costs and the sheer number of regulations with which business must comply pose significant challenges. Issues with specific current or proposed regulations within these broad categories are listed in the enclosed attachment with a brief description of our concerns. In some cases, particularly with respect to financial reform, proposed regulations have not yet been issued.

We would be happy to discuss any of these issues in further detail with you or your staff or provide you with additional information.

Thank you again for giving us the opportunity to share our views and for your personal interest in identifying regulations that reduce jobs and economic growth while generating little or no benefits.

Sincerely,

Larry D. Burton

Larry D. Burton

Attachments (2)

C: The Honorable Elijah Cummings, Ranking Minority Member
The Honorable Edolphus Towns

Business Roundtable℠

Business Roundtable Policy Positions on Existing and Proposed Regulations

Environmental Regulations

The Environmental Protection Agency has unveiled an aggressive Clean Air Act and Clean Water Act regulatory agenda that, cumulatively, threatens a significant number of electric power plants and industrial boilers. Most of these regulations are scheduled to be finalized over the next two years.

NESHAPS for Utility Boilers: Section 112 of the Clean Air Act (CAA) requires EPA to establish National Emissions Standards for Hazardous Air Pollutants (NESHAPS) for major (and area) sources of hazardous air pollutants (HAPS) that are subject to regulation. Pursuant to a consent decree approved by the U.S. District Court for the District of Columbia, EPA is required to issue a proposed rule for the regulation of HAPS emissions from coal and oil-fired utility boilers by March 16, 2011 and to finalize the rule by November 16, 2011. It is anticipated that any final rule will require the installation of costly new control equipment at virtually every existing coal-fired utility boiler. In addition, it is not clear if technology is available to meet the anticipated standards if EPA does not use its authority to sub-categorize or tailor its regulations depending on coal types. Regardless of the final form of the rule, it is anticipated that significant coal generating capacity will be at risk for closure as a consequence of the rule.

NESHAPS for Industrial, Commercial and Institutional Boilers: In two separate rulemaking proceedings, EPA proposed rules in April 2010 that would reduce HAAPS emissions from existing and new industrial, commercial and institutional boilers and process heaters located at major sources and reduce HAPS emissions from existing and new industrial, commercial and institutional boilers located at area sources. On December 7, 2010, EPA petitioned the federal court for an extension of the deadline for issuance of a final rule to April 13, 2012. EPA argued that it needed additional time to review over 4800 public comments filed in the rulemaking proceedings. In addition, EPA indicated that the final rules would reflect material changes from the proposed rules. According to an EPA Fact Sheet on the NOPR for major sources, there are approximately 13,555 boiler and process heaters at major sources in the U.S. The Fact Sheet estimates that the total national capital cost for a final major source rule would be approximately $9.5 billion in 2012, and the total national annual cost would be $2.9 billion in 2013. EPA also estimated that for area sources, there are approximately 183,000 boilers at 92,000 facilities. Most of these area sources are owned and operated by small entities. EPA estimates that the total national capital cost for a final area source rule would be approximately $2.5 billion, and the total national annual cost would be $1.0 billion.

Given the number of industrial sources affected and the potential severity of the final rule, this proposed regulation could be extremely costly and disruptive. Moreover, a number of older facilities could be expected to close given the magnitude of the capital and annual operating costs anticipated. Permitting the number of upgrades that will be required under these regulations will present a significant challenge.

Regulation of Greenhouse Gas Emissions Under the Clean Air Act: The EPA has finalized regulations under the Clean Air Act requiring major sources of greenhouse gas (GHG) emissions to be subject to the prevention of significant deterioration (PSD) and permit programs of the Clean Air Act. On December 23rd, 2010, EPA also indicated that it intended to promulgate New Source Performance Standard (NSPS) regulations for major sources. In general, the PSD program requires sources to apply the best available control technology (BACT) to limit emissions of air pollutants, determined on a case-by-case basis, and the NSPS program establishes a "floor" on what this technology can be. At this time, there is no readily available commercial technology to limit GHG emissions. On November 10, 2010, EPA issued BACT guidance for the states to implement. In general, this guidance calls for a reliance on efficiency measures, rather than fuel switching or entirely new, unproven technology to control GHG emissions. EPA has made it clear, however, that through subsequent rulemakings, the universe of affected facilities is likely to expand, thus subjecting more and more facilities to new case-by-case regulatory reviews. EPA is being challenged in court on every significant decision involving this program.

The Clean Air Act was not designed and is ill-suited to regulate a ubiquitous pollutant like CO2. CO2 emissions do not pose a local or even national problem; whatever impact there may be is global. EPA's current regulations require potentially lengthy BACT case-by-case reviews for new facilities or major modifications of existing facilities, thus further delaying investment in new manufacturing plants. In addition, EPA has made it clear that its current regulations are just the first step in what will be a series of further rulemakings potentially expanding the scope, severity and cost of the program.

Cooling Water Intake Structures: The withdrawal of cooling water from rivers, lakes or oceans by electric power plants or manufacturing facilities may result in adverse environmental impacts on aquatic life. These impacts may be greater at facilities with open-loop, or once-through, cooling water systems, which withdraw water from a source, use it to cool and then discharge it back into the source. Other facilities use closed-loop cooling water systems, in which cooling water is itself cooled, e.g., in cooling towers, and then recycled for further cooling purposes. Approximately 43% of electric power plants in the U.S. with cooling water systems use an open-loop system. On December 3, 2010, the District Court for the Southern District of New York approved a settlement agreement which requires EPA to issue a Notice of Proposed Rulemaking under the Clean Water Act for existing facilities by March 14, 2011. It also requires EPA to issue final rules by July 27, 2012. If final rules in the rulemaking proceeding require electric power plants and manufacturing facilities with open-loop, or once-through, cooling systems to install closed-loop cooling systems, then the potential retrofit costs could be substantial. The massive cost of retrofits could cause the

premature retirement of power plants. The North American Electric Reliability Corporation recently estimated that the costs of rules could cause 32,500-36,000 MW of capacity to be vulnerable to retirement if EPA requires the conversion of open-loop cooling water systems to closed-loop systems. The premature retirement of that capacity would have implications for the reliability of the electric power grid. Finally, some power plants may simply not have the space required for the installation of cooling towers and other associated equipment.

Revised National Ambient Air Quality Standard for Ozone: Under section 109 of the Clean Air Act, EPA is required to issue national ambient air quality standards (NAAQS) for six air pollutants: ozone, particulate matter, NOX, CO, sulfur dioxide and lead. EPA is required to issue both primary and secondary standards. Primary standards are requisite to protect the public health with an adequate margin of safety. Secondary standards are requisite to protect the public welfare from any known or anticipated adverse effects of the pollutants. On March 27, 2008, EPA, under the Bush Administration, finalized primary and secondary NAAQS for ozone. EPA established a new primary NAAQS for ozone of 0.075 parts-per-million (ppm) using an eight-hour dialing averaging time. This standard was at variance with the recommendations of the Clean Air Act Advisory Committee for a standard of 0.060-0.070 ppm. These NAAQs were appealed to the U.S. Court of Appeals for the D.C. Circuit. When the Obama Administration assumed office, EPA requested that the D.C. Circuit hold the appeal in abeyance with EPA officials appointed by the Obama Administration reviewed the 2008 standards. In September 2009, EPA Advised the D.C. Circuit that it would reconsider the 2008 NAAQS for ozone and would propose revised standards. On January 6, 2010, EPA proposed to revise the NAAQS for ground-level ozone to the level initially proposed by the Advisory Board. In November, 2010, EPA advised the D.C. Circuit that it would issue a final rule by December 31, 2010. On December 8, 2010, EPA requested a continued abeyance from the D.C. Circuit, indicating that it intends to issue a final rule by July 29, 2011. Compliance with the proposed NAAQS for ozone, if finalized, is expected to pose considerable challenges. According to EPA, 253 of the 675 counties in the U.S. with ozone monitoring equipment have not yet achieved compliance with the NAAQS for ozone issued in 1997. One half of the counties will be nonattainment areas under the standard of 0.075 ppm issued in 2008 and over 80% of the counties could be in nonattainment under the standard of 0.060 proposed last January. Nonattainment status requires reasonable further progress toward meeting the standards, which makes permitting new sources of ozone pollution virtually impossible unless offsets or other reductions are found and the lowest achievable emissions rate for a proposed facility is achieved.

Financial Regulatory Reform

There are a number of provisions stemming from the Dodd/Frank Financial Regulatory Reform legislation that are unnecessary, do not constitute "reform" in any recognizable sense, and are burdensome and costly. Below are examples of regulations stemming from the Dodd/Frank legislation that have negative consequence to the economy and jobs.

Proxy Access: The SEC has created a new federal right to proxy access. This undermines decades of state law, precedent and organic evolution of corporate law. The rules will result in short term focus by boards of directors, turn director elections into political contests, and could have serious consequences for economic growth and job creation. The BRT and the Chamber of Commerce have sued the SEC to vacate the rules and the issue is pending in the courts.

CEO Pay Ratio Disclosure: Section 953(b) of Dodd/Frank requires disclosure of the ratio of CEO compensation to the median of the compensation of all the company's employees. The statute sets forth a very specific calculation and, as such, it is a very difficult and expensive undertaking. It could potentially cause companies to take actions that result in less employment, such as outsourcing, to produce better ratios. Less specificity in the calculation is necessary.

Disclosure of Conflict Minerals: Section 1502 relating to conflict minerals will require any company that uses one of a number of commonly used minerals in the production of not only its products, but also potentially those it has contracted to manufacture, to conduct an inquiry to determine if the minerals came from the Congo, and if it cannot determine that they did not, to engage in a costly due diligence procedure, including an audit.

Reporting of Payments: Section 1504 requires resource extraction issuers to report payments to foreign governments, including taxes, royalties, fees and other material benefits. Such information will be competitively sensitive in many cases and its public disclosure may violate the laws of foreign countries.

Neither Section 1502 or 1504, as well Section 1503 relating to disclosure of mine safety violations to the SEC, have anything to do with the protection of investors. They are costly requirements that have been attached to the federal securities laws to address unrelated concerns. The SEC has no expertise to regulate in this area.

Other corporate governance provisions: Other sections of Dodd-Frank relating to executive compensation, including the advisory vote on compensation (Section 951) and mandatory stringent clawbacks (Section 954), will interfere with the ability of boards of directors to hire, retain and motivate the most qualified senior management teams to produce growth and jobs.

Whistleblower bounty: Pursuant to Section 922, the SEC has proposed rules which provide a substantial financial bounty to company employees who go directly to the SEC and report violations of the securities laws. These rules would circumvent and render ineffective company whistleblower and compliance programs and deprive companies of the ability to promptly address improper activities by their employees.

Derivatives Regulation: It is critical that end users of derivatives -- companies that employ derivatives to manage risk, not create it through speculative trading -- should have a clear

exemption from margin, capital, and clearing requirements imposed by the Dodd-Frank Act. We urge the Committee to focus on the dozens of regulations that have been or will be proposed to implement the Act's derivatives title (Title VII), which will unnecessarily burden end-user companies. There are a number of regulations, including proposals imposing margin, capital, and clearing requirements and defining the terms "major swap participant" and "swap dealer", which could cause end-user companies to be subject to bank-like derivatives regulation, when increased transparency combined with regulation of true swap dealers would address any systemic risks caused by derivatives use.

When considering the need for and effects of derivatives regulation on end-users, it is important to bear in mind the following:

- End-users account for approximately 10% of derivatives use and largely do not invest in derivatives to speculate for profit.

- A BRT study shows that a 3% margin requirement could result in the loss of 100,000 jobs and tie up an average of $269 million per year per company. These results are conservative as they reflect only the imposition of an "initial" margin requirement, though "variation" margin charges could be much higher, tying up more capital and costing more jobs.

Health Care and Retirement Benefits

The following are key regulatory issues that have been raised by Business Roundtable member companies in the area of health and retirement benefits.

ERISA Preemption: It is critically important that ERISA preemption be preserved in health care reform regulations under the Patient Protection and Affordable Care Act (PPACA). One of the key features of ERISA is the ability of an employer to design a plan to fit the profile/needs of its workforce. The imposition of employer mandates inhibits an employer's ability to do this and will likely result in cost increases for large, self-funded plans without commensurate benefits to employees.

"Grandfathering": These rules from the PPACA were too cumbersome and didn't allow plans to comply with "the early requirements over a period of time."

"Cadillac Plan" Tax: This new tax in the PPACA will divert resources away from investment in new technology, processes and jobs, and will significantly raise costs, harming global competitiveness. As a result of efforts to avoid the tax, one of the revenue sources that supports health reform will be significantly reduced.

Health IT: The CMS Notice of Proposed Rulemaking (NPRM) and the Interim Final Rule (IFR) are creating uncertainty and confusion, jeopardizing the goal of the rapid adoption of electronic health records. Without policy changes, innovation will be marginalized and job creation threatened.

RDS: Due to the elimination of the tax-free aspect of Retiree Drug Subsidy (RDS) in the PPACA, employers may be more likely to drop retirees into the open market, where costs to the Federal government (i.e., under Part D of Medicare), could exceed those to the Federal government under RDS.

Limited Plans: PPACA provides the Secretary transitional authority to allow benefit limits up until 2014. We support the "mini-med waiver authority" to allow employers to continue to offer limited benefit plans – to current categories of employees – until 2014 to ensure continued affordable coverage of part-time, seasonal, temporary and full-time employees in a waiting period; and vital services such as maternity coverage – a benefit that is generally not available in the individual market. We believe this waiver authority should be extended beyond 2014.

Medical Loss Ratio (MLR) Requirements: Careful consideration should be given to these requirements. They may:

- Increase premiums,
- Reduce competition in the marketplace, and
- Narrow provider choice for consumers.

Premium Increase Reporting: A new federal rate review regime would:

- Threaten carrier solvency leaving consumers and providers with unpaid claims,
- Decrease competition,
- Decrease choice of providers, and
- Add unnecessary administrative burden.

Administration and Reporting:

- The Health Care Reform bill includes a provision that requires more companies to file 1099 tax forms; the cost to modify systems to collect the data and send the additional 1099s will be significant.

- The short amount of time in which plans are required to comply with new ICD10 and 5010 coding requirements imposes an incredible administrative burden that will increase administrative costs significantly.

Retirement Policy Regulations:

- Proposed PBGC regulations under ERISA section 4062(e) would hinder normal business transactions in ways that are not supported by the language or intent of the statute. The rules were intended to apply only when an employer ceases operations at a facility,

but the proposed regulations would apply in many cases where no operations were shut down and would expose plan sponsors to potential liability that is disproportionate to the size of a transaction. By placing a significant toll charge on customary and economic business transactions, employers will be limited in their flexibility to redirect capital and efforts into job formation.

- Regulations governing cash balance and other hybrid pension plans, including interpretations of market rate of return standards and conversion requirements, are requiring unnecessary expenditures by employers and are disrupting pension benefit plans, adding costs and diverting resources from job creation.

- Ongoing regulatory projects with respect to pension plan funding should seek to minimize year-to-year volatility and maximize the employer's ability to predict costs. Without appropriate smoothing of asset values and interest rate swings, volatile funding requirements will intensify the cyclical nature of the U.S. economy -- forcing employers to make larger contributions when the economy is at its weakest. This, in turn, would deepen recessions and slow job growth. In contrast, more predictable, steady funding rules provide employers with the certainty they need to hire new employees and to make capital investments.

The Business Roundtable

Toward Smarter Regulation

1994

Toward Smarter Regulation

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Executive Summary

America is experiencing a dramatic increase in government regulation, with the most significant growth in the environmental, health, and safety areas. While the goals of many of these regulations may be laudable, there is a growing realization that we are wasting resources: Legislatures and agencies simply are not allocating limited resources in a cost-effective manner. We could achieve as good or better protection of human health and the environment at far less cost by regulating smarter.

Regulations are like "hidden taxes" that impose costs that are not readily apparent, yet are enormous. Just as the public must pay for government spending programs through higher taxes, they must also pay a high price for regulations – as customers, employees, and stockholders. The soaring costs of regulation stifle productivity, wages, and economic growth. Regulations also undermine jobs and international competitiveness. The increasing strain on our nation's resources brings into sharp focus the challenge for the '90s and beyond: The nation must not only reduce regulation, but when we choose to regulate, we must regulate smarter.

Regulators cannot regulate smarter unless their leaders allow it and demand it. Strong leadership must change the current incentives that drive agencies to create new regulations with little restraint, but offer virtually no reward for reforming or eliminating existing regulations or obviating the need for new ones.

Business is not alone in calling for regulatory reform; taxpayers, state and local governments, academics, members of Congress, the President and the Vice President have all expressed concern about the rising tide of regulations. To provide a framework for smarter regulation, The Business Roundtable recommends that federal, state, and local governments implement the following twelve tenets of rational regulation:

1. Risk-Based Priorities and Public Education: To provide more cost-effective protection to human health and the environment, regulatory priorities should be based upon realistic considerations of risk. Agencies must educate the public about the level of risks proposed for regulation compared to risks familiar to the public, as well as the cost of reducing that risk. The government should estimate the relative risks posed by different substances, products, or activities and decide whether, and

how, to regulate based on those risks. Resources should be committed where the greatest risks can be reduced at the least cost. The government should ensure that the public understands the magnitude of each risk compared to more familiar risks, as well as the costs of reducing that risk.

2. Risk Assessment and Risk Management: Risk assessment methodologies should be continuously improved, and agencies should establish a clear distinction between assessing risks and deciding how to manage them. The scientific process of risk assessment should be made as objective as possible, and uniform standards should be applied. Any necessary policy or scientific judgments should be disclosed. Cost-effective approaches to managing risks should be promoted.

3. Sound Science: Agency decision making should be grounded on the most advanced scientific knowledge currently available. New regulations should be based on the most advanced and credible scientific knowledge, and existing regulations and methods should be regularly updated to incorporate scientific advances. In making decisions and setting priorities based on risk, agencies should use "best estimates," not worst-case estimates of risk.

4. Benefit-Cost Analysis: Benefit-cost analysis should be utilized by agencies when developing regulations, with preference given the least costly regulatory alternative that accomplishes program objectives. First, agencies should use benefit-cost analysis to determine whether or not a proposal should be considered for adoption. Second, agencies should use cost-effectiveness analysis to select the regulatory option that achieves regulatory objectives in the least costly way.

5. Market Incentives and Performance Standards: Market-oriented solutions and performance standards should be favored over command-and-control regulation. Market-based regulatory approaches reproduce the efficiency of a free market by internalizing the cost of a regulated activity or substance. They allow regulated parties to meet or exceed regulatory goals in the least costly way. Moreover, market incentives and performance standards adapt to changed circumstances more quickly than government command-and-control regulation.

6. Productivity, Wages, and Economic Growth: Methodologies should be implemented and continuously improved to assess the impact of major regulations on productivity, wages, and economic growth, as well as the adverse impact on jobs and international competitiveness in industries that bear the burden of regulation. For our economy to grow, regulatory and economic goals must become complementary, not conflicting. Government must be more sensitive to the impact of regulation on wages, prices, jobs, and international competitiveness.

7. Coordination Among and Within Agencies: Coordination of regulatory activities among and within agencies should be improved to eliminate inconsistencies, duplication, and unnecessary regulatory burdens. To address problems within the jurisdiction of multiple agencies, a strong interagency committee should engage in strategic planning and develop a coordinated response before regulations are proposed. Each agency should also coordinate its programs that address different aspects of the same problem.

8. Openness: The entire regulatory process, including centralized Executive review and management of agency rule-making, should be open to public scrutiny, to promote the quality, integrity, and responsiveness of agency decisions. Secrecy should be removed from the regulatory development and review process. More rules should be developed through regulatory negotiation, which involves open negotiations between regulators and interested parties.

9. Periodic Review: Programs and regulations should be periodically reviewed for purposes of determining whether they should be reformed, discontinued, or consolidated. Periodic review allows for government-wide priority setting through reforming or eliminating regulations, updating scientific methodologies, reorganizing an agency, or reallocating responsibility among agencies. Where appropriate, legislatures can ensure a stricter review process by setting firm deadlines by which they will be compelled to evaluate and vote for continuation of a program, or the program will terminate.

10. Federalism: Regulatory authority should be more rationally allocated among the federal, state, and local governments, and federal regulatory programs should avoid unfunded mandates. Many activities and substances are controlled by a mix of federal and state regulation. Modern commercial realities demand a more cost-effective balance of federal and state regulation. The federal government is primarily responsible for achieving this balance and should carefully consider whether to preempt and regulate a field or leave the field to the states. The federal government should also refrain from directing state and local governments to administer or comply with federal programs without providing the necessary funds.

11. Paperwork Burdens: Paperwork burdens caused by regulatory programs should be expressly assessed and substantially reduced. The massive paperwork burdens imposed on business, the public, and governments themselves must be reduced. The Paperwork Reduction Act and OIRA's paperwork control responsibilities should be strengthened. Moreover, administrative process costs – the inflexibility, unresponsiveness, and delay that characterize many regulatory programs – should be examined and reduced.

12. Regulatory Budget: A framework should be developed to account for expenditures required by regulations and to promote greater fiscal restraint on regulatory programs. There is a pressing need for government to be more sensitive to the cumulative costs of regulations. Under a regulatory budget, agencies would have a powerful incentive to regulate in a more cost-effective manner; each agency could be limited in the amount of regulatory costs imposed on the economy each year.

* * *

A unique opportunity for meaningful regulatory reform presents itself. There is a growing consensus not only on the need for regulatory reform, but also on how to achieve it: Government must assess the seriousness of risks proposed for regulation, compare risks to be regulated to risks familiar to the public, disclose the costs of regulation, regulate only if the benefits outweigh the costs, and select the most cost-effective, market-driven method possible. This is smarter regulation. And smarter regulation is better regulation, for consumers, governments, and business alike. President Clinton's Executive Order on Regulatory Planning and Review espouses many of these principles for improving both regulations and the regulatory process itself.

However, the White House, Congress, agencies, and the states must all commit themselves to smarter regulation. The Business Roundtable recommends that governments at all levels implement these twelve tenets. *Our nation cannot afford to ignore the challenge to regulate smarter.*

I. Introduction

Since the 1970s, our nation has implemented far-reaching regulatory programs to protect human health and the environment. Congress created new agencies – such as the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Consumer Product Safety Commission – with broad responsibilities to reduce risks to public health, safety, and the environment. Older agencies, such as the Food and Drug Administration, have been given expanded regulatory authority. Sweeping legislative mandates have directed agencies to reduce risk to the environment, health, and safety, almost without compromise.

Some government intervention in the economy may be necessary to achieve desirable goals such as a cleaner environment, safer working conditions, and safer products. In many instances, specific regulations have been well-conceived and reasonably implemented. These efforts have produced substantial benefits for the country and its people.

And yet, even with the best of intentions, government simply is not allocating limited resources in a cost-effective manner. Despite a dramatic increase in environmental, health, and safety regulation, experience has taught us that often our regulatory efforts have been more costly and less effective than they could have been. Moreover, the enormous costs of federal and state regulations exert a heavy drag on the economy. They depress wages, stifle productivity and economic growth, drive up prices, and impede innovation. They also burden federal, state, and local governments. In our increasingly global economy, excessive regulation seriously undermines the competitiveness of U.S. businesses. Ultimately, the American public suffers.

The costs of regulation are undeniably high, and the costs of many regulations plainly outweigh their benefits. The annual cost of federal regulation was conservatively estimated at $581 billion for 1993; it is projected to rise to $662 billion by the year 2000.[1] Almost 75% of that cost increase is expected from additional environmental, health, and safety regulation.[2] According to EPA projections, by the year 2000 the United States will spend $160 billion annually on pollution control alone – almost 90 percent more than was spent in 1987.[3] Although economic regulation in areas such as transportation and energy has declined, cost reductions from earlier reforms have been dwarfed by new regulation in the environmental, health, and safety areas.[4]

Beyond the problems caused by the rising costs of government

regulation, the regulatory process itself has become unduly rigid, unresponsive, and inconsistent. These problems have sparked increasing concern about the rationality of the regulatory process and a growing determination to do something about it.

The Need For Priorities and Reform

Consumers, business, and governments all have a stake in regulatory reform. Federal, state, and local governments, like business, are part of the regulated community. The enormous liability of federal facilities and municipalities for Superfund cleanups is but one growing regulatory crisis faced by governments at all levels. To absorb the costs of regulation, businesses may be forced to raise prices, reduce production, eliminate jobs, cut research and development, or even go out of business entirely. Likewise, federal, state, and local governments may raise taxes or reduce services; some local governments may even face the prospect of bankruptcy.

Although the direct costs of regulation typically are imposed on businesses and governments, they ultimately are passed on to the American consumer through higher prices, diminished wages, reduced quality or availability of products and services, as well as through increased taxes. Per household, these costs total about $5,900 per year.[5]

These soaring costs of government regulation come at a challenging time. The national debt now exceeds $4 trillion – $16,600 for every man, woman, and child in America.[6] This expanding deficit makes it painfully obvious that our resources are limited. Many government priorities – including crime prevention, education, and defense – must compete for these limited resources. Any increase in regulation must be weighed against other legitimate priorities, as well as against its adverse impact on wages, productivity, and economic growth.

Too many regulations and regulatory programs have suffered from inadequate analysis and discipline. Both the Legislative and Executive Branches must share responsibility – first, to address this problem, and second, to cure it. The Business Roundtable believes that existing and proposed regulatory programs should ensure that:

- Stated goals are in fact attainable.
- Each program or regulation is worth the added cost to the nation (in increased prices and lower wages and productivity, for example).

- Each regulation is the most efficient means to achieve its objective and minimizes adverse economic impacts.

Toward "Smarter" Regulation

The regulatory process must be reformed. Governmental resources at all levels must be allocated more rationally. And business must devote its resources to becoming more innovative and productive. The question is not only how the nation can reduce regulation, but also how we can regulate smarter. This question is crucial in both good and bad economic times.

The concept of smarter regulation is not novel. The increasing regulatory burden has led to a growing demand for reform across a spectrum of American society – from leaders of all business sizes, academics, public interest groups, government officials, and the general public. This demand has already sparked some important steps toward reform; indeed, Vice President Gore's recent National Performance Review report expressed alarm at the cost of regulation and concluded:

> We must clear the thicket of regulation by undertaking a thorough review of the regulations already in place and redesigning regulatory processes to end the proliferation of unnecessary and unproductive rules.[7]

To this end, President Clinton signed Executive Order 12866 on Regulatory Planning and Review on September 30, 1993. This Order carries forward the concern of the last three Administrations by calling for a vigorous regulatory planning and review process and embracing many principles that would improve both the regulatory process and regulations themselves.

However, the hard work necessary to "reinvent" regulation still lies ahead. To further this worthy goal, The Business Roundtable recommends that governments at all levels implement the following twelve tenets of rational regulation:

1. *Risk-Based Priorities and Public Education:* To provide more cost-effective protection to human health and the environment, regulatory priorities should be based upon realistic considerations of risk. Agencies must educate the public about the level of risks proposed for regulation compared to risks familiar to the public, as well as the cost of reducing that risk.

2. *Risk Assessment and Risk Management:* Risk assessment methodologies should be continuously improved, and agencies should establish a clear distinction between assessing risks and deciding how to manage them.

3. *Sound Science:* Agency decision making should be grounded on the most advanced scientific knowledge currently available.

4. *Benefit-Cost Analysis:* Benefit-cost analysis should be utilized by agencies when developing regulations, with preference given the least costly regulatory alternative that accomplishes program objectives.

5. *Market Incentives and Performance Standards:* Market-oriented solutions and performance standards should be favored over command-and-control regulation. They allow regulated parties to meet or exceed regulatory goals in the least costly way.

6. *Productivity, Wages, and Economic Growth:* Methodologies should be implemented and continuously improved to assess the impact of major regulations on wages, productivity, and economic growth, as well as the adverse impact on jobs and international competitiveness in industries that bear the burden of regulation.

7. *Coordination Among and Within Agencies:* Coordination of regulatory activities among and within agencies should be improved to eliminate inconsistencies, duplication, and unnecessary regulatory burdens.

8. *Openness:* The entire regulatory process, including centralized Executive review and management of agency rulemaking, should be open to public scrutiny to promote the quality, integrity, and responsiveness of agency decisions.

9. *Periodic Review:* Programs and regulations should be periodically reviewed for purposes of determining whether they should be reformed, discontinued, or consolidated.

10. *Federalism:* Regulatory authority should be more rationally allocated among the federal, state, and local governments, and federal regulatory programs should avoid unfunded mandates.

11. *Paperwork Burdens:* Paperwork burdens caused by regulatory programs should be expressly assessed and substantially reduced.

12. *Regulatory Budget:* A framework should be developed to account for expenditures required by regulations and to promote greater fiscal restraint on regulatory programs.

Each of these tenets is explored in greater detail below.

II. Twelve Tenets of Rational Regulation

1. Risk-Based Priorities and Public Education: To provide more cost-effective protection to human health and the environment, regulatory priorities should be based upon realistic considerations of risk. Agencies must educate the public about the level of risks proposed for regulation compared to risks familiar to the public, as well as the cost of reducing that risk. The escalating costs of regulation and limited resources available make it imperative to establish priorities in environmental, health, and safety regulation. Despite the vast and expanding investment in programs to protect public health and the environment, there is a growing realization that we are not spending our money in the most cost-effective manner to achieve the greatest possible advances. All too often, regulatory priorities are based on misguided public perceptions of risk instead of valid scientific knowledge and reasoned analysis. Accordingly, there is a pressing need to establish a risk-based approach to environmental, health, and safety regulation and to provide the public with better information for evaluating and comparing risks that are candidates for regulation. The goal is not to put economic values before human values, but to achieve effective risk reduction at a lower cost.

Risk-Based Priorities

The problem of protecting human health and the environment may best be defined as the management of risk. The failure to manage risk effectively and to establish priorities rationally translates ultimately into a failure to protect health, safety, and the environment. Through the use of *comparative risk assessment*, the government can estimate the relative levels of risk posed by different substances, products, and activities and can establish priorities in determining whether, and how, to regulate. The government, with public input, should use comparative risk assessment to compare the magnitude of various risks and set priorities where we can achieve greater protection of human health, safety and the environment in the most cost-effective manner.

- The Environmental Protection Agency has recognized the urgent need for a risk-based regulatory approach employing comparative risk assessment. In its landmark report, *Reducing Risk*, EPA warned: "There are heavy costs involved if society fails to set environmental priorities based on risk. If finite resources are expended on lower-priority problems at the expense of higher-

priority risks, then society will face needlessly high risks. If the priorities are established based on the greatest opportunities to reduce risk, total risk will be reduced in a more efficient way, lessening threats to both public health and local and global ecosystems."[8]

Unfortunately, public fears and political expediency – not scientific analysis – often dictate the priorities set by legislatures and agencies. As a result, government risk-reduction efforts have been unplanned, uncoordinated, and inconsistent. Many risk-reduction programs simply have not been effective:

- Some very costly programs and regulations do not address the more serious risks.
  - ➤ Congress originally estimated that the Superfund program would cost $5 billion when it was enacted in 1980. Independent estimates now project the program will cost between $106 and $302 billion for Superfund and between $372 and $744 billion for related remedial programs[9] (in total, up to 25% of the national debt). Notwithstanding these enormous costs, a group of EPA professionals have ranked risks associated with hazardous waste sites well below other problems receiving far less resources.[10]
- Regulations based on uncertain or unsound scientific information are not revised when more reliable data is produced.
  - ➤ In January 1991, EPA's Office of Drinking Water eliminated the primary standard for silver because it determined that there were no adverse human health effects of silver in drinking water; yet the Office of Solid Waste continues to maintain silver on RCRA's toxicity characteristic list, even though the RCRA silver standard was based on the obsolete drinking water standard.[11]
- Some regulatory actions actually increase risk.
  - ➤ Early in the 1980s, government scientists argued that asbestos exposure could cause thousands of deaths. Congress responded by passing a sweeping law that led cities and states to spend between $15 and $20 billion to remove asbestos from public buildings. But three years ago, EPA officials acknowledged after further research that ripping out the asbestos had been an expensive mistake; it raised the exposure of the public because asbestos fibers had become airborne during

removal.[12] It also delayed the opening of many schools and other buildings.

Executive Order 12866 (Sec. 1(b)(4)) states:

> In setting regulatory priorities, each agency shall consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction.

The White House, the Office of Information and Regulatory Affairs, Congress, each agency, and the states should vigorously promote this policy. The Executive Branch should develop a current inventory of known risks, rank them, and periodically update the inventory every two to four years in light of new information. It should seek extensive public involvement in the process. EPA started towards this goal by creating and implementing two seminal reports, *Unfinished Business* and *Reducing Risks*. These reports were prepared by environmental experts who assessed, compared, and ranked the various environmental risks regulated by EPA

- *Unfinished Business* (1987) found that EPA and Congress in most instances had directed resources to problems based on misguided public fears, instead of objective scientific evidence.
- *Reducing Risks* (1990), produced by an independent committee of the Science Advisory Board, revised the risk rankings set forth in *Unfinished Business* and encouraged EPA to base its programs on the severity of risks and the availability of cost-effective options that would reduce the risks and not violate the Agency's statutory mandates.

The other health and safety agencies – including FDA, OSHA, USDA, and CPSC – would benefit from similar projects. Agencies should address highest priority risks first, rank new risks as they are identified in the future, and routinely communicate this information to the public. A coordinating group should be used to facilitate communication and long-term planning among agency leaders; Executive Order 12866 (Sec. 4(d)) provides such a mechanism by establishing the Regulatory Working Group.

Many other efforts could further the establishment of risk-based priorities. For example, President Clinton might issue guidance to agencies to require the use of risk analysis as a tool for making pollution prevention decisions. This would complement the President's

recent Executive Order 12856, which was designed to make pollution prevention central to government operation and procurement. Moreover, a task force composed of scientific experts from the environmental, health, and safety agencies should create a government-wide manual on the regulation of risk. The manual would provide guidance to regulators on how to manage risks.

In the end, the responsibility lies with Congress and state legislatures to promote a risk-based approach to environmental, health, and safety regulation. The most effective legislation for controlling risk will promote risk assessment while providing the agencies with sufficient flexibility to incorporate state-of-the-art scientific knowledge. In the short term, Congress and state legislatures should require the risk-reduction agencies, such as EPA, to conduct comparative risk assessments to set priorities. An Office of Risk Analysis should be created in EPA and other agencies that need increased expertise in analyzing and ranking risks. As statutes are reauthorized, reformed, and created, Congress and state legislatures should require – not inhibit – the consideration of risk, costs, and benefits in designing regulatory policy. Legislatures should set clear goals for regulatory programs, and these goals should be understandable to the regulated community and the public.

Public Education: Improved Risk Communication

Risk communication is critical to establishing risk-based priorities that are acceptable to the public. The government must educate the public about the level of risks proposed for regulation compared with familiar risks, as well as the costs of regulating them. Agencies often fail to regulate in a cost-effective manner because priorities are based on misguided public fears. All too commonly, agencies fail to inform the public adequately about risks proposed for regulation or misinform the public by making biased or exaggerated risk estimates. This distorts the public's perception of risk, which in turn influences the legislature's agenda and leads to irrational and costly regulatory mandates.

Government has the responsibility to accurately inform the public about the level of risks and to minimize distortion and exaggeration of risks. *Risk communication* is an interactive process in which government, the public, business, media, and the environmental and scientific communities exchange information and opinions about risk

and related concerns. In the past, risk communication has been viewed as a one-way channel from experts to the public, but risk communication should be a two-way street. Effective risk communication should satisfy the public that they are informed about the relevant issues within the limits of available knowledge. It should also generate information on which decision makers base their choices. This framework for effective risk communication should extend to all levels of the regulatory process.

To allow public involvement in the important decisions about whether, and how, to regulate various risks, government must educate the public about the risks to be regulated – in terms nonexperts can understand. This can be achieved through the process of *risk comparison*. Risks proposed for regulation that are unfamiliar to the public should be compared to familiar risks to convey the magnitude of the risk involved.

Risk comparison is critical to permitting the public to engage in the regulatory decision-making process. Moreover, risk comparison techniques are improving. One technique, risk ladders, improves the validity of risk comparisons by providing a range of probabilities for a single class of risk. Risk comparisons are most useful when they involve risks that occur in the same decision context, exhibit similar risk-perception attributes (such as whether they are voluntary or involuntary), and have similar outcomes. Multiple comparisons often will be more helpful than single comparisons. While the nature of different risks often varies in some respects, there should not be inflexible rules for comparing risks. The goal of risk comparison should be to enable the public to make informed choices about the risks they incur and the costs of reducing those risks. Government should inform the public about the relative magnitude of regulated risks, as well as those proposed for regulation, compared to risks commonly encountered and understood by the public. The government must also disclose to the public the potential cost of regulating those risks.

Environmental, health, and safety agencies should develop public risk communication programs. As part of their risk communication programs, agencies should summarize relevant qualitative and quantitative information on the nature of each risk, the nature of the benefits that might be achieved if the risk were reduced, the available alternatives, and uncertainty about risks, costs, and benefits. Agency

risk messages should include an estimate of the magnitude of the risk as well as a characterization of the current or potential efforts to reduce it. This includes the cost and adverse consequences of regulating the risk, who must pay the cost, the effectiveness of various regulatory options, and whether regulation of the risk creates additional risks of its own. Agencies should use risk communication to educate the public so they can be involved in formulating policies and establishing priorities – not to generate support for predetermined conclusions.

Effective risk communication also requires that when agencies assess the size of risks and decide how to manage those risks, decision making should be open to the public. To improve the quality of risk communication with the public, agencies should: distinguish policy or judgmental considerations from scientific considerations when estimating the size of risks and deciding how to manage them; instead of using single-value or worst-case risk estimates, identify a range of credible risk estimates and their corresponding probabilities of occurrence; and disclose and explain any uncertainties in data or scientific knowledge. The important value judgments that must be made in deciding how to manage risks should be disclosed.

Risk communication should be based on a written record that is available to the public: A record facilitates understanding and improvement of the agency's decision. It also prevents surprise when information on a particular risk is disseminated and enhances the consistency and accuracy of that information.

Comparative risk assessment and risk communication provide the means for implementing a more effective and efficient approach to environmental, health, and safety regulation. Comparative risk assessment allows agencies to estimate the size of various risks so that rational priorities can be established and risk can be reduced in the most cost-effective manner. Risk communication enables the public to understand the magnitude of a risk proposed for regulation compared to familiar risks, as well as the costs of reducing that risk. If elected officials and regulators fail to implement this risk-based paradigm, we will lose the opportunity to better protect human health and the environment at less cost and to increase public confidence in the regulatory process itself.

2. Risk Assessment and Risk Management: Risk assessment methodologies should be continuously improved, and agencies should establish a clear distinction between assessing risks and deciding how to manage them. Recent scientific and technical advances have made it possible to improve the core of the regulatory process, risk assessment and risk management.

Risk assessment is the technical process for estimating the level of risk posed by a product or process – that is, the probability that a given harm will occur. Risk assessment, as applied to a substance, proceeds in four major steps: (1) hazard identification, determining what kinds of adverse health effects a substance, product, or activity can cause; (2) dose-response assessment, predicting the degree of adverse effects at a given exposure level; (3) exposure assessment, estimating the amount of exposure; and (4) risk characterization, combining the foregoing into a numerical range of predicted deaths or injuries.[13]

Once risk assessment estimates the risk, *risk management* – the policy-oriented or political determination of what to do about the risk – should be employed. Unfortunately, agencies often merge the primarily scientific process of risk assessment with the primarily political process of risk management. This undermines both the validity and quality of agency decision making.

Separate Risk Assessment and Risk Management

Risk assessment and risk management should be separated as much as possible – both by agencies when conducting risk analyses and by legislatures when designing statutes.

The risk assessment should constitute an agency's best effort to employ the most advanced scientific and technical methods to predict accurately the size of the risk. Because risk assessments often require assumptions to fill information gaps, however, the intrusion of subjectivity into science cannot be totally eliminated. This subjectivity has two components: scientific (or professional) judgment and policy judgment. Nevertheless, most intrusions of scientific and policy judgments can be identified, and these value judgments made in the risk assessment process should be clearly and fully disclosed to the public.[14]

Once the agency makes the most accurate and objective estimate of the relevant risks in the risk assessment process, it can then make an open decision on how best to address that risk in the risk management phase.

Improve Risk Assessment and Risk Management Methodologies

A number of steps can be taken to improve the risk assessment and risk management processes. First, risk assessment methodologies and guidelines should be reviewed and updated to reflect the state of the art. In the short-term, agencies should review their risk assessment guidelines and methodologies and make improvements where appropriate.

- The Clean Air Act Amendments of 1990 created a Risk Assessment and Management Commission and directed the National Academy of Sciences to prepare a report on EPA's risk assessment methodology. This helped motivate EPA to reconsider and update its risk assessment guidelines.

The White House and Congress should strengthen the expertise of the Office of Science and Technology Policy in risk analysis. OSTP could be assigned the responsibility to develop detailed guidance for agencies on how best to use science in the evolving risk assessment process and to develop government-wide risk assessment guidelines. Uniform risk assessment guidelines could also be developed by an interagency committee or by experts outside of government. Those guidelines would:

- bolster the credibility of agency risk assessments;
- prevent duplication and foster joint risk assessment efforts among agencies regulating the same substance;
- define the types of data and interpretations relevant to agency testing procedures and help the regulated community to understand agency decisions; and
- promote uniform risk assessment procedures among the states.

Greater efforts are also needed to develop a more complete and current database of relevant scientific data to be used in the risk assessment process. The lack of scientific data and the uncertainty about various risks significantly hinder measuring and comparing risks accurately. The growing volume and reliability of scientific data, however, have greatly improved the risk assessment field. The data decrease the need to rely on inference and informed judgments to bridge gaps in scientific knowledge.

The government should establish a mechanism that would allow new

scientific information to be easily and quickly incorporated into the risk assessment process. This mechanism should allow for information to be provided by the agencies, academia, business, and the general public. Agencies also should establish procedures to reevaluate risk assessments and risk management decisions in light of scientific advances.

In addition to improving risk assessment methodologies, agencies should favor cost-effective approaches in the risk management phase as a matter of policy. Once the risk assessment process identifies the level of risk posed by a substance, product or process, policymakers should consider the full range of options for reducing or eliminating the risk. The principle for choosing among options should be reducing risk in the most cost-effective manner. Regulatory options should be analyzed in light of the full spectrum of costs and benefits (including risks of alternatives and the economic consequences of the regulation).

Risk assessment and risk management are promising tools for helping regulators achieve the ultimate goal of our environmental, health, and safety programs – greater reduction of risk to health and the ecology with our limited resources.

3. Sound Science: Agency decision making should be grounded on the most advanced scientific knowledge currently available. The difficulty of allocating limited resources for maximizing risk reduction is compounded by the common failure of agencies to base their analyses on the most advanced scientific principles. Without sound science, risks cannot be accurately assessed and effectively compared.

Science and technology are constantly evolving and improving; often they outpace the life cycle of regulations. Indeed, some regulations may become obsolete before they are adopted. This makes it all the more imperative that agencies use the most advanced and precise scientific methods to calculate risk estimates that form the basis for agency decisions. Moreover, agencies should regularly update their regulations and programs to incorporate advances in scientific knowledge.

To establish priorities and make regulatory decisions, agencies often must compare the size of various risks by using risk assessments. Unfortunately, agencies often lack complete data, leading to scientific

uncertainty. To compensate for scientific uncertainty, agencies must rely on default assumptions, which are sometimes codified in inference guidelines. To increase the reliability and credibility of their risk assessments, agencies should strive to structure their default assumptions and inference guidelines so that they will accurately reflect real risks. In characterizing risks, agencies should consider the probability that estimated risk values approximate the true size of the risks.

When faced with gaps in scientific data, agencies all too often have used a series of worst-case default assumptions and upper-bound probability estimates throughout the risk assessment process. The cumulative effect of these highly conservative assumptions may be to produce greatly exaggerated estimates of risk.

Agencies often base their decision on single-point estimates of risk, which assign a single value for a risk estimate. Typically, agencies incorporate policy judgments into single-point risk estimates by basing them upon highly conservative or worst-case estimates. Single-point estimates, however, do not reveal the degree to which risk estimates are both uncertain and highly conservative. Unrealistic risk estimates, however, undermine the credibility of agencies' scientific methods, can cause undue public alarm, prevent cost-effective regulations, and limit the public's ability to understand and respond to regulatory decisions.

Common agency practices contribute to biased risk estimates:

- Agencies often use highly conservative or worst-case assumptions for exposure estimates when more accurate data are available.[15]
  - ➤ OSHA bases occupational cancer risks on the assumption that a hypothetical worker is exposed at the permissible exposure limit 8 hours per day, 5 days per week, and 50 weeks a year, for 45 years.[16]
  - ➤ EPA sometimes assumes that an individual is exposed to emissions at a distance of 200 meters from the factory, 24 hours a day, every day, for 70 years.[17]
- Regulators often assume that there is a linear relation between the dose of a substance and its response or effect when there is no scientific rationale for the assumption.[18]
- Researchers sometimes base their research on reactions of animals that are most sensitive to the substance under review, instead of

> using animals that would best replicate a human reaction to the substance.[19]

When regulators lack information for a value or parameter needed for a risk estimate, they should use uncertainty analysis techniques. Uncertainty analysis techniques identify a range of possible values and their probability of occurrence. To promote public accountability, agencies should explain assumptions, inferences, and value judgments made in the risk assessment and characterize their impact on the estimated value of the risk.

Although risk assessments should provide a range of risk values to indicate data limitations and scientific uncertainty, the "best estimate" of risk – the most credible estimate possible from available scientific information – should be provided for policymakers and the general public in the risk management phase.

The use of sound science is only one tool for improving regulation, and it does not relieve political leaders and regulators of the responsibility for making the inevitably difficult decisions required. But it will help prevent misallocating vast resources to reduce inconsequential risks, will promote open decision making, and will increase public confidence in the regulatory process. Ultimately, the public will benefit.

Executive Order 12866 (Sec. 1(b)(7)) emphasizes the importance of sound science:

> Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.

The White House should work with agencies to promote this goal and should hold them accountable for adhering to it throughout the regulatory review process, and state agencies should apply this same principle.

Moreover, agency scientific and technical expertise can be improved at the federal and state level. As EPA has proved, agencies can effectively use outside experts to analyze internal scientific capabilities and to recommend structural improvements. Federal agencies such as OSHA and state environmental agencies should emulate EPA and FDA and create scientific advisory panels to participate actively their strategic planning and internal reform processes.

Science should be institutionally represented in agency decisions that depend on scientific evidence. Scientists can validate analytical methods and procedures, even if the ultimate regulatory decision will be based partially on science and partially on policy. Periodic outside review procedures bolster the scientific credibility of agency decision making.

Emphasis on the scientific soundness of the regulatory process will make that process more credible and transparent. It should reduce the tension among the White House, Congress, the agencies, and the states and should increase public confidence in regulatory policy.

4. Benefit-Cost Analysis: Benefit-cost analysis should be utilized by agencies when developing regulations, with preference given the least costly regulatory alternative that accomplishes program objectives. Every regulatory program consumes financial resources – of the government that is regulating, of the regulated community that must comply with the regulations, and, ultimately, of the consumers of the product or activity that is regulated. Since resources are limited, the government should maximize the benefits and minimize the costs of regulation, so that resources are not squandered. To further this goal, agencies should make better use of benefit-cost analysis, in which the benefits are weighed against the costs of a regulatory proposal *before* decisions are made and regulations are implemented.

Benefit-cost analysis generally proceeds in the following four steps: (1) identifying relevant impacts, (2) calculating monetary values for impacts, (3) discounting for time and risk, and (4) choosing among policies. First, all relevant impacts of a proposed action must be identified and classified as either costs or benefits. Second, impacts must be valued. When there is no organized market to value an impact, innovative techniques are required. Third, values should be discounted for time and risk. Costs and benefits accruing in different time periods should be discounted to their present values. When costs and benefits involve uncertainties, analysts should attempt to assign probabilities to various contingencies so that expected net benefits can be calculated. Finally, when efficiency is the primary goal, the combination of policies that maximizes net benefits should be preferred.

Even when values other than efficiency are important, or major impacts cannot readily be estimated in monetary terms, benefit-cost

analysis is still useful since its first step – identifying and categorizing impacts as benefits or costs – can provide a starting point for better decision making.

In the first instance, federal and state agencies should use benefit-cost analysis to decide whether or not a proposal should be a candidate for adoption – whether its benefits exceed its costs. Second, agencies should use cost-effectiveness analysis to select the regulatory option that achieves regulatory objectives in the least costly way. This analysis should be applied both to substantive regulations and to the administrative process established to implement them, including procedures for issuing permits and reviewing compliance. Benefit-cost analysis should be promoted by the Legislative and Executive Branches at the federal and state levels.

The White House and governors can and should play a central role in promoting the use of sophisticated benefit-cost analysis. Without tight constraints imposed by centralized Executive review under a benefit-cost standard, each agency has an incentive to pursue whatever goal has been set for it by the legislature without regard for other, equally important programs outside of its jurisdiction. This leads to inconsistent, duplicative, and burdensome regulatory requirements, as well as the misallocation of government resources.

To counter this tendency, the White House, through OIRA, as well as governors, can emphasize the importance of benefit-cost analysis and encourage all agencies to set priorities based upon this analysis. The potential gains to be realized by strong centralized review of proposed regulations under a benefit-cost standard, coupled with joint planning by an interagency group, are clear: better policy coordination; enhanced political accountability; and, ultimately, more balanced regulatory decisions.

Executive Order 12866 (Sec. 1(b)(6), (5)) directs agencies to use benefit-cost and cost-effectiveness analysis:

> Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.

* * *

> When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective.

Agencies thus are required to conduct a full benefit-cost analysis of significant regulatory actions as part of the decision-making process. Sec. 6(a)(3)(C). The White House and governors should hold agencies accountable for vigorously implementing this basic principle.

Federal and state agencies themselves should promote improved benefit-cost analysis by developing and using standardized guidelines for analyzing the costs and benefits of their regulations. Agencies that already have such guidelines – such as EPA – should periodically review and improve their guidelines in cooperation with other agencies and with the White House or the governor.

Further, when agencies estimate costs, they should attempt to estimate the *full* costs of regulations, not just *compliance* costs. Regulators should carefully consider the potential impact of each regulatory option. Agencies also should consider as a cost the potential benefits foregone by regulation of an activity or substance. If some costs and benefits are nonquantifiable, they should at least be identified.

- Various regulatory options can have different impacts on behavior; behavior induced by some options can actually increase risk.
  - ➤ The National Highway Traffic Safety Administration was confronted with data suggesting that a refusal to relax its fuel efficiency standards for automobiles could increase fatalities from auto accidents. All other things being equal, a large car is safer than a smaller car. However, NHTSA failed to consider whether its "corporate average fuel economy" standards, which promoted smaller cars, could increase automobile fatalities. Accordingly, the D.C. Circuit remanded a CAFE rulemaking decision to NHTSA for further consideration of the potential safety costs of its fuel-efficiency regulations.[20]
- Regulatory costs include foregone benefits.
  - ➤ If a pesticide is banned, food may cost more because less could be produced.[21]

Finally, Congress and state legislatures should promote, not inhibit, benefit-cost analysis. In many instances, agencies are constrained by

restrictive legislative requirements or oversight.

- The Clean Air Act prohibits EPA from considering costs of any kind, much less using benefit-cost analysis, in setting air quality criteria.[22]
- The Supreme Court has interpreted the Occupational Safety and Health Act to prohibit OSHA from basing certain regulations on a formal benefit-cost test.[23]

Accordingly, there is a pressing need for fundamental legislative reform to incorporate benefit-cost principles in statutes. Congress and state legislatures should design legislation to avoid an "at-any-cost" approach to achieving regulatory goals.

- Since EPA, OSHA, and CPSC were established in the early 1970s, many of the larger, more obvious risks have been reduced. As agencies continue to try to reduce smaller, more intractable risks, the cost and complexity of regulations are sharply rising.[24]
- Sometimes programs have standards so stringent that they impose unreasonably high costs without achieving significant additional safety benefits.
  - ➤ In environmental cleanups, for example, it can be extremely expensive to achieve cleanup levels beyond a certain point. At one Superfund site that was mostly cleaned up, an added $9.3 million was spent to meet the program's stringent cleanup standards. The benefits were miniscule: the extra expenditure theoretically meant that the children could safely eat dirt for 245 days per year instead of 70 days annually. But there were no children in the area because it was a swamp. And children were not likely to be there in the future because future development was improbable. Finally, half the volatile organic chemicals probably would have evaporated by the year 2000.[25]

Congress and state legislatures should encourage agencies to balance costs and benefits when designing regulatory programs. Otherwise, federal and state agency efforts to improve regulation may be frustrated by inflexible legislative mandates.

- The Toxic Substances Control Act is a well-designed risk-reduction law based on sound benefit-cost principles. Section 6 of TSCA authorizes EPA to impose a range of controls on a chemical substance or mixture if it poses an "unreasonable risk of injury

to health or the environment." In applying the concept of "unreasonable risk," EPA must balance the health or environmental risk of a chemical against the economic or social disadvantages of eliminating or restricting the availability of the chemical.

Estimating benefits and costs can be difficult, especially in areas where many benefits are by their nature difficult to quantify. Nonetheless, because limited resources necessitate difficult trade-offs, agencies must make best estimates for benefits and costs – stating clearly and publicly the bases for those estimates – and regulate only where the benefits justify the costs. Once a regulatory goal is established, agencies should select the least costly option for meeting that goal.

5. Market Incentives and Performance Standards: Market-oriented solutions and performance standards should be favored over command-and-control regulation. When properly calibrated and used, market-based approaches and performance standards cost less and accomplish more than government commands and controls. The past three Administrations have advocated that regulators use market mechanisms as much as feasible. Most recently, Executive Order 12866 (Sec. 1(b)(3), (8)) states:

> Each agency shall identify and assess available alternatives to regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices may be made by the public.
>
> * * *
>
> Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.

Market Incentives

Market-based regulatory schemes attempt to reproduce the efficiency of a free market by internalizing the costs of the regulated activity or substance, such as pollution, into private production or investment decisions. Market incentives allow regulated parties to achieve compliance in the least costly way, reward innovators who meet or exceed regulatory goals, and adapt to changed circumstances more quickly than government commands and controls.

Typically, regulations apply to a wide variety of activities and firms. Because compliance costs can differ dramatically among activities and firms, uniform standards often impose widely varying incremental costs for achieving a specific benefit. Economic incentives minimize regulatory costs; they allow firms unable to achieve compliance efficiently to buy permits or allowances from low-compliance-cost firms, while encouraging firms that can meet regulatory goals to do so most efficiently. In short, market incentives divert fewer public and private resources and reduce adverse economic consequences to obtain the same – or greater – benefits.

- The acid rain trading allowance program for sulfur dioxide emissions exemplifies the market-incentive approach to regulation. This program provides substantially reduced regulatory costs by providing an economic incentive for least-cost emissions sources to reduce their emissions first. The Clean Air Act Amendments of 1990 set a limit on yearly sulfur dioxide emissions that power plants must meet by the year 2010 (with lesser caps at intermediate deadlines). EPA will allocate annual allowances for emissions sources to meet their individual emissions limits, which are based on reducing their historical average emissions. The allowances can be banked for future use or sold to other emission sources that have higher compliance costs. EPA has estimated that the program could reduce compliance costs by nearly $1 billion per year – about one-fourth of the total cost of achieving its goal without emissions trading.[26]

Economic incentives also induce innovators not only to develop less costly means of meeting a regulatory standard, but also to find ways to exceed the minimum standard and to reap rewards for doing so through cost savings or revenues from credits sold to firms who do not meet the minimum requirements. In contrast, command-and-control regulations provide no incentive for regulated parties to exceed a regulatory goal;[27] they may actually punish firms that do so.

Finally, market incentives are flexible; they allow firms to adapt as their relative compliance costs change over time. Command-and-control regulations usually cannot adapt to changed circumstances without the burdensome costs and delays of new regulatory action. Accordingly, market incentive approaches should be favored over command-and-control regulation.

Performance Standards

To set a regulatory standard, agencies can choose between basing the standard on design or performance. Design standards specify how a product should be built, what technology should be used, or precisely how to reach a regulatory goal. Performance standards, on the other hand, establish the ultimate regulatory goal. They free regulated parties to achieve that goal in the best way they can find. Performance standards generally are superior to design standards: They allow the regulated community to meet or exceed the regulatory goal in the most cost-effective manner.

Design standards may be more attractive to the government because they sometimes are easier and cheaper for agencies to enforce than performance standards. For example, inspectors can verify compliance simply by determining whether a manufacturer is using mandated equipment. But typically, the "savings" from imposing design standards are illusory. Any administrative savings usually are far outweighed by the large costs imposed on the regulated community by design standards. These costs are passed on to the public through higher prices and diminished wages, productivity, and economic growth.

Design standards freeze technology and impede innovation that can produce better results at less cost. An innovative firm that invents a more cost-effective way to meet or exceed a regulatory goal must overcome the heavy burden of changing the agency's standard before it can implement its better method. Accordingly, performance standards should be used when performance can be measured or reasonably estimated. It simply makes no sense to impose the enormous costs and inefficiencies associated with design standards to reduce enforcement costs by a relatively small margin.

In contrast to design standards, performance standards promote innovation to increase safety and reduce costs. Because agencies must consider the comparative performance of different machines or products to write the regulatory standard in the first place, it can be as easy for the agency to base its standard on performance goals, such as fewer injuries or cleaner air.

In some instances, "performance" and "design" standards tend to converge. A standard should not be characterized as a performance standard if there is only one feasible way to meet it; such a standard

is a design standard. Although agencies sometimes transpose performance and design standards, there is a fundamental tension between allowing innovation to improve safety and reduce costs and setting a rigid, easily identifiable standard merely to make the agency's enforcement job easier.

- Under the Resource Conservation and Recovery Act, firms must treat hazardous wastes under "best available technology" standards. Instead of setting a clear standard based on health and environmental risks, the BAT standard changes with each advance in waste treatment. This design standard imposes enormous costs without regard to the actual threat to human health or the environment.[28]

In light of the vital importance of encouraging continual improvements in safety at less cost, performance standards should be preferred over design standards.

Both statutes and regulations should favor market mechanisms and performance standards over commands and controls. Instead of trying to mandate what technologies business should use or how to meet a standard, legislatures and agencies should set standards and then allow the market to develop the most efficient ways to attain them. Mandating *ends*, not *means*, usually offers the most effective form of regulation.

6. Productivity, Wages, and Economic Growth: Methodologies should be implemented and continuously improved to assess the impact of major regulations on productivity, wages, and economic growth, as well as the adverse impact on jobs and international competitiveness in industries that bear the burden of regulation. American businesses of all types, large and small, face increasing competition from foreign competitors in a global economy. Today's global competition is heightened by significant world-wide industrial overcapacity – a factor many believe will be the defining characteristic for the 1990s.

- In key industries – steel, coal, chemicals, textiles, pulp and paper, automobiles, shipbuilding, aircraft, computers, home appliances, and defense – global overcapacity is resulting in a major restructuring.
- Those firms that cannot compete on price and quality will be

driven out of business, which means that jobs will be lost, wages weakened, and tax bases eroded.

- Efficiency and productivity will determine who are the winners and losers; government policies can either advance or retard these objectives.

In response to these economic pressures, successful American corporations are significantly altering the way they conduct their business to become leaner, more flexible, and faster. In this new economic world, the slow-moving, pyramidal corporate structure of the past is facing extinction.

For our economy to grow, regulatory and economic goals must become complementary, not conflicting. Government must make greater efforts to promote productivity, economic growth, and innovation within the regulatory framework and must become more sensitive to the impact of regulation on wages, prices, jobs, and international competitiveness.

Executive Order 12866 (Sec. 6(a)(3)(C)(ii)) requires that benefit-cost analyses of significant regulatory actions include an assessment of their impact on employment, competitiveness, and productivity. The nation would benefit from greater consideration of the industry-wide and economy-wide impacts of regulation.

- A 1993 report by the National Commission for Employment Policy recommended the development of economic models to assess the effects of regulations on jobs and wages.[29]
- In Section 811 of the Clean Air Act Amendments of 1990, Congress directed the President to report on the economic impact of air pollution controls on the international competitiveness of U.S. manufacturers. The American Automobile Manufacturers Association has compiled a report documenting that their competitors operating in countries with more flexible and less prescriptive rules enjoy a significant cost/production advantage over U.S. automobile manufacturers that face onerous requirements on their manufacturing facilities. The new permit rules under Title V of the Clean Air Act can unnecessarily restrict production and operational flexibility without commensurate environmental benefit; this flexibility is critical to the ability of U.S. manufacturers to respond to dynamic market conditions and international competitive pressures.[30]

- A study recently conducted for the U.S. Census Bureau found a strong correlation between regulation and reduced productivity. The study found that significantly regulated plants have substantially lower productivity and slower productivity growth rates than less regulated plants. The magnitude of the impacts were found to be larger than expected: A $1 increase in pollution abatement costs reduced productivity by about $3 - $4.[31]

More information is becoming available on the negative effects of regulation on wages, productivity, and economic growth, as well as the differential economic impact on jobs and international competitiveness in many industries. Because these issues are vitally important to the American people, they should be directly considered when legislatures and agencies make regulatory decisions. The Legislative and Executive Branches at the federal and state levels should promote the use and improvement of state-of-the-art analytical tools to assess the economic impacts of regulations.

7. Coordination Among and Within Agencies: Coordination of regulatory activities among and within agencies should be improved to eliminate inconsistencies, duplication, and unnecessary regulatory burdens. Regulatory agencies have a variety of mandates that overlap – among agencies, including federal and state agencies, and even between different programs of a single agency. Consequently, there is a need for greater coordination of regulatory activities among and within agencies.

Interagency Coordination

To reduce duplication and inconsistency, a strong coordinating committee is needed to identify and address interagency problems. Executive Order 12866 (Sec. 4(d)) provides for the establishment of an interagency committee – the Regulatory Working Group – that can perform this function at the federal level.

Through the Regulatory Working Group or a similar interagency committee, agencies should engage in strategic planning to address problems before regulations are proposed. Where significant environmental, health, or safety problems demand action from multiple agencies, the interagency committee should coordinate common risk-reduction approaches for the agencies involved. The committee should rank the relative risks posed by particular problems in an effort to maximize risk-reduction in a cost-effective way. The relative risk

rankings could be updated periodically. An interagency committee could also promote the exchange of information among agencies and make each agency more sensitive to existing regulations from other agencies. The committee also could identify common research needs and allocate responsibility for fulfilling those needs among agencies. Finally, to address overlap and inconsistency originating in statutory requirements, the interagency committee could develop a forward-looking, comprehensive legislative program.

The strategic planning process should be open, incorporating views from the general public, including business, academia, and public interest groups. This strategic planning process could be used to educate Congress and involve the public in the decision making. Agencies could exchange information, data, and feedback, which would facilitate improvements in regulations and laws. These tenets of rational regulation should guide this process.

Intraagency Coordination

In addition to interagency coordination, there is a need for greater coordination of programs within each agency as well. Individual program offices within an agency often are assigned responsibility for implementing a specific law or part of a law. This narrow approach, and the growing complexity of statutes and regulations, has fragmented many programs, even within the same agency. Different programs often attempt to control different aspects of the same problem. Without coordination of programs, inconsistencies, unproductive duplication, and outright conflicts may result.

- EPA's Office of Solid Waste and Emergency Response at one time designated trace levels of carbon tetrachloride and chloroform found in chlorofluorocarbons as hazardous waste, thus discouraging refrigerator recyclers by threatening them with Superfund liability. Meanwhile, EPA's Office of Air and Radiation was urging that refrigerators be recycled to preserve the ozone layer. At the same time, the FDA allowed CFCs to be used in asthma inhalers.[32]

Agency efforts to coordinate regulatory programs should focus on reducing risks in the most cost-effective way. When properly designed and implemented, regulatory programs that address multiple environmental media, such as air, water, and land, have great potential to reduce both risk and costs. Unfortunately, the emphasis on highly prescriptive media-specific regulation in current environmental laws

often creates obstacles to cost-effective regulation.

- An ambitious joint pollution prevention study recently conducted by EPA and Amoco Corporation illustrates the cost of inflexible, media-specific regulation. The study found that if Amoco's Yorktown, Virginia refinery had been free to pursue a flexible, performance-oriented approach to pollution prevention, 90% of the emissions reductions required under applicable regulations could have been achieved for 20-25% of the cost of meeting the specific regulatory requirements. In particular, if a performance-oriented approach to emissions reduction had been followed, releases at the refinery could have been reduced at an average cost of $510 per ton, as opposed to the $2,400 per ton average cost of achieving reductions under EPA's prescriptive command and control regulations.[33]

The Executive Branch has the responsibility to ensure that its programs are coordinated and consistent. Fulfilling that responsibility should become a higher priority.

8. Openness: The entire regulatory process, including centralized Executive review and management of agency rulemaking, should be open to public scrutiny to promote the quality, integrity, and responsiveness of agency decisions. Openness is indispensable to the entire regulatory process, including regulatory planning and development, as well as centralized Executive review of agency rulemaking. Openness brings obvious benefits:

- The input of an informed public and the regulated community improves the quality of agency decisions.
- Openness will help ensure that the values and concerns of the public are addressed by regulators.
- A better informed public will have greater confidence in the regulatory process and the validity of decision making.
- With a better understanding of the regulatory requirements, the regulated community can more faithfully comply with them.
- Fewer legal challenges to final regulations are likely to ensue.

Removing Secrecy

The regulatory process should be open to maximum public involvement at the earliest stages. Executive Order 12866 (Sec. 6(b)(4)) recognizes the need for openness. This policy should be nurtured and

expanded. For example, OIRA should disclose written communications from those outside of the government before a rule is published. The White House should also require agencies to publish their Regulatory Plans when they are submitted to OIRA for review. Regulatory analysis documents that detail the costs and benefits of regulations also should be available to Congress and the public, even if they include information or considerations that the agency may not actually use to create a rule. More generally, the public should have access to the identities and positions of participants in the regulatory process.

Regulatory Negotiation

Agencies also could make better use of negotiated rulemaking, or "reg neg." To draft a rule, an agency can bring together representatives of interested parties for face-to-face negotiations, with the goal of achieving consensus on the proposed language. The primary goal of "reg neg" is to produce better rules, but it also avoids protracted litigation and reduces enforcement costs.

President Clinton recognized the benefits of regulatory negotiation in a Directive that accompanied Executive Order 12866. The Directive requires each agency to identify at least one rulemaking to be developed through negotiated rulemaking.[34] Although not always feasible, agencies should consider using "reg neg" more often, on a wider basis, and earlier in the regulatory planning process. Typically, the short-term costs of regulatory negotiation are fully justified by its many benefits.

In sum, openness can improve the quality and integrity of agency decisions and increase public confidence in the regulatory process.

9. Periodic Review: Programs and regulations should be periodically reviewed for purposes of determining whether they should be reformed, discontinued, or consolidated.

As circumstances and technology change, regulations can become outmoded, duplicative, or unnecessary. As an indispensable part of good regulatory management, Congress, the White House, agencies, and states should periodically review existing regulatory programs to determine whether they should be reformed, discontinued, or consolidated.

Legislatures ordinarily operate under the assumption that programs should continue unless there is an overwhelming reason to curtail

them. By conducting periodic review, legislatures can ensure that government resources are allocated to best address the needs of the public. Periodic review should allow for government-wide coordination and priority setting through reforming or eliminating regulations, updating scientific methodologies, reorganizing an agency, or reallocating responsibility among agencies.

In appropriate instances, Congress and states legislatures can ensure a stricter review process by incorporating sunset provisions in regulatory programs. Sunset is a powerful tool for managing the proliferation of government programs: Within set deadlines, the legislature is compelled to evaluate and vote for the continuation of a program, or it will terminate. This forces a review of priorities. Programs that are not rational or justifiable – perhaps because they have simply outlived their usefulness – can more readily be eliminated or incorporated into other programs. Routine periodic review of duplicative or overlapping programs provides an opportunity for Congress to consolidate them, even if it decides the programs should be continued. If similar programs are reviewed at the same time, Congress can more readily compare their effectiveness and streamline and rationalize them.

Regulatory programs would also benefit from periodic review by the Executive Branch. Executive Order 12866 (Sec. 5(a)) requires each federal agency to develop a program for periodically reviewing its existing significant regulations to determine whether they should be modified or eliminated to make the agency's regulatory program more effective, less burdensome, and more consistent with the President's priorities and principles set forth in the Executive Order. However, the White House does not now have in place a formal process for timely oversight and execution of these important reviews; it should develop and implement such a process without delay. The President also should issue a Directive, like the Negotiated Rulemaking Directive, to require each agency to identify and review at least three significant regulations.

Finally, agencies – individually or through an interagency coordinating group – should themselves initiate periodic review of their programs to eliminate outdated, duplicative, and irrational regulations. Where legislative authority is required to terminate or modify unproductive, outdated programs, the Executive Branch should aggressively pursue legislative action.

10. Federalism: Regulatory authority should be more rationally allocated among the federal, state, and local governments, and federal regulatory programs should avoid unfunded mandates. The expansion of government regulation has raised concerns about the rational allocation of regulatory authority and costs among federal, state, and local governments.

Allocation of Regulatory Authority

The growth of government regulation in recent decades has taken place at both the federal and state levels. In some cases, such as pollution control and waste disposal, new and expanded federal programs have supplanted state and local regulation. In other cases, states have added new and costly regulations of their own – both in areas that were traditionally matters of state policy (such as automobile insurance) and in areas that were traditionally matters of national policy (product labeling). The growth of state regulation has been encouraged by Supreme Court decisions that take a more lenient approach toward state policies affecting and burdening interstate commerce.

The mix of centralized national regulation in some areas and an array of state regulations in other areas has not always been a good one for American consumers and businesses. The traditional virtues of federalism – decentralization and responsiveness to varying local circumstances – remain important today. At the same time, however, markets, production technology, and business organization have become increasingly national and international in scope. State regulation that made sense at a time of primarily local markets can produce highly costly and wasteful conflicts and duplication where national businesses are affected. This is often the case today. For businesses whose products are sold nationwide and abroad, inconsistent and duplicative state regulation increases prices and chills productivity, wages, economic growth, and innovation.

Modern commercial realities demand a more cost-effective balance of federal and state regulation; achieving this balance is primarily the responsibility of the federal government. In general, three factors should be considered in determining whether the federal government should preempt and regulate a field itself or leave the field to the states:

- Is the problem primarily a national one, with little variation in the

nature of the problem among states and regions?

- Will state regulation lead to needless duplication of effort, costly conflicts among differing state rules applicable to national markets and national business firms, or opportunities for individual states to pursue local policies at the expense of citizens of other states?
- Does the policy in question present important controversies and uncertainties, so that state policy experimentation may produce new information to resolve the uncertainties?

These guidelines will not resolve every controversy over regulatory jurisdiction, but they do suggest several areas where large improvements could be made. For example, to the extent that regulation of the labeling of foods, beverages, and other products that are distributed nationally is appropriate, these regulations should be national rather than local: The costs of differing labels in different states is very large, while the benefits are small or nonexistent.

On the other hand, many pollution problems are primarily local or vary in severity from locality to locality; federal regulation to address these problems may still be justified (where a single item of commerce is involved, such as automobiles, or where necessary to overcome "NIMBY" – Not In My Backyard – problems), but should be resorted to with care. Transportation regulation presents states with numerous opportunities for imposing price and service controls that are paid for by citizens of other states, and the trend toward greater preemption in this area is appropriate and should be continued.

When Congress appropriately determines to preempt state regulation, it should not adopt a one-way approach that preempts only weaker, but permits more stringent, state regulation. This approach loses the benefits of preemption without gaining offsetting benefits from state experimentation.

Unfunded Mandates

The federal government also regulates state and local governments directly in the course of administering federal expenditures and federal programs. As the federal budget deficit has soared, Congress has increasingly used unfunded mandates. *Unfunded mandates* require state and local governments to administer or comply with federal programs, but do not include funding for the costs of administration or compliance. These unfunded mandates burden state and local governments in the same way that regulations burden business.

Unfunded mandates force state and local governments to raise taxes, cut services, or potentially to face bankruptcy. Likewise, regulations require businesses to raise prices, eliminate jobs or product lines, cut research and development, or even go out of business entirely.

Congress has imposed numerous obligations on the states to fund programs designed to achieve federal objectives. While this pattern has been familiar for some time, it has become even more significant in the 1990s. Unfunded programs do not appear in the federal budget deficit, yet they impose very real costs at the state and local levels. These programs threaten to overwhelm state and local governments who fear that raising taxes for businesses and consumers will stifle economic growth and jobs and hence erode the tax base.

- The City of Columbus, Ohio has had to comply with 67 new environmental mandates since 1988. Columbus is expected to spend $1.3 billion to $1.6 billion on environmental compliance from 1991 to 2001. In 1991, the average Columbus household paid $160 for environmental protection; by 2001 this cost is projected to rise to $856 per household, or more than the per-household cost of fire or police protection.[35]

The federal government should not burden state and local governments with unfunded mandates, especially where the benefits of a program do not fully accrue at the state or local level. Clearly, duplicative and inconsistent regulation must be prevented. Nonetheless, programs should be sufficiently flexible to facilitate innovation at the state and local level. In some instances, the federal government could define a program's objective (comparable to performance standards), but allow state and local governments to achieve those outcomes by the means they think best. When practical, agency leaders should grant waivers to allow state and local governments to experiment with innovative programs that may more efficiently achieve regulatory goals.

Executive Order 12866 (Sec. 1(b)(9)) recognizes the need to reduce unfunded mandates and to provide greater flexibility to state, local, and tribal governments:

> Whenever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental

interests. Each agency shall assess the effects of federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely affect such governmental entities, consistent with achieving regulatory objectives. In addition, as appropriate, agencies shall seek to harmonize Federal regulatory actions with related State, local, and tribal regulatory and other governmental functions.

This policy is supplemented by Executive Order 12875, which calls for reducing unfunded mandates; increasing waivers from federal requirements for state, local, and tribal governments; streamlining the process for applying for waivers; and providing greater consultation with those governments on federal matters that uniquely affect their interests. These concepts should be vigorously implemented and should be applied to regulated businesses as well.

11. Paperwork Burdens: Paperwork burdens caused by regulatory programs should be expressly assessed and substantially reduced. In our vast regulatory system, paperwork burdens impose huge costs. Federal paperwork burdens alone have been conservatively estimated to consume over 6.4 billion person-hours per year in the private sector – at a cost of at least $128 billion – merely to collect, report, and maintain information.[36] This does not include the massive person-hours federal employees spend on processing and evaluating the information.[36] Furthermore, paperwork burdens are a symptom of unreasonable administrative process requirements – complex, bureaucratic, and adversarial procedures for obtaining permits, reviewing compliance, and the like. These administrative processes impose massive and unnecessary costs by causing delay, frustrating innovation, and impeding process and facility changes that U.S. business must make to meet world competition.

Congress recognized the need to reduce the paperwork burden by passing the Paperwork Reduction Act of 1980, but this statute has not been effectively implemented.

- The Paperwork Reduction Act of 1980 was designed to minimize the federal paperwork burden for individuals, small businesses, state and local governments, and other persons; to minimize the cost of information collection to the federal government; and to maximize the usefulness of the information to the federal govern-

ment. The Act established OIRA and delegated it responsibility for coordinating government information policies, including reviewing and controlling agency collections of information.

Despite the many benefits promised by the 1980 Act, it requires much stronger implementation, and further initiatives to reduce paperwork are imperative. Stringent goals for reducing paperwork requirements are needed at all levels of government. The anticipated paperwork requirements of future legislation should be thoroughly assessed prior to enactment, and these assessments should be disclosed to the public. Alternative information technologies that can reduce the paperwork burden should be adopted.

The Administration should strengthen OIRA's paperwork control responsibilities. Moreover, the Administration and Congress should strengthen and amend the Paperwork Reduction Act. Sound legislative proposals include a government-wide goal of at least a 5% annual reduction in paperwork. In the absence of a legislative mandate, the Executive Branch should nonetheless commit itself to this goal and should annually report its progress in achieving it.

The new legislation should also address the problem of "third party" disclosures of information. The Paperwork Reduction Act was intended to limit the ability of federal agencies to impose paperwork requirements on the public. However, in *Dole v. United Steelworkers of America*, the Supreme Court held that the protections of the Act do not apply where an agency requires that information be provided to a third party (and not the government).[38] An agency can circumvent OIRA's paperwork review simply by not requiring that the information be submitted to the federal government. In that event, OIRA cannot review the agency's information requirement and has no authority to stop it. To remedy this problem, Congress should legislatively overrule *Dole* when it amends the Paperwork Reduction Act.

Excessive paperwork burdens often are caused by unreasonable administrative process requirements. These administrative process costs – the inflexibility, unresponsiveness, and delay that characterize many regulatory programs – are an increasing threat to the competitiveness of U.S. businesses in global markets.

Many major EPA programs, for example, are based on a multi-layered administrative process for permitting, compliance review, and

the like. Facilities otherwise ready, willing, and able to comply with the environmental controls can be rendered noncompetitive by the rigidity and delay of the administrative process. Many of the industries that hold the greatest promise for jobs and economic growth in the nation's manufacturing sector must be able to respond quickly to technological change at a pace dictated by international competition, not the regulatory process. Among these vital industries are electronics, advanced materials, aerospace, custom and specialty chemicals, pharmaceuticals, and automobile manufacturing. In these highly competitive industries, time is precious. They cannot wait for regulatory processes that take years when their products go through entire life cycles in less time. Despite the massive costs imposed by these complex administrative processes, the agencies do not have procedures for considering the costs and benefits of these administrative processes themselves or their potential for being streamlined.

Congress and the agencies should continually examine administrative processes. They should look beyond the direct costs of regulatory controls and take into account the incremental costs and benefits of each layer in the administrative process.

More generally, the adversarial, legalistic nature of the regulatory system must be reassessed. All too often, conflict – not consensus and compromise – characterizes decision making, enforcement, and the relationship among government, business, interest groups, and the public. And increasingly, legislatures and agencies are criminalizing regulatory violations that traditionally were addressed by civil and administrative remedies. In the environmental area, for example, errors in reporting, sampling, record keeping, and the like now are potentially subject to criminal sanctions. At the same time, the growing complexity of environmental regulation increases the likelihood that these errors will occur.

The antagonistic nature of the American regulatory system imposes enormous and unnecessary costs; these include exacerbating litigation and other transaction costs, prolonging delay, and chilling innovation. These costs, like paperwork and administrative process costs, ultimately are borne by customers, employees and stockholders of the regulated community.

The government should strive to achieve absolute paperwork reductions, streamline administrative processes, and reduce the adversarial

nature of our regulatory system. Only where their benefits clearly exceed their costs should mandatory paperwork or complex and adversarial administrative process requirements be imposed.

12. Regulatory Budget: A framework should be developed to account for expenditures required by regulations and to promote greater fiscal restraint on regulatory programs. The costs of regulation affect us all. They are, in effect, "hidden taxes." American workers see their tax burden on their Form 1040 and state tax reporting forms, but they are told nothing about their regulatory burden. To compound the problem, the decisions to create and impose regulations, especially at the agency level, are remote from public view. Although the public may see that increased government spending will require that they or their children eventually pay the price in higher taxes, they plainly do not realize that collectively they also must pay for regulations – as customers, employees, and stockholders.

Regulatory programs create an illusion that business absorbs their costs. In contrast to taxing and spending programs, regulatory programs impose costs that do not appear in government budget figures, and therefore seem "free." In the end, however, the public pays the price just the same – through higher prices, fewer products, and diminished wages, productivity, and economic growth.

Despite the enormous cumulative burden of regulations, there is no process for setting priorities and forcing trade-offs among different programs or goals. Government spending programs face some discipline through the budgetary process because current spending limits create an incentive to establish rational priorities and to spend money in a more cost-effective way. However, there is no formal budgeting process for the statutory and regulatory programs that direct non-federal resources to achieve public purposes. Regulations are created as their need is perceived, without budgetary constraints or forced trade-offs with other important regulations. Government must become more sensitive to the cumulative costs of regulations.

An accounting system for regulatory costs could measure the cumulative effect of regulations and promote a more efficient regulatory system. Under a regulatory budget, agencies would have a powerful incentive to regulate in a more cost-effective manner; each agency could be limited in the amount of regulatory costs imposed on the

economy each year. If the budget limit had been reached, an agency wishing to add a new regulation would be required to repeal or modify an existing regulation to offset the cost increase from the new regulation. If the agency were unable to offset the cost of the new regulation from other regulations for which it is responsible, the government would have to produce an offsetting reduction from another agency.

In light of the similarities between fiscal and regulatory expenditures, the fiscal budgetary process has been proposed as a model for a similar budgetary process to discipline regulatory expenditures. There have been bipartisan efforts in the Executive Branch and Congress to develop an accounting framework to monitor expenditures directly required by regulation. This work should be encouraged.

The goal of regulatory accounting is worthwhile. Nonetheless, it should be recognized that measuring the private expenditures required by federal regulation raises its own set of problems. The regulated community should not be unduly burdened with extensive and costly record-keeping requirements to validate projected budget estimates. It is also difficult to distinguish expenditures due to regulation from those that would have occurred regardless of regulation. And special challenges arise in estimating the indirect costs of regulation, including lost opportunities for consumers to purchase goods due to higher prices, less desirable products, or complete bans of products or substances. Regulatory accounting must consider these indirect costs, but they can only be estimated with complicated statistical models. Moreover, combining estimates of indirect costs with direct cost estimates could be difficult. Yet, because bans primarily cause indirect costs, measuring only direct costs could encourage agencies to institute bans rather than regulatory controls.

These challenges make regulatory accounting more complex than fiscal accounting, but there are good reasons to persevere in the development of a regulatory budget:

- Although regulatory budgets would require forecasts of private spending on regulations, the forecasts need not be exact to constrain spending (like spending forecasts for fiscal budgets).
- The measurement problem concerning the proper baseline for direct regulatory costs diminishes if an incremental budget approach is used.
- The potential for agencies to use bans to avoid regulatory budget

constraints is outweighed by their tendency to impose costs on the public absent a regulatory budget; rules for estimating indirect costs can be developed.[39]

While a regulatory budget has not yet been perfected, it holds promise for measuring and disciplining the cumulative burden of regulations and allocating resources more effectively. The starting point for a regulatory budget is to develop an accounting system that would use information available from both the fiscal budgetary process and the information-collection budget established by the Paperwork Reduction Act. The important work to develop a regulatory budget should continue.

III. Conclusion

Government regulation can and must be improved. Although some regulations have been beneficial, there is great need – and much room – for a smarter, more cost-effective approach to regulation. To ask how much regulation we should have or how we should best regulate in specific situations is not to put dollars before people. To the contrary: it is to make dollars work more effectively for people.

Regulations exact a heavy toll on wages, productivity, economic growth, prices, and innovation. They burden federal, state, and local governments. We do not see the factories never built, the products never made, the services never provided, or the entrepreneurial ideas drowned in the sea of regulatory process. But, in the end, all of these costs of regulation are borne by the public – as employees, consumers, stockholders, and taxpayers.

Regulatory reform must be a national priority. Because our nation has limited resources and many competing expectations, the soaring costs of regulation make it imperative to reform regulation and to reduce its burdens on the economy. There is growing consensus not only on the need for regulatory reform, but also on how to achieve it: Government must assess the seriousness of risks proposed for regulation, compare these risks to risks familiar to the public, disclose the costs of regulation, regulate only if the benefits outweigh the costs, and select the most cost-effective, market-driven method possible. This is smarter regulation. And smarter regulation is better regulation, for consumers, governments, and businesses alike.

The White House, Congress, agencies, and the states must all commit themselves to smarter regulation. The Business Roundtable recommends that governments at all levels vigorously implement these twelve tenets of rational regulation. Many promising ideas have been proposed to "reinvent" regulations and the regulatory system; President Clinton's Executive Order on Regulatory Planning and Review takes an important first step. However, the hard work necessary to achieve meaningful reform remains to be done.

It will take strong leadership to reform the culture of regulation that permeates government at all levels. Government leaders must remove incentives for regulators to impose burdensome new regulations and red tape, and reward innovators who reform or eliminate irrational regulations or who obviate the need for new ones. Government employees, like private-sector employees, must put the "customer"

first and be more accountable for achieving results, not for developing or following Byzantine rules.

If we fail to regulate smarter, and if we fail to change the culture of regulation, then the American public – not just governments and businesses – will suffer. Regulating smarter is a challenge our nation cannot afford to ignore.

Endnotes

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Summary of Recommendations

1. Risk-Based Priorities and Public Education:

Risk-Based Priorities

- The government should use comparative risk assessment to compare the magnitude of various risks and set priorities for achieving greater protection of human health, safety and the environment in the most cost-effective manner.
- Using comparative risk assessment, the Executive Branch should develop a current inventory of known risks, rank them, and periodically update the inventory every two to four years in light of new information.
- Federal and state health and safety agencies should utilize experts to assess, compare, and rank the risks regulated by each agency.
- An interagency coordinating group should be used to facilitate communication and long-term planning among agency leaders.
- The President should issue guidance to encourage the use of risk analysis as a tool for making pollution prevention decisions.
- In the short term, Congress and state legislatures should require the risk-reduction agencies, such as EPA, to conduct comparative risk assessments to set priorities.
- In the long term, as environmental, health, and safety statutes are reauthorized, reformed, and created, Congress and state legislatures should require – not inhibit – the consideration of risk, costs, and benefits in designing regulatory policy.
- Legislation for controlling risk should promote risk assessment while providing agencies with sufficient flexibility to incorporate state-of-the-art scientific knowledge.
- An Office of Risk Analysis should be created in EPA and other agencies that need increased expertise in analyzing and ranking risks.
- A task force composed of scientific experts from the environmental, health, and safety agencies should create a government-wide manual on the regulation of risks. The manual would instruct regulators on how to manage risks.
- Legislatures should set clear goals for regulatory programs, and these goals should be understandable to the regulated community and the public.

Public Education: Improved Risk Communication

- Agencies should improve the risk communication process, which

includes educating the public on the nature of risks potentially subject to regulation; the costs and benefits of regulation; available alternatives; and uncertainty about risks, benefits, and costs.

- The government should educate the public about the level of risks proposed for regulation; risks unfamiliar to the public should be compared to familiar risks.
- Environmental, health, and safety agencies should create public risk communication programs to inform and respond to the public on relevant risks and the costs of managing those risks.
- Risk communication should be based on a written record that is available to the public.

2. Risk Assessment and Risk Management:

- The risk assessment and risk management phases of the regulatory process should be separated as much as possible – both by agencies in conducting risk analyses and by legislatures in designing statutes.
- Risk assessment methodologies and guidelines should be improved; they should be routinely reviewed and updated to reflect the state of the art.
- Professional and policy judgments made in the risk assessment process should be identified and disclosed to the public.
- The White House should issue an Executive Order on risk assessment and risk management policy.
- Congress and the White House should strengthen the expertise of the Office of Science and Technology Policy in risk analysis.
- Uniform risk assessment guidelines for the agencies should be developed by OSTP, an interagency committee, or by experts outside of government.
- Agencies should review their risk assessment guidelines and methodologies and make improvements where appropriate.
- A more complete and current government database of relevant scientific data should be developed for use in the risk assessment process.
- The government should establish a mechanism that would allow new scientific information to be easily and quickly incorporated into the risk assessment process.
- Procedures should be established to reevaluate risk assessments and risk management decisions in light of scientific advances.
- Agencies should favor cost-effective regulatory options in the risk management phase.

3. Sound Science:

- Agencies should use the most advanced and precise scientific methods when making decisions.
- Agencies should regularly update their regulations and programs to incorporate advances in scientific knowledge.
- Agencies that depend on scientific information and judgments but lack scientific advisory boards, such as OSHA, should emulate EPA and FDA and create scientific advisory boards to participate actively in their decision making.
- Periodic outside review procedures should be used to bolster the scientific credibility of agency decision making.
- To increase the reliability and credibility of their risk assessments, agencies should strive to make their default assumptions and inference guidelines accurately reflect real risks.
- When regulators lack information for a value or parameter needed for a risk estimate, they should use uncertainty analysis techniques to identify a range of possible values and their probability of occurrence.
- To promote public accountability, agencies should explain assumptions, inferences, and value judgments made in each risk assessment and should characterize their impact on the estimated value of the risk.
- Although risk assessments should provide a range of risk values to indicate data limitations and scientific uncertainty, the "best estimate" of risk should be provided for policymakers and the general public in the risk management phase.

4. Benefit-Cost Analysis:

- Federal and state agencies should use benefit-cost analysis to decide whether or not to adopt a regulation and should regulate only where the benefits justify the costs.
- Once a regulatory goal is established, agencies should use cost-effectiveness analysis to select the least costly option for meeting that goal.
- Congress and state legislatures should incorporate benefit-cost principles in statutes and avoid an "at-any-cost" approach to achieving regulatory goals.
- The White House and governors should hold agencies accountable for conducting a full benefit-cost analysis of significant regulatory actions.

- Agencies should apply benefit-cost and cost-effectiveness analysis not only to substantive regulations, but also to administrative process, including procedures for issuing permits and reviewing compliance.
- Agencies themselves should develop and use standardized guidelines for analyzing the costs and benefits of their regulations.
- Agencies that already have benefit-cost guidelines, such as EPA, should periodically review and improve their guidelines in cooperation with other agencies and the White House or the governor.
- When agencies estimate costs, they should attempt to estimate the *full* costs of regulations, not just *compliance* costs.
- Agencies also should consider the potential benefits of the activity or substance to be regulated.
- If some costs or benefits are nonquantifiable, they should at least be identified by the regulator.

5. Market Incentives and Performance Standards:

- Both statutes and regulations should favor market mechanisms over command-and-control regulation.
- Performance standards should be favored over design standards in federal and state regulations.

6. Productivity, Wages, and Economic Growth:

- Agencies should directly consider the impact of regulatory options on productivity, wages, economic growth, innovation, jobs, and the international competitiveness of American businesses.
- The Legislative and the Executive Branches at the federal and state levels should promote the improvement of state-of-the-art analytical tools to assess the industry-wide and economy-wide impact of regulations.

7. Coordination Among and Within Agencies:

- To address problems concerning multiple agencies, a strong interagency committee should engage in strategic planning and develop a coordinated response before regulations are proposed.
- Each agency should coordinate individual programs that address different aspect of the same problem.
- Cross-cutting, cost-effective regulatory approaches, such as multi-media environmental regulations, should be favored over piecemeal approaches.

8. Openness:

Removing Secrecy

- The regulatory process should be open to maximum public involvement at all stages.
- OIRA should disclose written communications from those outside of government before a rule is published.
- The White House should require agencies to publish their Regulatory Plans when they are submitted to OIRA for review.
- Regulatory analysis documents that detail the costs and benefits of regulations should be available to Congress and the public, even if they include information or considerations that the agency may not actually use to create a rule.
- The public should have access to the identities and positions of participants in the regulatory process.

Regulatory Negotiation

- Agencies should make better use of negotiated rulemaking.

9. Periodic Review:

- Programs and regulations should be periodically reviewed for purposes of determining whether they should be reformed, discontinued, or consolidated.
- The President should issue a Directive requiring each agency to identify and review at least three significant regulations.
- The White House should establish a formal process for reviewing existing regulations and programs.
- Legislatures should incorporate sunset provisions into regulatory programs to ensure a stricter review process, compelled by termination of the program absent a vote for continuation.

10. Federalism:

- When creating regulatory programs in a field implicating both federal and state interests, Congress should carefully consider whether to preempt and regulate the field itself or leave it to the states; the goal should be to achieve a more cost-effective balance of state and federal regulation.
- The federal government should refrain from burdening state and local governments with unfunded mandates – programs without funding – especially where the benefits do not accrue at the state or local level.
- When practical, agencies should grant waivers to allow state and

local governments to experiment with innovative programs that may more efficiently achieve regulatory goals.

11. Paperwork Burdens:

- Paperwork burdens imposed by all regulatory programs should be assessed and reduced.
- Administrative process costs – the inflexibility, unresponsiveness, and delay that characterize many regulatory programs – should be assessed and reduced.
- The adversarial, legalistic nature of the regulatory process should be reduced where possible.
- The Paperwork Reduction Act should be strengthened; clear and stringent goals for reducing paperwork burdens should be established by Congress and the White House.
- When it amends the Paperwork Reduction Act, Congress should legislatively overrule *Dole v. United Steelworkers of America* to address the problem of "third party" disclosures of information.
- The anticipated paperwork requirements of future legislation should be thoroughly assessed prior to enactment, and these assessments should be disclosed to the public.
- Alternative information technologies should be employed to reduce the paperwork burden.

12. Regulatory Budget:

- A framework should be developed to account for expenditures required by regulations and to promote greater fiscal restraint on regulatory programs.
- Congress should impose a cap on the costs imposed on the economy by regulations each year. If the regulatory budget limit is reached, the government should be required to repeal or modify existing regulations to offset the cost increase from any new regulation.

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