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Testimony

of Rosario Palmieri
Vice President, Labor, Legal and Regulatory Policy
National Association of Manufacturers

before the Committee on Small Business
U.S. House of Representatives

on Regulation: The Hidden Small Business Tax

April 14, 2016

TESTIMONY OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

BEFORE THE

COMMITTEE ON SMALL BUSINESS

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Chairman Chabot, Ranking Member Velázquez and members of the Committee on Small Business, thank you for the opportunity to testify about federal regulations and how the rulemaking process impacts manufacturers in the United States.

My name is Rosario Palmieri, and I am the vice president of labor, legal and regulatory policy for the National Association of Manufacturers (NAM). The NAM is the nation's largest industrial trade association and voice for more than 12 million men and women who make things in America. The NAM is committed to achieving a policy agenda that helps manufacturers grow and create jobs. Manufacturers very much appreciate your interest in and support of the manufacturing economy.

I. State of Manufacturing

In the most recent data, manufacturers in the United States contributed $2.17 trillion to the economy (or 12 percent of GDP). For every $1.00 spent in manufacturing, another $1.40 is added to the economy, the highest multiplier effect of any economic sector. Importantly, manufacturing supports an estimated 18.5 million jobs in the United States—about one in six private-sector jobs. In 2014, the average manufacturing worker in the United States earned $79,553 annually, including pay and benefits—24 percent more than the average worker.

Manufacturing in the United States lost 2.3 million jobs in the last recession. Since then, we have gained back 802,000 manufacturing jobs. To maintain manufacturing momentum and encourage hiring, the United States needs not only improved economic conditions but also government policies more attuned to the realities of global competition. Because of the significant challenges facing manufacturing in the United States, the NAM advocates federal policies that will ensure a robust and dynamic manufacturing sector that is ready to meet the needs of our economy and workers.

II. Regulatory Environment

Democrats and Republicans have much in common on their views on regulation, but the rhetoric often fails to match that consensus. Similarly, the business community is often misunderstood about their views on regulation. Manufacturers believe regulation is critical to the protection of worker safety, public health and our environment. We believe some critical objectives of government can only be achieved through regulation, but that does not mean our regulatory system is not in need of considerable improvement and reform. New regulations are too often poorly designed and analyzed and ineffectively achieve their benefits. They are often unnecessarily complex and duplicative of other mandates. Their critical inputs—scientific and other technical data—are sometimes unreliable and fail to account for significant uncertainties.

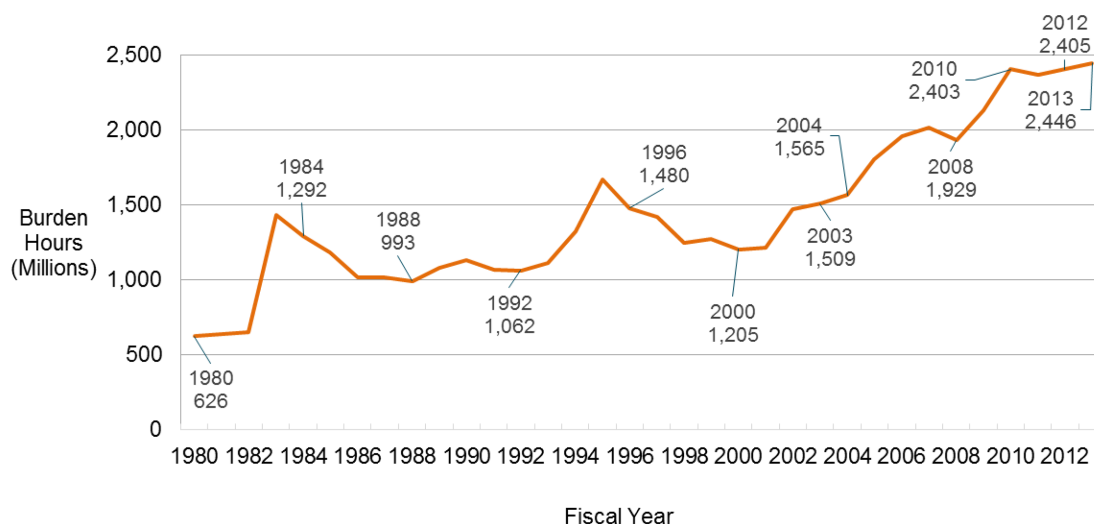
Regulations are allowed to accumulate with no real incentives to evaluate existing requirements and improve effectiveness. In addition, regulations many times are one-size-fits-all without the needed sensitivity to their impact on small businesses. We can do better.

Unnecessary regulatory burdens weigh heavily on the minds of manufacturers. In the NAM Manufacturers' Outlook Survey for the first quarter of 2016, 73 percent of respondents cited an unfavorable business climate due to government policies, including regulations and taxes, as a primary challenge facing businesses—up from 62.2 percent in March 2012.

The federal government's own data reflect these challenges. According to the annual information collection budget, the paperwork burden imposed by federal agencies, excluding the Department of Treasury,[1] increased from 1.509 billion hours in fiscal year (FY) 2003 to 2.446 billion hours in FY 2013, an increase of 62.1 percent (see Figure 1). In other words, federal agencies—excluding the Department of Treasury—imposed more than 279,000 years' worth of paperwork burden on the American public in FY 2013.[2]

These are challenges to prosperity, job growth and competitiveness that federal regulators are placing on manufacturers and other businesses in the United States. For the 10 years ending in FY 2013, which is the last year of available data, federal agencies (excluding the Department of Treasury) added almost 82 million hours in paperwork burden through their own discretion. This is on top of the 1.121 billion hours that non-Treasury agencies estimate was added because of new statutory requirements.

Figure 1: Government-Wide Paper Burden, Excluding the Department of Treasury



[1] The Department of Treasury's burden estimates include the burden imposed by the Internal Revenue Service and account for about 75 percent of the total federal burden imposed on the public. Treasury's burden has increased from 6.590 billion hours in FY 2003 to 7.007 billion hours (or 6.3 percent) in FY 2013. See Office of Information and Regulatory Affairs (OIRA), "Information Collection Budget of the United States Government" (2014), https://www.whitehouse.gov/sites/default/files/omb/inforeg/icb/icb_2014.pdf.

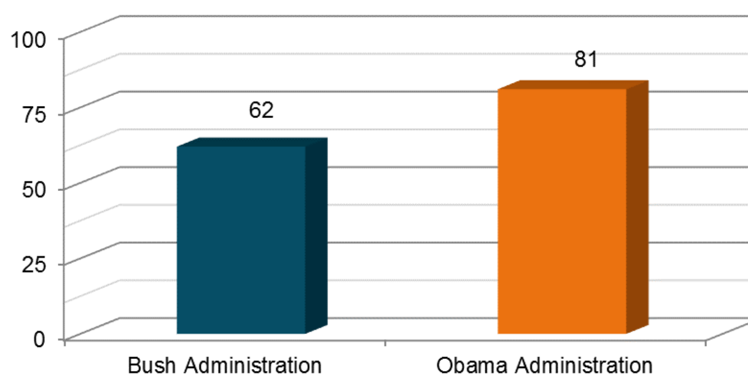
[2] In FY 2013, federal agencies excluding the Department of Treasury imposed the equivalent of 7.7 hours of regulatory burden for every person in the United States. In FY 2003, per-person regulatory burden was 5.2 hours annually. This demonstrates that the increase in regulatory burden is far outpacing population growth. Population estimates available from the U.S. Census Bureau, https://www.census.gov/popest/data/historical/2000s/index.html.

Manufacturers appreciate the need for recordkeeping and paperwork essential to ensuring compliance with important regulatory requirements, but government-imposed regulatory burdens continue to increase despite advancements in technology and both statutory and executive branch directives that federal agencies minimize unnecessary burdens. Government policies should support the global competitiveness of manufacturers and other businesses in the United States, not impose increasing burdens. Manufacturers in the United States confront challenges that our global competitors do not have.

The issue of an increasing federal regulatory burden is not unique to a particular presidency or political party. The non-Treasury paperwork burden increased 60 percent[3] during the eight years that President George W. Bush was in office. The NAM has welcomed efforts by President Barack Obama and his administration to reduce regulatory burdens. The president has signed executive orders, and the Office of Management and Budget (OMB) has issued memoranda on the principles of sound rulemaking, considering the cumulative effects of regulations, strengthening the retrospective review process and promoting international regulatory cooperation. Unfortunately, these initiatives have yet to provide real cost reductions for manufacturers or other regulated entities.

These directives are well-intentioned, but any benefits realized by these efforts have been subsumed by the unnecessarily burdensome regulations that federal agencies have been and are promulgating. Based on data from the Government Accountability Office,[4] 578 major new regulations—defined as having an annual effect on the economy of at least $100 million—have been issued by the current administration. A new major regulation has been issued by the current administration once every 4.55 days. Manufacturers and other regulated entities have confronted nearly 20 more major regulations per year from the Obama administration than during the Bush administration (see Figure 2). Regardless of the political party in charge, these regulations include significant burdens imposed on manufacturers in the United States and represent real compliance costs that affect our ability to expand and hire workers.

Figure 2: Major Regulations per Year, Through 2015

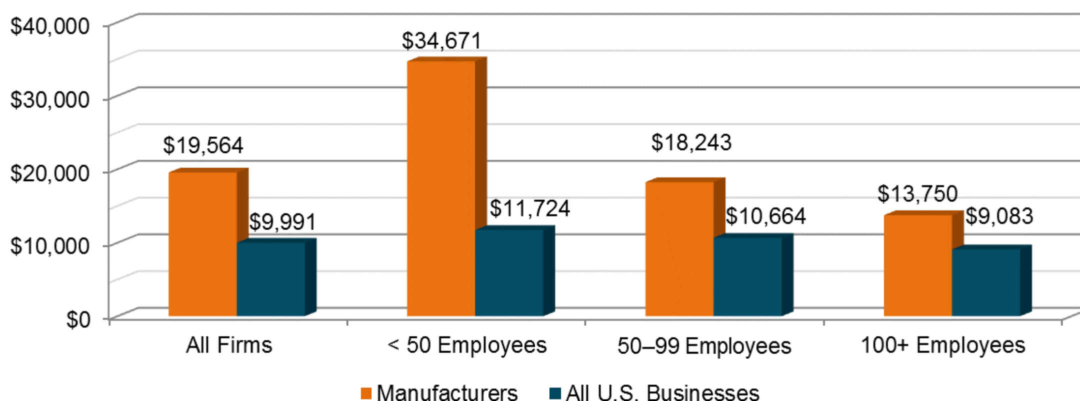


[3] Government-wide paperwork burden, excluding the Department of Treasury, was 1.205 billion hours in FY 2000 and 1.929 billion hours in FY 2008. See OIRA, "Information Collection Budget of the United States Government" (2009), https://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/icb_2009.pdf.
[4] U.S. Government Accountability Office, Congressional Review Act Overview, http://www.gao.gov/legal/congressional-review-act/overview.

III. Regulatory Challenges Facing Manufacturers in the United States

Because manufacturing is such a dynamic process, involving the transformation of raw materials into finished products, it involves more environmental and safety regulations than in other businesses. In September 2014, the NAM issued a report[5] that shows the economic impact of federal regulations. The report found that manufacturers in 2012 spent on average $19,564 per employee to comply with regulations, nearly double the amount per employee for all U.S. businesses (see Figure 3). Small manufacturers—those with fewer than 50 employees—incur regulatory costs of $34,671 per employee per year. This is more than triple that of the average U.S. business.

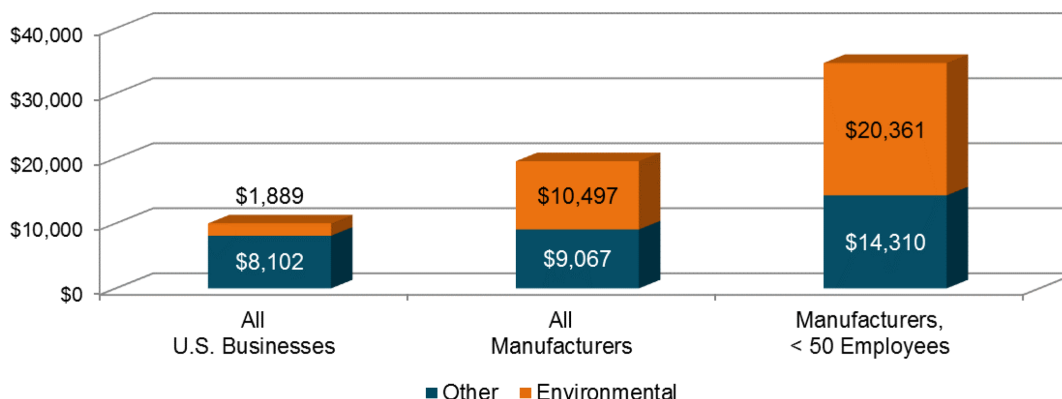
Figure 3: Regulatory Compliance Costs per Employee per Year, 2012 (in 2014 Dollars)



The burden of environmental regulation falls disproportionately on manufacturers, and it is heaviest on small manufacturers because their compliance costs often are not affected by economies of scale (see Figure 4). Manufacturers recognize that regulations are necessary to protect people's health and safety, but we need a regulatory system that effectively meets its objectives while supporting innovation and economic growth. In recent years, the scope and complexity of federal rules have made it harder to do business and compete in an ever-changing global economy. As a result, manufacturers are sensitive to regulatory measures that rely on inadequate benefit and cost justifications.

[5] NAM, "The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business" (September 2014), http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf.

Figure 4: Environmental Regulatory Compliance Costs per Employee per Year, 2012 (in 2014 Dollars)



In October 2013, the Manufacturers Alliance for Productivity and Innovation (MAPI) released an updated study[6] that highlighted the regulatory burdens placed on manufacturers. The study found that since 1981, the federal government has issued an average of just under 1.5 manufacturing-related regulations per week for more than 30 years. Individually and cumulatively, these regulations include significant burdens imposed on manufacturers in the United States and represent real compliance costs that affect our ability to expand and hire workers.

Manufacturers, particularly small manufacturers, know very well the importance of allocating scarce resources effectively to achieve continued success, which includes increased pay and benefits for employees. Every dollar that a company spends on complying with an unnecessary and ineffective regulatory requirement is one less dollar that can be allocated toward new equipment or to expand employee pay and benefits. Government-imposed inefficiencies are more than numbers in an annual report. They are manifested in real costs borne by the men and women who work hard to provide for their families.

Below are examples that highlight the regulatory challenges that manufacturers confront. The additional costs of these regulations are added to the already significant cumulative burdens of existing regulations imposed on manufacturers and other businesses. There is a failure within the federal government to truly understand the impact of regulatory requirements, such as paperwork and recordkeeping, on the public.

Agencies are failing in their responsibility to conduct analysis that would better assist them in understanding the true benefits and costs of their rules. Despite existing statutory requirements and clear directives from the president to improve the quality of regulations, manufacturers face an increasingly inefficient and complex myriad of regulations that place unnecessary costs on the public. Our regulatory system should be designed to promote coordination within and between agencies, and regulations should be designed to most effectively meet regulatory objectives to minimize unnecessary burdens.

[6] MAPI, *Growing Number of Federal Regulations Continue to Challenge Manufacturers* (October 2013), http://www.mapi.net/blog/2013/10/growing-number-federal-regulations-continue-challenge-manufacturers.

a. Existing Regulations

The Department of Labor's (DOL) Occupational Safety and Health Administration (OSHA): Occupational Exposure to Crystalline Silica (78 Fed. Reg. 56274). OSHA finalized the crystalline silica rule on March 25, reducing by half the permissible exposure limits for crystalline silica and mandates extensive and costly engineering controls. It also will require employers to provide exposure monitoring, medical surveillance, work area restrictions, clean rooms and recordkeeping. The proposal is based on outdated data and would impact 534,000 businesses and 2.2 million workers. The costs of this proposal could far exceed its benefits. An analysis by engineering and economic consultants estimated that the silica rule would impose $5.5 billion in annualized compliance costs on affected industries. Silica is perhaps the most common construction and manufacturing material in the world; it is a critical component in many manufacturing, construction, transportation, defense and high-tech industries and is present in thousands of consumer products. Significant progress has been made in preventing silica-related diseases under existing regulations, making proposed changes unnecessary and overly burdensome.

The DOL's Office of Labor-Management Standards: Interpretation of the "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act (Persuader Rule) (81 Fed. Reg. 15924). On March 23, the DOL published its final persuader rule, which provides sweeping changes to the rules that administer the Labor-Management Reporting and Disclosure Act. The agency drastically expanded the definition of "persuader" activity on how employers can seek advice regarding labor-organizing activities and when an entity will have to disclose information to the department. Under the old rules, only those entities that had direct contact with employees regarding labor-organizing campaigns would have to disclose their activity to the DOL. Under the new rule, however, even those consultants who have no face-to-face contact with employees and are educating employers on rights to organize and bargain collectively will have to report to the DOL as persuaders. The only exception to the new definition is if an entity or consultant is only giving advice to the employer (this would include lawyers). These changes would make it more difficult for manufacturers, especially smaller-sized manufacturers, to educate employees on union campaigns or to seek additional information on what is permitted for discussion under the law.

Environmental Protection Agency (EPA): Greenhouse Gas (GHG) Emission Limits for Existing Electric Utilities (80 Fed. Reg. 64510). The EPA finalized its much-publicized carbon pollution standard for existing power plants on October 23, 2015, setting first-of-their-kind performance standards for GHG emissions from existing power plants. The EPA's rule will fundamentally shift how electricity is generated and consumed in this country, effectively picking winners and losers in terms of both technologies and fuels. The rule also represents an attempt to vastly expand the EPA's traditional authority to regulate specific source categories by setting reduction requirements that reach into the entire electricity supply-and-demand chain. The requirements will be substantial, potentially costing billions of dollars per year to comply. Some studies estimate that compliance with the rule would cost well over $300 billion and cause double-digit electricity price increases for ratepayers in most states. Manufacturers are concerned about these potential costs and reliability challenges as electric power fleets are overhauled in compliance with the regulations. Manufacturers are also keenly aware that the EPA is using this regulation as a model for future direct regulations on other manufacturing sectors—meaning manufacturers could potentially be hit twice by GHG regulations. Interestingly, the EPA asserts that its final rule "will not have a significant economic impact on a substantial number of small entities." The regulation is currently stayed by the Supreme Court until litigation is resolved. Thirty-four senators and 171 members of the House filed a brief

pointing out the many legal and policy shortcomings of the EPA's rules on February 23, 2016, and currently 27 states are party to the legal challenge.

EPA: National Ambient Air Quality Standards (NAAQS) for Ozone (80 Fed. Reg. 65292). On October 1, 2015, the EPA finalized a more stringent NAAQS at 70 parts per billion (ppb), from the previous standard of 75 ppb. More than 60 percent of the controls and technologies needed to meet the rule's requirements are what the EPA called "unknown controls." Because controls are not known, the new standard may result in the closure of plants and the premature retirement of equipment used for manufacturing, construction and agriculture. The proposal could reduce GDP by $140 billion annually and eliminate 1.4 million job equivalents per year. In total, the costs of complying with the rule from 2017 through 2040 could top $1 trillion, making it the most expensive regulation ever issued by the U.S. government. The previous standard of 75 ppb—the most stringent standard ever—was never even fully implemented, while emissions are as low as they have been in decades and air quality continues to improve. The EPA itself admitted that implementation of the previous standard of 75 ppb, when combined with the dozens of other regulations on the books that will reduce ozone precursor emissions from stationary and mobile sources, will drive ozone reductions below 75 ppb (and close to 70 ppb) by 2025. The massive costs of a stricter standard—the most expensive regulation of all time, by a significant margin—was simply not necessary. As with GHG emission limits, the EPA states that the final rule "will not have a significant economic impact on a substantial number of small entities."

EPA: Emission Standards for Industrial, Commercial and Institutional Boilers and Process Heaters (Boiler MACT) (78 Fed. Reg. 7138). In January 2013, the EPA published its final Boiler MACT (maximum achievable control technology) rule. The NAM and business and environmental groups filed legal challenges in a federal appeals court, and the agency received 10 petitions for reconsideration, including one filed by the NAM that also requested reconsideration of related rules involving air pollutants for area sources (Boiler GACT, or generally available control technology) and commercial and solid waste incineration units. The EPA estimates that the MACT portion of the rule alone will impose capital costs of near $5 billion, plus $1.5 billion more in annual operating costs. The NAM will continue to advocate achievable and affordable Boiler MACT regulations. While the rule itself has improved over time, there are still flaws and unsettled legal and regulatory issues that impose significant costs and uncertainty for manufacturers. In the final rule notice, the EPA expressed concerns over "potential small entity impacts." However, the agency determined that, since it had conducted regulatory flexibility analysis for a different but related rule, it did not need to conduct similar analysis for this extremely costly rule.

EPA: National Emission Standards for Hazardous Air Pollutants: Area Source Standards for Nine Metal Fabrication and Finishing Source Categories (NESHAP 6X) (73 Fed. Reg. 42978). The NESHAP 6X regulations became effective July 23, 2008, for new sources, and July 25, 2011, for existing sources. NESHAP 6X is an air toxics regulation on metal fabrication and finishing operations (i.e., welding). Among other requirements, NESHAP 6X requires ongoing, indefinite, quarterly visual emissions monitoring for welding operations and for abrasive blasting operations, even after months or years of "zero visible emissions" have been recorded. As one might expect, the EPA certified that the rule "will not have a significant economic impact on a substantial number of small entities."

EPA and the Army Corps of Engineers: Definition of "Waters of the United States" Under the Clean Water Act (80 Fed. Reg. 37054). On May 27, 2015, the EPA and Army Corps of Engineers finalized a rule to greatly extend federal jurisdiction of Clean Water Act programs

well beyond traditional navigable waters to tributaries, flood plains, adjacent waters and vaguely defined "other waters." The rule gives federal agencies direct authority over land-use decisions that Congress had intentionally reserved to the states. Its vague definitions subject countless ordinary commercial, industrial and even recreational and residential activities to new layers of federal requirements under the Clean Water Act. For manufacturers, the uncertainty of whether a pond, ditch or other low-lying or wet area near their property is now subject to federal Clean Water Act permitting requirements is a regulatory nightmare, which can introduce new upfront costs, project delays and threats of litigation. As of October 9, 2015, the rule has been stayed nationwide by the U.S. Court of Appeals for the Sixth Circuit, pending resolution of litigation. When one considers the number of small manufacturers and farmers that this rule will impact, it is confounding that the EPA certified that the rule will not have a significant economic impact on a substantial number of small entities.

Interagency Working Group on Social Cost of Carbon: Technical Support Document, Social Cost of Carbon for Regulatory Impact Analysis. In May 2013, the administration increased its estimates of the "social cost" of emitting carbon dioxide (CO_2) into the atmosphere (i.e., social cost of carbon). As a result, the new estimates allow agencies to greatly increase the value of benefits of regulations that target or reduce CO_2 emissions. The process for developing the social cost of carbon estimates was not transparent and failed to comply with OMB guidelines and information quality obligations. Many of the inputs to the models were not subject to peer review, and the interagency working group that developed the new estimates failed to disclose and quantify key uncertainties to inform decision makers and the public. Despite wide public concern over the new estimates, agencies are using them to justify the costs of many of the costliest federal regulations. The OMB public comment period initiated at the end of 2013 yielded significant concerns by stakeholders that have never been adequately addressed, and federal agencies continue to rely on the 2013 social cost of carbon estimates that were developed and finalized without any public participation.

National Labor Relations Board (NLRB): Ambush Elections (79 Fed. Reg. 74308). On April 14, 2015, the NLRB's "ambush elections" rule became effective. The new rule shortens the time in which a union election can take place to as little as 14 days and limits allowable evidence in pre-election hearings. The NLRB provided no evidence supporting the dramatic change in policy. Business owners would effectively be stripped of legal rights ensuring a fair election, and those who lack resources, or in-house legal expertise, will be left scrambling to hastily navigate and understand complex labor processes. The compressed time frame for elections could deny employees the opportunity to make fully informed decisions about unionization. The rule also requires all employers to turn over their employees' personal e-mail addresses, home and personal cell phone numbers, work locations, shifts and job classifications to union organizers. Employees have no say in whether their personal information can be disclosed, and the recipient of the personal information has no substantive legal responsibility to safeguard and protect workers' sensitive information. The rule also provides no restriction on how the private information can be used, and employees have no legal recourse to hold accountable an outside group that compromises this important private information.

NLRB: Joint-Employer Standard (<u>Browning-Ferris Industries of California, Inc.</u> (362 NLRB No. 186)). On August 27, 2015, the NLRB issued a decision in the Browning-Ferris Industries, Inc. case, which redefines the 30-year-old joint-employer standard, calling into question what type of relationship one employer has with another. The previous standard deemed businesses joint employers only when they share direct and immediate control over essential terms and conditions of employment, including hiring, firing, discipline, supervision and direction. Now, however, manufacturers who contract out for any product or service with another

company could find themselves in a joint-employer relationship triggering responsibility for collective bargaining agreements and other parts of the National Labor Relations Act. The previous standard is one that all industries understood and had been operating with for more than 30 years. Due to the fact that there has been no change in circumstance in the business community, the change in this standard is unjustified. Manufacturers will now have to reanalyze all business relationships and how they do business in the future.

b. Currently Proposed Regulations

U.S. Consumer Product Safety Commission (CPSC): Mandatory Standard for Recreational Off-Highway Vehicles (79 Fed. Reg. 68964). In October 2014, the CPSC proposed a mandatory standard for recreational off-highway vehicles (ROVs) despite admitting that it had no evidence showing its proposed changes would improve safety. The proposal violates statutory requirements that the agency defer to voluntary standards and, when issuing mandatory standards, to issue only performance-based criteria and not design mandates. The CPSC's insistence on a mandatory standard will compromise the mobility and utility of the vehicles in the off-highway setting for which they are intended, negatively impact safety by limiting research and innovation and harm consumer demand. The result of this agency action would be the loss of thousands of manufacturing and retail jobs. Industry analysis has shown that at least 90 percent of serious incidents with ROVs would not have been affected by the CPSC proposal, but were instead caused by operator actions. If the rule were to be finalized, the variety of products available to consumers would be greatly limited as many features would be illegal and consumer demand for new vehicles would significantly decrease. In the CPSC's initial regulatory flexibility analysis, the commission found that the proposed rule "will not likely have a significant direct impact on a substantial number of small firms." However, the agency's analysis fails to consider dealers, other than those that would be considered "importers."

CPSC: Voluntary Remedial Actions and Guidelines for Voluntary Recall Notices (78 Fed. Reg. 69793). In November 2013, the CPSC issued a proposed rule that would place significant burdens on manufacturers and retailers of consumer products and negatively impact the highly successful voluntary recall process. The proposed rule would make voluntary corrective action plans and voluntary recalls legally binding, increasing enforcement jeopardy and legal consequences in product liability, other commercial contexts or in a civil penalty matter. The proposal would eliminate a company's ability to disclaim admission of a defect or potential hazard. The proposed rule would also empower CPSC staff to include compliance programs in corrective action plans. The CPSC lacks the statutory authority to proceed with binding regulations for voluntary programs. The success of our consumer product recall system is based on a strong cooperative relationship between the CPSC and the companies it regulates. The rule removes longstanding incentives for firms to proactively cooperate with the CPSC and could seriously threaten the Fast-Track recall program, which the CPSC itself highlights as a model of good governance and was implemented as a way to assist small firms to issue effective recalls. Small businesses that would be impacted by the proposed rule include manufacturers, importers, shippers, carriers, distributors and retailers. However, the CPSC failed to include an initial regulatory flexibility analysis in its proposed rule.

DOL: Contractor Blacklisting, Implementation of Executive Order 13673 (Fair Pay and Safe Workplaces). The executive order, proposed rule and guidance could bar federal contractors from new work if there has even been an allegation of a labor law violation in the past three years. It would apply to contracts valued at $500,000 or more and will be implemented by 2016. The DOL will issue guidance through notice and comment and OMB—through the Federal Acquisition Regulatory Council—will spearhead the issuance of a

regulation. First and foremost, the president does not have the legal authority to make the regulatory changes that will follow from this order. By directing the DOL to develop guidance that will establish degrees of violations not included in the underlying statutes, the executive order significantly amends the enforcement mechanisms Congress established for these laws. In addition, the order disregards existing enforcement powers the administration already has through federal acquisition regulations and labor laws as well as the longstanding process by which suspension and debarment actions are taken. This process is set forth in the Federal Acquisition Regulation (FAR) and specifically in FAR Part 9.4. Each agency has the ability to determine, through the agency's suspension and debarment official, whether the government should refrain from doing business with a particular contractor because the contractor is not "presently responsible." Factors taken into account for making such a determination include whether there has been a finding of fraud committed on the contract and/or willful and serious violations of other U.S. laws. Furthermore, the agency official may consider whether the contractor has taken measures to remediate past bad actions or eliminated systemic problems from the past. Rather than improving upon these existing processes, the executive order would unnecessarily create additional burdens on contractors and further complicate an already complex contracting process.

DOL: Federal Contractor Paid Sick Leave Proposed Rule (81 Fed. Reg. 9592). As directed by last year's Executive Order 13706, the DOL released a proposed rule requiring all federal contractors and subcontractors to provide to employees seven days of paid sick leave annually, which can be used for personal illness as well as leave allowing for family care. This will go into effect for every newly awarded contract starting January 1, 2017. This new mandate will apply to any contractors' or subcontractors' employees working "on" or "in connection with" any new contracts, and there is no dollar or employee threshold for the requirement to apply. Furthermore, the days accrued will also carry over into the following year. There is a lot of confusion about this new mandate and how it will affect leave programs already in place at certain contractors and subcontractors. Manufacturers that already provide paid time may have to start tracking time in hourly increments if an employee is taking leave under the Family Medical Leave Act.

DOL's OSHA: Improve Tracking Workplace Injuries and Illnesses (78 Fed. Reg. 67253 and 79 Fed. Reg. 47605). The proposed rule would change current reporting requirements for employer injury and illness logs and permit OSHA to publish the information on its website. While the agency has the statutory authority to collect the information, the statute does not authorize OSHA to make the information publicly available. The proposed rule presents privacy issues for employees as the information contained in injury and illness logs includes personally identifiable information, as well as other private information about individual employees. This information should not be available for public consumption. The employer reports also include information that is unrelated to work activity, which, without context, could mischaracterize a company's safety record. The NAM believes that the existing recordkeeping system is sufficient to allow employers to identify and address hazards in their workplaces. Finally, despite lacking statutory authority, OSHA issued an update to its proposal that would place companies in enforcement jeopardy if the agency determines that a requirement such as additional training or even reflective clothing is an "adverse action" in response to an employee injury report. Finally, in a supplement to the proposed rule, OSHA provided no regulatory text, but it suggests in the questions it posed that a mere posting of a company's safety record could be viewed by the agency as the company discouraging the reporting of incidents. These proposed updates would inject uncertainty and ambiguity into the workplace safety dynamic. Current protections for employees from retaliation in response to injury reports are comprehensive, well-established and support company initiatives to improve the health and well-being of employees.

DOL's Wage and Hour Division Proposed Rule Regarding Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees (80 Fed. Reg. 38516). Last year, the DOL proposed to increase the minimum salary threshold from $23,440 to $50,660 for employees to be exempted from overtime pay pursuant to the Fair Labor Standards Act (FLSA). The proposal would also automatically tie future salary threshold increases to the Consumer Price Index, which could lead to another substantial increase in only a few short years. Under the FLSA, certain employees are exempt from overtime pay if they meet certain requirements. In 2004, the rules were amended to exempt employees if they made more than $23,440 ($455 per week) and performed duties in certain categories or in a managerial or professional role. This proposed dramatic increase will require manufacturers to reclassify certain salaried employees as hourly, making them eligible for overtime pay.

Equal Employment Opportunity Commission (EEOC) Employment Information Report (EEO-1) Form Change (81 Fed. Reg. 5113). The proposed form change would require all employers with 100 or more employees to submit an employee compensation based on sex, race and ethnicity, categorized in 12 pay bands and 10 job categories. The administration believes this will encourage compliance with equal pay laws, and agencies will be able to target enforcement more effectively by focusing efforts where there are grave discrepancies. The proposal and expanded recordkeeping (the EEO-1 Report would expand from 180 data cells to approximately 3,600) requirements would put a company at risk of publicly disclosing employees' private information, potentially exposing proprietary information of a company. Moreover, the proposal would violate the Paperwork Reduction Act—it is unnecessary and duplicative. The agency also failed to employ sound rulemaking principles that are outlined in Executive Order 13563. The proposal would fail to accomplish the stated regulatory objectives.

c. <u>Anticipated Proposed Regulations</u>

CPSC: Mandatory Standard for Table Saws (76 Fed. Reg. 62678). In October 2011, the CPSC initiated rulemaking procedures to establish mandatory safety standards for table saws. The rulemaking, in its current trajectory, would potentially seek to impose a standard that could only be achieved through the use of one claimed patented technology. Regulation should not be used to advantage one technology or one company over another. The Consumer Product Safety Act (CPSA) dictates when the Commission can issue a mandatory standard: only upon a finding that an existing voluntary standard would not prevent or adequately reduce the risk of injury in a manner less burdensome than the proposed CPSC mandatory standard. Data used by the CPSC on alleged table saw injuries is questionable and outdated and is not relevant to current voluntary standards. If the CPSC proceeds with a mandatory standard, such action would undermine the industry's incentive to develop new alternative table saw safety technology and would impose unnecessary and significantly increased costs on consumers. In issuing an advance notice of proposed rulemaking, the CPSC fails to even mention the costs to small businesses, such as carpenters and contractors, in its discussion on economic considerations. According to the Power Tool Institute, the CPSC's proposal would increase the cost of each benchtop table saw by approximately $1,000—4 times the average price and an $875 million impact only for the benchtop category of table saws. Such a burden is not justifiable for Do It Yourself or small contractor customers. Unfortunately, this rulemaking illustrates a trend at the agency where the CPSC has failed to conduct adequate cost-benefit analyses with its rulemakings and imposes prohibitive costs on manufacturers and consumers without accounting for the actual risks associated with the products.

IV. Reducing Regulatory Impediments

Manufacturing in America is gaining momentum, but it could be much stronger if federal policies did not impede growth. If we are to succeed in creating a more competitive economy, we must reform our regulatory system so that manufacturers can innovate and make better products instead of spending hours and resources complying with inefficient, duplicative and unnecessary regulations. Manufacturers are committed to commonsense regulatory reforms that protect the environment and public health and safety as well as prioritize economic growth and job creation.

Manufacturers support reform proposals that would fundamentally change the regulatory process with the goal of improving the quality of rules that agencies issue. Leaders in Washington must view regulatory reform as more than just a rule-by-rule process but instead as a system-by-system and objective-by-objective review. The NAM recommends a number of reforms outlined below that would improve the system through which modern rulemaking is conducted.

a. Increase Sensitivity to Small Business

The Regulatory Flexibility Act of 1980 (RFA) requires agencies to be sensitive to the needs of small businesses when drafting regulations. It has a number of procedural requirements, including that agencies consider less costly alternatives for small businesses and prepare a regulatory flexibility analysis when proposed and final rules are issued. In 1996, Congress passed the Small Business Regulatory Enforcement Fairness Act (SBREFA), which requires the EPA and OSHA to empanel a group of small business representatives to help consider a rule before it is proposed. In recognizing the importance of the SBREFA panel process, the 111th Congress expanded this requirement to include the new Consumer Financial Protection Bureau when it passed the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Lawmakers have universally supported the RFA's provisions, but Congress needs to strengthen the law and close loopholes that agencies use to avoid its requirements. Unfortunately, agencies are able to avoid many important RFA requirements by simply asserting that a rule will not impact small businesses significantly. A recent analysis in the Administrative Law Review shows that agencies avoided the requirement of the RFA for more than 92 percent of rules issued between the fall regulatory agendas of 1996 and 2012.[7] Among the reasons for this small number of regulations requiring a regulatory flexibility analysis is the exclusion of "indirect effects." In addition, despite the success of the small business panel process, it only applies to three agencies. The RFA's requirements are especially important to improving the quality of regulations and have saved billions of dollars in regulatory costs for small businesses. In January 2016, the Small Business Administration's (SBA) Office of Advocacy—an independent office helping federal agencies implement the RFA's provisions—issued its annual report indicating that it helped save small businesses more than $1.6 billion in FY 2015 in first-year cost savings. Since 1998, the Office of Advocacy indicates that the RFA has yielded nearly $130 billion in savings for small businesses. Imagine the positive impact on regulations if agencies were not able to avoid the RFA's requirements so easily.

[7] See Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN.L. REV. 65, 69, 99 (2015) (identifying only 1,926 rules out of 24,787 as having completed RFA analyses).

The House has already passed legislation—the Small Business Regulatory Flexibility Improvements Act of 2015 (H.R. 527), introduced by House Small Business Committee Chairman Steve Chabot (R-OH)—which would close many of the loopholes that agencies exploit to avoid the RFA's requirements. The NAM supports H.R. 527 and urges Senate consideration. Agency adherence to the RFA's requirements is important if regulations are to be designed in a way that protect the public, workers and the environment without placing unnecessary burdens on small businesses. Through careful analysis and an understanding of both intended and unintended impacts on stakeholders, agencies can improve their rules for small entities, leading to improved regulations for everyone.

b. Streamline Regulations Through Sunsets and Retrospective Review

Our regulatory system is broken, unnecessarily complex and inefficient, and the public supports efforts to streamline and simplify regulations by removing outdated and duplicative rules. Through a thoughtful examination of existing regulations, we can improve the effectiveness of both existing and future regulations. Importantly, retrospective reviews could provide agencies an opportunity to analyze, revise and improve techniques and models used for predicting more accurate benefit and cost estimates for future regulations. As Michael Greenstone, former chief economist at the Council of Economic Advisers under President Obama, wrote in 2009, "The single greatest problem with the current system is that most regulations are subject to a cost-benefit analysis only in advance of their implementation. That is the point when the least is known, and any analysis must rest on many unverifiable and potentially controversial assumptions."[8] Retrospective review of existing regulations should include a careful and thoughtful analysis of regulatory requirements and their necessity as well as an estimation of their value to intended outcomes.

For an agency to truly understand the effectiveness of a regulation, it must define the problem that the rule seeks to modify and establish a method for measuring its effectiveness after implementation. In manufacturing, best practices include regular reprioritizations and organized abandonment of less useful methods, procedures and practices. The same mentality should apply to regulating agencies: the retrospective review process should be the beginning of a bottom-up analysis of how agencies use their regulations to accomplish their objectives. Agencies should look to the private sector and the concept of "lean manufacturing" as a model for how to improve our regulatory system. Many manufacturers have transformed their operations by adopting a principle called "lean thinking," where they identify everything in the organization that consumes resources but adds no value to the customer. They then look for a way to eliminate efforts that create no value.

In the government setting, agencies might identify anything that is not absolutely necessary to achieve the regulatory outcome and eliminate it. When considering a new regulation or reviewing existing requirements, agencies must first define the problem, which should include early participation by all stakeholders. They must engage in a bottom-up interagency analysis of how agencies use regulations, guidance and paperwork requirements to accomplish objectives. It is vital to identify all inefficiencies and determine how to eliminate efforts and processes that create no value or assist in meeting objectives. Finally, agencies must institutionalize these best practices.

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[8] Michael Greenstone, "Toward a Culture of Persistent Regulatory Experimentation and Evaluation," in David Moss and John Cisternino, eds., *New Perspectives on Regulation*, The Tobin Project, 2009, p. 113, http://tobinproject.org/sites/tobinproject.org/files/assets/New_Perspectives_Ch5_Greenstone.pdf.

The administration strongly promotes the benefits of conducting retrospective reviews. Executive Order 13563 directs agencies to conduct "retrospective analysis of rules that may be outmoded, ineffective, insufficient or excessively burdensome, and to modify, streamline, expand or repeal them in accordance with what has been learned." Retrospective review of regulations is not a new concept, and there have been similar initiatives over the past 40 years. In 2005, the OMB, through the OIRA, issued a report, titled "Regulatory Reform of the U.S. Manufacturing Sector." That initiative identified 76 specific regulations that federal agencies and the OMB determined were in need of reform. In fact, the NAM submitted 26 of the regulations characterized as most in need of reform. Unfortunately, like previous reform initiatives, the 2005 initiative failed to live up to expectations, and despite efforts by federal agencies to cooperate with stakeholders, the promise of a significant burden reduction through the review of existing regulations never materialized.

To truly build a culture of continuous improvement, retrospective reviews must be institutionalized and made law. One of the best incentives for high-quality retrospective reviews of existing regulations is to sunset rules automatically that are not chosen affirmatively to be continued. The NAM supports the Regulatory Review and Sunset Act (H.R. 2010), introduced by Rep. Randy Hultgren (R-IL), which would implement a mandatory retrospective review of regulations to remove conflicting, outdated and often ineffective regulations that build up over time. If an outdated rule has no defender or continued need for existence or is shown to have decreased in effectiveness over time, it should be sunset.

Adopting lean thinking into the review of existing regulations could produce more robust and significant reductions in regulatory burdens while maximizing the benefits associated with protecting health, safety and the environment. If agencies were conducting this kind of review, we would see requests to Congress to change statutes to allow for greater flexibility in a number of regulatory programs. Rep. Hultgren's bill includes a provision directing agencies to report to Congress on needed legislative changes that would assist them as they implement regulatory changes as a result of their reviews. The necessity of legislative changes should be an opportunity, not a roadblock, to any proposal.

The power of inertia is very strong. Without an imperative to review old regulations, it will not be done, and we will end up with the same accumulation of conflicting, outdated and often ineffective regulations that build up over time. These types of systems need to be put in place throughout the government to ensure regulatory programs are thoughtful, intentional and meet the needs of our changing economy.

c. Strengthen and Codify Sound Regulatory Analysis

The complexity of rulemaking and its reliance on highly technical scientific information has only increased since the passage of the Administrative Procedure Act (APA) in 1946. Our administrative process has not kept up with those changes, and agency accountability is lacking without meaningful judicial review. Moreover, the process by which the government relies on complex, scientific information as the basis for rules should be improved and subject to judicial review. Efforts to encourage peer review of significant data and to create consistent standards for agency risk assessment should be part of that process. The NAM supports legislative reforms to the APA to incorporate the principles and procedures of President Clinton's 1993 Executive Order 12866 into the DNA of how every rule is developed. Manufacturers also support legislation that would improve the quality of information that agencies use to support their rulemakings. President Obama reaffirmed the principles of sound rulemaking when he issued Executive Order 13563, stating,

> Our regulatory system must protect public health, welfare, safety and our environment while promoting economic growth, innovation, competitiveness and job creation. It must be based on the best available science. It must allow for public participation and an open exchange of ideas. It must promote predictability and reduce uncertainty. It must identify and use the best, most innovative and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative. . . . It must measure, and seek to improve, the actual results of regulatory requirements.

Manufacturers and the general public agree with these principles and believe the regulatory system can be improved in a way that protects health and safety without compromising economic growth. Agencies should, among other things, use the best available science, better calculate the benefits and costs of their rules, improve public participation and transparency, use the least burdensome tools for achieving regulatory ends and specify performance objectives rather than a particular method of compliance to improve the effectiveness of regulatory measures.

Manufacturers and other businesses are often asked which regulation is the most burdensome. It is a difficult question to answer because the cumulative costs of federal, state and local regulations are extremely complex. Agencies must better consider the cumulative effects of their regulations and requirements. Important reform measures, such as Sen. Rob Portman's (R-OH) Regulatory Accountability Act, would require agencies to consider the cumulative costs of regulatory requirements. Executive Order 13563 and OMB guidance for agencies both articulate this principle. President Obama also issued Executive Order 13610, which directs agencies to consider "the cumulative effects of their own regulations, including cumulative burdens . . . and give priority to reforms that would make significant progress in reducing those burdens while protecting public health, welfare, safety and our environment." Agency adherence to each of these regulatory principles is vital if we are to implement fundamental change to our regulatory system that improves the effectiveness of rules in protecting health, safety and the environment while minimizing the unnecessary burdens imposed on regulated entities.

d. Improve Congressional Review and Analysis of Regulations

Congress is at the heart of the regulatory process and produces the authority for the agencies to issue rules, so it is also responsible, along with the executive branch, for the current state of our regulatory system. While Congress does consider some of its mandates' impacts on the private sector through regulatory authority it grants in law, it has less institutional capability for analysis of those mandates than the executive branch. Congress does not have a group of analysts who develop their own cost estimates of proposed or final regulations. Over the past two decades, members of Congress have proposed to create a congressional office of regulatory analysis. As the Congressional Budget Office parallels the OMB, so too should Congress have a parallel to OIRA.

This institutional change to the regulatory system could encourage more thoughtful analysis of the regulatory authority Congress grants in statutes, provide Congress with better tools in analyzing agency regulations and allow Congress to engage in more holistic reviews of the overlapping and duplicative statutory mandates that have accumulated over the years. The NAM supports legislative proposals that would provide Congress with an office to analyze the prospective impact of economically significant rules in addition to conducting retrospective reviews. Not only would this office give lawmakers better information about the potential impacts

of a proposed regulation, but it would also provide agencies with analysis conducted by an objective third party. This is an important rethinking of the institutional design of our regulatory system and could lead to regulations that more effectively meet policy objectives while reducing unnecessary burdens.

e. Support Centralized Review of Agencies' Regulatory Activities

Executive Order 12866 defines the OIRA's regulatory review responsibilities. The OIRA reviews significant rules issued by executive branch agencies and the analyses used to support those rules at both their draft and final stages. The office applies a critical screen to the contents of regulation, agencies' analytical rigor, legal requirements affecting the proposal and the president's priorities and philosophy. Nowhere else in the government does this take place. Single-mission agencies are frequently effective in accomplishing their objectives. This intense focus on a relatively narrow set of policies can weaken their peripheral vision, however, including their assessment of duplication between agencies, cumulative impacts of similar rules on the same sector of the economy or other broader considerations. The OIRA is the only agency that brings to bear a government- and economy-wide perspective. For that reason, the OIRA is a critical institution in our regulatory process for conducting a centralized review of the agencies' regulatory activities, facilitating interagency review, resolving conflicts and eliminating unnecessary duplication.

A key responsibility of the OIRA is to ensure that regulating agencies are meeting the requirements of Executive Order 12866 for a significant regulatory action. The executive order states, "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." Importantly, the OIRA facilitates public participation in the regulatory process and helps ensure that agencies' analyses, to the extent possible, are accurate. Without quality analysis, it is difficult to ensure that regulations are meeting health, safety and environmental objectives "while promoting economic growth, innovation, competitiveness and job creation," as stated in Executive Order 13563.

Despite its critical function, even as the size and scope of the government has increased, the OIRA has shrunk. As the OIRA's staff was reduced from a full-time equivalent ceiling of 90 to fewer than 40 employees today, the staff dedicated to writing, administering and enforcing regulations has increased from 146,000 in 1980 to 290,690 in 2013. To ensure that the OIRA can fulfill its current mission, additional staff and resources are necessary. Much has been made about the length of OIRA reviews, but additional resources would allow OIRA analysts to do their jobs more quickly.

By expanding the OIRA's ability to provide objective analysis, to conduct thoughtful regulatory review and to work with regulating agencies, federal regulations will meet health, safety and environmental objectives more effectively at a much lower cost to businesses. A modest investment in this institution will pay back significant returns to the entire economy.

f. Hold Independent Regulatory Agencies Accountable

The president does not exercise similar authority over independent regulatory agencies, such as the Federal Communications Commission, the NLRB, the Securities and Exchange Commission and the CPSC, as he does over other agencies within the executive branch. Independent agencies are not required to comply with the same regulatory principles as

executive branch agencies and often fail to conduct any analysis to determine expected benefits and costs.

The president's bipartisan Council on Jobs and Competitiveness made recommendations in its interim and final reports to encourage Congress to require independent regulatory agencies to conduct cost-benefit analyses of their significant rules and subject their analysis to third-party review through the OIRA or some other office. Congress should confirm the president's authority over these agencies. If there is consensus that this process makes executive branch rules better, why would we not want to similarly improve the rules issued by independent regulatory agencies? Consistency across the government in regulatory procedures and analysis would only improve certainty and transparency of the process. Independent regulatory agencies often dismiss sound regulatory analysis as a hindrance to their abilities to regulate. However, the case for the inclusion of independent regulatory agencies in a centralized review of regulations is clear, and Congress should act to make it certain.

g. Enhance the Abilities of Institutions to Improve the Quality of Regulations

As discussed above, the SBA's Office of Advocacy plays an important role in ensuring that agencies thoughtfully consider small entities when promulgating regulations. When Congress created the office in 1976, it recognized the need for an independent body within the federal government to advocate for those regulated entities most disproportionately impacted by federal rules. The office helps agencies write better, smarter and more effective regulations. We urge Congress to support this office and provide it with the resources it needs to carry out its important work.

The Office of Industry Analysis is within the Office of Manufacturing and Services at the Department of Commerce's International Trade Administration and was created to assess the cost competitiveness of American industry and the impact of proposed regulations on economic growth and job creation. The office was created in response to a 2003 executive branch initiative to improve the global competitiveness of the manufacturing sector in the United States and was included as a recommendation in a January 2004 report, titled "Manufacturing in America: A Comprehensive Strategy to Address the Challenges to U.S. Manufacturers." The report states the office should develop "the analytical tools and expertise . . . to assess the impact of proposed rules and regulations on economic growth and job creation before they are put into effect." This office has developed the analytical tools necessary to perform those functions and to provide the Department of Commerce with a strong, thoughtful voice within the interagency review of proposed regulations. The department must speak for manufacturing when rules are being considered. Unfortunately, the office no longer engages in the type of regulatory analysis for which it was established. The cost of regulatory compliance is an important factor influencing our competitive profile within the global economy. The Office of Industry Analysis was created to reduce the unnecessary regulatory burdens placed on domestic firms, and its role as a provider of objective, third-party analysis to regulators should be restored and strengthened.

V. Conclusion

Chairman Chabot, Ranking Member Velázquez and members of the committee, thank you for your attention to these issues and for holding this hearing. We can reform the regulatory system and improve analysis while enhancing our ability to protect health, safety and the environment. Manufacturers are committed to working toward policies that will restore common sense to our broken and inflexible regulatory system. The best way to meet regulatory

objectives while ensuring continued economic growth and employment is by enacting a comprehensive and consistent set of policies that improve regulatory analysis, enhance the quality and transparency of scientific and technical inputs, eliminate waste and duplication and support the institutions and policies that work. These policies must be applied to all agencies, and we must ensure that regulators are sensitive to the needs of small business.