NATIONAL ASSOCIATION OF
Manufacturers

Jay Timmons
President and CEO

June 4, 2012

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

The Honorable Jim Jordan
Chairman
Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Chairmen Issa and Jordan:

On behalf of the National Association of Manufacturers (NAM), the largest industrial trade association and the voice for 12 million men and women who make things in America, thank you for the opportunity to identify high priority federal regulations that are negatively impacting jobs, the economy and our economic competitiveness.

The problem of excessive regulation weighs heavily on the minds of manufacturers. In a recent NAM/IndustryWeek Survey of Manufacturers an unfavorable business climate caused by regulations and taxes, cited by over 62 percent of respondents, is the top challenge facing businesses. One manufacturer who volunteered a comment sums up the environment facing U.S. firms: "Lack of clarity regarding future federal tax policy, regulation and health care mandates." This is further quantified by a study conducted by the Manufacturing Institute and MAPI in 2011 which calculated that U.S. manufacturers face a 20 percent structural cost burden compared to nine major trading partners. That is an increase from the last study we shared with you, conducted in 2008, which demonstrated that domestic policies added 17.6 percent to the cost of manufacturing in the United States. The cost of regulatory compliance is among those factors that could change our competitive profile.

The NAM has a four-point plan for economic growth and jobs, which will enable the U.S. to compete and succeed in the global economy. First, we will need to adopt policies that will make us the best place in the world to manufacture and attract foreign direct investment. Second, we must expand access to global markets to enable manufacturers to reach the 95 percent of world consumers who live outside our borders. Third, we must enact policies that provide a workforce that the 21st century economy requires. Fourth, we must adopt strategies to continue U.S. manufacturers' place as the world's leading innovators. Part of achieving this manufacturing renaissance is contingent upon smart policy reforms from lawmakers and the Administration on taxes, energy, litigation, education, labor, health care, trade, infrastructure and regulation.

Because manufacturing is such a dynamic process, involving the transformation of raw materials into finished products, it creates more environmental and safety issues than other businesses. The burden of environmental regulation falls disproportionately on manufacturers, and it is heaviest on small manufacturers because their compliance costs are often not affected by economies of scale.

The NAM welcomes recent efforts by the 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. These directives are well-intentioned, but the benefits realized by these efforts are unable to counteract the overly burdensome regulations that federal agencies have been and are promulgating. Since your last request to identify regulations impeding job creation, federal agencies have finalized 98 major rules. These regulations include significant burdens imposed on U.S. manufacturers and represent real compliance costs that affect our ability to expand and hire workers.

On January 5, 2011, the NAM provided, at your request, a list of regulations that impact manufacturers. We would first like to update the Committee on some of those past submissions, outline additional regulatory hurdles identified since our last submission and offer recommendations on reforms of the regulatory system to help us achieve a manufacturing renaissance. These lists are not exhaustive but represent high priority regulations for manufacturers that, without significant change, would greatly inhibit the ability of manufacturers to compete in the global marketplace.

Updates on Regulations Previously Submitted to the Committee

EPA Boiler MACT

The Environmental Protection Agency (EPA) is reconsidering the Boiler MACT regulations that would establish more stringent emissions limits on industrial and commercial boilers and process heaters. The rules are expected to be finalized in June of this year. While some progress has been made to improve these burdensome regulations for manufacturers, one study from the Council of Industrial Boiler Owners (CIBO) estimates that the cost to comply with the reconsidered proposal is approximately $15 billion. The NAM, in its regulatory comments, has urged the Agency to set more achievable standards, ensure that materials traditionally used as fuels in boilers will not be considered wastes, and extend the compliance time frame from three to five years.

EPA National Ambient Air Quality Standards (NAAQS)

Although the Administration wisely abandoned EPA's misguided reconsideration of the 2008 ozone air quality standard, the NAM is now closely following implementation of this standard while also litigating it in federal court. The EPA also plans to issue a proposal in

August 2012 to revise the particulate matter ($PM_{2.5}$) standard. Should the Agency propose a more stringent standard, manufacturers will be concerned about restricted economic development and increased operating costs in new non-attainment areas.

EPA Greenhouse Gas Regulations (PSD / Title V)

The NAM is aggressively litigating the EPA's regulation of greenhouse gas emissions under the Clean Air Act. The D.C. Circuit Court of Appeals heard oral arguments on the consolidated cases on February 28-29, and NAM counsel specifically challenged the weak statutory authority for the EPA's actions. The court's decision is expected in June.

DOT Trucking Hours of Service Rule

On December 22, 2011, the Department of Transportation's (DOT) Federal Motor Carrier Safety Administration (FMCSA) finalized its Trucking Hours of Service rule. The NAM and other industry groups will file a joint *amicus curiae* brief supporting the American Trucking Associations' legal challenge to the final rule's 34-hour restart provision and a second *amicus* brief opposing legal challenges to provisions of the rule that maintain the 14-hour driving window and the 11-hour daily driving provision. Though the final rule is improved from FMCSA's proposed changes, the rule will have a negative impact on manufacturers' supply chains, distribution operations and productivity. The Administration conceded that it lacked evidence to support many of the proposed changes and still moved forward with new requirements that will place more trucks on the road during peak driving times and will fail to improve safety.

SEC/CFTC Derivatives Regulation

Manufacturers are still awaiting final rules, as mandated in the Dodd-Frank Act, from the Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC) on over-the-counter (OTC) derivatives. New regulations on derivatives must include a strong and workable exemption for end-users, such as manufacturers, that use derivatives to hedge commercial risk. In contrast, rules that impose margin requirements on manufacturers or that impose financial regulation (such as a swap dealer or major swap participant) on non-financial businesses, could seriously harm the recovery by diverting companies' financial resources from much-needed business investment and job retention and creation. Similarly, regulations that make hedging too expensive will place manufacturers in the uncomfortable position of either having to divert additional money away from production or discontinue hedging business risk, which would require liabilities to reappear on corporate balance sheets, driving up the cost of capital.

Commerce/State/Defense Export Control Regulations

The current U.S. export control regulations have not been significantly revised since they were implemented during the Cold War. As a result, our system no longer fully protects our national security and has failed to keep up with accelerating technological change. The Obama Administration has taken steps to modernize the export control system, but manufacturers

encourage the Administration to prioritize the immediate movement of the vast majority of United States Munitions List (USML) parts and components to the Commerce Control List (CCL) while the ongoing USML list review continues. We also encourage the Administration to establish an effective and efficient program license that dramatically reduces the number of licenses among trusted companies and allies required to support U.S. government defense and security programs, and to create an effective and efficient intra-company transfer license that allows trusted companies to exchange technology freely within their own organizations protected by their own compliance processes and technology and intellectual property controls.

PHMSA Hazardous Materials: Transportation of Lithium Batteries

The Pipeline and Hazardous Materials Safety Administration (PHMSA) reopened the transportation of lithium batteries docket in April, seeking additional comments based on the new requirements for the air transportation of lithium cells and batteries that were adopted in to the 2013-2014 International Civil Aviation Organization Technical Instructions on the Transport of Dangerous Goods by Air (ICAO Technical Instructions) in Montreal, Canada earlier this year. PHMSA used the April 11, 2012 notice for public comment to announce that it is considering harmonization with these new requirements and requested input from the public on this new direction. Manufacturers welcomed this news and it represents a positive first step that shows the Administration is serious about promoting international regulatory cooperation. When PHMSA first issued its transportation of lithium battery NPRM in January 2010, a unilateral regulatory approach seemed to be the Agency's strong preference and manufacturers were alarmed that regulatory confusion and efficiencies in the logistics supply chain would adversely impact safety and international commerce. If PHMSA continues on the path to harmonize with the 2013-2014 Technical Instructions, the results will deliver regulatory certainty, greater efficiencies in the logistics supply chain and improved safety of lithium battery shipments.

High Priority Regulations Not Previously Submitted to the Committee

EPA Utility MACT

In late 2011, the EPA released its final Utility MACT rule. This regulation would require both existing and new power plants to install expensive pollution control technology to reduce mercury emissions and other Hazardous Air Pollutants (HAPs). It is one of the most expensive EPA regulations ever released and will undoubtedly raise electricity costs for manufacturers. One study estimates that the regulation will cost $94.8 billion and could result in the loss of 180,000 to 215,000 jobs in 2015. According to the EPA, over 99 percent of the benefits of the MACT rule come from reductions in particulate matter (PM) — not mercury or other "air toxics." In fact, the EPA claims no benefits from reducing toxics and the benefits of reducing mercury ($6 million) are overwhelmed by the costs of the rule ($10 billion). The NAM is also concerned about the EPA's Cross-State Air Pollution Rule (CSAPR) which impacts power plants in approximately 27 eastern states. A federal court recently stayed implementation of this regulation until litigation over the rule is resolved.

EPA Clean Water Act Jurisdiction

The EPA and the U.S. Army Corps of Engineers (Corps) have sent final guidance on the definition of Waters of the United States to the Office of Management and Budget (OMB) for final review. NAM expects this guidance to be released sometime this summer. The EPA and the Corps are trying to accomplish through revised guidance what the 110th and 111th Congresses refused to do: an unprecedented expansion of federal jurisdiction under the Clean Water Act. The consequences of such expansion could mean additional regulatory hurdles for a wide range of manufacturing sectors, from oil and gas to agriculture to construction. Moreover, by issuing these significant policy changes as guidance rather than regulations, EPA and the Corps are attempting to circumvent many of the safeguards built into the regulatory process to protect members of the regulated community.

EPA Hydraulic Fracturing

On April 13, 2012, President Obama issued an Executive Order declaring that "states are the primary regulators of onshore oil and gas activities," and seeking to consolidate and coordinate the ten federal agencies currently considering regulation or oversight of hydraulic fracturing. However in the weeks since, the EPA has issued a final regulation on hydraulic fracturing emissions and a proposed regulation on the use of diesel fuel in the hydraulic fracturing process, and the Department of the Interior (DOI) proposed a regulation governing disclosure of fluids used in the hydraulic fracturing process on federal lands. It is not clear how, or to what extent, the EPA and DOI complied with the President's Executive Order.

EPA Greenhouse Gas Regulations New Source Performance Standards

The EPA recently proposed greenhouse gas (GHG) New Source Performance Standards (NSPS) for new power plants. The proposal, if finalized, would prohibit the construction of new conventional coal-fueled power plants. The EPA is using regulations to affect our fuel mix, an area where the market should be the primary driver. The Agency failed to conduct a proper cost-benefit analysis of the regulation, claiming that that no new coal-fired sources would be constructed due to fuel economics, giving EPA's proposal no impact on such sources. This reasoning fails to take into account the EPA's own projections that some new coal facilities are likely to be built and that regional price differentials may change the dynamics of its assumptions and calculations in some areas. While EPA's proposal currently only applies to new facilities, the EPA could apply this regulation to existing facilities in the near future. The NAM is also concerned that this proposed NSPS sets the stage for additional GHG limits on new and existing manufacturing facilities.

EPA Cooling Water Intake Structures

The EPA's proposed Clean Water Act Section 316(b) regulation requiring cooling water intake structures at power plants and other facilities will have direct economic, energy and environmental impacts on companies while providing minimal benefits. Not only will the

regulation impact the power plants and manufacturing facilities that rely on cooling water and thus will have to comply with the new requirements, but it will also directly impact manufacturers across the board through increases in electricity prices. The NAM believes the EPA should revise the rule to reflect a more site-specific approach to managing power plant discharges, one that requires less onerous study, monitoring, reporting and permitting obligations. The EPA should also perform a true cost-benefit analysis for the rule.

EPA/DOJ Environmental Justice

The EPA and the Department of Justice (DOJ) have sharply increased their regulatory presence in the area of Environmental Justice over the last six months. The agencies have proposed a number guidance documents which, if finalized and taken to their logical conclusion, could have significant negative impacts on the manufacturing economy. Impacts could include additional hurdles for manufacturers to site facilities, new requirements on air and water permits and new mitigation requirements at existing facilities.

NLRB Poster Rule

On August 30, 2011, the National Labor Relations Board (NLRB) issued a final rule requiring all employers subject to the National Labor Relations Act (NLRA) to post a notice of employees' rights. The NLRA provides the NLRB the authority to adjudicate unfair labor practice complaints and to oversee representation elections but does not give the NLRB authority to require all employers to post such a notice. Legislative history makes clear the intent of Congress that the NLRB does not have authority to issue a notice posting rule since Congress explicitly grants such authority to other agencies in relevant statutes. The NLRB has overstepped its authority under its governing statute and the rule should be invalidated. The NAM and other parties filed multiple suits against the NLRB in D.C. and South Carolina District Courts. There have been conflicting rulings on the cases but implementation of the rule has been stayed pending resolution before the D.C. Circuit Court of Appeals

NLRB Ambush Elections

On December 22, 2011 the NLRB issued a final rule on amending the representation election process. The rule eliminates the 25-day waiting period, which could shorten the time frame for an election to take place from about 38 days to as little as 15 to 20 days. This will disadvantage employers who will have very little time to educate themselves and their employees prior to the election taking place. The rule will also postpone certain pre-election challenges (*e.g.* who is eligible to vote in the bargaining unit) until after the election, which in most cases will make the challenges moot. The NLRB's own data shows that the median number of days it takes to hold a union representation election is 38 days, well within the NLRB's own target of 42 days. In those instances where the 42 day target is not met, 90 percent are held within 56 days. This new regulation would pose a considerable burden on employers — particularly smaller-sized manufacturers who lack the legal expertise to navigate complex and detailed labor laws — and could result in numerous NLRB violations for unknowing employers.

DOL OFCCP Hiring Rule

The Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP) proposed a rule December 9, 2011, which would amend the nondiscrimination and affirmative action reporting requirements under Section 503 of the Rehabilitation Act of 1973 in order to establish a "hiring goal for individuals with disabilities to assist in measuring the effectiveness of the contractor's affirmative action efforts." The regulation would establish a seven percent hiring goal for each job classification and require employers to anonymously self-report on an individual's disability. While well-intentioned, the reporting requirements are duplicative. A contractor is already required to establish Affirmative Action Plans (APPs) as well as dedicate resources to report these AAPs to OFCCP to demonstrate nondiscrimination with respect to hiring, recruiting or promoting employees. These proposed requirements would be unnecessarily burdensome and transfer scarce resources away from the critical operations of a business.

DOL Persuader Rule

On June 21, 2011, the DOL proposed sweeping changes to the rules that administer the Labor-Management Reporting and Disclosure Act by drastically expanding the definition of "persuader" activity to include many activities currently recognized as labor law advice. These new regulations seek to drastically reinterpret longstanding requirements on how employers can work with legal counsel to comply with the complex and nuanced laws governing labor relations. These proposed changes would make it more difficult for manufacturers, especially smaller-sized manufacturers, to access necessary legal assistance. It would also make it more difficult for employers to understand how to legally discuss labor issues with their employees, effectively gagging them by preventing access to legal assistance and keeping many employees from hearing both sides of the unionization debate. Current law requires employers, law firms and other labor union experts to disclose when employers have sought assistance from consultants who intend to directly persuade employees regarding union members. For decades, the law has included a very important exemption: employers were allowed to obtain legal advice from attorneys to remain compliant with current law. Broadening the definition would violate the tenants of the attorney-client privilege and confidentiality.

DOL OSHA Hazard Communication Rule

In March 2012, the Occupational Safety and Health Administration (OSHA) finalized a rule aligning the U.S. Hazard Communication Standard with the U.N. Globally Harmonized System of Classification and Labeling of Chemicals (GHS). While the NAM supports the goal of this rule and agrees that a unified system will benefit manufacturers selling products to countries covered by the GHS, we are concerned that, with certain provisions, OSHA went beyond the notion of regulatory harmonization. OSHA created a new term, "hazard not otherwise classified," that is not in the current GHS and is so vague that it could lead to broad interpretation, creating more confusion rather than harmonizing the system. Furthermore, OSHA has classified the term, "combustible dust," as a hazardous chemical. Combustible dust does not yet have a formal definition through a rulemaking and is also not a term in the GHS. By including terms not

recognized by the international standards-setting organization, OSHA abused its discretion and will ultimately create more confusion, uncertainty and costs.

DOL OSHA Silica Rule

On February 14, 2011, OSHA submitted to OMB for final review its rule that would reduce, by half, the existing permissible exposure limit (PEL) for crystalline silica and would mandate extensive and costly engineering controls. It would also require employers to provide exposure monitoring, medical surveillance, work area restrictions, clean rooms and recordkeeping applicable to as many as two million American jobs. 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.

USDA Lacey Act Requirements

The Department of Agriculture's (USDA) Animal and Plant Health Inspection Service (APHIS) is implementing amendments to the Lacey Act made in the 2008 Farm Bill that encompass products from illegally harvested plants, including wood products made from illegally harvested lumber. The amendments also included new declaration requirements, which will be burdensome for importers whose products are not primarily made of wood or plant materials or whose products include only trace amounts. In most cases, the wood or plant product is obtained by multiple suppliers several steps earlier in the manufacturing or production process making it nearly impossible to obtain the information required by the declaration (e.g. genus, species, amount and quantity). In addition to wood and wood composites, trace amounts of plant material used in manufacturing include things like sap (used to manufacturer rubber, car parts, plastics, etc.) and raw materials for pharmaceuticals. The NAM has recommended several actions to APHIS and Customs and Border Protection (CBP) to reduce the regulatory burden. For example, the agencies should establish a *de minimis* standard — consistent with the governing statute and Congressional intent — below which manufacturers would not be required to submit a declaration.

SEC Special Disclosures Section 1502 (Conflict Minerals)

The SEC is expected to soon release its final Conflict Minerals rule in accordance with Sec. 1502 of the Dodd-Frank Act. The NAM has encouraged the SEC to issue a final rule that is consistent with the realities of global supply chains and that acknowledges the practical limitations on issuers in monitoring and influencing the behavior of other parties in the supply chain. A successful outcome is one that achieves the goals of the statute without unduly burdening industry and harming American competitiveness. The NAM has urged the SEC to work with all affected industries to understand how the requirements can be realistically

implemented across supply chains. Currently, the necessary infrastructure is not in place to trace the origin of the minerals or to determine with certainty that they are not conflict minerals. Without this vital information, it is nearly impossible for companies to know if their products contain conflict minerals. These issues and concerns were described thoroughly at the May 10, 2012 hearing of the House Financial Services Committee's Subcommittee on International Monetary Policy and Trade by our Vice President of International Economic Affairs, Franklin Vargo. The topic of the hearing was "The Costs and Consequences of Dodd-Frank Section 1502," and Mr. Vargo's testimony focused on three key points: (1) the SEC's conflict minerals rule needs a phase-in of several years to allow the necessary information infrastructure to be developed, and there should be an "indeterminate" category during that time; (2) the rule must provide for flexible due diligence, including allowing a "contract flow-down" approach and an OECD Guidelines "safe harbor;" and, (3) the rule could cost American manufacturers as much as $9-16 billion to implement.

CPSC Standard for Recreational Off-Highway Vehicles

In October 2009, the CPSC began a rulemaking to establish a mandatory safety standard for a relatively new class of vehicles called recreational off-highway vehicles (ROVs). Despite industry efforts to develop ANSI-accredited voluntary safety standards, the CPSC is moving forward with a mandatory standard without adequate data supporting the restrictive design standards the agency is demanding. Industry analysis has shown that at least 90 percent of serious incidents with ROVs would not have been affected by the CPSC proposals, but were instead caused by operator actions. In addition to robust design standards, the industry has implemented a comprehensive safety plan and education initiative, which includes a hands-on driver course and state-of-the-art online education program, intended to address driver and passenger behavior that has contributed to crashes resulting in avoidable serious incidents. 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 impacting consumer demand and costing thousands of American manufacturing and retail jobs. With its command and control regulatory policy, the CPSC will greatly harm an entire class of recreational vehicles with no clear improvements to safety and no justification for the costs the agency seeks to impose on manufacturers and consumers.

CPSC Standard for Table Saws

On October 11, 2011, the Consumer Product Safety Commission (CPSC) initiated a rulemaking to establish mandatory safety standards for table saws. The rulemaking, in its current trajectory, would seek to impose a standard that could only be achieved through the use of one patented technology. Regulation should not be used to advantage one technology or one company over another. According to the CPSC's governing statute, it can issue mandatory standards only upon making 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. However, the industry recently updated the Underwriters Laboratory (UL) voluntary standard so that since 2010 all table saws sold must meet the new safety standard. This was done to address concerns raised by the agency. Data used by the CPSC on table saw injuries are outdated and are not relevant to the new voluntary standards. In fact, the data used

by the CPSC to proceed with the mandatory standard was collected from table saws that met the old standard. If the CPSC proceeds with a mandatory standard, such action would undermine industry's incentive to develop new alternative table saw safety technology and would impose unnecessary increased costs on consumers. Unfortunately, this rulemaking illustrates a trend at the agency where the CPSC fails 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 products.

CBP Changes to the In-Bond Process

In February 2012, U.S. Customs and Border Protection (CBP) announced various changes to procedures associated with the importation of in-bond merchandise. One change in particular reduces the transport time of in-bond merchandise from 60 to 30 days between domestic ports for all modes of transportation, except pipeline. Manufacturers rely upon the nation's vast inland waterway system for in-bond barge movements of raw materials that originate at deep water ports and are transferred to barge for inland delivery. Transit times of in-bond merchandise often exceed 30 days and the current 60 days provides an appropriate window due to the nature of these shipments. Inland waterway barge movements are often impacted by factors such as weather, water levels, lock maintenance or construction, lock closures and other delays along the system. It does not appear that CBP fully understood these factors when drafting the proposed rule. Manufacturers are requesting preservation of the current 60-day in-bond barge transit time.

Reforming the Regulatory System

Since your last hearing the challenge of regulatory impediments to growth has not diminished. Permanent, structural reforms of the system are necessary to make us a more competitive nation. Thank you for your leadership on the Midnight Rule Relief Act of 2012. Often the most problematic regulations are those that have been rushed and undergone the least analysis. There is a tendency in both Republican and Democratic administrations to complete work on items that might be contrary to the policy preferences of the next administration and in their haste they fail to account for relevant stakeholder input or conduct poor impact analyses. The last Administration attempted to police itself by requiring no new significant regulatory proposals be introduced after June 1 of the election year and no new final regulations be promulgated after November 1. That type of restraint is uncommon and legislation is necessary to accomplish this objective.

Manufacturers have supported legislation to reform the Administrative Procedure Act and the Regulatory Flexibility Act and both achieved bipartisan votes on the House floor in 2011. There are, however, other reforms that merit your attention and the Committee's efforts.

Office of Information and Regulatory Affairs

The Paperwork Reduction Act of 1980 created the Office of Information and Regulatory Affairs (OIRA) to impose discipline on the unlimited appetite of federal agencies for information, which imposed significant burdens on the public. Through executive orders since 1981 in

Democratic and Republican administrations, OIRA has also served as the central clearinghouse for non-independent agency significant rulemaking. It applies a critical screen to the contents of regulation, agencies' analytical rigor, legal requirements affecting the proposal and the President's priorities and philosophy. This does not take place anywhere else in government. 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. OIRA is the only agency that brings to bear a government-wide, economy-wide perspective. For that reason, OIRA is a critical institution in our regulatory process for conducting centralized review of the agencies' regulatory activities, facilitating interagency review, resolving conflicts and eliminating unnecessary duplication.

Despite its critical function, even as the size and scope of government has increased, OIRA has shrunk. As OIRA's staff was reduced from an FTE ceiling of 90 to 50 employees, the staff dedicated to writing, administering and enforcing regulations across all agencies increased from 146,000 in 1980 to 242,000 in 2006. As OIRA's budget was reduced by more than 50 percent, or $7 million in real 2000 dollars, all regulatory agencies' budgets increased from $12.9 billion to over $36 billion in real 2000 dollars. To ensure that OIRA is able to fulfill its current mission, additional staff and resources are necessary. Since this office falls under the Committee's jurisdiction, oversight should be conducted to determine appropriate resources for this critical function. A modest investment in this institution will pay back significant returns to the entire economy.

Congressional Office of Regulatory Analysis

Congress is a fundamental institution in the regulatory process. Congress produces the authority for the agencies to issue rules, so it is also responsible, along with the Administration, for the current state of affairs in regulation. While Congress does consider some of the impact of the mandates it may be imposing 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 regulation. Over the last two decades, there have been proposals in Congress to create a congressional office of regulatory analysis, which this Committee has considered and reported favorably. Previous attempts to create such an office have even become law but were never implemented. As Congress has a Congressional Budget Office that is a parallel institution to the OMB, so too should it have a parallel to OIRA. This 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 some more holistic reviews of the overlapping and duplicative statutory mandates that have accumulated over the years.

Retrospective Review/Sunsets

The Administration's attempts at retrospective review of regulation are commendable but a review of agencies' final plans shows weakness in their scope and design. It does not appear that any agency stretched itself or attempted to rethink the way it is currently doing things.

Manufacturers might use a similar opportunity to review current practices in a more aggressive and holistic way. Best practices in business include regular reprioritizations and organized abandonment of less useful methods, procedures and practices. This should be the beginning of a bottom-up review of how agencies use their regulations to accomplish their objectives.

Agencies should be looking to corporate America for a model, and we believe the concept of "lean manufacturing" is one of those examples. As you may know, over the past two decades, many manufacturers have transformed their operations by adopting a principle called lean thinking. The concept is very simple. Identify everything in the organization that consumes resources but adds no value to the customer. That's defined as waste. 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 achieving the regulatory outcome and eliminate it. Adopting lean thinking into the review of existing regulations could produce more robust and significant reductions in regulatory burdens. If agencies were actually conducting this kind of review, there would be requests to Congress to change statutes to allow for greater flexibility in a number of regulatory programs. The necessity of legislative changes to reform a rule should be seen as an opportunity and not as a roadblock to the proposal.

This retrospective review should include a careful and thoughtful analysis of every regulatory requirement and its absolute necessity as well as an estimation of its value to the intended outcome. This is why the "independent regulatory agencies" that are not covered by the President's Executive Order but highly encouraged to participate in a second executive order, like the Federal Communications Commission, the Consumer Product Safety Commission, the Securities & Exchange Commission and the Commodity Futures Trading Commission, need to be mandated to participate by law. Some already have affirmative obligations to review their rules, but there is inconsistency across the agencies.

To truly build a culture of continuous improvement and thoughtful retrospective review of regulations, it must be institutionalized and be made law. The best incentive for high-quality retrospective reviews of existing regulations is to automatically sunset rules that are not affirmatively chosen to be continued. 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.

The power of inertia and the status quo is very strong. If there is no necessity to review old regulation, 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. There is no natural constituency for regular cleanup of our Code of Federal Regulations. These types of systems need to be put in place throughout government to ensure regulatory programs are thoughtful, intentional and meet the needs of our changing economy.

One such approach to mandated retrospective review and sunsets of federal regulation has been introduced by Rep. Randy Hultgren (R-IL). H.R. 3068, the Regulatory Sunset and Review Act of 2011, has been referred to your Committee and Subcommittee for consideration. The legislation has a long, bipartisan history and has been reported out of the Committee in past Congresses. One of the four recommendations from the Kauffman Foundation's original

proposal to help create more business startups was to sunset all major rules after 10 years. This type of reform is long past due. The authors of the Kauffman proposal contend that the accumulation of inefficient and costly rules is a barrier to business formation and to growth for startups.

Independent Agencies

As discussed previously, the President does not exercise similar authority over the independent regulatory agencies as he does other agencies within the executive branch. Congress through the Paperwork Reduction Act has given the President's OMB review authority over those independent agencies' information collection and paperwork requirements; there is little distinction then to extending its review to the regulations that impose those paperwork burdens. Congress must confirm this authority through legislation. The same reasons that it benefits other single-mission agencies, like a broader economy-wide perspective on regulatory proposals, would similarly benefit independent agency rules. Consistency across the government in regulatory procedures and analysis would only improve certainty and transparency of the process. During recent crises in the regulatory sphere of the independent agencies, they proved no better than other executive branch agencies at preventing bad outcomes. The President's bipartisan Council on Jobs and Competitiveness made recommendations in their 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 OIRA or some other office. Manufacturers are eager to work with you on reforming this challenge within our regulatory system.

Conclusion

The President stated in his Executive Order 13653 on improving regulation and regulatory review that our regulatory system should promote "economic growth, innovation, competitiveness, and job creation." We agree. Manufacturers look forward to a day when our regulatory system is a competitive advantage for our country, instead of unnecessarily costly, inefficient, adversarial and a barrier to business formation. To achieve those goals, Congress must hold the Administration accountable for its poorly constructed regulations like the ones outlined above. Congress must also permanently reform our regulatory system to protect our citizens, while being flexible, agile, innovative and imposing only the burdens that are necessary. Thank you for your continued leadership on oversight of the problems of regulation.

With all best wishes I remain,

Sincerely,

Jay Timmons

JT/rp