NATIONAL ASSOCIATION OF Manufacturers

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Testimony

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

before the Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs
U.S. Senate

on Improving Small Business Input on Federal Regulations:
Ideas for Congress and a New Administration

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TESTIMONY OF ROSARIO PALMIERI, VICE PRESIDENT, LABOR, LEGAL AND REGULATORY POLICY OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

BEFORE THE

SUBCOMMITTEE ON REGULATORY AFFAIRS AND FEDERAL MANAGEMENT

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

U.S. SENATE

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Chairman Lankford, Ranking Member Heitkamp and members of the Subcommittee on Regulatory Affairs and Federal Management, thank you for the opportunity to testify about federal regulations and how the rulemaking process impacts U.S. small businesses, particularly small manufacturers.

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 appreciate your attention to the regulatory burdens that are impacting their competitiveness and growth. In particular, we thank the chairman and ranking member for their efforts to improve our regulatory system.

The subcommittee's attention to the requirements contained in the Regulatory Flexibility Act (RFA), the Small Business Regulatory Enforcement Fairness Act (SBREFA) and other statutes designed to increase agencies' sensitivity to regulatory effects on small businesses is important as the new Congress and the new administration examine ways to improve our regulatory system. Chairman Lankford and Ranking Member Heitkamp, your bipartisan efforts at regulatory reform during the last session of Congress were highly admirable, and manufacturers stand ready to work with you to continue that momentum so that reform can become reality.

I. Manufacturing in the United States

Manufacturing in the United States lost 2.3 million jobs in the last recession. Since then, we have gained back 822,000 manufacturing jobs. Yet, the sector has struggled over the past two years from global headwinds and economic uncertainties. Manufacturing employment declined by 45,000 in 2016, with essentially stagnant production growth. On the positive side, signs at year's end indicated that business leaders and consumers were more upbeat about activity in 2017, especially since the election. To ensure that demand and output improve this year, the United States needs not only improved economic conditions but also government policies more attuned to the realities of global competition.

Manufacturing has the highest multiplier effect of any economic sector. For every $1.00 spent in manufacturing, another $1.81 are added to the economy. In addition, for every worker in manufacturing, another four employees are hired elsewhere. In 2015, manufacturers in the

United States contributed $2.17 trillion to the economy (or 12 percent of GDP), and the average manufacturing worker in the United States earned $81,289 annually, including pay and benefits—27.4 percent more than the average nonfarm business worker.

Nearly 95 percent of all manufacturers in the United States have fewer than 100 employees, and the Small Business Administration (SBA) defines a small manufacturer as a firm with fewer than 500 employees. To compete on a global stage, manufacturers in the United States need policies that enable them to thrive and create jobs. Growing manufacturing jobs will strengthen the U.S. middle class and continue to fuel America's economic recovery. Manufacturers appreciate the subcommittee's focus on ways to reduce the regulatory burden imposed on small businesses. Unnecessarily burdensome regulations place manufacturers of all sizes at a competitive disadvantage with our global counterparts.

II. The Cost of Regulatory Burdens Facing Manufacturers

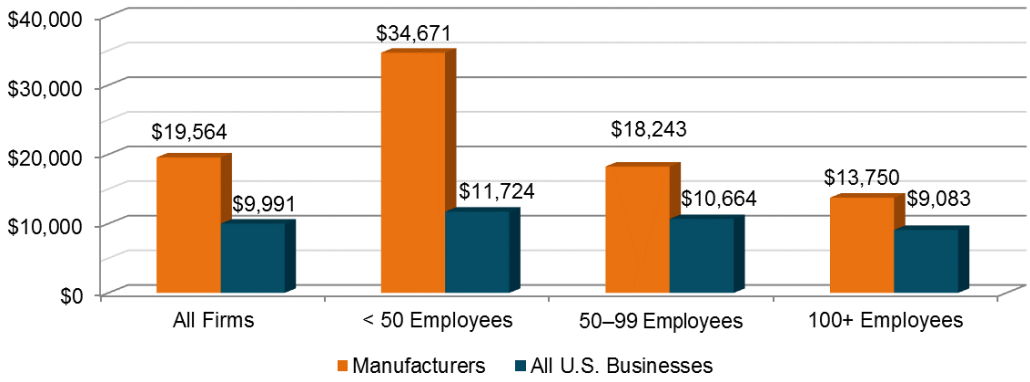
Because manufacturing is such a dynamic process, involving the transformation of raw materials into finished products, it entails more environmental and safety regulations than other businesses. The NAM issued a study[1] on the expansive set of federal regulatory requirements that are holding manufacturers back. Manufacturers face 297,696 restrictions on their operations from federal regulations. Eighty-seven (87) percent of manufacturers surveyed as part of our study indicated that if compliance costs were reduced permanently and significantly, they would invest the savings on hiring, increased salaries and wages, more R&D or capital investment. Regulations impose real costs that impact a company's bottom line, so it is extremely important that our regulatory system be transformed so that we are effectively protecting health and the environment while minimizing and seeking to eliminate unnecessary burdens. Despite the acknowledgment of lawmakers of the problems with our regulatory system, things are getting worse. Ninety-four (94) percent of manufacturers surveyed said the regulatory burden has gotten higher in the last five years, with 72 percent reporting that the burden is "significantly higher."

In September 2014, the NAM issued a report[2] that showed 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 1). The smallest manufacturers—those with fewer than 50 employees—incurred regulatory costs of $34,671 per employee per year. This is more than triple that of the average U.S. business.

[1] NAM, "Holding Us Back: Regulation of the U.S. Manufacturing Sector" (January 2017) http://www.nam.org/Data-and-Reports/Reports/Holding-Us-Back--Regulation-of-the-U-S--Manufacturing-Sector/

[2] 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 1: Regulatory Compliance Costs per Employee per Year, 2012 (in 2014 Dollars)



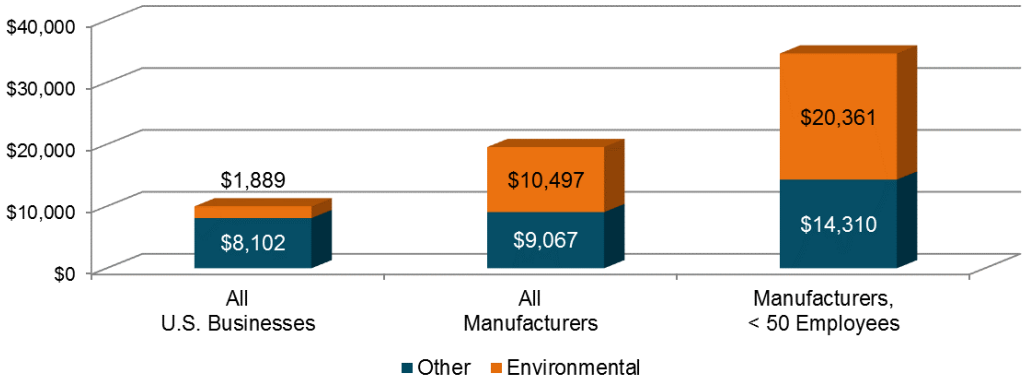
The burden of environmental regulation falls disproportionately on manufacturers, and it is heaviest on small manufacturers because their compliance costs often are not affected by economies of scale (see Figure 2). Manufacturers recognize that regulations are necessary to protect people's health and 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.

In October 2013, the Manufacturers Alliance for Productivity and Innovation (MAPI) released an updated study[3] 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. In a Federal Reserve Bank of Philadelphia report released last April, nearly 74 percent of manufacturing leaders in the region said that their state and federal regulatory compliance costs had increased over the past few years, with no one noting declines in this trend. In addition, they devoted 5.8 percent of their capital spending costs to regulatory compliance on average, more than what was spent on data and network security (4.7 percent) or physical security (2.8 percent).[4]

[3] 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.
[4] Manufacturing Business Outlook Survey (April 2016), Federal Reserve Bank of Philadelphia, www.philadelphiafed.org/manufacturing-BOS.

Figure 2: Environmental Regulatory Compliance Costs per Employee per Year, 2012 (in 2014 Dollars)



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 regulations should be designed to most effectively meet regulatory objectives while minimizing unnecessary burdens.

III. Regulatory Environment

Our regulatory system is 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 fourth quarter of 2016, 71.2 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.

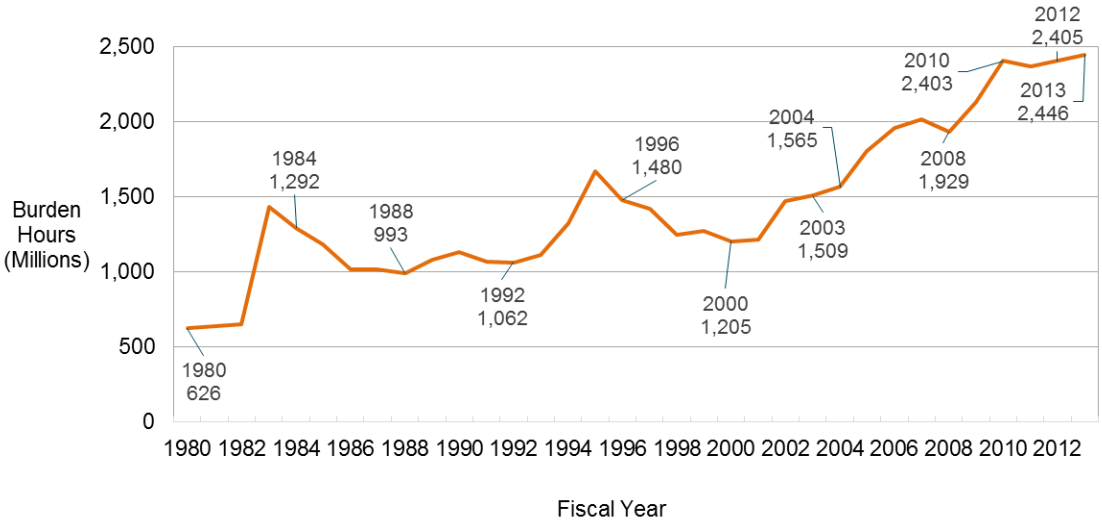
The federal government's own data reflect these challenges. According to the annual information collection budget, the paperwork burden imposed by federal agencies, excluding the Department of Treasury,[5] increased from 1.509 billion hours in fiscal year (FY) 2003 to 2.446 billion hours in FY 2013, an increase of 62.1 percent (see Figure 3). In other words, federal

[5] The Department of Treasury's burden estimates include the Internal Revenue Service and account for 75 percent of the total federal public burden imposed. Treasury's burden 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," https://www.whitehouse.gov/omb/inforeg_infocoll#icr.

agencies—excluding the Department of Treasury—imposed more than 279,000 years' worth of paperwork burden on the American public in FY 2013.[6]

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, 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 3: Government-Wide Paperwork Burden, Excluding the Department of Treasury



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.

As the modern federal regulatory state expanded, Congress grew increasingly concerned about the significant regulatory and paperwork burdens imposed on the public, particularly small businesses. In September 1980, the RFA was signed into law and requires federal agencies to thoughtfully consider small businesses and other small entities when developing regulations. If an agency determines that a regulation is likely to have a "significant economic impact on a substantial number of small entities," the agency must engage in additional analysis and seek less-burdensome regulatory alternatives. In addition to requiring improved regulatory analysis to better determine the small entity impact, the RFA attempted to improve public participation in rulemaking by small businesses. It also requires agencies to publish an agenda semiannually listing expected rulemakings that would impact small businesses and to conduct "lookback" reviews—required under Section 610 of the law—of regulations that affect small entities to identify rules in need of reform.

[6] 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.

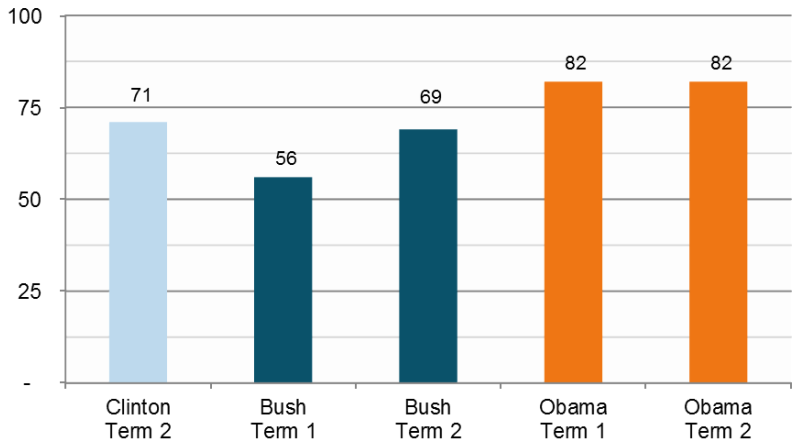
Despite the statutory requirements of the RFA and other reform measures, federal regulatory burdens continue to increase every year. Congress amended the RFA with passage of the SBREFA of 1996. Importantly, SBREFA requires the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (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.

There have also been presidential directives aimed at improving the regulatory state. The NAM welcomed efforts by President Barack Obama to reduce regulatory burdens. The president signed executive orders, and the Office of Management and Budget (OMB) 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. President-Elect Donald Trump has focused much attention on the challenges of our regulatory system. Manufacturers look forward to working with the new administration on substantive regulatory reforms that will support economic growth, not hold it back.

Every administration over the past half century has introduced initiatives designed to reform the regulatory system. These past directives to reduce regulatory burdens were well-intentioned, but any benefits realized by those 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,[7] 650 major new regulations—defined as having an annual effect on the economy of at least $100 million—have been issued by the Obama administration through the end of 2016. During President Obama's two terms, a new major regulation was issued every 4.47 days. Manufacturers and other regulated entities have confronted nearly 20 more major regulations per year from the Obama administration (82 major regulations per year) than during the Bush administration (62 major regulations per year). Figure 4 shows the major regulations issued per year since the enactment of the Congressional Review Act in 1996.

[7] U.S. Government Accountability Office, Congressional Review Act Overview, http://www.gao.gov/legal/congressional-review-act/overview.

Figure 4: Major Regulations per Year, Through 2016



Regardless of the political party in charge, these regulations include significant burdens imposed on manufacturers and other small businesses and represent real compliance costs that affect our ability to expand and hire workers. There are numerous examples that highlight the regulatory challenges that manufacturers confront (see Attachment A). 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, especially on small businesses.

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 to strengthen the RFA and to ensure regulators are sensitive to the burdens placed on small businesses. 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 SBA's 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.

a. Increase Sensitivity to Small Business

The RFA requires agencies to be sensitive to the needs of small businesses when drafting regulations. Among a number of procedural requirements, agencies must consider less costly alternatives for small businesses and prepare a regulatory flexibility analysis when proposed and final rules are issued. 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.[8] Attachment A of my testimony outlines some of the most significant regulatory challenges currently facing small manufacturers, and most of those rules failed to conduct any small entity analysis or were deficient in significant ways. Among the reasons for this small number of regulations requiring a regulatory flexibility analysis is the exclusion of "indirect effects." One of the original authors of the RFA, Sen. John Culver (D-IA), intended that the scope of the RFA include direct and indirect effects.[9] Unfortunately, the U.S. Court of Appeals for the D.C. Circuit in 1985[10] disagreed, and subsequent courts have found "indirect effects" to be outside the scope of the RFA. This one change in the RFA would bring many of the rules most costly to small businesses under the act's framework and result in significant cost savings for small businesses. Clear examples of an entire class of regulations exempted from the RFA because of this decision are Clean Air Act rules establishing National Ambient Air Quality Standards. Despite the fact that even the EPA acknowledges these rules often cost hundreds of billions of dollars to implement, no small entities are directly affected by these rules—simply because the Clean Air Act only directly regulates states which, in turn, regulate small businesses. This simple clarification to the law would have significant benefits to our small business economy, all the while ensuring the continued strong protection of air quality. After all, the RFA only requires the analysis of small entity impacts; it does not dictate how an agency will design its regulation. Since the RFA was modeled on the National Environmental Policy Act (NEPA), its consideration of effects is also helpful to understanding the original intent of the authors of the legislation and the Congress that passed the law. The NEPA's implementing regulations define the term "effect" to mean "direct effects" and "indirect effects," which are caused by the action and are later in time or further removed in distance but are still reasonably foreseeable.[11]

Over the past few years, the House has passed legislation—the Small Business Regulatory Flexibility Improvements Act—which would close many of the loopholes that agencies exploit to avoid the RFA's requirements, including the addition of indirect effects within the scope of the law. The bill has again been introduced as H.R. 33 by House Small Business Committee Chairman Steve Chabot (R-OH). The NAM encourages the Senate to take action on similar provisions to ensure vital improvements to the RFA are achieved in this Congress. Agency adherence to the RFA's requirements is important if regulations are to be designed in a way that protects 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.

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[8] 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).
[9] 126 Cong. Rec. 21,456 (1980).
[10] *Mid-Tex Elec. Coop. v. FERC*, 773 F.2d 327, 342-43 (D.C. Cir. 1985).
[11] 40 C.F.R. § 1508.8.

b. Streamline Regulations Through Periodic Review, Section 610

Section 610 of the RFA requires that agencies periodically review rules to determine significant impacts to small entities. The intent of Congress is clear: 5 U.S.C. §610(a) states, "The purpose of the review shall be to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of such small entities. . . ."

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.

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 periodic review process should be the beginning of a bottom-up analysis of how agencies use their regulations to accomplish their objectives.

The Obama administration strongly promoted 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, the periodic review process must be strengthened. 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 reinforced throughout the government to ensure regulatory programs are thoughtful, intentional and meet the needs of our changing economy.

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."[12] Retrospective review of existing

[12] 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.

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.

c. Hold Independent Regulatory Agencies Accountable

The president does not exercise similar authority over independent regulatory agencies, such as the Federal Communications Commission, the National Labor Relations Board (NLRB), the Securities and Exchange Commission and the Consumer Product Safety Commission (CPSC), as he does over other agencies within the executive branch. Independent agencies are not required to comply with the same regulatory principles outlined in executive orders and OMB guidance as executive branch agencies and often fail to conduct any analysis to determine expected benefits and costs.

Independent regulatory agencies are required to comply with the RFA. Since independent regulatory agencies are not accountable to the OIRA nor do they participate in interagency review of their rules, accountability mechanisms to ensure executive branch agency compliance with the RFA do not exist for them. A stronger RFA is necessary because the courts are the only backstop to noncompliance by independent agencies.

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

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 businesses 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.

V. Conclusion

Chairman Lankford, Ranking Member Heitkamp and members of the subcommittee, thank you for the opportunity to testify today and your attention to these issues. Manufacturers believe that reforms to strengthen the RFA are necessary to create smarter regulations and minimize unnecessary burdens imposed on small businesses and others. The regulatory system can be improved while still enhancing our ability to protect health, safety and the environment.

In his January 2011 *Memorandum on Regulatory Flexibility, Small Business and Job Creation*,[13] President Obama established a goal "to eliminat[e] excessive and unjustified burdens on small businesses and to ensur[e] that regulations are designed with careful consideration of their effects, including their cumulative effects, on small businesses." However, that goal gets farther from our reach with the regulatory accumulation that businesses in this country face. Your attention to regulatory reform has created optimism among manufacturers and others that the admirable goal set by the president can be achieved.

Manufacturers are committed to working toward policies that will restore common sense to our broken and inflexible regulatory system. Too many regulations that have significant effects on small businesses escape the RFA's requirements because unchallenged traditions enable agencies to exploit loopholes. The RFA must be strengthened to ensure all agencies

[13] 76 Fed. Reg. 3827

carefully consider unintended impacts and costs and are sensitive to the needs of small businesses. The NAM urges the committee to move forward with legislation expeditiously. Jobs and growth for small manufacturers depend on your efforts.

Attachment A: Regulatory Challenges for Manufacturers

Compliance with the RFA is underlined for each rule where applicable.

a. Existing Regulations

Equal Employment Opportunity Commission (EEOC) Employment Information Report (EEO-1) Form Change (81 Fed. Reg. 45479, approved without change). The form change requires all employers with 100 or more employees to submit employee compensation data 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 expanded recordkeeping requirements—the EEO-1 Report would expand from 180 data cells to approximately 3,600—put a company at risk of publicly disclosing employees' private information, potentially exposing proprietary information of a company. Moreover, the form change violates the Paperwork Reduction Act—it is unnecessary and duplicative, and the agency failed to employ sound rulemaking principles that are outlined in Executive Order 13563. Information collections, even ones that institute vast, new regulatory programs, are not subject to the RFA.

Federal Acquisition Regulatory (FAR) Council Rule/ Department of Labor (DOL) Guidance: Fair Pay and Safe Workplaces (Contractor Blacklisting, Implementation of Executive Order 13673) (81 Fed. Reg. 58562). The executive order and subsequent rule and guidance, which were published on August 25, 2016, could bar federal contractors from new work if there has been even an allegation of a labor law violation in the past three years. It would apply to contracts valued at $500,000 or more, and the final rule expanded the proposed reporting requirements to include subcontractors, which would impact small business. First and foremost, the president and the regulating agencies do not have the legal authority to make the regulatory changes outlined in the rule and guidance. By directing the DOL to develop guidance that will establish degrees of violations not included in the underlying statutes, the executive order significantly amended the enforcement mechanisms Congress established for these laws. In addition, the order and implementation disregard existing enforcement powers the administration already has through federal acquisition regulations and labor laws as well as the long-standing process by which suspension and debarment actions are taken. This process is set forth in the 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. In October 2016, a nationwide injunction affected the majority of the rule. The ruling strongly affirms the NAM's arguments related to the First Amendment; due process; constitutional, arbitrary and capricious concerns; and other concerns raised in the complaint.

DOL: Federal Contractor Paid Sick Leave Proposed Rule (81 Fed. Reg. 67598). As directed by Executive Order 13706, the DOL finalized its 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 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 (81 Fed. Reg. 29623). On May 12, 2016, OSHA published its final rule changing reporting requirements for employer injury and illness logs and permitting the agency to publish the information on its publicly accessible 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 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. Finally, despite lacking statutory authority, OSHA's update 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. In a supplement to the proposed rule, OSHA provided no regulatory text, but it suggested 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. The new requirements inject uncertainty and ambiguity into the workplace safety dynamic. Protections for employees from retaliation in response to injury reports were and are comprehensive and well-established and support company initiatives to improve the health and well-being of employees. Within the final rule, OSHA acknowledges, yet dismisses, commenters' assertions that the rule should have been subject to a small business review panel as required under the SBREFA of 1996. The rule imposes significant consequences, however, including reputational harm from publishing information that is often preliminary and does not reflect actual workplace incidents.

DOL OSHA: Occupational Exposure to Crystalline Silica (78 Fed. Reg. 56274). OSHA finalized the crystalline silica rule on March 25, 2016, reducing by half the permissible exposure limits for crystalline silica and mandating 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. OSHA's estimate relies upon data from a SBREFA panel that examined a draft rule in 2003, more than 13 years ago. Since 2003, significant changes in the economy and technological advances made in personal protective equipment demonstrate that the proposed changes are unnecessary and overly burdensome. During the rule's comment period and until it was made final in late March, the NAM and other industry stakeholders repeatedly asked OSHA to convene a new SBREFA panel so the most current analysis of costs and other impacts could be considered. These requests were rejected. Manufacturers will now be faced with a new regulation that could force some of our members to shut their doors.

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, 2016, 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. During attempted RFA analysis, it was determined that economic impacts to small entities would follow; however, the department stated that it would not have significant impacts on a substantial number of small entities, and therefore, a full RFA analysis was unnecessary. In November 2016, a judge granted motion for summary judgment and entered an order for a permanent injunction with nationwide application.

DOL's Wage and Hour Division: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees (81 Fed. Reg. 32391). On May 23, 2016, the DOL finalized its increase of the minimum salary threshold from $23,440 to $47,776 for employees to be exempted from overtime pay pursuant to the Fair Labor Standards Act. Of significant concern to manufacturers, particularly small firms, is a provision that would automatically tie future salary threshold increases to the Consumer Price Index. Under certain estimates, the minimum salary threshold could be $70,000 in 2020. In November 2016, a federal judge issued a nationwide injunction preventing the implementation of the rule, asserting that the department likely exceeded its statutory authority.

EPA: Carbon Pollution [i.e., Greenhouse Gas (GHG)] Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (80 Fed. Reg. 64662). 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: 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 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—were 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: 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: Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units (80 Fed. Reg. 64510). On October 23, 2015, the EPA issued first-ever standards of performance for GHG emissions

for new fossil-fuel-fired electric generating units. The EPA inappropriately concluded that carbon capture and sequestration (CCS) is "adequately demonstrated" for utility-scale applications and its utilization is the basis for the mandated standard for all new coal-fired power plants. As a matter of fact, CCS has not been adequately demonstrated at the utility scale—making a standard that requires it for all new coal plants an effective ban on those plants. Manufacturers support an "all of the above" approach to energy, and the EPA's proposed regulations on new power plants would deselect a fuel source—coal—from the nation's future energy portfolio. Moreover, the manufacturers of CCS worry that the regulation will stifle investment in this promising but as-yet unproven technology. As with its other rules, the EPA asserts that its final 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. Guidance documents are not subject to the RFA.

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 preelection 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. Surprisingly, the board determined that there would be no significant impact on small entities as the RFA would only require they determine the direct burden of compliance associated in cases of representation elections, and not that they consider the indirect cost associated with the rule impacting all companies that would hire legal advice to stay informed or ensure compliance.

NLRB: Joint-Employer Standard (Browning-Ferris Industries of California, Inc. (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. NLRB adjudicatory decisions, even those with widespread effect on businesses, are not subject to the RFA.

b. Currently Proposed Regulations

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, 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 long-standing 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.

c. Anticipated Proposed Regulations

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 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 are questionable and outdated and 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—four 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. An advanced notice of proposed rulemaking is not subject to the RFA.