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Subject: NAM's OIRA Draft Report Comments

The following is a link to the NAM's comments on the OMB 2004 Draft Report on the Costs and Benefits of Federal Regulations. We are having trouble with our e-mail server and could not send it as an attachment. A fax backup copy was sent as well. If there is any problem in opening the link please contact Elizabeth Larterat (202) 637-3150 or elarter@nam.org.

www.nam.org/2004oiracomments

Thank you!

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COMMENTS

on THE 2004 DRAFT REPORT ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS

By the National Association of Manufacturers

Submitted to the Office of Management and Budget, Office of Information and Regulatory Affairs, on May 20, 2004

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Executive Summary

The National Association of Manufacturers (NAM) is pleased that the OMB *2004 Draft Report to Congress on the Costs and Benefits of Federal Regulations* (Draft Report) focuses on the impact of regulation on the manufacturing sector. In particular, the NAM appreciates that the Draft Report asks for "public nominations of promising regulatory reforms relevant to the manufacturing sector, particularly those relevant to the welfare of small and medium-sized enterprise," and "suggestions to simplify IRS paperwork requirements." In these comments, the NAM makes the following observations:

- Regulation hits manufacturing much harder than any other sector. This is mainly due to the disparate impact of health, safety and environmental regulations on manufacturing than on other sectors.

- Since the multiplier effect of economic activity generated by manufacturing is greater than for other sectors, a focus on manufacturing for improving regulations that affect this sector is especially warranted.

- The Office of Information and Regulatory Affairs (OIRA) needs additional staff and resources in order to improve its capabilities to estimate the costs and benefits of federal regulations. This analysis capability may be improved through OIRA's future relationship with the Department of Commerce, as outlined in that department's January 2004 report *Manufacturing in America: A Comprehensive Strategy To Address the Challenges to U.S. Manufacturers*. The Draft Report should contain some description of how OMB envisions that this relationship will work.

- The NAM remains disappointed that OIRA continues to struggle to meet the regulatory accounting and budgeting requirements contained in the Regulatory Right-to-Know Act. This is principally due to the poor quality of estimates supplied by the agencies. Accordingly, OMB needs to exert greater pressure on the agencies to supply more credible estimates.

- In the Executive Summary, OIRA should underscore the uncertainty of the estimates presented, as a casual reader may look only at this section.

- The Draft Report is deficient because it contains the costs and benefits for only 6 major rules, rather than a comprehensive total for all federal regulatory programs.

- The Draft Report needs to address the discrepancy between its estimate of the annual cost of federal regulations, ($34 billion - $39 billion) and estimates by outside experts, such as in the 2001 report written by Mark Crain and Thomas Hopkins and released by the Office of Advocacy of the Small Business Administration. Crain and Hopkins estimated costs of $843 billion for 2000. The NAM 2003 estimate is $850 billion.

- The NAM is hopeful that several initiatives of OIRA—such as Circular A-4, the Peer Review Guidelines, the Information Quality Guidelines, work with National Academy of Science panels, and the closer relationship with the Department of Commerce—will help to improve the estimates in future reports.

- Another initiative that OIRA should undertake is to require selected agencies to analyze the real-world costs and benefits of at least a few major rules and compare these with what the agency estimated the costs and benefits would be at the time of promulgation. This could provide OIRA, researchers and other analysts with valuable data with which to help agencies refine their anticipated costs and benefits.

- The NAM focuses on seven specific regulations that could be improved, highlighting the Particulate Matter and Ozone National Ambient Air Quality Standards; the Toxic Release Inventory; the Definition of Solid Waste; Spill Prevention Control and Countermeasures; SARA Title III; the FCC "Do Not Fax" rule; and the Family and Medical Leave Act. While it is submitting other regulations that also need improvement, the NAM hopes that OIRA can give special attention to these seven.

- As a general recommendation, electronic forms available online should be available in multiple formats in order to reduce the time firms spend on converting these forms to their format

COMMENTS OF THE
NATIONAL ASSOCIATION OF MANUFACTURERS

to the
OFFICE OF MANAGEMENT AND BUDGET
OFFICE OF INFORMATION AND REGULATORY AFFAIRS

on the
2004 DRAFT REPORT ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS

The National Association of Manufacturers (NAM) is pleased to comment on the *2004 Draft Report to Congress on the Costs and Benefits of Federal Regulations* (Draft Report). The NAM is especially appreciative that this year's Draft Report focuses on the effects of regulation on the manufacturing sector. As will be discussed below, manufacturers are affected by regulations to a far greater extent than businesses in other sectors. Thus, seeking ways to improve regulations affecting manufacturing is particularly relevant now, as the current economic upturn is unique; the most recent recession, which began in 2000, is the only one since World War II where manufacturing led other sectors in the downturn and then lagged in recovery.

The National Association of Manufacturers is the nation's largest industrial trade association. The NAM represents 14,000 member companies (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states. Headquartered in Washington, D.C., the NAM has 10 additional offices across the country.

Regulatory Accounting and Budgeting

The NAM supported inclusion of a permanent "Regulatory Right-to-Know Act" (RRKA) as Section 624 of the FY 2001 Treasury and General Government Appropriations Act. The RRKA, like similar NAM-supported one-time provisions in several previous appropriations bills, statutorily directs the Office of Management and Budget (OMB) to submit a report to Congress with estimates for the annual costs and benefits of federal rules and paperwork: (1) in the aggregate; (2) by agency and agency program; and (3) by major rule. The RRKA also directs OMB to analyze the impacts of regulation on state, local and tribal governments, on small business, on wages and on economic growth. Finally, the RRKA directs OMB to provide recommendations for regulatory reform.

The NAM has commented in the past that it understands the difficulties faced by OMB and its Office of Information and Regulatory Affairs (OIRA) in estimating the costs and benefits of federal regulatory programs. In particular, as the Draft Report—and many scholars—has noted, the NAM recognizes that direct costs are far easier to quantify than indirect costs and both direct and indirect benefits.

The NAM's long-range view is that OIRA, which takes the lead in writing the Draft Report, will be able to come up with a credible methodology that will at least be useful for comparing changes in regulatory burdens and net benefits from year to year and from agency to agency, as well as for specific regulatory programs. This would help senior Administration officials and Congress prioritize what they need to do to minimize the regulatory burden and to maximize consumer welfare and public safety. A

comparison has been made to the federal unified budget, whereby Congress, in consultation with the Administration, establishes an overall spending level and then distributes that money among the agencies according to where it would provide the most benefits. With regulatory accounting and budgeting, an overall burden level could be set and then distributed where it would do the most good.

Improvement in Agency Estimates Is Needed

A major problem that OIRA once again mentions as a hindrance to reporting on the costs and benefits of federal regulatory programs is that it must rely on agency estimates. Given the staff level authorized for OIRA, the NAM understands that OIRA does not have the manpower to review and improve upon agency estimates. The NAM therefore encouraged the authorization of increased staffing levels for OIRA in testimony before the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs of the House Committee on Government Reform on July 22, 2003.

Even with its current staffing levels, however, the NAM hopes that OIRA will find a way to have agencies adhere to standards set by OMB so that the numbers provided will be more consistent and reliable. Circular A-4, the Information Quality Guidelines and the new Peer Review Guidelines should help improve the estimates that OIRA receives from the agencies.

In addition, one of the reasons why the NAM is supporting enactment of H.R. 2432, the Paperwork and Regulatory Improvements Act, is the hope that the regulatory accounting and budgeting pilot study provided for in Section 6 will allow OIRA and the selected agencies to seek ways to improve how they generate their

numbers. If the pilot project is successful, then future reports to Congress should be greatly improved.

In its submission two years ago, the NAM reiterated the suggestion it had previously made by letter for the Department of Commerce to become more involved in the review of regulations. Thus, the NAM is pleased that the Administration has created the post of Assistant Secretary of Commerce for Manufacturing and Services. The NAM hopes that the final report to Congress can include at least a brief discussion of how the interaction between OIRA and Commerce might work. Specifically, *Manufacturing in America: A Comprehensive Strategy to Address the Challenges to U.S. Manufacturers*, released by the Department of Commerce in January 2004, recommends that there be an Office of Industry Analysis under the new assistant secretary that would "assess the impact of proposed rules and regulations on economic growth and job creation before they are put into effect." This office apparently would complement OMB's designated regulatory review role under E.O. 12866. Therefore, the NAM believes that, before being finalized, the report should address how OMB envisions the future relationship between OIRA and Commerce. Most importantly, the NAM hopes that the regulatory review function of the Office of Industry Analysis is viewed as permanent rather than temporary.

The problem with the current system is highlighted by the fact that the costs and benefits for only six major rules (those regulations subject to intensive OIRA review) were accounted for in this year's report. As the Draft Report notes, OIRA started off with 37 major rules, but dismissed 25 because they implemented budgetary programs and were viewed by OIRA as nothing more than income transfers. The NAM encourages

OIRA to review the dismissal of the 25 budgetary programs, as federally imposed income transfers may not be a zero-sum game, especially when indirect costs resulting from economic activity that would not have occurred but for the existence of the program are taken into account.

OIRA then notes that six of the remaining 12 rules were not monetized for either costs or benefits and thus are not included in the Draft Report. OIRA either needs to impose discipline on the agencies by returning rules that are incompletely analyzed—perhaps holding the paperwork review officer at the offending agency accountable—or find a way to monetize the costs and benefits for regulations where this was not done initially. It may be that OMB needs to recommend to the President that Executive Order 12866 be amended to have the Cabinet Secretaries and other senior administrative officers include adherence to OMB guidelines and procedures (perhaps tailored to the agency's mission) for consideration in the performance review of the designated agency chief paperwork and/or information officer.

The NAM appreciates that the Draft Report cites *The Impact of Regulatory Costs on Small Firms*, a 2001 report for the Office of Advocacy of the Small Business Administration by Mark Crain and Thomas Hopkins (Crain and Hopkins), to make the point that the burden of regulation falls disproportionately on the manufacturing sector. Specifically, Crain and Hopkins found that in 2000 the manufacturing sector shouldered $147 billion of the $497 billion onus of environmental, economic, workplace and tax-compliance regulation. Overall, Crain and Hopkins found that the per employee regulatory costs of businesses with fewer than 20 employees were $6,975, or 60 percent more than the cost per worker of $4,463 for firms with more than 500 employees. In

manufacturing, this disparity was even wider, as the cost per employee for small firms (fewer than 20 employees) was $16,920, or 127 percent higher than the $7,454 cost per employee for medium-sized firms (20–499 employees) and 140 percent more than the $7,059 cost per employee for large firms (500 or more employees). Crain and Hopkins acknowledge that their methodology does not attempt to capture the benefits of regulation.

In December 2003, the NAM released *How Structural Costs Imposed on U.S. Manufacturers Harm Workers and Threaten Competitiveness* (NAM Report, available over the Internet at www.nam.org/costs). This report examined structural costs borne by manufacturers in the United States as compared to our nine largest trading partners.[1] The principal finding was that structural costs—those imposed domestically "by omission or commission of federal, state and local governments"—were 22.4 percent higher in the United States than for any foreign competitor. The structural costs included regulatory compliance, along with excessive corporate taxation, the escalating costs of health and pension benefits, the escalating costs of litigation and rising energy costs (especially natural gas).

In studying the effect of regulatory costs in the United States, the NAM Report relied in part on the 2001 Crain and Hopkins study. By looking at updated data, including a working paper by the Mercatus Center at George Mason University based on a survey of NAM member companies and trends in changes for pollution-abatement expenditures, the NAM Report concludes that the 2003 total compliance burden "is in the order of $850 billion—with $160 billion on manufacturers alone, equivalent to a 12 percent excise tax on manufacturing production."

[1] Canada, Mexico, Japan, China, Germany, United Kingdom, South Korea, Taiwan and France

In order to determine the effect of regulation on domestic manufacturing as compared to the studied competitor countries, the NAM Report used pollution-abatement expenditures, as they are the only cross-country regulatory compliance cost data available. Thus, the 22.4 percent higher structural costs that U.S. manufacturers face in comparison with our largest trading partners are significantly understated as the regulatory component includes only pollution-abatement expenditures. Even so, just including these specific costs puts the United States at a trade-weighted disadvantage of at least 3.5 percentage points. (Only South Korea's pollution-abatement costs are higher; all other U.S. trading partners, including those in Europe, have much lower costs.)

The NAM is concerned that the Draft Report fails to address the glaring discrepancy of $800 billion between OIRA's estimate of $34 billion–$39 billion and the Crain and Hopkins estimate for 2000 of $843 billion, or the more up-to-date cost estimate in the NAM Report of $850 billion for 2003. This discrepancy is mainly due to limiting the report to the major rules reviewed by OIRA from October 1, 1993, to September 30, 2003. Since agencies tend to inflate their benefits estimates while minimizing potential costs, it would be constructive to see how OIRA could reconcile the estimation of regulatory costs by outside experts versus what the agencies report.

In its discussion of information contained in Table 2 (estimating the annual benefits and costs of major federal rules for October 1, 1993, through September 30, 2003), OIRA acknowledges that the total costs and benefits "could easily be a factor of ten or more larger than the sum of the costs and benefits reported in Table 2." After multiplying by ten, this could account for up to $390 billion in costs, but still, the figure remains far below the Crain and Hopkins estimate for 2000 of $843 billion and the NAM

Report estimate for 2003 of $850 billion. If nothing else, the uncertainty of OIRA's estimates needs to be made clear in the Executive Summary.

As a "reality check" on the estimates that agencies use during promulgation, the NAM suggests that OIRA have selected agencies review major rules that have been in existence for more than 10 years to determine the real-world costs and benefits. These findings could then be compared against what the agency originally anticipated the costs and benefits to be. In discussing Table 2, the report notes that "pre-regulation estimates prepared for rules adopted more than ten years ago are of questionable relevance today." What *is* relevant, however, is what costs do rules in place impose on society and what benefits do rules in place engender for society? Looking back at the true costs and benefits as opposed to those predicted would help to provide a basis to refine estimates used while a rule is being promulgated.

OIRA Efforts To Improve the Estimates

The NAM acknowledges and appreciates that OIRA is trying to get a grasp on how to improve estimates of the benefits of a regulation during the promulgation process by working with EPA to implement the recent recommendations of the National Academy of Sciences found in *Estimating the Public Health Benefits of Proposed Air Pollution Regulations*. In addition, the Committee to Evaluate Measures of Health Benefits for Environmental, Health and Safety Regulation, recently formed by the Institute of Medicine at the urging of OIRA, has the potential to help agencies arrive at better estimates for health benefits—or at least to monetize them.

The NAM is disappointed that the regulatory accounting portion of the annual report prescribed by the Regulatory Right-to-Know Act continues to struggle to provide a

comprehensive estimate of the costs and benefits of federal regulatory programs. As noted, however, the NAM supports providing OIRA with more resources in order to provide the research and other analysis necessary to issue the Draft Report. On the other hand, several initiatives undertaken by OIRA have the potential to improve the bottom-line estimates for future reports. These include the release of Circular A-4, the Peer Review Guidelines, the Information Quality Guidelines, the work of the two panels mentioned in the previous paragraph and an anticipated closer working relationship with the Department of Commerce.

As urged by the NAM in comments on previous reports, OIRA—perhaps through the director of OMB with the concurrence of the Secretary of Commerce—needs to find a way to hold the agencies themselves accountable for providing OIRA with more credible estimates of the costs and benefits of their regulatory programs, not only for major rules, but for *all* of the regulations that they administer.[2] Only then will the annual report to Congress have the analytical value envisioned at the time of enactment.

The Importance of Manufacturing to the U.S. Economy

The NAM very much welcomes the acknowledgment that estimates of the benefits and costs of proposed regulations for manufacturing should especially "strive" to be accurate. As noted in Crain and Hopkins and elsewhere, the burden of regulation falls most heavily on the manufacturing sector. This is principally because environmental regulation, by its very nature, has a disproportionate impact—around 50 percent of total burden – on manufacturing over other sectors. In addition, agencies should especially

[2]Again, it may be that OMB needs to recommend to the President that Executive Order 12866 be amended to have the Cabinet Secretaries and other senior administrative officers include improvement of the estimates and adherence to OMB guidelines as a "success factor" in the performance review of the designated agency chief paperwork officer.

strive for accuracy when considering regulations that affect manufacturing because, more so than in other sectors, the impact of regulation hits smaller manufacturing firms in terms of cost per employee much more than medium and especially larger manufacturing firms.

The following facts help to demonstrate the importance of manufacturing to the U.S. economy and why undue burdens on the sector caused by excessive or overly onerous regulation should be minimized:

- While manufacturing made up 17 percent of real GDP, it was responsible for one-third of total productivity growth for the years 1992 through 2000.
- The "multiplier effect" of manufacturing is far stronger than in any other sector. For example, due to the use of intermediate goods and services, every $1 of a manufactured good sold generates an additional $1.43 of other economic activity.
- For every $1 million in final sales, a manufactured product supports 8 jobs in the manufacturing sector and 6 jobs in other sectors. By contrast, $1 million in service-sector final sales only contributes to 3.5 jobs in other sectors due to a far lower multiplier effect.
- Two-thirds of all exports are manufactured goods. And 97 percent of exporting manufacturers have fewer than 500 employees, making them small businesses.[3]

As mentioned in the NAM's comments on the 2002 Draft Report, the NAM recognizes the place of regulation in the modern economy. But before promulgating a new regulation, the NAM asks that the agency ensure that it be based on sound economics and mainstream science and that care be taken to minimize costs. In most cases, market-based solutions can accomplish all three NAM-supported objectives. A market-based approach allows the agency to set a standard but also allows the regulated

[3] *The Facts about Modern Manufacturing*, released by the NAM's Manufacturing Institute in October 2003, available on the Internet at www.nam.org/facts.

entities the ability to find innovative—and probably far more efficient—ways to meet that standard than if the agency authorizes one and only one methodology or technology.

The NAM appreciates the lower level of regulatory cost burden per year experienced over the first 32 months of the current Administration—80 percent lower than the average of the previous 14 years. We also appreciate that this year's Draft Report asks specifically for recommendations for "promising regulatory reforms relevant to [manufacturing]," especially as they affect small- and medium-sized firms, and for "suggestions to simplify IRS paperwork requirements."

Recommendations for Improving Regulations Affecting Manufacturing

The NAM solicited its membership for which regulations they thought could most be improved. The NAM is member-led, and its Regulatory Improvement Task Force reviewed the regulations nominated to the NAM staff. With a limited amount of time and resources, the task force recognizes that in making its selection it could not, in most cases, meet the first criteria set forth in the Draft Report, namely that a benefit-cost case can be made.[4] In assessing the other criteria, however, the task force has tried to limit the recommendations to those that do not need a statutory change, will continue or enhance fair and open trade, or are important. The task force realizes that the Draft Report uses the term "and" prior to the fourth criterion, but in the spirit of the exercise hopes that OIRA will consider even "nitpicks" that would improve the regulatory environment. In addition, some nominated regulations may require changes in the regulation's underlying statute. While nothing can be done administratively in these instances, OMB and the

[4]All four criteria are that ". . . (1) a benefit-cost case (quantitative and/or qualitative) can be made for the reform; (2) the agency or multiple agencies have statutory authority to make the suggested change; (3) the reform recommendation gives due consideration to fair and open trade policy objectives; and (4) the rule or program is important."

agency should be aware of the difficulty caused by the statutory language for regulated entities and work with Congress to make the necessary changes. Finally, the Draft Report cites several studies noting that environmental regulations are most burdensome to the manufacturing sector, so it should not be surprising that a disproportionate number of regulations nominated by the NAM deal with EPA regulations.

As a general recommendation, the NAM received comments that electronic forms available through agency Web sites are often only in one format. One particular complaint focused on Form 3540-16, an EPA form for reporting the production of "pesticide devices." This commenter noted that Form 3540-16 is available online only in WordPerfect format. Yet, the commenter's company, like many other manufacturers, uses Microsoft Word.

EPA and other agencies should not congratulate themselves on easing compliance burdens by placing forms online if the forms must be manually converted to other formats by a large number of users. At the least, the agency should include the time spent performing the conversion in its estimate for how long it takes to complete the form. The hours spent per regulated entity converting government forms to other formats could be spent on more productive activity. The benefits to the overall economy of agencies making electronic forms available in multiple formats would far outweigh the incremental cost to the agency, especially if the time it takes for each affected regulated entity to perform a conversion is included in the paperwork-burden calculation. This could prove especially helpful to smaller businesses and others subject to the form.

Another general recommendation, from a small manufacturer, would be for changes in agency small business liaisons to regularly inform small businesses of

reporting or other regulatory obligations. This would greatly enhance voluntary compliance by small businesses and reduce their compliance costs.

In reviewing the regulatory improvements that were nominated in 2002, the NAM was disappointed to find that nothing changed in any of them. Perhaps the recommendations submitted did not meet all of the criteria set forth by OIRA at that time. OIRA could nevertheless have encouraged the agencies involved to use the opportunity to take actions to correct, update and otherwise improve their regulations.

One such example is an OSHA rule found at 29 C.F.R. §§1910.106 and 1910.107, dealing with fire standards when using resin in boat building. The *Code of Federal Regulations* (C.F.R.) cites the National Fire Protection Association (NFPA) standards set in 1969. Not surprisingly, the NFPA has updated its standard numerous times in the past 35 years. Yet, OSHA refuses—despite being petitioned by regulated entities—to make a simple change in the C.F.R. that would accurately reflect modern fire standards. One can only imagine what OSHA would do to a covered company if it refused to update a Material Safety Data Sheet because, after all, everybody knew about the changes and, well, it was just too much trouble to change. This "nitpick" calls for a prompt letter and the NAM strongly urges OIRA to send one.

For all intents and purposes, the C.F.R. has the force of law, so the NAM hopes that OIRA will effectively encourage agencies to pay attention to "simple" fixes for the C.F.R. that are submitted. In the OSHA case above, a company technically could be cited for not adhering to 1969 fire standards, for example.

Another disappointment is that nothing has happened on needed changes to the regulations governing implementation of the Family and Medical Leave Act (FMLA)—

this despite the fact that the NAM and other organizations submitted very detailed analyses. In addition, *Ragsdale v. Wolverine Worldwide* (122 S. Ct. 1155 [2002]), the first FMLA case to be heard before the Supreme Court, struck down the Department of Labor's notice requirements as not consistent with the statute. While they were attached to the general submission in 2002, the NAM also submitted its proposed suggestions for making the FMLA more comprehensible and easier to comply with—while not undermining the intent of the statute—under separate cover. In Appendix B, the NAM resubmits its FMLA nomination from 2002, as nothing has changed.

On a more positive note, the NAM realizes that OIRA did make some changes as a result of the 2002 call for regulatory improvement nominations. We hope to be more successful with this year's submission and have altered our format. Specifically, these comments highlight key regulations in need of improvement by listing them separately. These recommendations are those that the NAM Regulatory Improvement Task Force believes best meet the last three of OIRA's criteria and that also will make a difference to the regulatory environment faced by manufacturers as a sector if improved. These nominations are found in Appendices A and B. Specifically, they are: the Particulate Matter and Ozone National Ambient Air Quality Standards; the Toxic Release Inventory; the Definition of Solid Waste; Spill Prevention Control and Countermeasures; SARA Title III; the FCC "Do Not Fax" rule; and the Family and Medical Leave Act. The NAM made detailed comments and provided testimony with suggested improvement for the Toxic Release Inventory and submits those documents as Appendices D and E.

Since it is under the jurisdiction of the Federal Communications Commission (FCC), the NAM recognizes that the "Do Not Fax" rule is beyond the scope

of OIRA's authority as laid out in E.O. 12866. The information collection requests—the most onerous part of the rule—are, however, subject to OIRA review under the Paperwork Reduction Act. The NAM acknowledges that the FCC, as an independent commission, can overrule OIRA's rejection of an information collection request by majority vote, but strongly urges OIRA to look closely at the FCC "Do Not Fax" submission. Perhaps a strongly worded communication from OIRA or its parent, OMB, will help to persuade the commissioners to reconsider the amount of paperwork that the new rule will impose.

The NAM again submits more specific changes in Appendix C. While not as detailed as those in Appendix A or B, the NAM hopes that OIRA will give every consideration to encouraging the agencies involved to take these nominations seriously. While they may not be "important" to the overall economy, they were important enough for the NAM member company to take the time and effort to write them up and nominate them. In addition, NAM member companies—especially smaller manufacturers—have indicated that the true problem of excessive regulation is not really one or two specific regulations, but having to deal and comply with the sheer volume of what would be considered minor regulations.

IRS Regulations

One of the areas specifically mentioned in the Draft Report was the need to improve IRS regulations and reduce paperwork. Currently, IRS forms represent about 80 percent of the total federal paperwork burden. Clearly, the magnitude of this paperwork is due, in large part, to the fact that the vast majority of Americans have direct contact with the agency.

Through the tax-writing process, Congress also plays a role in generating additional regulations and paperwork from IRS. For more than a decade, Congress almost annually has passed—and the President has signed into law—significant tax law changes. Given the complexity of the tax code, these new laws have required regulatory guidance and additional forms and/or reporting requirements. Moreover, many of these changes were enacted into law late in the year, requiring last-minute changes (some of which were retroactive) to forms and other required paperwork.

In general, the business community supports the ability of IRS to issue regulations and other guidance in a timely manner to clarify unclear and/or ambiguous statutory language. At the same time, we recognize the need for IRS to work to make it easier for business taxpayers to comply with an increasingly more complex federal tax code. In fact, the burden of complying with current tax rules is consistently ranked by the NAM's mid-size manufacturers as one of the top five tax areas that represent the greatest burden to them. There are several specific actions that IRS could take to reduce the burden of tax law compliance. These include efforts to:

- streamline forms by eliminating duplicative or unnecessary information, *e.g.*, Form 5471 on foreign entity reporting;
- wherever possible, avoid retroactive rulings, or make them optional for taxpayers;
- continue efforts to accelerate the guidance process; and
- ease recordkeeping requirements.

Conclusion

Thank you for the opportunity to comment on the *2004 Draft Report on the Costs and Benefits of Federal Regulations*. Given that the focus of this year's report is on

improving regulations that affect manufacturers (as well as all IRS regulations and paperwork), the NAM fully intends to follow up with OIRA, OMB and perhaps the agency involved as to the status of the regulations nominated, especially those submitted in Appendices A and B. Any improvement that can be made in terms of the quality of the regulations and in easing voluntary compliance will be beneficial to the overall economy and to helping the regulations involved meet their intent and purpose. The NAM looks forward to reviewing the final report to Congress.

Appendix A

Agency: Environmental Protection Agency (EPA)

CFR Citation: 40 CFR 372, Toxic Release Inventory, Lead Rule

Regulation:

Lowers the reporting threshold for Lead to 100 lbs/year. The lowered threshold and cancellation of burden reduction streamlining measures was based on inappropriate use of the Persistent Bioaccumulative and Toxic (PBT) criteria. If a facility uses more than 100 lbs/year, it must file Form R.

Reason for Modification:

The lead rule dramatically lowered the reporting threshold for lead and lead compounds under the Toxic Release Inventory (TRI) from 25,000 lbs (over 12 tons) to 100 lbs in 2001. The new threshold is too low, forcing a disproportional number of businesses to file Form R. During the first reporting year (2001) using the lowered lead threshold, 8,561 Form Rs were filed for lead and lead compounds. Over eighty-five percent of these forms were filed by the manufacturing sector, yet this same sector was responsible for only six percent of reported releases. The filing increase is due, in part, to the elimination of the *de minimis* exemption. Previously, reporting facilities with less than one percent of lead could disregard the reporting requirement, helping to keep down administrative costs associated with tracking minute quantities. With the new rule, the *de minimis* exemption was dropped, requiring more facilities to file Form R.

The 2001 Lead Rule has added an extra burden to manufacturers, particularly small businesses. Manufacturers believe that the EPA has grossly underestimated the cost of compliance for industry, particularly small businesses. In particular, the EPA has unnecessarily increased the reporting burdens by eliminating the burden reduction measures designed specifically to streamline reporting for small business with small releases. In the rule, EPA specifically disallows the use of Form A, which was designed to simplify reporting for entities with small releases. Additionally, the EPA eliminated the *de minimis* exemption, which allowed reporting facilities to exclude detailed and costly calculations, tracking and reporting for materials containing less than one percent of lead.

Manufacturers believe that existing Toxic Release Inventory burden reduction options should be made available to lead reporters including the use of a simplified Form A, *de minimis* and range reporting. In addition, we recommend that a new simplified Form NS be created for those many small manufacturing operations that reported negligible lead release in a Form R filing (less than 10 pounds). It is also highly recommended that the EPA consider raising the lead reporting threshold. A 100 lbs. threshold requires too many reports from manufacturers who collectively are the source of only six percent of the reported releases, and further strains the manufacturing community.

The NAM submitted testimony on the TRI lead rule to the House Committee on Small Business on June 13, 2002. On February 3, 2004, the NAM submitted comments to the EPA on improvements to the TRI Program. Both documents are attached in Appendices D and E.

Agency: Environmental Protection Agency (EPA)

CFR Citation: Resource Conservation and Recovery Act; 40 CFR 260-261 and 261.2 (a,b & c)

Regulation:

Recycling is considered a component of the definition of "discarded." Many chemicals that could be beneficially reused are not due to RCRA permit and standards requirements, instead they are disposed of by incineration or landfilling. There is a cost of not reusing available materials and a cost of disposing of the available reusable materials.

Reason for Modification:

Recycled materials that are classified as hazardous waste are subject to extensive, and excessive, regulatory controls designed for waste materials destined for disposal. The current regulation causes an increased use and dependence on new materials, squanders beneficial resources and increases societal costs associated with managing these materials. The EPA should revise the definition of "solid waste," limiting it to materials that are truly discarded (*i.e.*, disposed of, thrown away or abandoned). Any legitimately recyclable materials should be excluded from the definition of solid waste to encourage both recycling and the use of recycled materials. This change would be beneficial both to the overall environment by decreasing the need for new raw materials and to the regulated community by decreasing cost and other compliance burdens.

Agency: Environmental Protection Agency (EPA)

CFR Citation: SARA Title; 40 CFR 313

Regulation:

SARA 313 is submitted annually to the EPA and requires estimates of a facility's emissions to air, water and land, as well as off-site transfers or discharges to Publicly Owned Treatment Works, of chemicals specifically listed by the EPA. The intent of this rule was to provide the community with knowledge about the compounds that could be released from industrial facilities in their neighborhoods.

Reason for Modification:

SARA 313 Form R has grown. Today, besides providing estimates of emissions to the environment, a facility has to provide estimates of how much energy recovery, recycling and "source reduction" it had in the previous year, and project how much it is planning to do in the next two years. The facility must also describe its treatment processes and its removal efficiencies. The cost to generate this information in extra man-hours outweighs any potential benefit to the EPA.

Agency: Environmental Protection Agency (EPA)

CFR Citation: Spill Prevention, Control and Countermeasures (SPCC) Plans – Risk Management Plan (RMP) 40 CFR 112 and 67 FR 47062, July 17, 2002

Regulation:

"A facility is not regulated under SPCC . . . if due to its location, the facility could not reasonably be expected to have a discharge of oil to navigable waters. This determination must be based solely upon consideration of the geographical and location aspects of the facility and must exclude consideration of man-made features such as dikes, equipment or other structures, which may serve to restrain, hinder, contain, or otherwise prevent a discharge." (40 CFR 112.1 (d)(1)(i)). "To allow consideration of man-made structures (such as dikes, equipment, etc.) to relieve a facility from being subject to the rule would defeat its preventive purpose. Because manmade structures may fail, thus putting the environment at risk in the event of a discharge, there is an unacceptable risk in using such structures to justify relieving a facility from the burden of preparing a prevention plan. Secondary containment structures should be part of the prevention plan." 67 FR 47062, July 17, 2002.

In contrast, RMPs (40 CFR 68), which must be developed by companies using certain flammable and toxic substances, take man-made features into account. The RMP's must include a hazard assessment, a prevention program and an emergency response program. Facilities may consider passive mitigation systems (including man-made structures) in performing "the analysis of worst case provided that the mitigation system is capable of withstanding the release event triggering the scenario and would still function as intended." 40 CFR 68.25 (h)

Reason for Modification:

Under the current SPCC rules, if a facility invested capital to construct containment systems to prevent oil from reaching a river and/or waterway, the facility must ignore its investment and assume that the spill prevention system does not exist. SPCC should be modified to allow facilities to consider man-made structures under SPCC as is consistent with the RMP's. This would protect the environment, provide an incentive for facilities to invest in containment structures and reduce the burden on facilities with little potential of a release into U.S. waters.

The following is suggested as a possible fix for 40 CFR 112.1(d)(1)(i): "Any onshore or offshore facility that, due to its location, could not reasonably be expected to have a discharge as described in paragraph (b) of this subsection. This determination must be based solely upon consideration of the geographical and location aspects of the facility (such as proximity to navigable waters or adjoining shorelines, land contour, drainage, etc.) This determination may allow for the consideration of passive mitigation systems (such as dikes, equipment, or other structures) that may serve to restrain, hinder, contain, or otherwise prevent a discharge as described in paragraph (b) of this section, when determining reasonable potential for oil to reach navigable waters. The passive mitigation system must be capable of containing the oil release and still function as intended."

Agency: Environmental Protection Agency (EPA)

CFR Citation: 40 CFR Parts 50/51

Regulation: National Ambient Air Quality Standards (NAAQS) for Ozone and Fine Particulate Matter ($PM_{2.5}$) under the Clean Air Act (CAA)

Reason for Modification:

In 1997, the Environmental Protection Agency (EPA) established a National Ambient Air Quality Standard (NAAQS) for fine particulate matter ($PM_{2.5}$) for the first time and revised its ozone standard. As required by the CAA, the EPA is currently reviewing the PM and ozone NAAQS. This process occurs in three phases: Criteria Document (CD), Staff Paper (SP) and Rulemaking. The CD represents a compilation and scientific assessment of all the health and environmental effects information available. The SP contains staff recommendations to the EPA Administrator regarding any revisions to the standards to protect public health and welfare and is based on the scientific information found in the CD. Based on the scientific assessments and the recommendations of the Clean Air Scientific Advisory Committee (CASAC), the EPA Administrator decides whether it is appropriate to revise the standards.

NAAQS standards, particularly those for ozone and $PM_{2.5}$, set ambient concentration limits for criteria pollutants that areas must meet, or else face very onerous controls. Although the nation's air quality has steadily improved for more than 30 years, a new, more stringent, 8-hour ozone standard is scheduled to be implemented in spring 2004 and a new, more stringent, $PM_{2.5}$ standard is scheduled to be implemented by year-end 2004.

Many urban areas fail to meet the new ozone standard and many of these areas are expected to be in nonattainment for the new $PM_{2.5}$ standard as well. The resulting more stringent controls requirements are expected to result in increased costs for both existing and planned stationary sources, as well as the potential for more expensive fuels for mobile sources. The EPA modeling predicts that a number of major metropolitan areas will not be able to submit approvable State Implementation Plans to the EPA in 2007 that demonstrate attainment by their prescribed deadlines. Major sources in such areas will face CAA sanctions costing millions of dollars annually. These areas will also face the loss of federal highway dollars.

There is little or no harmonization between the NAAQS attainment deadlines and when the EPA's modeling shows these areas coming into attainment. Furthermore, there is little or no harmonization between NAAQS attainment deadlines and existing federal control measures for transport and cleaner engines and cleaner fuels, the full benefits of which will not be seen until the 2015-2025 timeframe. For example, most areas will have an attainment deadline for the new 8-hour ozone standard by 2010, yet the full impact of emissions reduction from the proposed Interstate Air Quality Rule will not be seen until 2015.

The NAAQS attainment deadlines must be realistic and harmonized with existing federal controls expected to achieve significant emission reduction benefits in the 2015-2020 timeframe. EPA should not place states in the untenable position of facing federal CAA sanctions as the result of unrealistic deadlines and the lack of reductions from federally regulated sources.

Longer term, the "Clear Skies" approach to regulating emissions (*i.e.*, results-oriented, multi-pollutant, regional, market-based) should be pursued with a vision of eventually replacing the existing patchwork of confusing and conflicting rules. In addition, the EPA should rigorously review the ozone and $PM_{2.5}$ NAAQS based on all sound, peer-reviewed science and adjust them only if warranted by the record.

Agency: Federal Communications Commission (FCC)

CFR Citation: 47 CFR Part 64, Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, 68 Fed. Reg. 44,143 (July 25, 2003), effective Jan. 1, 2005.

Regulation:

Prohibits any person or entity, including for-profit companies and nonprofit tax-exempt associations, from sending an unsolicited "advertisement" to a fax machine. The only exception is where the recipient has "granted the sender prior express invitation or permission to deliver the advertisement, as evidenced by a signed, written statement that includes the facsimile number to which any advertisements may be sent and clearly indicates the recipient's consent to receive such facsimile advertisements from the sender."

Reason for Modification:

The FCC's rule mandates new and ongoing paperwork requirements if companies and associations are to continue to be able to send routine information by fax to their customers and members.

The Commission substantially underestimated the number of U.S. businesses that will be burdened with these new recordkeeping requirements and failed to provide OMB adequate notice of the sizeable increase in information collections required under the new fax rules. It also substantially underestimated the cost of compliance for businesses and trade associations.

The FCC eliminated the "established business relationship" exception, meaning that a business may not send faxes with any advertising content to its own customers — even in response to a customer's request — without first obtaining written, signed permission. These requirements take away the flexibility and freedom that companies and associations need to voluntarily communicate with one another by fax. The rule imposes substantial financial penalties and the threat of litigation for those who fail to create and maintain the required paperwork, including small businesses.

Since OIRA concerns can be overridden by a majority vote of FCC Commissioners, the NAM encourages OMB to work directly with the Commissioners and their staff members to alleviate the expected overly heavy burden that the information collection requests and other requirements of the updated rule are likely to impose.

NAM Comments to OMB on FMLA

May 28, 2002

John Morrall
Office of Information and Regulatory Affairs
Office of Management and Budget
NEOB Room 10235
725 17th Street, N.W.
Washington D.C. 20503

Dear Mr. Morrall:

On behalf of the National Association of Manufacturers and its members, we would like to recommend that the Family and Medical Leave Act's (FMLA) implementing regulations and associated non-regulatory guidance be reviewed under OMB's request for comments on the costs and benefits of federal regulations. The National Association of Manufacturers is the nation's largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states. Headquartered in Washington, D.C., the NAM has 10 additional offices across the country.

Specifically, the Department of Labor's (DOL's) regulation, and subsequent interpretations, regarding the definition of "serious health condition" under the FMLA should be reviewed. In addition, the regulations and interpretations of "intermittent leave" issues as well as the notification and recordkeeping requirements should also be reviewed, particularly in light of the Supreme Court's decision in Ragsdale v. Wolverine Worldwide. We would also draw your attention to wage and hour opinion letters that, while technically non-binding guidance have, in effect, and without benefit of notice and comment, usurped the regulations.

1. Definition of "Serious Health Condition" 29 C.F.R. 825.114

When the FMLA passed, Congress covered both leave for the birth or adoption of a child as well as medical leave (for the individual or an immediate family member) for serious health conditions. Congress made clear that the term "serious health condition" was not meant to cover short term illnesses where treatment and recovery are brief and such conditions fall within even modest sick leave policies. Nevertheless, DOL broadly defined what constitutes a serious health

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condition when it promulgated it definition of serious health condition at 29 C.F.R. 825.114. The expansive way in which the regulation was written has been further stretched beyond recognition by nonregulatory guidance, specifically, wage and hour opinion letters that DOL has subsequently issued without benefit of public notice and comment. As a result the FMLA, which began as a statute meant to protect jobs for new parents and those who are seriously ill, has turned into a national sick leave law which would be barely recognizable to its drafters. Moreover, employers and employees are left with no discernable guidance on what does or does not constitute a "serious health condition." Many NAM members have articulated that they don't have difficulty interpreting what constitutes a "serious health condition" because "just about everything is covered, especially if a doctor says it is covered." This unacceptable "status quo" is clearly inconsistent with the statute.

On April 7, 1995, DOL issued wage and hour opinion letter number 57 which stated that "the fact that an employee is incapacitated for more than three days, has been treated by a health care provider on at least one occasion which has resulted in a regimen of continuing treatment prescribed by the health care provider does not convert minor illnesses such as the common cold into serious health conditions in the ordinary case (absent complications)." Just a year and a half later, on December 12, 1996, DOL issued opinion letter number 86. That opinion letter stated that wage hour opinion letter 57 expresses an "incorrect view" with respect to the common cold, the flu, ear aches, upset stomachs, minor ulcers, headaches other than migraines, routine dental or orthodontia problems, periodontal disease etc. and that if "any of these conditions met the regulatory criteria for a serious health condition, e.g. an incapacity of more than three consecutive calendar days and receives continuing treatment e.g. a visit to a health care provider followed by a regimen of care such as prescription drugs like antibiotics, the individual has a qualifying 'serious health condition' for purposes of FMLA."

In effect, the issuance of this later opinion letter has superceded the regulation itself and has become the standard in enforcement actions and before the courts. If an employee has a three day absence, has been to a doctor and has received a prescription, no matter what the underlying cause-- from a cold to cancer-the employee is entitled to FMLA leave and all of the rights it confers.

The resulting confusion to employers and employees should be fixed immediately, first by DOL rescinding wage and hour opinion letter 86 and restoring the meaning of the word "serious" to serious health conditions protected by the FMLA. DOL should also institute rulemaking to determine whether its current regulation defining serious health condition is consistent with the statute.

2. Intermittent Leave 29 C.F.R. 825.203; 825.306; 825.307; 825.308

Specific applicable regulations:

825.203 -- Leave may be taken intermittently. Examples include cases where employees or their family members have serious health conditions which require periodic care by a Health Care

Provider ("HCP") and in cases where the employee or family member is incapacited even if he/she does not receive treatment by a HCP.

825.306 -- Employers can request medical certifications. With respect to intermittent leave, employers can ask HCP's to provide the likely duration and frequency of episodes of incapacity.

825.307 -- Employers cannot generally question the adequacy of certifications. If an employee submits a complete certification, the employer cannot request any additional information from a HCP. An HCP representing the employer, however, can contact the employee's HCP for clarification.

825.308 -- Employers cannot generally request recertifications of medical conditions until the minimum duration specified by the HCP on the original certification has passed.

DOL's intermittent leave regulations have also been problematic for NAM members for a number of reasons. First, Congress drafted the FMLA so that employees could take leave in increments of less than one day (for example, for chemotherapy or radiation treatments). The regulation provides that leave may be counted "to the shortest period of time that the employer's payroll system uses to account for absences or use of leave, provided it is one hour or less." Since many employers track in increments of a small as six minutes, the task of accounting for and tracking intermittent leave is a significant administrative burden. This is especially the case when coupled with the broad definition of "serious health condition" which means that employers are keeping track of a large number of partial days for serious and non-serious conditions alike. Allowing employers to track intermittent leave in larger increments (such as by the hour or half day) would ease the cost and paperwork burden while ensuring that those employees who need intermittent leave are granted such leave. Redefining what constitutes a serious health condition will also reduce the number of absences and conditions under which an employer must track intermittent leave.

Unfortunately, because of the way the regulations have been written and interpreted, intermittent leave can be misused by employees, and employers have little recourse. For example, an employee may have his HCP certify that he needs intermittent leave for migraines. The HCP lists the duration as "indefinite," or "lifetime." With respect to the frequency of the episodes of incapacity, the HCP writes "unknown." The employee is then free to take every Friday afternoon off for the rest of his career due to migraines, even though he/she is not receiving any treatment on those afternoons. Another example may involve an employee who has his HCP certify that he needs intermittent leave for high blood pressure. Again, there is no duration or frequency specified, but the HCP does indicate that the purpose of the leave is for the team member to go to the doctor when his/her pressure is high. The team member takes off every Monday for high blood pressure and the employer has no way of knowing whether he has been to the HCP or not. These problems are further exacerbated by the certification provisions and the limitations placed on employers in verifying illnesses.

Revising the regulations so that HCP's provide the duration and frequency of the leave would be beneficial. Alternatively, where the duration of leave is not specified, permitting employers to

authorize leave for an initial period of 30 -90 days, with recertification required upon expiration of the initial leave period would ease employers' burdens. Although HCP's cannot always say with certainty the frequency of absences, without additional information from the medical provider, employers are at a disadvantage in terms of attempting to adequately staff and schedule their operations. Moreover, the regulations should allow employers to ask employees to provide evidence that they received treatment if they are off work on intermittent leave for periodic treatments, e.g., the blood pressure example. Perhaps the regulatory change that would most effectuate the purpose of the statute is to relax the regulations on employers' ability to contact HCP's. As the above discussion illustrates, there are many circumstances under which employers need additional information from HCP's, not just "clarification."

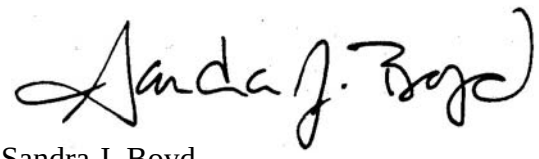
Employers want to be able to provide legitimate intermittent leave to employees but they also need to have adequate information so that they can properly staff their operations. Moreover, employers ought to be able to verify that an employee has an illness that requires intermittent leave and be able to understand the ramifications of that illness. Employers must also be able to institute proper absence control policies and to ensure that the use of leave is legitimate, a proposition that is difficult under the current intermittent leave regulations taken together.

Conclusion

It is important, in order to fulfill the purpose of the FMLA, to alleviate the current interpretive and legal confusion which discourages companies from offering or expanding beneficial programs, including paid leave. DOL's interpretations have especially penalized companies which have gone beyond the FMLA's requirements. This problem, which manifests itself throughout DOL's FMLA regulations, was recognized by the Supreme Court when it recently struck down DOL's notice requirements in Ragsdale vs. Wolverine Worldwide.

Vague, confusing and contradictory regulations and guidance do no allow employers to administer the FMLA's requirements with confidence and certainty. A thorough review of DOL's FMLA regulation, specifically those regulations that define serious health condition, intermittent leave and notice, is in order.

Sincerely,



Sandra J. Boyd
Assistant Vice President, Human Resource Policy
National Association of Manufacturers

Appendix C- Recommendations to OIRA for Regulation Modifications

Dept.	Title/CFR Code	Regulation	Reason for Modification
Agriculture; Food Safety and Inspection Service	*Listeria* Rule 9 CFR 430; FSIS Directives 5000.1, 5400.5, 8080.1, 10,200.1 and 10,240.4.	The *Listeria* rule regulates meat production to avoid the transmission of listeriosis, which is induced by *L. monocytogenes* .	*L. monocytogenes* are found in more than just ready-to-eat meats. They can also be found in your home, on your pets, in restaurants and in your general environment. The cost of this regulation to Industry is proving to be much higher than FSIS estimates. FSIS estimates $1,600 per year, but the cost of compliance is closer to $12,000. NAM members, particularly small businesses, would appreciate FSIS reviewing the costs associated with the *Listeria r* ule, increasing the estimated compliance costs to a more reasonable figure.
Commerce; NOAA	Proposed Rule on “Coastal Zone Management Act Federal Consistency Regulations” (Fed. Reg., June 11, 2003)	Change existing rules concerning "Federal Consistency” and state participation in consistency determinations for coastal siting and energy development activities.	Proposed rules need to be changed to reduce the time available for NOAA to consider appeals of an initial consistency ruling from 270 days to 120 days. Delete proposed provisions that imply new environmental evaluations are needed before Commerce makes decision on consistency appeal. Tighten proposed language to limit state opportunities to use the consistency review process to simply prolong consideration. Encourage a Memorandum of Agreement between NOAA and MMS regarding responsibilities, application of the “effects test,” and on streamlining project permitting. Eliminate “conditional concurrence” provision (section 930.4) policies that enable states to demand extraneous actions in exchange for agreement. Redress the improper application of the “chain of causation” theory (applied though section 307c) to avoid overly broad interpretation of impacts of “activities.” These process modifications are needed to reduce the delays and other unnecessary burdens currently hindering final decision in CZMA consistency reviews, thereby meeting the goals of Ex. Orders 13211 and 13212 (May 18, 2001) regarding expediting energy project permitting and reducing burdens on energy supplies.
U.S. Customs	Customs Valuation; 19 CFR	Requires the computing of the "value for duty." Calculations are based on accounting procedures that do not resemble nor are applicable to other accounting areas of a company, thereby adding complexity to the process.	Currently, the value of an imported product is calculated by finding the sum of the following items: 1) cost of production of U.S. components; 2) the freight cost of transporting them to a foreign assembly or production facility; 3) the value of U.S.-produced tools or dies amortized over the number of items that can be expected to be produced over the life of the tool; and 4) other miscellaneous requirements referred to as "assists." These calculations require a separate recordkeeping system. It is proposed that the value for duty calculations be aligned with GAAP standards and based on values that are already required for inventory purposes, greatly reducing the administration costs for manufacturers.

U.S. Customs	Duty Drawback; 19 CFR 191 Subpart E	Drawback is the refund of Customs duties, certain Internal Revenue taxes and certain fees that have been paid to U.S. Customs at the time of importation. The refund is administered after the exportation or destruction of either the imported/substituted product or article that has been manufactured from the imported/substituted product.	The Duty Drawback paperwork is so time consuming that some member companies forego the process because the administrative costs associated with going through the process are higher than the amount they can claim. It is recommended that the recordkeeping requirements be standardized, saving manufacturers significant amounts of money and time.
EPA	Maximum Achievable Control Technology (MACT) Standards	These standards have overlapping requirements, thereby duplicating compliance efforts. For example, RCRA subpart BB under 40 CFR 264 overlaps with Leak Detection and Repair (LDAR) programs of the MACT standards. Furthermore, there are more than six distinct LDAR programs and hybrids that apply to various MACTS, including 40 CFR 63 subpart H, 40 CFR 63 sub GGG, 40 CFR 63 sub JJJ, and 40 CFR 63 sub I.	The overlapping regulations require lots of extra paperwork to be filed. The MACT standards mentioned should be reviewed so that only one LDAR program is required for any given plant.
EPA	MACT- 40 CFR 63 sub GGG (pharmaceutical); 40 CFR 63 sub JJJ (paper and web coating)	The Pharmaceutical MACT sets standards for pharmaceutical processes and there is debate whether a condenser is part of the process or if it should be classified as an air pollution control device. The paper and other web coating MACT requires agency case-by-case approval for any control device if there is not a Sulfur Recovery Unit (SRU) or an oxidizer.	Pharmaceutical MACTs are interpreted differently, even by EPA enforcement officers. This causes confusion in recordkeeping and reporting, generating more administrative costs to keep it all organized and compliant. The condenser should be interpreted as part of the manufacturing process as it is so integrated into the process rather than interpreted as an air pollution control device. The paper and web coating MACT is limiting as it requires an exhaustive process to receive approval to use different technologies that also meet the hazardous air pollutant (HAP) control standards. It is suggested that the EPA allow companies the flexibility to utilize any appropriate control device that will meet the standard of greater than ninety five percent HAP control, instead of imposing requirements on which devices to use.
EPA	Comparable Fuels Exclusion (CFE); 40 CFR §§ 261.4(a)(16) and 261.38	CFE excludes from RCRA hazardous wastes that can be and are burned as fuels, and that are not more hazardous than the fossil fuels that facilities would otherwise use.	This rule conserves finite fossil fuel resources, in addition to allowing hazardous wastes to be managed with equal safety but at a lower cost. EPA should expand the use and utility of the CFE by promulgating enhancements to the existing rule. The analytical requirements should be reduced and the analytical problems associated with demonstrating qualification should be resolved. The EPA should also adopt a flexible compliance demonstration for non-halogenated organic constituents that can be shown to be destroyed in well-operated, efficient combustion systems.

EPA	Leak Detection and Repair Regulations (LDAR) 40 CFR parts 60/61 and 63	Aims to reduce or eliminate Volatile Organic Compound (VOC) or Volatile Hazardous Air Pollutant (VHAP) emissions from certain process equipment leaks. Equipment leak standards specify certain monitoring and maintenance practices intended to reduce or eliminate these leaks and the resultant fugitive emissions. These emissions are monitored by Method 21.	Using Method 21 to monitor emissions requires an operator to visit and screen each regulated component to determine if it is leaking. This process is labor intensive, expensive and may not accurately represent the magnitude of a specific leak as it only measures hydrocarbon drawn in through the sample leak. Method 21 usage in a refinery with over 200,000 components can exceed $1,000,000, annually, for the LDAR program. There is new technology, optical imaging, that can identify leaking components within sight of the imager, leading to a more accurate and less labor intensive emissions reading. The EPA should phase out Method 21 and adopt a more technologically-advanced emissions monitoring process.
EPA	Clean Air Act; Operating Permits (Title V); 40 CFR Part 70	All major and some minor stationary sources have to file for operating permits under Title V of the Clean Air Act. The permits are to record all federally applicable requirements that apply to that source.	This program has grown considerably, becoming complex and costly. States have also adopted permitting programs, further adding to the confusion. The EPA should review Title V, taking into consideration Title V's original intent compared to the current process industry goes through in order to comply with this regulation. The goal of the rule revision should be to reduce costs and clarify language to make permitting easier and the actual permit language more concise.
EPA	TSCA - Export Notification; 40 CFR 707, Subpart D	Companies are required to notify EPA when exporting substances or products that contain chemicals listed on the TSCA Export Notification 12(b) list. Currently, there is no low-level cut-off for this notification.	Since there is no low-level cut-off for the notification, many minor substances or product ingredients notifications are filed, creating large amounts of paperwork. To remedy this, EPA should adopt a low-level cut-off for Export Notification under TSCA 12(b).
EPA	Clean Water Act; 40CFR 316 (b)	This regulation forces utilities to build dry cooling towers in an effort to reduce the amount of water needed for cooling.	This regulation will force significant expenditures that will be passed on to customers with little or no environmental benefit in water rich regions. The water conservation intent of this regulation may make sense in more arid regions, such as the Southwest, but in water abundant areas, such as the Great Lakes, this regulation becomes troublesome. We encourage the EPA to review this regulation and its applicability to different ecological regions.

EPA	New Source Performance Standards Subpart GG for Stationary Gas Turbines 40 CFR Part 60.334 (b)(2)	Requires monitoring of sulfur and nitrogen content of fuel being fired in gas turbines.	There is negligible sulfur and little nitrogen in natural gas, thus the NAM recommends that the rule be repealed. The challenging part is that reports are due even if there were no excess emissions. In addition, for sources covered by Title V permits, the requirement should be modified to conform with Title V monitoring and compliance reports, *i.e.,* if there are excess emissions they would be reported under the Title V deviation reports and not a separate NSPS report.
EPA	Water Effluent Guideline; 40 CFR 414	The current rule sets mass-based effluent limits by multiplying average process wastewater flow times at regulated concentrations. If a company implements a water conservation project, it will be penalized when the permit is renewed; mass limits will be reduced since the average flows will go down but the regulated concentration is not adjusted.	Permittees should retain mass limits when NPDES permits are renewed when process wastewater flows are reduced for purposes of water conservation. If process wastewater flows are decreased for other reasons, the mass limits can be adjusted per the current rule.
EPA	Safe Drinking Water 40 CFR 141; Great Lakes Initiative (GLI) Standard for Mercury	The GLI contains standards for surface water affecting effluent standards including mercury. The standards at issue are the GLI water column standards of 1.3 ppt for human health and 1.6 ppt for wildlife.	These standards are problematic as they are based on a false assumption that there is a linear constant relationship between inorganic mercury in the water column and organic mercury in fish. In the GLI, EPA is attempting to limit the organic levels in fish by regulating the inorganic mercury concentration in the water column. In the rest of the country, however, EPA only has a standard for fish. The GLI water column has caused POTW and industry to go to great efforts to reduce inorganic mercury levels in NPDES discharges with no demonstrated benefit after a number of years of effort. EPA should re-evaluate its approach contained in the GLI to create a standard that reflects nationwide policy.

EPA	Reporting of Releases in Excess of Reportable Quantity; 40 CFR 302 and 40 CFR 355- Associated with Thermal NOx Emissions	40 CFR 302.4 lists nitrogen oxide and nitrogen dioxide as CERCLA hazardous substances with a Reportable Quantity (RQ) of 10 pounds. 40 CFR 355 Appendix A also lists both materials with a Reportable Quantity of 10 pounds. The RQ is set too low for combustion sources such as flares, which are used to control VOC emissions.	Increase the RQ for nitrogen oxide and nitrogen dioxide to 100, 1000, or 5000 pounds for combustion sources. This will greatly reduce the reporting burden on owner/operators and the administrative burden on the NRC, state and local reporting entities.
EPA	Clean Water Act - Method Detection Limit/Minimum Level (MDL/ML)	Requires laboratory analytical procedure to determine chemical content.	MDL/ML procedure used for establishing low-level detection of chemical constituents result in a high level of "false positives." This data is used for compliance determinations and may inaccurately characterize discharger effluents as being non-compliant. These procedures are currently being re-evaluated, but the agreed upon assessment approach is not being followed by the EPA. The EPA's Technical Support Document confirms that the MDL/ML approach is unsuitable for compliance determinations, but it is anticipated that the agency will recommend that the process remain significantly unchanged. The continued use of the existing MDL may subject dischargers to possible fines and imprisonment due to inaccurate test results.
EPA	Superfund Alternative Program PL 99-499, 100 Stat. 1613 (1986). Guidance document interpreting authority of OSWER 9208.0.18. Revised response selection and settlement approach for Superfund Alternative Program (SAP) sites	The guidance encourages EPA Regional Offices to evade requirements for listing a site on the National Priority List (NPL) and arbitrarily select solvent companies to clean up sites regardless of actual risk to the public and regardless of the company's accountability at the site. The program abrogates the responsibility of EPA Headquarters to assure that Superfund assets are spent on the highest priority sites, and EPA's administrative reforms that mandate an attempt to achieve fairness in assigning cleanup liabilities.	The Superfund Alternative Program (SAP) should be eliminated as it essentially creates a "shadow" NPL without following the same process for listing a site on the NPL.
EPA	National Environmental Policy Act (NEPA) 40 CFR part 1500 to 1508	NEPA requires governing agencies to oversee land and resource management plans and environmental documentation for developing projects or creating and permitting of new facilities.	NEPA has become entangled with state, local and private interests, thereby creating much confusion for producers and manufacturers. It has been successful in requiring federal agencies to review the environmental consequences of their actions and has brought the public into the decision-making process, but the NEPA implementation process is full of delays due to inadequate federal staffing and funding. This adversely affects site permitting and project development. This, in turn, inhibits industry's ability to conduct business.

EPA	Office of Air Quality PS- AP-42	Requires reporting of chemical-specific emissions factors.	AP-42 does not provide emission factors for all source plants for all industries, thus more accurate emission estimates are made through use of alternative emission factor sources. AP-42 also lacks a needed statement on every page that site-specific data are preferable to category-wide average emission factors for regulatory applicability and permitting applications. AP-42 should be modified to allow more comment by industry as the current process is too long and the EPA has been non-responsive to suggestions for improvement and uses outdated source test results. Also, the Technology Transfer Network posting of AP-42 emission factors are used and interpreted differently by state and local regulatory agencies, leading to misinterpretations and inaccurate applications.
EPA	FIFRA 40 CFR 167.85 Form #3540-16	Requires annual reporting of pesticide production for registration of pesticides and pesticide devices (like filters) for registered facilities.	Form #3540-16 imposes an extraneous administrative cost as it requires the reporting of how many pesticide devices and filters are produced. Also at issue is the definition of pesticide devices, which is too broad. For example, the definition is so broad that companies have reported on filters that had no relation to pesticides- and it took close to 25 man-hours to complete the forms, not the EPA estimate of two hours. The definition of pesticide devices should be reviewed and the time for filling out the forms should be re-evaluated. In addition, the NAM suggests that form #3540-16 and other federal compliance forms be made available electronically in several formats. Otherwise, EPA – and other agencies – need to factor in conversion in estimating the time it takes to complete the form.
FAA	14 CFR Part 121 Air Carrier supplier rule	This rule requires that the employees of any supplier to an air carrier must have a drug and alcohol testing program.	This standard is not applied to foreign counterparts, giving U.S. companies a disadvantage when supplying items to air carriers.
Fish and Wildlife Service (Interior)	Endangered Species Act (ESA) 50 CFR 1711 and 1712; 50 CFR part 402, Interagency Cooperation	ESA permits citizens to nominate additions to the threatened and endangered list without requiring scientific data or analysis.	There is no qualification requirements nor scientific data required to nominate species for the ESA. This has hindered land management planning and permitting, making it difficult for and even inhibiting industry to conduct business. It is proposed that public hearings should be required on list additions and that specific criteria be developed to ascertain which species should be added to the list. Fish & Wildlife Service needs to work with Congress to tighten the statute so that it uses mainstream science as nomination criteria.
Health and Human Services; CMS	Medicare Title II, Section 301	Medicare Secondary Payment Law requires collection or recovery of alleged overpayments to Consumer Credit Collection agencies that do not have a time limit.	Medicare should only use subcontractors that deal professionally with former employers of alleged fraud perpetrators. The program should ensure that its debt-collection subcontractors stay well within the bounds of FTC-sanctioned practices, especially when dealing with innocent third parties, such as former employers. A time limit of ten years for contacting former employers should be imposed to alleviate employers having to research decade-old claims.

Labor - Office of Federal Contract Compliance Programs		When doing contract work with the government, contractors have to fill out compliance surveys. These surveys are required for every contract that that company may have with the government.	To simplify the government-contractor compliance surveys, it is suggested that the government create company profile codes, which identify the characteristics of a company. For example, the surveys ask questions about companies to determine if it is minority owned, a small disadvantaged business, etc. This profile code could then be used in lieu of filling out a complete survey for every government contract.
Labor - OSHA	Lead Annual Retraining 1910.1025 (L)	After initial employee training, OSHA requires annual retraining sessions.	The initial lead training should be required, with a follow-up in 6-12 months, but the annual retraining should be substituted for experience. For example, if someone working in and/or around lead is able to pass a test, then that employee should be exempt from the 8-hour retraining sessions.
Labor - OSHA	Lead 1910.1025(L); Bloodborne Pathogens annual retraining 1910.1030 (g)(2); Respirators Retraining 1910.134 (k)(10); Hearing Conservation Retraining 1910.95 (k)(2); Asbestos Retraining 19109.1001(j)(7)(ii)	Require 40-hour training sessions and 8-hour annual retraining.	These retraining sessions are too time-intensive. Similar to Lead Retraining regulations (above), manufacturers would like retrainings be performance based. If someone passes the test, then that employee should be exempt from completing the retraining. If an employee is new and/or does not pass the test, then they should go through the retraining, but making every employee go through retraining causes losses in productivity and is costly without much additional undue benefit.
Labor-OSHA	Flammable and combustible liquids standards; 29 CFR 1910.106 and 29 CFR 1910.107	Provides fire safety standards for the technology required for working with flammable and combustible materials.	Cites, and incorporates by reference, the National Fire Protection Association (NFPA) standards set in 1969 for spray application of flammable and combustible liquids. These OSHA regulations are long overdue for an update and need to reflect current technology available to boat manufacturers. For example, OSHA should update these regulations to use NFPA 33, Chapter 17, 2003 edition standards. Even more preferable is for OSHA to refer to the most up-to-date NFPA standard.
Labor-OSHA	Draft Model Training Program for Hazard Communication; http://www.osha.gov/SLTC/hazardcommunications/index.html	Designed to help business train employees who work with and/or around hazardous substances.	The general audience of this model training program is not clear, is it for small or large businesses? The current format and detail of the information in this program is overwhelming to a small business audience. Some of the recommended procedures in this guidance document may prove to be too complicated or involved for smaller businesses with limited resources. For example, risk analysis and the development of checklists are many times beyond the capabilities and resources of smaller employers. As a majority of small business owners may not know where certain referenced documents can be found, it would be helpful to have more information on how to obtain some of these resources mentioned throughout the document, like the Hazard Communication Standard and OSHA's Voluntary Training Guidelines. It would also be helpful to business to have more information as to where to obtain some resources identified in Appendix B Sources of Help and References. For example, it should list Web sites of government agencies and other applicable offices. We recommend that OSHA develop a reduced and simplified approach to the model training program with the input of small businesses. For more detail, pleas the comments of the Specialty Graphic Imaging Association (SGIA).

Labor-OSHA	Material Safety Data Sheets (MSDS); Hazard Communication Standard; 29 CFR 1910.1200	Companies must submit MSDS's to convey the hazard information to their downstream customers. All employers with hazardous chemicals in their workplaces must have labels and MSDSs for their exposed workers, and train them to handle the chemicals appropriately.	MSDS's should have higher quality standards. Poor quality of any input MSDS increases the cost and diminishes the quality of the output MSDS for a finished product. It also increases the risk of unintended employee health and safety exposure.
Labor; Mine Safety & Health Administration		Requires initial training of 20 hours and 8 hours annual retraining for all drivers working in the mining industry	The definition of what is "mining" is too expansive. For example, clay and shale are covered, but removal is similar to digging a shallow building foundation. Dump truck drivers haul the raw material to a stockpile near the manufacturing plant. Drivers moving just "mined" clay and/or shale should not be required to sit through the same trainings as those drivers working for deep surface mines as the clay drivers do not have the same degree of hazard. Clay and shale drivers should be exempt from training required for drivers who work in deep mines.
State	International Traffic in Arms Regulation; 22 CFR 120-130; Form DSP-5 Application for Permanent Export of Defense Articles. Technical Assistance Agreement.	ITAR requires application for DSP-5 for permanent export of defense articles for each individual purchase order required for end-items, components, accessories, attachments, parts, firmware, software and systems. ITAR also requires that a compnay have a Technical Assistance Agreement before a U.S. company can discuss the technical details of a potential solution with either a foreign company or even non-U.S. citizen employees of international operations.	Once a license is approved a company should not have to resubmit paperwork for each additional purchase for the same part. ITAR should not be applied to lower level parts that go into system. Foreign counterparts do not have the same regulations and are better able to compete in the global marketplace. This regulation is particularly time consuming and costly to small business, as they tend not to have export control departments.
DOT; National Highway Traffic Safety Administration (NHTSA)	Reporting of Information and Documents About Potential Defects in Trailers – Early Warning Reporting (EWR) requirements; 49 C.F.R. Part 579	Requires manufacturers of vehicles (including small-to medium-sized trailers under 26,000 lbs. gross vehicle weight rating [GVWR]) whose yearly production of vehicles for sale in the United States is 500 or more in a particular vehicle category to report comprehensive information to NHTSA.	Reporting threshold for small- to medium-sized trailer manufacturers is set at an inappropriately low level (500 units). This level provides no meaningful exemption for small businesses. NHTSA should re-evaluate the EWR burdens for manufacturers of small-to medium-sized trailers (such as boat trailers) under 26,000 lbs. GVWR because of the high reporting burden and limited increase in safety provided by this rule.
DOT; NHTSA	FMVSS 108 - Federal Motor Vehicle Safety Standard No. 108	"Lighting, reflective devices, and associated equipment," which sets forth minimum safety performance standards applicable to all motor vehicles and automotive lighting equipment in the United States. At issue is NHTSA's enforcement of the imported non-compliance product clause.	Standard 108 has been amended frequently since its adoption more than thirty years ago. These amendments coupled with the many interpretations by NHTSA make Standard 108 difficult to understand and to comply with. Standard 108 is important but is in need of revision to develop a more clear and concise rule. Updating the rule to reflect changes in vehicle lighting systems will enhance lighting safety and decrease confusion among complying companies.

DOT; NHTSA	Transportation Recall Enhancement Accountability Documentation (TREAD) Act	Regulates vehicles, trailers and requires periodic reports to the NHTSA on a variety of information to indicate the existence of potential safety defects and to advise NHTSA of foreign safety recalls and other safety campaigns. Allows Secretary to expedite a manufacturers' plan to remedy defect(s) and manufacturers must have a plan to reimburse owners who incur cost of remedy before notification. Allows Secretary to update rules on FMVSS for tires.	Small businesses are hit hard by the enhanced reporting forms, costing an estimated $250,000 for one manufacturer to complete. Increase the number of trailers manufactured for coverage from 500 to a more significant amount such as 5,000 before requiring a company to comply with detailed (*i.e.* , non-fatal/injury) incident reporting. NHTSA should review the application of the TREAD Act to vehicles that are strictly used off road and that are placed on other trailers when being transported.
DOT; NHTSA	FMVSS 208 (49 CFR 571.208)	Crash performance requirements that are intended to assure occupant protection in the event of a crash. New amendments require equipping seats with extra sensors in front passenger seats. The sensors react to the occupant's weight and disable the airbag if it is under a certain weight. There is also a low-risk deployment option for airbags, but it has been passed over.	The sensors are costly and are purchased by outside safety products manufacturers. To comply with this new regulation is costing one company up to $41 million. Technology has improved on the smart airbags (airbags that deploy based on the severity of the accident), which significantly reduced injuries during a trial run. Usage of the smart airbags should be implemented not only to cut down on sensor costs to manufacturers but also to provide an equally safe option for the front passenger seat.
DOT Federal Motor Carrier Safety Administration (FMCSA)	Parts and Accessories Necessary for Safe Operation - Brakes/ 49 CFR 393.48	Provides minimum requirements for all motor vehicle brakes.	Outdated brake rules need to be amended to permit the limited lawful use of “surge brakes” on small-to medium-sized trailer and tow-vehicle combinations since they meet the federal regulatory requirements for stopping distance and holding on a 20 percent grade and have a record of safety. Trailers with surge brakes can be used by consumers but not for commercial uses (such as where a marina owner would transport a boat for a boat owner for repair). The mandated electric brakes are not workable in conditions where the trailer would be submerged in water such as in a boat trailer. FMCSA has ignored requests to initiate a rulemaking.

Appendix D

Testimony

Jeffrey Marks
Director, Air Quality

On behalf of the National Association of Manufacturers

Before the Subcommittee on Regulatory Reform and Oversight, Committee on Small Business

on "The TRI Lead Rule: Costs, Compliance and Science"

June 13, 2002

TESTIMONY OF THE
National Association of Manufacturers
to be submitted to the record of the

Subcommittee on Regulatory Reform and Oversight
House Committee on Small Business

June 13, 2002

The National Association of Manufacturers (NAM) appreciates this opportunity to present written testimony to the House Committee on Small Business, Subcommittee on Regulatory Reform and Oversight regarding the Toxic Release Inventory (TRI) Lead Reporting Rule. The NAM is the nation's largest industrial trade association. The NAM represents 14,000 member companies (including 10,000 small and mid-sized companies) and 350 associations serving manufacturers and employees in every industrial sector and all 50 states.

The NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth. Accordingly, the NAM has a vested interest in the TRI rules, as they will affect a broad array of industry owners and operators, particularly small businesses. Our comments will address those general issues of the TRI Lead Reporting Rule of concern to the manufacturing community.

On Jan. 17, 2001, the Environmental Protection Agency (EPA) published a final rule reducing the "manufacture, process or otherwise use" reporting threshold for lead and lead compounds under the TRI program to 100 pounds – a reduction by a factor of 250 in the case of facilities that "manufacture or process" lead and by a factor of 100 in the case of facilities that "otherwise use" lead. This action was taken based on the EPA's view that "lead and lead compounds are PBT (persistent, bioaccumlative, toxic) chemicals." As a result, any amount of lead or lead compounds present in a mixture or trade-name product must be counted toward the

reporting threshold, no matter how low the concentration of lead in the mixture may be. The combined effect of reducing the reporting threshold and eliminating the de minimis exemption will subject perhaps tens of thousands of new facilities to the burdens of 1) making "manufacture, process or otherwise use" threshold determinations for lead and lead compounds; and, 2) preparing and filing annual TRI reports when the 100-pound threshold is exceeded.

Executive Summary

The NAM believes a number of serious scientific concerns exist with respect to the TRI Lead Reporting Rule that remain unresolved. Of specific concern are the EPA's questionable scientific approach to applying PBT criteria to metals and inorganic metal compounds; whether the EPA's determination of lead as a PBT under that approach is appropriate; and, whether the EPA's lowering of the lead reporting threshold to 100 pounds is warranted under that determination. Accordingly, on April 26, 2001, the NAM urged the EPA to charge the Science Advisory Board (SAB) with the task of thoroughly reviewing these issues in ample time for the EPA to reconsider the rule, as appropriate, prior to the July 1, 2002, deadline for filing these onerous reports. With this deadline now approaching in a few short weeks [by this testimony] we are again urging the agency to defer the implementation of the rule's reporting deadline until these issues, and others, are resolved. The SAB review would represent a meaningful step toward resolving some of the scientific uncertainty about the rule.

In addition, the NAM has been urging the EPA to formally consider concerns that would have been expressed by small businesses, had they had full opportunity to participate in the rule's formulation. The July 1, 2002, deadline should, at the very least, be extended by a year, as

the EPA has not provided adequate compliance assistance to regulated entities with respect to the new rule, as has been repeatedly promised by the agency.

The final rule subjects potentially tens of thousands of new facilities to the burdens of determining whether they manufacture, process or use 100 pounds of lead, and if so, they must prepare and file annual TRI reports. The costs associated with these new requirements will be very substantial and may threaten the ability of certain small businesses to continue operating in the United States. The EPA's TRI Lead Reporting Rule does little to protect our environment, yet mandates unnecessary and unwarranted regulatory burdens and costs on those small businesses.

Scientific Concerns

The scientific validity of the application of the EPA's PBT chemical methodology to evaluate the health and environmental hazards of metals has not been agreed upon. In fact, the Residual Risk Subcommittee of the SAB has stated that classification of metals as PBT is problematic, since their environmental fate and transport cannot be adequately described using models for organic contaminants. In the final rule, the EPA itself requests external scientific peer review from the SAB on "the issue of how lead and other as yet unclassified metals, such as cadmium, should be evaluated using the PBT chemical framework." Despite the EPA's own misgivings about the applicability of the PBT approach, the agency nevertheless proceeded to lower the TRI lead-reporting thresholds from 25,000 or 10,000 pounds to 100 pounds, leaving the scientific review, if ever, to occur well after the effective date of the rule (originally Feb. 16, 2001, but deferred until April 17, 2001)

Congress also has voiced its concerns about the scientific justification for the rule. On July 26, 2000, a bipartisan group on the House Committee on Science wrote to then-EPA Administrator Carol Browner, urging the EPA "to seek independent peer review and refer the question of the scientific appropriateness of applying PBT criteria to metals to the SAB before deciding whether to include metals." Similarly, former Science Committee Chairman James Sensenbrenner (R-WI) expressed this same concern in a Jan. 3, 2001, letter to the Office of Management and Budget (OMB) urging OMB to block the rule until such SAB review is completed.

According to EPA Administrator Christine Todd Whitman, "scientific analysis should drive policy. Neither policy nor politics should drive scientific results." The NAM agrees wholeheartedly. As the NAM testified in a March 27, 2001, hearing before the House Committee on Government Reform, "a number of rules that were hurried through the promulgation process in the final days of the last Administration suffered from demonstrable deficiency in these essential qualities of responsible rulemaking. As a result, some recently finalized rules could require huge expenditures even for modest – let alone any genuine – protection of human health, the environment and worker safety." As the NAM noted in the March 27 testimony, the TRI lead-reporting regulation is such a rule. Earlier, on March 1, 2001, the NAM and more than 70 trade associations representing almost every sector of U.S. business, wrote to EPA Administrator Whitman urging that the EPA "suspend or otherwise stay the effectiveness of the TRI lead threshold reduction rule until the SAB completes its review of this important scientific issue and the results of that review can be assessed." In addition, as mentioned above, the NAM sent its own letter to the EPA on April 26, 2001, urging the agency

to charge the SAB with a broad review of the PBT issue, as well as to revise the onerous TRI rule should revisions be appropriate in light of the SAB analysis.

Small Business Concerns

In addition to failing to wait for an SAB review of the scientific underpinnings of the rule, the EPA ignored its procedural obligations under the Small Business Regulatory Enforcement Fairness Act (SBREFA). The rule suffers from a questionable agency evaluation of the impact on small business, as the EPA engaged in virtually no small business consultation before publishing the proposed rule. Senator Christopher Bond (R-MO), the chairman of the Senate Committee on Small Business, in an October 1999 letter to the EPA, raised strong objections to the EPA's neglect of SBREFA requirements when proposing the rule. Subsequent attempts at small business outreach came too late to meet the SBREFA goals. On April 24, 2001, the Senate Committee on Small Business held a hearing on the effectiveness of SBREFA, at which the General Accounting Office testified that the EPA ignored more than 30 industry groups' concerns about the rule when it asserted that the rule would not have a "significant impact" on small entities. Also on April 24, the House Committee on Government Reform explored the burdensome paperwork requirements presented by the lead rule.

Notwithstanding the fact that the EPA moved the effective date to April 17, 2001, the reporting obligations under the rule were nevertheless still retroactive to Jan.1, 2001, an onerous requirement unprecedented in the history of the TRI program. However, in May 2001, the EPA appeared to recognize the need for help for small businesses with respect to the Lead Reporting Rule. In a May 25, 2001, Office of Environmental Information (OEI) letter, the EPA stated that the TRI program "is actively developing a guidance document that will assist regulated

entities to comply with the new lead rule. A primary objective of this guidance is to help reduce burdens imposed by the rule. Development of this guidance has been given high priority, and the guidance is expected to be finalized and made available by October of 2001." Despite the good intentions offered by the OEI, the guidance, which was not issued until the end of Spring 2002, was neither effective nor timely in helping small businesses to comply.

First, the guidance document was not issued until the end of January 2002, 13 months after the date on which facilities were required to begin recording data. Meanwhile, small businesses were subject to substantial new reporting obligations throughout the entire calendar year 2001 without the assistance necessary to carry out the reporting. Second, small businesses, including first-time filers, were being forced to reconstruct data back to the beginning of January 2001 without the benefit of the promised guidance. Third, the guidance document, once finally released, was long, confusing and incomplete. Other problems with the document included unclear exemptions, out-of-date and misleading reference materials and poorly publicized compliance workshops. On Feb. 22, 2002, 43 trade associations representing small businesses, including the NAM, sent a letter to Administrator Whitman advising the agency to defer the implementation of the TRI lead rule's reporting requirement from July 1, 2002, to July 1, 2003, for the reasons cited above.

The EPA has estimated that the cost of reporting lead and lead compounds during the first year will be up to $7,700 per facility, and more than $4,000 each additional year. However, this does not include the cost of any testing to ensure lead does not exist in trace amounts in each of the raw materials, processes and products manufactured or disposed. The rule would have significant impact on all manufacturers with trace amounts of lead in the raw materials they use, manufacturer or dispose. The presence of lead in any materials used in large-enough amounts

may require testing and reporting. At a minimum, manufacturers will have to analyze whether or not they need to report.

While the EPA says that testing is not required to meet the due diligence aspects of reporting, it is difficult to envision a circumstance where precautionary testing would not be required. The costs of reporting lead is also on top of the costs already incurred by industry in reporting other toxic releases at their facilities. The burden of reporting will, in many cases, entail hiring people, contracting consultants and spending many additional hours deciding whether the facility used 100 pounds of lead, and then reporting it if they do.

Conclusion

The final rule subjects potentially tens of thousands of new facilities to the burdens of determining whether they manufacture, process or use 100 pounds of lead, and if so, preparing and filing annual TRI reports. The costs associated with these new requirements will be very substantial and may threaten the ability of certain small businesses to continue operating in the United States. The NAM represents more than 10,000 small and mid-sized businesses, so it knows that small business is the economic backbone of our country's workforce and continues to be a major source of job creation. The NAM also knows the serious commitment of small businesses and their workers to protecting the air, water and land in their neighborhoods. The EPA's TRI Lead Reporting rule does little to protect our environment, yet mandates unnecessary and unwarranted regulatory burdens and costs on those small businesses.

Overall, we are pleased with the way that this Administration has chosen to proceed with its review of those rushed rulemakings in the final weeks of the previous Administration by looking at these issues on a case-by-case basis. In addition, we thank EPA Deputy Administrator

Linda Fisher for meeting with trade association representatives on May 10, 2002, to discuss small business concerns with the EPA's compliance assistance activities on TRI lead reporting. We are also pleased by this committee's personal commitment to honest scientific analysis as a prerequisite to policy-making. In that connection, we hope that this committee will be committed to encouraging the EPA to revise the onerous TRI Lead Reporting rule should revisions be appropriate in light of subsequent scientific assessment. The TRI Lead Reporting rule is a clear candidate for further independent scientific peer review and should not be fully implemented until this review is completed.

Thank you for this Committee's attention to this important matter. If you have any questions, or would like the opportunity to discuss this issue more fully, Jeffrey Marks, the NAM's Director of Air Quality, would be the appropriate person to contact at the NAM. He can be reached at (202) 637-3176.

Appendix E

Comments

On Toxic Chemical Release Reporting; Community Right-to-Know; Notice of On-Line Dialogue (Docket Number TRI-2003-0001)

By the National Association of Manufacturers

Submitted to the Environmental Protection Agency on
February 3, 2004

COMMENTS OF THE
NATIONAL ASSOCIATION OF MANUFACTURERS
to the
ENVIRONMENTAL PROTECTION AGENCY
regarding
DOCKET NUMBER TRI-2003-0001
on
TOXIC CHEMICAL RELEASE REPORTING; COMMUNITY RIGHT-TO-KNOW; NOTICE OF ON-LINE DIALOGUE

Introduction

In September 2002, the Environmental Protection Agency (EPA) initiated a Stakeholder Dialogue process to identify improvements to the Toxics Release Inventory (TRI) program that would reduce the burden on reporting facilities. According to the EPA, the goal of the dialogue is to "reduce burden associated with TRI reporting while at the same time continuing to provide valuable information to the public consistent with the goals and statutory requirements of the TRI program."

On November 5, 2003, the EPA published in the *Federal Register* a Notice of Availability and Request for Public Comment on its "Toxic Chemical Release Reporting; Community Right-to-Know; Notice of On-Line Dialogue" (*hereinafter*, Dialogue). In conjunction with the notice, the EPA published on its Web site a paper describing several burden reduction options for public comment. The EPA is requesting comment on the following options:

1. Higher reporting thresholds for small businesses;
2. Higher reporting thresholds for a category of facilities or class of chemicals with small reportable amounts;
3. Expanded eligibility for the Form A Certification Statement;
4. Creation of a new "No Significant Change" Certification statement;
5. Use of Range Reporting for Section 8 of the Form R; and
6. Other options for burden reduction.

The National Association of Manufacturers (NAM) submits these comments in response to the EPA's Dialogue. The NAM is the nation's largest industrial trade association, representing 14,000 member companies (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states. The NAM has a vested interest in the Dialogue's burden reduction options, as these options may influence regulatory decision-making affecting a broad array of industry owners and operators, particularly small businesses of various kinds. The NAM is also concerned that the EPA's recent underestimation of the TRI compliance burden is giving Congress and the public the incorrect impression that the TRI is a "low-cost/high-value" program.

Background

The TRI is a publicly available EPA database that contains information on toxic chemical releases and other waste management activities reported annually by certain covered industry groups as well as federal facilities. This inventory was established under section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA) of 1986 and expanded by section 6607 of the Pollution Prevention Act (PPA) of 1990. Under the TRI program, covered facilities are required to report quantities of TRI chemicals recycled, combusted for energy recovery and treated on- and off-site. Covered facilities must meet the following criteria:

- The facility has 10 or more full-time employee equivalents (*i.e.*, a total of 20,000 hours or greater);
- The facility is included in a certain Standard Industrial Classification (SIC) code;
- The facility manufactures, processes or otherwise uses any EPCRA section 313 chemical in quantities greater than the established threshold in the course of a calendar year.

Unfortunately, the TRI reporting forms have strayed from their original goals, increasing the burden of reporting while failing to provide corresponding benefits. These burdens are particularly difficult for small businesses.

Option 1 - Higher Reporting Thresholds for Small Businesses

The EPA's first suggested option for reducing burden on the regulated community is to modify the reporting thresholds for small businesses. Small businesses often bear a disproportionate burden for complying with regulatory requirements. Small businesses often lack the staffing needs and resources necessary to devote to reporting, recordkeeping and regulatory compliance activity. Accordingly, the EPA is considering providing small businesses with higher reporting thresholds.

The NAM certainly supports all attempts to reduce the burden of the TRI program on the small-business community. Small and medium manufacturers comprise one of the most vital sectors of the economy. Understanding the critical role these businesses play in our economy and developing laws and policies to enhance their competitiveness are imperative. They account for about half of private-sector output, employ more than ½ of private-sector workers and provide about ¾ of the net new jobs each year. Small and medium manufacturers comprise approximately 95 percent of all manufacturing firms and employ about half of all manufacturing employees; account for 37 percent of all manufacturing receipts—more than $1 trillion a year; pay their workers 20 percent more than employees in other types of small businesses; and export increasingly more each year. Though smaller businesses provide extraordinary benefits to society, they also contend with extraordinary challenges. Large increases in basic costs, such as energy and

regulatory mandates, are not easily funded. Only by cutting costs and increasing productivity are they able to stay in business when costs rise.

Small and medium manufacturers share a disproportionate regulatory burden, according to the Small Business Administration, and that burden is increasing. They are increasingly subject to substantial new reporting obligations without the assistance necessary to carry out the reporting. Small businesses, including first-time TRI filers, are being forced to reconstruct data without the needed benefit of appropriate guidance. Guidance documents, when available, are sometimes long, confusing and incomplete. Other problems include unclear exemptions, outdated and misleading reference materials and poorly publicized compliance workshops. In many cases, the burden of reporting entails hiring people, contracting consultants and spending many additional hours deciding whether a facility used a certain amount of toxic chemicals, and then reporting it if it did.

Option 2 - Higher Reporting Thresholds for a Category of Facilities or Class of Chemicals with Small Reportable Amounts

The EPA's second option for reducing TRI burdens on the regulated community is to modify the reporting thresholds for a category of facilities and/or class of chemicals with small reportable amounts. The EPCRA clearly gives the EPA authority to delete industry sectors from TRI coverage. This option would be attractive to NAM member companies that release very low amounts of toxic chemicals, but must undergo the annual burden of TRI reporting even though they present little or no risk to public health or the environment.

The NAM believes this option would reduce the reporting burdens for a number of facilities, which must undergo the annual burden of TRI reporting despite having very low releases of toxic chemicals to the environment. Removal of facilities reporting minimal releases would improve the quality of the TRI database by focusing on releases that represent a real risk to the public welfare.

For example, releases of lead to the environment by industry, in general, are virtually insignificant. The lowered reporting threshold for lead significantly increased the reporting burden on industry, but has resulted in little additional data. In 2001, the first reporting year under the lowered reporting threshold for lead, 8,561 Form Rs were filed for lead and lead compounds. More than 85 percent of these forms were filed by the manufacturing sector, yet this same sector was responsible for only six percent of reported releases. In fact, the median release of lead to the environment for all reporters is one pound.

The NAM continues to believe that a number of serious scientific concerns exist with respect to the TRI lead reporting rule than remain unresolved. Of specific concern are the EPA's questionable scientific approach to applying PBT [persistent, bioaccumulative, toxic] criteria to metals and inorganic metal compounds; whether the EPA's determination of lead as a PBT under that approach was appropriate; and whether the

EPA's lowering of the lead reporting threshold to 100 pounds is warranted under that determination.

The lead reporting rule subjects potentially tens of thousands of new facilities to the burdens of determining whether they manufacture, process or use 100 pounds of lead, and if so, preparing and filing annual TRI reports. The costs associated with these new requirements are substantial and may threaten the ability of certain small businesses to continue operating in the United States. As the NAM represents more than 10,000 small and mid-sized businesses, it knows that small business is the economic backbone of our country's workforce and continues to be a major source of job creation. The NAM also knows the serious commitment of small businesses and their workers to protecting the air, water and land in their neighborhoods. The EPA's TRI lead reporting rule does little to protect our environment, yet mandates unnecessary and unwarranted regulatory burdens and costs on those small businesses.

The NAM urges the EPA to closely consider the comments of individual companies and industry-specific trade associations on this option and to delete those industry sectors from TRI coverage that demonstrate insignificant releases from their facilities. The NAM also recommends that the EPA raise the lead reporting threshold for manufacturing facilities.

Option 3 - Expanding Eligibility for the Form A Certification Statement

The EPA's third option for reducing TRI burdens on the regulated community is to expand eligibility for use of the Form A Certification Statement in lieu of the more detailed and extensive Form R. Although the burden reduction associated with filing Form A instead of Form R is often small because facilities still have to undertake detailed calculations to determine eligibility for Form A, the NAM agrees with the EPA that expanding the eligibility and use of Form A warrants serious consideration by the agency.

However, many companies feel that submission of Form A instead of Form R carries heightened risk of enforcement. These facilities believe that use of Form A leaves them vulnerable to EPA enforcement for failure to file should it be determined that they were not eligible to report under Form A. The EPA notes that there are many facilities that are eligible to use Form A, but do not. In order to rectify this situation, the EPA needs to eliminate the legal barriers to use of the Form A.

The EPA should also modify the "annual reportable amount" criterion to reflect only reported releases to the environment and not the waste management activities currently included, such as recycling and energy recovery. The purpose of the TRI program is to provide information regarding "releases to the environment." Chemicals released from recycling, energy recovery and other waste management activities should not be included in TRI reporting thresholds as they are not released "to the environment

The EPA should also allow Form A to be used for lead releases. As evidenced by the large number of facilities reporting lead releases of only one pound or less, use of Form A makes more sense than the more burdensome Form R.

Option 4 - Creating a New "No Significant Change" Certification Statement

The EPA's fourth option for reducing TRI burdens on the regulated community involves the development of a new form that would allow facilities to certify to "no significant change" in TRI reporting as measured against a designated baseline year. Facilities that qualify for this "no significant change" certification would be relieved of their obligation to complete either the Form R or Form A Certification Statement. While this option has the potential to reduce reporting burdens for a number of facilities, the definition of "no significant change" will have a considerable effect on the number of eligible facilities.

The NAM supports the idea of creating a "no significant change" certification statement, so long as the "no significant change" determination is easy to make and the required statement is simple. If facilities need to go through all of the calculations necessary for a Form R or complete a complicated form, they are likely to continue using Form R. In addition, the certification statement must be an acceptable substitute for the required Form R and its use should not trigger enforcement and liability policies for failing to file a Form R. As an added benefit for this option, a certification of "no significant change" would allow users to quickly find that no significant changes in releases have occurred at a specific facility without having to review and compare data from year to year.

Option 5 - Use of Range Reporting for Section 8 of Form R

The EPA's fifth option for reducing TRI burdens on the regulated community is to allow for use of range reporting in Section 8 of the Form R. Because the EPA currently allows range reporting for non-PBT chemicals in Sections 5 and 6 of the Form R, the NAM believes that the use of range reporting should be utilized in Section 8 as well. Allowing range reporting provides facilities with extra comfort and flexibility in making reliable estimates.

Option 6 - Other Options for Burden Reduction

The EPA is seeking comment on any other burden reduction options in addition to those discussed in the Dialogue paper. For example, the agency considered an option that would afford reporting relief to those facilities that report zero releases on their Form R reports. The very existence of a significant number of TRI reports for zero releases is indicative of the extent to which the TRI program fails to achieve its goals in an efficient way that reduces risk to the environment and the public. The goal of burden relief should be to simplify and reduce the number of calculations, recordkeeping and reporting that is required without reducing the value of the TRI program. Clearly, the EPA should eliminate reporting for chemicals with zero-release quantities. The NAM strongly urges

the EPA to reconsider the value of zero-release reports. The NAM recommends that the EPA determine the number of zero-release reports that the agency receives, assess their practical utility and consider eliminating the obligation to file them.

The extensive use of guidance in the TRI program has the effect of imposing additional requirements on the regulated community. Although the purpose of guidance should be to clarify reporting requirements, the EPA has often relied on guidance to change the program and significantly increase the burden of TRI reporting. The issuance of guidances outside the proper notice-and-comment rulemaking process sometimes results in more expansive reporting than previously required. The NAM recommends that the EPA minimize changes to guidance documents in order to reduce the burdens of reviewing, assessing and applying the changes to facility reporting. The NAM also recommends that the EPA refrain from making changes to guidance documents that have the potential to expand reporting requirements. The formal rulemaking process should be used instead for the purpose of expanding reporting requirements.

Finally, the NAM recommends that the EPA reinstate the *de minimis* exemption for persistent, bioaccumulative, toxic (PBT) chemicals. Attempting to identify and quantify quantities below *de minimis* levels is impractical and does not produce meaningful data for public use. The elimination of this exemption has required many facilities to calculate or estimate the total volumes of chemicals that make up a minute portion of a material processed, manufactured or otherwise used. Because of the very low thresholds for PBT chemicals, it is a great burden to report low levels of actual releases. As just one example, the TRI burden has dramatically increased for many facilities due to the elimination of the *de minimis* options for lead.

Conclusion

The EPA should take this opportunity to truly examine the costs, benefits and burdens involved with the TRI program and to commit to reducing the reporting burdens, especially as they pertain to small businesses. The NAM appreciates the opportunity to comment on the Dialogue and looks forward to working with the EPA to implement these improvements to the TRI program. If you have any questions, or would like the opportunity to discuss this issue more fully, Jeffrey Marks would be the appropriate person to contact at the NAM. He can be reached at (202) 637-3176 or jmarks@nam.org.