# SMALL BUSINESS REGULATORY ISSUES

## ROUNDTABLE

BEFORE THE

SUBCOMMITTEE ON REGULATORY REFORM AND PAPERWORK REDUCTION

OF THE

## COMMITTEE ON SMALL BUSINESS HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

FIRST SESSION

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# SMALL BUSINESS REGULATORY ISSUES

**THURSDAY, JUNE 21, 2001**

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON REGULATORY REFORM
AND OVERSIGHT,
COMMITTEE ON SMALL BUSINESS,
*Washington, DC.*

The Subcommittee met, pursuant to call, at 10:00 a.m. in Room 2360, Rayburn House Office Building, Hon. Mike Pence (chairman of the Subcommittee) presiding.

Mr. PENCE. Thank you so much for coming to this regulatory summit. I could not be more delighted with the turnout and with the commitment that all of you have shown to assisting us in the Regulatory Reform and Oversight Subcommittee of the Small Business Committee as we develop what we hope to be a very aggressive agenda for this Congress and our subcommittee and also develop an agenda that, we hope even beyond the hearings process, will be an agenda that we can take to the White House and ask the friendly occupants there for administrative relief.

Let me tell you that this summit, while not formally a hearing, is going to have a couple of basic ground rules so that we can expedite.

I also want to indicate that my legislative director, Pat Wilson, has informed me that we are expecting our first vote this morning between about 10:40 and 10:45. It will be a vote on the rule, and so we may have to adjourn briefly for those that can accommodate that and we will reconvene immediately after that vote if there is not a member here that we can switch out with.

But, basically, a couple of ground rules. I am going to ask everyone, as we go around the room, just to introduce yourself and your organization and then we will begin the process of calling on you for a couple of very brief remarks. I know that many of you have prepared written statements for the record, know that those will not only be formally added to the record, but they will be very carefully reviewed by this chairman and also by the staff of this committee.

This is not a pro forma summit. This is a working session and we are going to be taking a very hard look and getting out the highlighter and the red ink pen and going through as we develop our top 100 examples of regulatory excess.

We are going to be tearing into those statements that you prepare, so feel free, in your presentations, to highlight specifically one to three regulations that are particularly problematic for your membership.

If you can keep your remarks to between three and five minutes, you will score points with the chair, and I will try and be courteous

but somewhat strict about holding us to no more than five minutes of remarks.

And then I would like you to kind of hold any questions that you might have or dialogue opportunities you might have until we have each had a chance to pitch in a little bit.

Although many of you do not know, I am a freshman member of Congress. My background, after practicing law for a number of years, was that I spent seven years in talk radio and television. I pride myself on getting some of the most boring people in the world to talk a lot and to talk to each other, present company excluded, but I am really looking forward to a dialogue this morning, one between another about issues that you may agree on.

So I encourage you to take notes as other people are talking. If you hear someone point out a particular regulatory issue that also is of interest to your membership, whether it is in your statement or not, we would love you to reflect on each others' comments as we go, and then in the discussion portion of the summit.

Finally, Barry Pineles, who is our staff director, has suggested that, if you wish to ask a question or comment, turn your nameplate on its end and wait to be recognized by the chair when we get to that portion and we will try and do that in and orderly way.

Should there be votes and no member is present, in the interest of time for your initial presentations, Mr. Pineles will handle the meeting while I duck down the hall and jump on the train to vote.

Let me, again, thank you all for being here and for helping in this prioritization process. Let me say I really believe that part of success in any enterprise is to know the end at the beginning, know where we want to go, and just so you know, my vision is to truly develop a regulatory agenda. We have not quite lighted on what the name of it will be. We understand that the term "D-reg for Dummies" is probably trademarked, but we want to come up with a written document of up to 100 examples of regulations that wage war on small business enterprise in the United States and that are redundant, that are costly, that are meaningless, that have no justification for their existence, and we want to make those a target.

And the goal would be, by the end of the 107th Congress, either through administrative fiat or through legislative action, we want to see how many of those we can run a red line through before we get to the end of this Congress.

With that said, I want to begin on this side of the room and we will begin with you and just kind of name, rank, and serial number. We will get around and we will start with opening comments. Pass the mike.

Ms. KRESE. Jenny Krese with the National Association of Manufacturers.

Mr. NOAH. Jeff Noah, National Association of Manufacturers.

Ms. MUCKLOW. Rosemary Mucklow with the National Meat Association from Oakland, California.

Ms. SEEGER. Arline Seeger with the National Lime Association.

Ms. SWEATT. Loren Sweatt with the Associated General Contractors.

Ms. CAMPAGNA. Shannon Campagna, National Beer Wholesalers Association.

Mr. KIRKLAND. Kerry Kirkland with the National Black Chamber of Commerce.

Ms. BLANKENBILLER. I am Amy Blankenbiller and I am with the American Foundry Society.

Ms. KERRIGAN. Karen Kerrigan with the Small Business Survival Committee.

Mr. NIPPER. Joe Nipper with the American Public Power Association.

Mr. EICHBERGER. John Eichberger with the National Association of Convenience Stores.

Mr. KELLEY. Ty Kelley, Food Marketing Institute.

Mr. FITCH. John Fitch, Funeral Directors Association.

Ms. LEON. Mary Leon, NFIB.

Mr. MAHER. Kevin Maher with the American Hotel and Lodging Association.

Mr. GREENHAUS. Douglas Greenhaus with the National Automobile Dealers Association.

Mr. LITTLE. Bryan Little with the American Farm Bureau Federation.

Ms. DODGE. Sarah Dodge with Petroleum Marketers Association of America.

Mr. MAHORNEY. I am Bill Mahorney with the American Bus Association.

Mr. PAGE. I am Matt Page with AEA, formerly the American Electronics Association.

Ms. PHILLIPS. I am Debra Phillips with the American Chemistry Council, formerly the Chemical Manufacturers Association.

Mr. DOZIER. Damon Dozier, National Small Business United.

Mr. SEIFFERT. Grant Seiffert, Telecommunications Industries Association.

Mr. GREEN. Rob Green, National Restaurant Association.

Mr. CORATOLO. Giovanni Coratolo, U.S. Chamber of Commerce.

Ms. LAIRD. I am Betsy Laird with the International Franchise Association.

Mr. COX. John Cox, National Tooling and Machining Association.

Mr. HERZOG. John Herzog, Air Conditioning Contractors of America.

Mr. HANNAPEL. Jeff Hannapel, National Association of Metal Finishers.

Mr. LUZIER. Michael Luzier, National Association of Home Builders.

Mr. PENCE. Great. We are going to begin.

I am going to alternate, just to keep it interesting, for very brief introductory remarks and, specifically as I suggested earlier, try and focus your remarks on those two or three regulations that you think are most deleterious to your membership and we are going to be hopefully being able to dialogue and discuss those.

Let us begin with Jeff Noah of the National Association of Manufacturers.

**STATEMENT OF JEFF NOAH AND JENNY KRESE, NATIONAL ASSOCIATION OF MANUFACTURERS**

Mr. NOAH. I think I will score lots of points because I will be real brief, and also, Jenny Krese has got a couple comments she is going to make, too.

But I want to thank you, Congressman, for the opportunity to provide the Small Business Committee a list of rules and regulations that NAM members find very onerous, to say the least. And these rules, I will name three of them, then I will go over one that is particularly onerous and then Jenny can comment on the other one.

The ones that we have some strong concerns about are HHS privacy regulations regarding patient confidentiality, DOL's final rule on claims procedures under ERISA, EPA's rule ordering reporting threshold for lead under Toxic Release Inventory (TRI) program, and of particular concern is the EPA's metal products and machinery proposed rule, which would require manufacturers to significantly stop or limit the amount of processed water being discharged to sewer systems or any water body.

Companies that are manufacturers or rebuild or maintain finished metal products, parts, or machines would have to curtail their production, decrease the amount of metals used, or install unnecessary and costly product control equipment. The MPM rule, as it is called, would cover more than 89,000 facilities. EPA admits that there are potentially 10,000 unknown industrial sectors.

The EPA has not made any justifications for the need for this new rule. The EPA has made numerous flaws in its regulatory analysis, underestimating cost and grossly mischaracterizing the impact of manufacturers on U.S. waterways.

We think it is one of the most expensive environmental regulations ever proposed, costing upwards of $1.9 million on an annualized basis. And finally, the total cost of compliance, for us anyway in terms of our calculations, would be 6.5 percent of sales.

So I hope I scored some points by being brief. Jenny will talk to you now about the OSHA's proposed recordkeeping regs.

Ms. KRESE. I do not know that I need to say much beyond that, but as many of you in this room know, I would be remiss not to mention recordkeeping. The NAM has sued OSHA over its final rule that was put out January 19th, the day before the previous administration left office.

We have got a number of concerns which we will be submitting for the record and for your records and have been meeting with OSHA on a fairly regular basis to come to some sort of agreement and negotiate out some kind of rulemaking that would be good for manufacturers and for the business community as a whole.

We have gotten a lot of support from the business community in our efforts with OSHA and we would hope that others would join in as well.

[Mr. Noah's and Ms. Krese's statement may be found in appendix.]

Mr. PENCE. Jenny, very quickly, what has been the response from the agency up to this point?

Ms. KRESE. Fairly positive, but, with that said, they are just overwhelmed by the number of regulations, about 20 of them, that

they are contending with from the previous administration, so this is just one in that group, but our initial conversations with them have been quite positive.

Mr. WILSON. Jenny, I know that the new OSHA—I do not know if you all saw that, but the new Assistant Secretary of Labor for OSHA was just named and does anybody have an opinion about recordkeeping, one way or the other, about what their position was or——

Ms. KRESE. The new nominated——

Mr. WILSON. The new OSHA Administrator. Yes, the nominee.

Ms. KRESE. I do not know his position on recordkeeping.

Mr. WILSON. Okay.

Mr. PENCE. Thank you.

Michael Luzier of the National Association of Home Builders.

**STATEMENT OF MICHAEL LUZIER, NATIONAL ASSOCIATION OF HOME BUILDERS.**

Mr. LUZIER. Thank you, Congressman. It is a pleasure to be here. I want to mention three issues very briefly and then I will make a few short remarks.

First issue that is of very much concern to us is the designation of critical habitat under the Endangered Species Act. The way we read the statute, the statute requires the designation of areas that are essential for the conservation of species. It specifically says this is not to include the entire occupied range of the species, yet we find that the Department of Interior, Fish and Wildlife Service, and National Marine Fisheries are either unable or unwilling to make that tough decision.

As an example, in California, the red-legged frog has an area designated of over five million square acres. A complicating problem with that is that we are unable to get the Fish and Wildlife Service, once they have done surveys of where individual species exist, to disclose that information.

As a result, we say we have a duty to avoid take, you have data that tells us where these organisms are, it would be useful to the landowners and regulated community to know what you know about where these species are so that we could fulfill our obligations under the Endangered Species Act.

I forget the total amount of acreage in California alone, but there are probably 30 million acres of critical habitat, many of which overlay each other. It has resulted in a regulatory maze that is impenetrable, so that is a critical problem.

A second area that is of great concern to us is the EPA's and the Corps of Engineers' continued efforts to regulate isolated waters despite the fact that the Supreme Court has told them they do not have the authority to do so, and *Solid Waste Agency* v. *Corps of Engineers,* 531 U.S. 159 (2001), a recent Supreme Court opinion. The Supreme Court said that the supposed legal justification for regulating isolated waters, the migratory bird rule, is invalid. It does not comport with the plain meaning of the Clean Water Act and it does not comport with its legislative history.

This is the way that the Corps of Engineers and EPA have said that they will draw this Commerce Clause nexus, that migratory birds may fly from one area to another, one state to another, and

that is sufficient to draw regulatory jurisdiction. The Supreme Court said no.

In January what we found was the EPA and the Corps of Engineers issued a legal memo that said that though the Supreme Court has said we cannot use the migratory bird rule, there may well be other ways to get to these areas through other Commerce Clause bases.

We think none of those make sense in light of the clear opinion in the Supreme Court. The key point is what we have been encouraging agencies to do, is to embrace what the Supreme Court has told them rather than look for ways around it. That has been a problem.

The third area, which is a potential problem but actually one that we have a potential to work cooperatively on, is forthcoming regulations by EPA under the Clean Water Act for effluent limitation guidelines. Effluent limitation guidelines are being established by EPA for construction activity discharges.

These, depending on how they are written, literally have the potential to impose billions of dollars of housing costs across the nation, literally billions.

Our concern is that the preliminary proposal EPA has made about developing the scientific basis is simply inadequate. It is almost anecdotal and our view is the Clean Water Act demands more than that and more so what we have found is that if, in fact, you are going to impose billions of dollars of costs on the economy and you expect people to embrace that, they have to have confidence that this is, in fact, solving a problem.

We have proposed to EPA a thorough water monitoring and sampling program that we believe the federal government needs to do in support of this regulation. We believe it is justified in light of the tremendous impacts that may be imposed.

The technical people at EPA say, "It kind of makes sense to us." We met with Governor Whitman. She said she would consider it, but simply may not have the budget to do what we want.

Two quick things and I will end. One, we have said if we can find a way to do this and do real science, which all the agencies say they want to do, but somehow cannot afford to do, if we can do real science, we will go out and sell this to our members. We will tell the members we are part of the problem and we will contribute to it.

My closing comment is we should keep in mind that, according to the states in reporting to Congress pursuant to the section 305(b) of the Clean Water Act, construction activity discharges are responsible for only one-tenth of one percent of the water quality impairment in this nation, so in light of the agency's own admission that this is a small problem, we think that better information ought to be generated.

Thank you, sir.

Mr. PENCE. Thank you, Michael.

Has the EPA defined navigable water when you talk about regulating isolated waters? Is that——

Mr. LUZIER. There is a long-standing definition or understanding of navigable waters under the Clean Water Act. What the government is now doing is saying since we cannot regulate isolated wa-

ters, they are doing a couple of things. They are saying let us expand the concept of adjacency. The Supreme Court said it is legitimate to regulate wetlands adjacent to navigable waters. Now, in many situations, we have a lot of property owners who are miles from any truly navigable water that are being claimed to be adjacent by virtue of ditches and drainage conduits and that kind of thing.

Mr. PENCE. Okay. Very helpful. Thank you very much.

Rosemary Mucklow.

**STATEMENT OF ROSEMARY MUCKLOW, EXECUTIVE DIRECTOR, NATIONAL MEAT ASSOCIATION**

Ms. MUCKLOW. Thank you very much. I appreciate enormously being here to talk to you today.

Regulatory uncertainty is devastating to small business. A significant consequence of regulatory uncertainly is consolidation and the industry that I represent, the meat industry, has undergone substantial consolidation at a highly accelerated pace in the last ten years. It has been going in that direction for 20 or 30 years, but it has really heated up.

A small business is faced with uncertainty about what rules to follow, whether their business can be profitable and whether their line of business has become subject to substantial fines, criminal penalties, or other actions exercised by government agencies, and, in this case, it is the United States Department of Agricultures, as huge incentives to leave the business and cash in and leave the money to their family in stocks and savings accounts rather than in a going small business. It creates a great deal of fear in minds and hearts and souls of small business.

We have had some very serious problems in the last several years with the development of major new rules that hold small to medium size businesses responsible for microorganisms on their meat, on the meat that they bought from somebody else, and it was USDA passed and inspected meat. But this small firm, because they make it into ground beef, are put high on the pedestal and held accountable for what somebody else has sold them.

We cannot regulate microorganisms. They do not understand and read the books like people do. The government developed this regulation without full advice from its scientific advisory panel. They went for two years and did not even meet with the microbiology panel and yet they implemented new rules that were hugely substantial.

One small business that USDA closed down in Texas went to court. It is unprecedented but the firm got an injunction from a district court that required USDA to go back in and inspect them.

What did USDA do? They went back in and they hard-timed him until eventually, they put him out of business another way. He is now closed. That case is before the 5th Circuit because the government lost. They did not like losing and they have enormous resources.

We have another small business that is engaged in litigation. The government is on the losing end. You have no idea. I mean, the government has such deep pockets that it can wind on and on

and that small business does not have that kind of deep pocket to keep a lawsuit going. It has been very, very difficult.

Because regulatory uncertainty is so devastating to small business, USDA needs to treat small firms as cooperators rather than as adversaries or enemies. Regulation should serve the common interest of business and government to provide safe food to consumers, rather than to be structured as a contest, or even a war, between the government and the industry.

I have given you a lot more detail. In respect to your rules, I decided you did not want me to read all of it.

[Ms. Mucklow's statement may be found in appendix.]

Mr. PENCE. That is great. Thank you, Rosemary.

And the one piece of legislation that I am involved in very heavily is the Equal Access to Justice Act that, in effect, would require the government to pay legal fees in cases the likes of which you are referring to.

Would you see that as real positive for your membership, that bill?

Ms. MUCKLOW. Yes, but to save that company, it is too late, because they finally, when the government put them in the newspapers every day and really hoisted them on their petard, they really could not tolerate it. Their customers could not tolerate it. They could not say we are buying that company's meat because the government has controlled the media on it.

It is highly irresponsible and their science is wrong and it was very interesting to hear the Home Builders who just want science. They want to know what the science is. The government has got a piece of convoluted science. They had not even presented that to their expert committee while they were developing that regulation and enforcing that rule. There is something blatantly wrong that they can just simply choose to avoid their scientists.

Mr. PENCE. Thank you, Rosemary.

Ms. MUCKLOW. Thank you. I appreciate being here.

Mr. WILSON. We have heard that before, about the government regulators ignoring science.

Mr. PENCE. Yes. More than once.

Good. Let's go. And I am going to ask, in the interest of time, maybe let us shoot for a three minute timetable, and I will give you tap when you hit three minutes. If you hit five, then I will throw the gavel.

Jeff Hannapel.

## STATEMENT OF JEFF HANNAPEL, NATIONAL ASSOCIATION OF METAL FINISHERS

Mr. HANNAPEL. Thank you, Chairman Pence. I appreciate the opportunity to be here this morning. I am here on behalf of the Metal Finishers. They are the folks who make your metal products last longer, work better and look better. I am going to talk about two EPA regulations that are a problem, the first is the proposed MP&M regulations, and echo NAM's.

This proposed regulation is proposing new limits that lower existing limits 50 to 90 percent. These limits are not needed, particularly for the metal finishers, who are already covered by federal standards. There are, in addition, local limits set by POTWs and

also, metal finishers have a lot of voluntary programs that they are working with as part of EPA's Common Sense Initiative and the National Metal Finishing Strategic Goals Program.

In addition, these proposed limits just cannot be met with the technology that EPA has used to define the limits. It is in essence the same technology that they are using now and was the technology for setting the existing regulations and EPA expects the 50 to 90 percent reduction in metals using the same technology.

This rule is not justified and EPA has grossly overestimated the pounds of pollutants that would be removed as a result of this rule. For the metal finishing subcategory, EPA's estimates would be about 1200 pounds of pollutants removed per facility. Based on many of their sampling and analysis errors that we have identified in the administrative record, a more realistic total would be about 25 pounds per facility of pollutants.

In addition, the economic impact on the industry is significant. EPA's estimates are 10 percent of the industry would be forced to close as a result of this rule. Again, EPA has made significant errors in its economic impact analysis and it as many as half of the metal finishing industry could be forced to close as a result of this industry.

Also, EPA has undertaken a somewhat novel—and even they admit it, novel approach to environmental benefits in this rule in assessing human health, recreational water quality benefits. They have estimated those monetized benefits to be $2.4 billion. Based on our estimates, it is closer to only $200 million. And a good example of that is they have taken the monetized benefits for avoided cancer risks, 98 percent of that was attributable to one chemical and they are not even proposing a regulatory limit for that chemical.

And lastly, the POTWs are vehemently opposed to this rule because it does nothing and it imposes a significant burden on them.

Mr. PENCE. Thank you, Jeff.

Arline Seeger of the National Lime Association.

Welcome.

**STATEMENT OF ARLINE SEEGER WITH THE NATIONAL LIME ASSOCIATION**

Ms. SEEGER. I am going to make my remarks in the context of a systemic problem that we have been facing with EPA and their reluctance to convene small business panels for small businesses and that they throw up every trick in the book in order to avoid convening panels.

A panel is supposed to be convened when EPA determines that there has been a significant impact on a substantial number of small businesses and among the many roadblocks that we have encountered in our six-year journey with EPA is the so-called mini industry.

From the outset, EPA knows that in the United States there are only 28 lime manufacturers and from at least six years ago they know that 12 of them are small businesses. So there are those 12 businesses that have been the focus of attention.

While we have convinced the agency that the annual costs of the rule are crippling and so no we have finally gotten to the point

where we have demonstrated beyond a shadow of a doubt that there has been a significant impact, EPA is now saying, well, there are only 12 businesses, they have coined the term the "mini industry" issue, which is very disheartening because they have known from the start that we only had 12 small businesses and so if 12 small businesses could be cast aside without a thought, they should have told us that from the beginning, because it is the significant impact on a substantial number of small businesses.

Our view is that substantial number should be looked at in the context of the industry and since we only have 28 companies and 11 are small businesses, all have impacts over 5 percent of their revenues from the entity that is being regulated, that of course EPA should be convening a panel and they are loathe to do so.

Mr. PENCE. Is it your judgment that this policy over the long term would be very harmful to the survival of small businesses in yours and any other industry where that was practiced?

Ms. SEEGER. The industries that only have a handful of members are those that are usually quite threatened because the larger groups tend to have more sophisticated trade associations, so there are a network of, for example, industrial trade associations that have dozens or so members, those are the ones that find it particularly difficult to carry on a theme of Rosemary's, which is that you are up against the government and you may have a staff person or two confronting a very gross overstatement of benefits, understatements of costs, mischaracterizations of what the rule is going to do. And so it is precisely these people that need to have a panel convened.

Thank you.

Mr. PENCE. And it is Arline.

Ms. SEEGER. Arline.

Mr. PENCE. Great. Arline, that is terrific.

I want to compliment all the people that have made presentations so far. It is precisely what we are hoping for, a very focused presentation on things that we can begin to tackle.

John Herzog is next.

John, thank you for coming.

**STATEMENT OF JOHN HERZOG, AIR CONDITIONING CONTRACTORS OF AMERICA**

Mr. HERZOG. Thank you, Representative Pence, for the opportunity. This is going to sound like deja vu to Pat and several others in the room because we have been fighting these battles for three years, but perhaps they are new to you.

We have tried legislative solutions to some of these issues and we have gotten fairly far in some instances, but it has failed because either the administration opposed it or what. But what you are doing on the Equal Access to Justice Act really crosses many of these areas that we are concerned about and that is that under the existing statute the process is extremely time consuming and is usually more costly than the fees they are paying themselves.

I think that the only way that you can really stop frivolous suits by the government or by others such as in salting cases is the loser pay rules which many states have passed. And getting into some of these issues, on the salting issue, we had an instance, we have

a chapter in Indianapolis, we were finally able to get the National Labor Relations Board to pull off the local union. It was Local 20. But they had filed in a period of six years 300 salting cases against—half of them were against our chapters, other against others. Those are just the ones that were filed.

In many cases, they had figured out how much it cost to defend those cases so they went to the contractor and said for blank number of dollars we will go away. So basically what they were doing was blackmailing them into paying.

The local union had set up their apprenticeship program so that in the final year, in the last six months of the program, they had what they called a youth to youth program and what was going on was that they would use those youth for salts. Some would be overt salts and some would be below the radar screen and the overt salts would go in and they would ask for jobs, they would be wearing the union hats so that you knew that they were union members. The ones who were non-overt would go in just asking for jobs.

Most of them were not qualified because a lot of these were residential contractors, so they were trained through their union in commercial work.

Generally, they would go in and they would falsify their records and then after a few weeks they would tell the contractor they had falsified their records, they were not qualified. They were looking to get fired so they could file with NLRB. Those that actually stayed quit anywhere from three to four months after they joined. They went back to finish their apprenticeship, get a job with a union contractor, et cetera.

So that is one issue that is the overriding concern in regulations that seems to affect our folks.

The other one where that affects also is the equal opportunity law where we have had—one of our board members had a case filed against him which was without merit, he ended up paying for it, and, of course, it cost him time and money and he won.

The other ones that we certainly should mention which is currently under hearing by the government is blacklisting which has been brought up. They are trying to resurrect the Clinton era regulation. Tying in with that, too, is the fact we support the idea that the government can debar contractors who consistently break the law. Unfortunately, that is not the case. They continue to get contracts maybe because they are the sole source provider. We are concerned about where a salting case can be filed against a contractor and then he could be disqualified by a contracting officer.

The other one that ties in with that is federal bundling contracts, which is something that there has been hearings on, and then the cash versus accrual accounting, which we have had legislation on, but it is still not been decided and that was an arbitrary decision of the IRS to go after these small businesses.

Thank you.

Mr. PENCE. Thank you, John.

A show of hands of people in the room that think the loser pays legislation would be beneficial to your membership as a priority.

[Show of hands.]

Mr. PENCE. A fair amount. Good.

Let's jump next to Loren Sweatt with AGC.

Welcome.

**STATEMENT OF LOREN SWEATT, ASSOCIATED GENERAL CONTRACTORS**

Ms. SWEATT. Let me say we unequivocally oppose the blacklisting regulation. There is absolutely no reason for it to be in the Federal Acquisition Regulations. And I have a list of other things that we, if I could pass that down, that we are concerned about. They had hearings on Monday. The Administration has proposed to revoke it and we have been told by the procurement professionals that at this time the Bush administration has not told them directly what they are going to do once they take all of the comments that are out there. So we would certainly hope that there is some congressional nudging that could go on to make sure that this does get completely removed from the Federal Acquisition Regulations.

The second thing that we are concerned about is definitely the cash versus accrual accounting. There are IRS regulations on the books that allow construction contractors to use the cash method of accounting and the IRS has told construction contractors that they do not care that those regulations are on the books, they are going to use the accrual method. We have a detailed description of why that is harmful to construction contractors in our formal statement.

And then I also wanted to address some of the things that the Home Builders were talking about. We are currently on the effluent limitation guidelines SBREFA panel with the Home Builders and the Associated Builders and Contractors. The only reason EPA is going forward with this is that they settled a lawsuit with the NRDC and I do not think that they woke up one morning and decided that they wanted to regulate us in this manner, but we would certainly be happy to share our experience on the SBREFA panel in the next couple of months.

It has already been an eye opener and the first meeting was last Thursday. We have had some problems with getting the information out of EPA. Our regulatory folks are working on doing that. But the most interesting part was my counterpart on the regulatory side did not get the e-mails that our folks got who were the small entity representatives and she is considered a helper on this panel. So I do not know if the Home Builders have had that problem, I think ABC is sort of in the same boat with us, that they have not communicated very well.

We are hoping that this process has just hit sort of an immediate bump in the road, but in a couple of months we would definitely like to come in and talk about how this has worked.

Thank you.

[Ms. Sweatt's statement may be found in appendix.]

Mr. PENCE. Thank you. Good to have you here, Loren.

John Cox is next.

Welcome.

**STATEMENT OF JOHN COX, NATIONAL TOOLING AND MACHINING ASSOCIATION**

Mr. COX. Thank you, Mr. Chairman, for having this opportunity. Our association represents small manufacturers and we assumed,

and I have been borne out with that, that the big, larger issues would be raised: recordkeeping, a lot of OSHA stuff, EPA, that type of thing that can be applied across the board to small business, so we purposely e-mailed some of our more—it is a core of people that we rely on that are more involved than others, and asked them to specifically pick out certain issues that just bugged the hell out of small manufacturers and they are in the process of doing that.

They are not scholars in Federal regulations, so we are still in the process and for that reason I would request the record remain open for about two weeks that we can submit more detailed material and more examples.

With that, one example that has been cited that we were able to track down and find out is, in 29 C.F.R. 1910.242. Our companies are required to clean parts and metal of various equipment with compressed air. There is actually an OSHA reg that says you can do that, but you have to use less than 30 psi to do that and then you have to have effective chip guarding and personal protective equipment. Well, with this type of cleaning, it is not effective unless you use 60 psi, so we are looking for things of that nature.

One of our companies called me and he said that he just had a $5000 fine from OSHA because the new machine that he put on his floor had the wrong color buttons, the control knobs on it.

So I am going to—I love to say this—yield the balance of my time. [Laughter.]

And I will get you more written material. Thank you.

Mr. PENCE. Thank you, John.

And let me say that all submitted statements will made a part of the formal record, although I intend to some significant reading over the July 4th recess as I am traveling in my district, so if there is any opportunity to get those to us prior to that, then you will know I will be reading it somewhere in a rural county near you.

The competition is very stiff so far for egregiousness. The wrong colored buttons fine now is very close to edging out the red legged frogs getting five million square acres. So keep those coming.

John, thank you. A very good presentation.

Shannon——

Ms. CAMPAGNA. Campagna. Like lasagna.

Mr. PENCE. Campagna. Thank you. That helps.

Good to have you, Shannon.

## STATEMENT OF SHANNON CAMPAGNA, NATIONAL BEER WHOLESALERS ASSOCIATION

Ms. CAMPAGNA. Thank you, Mr. Chairman. Thanks for inviting us here to participate in this forum. We appreciate it.

By way of introduction, let me tell you just a little bit about the beer wholesaling industry. As set forth by State regulation in response to the 21st Amendment to the Constitution, beer wholesalers are the middle tier of a three-tier system within the beer industry. We distribute beer from the brewers to the retail locations. Those beer trucks you see navigating safely down your hometown streets delivering America's beverage to your local grocery store, that is your beer wholesaler.

The average wholesaler has annual sales of around $12 million, employs 36 people, maintains and operates a fleet of 12 delivery ve-

hicles and owns a temperature controlled warehouse. Most are family owned and operated.

Regulation is a fact of life for beer wholesalers. We are regulated every day by BATF, the FCC, the DOT, NHTSA, EPA, OSHA, the IRS and many other agencies. I would like to address a couple of ways the subcommittee might be of assistance to the industry in regard to our regulatory concerns.

Commercial driver's license reform is tantamount to ergonomics within our industry. Beer is delivered by your local wholesaler by truck to bars, restaurants, supermarkets and convenience stores. Our drivers generally double as our salespeople. Sales, delivery and customer satisfaction is their primary responsibility. Driving is secondary. They are in and out of their trucks all day, servicing their accounts. In fact, they spend the majority of their time with their engines turned off and only drive about 25 percent of their work day. Further, they only drive within a 100-mile radius of their warehouse, if that, and spend the night at home each night with their families. They are not long haul interstate truck drivers.

Currently, however, our drivers are required to have the same commercial driver's licenses (CDL) as long haul interstate drivers. While MBWA fully supports rigorous testing standards for our drivers, it is unduly regulatory and unnecessary to require a driver engaged in intrastate commerce where the operation of a truck is but a small part of the employee's job to the same standards as someone driving an 18-wheeler from Maine to California.

Beer wholesalers have inadvertently found themselves in the business of training CDL drivers for the larger trucking companies. While not true in every market, our members find themselves providing costly training and licensing fees for CDL drivers who are then cherry picked from our operations to drive for the interstate trucking companies. The cost and burden of training drivers is one our members are willing to bear, but they are growing weary of training drivers for other companies.

To this end, Congressman Howard Coble will soon introduce the CDL Devolution Act of 2001. This bill would return power to the states by allowing states to license intrastate drivers of commercial vehicles based on testing standards determined by the State. The emphasis is on allowing the states to regulate intrastate trucking, not mandating that the power return to the state. I submit to the subcommittee that this is exactly the type of regulatory relief that helps small businesses: let states decide how best to regulate what happens within that state if they so choose.

Additionally, I will just hit on this one point very quickly. I understand ergonomics is not the focus of this forum, but I appreciate the subcommittee's role in stopping implementation of the ergonomics standards issue during the last administration and I would be remiss in my duties if I did not also add that recent changes in leadership in the Senate and Secretary Chao's announcement of forums to be held in three locations around the country are sure signs that this issue is not going away.

I implore the Subcommittee not to let the fox into the henhouse by permitting new and equally onerous ergonomics regulations to be promulgated. Congress cannot rest on its laurels and must be proactive in the debate and formulation of fair and legitimate ergo-

nomic standards that protect workers while not unduly punishing business.

That is the end of my comments. I appreciate the opportunity to be here. Thank you.

Mr. PENCE. Shannon, thank you very much. I want to recognize Congressman Phelps for joining us.

Thank you for being with us at this summit.

And with that, I believe Betsy Laird is next on the docket.

Ms. LAIRD. I am up. Yes. Thank you.

Mr. PENCE. For three minutes. Thank you.

**STATEMENT OF BETSY LAIRD, INTERNATIONAL FRANCHISE ASSOCIATION**

Ms. LAIRD. Okay. I will try to talk fast. I am Betsy Laird with the International Franchise Association. You recognize most of our members, McDonald's, Blockbuster, Holiday Inn, Krispie Kreme. Sorry I did not bring any Krispie Kreme donuts this morning.

Many of our members also belong to other organizations sitting around the table: Rob Green's organization with the Restaurant Association, Kevin Maher, and I would just add that we would support some of the views that they are going to represent today as well.

I am here to really talk about a good news story. The FTC since 1979 has had in place a very good trade regulation rule requiring comprehensive pre-sale disclosure for any company that wants to go into franchising, making available to a prospective franchisee an enormous amount of information. There is probably no other business venture that you have access to more information going into it than franchising. There is a comprehensive disclosure document required by the FTC. Many states also have their own disclosure requirements. The kind of information that is required by this regulation are things like the litigation history, a list of current and past franchisees and how to get a hold of them.

We believe that the current regulatory scheme that is in place at the FTC has worked very well. And to support that, let me tell you that franchising has provided 8 million jobs. Every year it accounts for a trillion dollars in retail sales and it has also created 300,000 different franchise units across the country, making available to consumers a quality consistent option when they go to either do their dry cleaning or get their hair cut or grab a burger.

We would like to see the subcommittee continue to support the work of the FTC. It is in the final stages of streamlining this regulation, improving the disclosure rule and our members have worked very closely with the FTC and we would hope the subcommittee would continue to support its work.

Secondarily, I wanted to talk about franchising has been utilized by 75 different businesses as a way to do business. Franchising is not an industry, but it is a way to distribute goods and services. We have been contacted by a couple of our members with very specific regulatory concerns. One is a recent U.S. Postal Service regulation requiring anyone that operates their office and has a post office box, say at a Mail Boxes, Etc. or some facility like that, to identify it as such instead of calling it a suite number. The rationale behind the new reg is that it would cut down on mail fraud. Our

members believe that it is unwarranted and unnecessary, but very expensive to small businesses who operate their mail through that fashion.

Secondarily, I have talked to Barry Pineles about this. There is an issue of a midnight proposed rule by the last administration, doing away with an exemption in home health care for companion services. The current rule exempts employers of care giver services in the home from overtime regulations. The proposal would now require them to follow the overtime regulations. We believe that these regulations—I can submit more information about this—were to be implemented, would be costly for families and the quality of care would suffer. We will submit more information about that.

Thank you.

[Ms. Laird's statement may be found in appendix.]

Mr. PENCE. Great. Thank you, Betsy. Appreciate that energetic presentation.

Also, I recognized Mr. Phelps earlier, but I certainly would recognize my colleague for any opening statement or any comment.

I know that all of the participants are grateful for your participation and attendance.

I believe, Kerry, you are next for three minutes. Thank you.

**STATEMENT OF KERRY KIRKLAND, NATIONAL BLACK CHAMBER OF COMMERCE**

Mr. KIRKLAND. Good morning, Mr. Chairman and Congressman Phelps. I just wanted to bring to your attention this morning an issue that has been of concern particularly for our members over the past several years and that is the certification requirements for minority and women as well as small and disadvantaged business determinations that is required by the federal level, State, and local level.

Notwithstanding the fact that our members are strongly supportive of certification requirements that would minimize fronts and frauds, we think that the process has become time consuming, burdensome and certainly expensive for our members. I mean, we have DOT certifications, LBE certifications, Hubzone, 8(a), SDB, along with a host of other certification requirements at both the state and local level.

We think that it is long, long overdue for a national uniform certification process that is electronic-based, along with arranging some type of reciprocal agreements with state and, local jurisdictions, that would accept those certifications. This would eliminate the unnecessary paperwork on the part of our members.

Thank you.

Mr. PENCE. Thank you, Kerry. I appreciate your comments.

Another freshman colleague member of the committee, Congressman Langevin is here.

I do not know if you wanted to make an opening statement or any remarks?

Mr. LANGEVIN. Thank you all for being here today. I look forward to your comments.

Mr. PENCE. Thanks for being here, Jim.

Next on the docket, Giovanni Coratolo.

The names are not easy in this room. Give me a Smith.

Giovanni, you are up for up for three minutes. Thank you.

**STATEMENT OF GIOVANNI CORATOLO, U.S. CHAMBER OF COMMERCE**

Mr. CORATOLO. Thank you, Mr. Chairman, and thank you, Congressmen, for allowing us to be here.

I, too, would like to highlight the blacklisting regulation or the procurement rule that gives sweeping values to the procurement officers. There are over $200 billion in government sales and contracts that are provided to all businesses. This rule that was passed in the waning hours of the last administration and would provide blanket discretion for these contracting officers to judge what is an undefined unsatisfactory record of compliance by a company with any federal, state or even foreign law and then disqualify any business from competing for a particular government contract, based on that judgment.

Mere allegations of wrongdoing can prevent a business from winning a federal contract. If this blacklisting rule goes forward, federal contracting officers would be instructed to consider anything they deemed credible in evaluating a company's record. This would be particularly hard on small businesses. No one thinks that GE is going to be precluded from obtaining government contracts, but we can see small businesses being discriminated against. They are the most easy to sweep aside and we have seen that currently in bundling and the proclivity of government contracting to go toward larger businesses.

Enough said on blacklisting. Another area that I think is good to highlight what I call regulating the regulators. They can certainly provide sweeping regulations on our business, some of which are not based on sound science. As we know, they have tremendous discretion, yet we have to be able to regulate the regulators that are controlling our business.

A lot has been done in the passage of Pub. L. 104–121, which was SBREFA, in 1996 which gave us sweeping rights. That has to be examined, that has to be expanded. We have seen the Congressional Review Act which was part of SBREFA, passed as part of SBREFA, have a fantastic effect as far as controlling ergo and eliminating that from the horizon. That was very important. If SBREFA had not passed through the small business efforts, we would have seen the ergonomics regulation in force today, which I think we all in this room agree would have had devastating effects on small business.

So regulating the regulators is an important agenda for this subcommittee, including IRS as part of SBREFA panel process, looking at making these agencies more accountable. The Senate has had hearings on SBREFA and the definitions of economic impact. We also have to make sure that the Office of Advocacy is strengthened, and the Chief Counsel for Advocacy is speedily appointed. That agency has been very beneficial to regulation and controlling regulation within the Administration, you have so many different aspects to controlling regulation, that is just one aspect. That is certainly not the total answer, but certainly having a Chief Counsel or permanent Chief Counsel appointed, having legislation that

would make consistency and continuity within that office I think would be very important.

I do not want to take any more time, but these different aspects to regulation I think are important to focus on and we appreciate being able to provide you with this information.

Mr. PENCE. Thank you, Giovanni.

And—it is behind a glass. Is it Amy?

Ms. BLANKENBILLER. Amy.

Mr. PENCE. With the American Foundrymen Society.

Welcome for three minutes opening comment.

**STATEMENT OF AMY BLANKENBILLER, AMERICAN FOUNDRY SOCIETY**

Ms. BLANKENBILLER. Mr. Chairman, Congressmen, thank you very much for the opportunity to be here.

I would like to make one correction for the record. The American Foundrymen Society has actually come into being politically correct and it is now called the American Foundry Society.

Similar to what John Cox was saying, the American Foundry Society took the opportunity, rather than looking at some of the broader regulations that affect small business on whole, to try and identify some regulations that are specifically egregious to our membership.

There are two under the Clean Air Act at EPA that I would like to specifically identify. They are both MACT standards, maximum achievable control technology standards under the Clean Air Act. One is the secondary aluminum MACT standards and the second rule is the iron and steel MACT.

Our industry is the metal casting industry and we take molten metal and produce solid products. A wide variety of metals, from aluminum, magnesium and zinc to iron and steel.

Under the secondary aluminum MACT, which would affect the smelting industry, they provide us with our raw material in the aluminum metal casting sector. EPA did not do their homework and they lumped aluminum metal casting facilities into the smelting industry sector, which is overregulating the aluminum metal casting. We are at the point of having a remedy to this situation, but it took us four years, a lawsuit and untold man-hours and other resources to fight EPA and educate them when they chose not to do their homework.

The second part of this issue with the MACT processes in general is the iron and steel MACT and the fact that EPA inconsistently applies the discretion allowed under the Clean Air Act when they are developing their regulations. And I will give you one specific example and that is when you collect data, there is always an error band. It is 5 percent give or take around that number, similar to polling. And under the secondary aluminum MACT, for example, the staff used discretion to allow a 5 percent margin of error. Under the iron and steel MACT, for example, they are only allowing a 1 percent margin of error. That draws in another 250 facilities that are going to be affected by the rule and, again, adds cost to the regulatory process. So my point with the MACT is the fact that EPA does not do their homework and they use their discretion inconsistently.

Another example under the iron and steel MACT for inappropriate discretion is that within the metal casting industry and in the iron metal casting facilities specifically, there are two kinds of air control technologies. There is a wet scrubber that is a wet filter and there is a fabric filter, a bag house. Forty-nine percent of our industry uses wet scrubbers, 51 percent of our industry uses bag houses. Bag houses are literally a better control technology but only incrementally. EPA is not using their discretion to subcategorize bag houses and wet scrubbers, so they are going to require 49 percent of our industry to rip out their control technology and put in a $1.5 million bag house for questionable gains in environmental protection.

I also wanted to raise one other point that I think is interesting within the EPA's analytical processes, that the agency has started using the TRI data to do risk analyses and they have some very questionable defaults that they use. For example, they automatically assume that if you emit chromium you are emitting hexavalent chromium. We have all seen Erin Brockovich, we all know how bad hexavalent chromium is, but there is also good chromium that is out there and automatically defaulting to bad chromium is going to skew the risk analysis and identify an industry sector as being much more detrimental to the surrounding neighborhood than it may very well be, which takes small businesses like ours, we have 85 percent small business membership, a lot of time, resources, money to try and, again, go back and help EPA do the homework that they chose not to do.

Thank you very much for the opportunity to be here.

Mr. PENCE. All written statements will be included, even if you want to submit them in a week or two and they will be a part of the record of these proceedings.

Robert Green with the National Restaurant Association.

Welcome.

**STATEMENT OF ROB GREEN, NATIONAL RESTAURANT ASSOCIATION, ACCOMPANIED BY STEVE GROVER, NATIONAL RESTAURANT ASSOCIATION**

Mr. GREEN. Thank you, Mr. Chairman, and members of the subcommittee. I am also accompanied by Steve Grover, our Vice President of Regulatory Affairs, and we are very happy to be here on behalf of the National Restaurant Association.

Three issues on the regulatory side that have concerned our industry. Ninety-two percent of restaurants in the United States employ 50 or fewer employees, so we have a very large small business component. The three issues are the need for better federal agency coordination with regard to food safety, particularly between the USDA and FDA, the Department of Labor's white collar regulations and the Department of Labor's teen regulations.

Dealing with the first issue of the agency coordination, the National Restaurant Association has helped to develop effective food safety regulations and educational materials based upon current science and it is very important that improvements in food safety be science-based and coordinated between the various federal agencies and industries that will implement the changes. We believe that the current FDA system of food safety regulation is disjointed,

inconsistent and in need of a clear food safety focus and the FDA's current system makes it almost impossible for small restaurant operators to comply with the varying recommendations and regulations.

One example regards egg safety and storage. New USDA proposals require that eggs be maintained at 45 degrees Fahrenheit during transport and storage, while FDA recommends in its model food code a storage temperature of 41 degrees Fahrenheit. It is very difficult for small business restaurant to determine which standard is appropriate, which standard is effective and it would cost the industry $8 billion—$8 billion—to change the refrigeration systems for the industry and that is just for small refrigeration units. Without making light of this, I would like to say I am not "eggs-aggerating." And that is just one example.

In addition, the disjointed nature of FDA's agenda makes it difficult, if not impossible, for the restaurant industry to consistently develop training materials for restaurants that are reflective of the varying food regulations established by both USDA and FDA. And we also feel it is time to move on from the Clinton administration proposals and look forward to the Bush administration. There is a lot of talk about existing food safety proposals, a lot of it is left over from the Clinton administration and we want to see it moved forward to the Bush administration.

Secondly, real briefly, white collar reform. Federal law currently requires covered employees be compensated if they work over 40 hours a week at time and a half pay. The law also provides that certain employees in executive, administrative and professional capacities be exempt from these standards based on a salary test, and a duties test that is very complex. These are known as the white collar regulations. These have not been updated since 1954.

For our industry in particular, the classification of restaurant managers and assistant managers is very difficult on a unit-by-unit basis and it is a direct result of the complexity and the confusion caused by these outdated regulations. In the last 46 years, a lot of changes have occurred in the industry and we would just like to see DOL move forward with aggressively pursuing a new standard.

Finally, teen labor. We just want to try to encourage additional employment of teenagers. Two proposals, one dealing with the hours of work requirement for 14 and 15 year olds, allow them to work a little bit later in the evening with certain restrictions and more, importantly, 14 and 15 year olds cooking in certain establishments with restrictions. There is an outdated example of snack bars and lunch counters. We would like to see it broadened with certain restrictions to allow teenagers to cook in certain situation and we will provide a written statement.

Thank you very much.

[Mr. Green's statement may be found in appendix.]

Mr. PENCE. Thank you, Robert.

I appreciate everyone's brevity, although I think Kerry Kirkland still holds the prize for two sentences forcefully presented. I want to acknowledge that and everyone's brevity. We are going to get through to everybody and then have time for discussion before we break.

Karen Kerrigan for three minutes from the Small Business Survival Committee.

**STATEMENT OF KAREN KERRIGAN, SMALL BUSINESS SURVIVAL COMMITTEE**

Ms. KERRIGAN. Thank you. Thank you, Chairman, for having this forum and, thank you, Congressman, for inviting us to be here today.

With a membership as diverse as our organization, let me just say that this was indeed a challenging endeavor to come up with the top two regulatory concerns of small business. Depending upon the type of business or industry in which a small business is engaged, which state they are in, how labor intensive they are, the top regulatory concerns that we catalog and receive reflect the range of businesses we represent. And I would just like to say many of the specific regulations that have already been brought up by the industry specific group also reflect what has come in from our membership as well and I would like to include all those in a written statement that not only represents the views of SBC, but also support the other groups as well.

If you look at it really from a consensus perspective when we asked our members about the top regulatory problem, under the broadest interpretation of regulatory, we just keep coming back to the overly complex IRS tax code. Of course, this top concern comes as no surprise to us, will not come as startling news to Congress. Small business really has been lamenting the complexity of the tax code and the regulatory headaches they must endure for many years.

I guess if I had to drill it down to issues that we continue to receive back from our membership on an ongoing basis it is the alternative minimum tax, the calculations the forms, this is a major problem, as well as the payroll deposit rules.

Secondly, the other—and this is going to be another broad concern—is the impact that regulations, federal regulations and, indeed, state regulations are having on the cost of health care. The medical privacy rule came up and our members feel that as Washington continues to regulate the health care industry that indeed this is putting the ability of small businesses to provide health care for their employees out of reach.

So those are just two broad issues representing the broad membership of SBSC. And, again, as I mentioned, I will submit the other specific ones as well that support the group, although I will be interested to hear from Bryan Little at the Farm Bureau whether the ding dong forms required by USDA are on his list.

Thank you.

Mr. PENCE. I await with anticipation for a definition of the ding dong forms.

Ms. KERRIGAN. I was waiting for that as well.

Mr. PENCE. Thank you, Karen.

I am very provoked by your observation about the Internal Revenue Code as a form of government regulation. A show of hands, do your membership consider that a part of the regulatory burden typically, ordinarily?

[Show of hands.]

Mr. PENCE. Yes? Okay. Yes. Good. That is a new thought for me. I usually segment those. Grant with the Telecommunications Industry for three minutes. And let me also introduce Congressman Sam Graves, also a member of the subcommittee. Did you have an opening statements or any comments you care to make?

Mr. GRAVES. I have no statement. Thank you.

Mr. PENCE. Well, thank you for being here.

And to all the members, I know we are extremely grateful for your time, as I know you are grateful that all these members are here.

Grant.

**STATEMENT OF GRANT SEIFFERT, TELECOMMUNICATIONS INDUSTRIES ASSOCIATION**

Mr. SEIFFERT. Good morning and thank you for having TIA here participating in the panel discussion. I would like to thank the chairman and the subcommittee for having us.

T.I.A. represents 1100 companies. Seventy-six percent of those are small business companies selling into the carrier world. I will mention a few things quickly.

The Federal Communications Commission (FCC), is a hot topic of debate in this town for our industry. It has gone under several hearings for FCC reform and reauthorization hearings. That has a significant impact on our industry by the streamlining process which the path to market of new equipment is certified by the FCC engineers. So privatizing the FCC labs is critical. It can have an immediate impact on our industry and that is slowly going on, but we would like to see that speed up if we could have your help on that.

Export controls for our companies, certain international trade is a huge part of our opportunities to grow worldwide. We operate in a global economy here and certainly we would support the Export Administration Act in lifting restrictions on encrypted products and technology.

And then also we are working with the Pentagon and the Department of Defense on spectrum allocation. That is a new opportunity for our industry to grow and to harmonize with the rest of the world for 3G services and products and that is going to be a critical issue. It is not necessarily—we are regulated, but we are sort of regulated out of business opportunity and future economic benefits for our country.

So with that, thank you.

[Mr. Seiffert's statement may be found in appendix.]

Mr. PENCE. Thank you very much, Grant.

Joe Nipper with the American Public Power.

Thank you for being here, Joe.

**STATEMENT OF JOE NIPPER WITH THE AMERICAN PUBLIC POWER ASSOCIATION**

Mr. NIPPER. Thank you very much, Mr. Chairman, and members of the committee for inviting me here this morning. I represent the 2000 publicly owned electric utilities around the country, almost all of whom are municipal electric utilities and the vast majority of which serve communities of 10,000 people or less. I want to men-

tion just two regulations that are affecting electricity supply and, of course, energy supply is a focus of national attention at the moment.

One I will mention just briefly is the Federal Energy Regulatory Commission's regulations and process for licensing and re-licensing hydroelectric projects. The process is severely out of whack and is the subject of other pending legislation. But there has been little consideration in all of that of the impact on very small electric utilities, the administrative and financial burden imposed in that process on them and their special characteristics.

But let me focus a little bit more on an EPA regulation, the regulations dealing with emissions of nitrogen oxide from power plants and their disproportionate adverse impact on small utilities. Most of my members purchase electricity at wholesale and resell it at retail in their communities. However, many of them also have very small generating units in their town, often diesel powered generators that they use to meet peak load demands in the summer and other times of peak load and for reliability purposes as backup supply in case there are problems on the system.

E.P.A. has ignored the special operating characteristics of those small backup units which, as I say, operate typically only a few days during the year for emergency purpose or to meet peak loads and yet they are regulated virtually in the same manner as the large base load power plants, particularly with regards to $NO_X$ emissions, and so we call that just to your attention as a regulatory area where EPA has, again, not taken into consideration the operating characteristics of those small units. They are regulated now on what is called the potential to emit, which is, as the name implies, the potential level of emissions if they were running virtually continuously as large power plants do, but, again, since they operate on a very limited basis, we feel that they should be afforded some—and because they are owned and operated by small entities—should be afforded some additional consideration in that regard and to date they have not.

So we also would like to submit some additional examples because as operating utilities we have a number of concerns, some of which have been addressed earlier: NAM's comments on TRI reporting, for example; OSHA regulations and other regulations. We can provide some more information for your consideration.

Mr. PENCE. Thank you, Joe.

Damon Dozier, I cannot see your name plate there, with the National Small Business United.

Good to have you here for three minutes.

**STATEMENT OF DAMON DOZIER, NATIONAL SMALL BUSINESS UNITED**

Mr. DOZIER. Thank you, Congressman, and thank you, Congressman Graves and Congressman Phelps. My name is Damon Dozier and I represent National Small Business United. We have about 65,000 members nationwide, which represent a variety of small business industry sectors, if you will.

I sort of feel like the guy who followed the Beatles in that a lot of the things here have already been mentioned and, you know, some of the thunder has been stolen a bit. But what I would like

to do is actually echo the comments of Arline Seeger, Loren Sweatt and Giovanni Coratolo in terms of enforcement of the Small Business Regulatory Enforcement Fairness Act.

Senator Bond has introduced legislation that would actually strengthen the act and add additional agencies such as IRS, the National Marine Fisheries Service, the Department of Interior and some other offices into the scope of that law, but what we are particularly concerned about at National Small Business United is the rationale used to convene small business regulatory enforcement fairness panels.

For example, EPA uses a cost over sales test and they examine an industry and if the regulatory cost is 1 percent over a business' sales, then that is sort of their trigger to be concerned and if it is 3 percent cost over sales, then they will go into a SBREFA panel.

And, as any teenager could probably tell you, 3 percent over sales could be a greater ratio in terms of profits. That could actually be 25 percent, 30 percent, even 50 percent of your profits when you talk about 3 percent cost over sales. So actually the test that EPA and other agencies use to go into the SBREFA panel process is flawed and we would encourage this body to take a look at actually the process by which EPA actually decides which rules will go into panel and which rules are not going into panel. And the same thing with OSHA.

Thank you for your time.

Mr. PENCE. Thank you, Damon, very much.

Now, John, help me out.

Mr. EICHBERGER. Eichberger.

Mr. PENCE. Eichberger. Thank you, John. You are recognized for three minutes. We appreciate you being here.

**STATEMENT OF JOHN EICHBERGER WITH THE NATIONAL ASSOCIATION OF CONVENIENCE STORES**

Mr. EICHBERGER. Thank you. I am here on behalf of the National Association of Convenience Stores and I want to start out by echoing the comments made on the recordkeeping rule and with NRA's on the white collar working situation.

The convenience store industry sells approximately 70 percent of the motor fuels in America. We have two main issues we want to bring up with you today. Number one is in January, EPA issued a rule requiring a 97 percent reduction in the sulphur content of on-road diesel fuel. EPA implement this by a phase-in. Starting in 2006, 80 percent of the diesel produced for refiners must meet this 15 parts per million sulphur content requirement, 100 percent compliance is not until 2010.

Our concern as marketers is that essentially puts another brand of fuel on the market. In order for our members to sell both types of diesel fuel, they are going to have to install a second temporary underground storage tanks. These tanks can cost up to $50,000 to $60,000 to install and within four years that tank will become obsolete because the second fuel will be off the market. Therefore, you have a problem whether they go to put in that type of investment or do they even have the physical space to put in a second tank to service both fuels? A lot of our members do not. There are other options to choose: to service one fuel and that means they have to

choose between two classes of customers. Either they service those customers driving vehicles built after 2007 which have new emission technology which require the new fuel or those who drive other vehicles. The new fuel is estimated to cost approximately anywhere between six and estimates up to 50 cents per gallon more than the older fuel. Therefore, there is a cost advantage to selling the cheaper fuel, but then you eliminate one class of customers. So they are in a situation where either you put in the $50,000 temporary investment or you have to choose between customers. That is putting them in a really tough situation.

We support a 100 percent implementation. There is legislation introduced in the house by Congressmen Bryant and Gordon to require 100 percent implementation in 2006. It is H.R. 1891 and we fully support that. We have also filed suit against the EPA to try and get the court to remand the rule back to the agency to revise their rule to take into consideration these marketing concerns.

The other issue we want to bring to your attention is the Department of Transportation's hours of operation for commercial motor vehicle drivers. Right now, the way this is set up, they want to address driver fatigue and we support that. But they are trying to put in mandatory on duty/off duty rest periods as applied to all drivers. And similar to the beer wholesalers, our drivers oftentimes only service one small market, they leave from one location, they return to one location. They are susceptible traffic congestion, they are susceptible to delivery delays. The way this rule is written, it applies to them the same way it applies to a driver who crosses the country. We would like to see the rule reassessed and take into consideration the different characteristics of the different classes of drivers and how their operations apply to their on duty/off duty time periods.

Those are the two number one things we wanted to bring to your attention today and we have submitted comments for the record and if there is anything we can do for you, please let us know.

[Mr. Eichberger's statement may be found in appendix.]

Mr. PENCE. Thank you very much. Good to have NACS here.

Debra Phillips is next, recognized for three minutes.

**STATEMENT OF DEBRA PHILLIPS, AMERICAN CHEMISTRY COUNCIL**

Ms. PHILLIPS. I am here representing the American Chemistry Council, which I think is typically viewed as an organization of larger business. However, more than one third of our member companies are small, in fact, small businesses. And I would like to take the opportunity to bring up two regulatory programs that are of particular concerns to our members and both of these programs have to do with EPA regulatory requirements.

The first, I think, was touched on by NAM and that is the TRI Section 313 reporting requirements. The requirements of this program are such that industries must report emissions to the air, water, land, et cetera, and while this is a good goal, the fact is a lot of the data that is required in the reporting is not used. And the data is very labor intensive to gather. For example, a current requirement is that companies report internal concentrations of chemicals within their facility that really has no impact on what

is being emitted to the environment, yet this is a reporting requirement within this program. I feel I can speak fairly intelligently about this because I was responsible for this kind of reporting at a small chemical facility for about four years and I can say that I would spend weeks completing the report and that is at the expense of taking care of important issues like regulatory and environmental compliance at the facility. So we feel like there are opportunities to really streamline this program and make the requirements such that the important information is reported and extraneous material is not.

The second program that I think was also mentioned by some of the utilities that our members are having issues with is the new source review program. This is a program that is getting a lot of attention as of late due to energy implications, but it is also an issue for some of our smaller companies. The intent of this program is to ensure that when new facilities are built and when significant modifications are undertaken at existing facilities that these projects undergo a stringent review to make sure that there are not decreases in air quality associated with the projects or new facilities. We agree with the program's intent. However, in recent years, the EPA has taken to expand that program such that pretty much any modification that is taken falls under this program.

It is of particular interest to our smaller members because typically they operate in markets that must change fairly quickly. They have to make fast changes due to market demands and they are not able to undertake these modifications, many of which have a beneficial effect on energy, efficiency, and also emissions and they cannot undertake these projects because they are triggering this new source review program, which is making the projects cost preventive to them being undertaken and I will give just a brief example.

We have a small chemical company that wants to make a change to its waste water treatment facility that will increase its energy efficiency by 40 percent and decrease its actual emissions by 5 percent. It cannot undertake this project because it will trigger the new source review program. They will have to go through an approximately three-year permitting procedure to undertake the project and its cost will be about $750,000. The plant currently earns about $1.5 million. So it is half of their annual earnings to undertake a project that will result in energy efficiency and decreased emissions.

So we feel like there is some real reform needed in this program such that our companies can operate efficiently, effectively and are environmentally conscious.

Thank you.

Mr. PENCE. Thank you, Debra. Good presentation.

Craig, I think you are next.

Mr. BRIGHTUP. Yes, sir.

Mr. PENCE. Thank you for being here.

**STATEMENT OF CRAIG BRIGHTUP, NATIONAL ROOFING CONTRACTORS ASSOCIATION**

Mr. BRIGHTUP. Thank you, Mr. Pence. My name is Craig Brightup. I am with the National Roofing Contractors Association

and it is nice to see Mr. Phelps again. This morning we had a very good roundtable discussion on health care. And thank you for the opportunity to talk about some other regulatory problems that the industry has.

N.R.C.A., the National Roofing Contractors Association, has about 5000 members. We estimate that about 60 percent of the roofing work in this country is performed by our members, certainly 60 percent of the commercial roofing work, but all of our members are small business people. So if you are going to a roofing contractor, the first thing that you need and the first area I want to talk about are workers. There is an acute labor shortage right now and immigrants comprise more and more of a substantial percentage of the workers that are being employed by our members.

The first area, then, in the regulatory realm that we are concerned with and having problems with are immigration regulations from the Immigration and Naturalization Service. Now, I do not know if you have ever had a chance to take a look at these or not, but you would really kind of need an Ouija board to figure out exactly what you should and should not be doing. We have a roofing contractor in Portland, Oregon, one of our larger, 130-employees. INS came in, did an audit, said congratulations, Mr. Satron, he is the owner of Interstate Roofing, in Portland, Oregon, you have done everything right, but half of your workforce has to go. Now, that is the kind of thing that our members are dealing with and I suspect other small businesses that hire workers that are immigrants are dealing with.

We support President Bush's proposal to split the INS into two so that one of the agencies helps people, helps small business employers and those that wish to follow the rules and do things right. Number two, we are a member of the Essential Worker Immigration Coalition, which supports, among other things, perhaps developing a guest worker program or programs similar to what agriculture has so that we can deal with the acute labor shortage and do things the right way.

Now, once you have the workers, you have to get them to the job. And I echo the comments made by our friends around the table, particularly I heard the National Beer Wholesaler's Association complaining about the Federal Motor Carrier Safety Regulations. These regulations are intended to deal with trucks of a size of 26,000 pounds gross vehicle weight rating. These are overland carriers that go from Portland, Maine to Portland, Oregon. But roofing contractors are getting nailed on this and, believe me, the different things that you have to comply with, not just the commercial driver's license or the hours of service, there is a lot more going on there than that. They are getting nailed for vehicles of 10,000 pounds, between 10,000 and 20,000 pounds and we would like to address that and fix it.

Finally, once you get to the job, you may need to tear off an old roof. What do you do with the roof tear off? Well, no thanks to Superfund, you are highly likely to get nailed in a Superfund legal morass which is almost impossible to get out of, so we applaud the U.S. House of Representatives for voting for H.R. 1831 on May 22d, the Small Business Liability Protection Act, by a vote of 419 to nothing. Just very quickly, as you know, Mr. Pence, it would ex-

empt any business, regardless of size, from Superfund liability if responsible for less than 110 gallons of liquid waste or 200 pounds of solid waste, but, perhaps more importantly, small businesses are defined as having fewer than 100 full-time employees and would be protected from lawsuits filed by companies responsible for a majority of the waste at the site. Will this cure all of our problems? No, but it is a terrific start and the Senate seems intent on dealing with a broader, more comprehensive approach dealing with brown fields. I hope ultimately that the House is able to put pressure to get this done. Four hundred nineteen to nothing speaks volumes and we completely support it and anything that we can do to get the Senate to move, we would be glad to support your efforts.

Mr. PENCE. Thank you very much, Craig.

And I believe Matt Page is next on the docket for three minutes.

Matt, thank you.

**STATEMENT OF MATT PAGE, AMERICAN ELECTRONICS ASSOCIATION**

Mr. PAGE. Thank you, Mr. Chairman. Thanks to the subcommittee for calling this roundtable together. I represent the high tech industry. AA represents semiconductor manufacturers, software industry folks, and about 70 percent of our members are small business. The issue I want to talk about today is involving the IRS and specifically the duplicative reporting of stock option compensation.

Currently, on W–2s, the exercise of non-qualified stock options are taxable as wages and they are reported on the W–2 form in no less than three different areas. Last year, the IRS came out with an announcement which is now going to impose on employers a new reporting requirement. It is called Code V, and is under box 12 on the W–2 form. This is to report separately the amount of compensation received upon exercise of non-statutory stock options.

Separately, another announcement came out which advised employers that the reporting requirement for Code V was going to be optional for 2001, but that it was going to become mandatory in years after 2001. The reason this is a problem is that Code V reporting will have no net tax effect. It is already being reported on the W–2 form, as I mentioned, in boxes 1, 3 and 5, so accordingly the income is already subject to the appropriate income and Social Security taxes. There is no net benefit to the employee. Code V reporting would have no beneficial impact on employees because stock option compensation, again, is already disclosed to them as either part of their non-qualified stock option program as part of their pay stubs. And also there is no other tax-related purpose for this information.

On the W–2 form, which you are probably all familiar with, in box 12, there are actually 18 different items that need to be reported in that area. Types of information that are put in there are for legitimate compliance purposes such as for the proper calculation of Social Security benefits, compliance with welfare and pension limitations, or information about non-taxable fringe benefits not otherwise reported on W–2 forms. None of these purposes justify separately reporting income from non-statutory stock options.

What does this mean? It is a needless administrative burden and will require companies, particularly smaller ones, to redesign their payroll system, again, for no specific tax purpose or informational purpose. Treasury may find it more convenient to have such information on W–2 forms for their statistical and economic models. However, this information can be found in other sources, such as SEC filings. In any case, it is inappropriate to impose additional costs and burdens on employees without demonstrated immediate compliance justification.

There is also a question of whether or not they have the legal ability to do this. Let me just state that when the IRS went through with this, there was no normal regulatory hearing process or request for comments, so essentially there was no public input on this new requirement and we would just simply recommend that the reporting requirement be withdrawn permanently.

I would echo other comments that have been made about SBREFA and the expansion of SBREFA and the Office of Advocacy.

Thank you.

[Mr. Page's statement may be found in appendix.]

Mr. PENCE. Thank you very much, Matt.

I think it was in our subcommittee's first hearing that we heard from a number of people in your industry who talked about the need to lift the regulatory burden to encourage more entrepreneurism and stock options. It came up then, so I appreciate you calling our attention to this Code V problem.

Ty Kelley.

Mr. KELLEY. Correct.

Mr. PENCE. Thank you for being here, Ty.

**STATEMENT OF TY KELLEY, FOOD MARKETING INSTITUTE**

Mr. KELLEY. Thank you, Mr. Chairman. I am with the Food Marketing Institute. We represent the supermarket industry. We sell food and a lot of our members are getting into the prescription drug business, like Marsh's out of Indianapolis.

The regulation that I wanted to bring to your attention nobody else around this table has mentioned and it comes from the Food and Drug Administration and it relates to the sale and distribution of prescription drug products in the United States. It is a reg that impacts secondary wholesalers and here is the problem. If this rule goes into effect, it is a final rule whose enforcement has been stayed, issued in December of 1999, it will close down 4000 small businesses throughout the United States that currently distribute prescription drugs throughout this nation.

Now, how would this reg close down 4000 small businesses?

Very easily. It imposes a massive paperwork burden on these companies because they simply do not purchase prescription drug products directly from the manufacturer. In other words, they would be required under this FDA rule to obtain the entire sales history or pedigree of the product they have purchased, but we have a classic Catch-22 situation. The FDA reg requires them to get the pedigree, but it does not require the manufacturer or the primary wholesaler to provide it. Thus, they cannot distribute prescription drugs legally in this country.

What does this mean? It is going to mean less competition, higher prices, reduced access to life saving medications, especially for folks in rural communities because the secondary wholesalers are the primary source of supply to remote locations.

Our interest is very simple. Our members from time to time buy from secondary wholesalers and they do for two key reasons: one, availability of product when our members need it and, two, these secondary wholesalers because of prudent purchasing practices can get prescription drugs at lower prices than, say, the full like McKesson types.

We have a solution to this FDA reg and it is going to kick in next year. The solution is a bill that has been introduced by Joanne Emerson and Marion Berry, H.R. 68. What it does is very simple. It provides for reasonable accountability of the purchase of these drugs by secondary wholesalers, number one, and, number two, it clarifies congressional intent in terms of the law that Congress passed back in 1987. And I mention that because the regs were issued in 1999, 12 years after Congress passed the law. None of this makes any sense. So we can avoid a huge problem by enacting into law the Joanne Emerson-Marion Berry bill, H.R. 68, and I would urge you to take a look at that. We have 45 co-sponsors to date and I have a number of materials that I would love to share with the subcommittee.

Thank you.

[Mr. Kelley's statement may be found in appendix.]

Mr. PENCE. Thank you, Ty. It is good to have FMI here.

Let's go to Bill Mahorney with——

Mr. MAHORNEY. American Bus Association.

Mr. PENCE [continuing]. The American Bus Association. Thank you.

Mr. MAHORNEY. Thank you, Mr. Chairman.

Mr. PENCE. I promise our next summit I will bring my prescription glasses so that I am not failing my reading test on the back panel.

Thank you for your patience, Bill. Go ahead.

**STATEMENT OF BILL MAHORNEY, AMERICAN BUSINESS ASSOCIATION**

Mr. MAHORNEY. Thank you, Mr. Chairman. I represent the American Bus Association. We have about 850 operator members, such as the Greyhounds of the world, but about 96 percent of our membership and of our industry is small businesses that operate less than ten motor coaches.

Three of the issues that we would like to talk about today, the first has been mentioned by a couple of other folks is hours of service of drivers. Back in May, the Federal Motor Carrier Safety Administration proposed sweeping changes that would severely limit the time a driver can operate. It was supposedly based on sound science. The first mention of motor coaches or buses in this proposal was, and I quote, "For purposes of this proposal, the FMCSA has assumed that bus drivers operate in ways similar to truck drivers." Now, that certainly is a problem for us. We do not operate like trucks. In fact, the rule lumps a trip from Philadelphia, a three-day trip from Philadelphia to D.C. to Baltimore, where the driver

is operating maybe three or four hours a day, as a long haul type 1 driver, which would be the same as someone who is carrying something from New York to California, jamming all the way. So we have some basic problems with that.

We estimate it would reduce our ability to provide services in rural areas because we would have to cut—the driver's pay would be greatly reduced. We estimate about a 30 percent reduction in our operations.

Our biggest problem with it is, though, is our safety record has been so good. In 1999, we carried 774 million passengers. That is a third more than the airlines. We average about five passenger fatalities a year and our hours of service violation rate is about a third that of trucks, so we figure we are complying with the current rule and we are safe, so we do not need any changes. So our goal is to be carved out of that rule and continue to operate under the current rules, until someone proves to us we have a fatigue problem. And if someone proves that to us, we will certainly work with them to try and address it.

The other issues relate to NAFTA. There are three rulemakings on the table now that relate to safety monitoring and authority of carriers coming into the U.S. Our big concern with those is we support NAFTA. We are very much looking forward to working in Mexico, even more so than we do now, but our concern is the lack of enforcement at the border. We really think that border enforcement is critical.

Our president went to Brownsville, Texas last week and it was told to us that there is approximately 350 motor coaches a day coming across one of the bridges there, the Los Tomates/Veterans bridge, but enforcement is only done one day a month, so that is quite a gap that we think needs to be addressed. We are very concerned about the enforcement of the Federal Motor Vehicle Safety Standards which govern the construction of buses and we are very concerned with the Federal Motor Carrier Safety Regulations which govern hours of service, et cetera, for the drivers and making sure that the drivers have the Mexican equivalent of a CDL, the licensia federal. So that is something that we are looking very much to Congress to maybe step in and give some additional money to the appropriate parties to enforce at the border.

There are also a couple other rulemakings regarding small passenger vans that we would like to see enacted prior to the border opening. There is a proposal on the board that hopefully the Federal Motor Carrier Safety Administration will have completed.

The last thing I would like to mention is transit competition. Many of our members are facing increased competition from publicly subsidized transit agencies, which is clearly against the law. Small businesses rely a lot on some of these shuttle type services to and from football games and that type of thing and we are getting competition that we cannot handle. In fact, the Federal Transit Act does prohibit funding for charter and sightseeing and also prohibits a recipient from providing service if a private company can do it. We have brought it up several times with the FTA. It is not really enforced very strongly. What we would like to see is maybe a clear definition of charter bus service that is not eligible for funding and specifically provide that transit agencies may not

provide regular route service beyond their urban area boundaries. So we would like to see a little stronger regulation and better enforcement.

We do have comments to submit as well.

Thank you.

Mr. PENCE. Bill, thank you. Good presentation.

I appreciate how people are commenting on what other presenters have stated. That is very helpful.

John Fitch with the National Funeral Directors Association for a few minutes.

John, welcome.

**STATEMENT OF JOHN FITCH, FUNERAL DIRECTORS ASSOCIATION**

Mr. FITCH. Thank you, Mr. Chairman. I will briefly discuss some of the key issues that funeral homes are experiencing from a regulatory standpoint.

One major issue that they would like to see is an amendment to the federal Fair Labor Standards Act to allow compensation time in lieu of overtime for employees. Because of the irregular hours that funeral directors work, nights, weekends, holidays, a lot of their employees, particularly their licensed employees, would like to have comp time to be with their families and make up that time and right now that is impossible under the Fair Labor Standards Act because licensed funeral directors do not meet a lot of the tests for the current exemption.

The second issue that we would like to have the committee take a look at is to codify what some of the courts have already decided in favor of employers and that is to allow the defense of an employee error by an employer for an OSHA citation. In essence the defense permits an employer to show that he has done everything conceivably and reasonably possible to prevent an accident and the employee has disregarded that and caused harm or injury, that that should be an employer defense under the OSHA law.

We also believe that OSHA should adopt what the state of Maryland has adopted, which is a state plan state, and that is a streamlined, simplified review process of informal conferences and formal hearings that are purely administrative in nature rather than quasi-judicial. In other words, adopt a streamlined, easy administrative review process rather than having employers go through the federal court system to challenge an OSHA citation.

The other issue we would like to bring to your attention is to allow an employer under the OSHA rules to offset any civil penalties that may be assessed for an alleged violation of the OSHA law, regulations and standards by the documented amount spent to correct the condition, retrain employees, or to make other corrections or actions to abate the hazard. In other words, offset the penalty with corrective action under the OSHA law.

Lastly, unfortunately funeral homes also come under RCRA. In many instances, funeral homes use swabs, cotton swabs and cotton products to remove certain spots and they may contain halogenated compounds, which makes them a hazardous waste, so you have these swabs that we use for your ears and things and they may have very few of these, but they are considered a hazardous waste,

they come under the RCRA rules. Therefore, funeral homes have to hire a special hazardous waste hauler to come and pick up these little cotton swabs, they have to take them to a certain place. This costs them a great deal of money and aggravation and we would like to see some kind of reasonable exemption under the RCRA rules for these kinds of small situations that otherwise would not be a problem for any disposal.

Thank you very much.

[Mr. Fitch's statement may be found in appendix.]

Mr. PENCE. Thank you, John. We have been very strongly supportive of a bill that I know you are familiar with and maybe will be interested in and we will look at putting the subcommittee's efforts behind the 90 days to cure provisions where employers would not be subject to fines. Again, it is in the spirit of getting away from the judicial approach to more of an administrative review and cooperative role. Sarah Dodge with the Petroleum Marketers Association.

Welcome and thank you for your patience.

**STATEMENT OF SARAH DODGE, PETROLEUM MARKETERS ASSOCIATION OF AMERICA**

Ms. DODGE. Thank you. And thank you, Mr. Chairman, for holding this forum.

At P.M.A., we represent about 42 state and regional trade associations and about 7800 petroleum marketers nationwide. Our members are terminal operators, they deliver fuel, they also store fuel and offer it for retail sale.

By far, our most important priority this year is getting the phase-in, as was mentioned earlier, of the EPA diesel sulphur rule removed. We have worked hard with Congressman Bryant and Congressman Gordon to get a bill introduce and we thank you for your co-sponsorship of that bill, H.R. 1891. In addition, I think I mentioned to Patrick that Congressman Blunt recently put forward an RFG/diesel sulphur proposal and he did include that provision as well in that legislation.

It was already mentioned earlier the cost to industry to install a whole new universe of underground storage tanks. Obviously, that is a huge concern for our members. But an even bigger concern is the possible price spikes and supply problems which we anticipate will occur. EIA has also done a study and said that that is very likely with the phase-in.

So we are pleased to say that although during the rulemaking almost every industry group, environmental group, agency opposed the phase-in, DOE was the only entity that supported it. They have now changed their tune and are supporting a repeal of the phase-in.

So we thank you for your support on that and I have a number of other issues that I have submitted for the record.

Thank you.

Mr. PENCE. Very good. Thank you, Sarah.

And, Mary, I appreciate your patience and very much appreciate NFIB sending you to be with us today.

**STATEMENT OF MARY LEON, NFIB**

Ms. LEON. Thank you, Chairman Pence. I am delighted to be here with you today. I think NFIB recognizes that much of what you are charged to do is to undo what the previous administration did while they were in office and what I want to focus on today certainly falls in that category and that has to do with the OSHA recordkeeping rule which a number of other people around the table have already mentioned.

Really, the OSHA recordkeeping rule is one of the regulations that would threaten small business owners if it were to go into effect. The recordkeeping rule will affect nearly every small business in the country and significantly add to the paperwork burden of small business owners. In particular, NFIB is concerned with the provision requiring employers to determine and record injuries that occur outside the workplace, but are aggravated on the job. The rule specifically states "You must consider an injury or illness to be work-related if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a preexisting injury or illness." The regulation is supposed to be designed to help employers recognize workplace hazards and correct hazardous conditions by keeping track of work-related injuries and their causes, they should not be responsible for recording injuries and illnesses that have occurred or were caused outside the workplace.

One of our NFIB members, Eamonn McGready, who owns Martin Imbach, Inc. in Baltimore, Maryland, a marine construction company, testified before House Education and Workforce Committee last year and he made a very interesting statement. He said, "OSHA seems to want to record every rash or blemish that an employee may have at some time during the workday, every muscle strain or twinge, every runny nose or respiratory infection, every sore shoulder, knee or ankle, even if these perceived or real ailments may have occurred as a result of weekend gardening or softball."

As Jenny Krese has mentioned earlier, the recordkeeping rule was finalized, ironically, on Friday, January 19, 2001, the last day of the Clinton administration. The Department of Labor has pulled the rule back from OMB as a result of complaints from our organization and other organizations like NAM and it is my understanding that the OMB can deny the regulation approval under the Paperwork Reduction Act if it determines the rule will produce unnecessary paperwork for employers. So we simply urge you to hold hearings on this very dangerous regulation for small businesses and to work with OMB to deny the regulation's final approval.

Thank you, Chairman.

Mr. PENCE. Thank you, Mary.

A show of hands about a level of awareness about that particular recordkeeping issue, you are hearing about that from your members?

[Show of hands.]

Mr. PENCE. News to the chairman.

Bryan Little with American Farm Bureau.

Thank you for your patience and please proceed.

**STATEMENT OF BRYAN LITTLE, AMERICAN FARM BUREAU**

Mr. LITTLE. Mr. Chairman, one of the good things about being one of the last people to get a chance to have your say is that an awful lot of my work has already been done for me because an awful lot of folks have already mentioned a lot of the things I was going to talk about. In recognition of the fact that one of the most dangerous places to be is between a roomful of people and their lunch, I will try to keep this as brief as I can, except to say that Mike did an excellent job talking about our concerns about the Endangered Species Act and wetlands regulations. We have all those same problems and his discussion of that was a tour de force in describing what our problem is with that as well.

As to the effluent discharge regulations, Mike, welcome to our nightmare. They did it to us in January of this year when they decreased the number of animal units that their effluent guidelines—a farm with the number of animal units applies so that about 39,000 farms would have to be permitted now that did not have to be permitted before, subjecting a lot of our members to the tender mercies of the Environmental Protection Agency that did not have to deal with that before, and treating them essentially as though they are a point emitter of runoff, which does not make a whole lot of sense in an agricultural context. And, amazingly, for the first time in more than a century, applying these kinds of regulations to a common agricultural practice, the spreading of animal manure on a farm field as fertilizer. This has been done by farmers for at least 150 years in this country and all of a sudden EPA thinks this is a problem. I am not quite sure why after all this time they think it is a problem.

Shannon, your description about ergonomics problems was right on point. A lot of our people have that problem. The only problem we have is that it is not supposed to be an agricultural regulation and yet an awful lot of what farmers do fall under the description that OSHA offered us about what ergonomics problems are, so we do not even know whether we would have been covered or not if we had ever had to be in compliance with it.

Giovanni, you talked about SBREFA and we would like to see the Forest Service and the Fish and Wildlife Service covered by that. I can assure you, Mr. Chairman, that the prospect of bureaucrats from the Forest Service and Fish and Wildlife Service having to sit and listen to farmers and ranchers talk about the way they run their agency is something that would make a lot of our members' mouths water with anticipation. Even though a lot of you have been through those processes before and understand that it is maybe not the perfect solution to your problems, but at least it is a start because right now these agencies are famous for their inability to listen.

Hours of service—I am sorry, I did not catch your name with your dissertation about hours of service, but thousands of farmers operate commercial motor vehicles as an incidental activity in the operation of their farm businesses and the new hours of service regulation that our friends at DOT brought forth last year would have been hugely problematic for a lot of these people. One of the common features you will find in agriculture is that the work needs to be done when the work needs to be done. Otherwise, your liveli-

hood for an entire year is potentially at stake. And trying to make bureaucrats at the Department of Transportation understand this is an incredibly high hill to climb.

Craig, you talked about your problems with INS and I am amused that you cited our guest worker program as an example you would like to follow. We have been trying to fix ours for six years now. So your comments kind of reminded me of the bumper sticker you will see on cars from time to time, you know, "Don't follow me, I'm lost." You do not want our guest worker program or anything like it.

We have been trying to figure out a way to deal with our problem with a huge illegal labor force. At least 60 to 70 percent of the labor force that works in agricultural at various times of the year are people who are fraudulently documented. When INS comes to call, we find out that a lot of them are illegal. They do not wind up leaving the country and the INS does not deport them, they just wind up working for a guy down the road or for a packing plant or for a carpet factory or furniture factory or something like that. So we have this enormous game of musical chairs that goes on every time INS does any significant amount of enforcement activity in a region. And you do not really serve the underlying enforcement need to actually enforce the law, you are just forcing people to move around. INS can do a press release and look good in the local paper, the folks from the Federation for American Immigration Reform think it is wonderful and all you have done is you have created a massive headache for employers in that area.

One thing that nobody else mentioned and I will mention very quickly is our ongoing concern with the way the Environmental Protection Agency regulates the registration and use of pesticides which we now in the new politically correct age call crop protection chemicals. After the Alar scare in the 1980s when Meryl Streep suddenly became an authority on the effect of a relatively benign chemical like Alar on the bodies of young people, we later came to find out that Alar really was not all that bad after all, we have had an ongoing problem with this issue. We tried legislation in the mid 1990s to get EPA to recognize the need to use sound science rather than political science when they are figuring out what kind of chemicals ought to be registered and that was singularly unsuccessful with the last administration. We are making a little more headway with the current administration, but there is still a lot of work that needs to be done and a lot of this has to do with issues of simply the kinds of assumptions the agency makes. They are still in the habit of making the most conservative—and this is not conservative good, this is conservative bad—assumption they can make about how much exposure to something is bad as opposed to maybe a more liberal assumption. They will always default to the most conservative assumption they can make. What that means is that a lot of chemicals that have been used commonly in agriculture for years now are in potential danger of not being able to be used to perform vital functions that will allow you to cultivate and grow a lot of these kinds of crops.

So all these issues are—we feel like we are a very heavily regulated industry, even though a lot of people think that we are not,

and a lot of these issues amazingly we have in common with a lot of our colleagues in other industries.

[Mr. Little's statement may be found in appendix.]

Mr. PENCE. Thank you very much, Bryan.

Mr. LITTLE. And, by the way, I do not know what dum-dum forms are. I thought you were talking about a Form I–9.

Mr. PENCE. It was ding dong forms.

Mr. LITTLE. I thought you were talking about a Form I–9.

Mr. PENCE. We will have to find that out.

I think we only have to worry when the EPA has a problem with spreading manure in Washington, D.C. That will be a real threat to the nation.

Kevin Maher with——

Yes, go ahead.

Mr. WILSON. Bryan, I was chuckling back there when I heard Craig Brightup's comments today about the guest worker program. I used to be a member of the Essential Worker Immigration Coalition and I was chuckling a little bit, Craig, whenever you were talking about if only we could be like the ag worker program. I think at one time I have had back-to-back meetings with the Farm Bureau saying could you please reform the temporary worker program and then also from my friends at the Hotel and Motel Association about why we need to get a new program. So just as a staffer, I thought I would observe that we probably could all agree that more paperwork is not necessarily the answer to the worker shortage problem.

Mr. PENCE. Before I introduce Kevin Maher, and we have two more presenters, let me give you an idea of the lay of the land here. We are going to cut loose for lunch here at about a quarter after 12 and I am expected over for a vote and have a brief meeting. There would be no obligation that you would return here at 1:00. I know that Barry Pineles indicated to all of you that we would be done by 12:30 or 1:00 and you are all—particularly given the caliber of people in this room, I am sure you have appointments and commitments.

If you do not, please know that the chair will reconvene more of a dialogue session at 1:00 in this room and we will be here from 1:00 to 2:00 to really talk about and knock around in a more informal way what have been extraordinarily effective presentations.

And with putting that pressure on you, Kevin, not to blow the curve, with American Hotel and Lodging Association you are recognized.

## STATEMENT OF KEVIN MAHER, AMERICAN HOTEL AND LODGING ASSOCIATION

Mr. MAHER. Thank you. I appreciate the opportunity to be here and I will be brief.

I certainly want to echo a few of the issues that have been brought up. I do not want to re-plow the field, but the hours of service issues, the immigration issues, recordkeeping, comp time, flex time, blacklisting are all a concern. Although fortunately I did want to talk about one issue that has not been brought up yet and I think in my eight years with the association the number one

issue the largest source of confusion and complaints for our members is the Americans with Disabilities Act.

And I am not here to condemn the ADA, we have made tremendous strides in the last ten years as a result of this act, and we have no sympathy for any lodging property that willingly ignores the requirements of the ADA. In fact, there are about 40 million disabled travelers in the United States. That is a significant market that we cannot ignore.

But while there are pluses to the ADA, there are also problems and I am speaking primarily of Title 3, the public accommodations provisions. Essentially, it is a national building code and if you want to build a hotel or make an extension to your property, you can go to your local commission and get your building permits and your water permits and whatever permits you need, but you cannot get an ADA permit. There is no source you go to get an ADA permit or a certification to prove that you do comply or your property does comply with the ADA. And that is a concern particularly for smaller members that are not able to hire the attorneys that they need.

And we certainly know that what is a disability and what our members need to accommodate is an elusive and constantly changing target. Courts have been defining and redefining over the last few years what is a disability. I have taken phone calls from members who tell me that they had a guest checking in at that moment at the hotel who has a dog with him and the guest is obviously not blind and the hotel has a no dog policy, but the guest is claiming that under the ADA they need to be allowed to bring in this dog and they want to know does the ADA requirement, and it does, and is there any way to prove that this is in fact a comfort or service animal as defined in the ADA for a disability of a guest. And there really is not. There is no way to determine if this is a service animal or if this is somebody traveling around with their dog and just claiming that it is a comfort animal.

There is an obvious concern with litigation. There are a number of properties that have been hit with drive-by lawsuits, certainly you have heard of a number of those, and it is a particular concern for the smaller members who cannot afford the expensive attorneys that someone like Clint Eastwood can to fight these in court. Our members have to settle as quickly as they can, do what they can, and they need some help in that area.

A particular concern is the ADAG and the organization that begins the process of setting the ADA standards, is undergoing changes. They are looking at how they can implement technical corrections in the ADA. What that is going to do is that at some point it is going to be handed over to our members to comply and it is going to start a new round of lawsuits because everything is going to change a little bit and our members will not know what the new rules are versus what the old rules are and attorneys are going to show up saying you are not in compliance, here is a lawsuit.

I will stop right there, that was the one issue I wanted to talk about today.

Thank you very much.

Mr. PENCE. Thank you, Kevin. Appreciate your patience today.

Being new to Washington, terms like "comfort animal" and "service animal" are just not part of the world I used to live in, so I just appreciate that education.

Doug Greenhaus with National Automobile Dealers.

Thank you for being here. Proceed.

**STATEMENT OF DOUGLAS GREENHAUS, THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION**

Mr. GREENHAUS. Thank you, Mr. Chairman. It is our pleasure to come today to mention a few issues, fortunately none of which have been talked about today. That is not, of course, to say that we—I think I have heard about at least a dozen issues that are equally of concern to our industry, but we do have a couple that have not been mentioned, two of which are specific to our industry, one of which is a more general nature.

First is one that is due for compliance July 1st of this year, less than a week away, I believe, now and it comes from the Gramm-Leach-Bliley Act of 1999. Now, privacy, of course, is a big issue. We have heard about the medical privacy issue mentioned a couple of times today. Gramm-Leach-Bliley, of course, is well intended. We do not question the goals of that act. Unfortunately, the way the Federal Trade Commission has implemented that rule has left things a little short and our members are truly struggling to meet the requirements set out in the regulation which is found at 16 C.F.R. 313.

Any retail business significantly involved in financial transactions, and by that I mean everything from running a credit report to taking credit applications, doing leasing, it would apply, of course, to not only car dealers, to equipment sellers, to the sellers of appliances, so it is a fairly broadly applicable rule. All of these industry folks are trying to struggle to meet this rule. Now, to the agency's credit, they are trying to be responsive. They are overwhelmed by the difficulty that industry is having. At the same time, they do not have the resources perhaps and have not made any attempt to issue compliance assistance materials for small business and I think it is clear that their rule unduly affects small business as compared to large business.

So what is the solution? I think the solution at this point, given the rule is taking effect the first of next month, is for your committee perhaps to exercise some oversight authority some time later this year and see how it is working out, see what impact it has had, see perhaps how in the future the rule can be amended to reduce some of the burden that it clearly has on small business.

The next two issues I want to mention are dealership specific, so most folks can probably tune out a little bit.

The first is known as the dealer certification requirement. It comes from EPA. It is 40 C.F.R. 85.2108 and it dates from 1981 and it comes out of the 1977 Clean Air Act amendments. Very simply, it is an outdated rule. It does not comport with the 1990 Clean Air Act amendments, it does not comport with the newly issued Clean Air Act rules for motor vehicles and the language unfortunately that is mandated by the act, the Clean Air Act, Section 207(g), just does not make sense any more. It requires that every single new car sold in this country or leased have this form pro-

vided to the customer which the customers do not understand, which the dealers do not quite understand and it really is just one of these things where you mentioned at the outset you can draw a red line right through it. The solution is elimination.

And lastly the insurance cost information requirement. This is a NHTSA rule. It stems from the Motor Vehicle Information Cost Savings Act, Section 201(c). It dates back to 1972, another outdated rule. Someone mentioned earlier the gap between the statute and the regulation of 12 years, the gap here was 20 years. The rule was not issued until 1993 and, again, it resulted from a lawsuit, Consumers Union v. DOT. The agency has no more interest in this rule being on the books than we do, the regulated community, and they resisted for some 20 years, as I have said, to its issuance. But unfortunately it is on the books, is it of very little utility, requires that insurance cost information, information describing the historical collision experience of a given model of vehicles be provided in booklet form at the point of sale upon request. To my knowledge, I have never run into a dealer who has had a request from a single consumer for this information. So it is of admitted limited utility, according to the agency. Again, the solution is elimination. Unfortunately, it is statutorily mandated under Section 201(c) of the Motor Vehicle Information Cost Savings Act.

Mr. PENCE. Thank you very much, Doug.

Lastly, Charles Maresca with Associated Builders and Contractors.

Thank you for your patience, Charles.

**STATEMENT OF CHARLES MARESCA, ASSOCIATED BUILDERS AND CONTRACTORS**

Mr. MARESCA. Thank you, Mr. Chairman. I was going to begin by saying I see my time has already expired. We will submit a more extensive comment for the record.

The blacklisting regulations are, of course, a problem. Ergonomics, ergonomics particularly in construction a problem. Paperwork, paperwork reduction. Sound science, especially with regard to EPA and OSHA, sound science and reliable data as well. And also small business outreach by EPA and the agencies. E.P.A. simply seems unable to find small businesses and when they do find them, do not know how to contact them. That is a problem that the committee might take a look at.

We wanted to raise the issue and in two regards. One is under the Davis-Bacon Act, the definition that the Department of Labor uses for helpers is unnecessarily restrictive. We think that that regulation really cuts out a lot of important entry-level training opportunities on public works and we think that that regulation needs to be looked at.

On the apprenticeship and training side, we believe that a new look, a fresh look at the apprenticeship and training regulations would produce regulations that allow for new training programs. There is a need in our industry and other industries as well for expanded training programs and new approaches to training and we think that a new look at those regulations would produce new opportunities, not just for training programs, but also for entry level workers.

Mr. PENCE. Thank you, Charles. I appreciate your brevity. I am happy to inform you that we are already planning a hearing on the Wicker bill on apprenticeship and training in this subcommittee.

We will look forward also to discussing, for those of you that can reconvene after 1:00, other potential hearings, there have been some formal suggestions for hearings, but that is kind of the next part of the conversation we would like to have.

Craig, do you have a quick question?

Mr. BRIGHTUP. Mr. Chairman, may I make just one brief comment? I am not going to be able to come back and I certainly do not want this to sound offensive because I work with everybody in this room and we get a lot done, but I wanted to get back to the guest worker program. Our association and I personally and the Essential Worker Immigration Coalition are completely aware of how unhappy the agricultural community is with the guest worker program. So when I spoke of that I was speaking of the fundamental concept which has at least been accepted at its base level of allowing foreign nationals to come into this country perform certain jobs.

And just one other comment on what Bryan had to say about the fact that when the INS comes in, like it did with our member in Portland, and says half of your workers have to go. When our member asked him if this serves no purpose, these people are simply going to take jobs with my competitors, the INS person, the regional director, said, yes, we know, we call this technique reshuffling.

Thank you.

Mr. PENCE. Thank you, Craig.

There are a couple of other people that wanted to add to the discussion. I am going to go ahead and get off to my vote, but Barry will go ahead and hold forth here until 12:30, if there are other clarifications for people that cannot be with us at 1:00.

Let me say this has been enormously educational for me and I am extremely impressed with the quality of individuals that are here and I am very honored by that and know that you have provoked the chair to even a more energetic approach to the agenda of this subcommittee by your remarks. And those of you that can return at 1:00, we will look forward to a more informal conversation about all the issues that you have raised. But if there are people that want to add who cannot be here at 1:00, Barry will take the chair and I will see some of you back at 1:00.

Thank you all very, very much.

[Applause.]

Mr. PINELES. Before people leave, Craig, if you can call me about a hearing on Mr. Wicker's bill that Mr. Pence mentioned. Call me because I would like to arrange a hearing some time in July for that. Yes, you, too, Loren. Yes. And Charlie and John. If all the construction contractor people can call me about that,that would be great.

Now, I know Rosemary has a plane to catch——

Ms. MUCKLOW. I just wanted to thank——

Mr. PINELES. Rosemary, you need a microphone.

Ms. MUCKLOW. Oh, I am sorry. I just wanted to thank both Robert Green and Betsy Laird for their industries' concomitant com-

mitment to producing safe food. They work very hard to train their people to do the most effective job to kill ugly organisms, microorganisms. Things like salmonella, e-Coli 0157H7. We cannot regulate them out of business. We can set up systems to destroy them before that food is served to consumers and they are excellent partners in accomplishing that activity and Betsy and Robert both had comments this morning and that really fits.

Thank you very much. Much better than government regulation.

Mr. PINELES. Jeff or Jenny?

Ms. KRESE. I wanted to add one small point which is actually kind of a big point on recordkeeping. As you all know, the rule is set to go into effect and to be implemented January 1, 2002. Of course, further, as you probably are aware, the states and companies would need six months to come up to speed with the current recordkeeping rule if it is to be implemented by January 1, 2002. That six-month deadline starts on July 1st, so just in about a week and a half to two weeks. I meant to offer this earlier, but if the chairman or anyone on this subcommittee, any member on this subcommittee, can weigh in with the Department of Labor to just simply ask for a stay of the rule for a very short period of time while these issues are getting resolved, and they are getting resolved, we feel, through our discussions with OSHA, that would be very much appreciated. If it is not stayed within the next week or two, it will become implemented in January.

Mr. WILSON. Does anybody know, is there a recordkeeping letter going around on the Hill on recollection?

Ms. KRESE. There is not. I have just personally been making contact with offices to tell them about it and this roundtable was another good opportunity. My gut feeling is that they probably will issue a very short stay, but we have not gotten that confirmation from them yet. We have written them several letters asking for that clarification and we feel that they will probably make a decision—well, they have to—in the next two weeks, but probably this week.

Mr. WILSON. That is a really good action point for us to take away from this today, Jenny. Perhaps Chairman Pence could circulate a letter to all of his colleagues asking them to sign a letter on this very point because I think if we had 60 days or 90 days to help with the communication that is going on between the regulated community and OMB and OSHA, I think that would be really helpful, so thanks for bring that up.

Ms. KRESE. We included something in our packet, actually a letter we just sent over to the department again this week that you can probably gather some information from, but if you need anything further, I am happy to help.

Mr. WILSON. Excellent. Another follow-up on that point, I just wanted to say that on the recordkeeping issue, if you have statements, if anyone here has a statement, that we do not have, we want to make sure that Barry or I have that before you leave so we can be sure that that is included in the official record of what has transpired today. I just want to add that little reminder.

Thanks, Jenny.

Mr. PINELES. Does anybody have any comments, other comments that they need to break before we break for lunch?

[No response.]

Mr. PINELES. Obviously everybody wants to eat lunch before we make more comments.

All right. Well, under the authority granted by the chairman to me, I declare this summit in recess until 1:00.

[Recess.]

Mr. PINELES. I think we should probably get started. Yes. Would people please sit in front of your name tags? That helps the court reporter handle what is going on here.

Since the chairman has not returned, I will take the authority he delegated to me to reconvene the regulatory submit.

Let me start off by asking a sort of generic question.

We have heard lots of different regulatory problems, we have heard about Endangered Species Act issues, we have heard about Federal Trade Commission lending rules, Federal Motor Carrier Safety stuff, EPA issues, OSHA issues.

Let me ask for the people remaining, without going through each individual statute and changing the individual statutes or without using the Congressional Review Act, which given the changes in the Senate probably will not be happening, what sort of process changes can you envision that would apply across the board that would help the agencies recognize small business problems and not promulgate really problematic regulations?

Who wants to start? Come on, somebody volunteer.

Mr. MAHORNEY. I will. Bill Mahorney, American Bus Association. I think probably a theme that is shared by everybody in here is economic analysis, proper economic analysis. I always think especially with respect to the Federal Motor Carrier Safety Administration, they just do not put the resources into that area and it is critical for us as small businesses. So I would say that is my number one, spending a little more time and effort in advance to do regulatory analysis.

Mr. PINELES. Amy.

Ms. BLANKENBILLER. To just dovetail on what Bill was talking about, I know we have talked privately about these MACT standards. Publicly, I raised them again today. You know, time and time again we meet with the agency and they say, oh, there is only going to be 20 foundries in the United States that are going to have to meet the requirements of this particular MACT standard, but they put no baseline requirement, so every single foundry has to do something to get out of the standard or prove that it does not impact them, and we go back and we say your economic analysis that it is really not that burdensome or it really does not cost that much is completely skewed because they are only looking at the 20 or 30 facilities that are actually going to have to follow the steps within the requirement of changing control technologies or changing processes, but they are not accounting for what they have to do to determine if it affects them, what they have to do to hire some consultants in most facilities when they do not have somebody who works there and the steps they have to take to keep themselves out, all those monitors, recordkeeping and those kinds of things.

And you go to talk to them and it falls on deaf ears because they say, oh, we have a court deadline. Or NRDC is going to sue us. And

so I think—believe me, I am the last person to be on EPA's side, but they get pushed up against a wall and at the same time they are getting sued.

So we are trying to help them with economic analysis and they are like but we do not have time or we cannot do it. So there is some legitimacy to why they are having problems.

Ms. SEEGER. Barry, is it all right if I follow up on what Amy was talking about?

Mr. PINELES. Sure.

Ms. SEEGER. All right. Do you still have the chair?

Mr. PENCE. Not any more.

Ms. SEEGER. Well, Congressman, we were talking about EPA's hazardous air pollutant program and this is one in which EPA has to put out over a ten-year period hundreds of rules and they have backed into a situation where they have another year to go in this ten-year program and they still have 50 rules to go. And those 50 that EPA has to finish are rather dreadfully written, though when you try to go into the agency and ask to have a meeting on how this would decimate small businesses, EPA says I do not have time, I do not have time for your.

When it was a problem of their own making—in our instance six years ago, we said half of our folks are small businesses and we would like to explain to you some opportunities where you might be able to minimize the impact of the rule, and they said, well, we do not really know what the rule is going to be right now, so that would be a waste of time.

And so then the rule gets further and further into the mind set of the mid-level people that are preparing it and now we are at a point where EPA is saying exactly what they are saying to Amy, which is that we are bumping up against this statutory deadline when we are supposed to get all of these rules out by a date certain. In this instance, it is not the end of the world sort of deadline in that basically you just have to get a case-by-case permit, but up front early on participation rather than the gaming of the system here, which is that EPA will offer up the excuse that we cannot really listen to your concerns now, we do not want to convene these panels because they take forever, and we are very sorry.

I do not have the sympathy that Amy has about——

Ms. BLANKENBILLER. It is not sympathy.

Ms. SEEGER. Because for years, if you go through and read what they have asked the Congress to implement this program, they will say they have enough money, but then when you go to the program office and ask them to do some differential analysis or risk assessment or something just a little bit out of the ordinary, they will say, my God, we do not have the resources to do that. So they are speaking out of both sides of their mouths.

And with that, I yield the floor.

Mr. PENCE. Let me jump in. I appreciate very much Barry getting the conversation going and let me thank you all for sticking around. I have an agriculture committee caucus, so I will be leaving in about 30 minutes, but I really wanted to encourage less formality at this point and feel free to interrupt even the chair if you have a thought or a point.

Maybe we could just start right there, Arline.

I mean, that seems to me to be a very difficult issue for you and for your membership to deal with, if you are going to agency officials and they are essentially saying they are understaffed or they are incapable of meeting the deadlines?

Ms. SEEGER. They are understaffed and over the course of the years it is too early to come talk to us now because we do not know what you are going to do, then we have lost our contractor money so we are in a holding pattern, and then you just learn because you are part of a group that is sort of—this group analysis that the Small Business Administration convenes every two months, that is where we learn that these MACTs are about to come out of the agency.

And so that is the participation—or there has been no participation by the small businesses.

Mr. PENCE. See, I would be very interested—and Barry and I can talk about this. I think my vision for the subcommittee is that we are going to take what we got from this summit and then collaborate with the members of the Subcommittee and develop an agenda that is really reflective of the priorities that we heard here today. But phase one would be let us add definition by picking a subject area per hearing. Then the next phase is what I like to call the confrontation phase and that is bringing administration officials in, and we have been assured by the White House a couple of weeks ago that we will have access in a cooperative way to very high ranking officials in the relevant agencies to come and talk to us about this. But it seems to me that tyranny by inefficiency is still tyranny and I am very intrigued about Barry possibly developing a series of hearings on simply how inefficiency wages war on small business.

Ms. BLANKENBILLER. Congressman——

Mr. PENCE. Yes, go ahead.

Ms. BLANKENBILLER. Sorry. I am the first one to interrupt the congressman.

Mr. PENCE. Yes. Please.

Ms. BLANKENBILLER. One of the things, while we are being more informal and speaking a little more candidly is talking to a top ranking official at EPA is going to—it not going to be helpful because while——

Mr. PENCE. Who do we need to talk to?

Ms. BLANKENBILLER. You need to talk to the mid level people at EPA because, for example, in the air office, it took us two years, seven letters and I do not know how many phone calls to request meetings with top level people at EPA during the time we were having problems with the secondary aluminum MACT issue. The staff was telling us one thing, as the rule started going up the chain of command, political influences were coming down from the top, technical expertise or decisions or whatever was coming up from the bottom, and they were reaching this log jam.

Mr. PENCE. So you are saying it is more—it could have more short-term impact. I mean, is that true around the room? If we brought in more mid-level people that have more direct contact with your membership in resolving these issues?

Ms. BLANKENBILLER. And I would bring them into your office and not a hearing because the only way you are going to get testimony

at EPA—I worked at EPA during Bush 1 is to get it approved through the OMB process and all that kind of stuff. Even when John Sites testifies, that is official EPA policy that goes through OMB. But if you sit down and talk to John Sites in your office about some of the problems of managing the technical staff, he is going to give you a much more candid response to exactly—potentially—and then you can ask the higher level officials some of those suggestions.

Mr. LEITER. One way to accomplish that would be to have a briefing. My name is Jeff Leiter. I am counsel for the National Association of Convenience Stores.

Mr. PENCE. Oh, hi, Jeff. I did not think you were here before.

Mr. LEITER. I was a back bencher.

Mr. PENCE. Okay. Well, thank you. Thank you.

Mr. LEITER. John Eichberger had to go back to Alexandria and asked me to fill in for the rest of the session. I appreciate the opportunity to be here.

Typically, what I have found, one example has been in the underground storage tank area where it is just that detailed where they have to bring the staff over to explain to members of Congress or their staffs just how the program operates. So to the extent, let us say, you had this effluent limitation guideline or the MACT issues, having those people come over and say, all right, tell us how this works, and then raising these kind of questions is probably the proper context.

Mr. PENCE. Are you talking about in a hearing context or are you talking about in an informal context?

Mr. LEITER. No, no. Just an informal session.

Mr. PENCE. Okay.

Mr. LEITER. Because otherwise, you are not going to get the testimony.

Mr. PENCE. That is saying—and you cannot insult a freshman member of Congress, so what you are saying is then I say in that kind of a meeting, I say, well, gee, that is interesting how that is supposed to work because what I am hearing is something else.

Mr. LEITER. Otherwise, the staffer who has been working on the science on this for the last two years is either not going to be allowed to testify or they are going to write it for him.

Mr. PENCE. Yes. That helps a bunch, actually.

Mr. LEITER. I kind of liken this to a Whack-a-Mole game where there is somebody there that knows what the answer is and, you know, people are doing this. And it depends on the rule what is going to pop up. They may do the science piece of it, but when you get to the economics, let us say, on this diesel desulphurization rule where we are talking about having to install additional tanks, the economic analysis says, well, I am going to amortize that cost over 10 or 15 years. Number one, I cannot get a loan from the bank for that long period of time and the IRS depreciation period is five and a half years when I am going to get rid of it after four. But they just gloss over that when they do this financial side. So that is the particular Whack-a-Mole on that.

Mr. PENCE. Right.

Mr. LEITER. You go to any other rule, you are going to find something else that pops up, it is just a defect.

Mr. LUZIER. Mr. Chairman, Mike Luzier with Home Builders. I endorse the comments about the process changes in the economic analysis that is done. Endangered species is one even where that is done honestly that—we are groping with this right now in light of a 5th Circuit opinion which said, Fish and Wildlife Service, the way you have been doing economic analysis is invalid, go back and do it right, so they have asked us——

Mr. PENCE. Is that the Solid Waste Agency decision?

Mr. LUZIER. No, that is in wetlands. This is an ESA. And it is significant, it dovetails to the critical habitat thing. Congress clearly said in the ESA economic considerations are not relevant when we decide to list a species, it is a purely biological decision. And we agree with that as home builders, we think that should be a biological decision. What the Congress did go and say is when you designate critical habitat, though, that is an economic decision and we want to make sure that the costs do not outweigh the benefits.

Well, the Fish and Wildlife Service always says—and there are two outs to designating critical habitat, it is either indeterminable, which almost all of them are, or it is imprudent to do so, which we would think would be the only out to say, well, the economic costs outweigh it. We have some very good economists and what they are saying is the status of economic theory really does not allow us to put an objective number on what 20 golden cheek warblers is worth. It is a normative decision, it is a value judgment. And what the Fish and Wildlife Service is struggling with is saying but we need an answer, at what point do the scales tip. We support the economic analysis, but it is not going to solve all of the problems that are out there.

One of the things in answering your question or picking up on your idea that might be helpful is if we could think of a way to force the agencies and applicants, too, to do what they say they want to do and that is better science.

If I could give you one example, EPA is concerned about——

Mr. PENCE. Force the agencies?

Mr. LUZIER. To do better science. Let us do that.

They say, for example, under the ESA we are only required to go with best available data and Congress unfortunately did not say but that has to be at least credible data. Many of the listings are based on data that would not pass muster at a Master's level thesis, yet the Fish and Wildlife Service has an ironclad defense: Congress said just give me the best that is out there.

In one case, the petition to list the golden cheek warbler was based on a one-paragraph letter from an amateur naturalist. And we fought that. There are billion dollar consequences that flow from that and it does not seem reasonable to us.

One of our frustrations, this is my closing point, not to dominate, is that as we talk to Governor Whitman about our willingness and desire to do this effluent limitation guideline process correctly, our president committed, we will go out and educate the members that you need to do this. If we are impairing water quality, we want to certainly do our share to fix it.

The immediate response is, well, geez, we do not think we have the money, yet I can point to probably—if you gave me a day, a billion dollars worth of expenditures EPA has made where Con-

gress has never mandated them to do anything and it seems to me that an administrator of an agency ought to at least attend to their statutory obligations before they attend to discretionary items. So that is an idea.

They funded this major smart growth effort out of EPA, which has been okay, but it makes it hard for business people who are then told we cannot do good science on the listing end, but you had better do definitive science on your end when we are going to approve a mitigation plan, you had better give us more. And so many of our guys feel that there is a certain level of disingenuousness to the debate and we would think in a multi-billion dollar budget—if it is a million dollars, that is not much.

Last word. There is hope because if we can truly get the regulatory discussion down to an honest technical debate, we can often make good decisions. I will give you one example of a success story.

When EPA proposed its total maximum daily load regulation (TMDL), it was very controversial. One of the requirements they were going to impose was that for any impaired level, any impaired stream, that our industry was going to have to remove one and a half times the amount of pollution it was going to pose. We were going to have to correct other people's problems.

We had our economists and our Ph.D. biologists sit down with EPA's economists and they jointly concluded that that cost was going to be $5000 per lot. EPA concluded it was not justified and eliminated it from the final rule.

That was because there was an honest effort on both ends to get the right answer. We told them if the numbers show that this is cost effective, then we should do it. It turned out not to be cost effective. I think the difference was when they came to the table, they, the EPA, there was not a preordained outcome in mind. It was truly saying how do we find the right answer? And then when we got the number, we did that. Last year, that saved housing consumers $6.5 billion.

Ms. BLANKENBILLER. Barry, the other thing I want to add into your general question.

Before you got here, Congressman, he was asking us what kind of general ideas do we have to make the process better.

I would suggest a more limited role for the Office of Enforcement or a more cooperative role for the Office of Enforcement at EPA. We were in the process of working on the iron and steel MACT standards. We had four United States foundries that were willing jointly with EPA to test the stacks to find out what emissions were there, the levels and what we needed to do. The Office of Enforcement, however, said if you found one thing out of whack in those we are going to fine you, we are going to give you a notice of violation. And we said can't we get a waiver? Can't we get a 30-day waiver, a 90-day waiver or something because we are trying to get the science for you at an operating facility rather than having some computer-generated modeling that they use most of the time.

And they would not do it. So we had to test in a facility in Mexico and it is not necessarily representative of the same way that we operate in the United States and it makes the data not necessarily as good as we could have gotten if we did it in the United

States, but the Office of Enforcement stood right in the way. And we have seen that repeatedly.

I do not know if you guys have seen it in other industries, but we just thought it was absolutely ridiculous when we had four facilities willing to do it, but EPA basically said we do not want it, we do not want your information.

Mr. PENCE. I am involved with some legislation involving 90 days to cure with regard to OSHA, but it seems like what I hear you saying is how about a different culture in the whole regulatory agency structure.

It is my experience, having grown up in a small business, Amy, that there are very few small business people that just are not interested in getting it right and if they get it wrong, they will fix it, pay the lawyers and pay the fee, whatever we need to get it done, but what I heard again and again and again today is more like a gotcha game in the regulatory state which seems to me to be really antithetical to what we want to do in terms of the mission of the original legislation, which is to achieve the goals of the legislation and not to be collecting fees and fines.

Mr. LEITER. Since you mentioned legislation, if I could just put out a bold suggestion, and it is something that I have mentioned in meetings that the small business community has had on an ongoing basis with the deputy administrator of EPA, one of the continuing refrains we have is, well, we have the statute and many times the administration is proposing amendments to the statute or it is being reauthorized and they are looking to try to fix problems with the statute. And we constantly get, well, we do not have any flexibility here to deal with a small business issue because of Congress.

And EPA has made a decent effort, it has not been perfect by any means, to do outreach to the small business community. The one area I have kept suggesting is the legislative office at EPA. If they are developing a proposal to respond on brown fields, Superfund, whatever the issue may be, why not have a discussion with small business before that legislative language comes up here to the Hill?

Many times then we are having it come up to you or your staff and say there is a problem here and to the extent that there is deference paid to the agency's expertise, we get some bad laws written that then we have problems trying to deal with the agency when they have to write the rule. If there is some way to encourage the agency, particularly in the legislative shop, to have those kind of discussions before they send something over here and they can look you straight in the face and say, yes, we have talked to a lot of the players, it might make things a lot easier.

Mr. PENCE. Doug, you are being awful quiet.

And, Bill, I do not want to exclude you guys, having waited the longest to speak this morning.

Mr. GREENHAUS. Just to pick up on what Jeff was saying, again, to be bold, I always thought it would be great if there was some way to have a uniform process up here on Capitol Hill to review in some fashion—I do not know who would have this responsibility—the potential small business impacts of most pieces of substantive legislation. Only so many things are going to come through your committee and even fewer your subcommittee and get a good

look at from a small business perspective, but if we could have—because it all starts up here. The agencies claim their hands are tied and to a large degree, unfortunately, they are tied. Not as much as they say, but there are certain things that are done up on Capitol Hill with respect to time constraints, with respect to substantive requirements where perhaps it was not thought completely through what the small business impacts would be, almost a scoring, if you will, of legislation with respect to its potential small business impact, that could be later on when it goes down to the agencies.

Mr. PENCE. You made a comment that I thought was one of the most provocative things that was said all morning and I wanted to ask you to elaborate on it for my benefit and for the benefit of the staff, but you said that with regard to dealer certification under the EPA that there are regulations that do not comply with the current Clean Air Act, but these are regulations and certification requirements that your members have to meet in addition to other regulations or just—I mean, it may sound like a dumb question and it probably is, or maybe naive, but——

Mr. GREENHAUS. Just to review quickly, it is a piece of paper that is mandated very specifically, I do not know if it actually spells out what size it has to be and what font, although some of these rules do, believe it or not, but it is a form that is handed out to consumers that has language in it that is inconsistent with both the 1990 Clean Air Act and with the emissions regulations promulgated under that.

Mr. PENCE. So the language in the form is inconsistent.

Mr. GREENHAUS. Information given the consumer is contrary to the language of the statute. And it was—originally, it made sense, going back to 1977, the so-called tier 1 emission standards, but it no longer makes sense. And I think there are a lot of these provisions that still exist in the laws and the regulations where someone just has not taken them off the books.

Mr. PENCE. Okay. Yes. That was very—and then the NHTSA rule. The legislation was 1972 and they did not promulgate the regulation until 1993?

Mr. GREENHAUS. 1993. Right. And the idea there is that they could not find anything that they thought would satisfy the intent of the legislation, which was to provide consumers with useful information regarding the crash worthiness of motor vehicles they were going to buy.

Mr. PENCE. So that lawsuit created a fact circumstance and some legal decisions.

Mr. GREENHAUS. Right. And they just grabbed something and threw it in just to satisfy the court.

Mr. PENCE. Is there any inherent value in terms of ensuring that regulations reflect legislative intent? Does a time table or a time limit or deadline for the promulgation of regulations make sense? Does it exist?

Ms. BLANKENBILLER. They exist. There are time lines, there are requirements. I mean, just like the MACT standards.

Mr. PENCE. In the enabling legislation.

Ms. BLANKENBILLER. The Clean Air Act specifically identifies certain categories that you are going to have an air standard promul-

gated within five years and certain categories that are within 10 years and EPA just willy-nilly has a million reasons why they do not meet certain things.

And I will tell you, if anybody asks the EPA to justify something, they will. They will figure out a way to do it.

Mr. LUZIER. We have this problem in spades in the Clean Water Act and in the Endangered Species Act. One of the down sides of hard deadlines in a statute is they provide very easy targets for litigation for those that would want to stop rational progress. ESA, we have one environmental organization called—they have renamed themselves because they were getting such bad press, but they were called the Southwest Biodiversity Institute or something. All they did was litigation. And the only litigation they brought was the statute requires critical habitat designated within a year, you are one year past, that is it. It is a very easy case for a judge who has a heavy docket, geez, we have that in the Clean Water Act, these standards were to be out at such and such a time.

There are often—I do not have a solution, sir, but there are often, at least on the Clean Water Act side, legitimate reasons why EPA said we need a little bit more time. It was very cumbersome, of course, to come back to Congress, open up the Clean Water Act with all that is attendant to that. So we have thought about that. We see it often in state legislation where we often want a permit review deadline. The reason they are ineffectual is the agency says, all right, you can either get denied or you can give me another month. And being business people, we say take your time.

And so my experience has been under the environmental statutes those have hurt us more than they have helped us.

Ms. SEEGER. But in some instances, the deadlines are not as draconian as EPA. They only look at the consequences of the deadlines from their narrow point of view and, again, this hazardous air pollutant program or MACT program, EPA is given a certain amount of time to regulate 200 industries, if they fail to do it by a date certain, the world does not come to an end, though EPA thinks it does, and so that is why they are rushing to promulgate bad regulations.

The statute has what I would call a soft hammer, which is that rather than have a rule go out and be in effect, then the states on a case-by-case basis make the control technology decision in a permit. But EPA is ignoring what I think is a rather sensible part of the Clean Air Act, which is to just let that hammer fall because EPA in its arrogance thinks that the states cannot possibly make control technology decisions and so that is why they are going to have lousy rules on the books, which was an artifact of their own inefficiency, rather than let the statutory scheme take place. So there are times when—if a hammer is not bad, then it makes some sense because it does stop—they are put in there to stop the gamesmanship where strong industry groups will come in and just comment a rule to death.

Ms. BLANKENBILLER. But one thing to elaborate a little bit on what Jeff said is that——

Mr. PENCE. We will go right to you next, Bill.

Ms. BLANKENBILLER. Oh, I am sorry.

Mr. PENCE. Excuse me, Amy.

Mr. MAHORNEY. That is all right.

Ms. BLANKENBILLER. Is that the small business community does sit down—or at least did during the Clinton administration and before that was Bush—on a quarterly basis in face-to-face meetings with the deputy administrator and the small business representatives, most of us who are here today meet with the deputy administrator and have an open forum. You can put anything you want to on the agenda. And, personally, in the foundry industry, we have put several things on the agenda and have seen action because the deputy administrator has it on their radar screen and somebody has to be accountable.

So Jeff just mentioned it and I wanted to let you know what that was.

Mr. PENCE. Okay. Thanks.

Bill.

Mr. MAHORNEY. One thing, talking about all these things is we in our industry have issues with all these things that are even more fundamental. There is not a definition at DOT of what a motor coach is. We are bus. Period. So are school buses, so are transit buses. So everything starts with bad data to start with.

The National Governors Association accident data that the law enforcement officers use on the road, if there is a fatality accident, they check bus, we do not know. We do not know unless we find out whether it is a school bus, a transit bus or a nine to 15–passenger van, which sometimes they classify as a bus. So we have even got fundamental issues down at that level for basic data that is needed before any of this can occur. And I will, to give National Highway Traffic Safety Administration some credit, about a year ago they did at our urging convene a group to try and come up with these definitions and, of course, through the Commercial Vehicle Safety Alliance and some other groups that we are involved in, we submitted some sample definitions that said here is what we understand these things to be, but they still have not moved forward and until these fundamental definitions are completed, the data is never going to be any good. We can study it forever, but unless you have that core fundamental definition, it is always going to be a problem and we are always going to be shooting at them then.

Ms. BLANKENBILLER. But that is just like we heard with the transportation of being short haul versus cross-country, that is what our problem was under the secondary aluminum MACT. They thought aluminum foundries were some other kind of business. You have four or five kinds of buses and that is them doing their homework.

Mr. MAHORNEY. Exactly. It is fundamental.

Ms. BLANKENBILLER. Right.

Mr. MAHORNEY. Fundamental.

Ms. BLANKENBILLER. And we got surprised by the secondary aluminum MACT standards because when the advance notice of proposed rulemaking was put in the Federal Register, it was for a different industry. We never had the idea it would affect us. Same thing with different classifications of buses or different classifications of delivery system.

Ms. SEEGER. Thank you, Amy.

I am going to head in the direction of the agricultural committee, but I really want to encourage you to stick around. Obviously, you

have the majority counsel and also the ranking member's staff director here and your input is very, very valuable. I appreciate you coming back after lunch.

I want to tell you that I am really looking forward to circling the wagons with all the members of the Subcommittee and coming up with a real set of goals and an aggressive series of hearings and you will be hearing from us about participating in those and seeing if we could not get your membership to be in and to be a part of that.

I just want to thank you again and I will yield to Mr. Pineles to run the rest of the meeting.

Mr. PINELES. Thank you. I actually want to follow up on a question that Mike had that sort of relates to sort of how people do economic analysis and I think this applies both to EPA, the Fish and Wildlife Service and lots of other agencies.

For example, one of the things that I have seen in the past with respect to the Fish and Wildlife Service is that they claim that the economic impact of designating critical habitat really is not the designation of the critical habitat, it is the actual listing of the species, so that their economic analysis starts from the basis that we are more worried about the so-called benefits of whatever we are doing than we are worried about the costs. In other words, that their economic analysis starts off with a bias.

Is that something that people around the room see at EPA, at Federal Trade Commission or lots of other agencies? In other words, they want to analyze what the benefits are and they are not so much worried about getting an accurate analysis of what the costs are because they are regulators, that is what they do.

Mr. LUZIER. That has certainly been our experience, not only under the Endangered Species Act or the Clean Water Act, many of the technology standards under the Clean Water Act require consideration of achievability and costs.

You probably know, but just to reiterate, that incremental approach under the ESA has actually been the way they have rendered away the economic analysis. The 5th Circuit just threw that out and said that is not the way the ESA is intending this to be done. So I think there is an increase certainly in our industry and hopefully in the courts there is an increased sensitivity to getting a fair assessment of costs.

Let me go back to my TMDL example. We have had great success in that case where we could have an honest discussion about what these costs are when there was not a preordained outcome in mind.

Ms. SEEGER. We were given a three-quarter page summary of a rule in November which has a 25 foot docket, so that is the level of small business participation we have had and we have been given incrementally spreadsheets that would purport to describe the cost, the capital cost, the operating costs, of this, that and the other thing. And they were replete with errors. And one of the problems is that in the air program, anyway, there is no look at, let's say, the lime industry or even what preceded it. These default assumptions that EPA says in terms of a scrubber being put onto a lime plant may have been transferred from a study of a utility two decades ago. So their underlying—just their unit cost informa-

tion is abysmal and outdated and you marry that up with a total unfamiliarity with how your particular people make their product, and then carrying that forward, that is simply cost, unit cost information, then you get into the impact analysis, which is a much more complicated thing, and EPA will say that, well, ideally, we would measure these costs, as one of the speakers spoke about this morning, in terms of the profits and whether this organization's profits will be able to carry these costs.

But EPA says that is entirely too complex. Well, they have never asked our industry what the profits are, so it might be complex, but since they have never even posed the question, they are never going to get any expertise in taking a look at what probably is the sensible way to do an impact analysis.

So then they use this sales test approach, but what Damon was getting at, even there it is rather perverted because lots of small businesses are in more than one line of business. They come down through families. And so rather than compare the cost of the rule to the part of the business that is being affected, the compare it to the revenues of the entire enterprise. And they are quite—they are not even ashamed to advance the principle that the small portion, the profitable part of the business, will continue to subsidize in perpetuity the losing part of the business. So they will say that a rule is not necessarily going to wipe out this small business because the profitable side of the business will subsidize it. So their whole methodologies to do impact analyses just do not mirror how American businesses operate and that, I think, it would be delightful to have EPA explain across the board how they do impact analyses.

Mr. PINELES. We will go to Doug and then we will go to Jeff.

Mr. GREENHAUS. To sort of build on what these folks have been just mentioning, there is a crying need, in my opinion, perhaps spurred on by this Committee and the Subcommittee in particular, some uniformity in practice on how these economic analyses are done.

We have the requirements of the law, we have the requirements of the executive orders, but because of cultural reasons, because of resource reasons, because of just level of knowledge reasons, every agency, every office within every agency, does a better or worse job at economic analysis than the others. And I am very hopeful with this OMB and with this OIRA in particular we are going to see some changes, but that could very well be relatively temporary, eight years at the most, maybe.

And so I think something more systemic has to be built into it. And it is not an easy task. I mean, cultures are not easily changed and government cultures in particular, but the willingness to do the right thing is the first thing we have to see. The willingness to hold themselves up to the highest standard of economic analysis and the willingness to be accepting of and, in fact, to go out and look for small business input is what we have to see built into these low level or secondary agency decision makers.

Mr. PINELES. Jeff.

Mr. LEITER. I just want to build on that as well. I mean, I wrote down two notes. One is if you want to have a witness on this, I think probably OMB is the best witness. My experience with dif-

ferent agencies in this area of economic analysis is that they have to pass muster with the reviewers, at OIRA, before the rule is allowed to go forward and really that is where the dialogue takes place between the agency and OMB on the economic analysis.

And, as I mentioned a few minutes ago, some of the data points that are used to make those analyses, what the discount rates are, what interest rates you can borrow at. They do not, I do not believe, properly test or discriminate for small business in those analyses in terms of what a typical small business can do.

And then secondly is that when they do these analyses, they are done in a vacuum. They do not look and say, All right, I have five other regulations that are hitting me at the same time or I have these other costs that I am looking to bear that they may affect and so that it does not take a much more macro picture of what the overall regulatory burden is for this particular—what it will do to add to their ongoing burden, this is what it is going to cost, we amortize it, does the benefit exceed it, sure, we will let it go forward.

So that is another piece to the economic analysis that I always have felt has been drastically missing.

Mr. PINELES. Bill.

Mr. MAHORNEY. One of the things that has been a challenge for our industry as well when we are talking about any kind of research, whether it be economic analysis research or fatigue research on the specific operational characteristics of our industry, we have actually heard from folks at FMCSA that you guys are not enough of a safety problem, why am I going to spend any money on you?

So, of course, you know, our response is, well, then, leave us out of the rules.

But we certainly have no problem with the proper analysis being done, but since we operate so much differently, but we do not have a separate administration like the transit folks or FAA or anybody else who carries passengers, we have a tendency to be just lumped in all the time.

One of the things that we had pushed hard for when the Federal Motor Carrier Safety Administration was created was a separate office. What we are thinking now is what we probably need is a deputy administrator for motor coach or passenger carrier issues because as long as we are a part of the trucking organization over there, none of these things are ever going to happen for us and we do not have any problem with research, we will help with it, but we have to have the data and we have to have the focus on our own operations to make anything meaningful in a regulatory environment.

Mr. PINELES. Arline.

Ms. SEEGER. I just wanted to follow up on one thing that Jeff mentioned and I think it is a great idea to have OMB explain their new philosophy and hopefully some rigor in terms of how to make these economic impact analyses sensible, but there is a whole group of rules that OMB never sees because the only rules that go over to OMB are those that are significant or, in some instances, there is an agreement that EPA will even send over rules that have greater than a $25 million per year annual impact. Well, the

staff at EPA will always at the outset, certainly at the proposed rule stage, understate the costs so OMB never sees those rules. So OMB is a nice safeguard for those rules that actually get some elevated attention because it is a big industry, but there is a lot of the smaller industries that do not have that protector.

Mr. PINELES. Well, unless anybody has any final comments, the chairman promised that you would get out by 2:00 and since he delegated the responsibility of me taking this home, it is 2:00 and I will adjourn the regulatory summit and thank everybody for staying.

[Whereupon, at 2:00 p.m., the proceedings were adjourned.]

NAM National Association of Manufacturers

# PROBLEMATIC FEDERAL REGULATIONS

# SUBMITTED TO

# THE HOUSE SMALL BUSINESS COMMITTEE

**June 21, 2001**


1331 Pennsylvania Avenue, NW • Washington, DC 20004-1790
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## TALKING POINTS

- The Metals Product and Machinery (MP&M) proposed rule would require manufacturers to significantly limit or stop the amount of process water, which often contains trace amounts of metals, from being discharged to a sewer system or a water-body. Companies that manufacture, rebuild, or maintain finished metal products, parts, or machines would have to curtail their production, decrease the amount of metals used in a product or install unnecessary and costly pollution-control equipment.

- The MP&M rule would cover more than 89,000 facilities. The types of industries include: aerospace, aircraft, bus and truck, household equipment, iron and steel, electronic equipment, hardware, job shops (metal finishing, painting, machining, etc), the motor vehicle industry, precious metals and jewelry, office machines, printed circuit boards, railroad, ships and boats, and stationary industrial equipment. EPA admits that there are potentially 10,000-unknown industrial sectors.

- EPA has not made any justifications for the need for a new rule. Further, the rule would add an extra layer on top of existing Federal rules that regulate these industries for the exact same industrial practices.

- EPA made numerous flaws in its regulatory analyses, underestimating costs and grossly mischaracterizing the impact of manufacturers on U.S. waterways.

- It is one of the most expensive environmental regulations ever proposed ($1.9 billion in annualized costs). Even EPA admits that the cost far outweigh the environmental benefits ($0.7 billion annually).

- The Association of Metropolitan Sewer Agencies (AMSA) the association that represents Publicly Owned Treatment Works is vehemently opposed to the rule. AMSA cites local limits and existing Federal effluent guidelines as being sufficient to protect the environment and public health.

- The economic impact of the new rule would be devastating. The total compliance cost for an average job shop is approximately 6.5% of total sales. EPA's estimate for economic impact of the proposed MP&M rule would double the existing compliance costs for metal finishing facilities. The industry is unable to pass this additional cost on to customers due to a competitive market, in which metal finishing facilities have not been able to raise prices in over a decade.

- Requiring compliance with the proposed stringent standards for new sources will force facilities to shut down and limit new growth, because it would require an even higher capital investment and result in a higher annualized compliance costs than under the proposed limits for existing sources.

**TALKING POINTS: Lead Reporting Rule under Toxic Release Inventory (TRI) Program (Issued January 17, 2001)**

- The rule lowers the TRI reporting thresholds for lead and lead compounds from 25,000 (for those that use lead and lead compounds in manufacturing) and 10,000 (for those that manufacture lead and lead compounds) pounds to 100 pounds.

- The final rule subjects potentially tens of thousands of new facilities to the burdens of:
    1. Determining whether they "manufacture, process or otherwise use" 100 pounds of lead and lead compounds, and, if so,
    2. 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 U.S.

    - EPA estimates increases in overall TRI reporting costs at $116 million in the first year, and $60 million in years 2 and beyond.
    - TRI reporting costs increased from $65 million in 1988 (when the TRI program was established) to $498 million in the year 2000 in actual dollar terms.
    - The EPA has not considered the additional reporting costs of the proposed rule in the context of overall TRI reporting costs.

- The EPA estimates that an additional 35,376 facilities would need to report at the new threshold.

- The rule is not based on sound science. After pressure from various sectors, including industry and Congress, the EPA is finally referring the issue to the Science Advisory Board (SAB) for review – AFTER THE TRI RULE TAKES EFFECT

- The rule suffers from a questionable evaluation of small business impacts. The EPA engaged in virtually no small business consultation before publishing the proposed rule, against the sprit of SBREFA.

- EPA's evaluation of overall costs and benefits of the rule was weak. For example, EPA identified a variety of industries "that may be effected by the rule, but for which existing data are inadequate to make a quantitative estimate of additional reporting," so they were not included in the cost equation.

**Talking Points: HHS Privacy Regulation**

- We support establishing federal standards for protecting patient confidentiality. However, there are some major problems with the HHS privacy regulation that make it unworkable in its current form.

- These problems need to be fixed expeditiously, before scarce resources needed for patient care are spent complying with a rule, only to see it changed.

- These problems could seriously disrupt, even harm, patient care. The key problems that need to be fixed:

  **Prior Consent** -- The requirement that prior consent be obtained to use patient information for routine health care purposes is virtually unprecedented and unworkable. A less-strict consent law in Maine was suspended 12 days after it took effect after major disruptions for patients and providers occurred.

  **Minimum Necessary** -- Requiring that the "minimum necessary" amount of information be used, even when treating patients, is unworkable and is potentially dangerous to patients.

  **Oral Communications** -- Applying the regulation to "oral communications" is an unworkable approach, especially in settings such as hospitals where conversations among health care teams could inadvertently run afoul of the regulation.

  **Business Associate Contracts** -- The regulation sets up a Rube Goldberg-like scheme in which entities covered must renegotiate and/or create privacy contracts with potentially hundreds – even thousands -- of their "business associates."

  **Research** – The regulation includes two provisions that could have a chilling effect on the ability of research institutions to obtain medical information vital to their life-saving work.

  Real life examples of how these problems will disrupt patient care are attached.

- Because the HHS privacy regulation already went into effect on April 14, 2001, entities have but 23 months left to comply with this massive and extremely complicated rule. It is estimated that it will cost more than $40 billion to comply with the regulation.

- We urge that the Secretary of HHS move expeditiously to fix these key problems. The Health Insurance Portability and Accountability Act (HIPAA) anticipated that modifications would be needed and explicitly gives the Secretary the authority to make modifications to allow compliance with the regulation. We urge the Secretary to exercise this authority and make modifications addressing these problems now.

BY HAND

June 18, 2001

The Honorable Elaine Chao
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Dear Secretary Chao:

We are writing to respectfully urge that you provide an extension of the compliance date for the Department's Final Rule on Claims Procedures under the Employee Retirement Income Security Act (ERISA), at least through the end of the 107th Congress.

We recognize that the final claims procedures regulation includes many significant improvements over the Department's earlier proposed rule on this important issue. Despite these improvements, serious practical implementation problems remain and have only been compounded by many unanswered questions that have surfaced concerning the rule's intended interpretation. Beyond these issues of interpretation, we would also urge the Department to consider further substantive changes in the rule through an additional round of modifications and public comment.

We agree that ERISA's standards for claims procedures can be improved. However, we also believe that any improvements must be made carefully and with sufficient lead time. This regulation represents the first comprehensive change in the federal rules governing employer-sponsored group health plans under ERISA in over 20 years. Unfortunately, we have concluded that accurate and consistent compliance with the detailed requirements of this rule in its current form will be extremely difficult, it not impossible to achieve.

The most immediate problem is that, while compliance is not actually required until January 1, 2002, insurers, employers and others who provide plan administrative services must begin now to make the systems changes, notice modifications and operational upgrades that the rule requires. State regulatory agencies and plan sponsors are also looking for assurances now that the changes required by the rule will be in place long before the January 2002 deadline.

We urge you to continue the consultation process with all affected parties on areas where the final claims processing rule is ambiguous or needs to be modified. Under your leadership, we have no doubt that this time will be well spent and will ultimately lead to a better rule as well as one that provides the time necessary to assure proper and effective implementation.

We thank you for your consideration of this request and offer to work with you and your staff during the extended compliance period to improve the current version of the ERISA claims procedures regulation.

American Benefits Council
American Association of Health Plans
American Insurance Association
The Business Roundtable
U.S. Chamber of Commerce
Blue Cross and Blue Shield Association
Delta Dental Plans
The ERISA Industry Committee
Food Distributors International
Health Insurance Association of America
National Association of Manufacturers
National Association of Wholesaler-Distributors
National Association of Health Underwriters
National Federation of Independent Business

cc: Ann Combs, Assistant Secretary, PWBA

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VIA FACSIMILE (202) 693-6146

Tevi Troy
Deputy Assistant Secretary for Policy
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C.

Re: *National Association of Manufacturers v. Chao, No. 01-CV-575 (GK) (D.D.C.)*

Dear Deputy Assistant Secretary Troy:

Thank you for taking the time to meet with us on Friday regarding the National Association of Manufacturer's challenge to OSHA's "midnight" recordkeeping rule.

I would like to follow up on a number of issues raised during our meeting. First, the NAM's proposed modifications to the new rule are designed to enhance the accuracy and reliability of data collected by OSHA by limiting this data collection to bona fide occupational injuries and illnesses. Over-recording is every bit as inappropriate as under-recording because it misdirects OSHA's enforcement and standard-setting priorities. Moreover, the one-year extension of the current recordkeeping regime that will be required in order to re-open the record will pose no threat to worker health and safety – as the AFL-CIO observed, the current system has been in place for decades, and so a short continuation period can hardly be said to cause harm.

Second, we strongly disagree with Mr. Cohen's characterization of the issues raised by the NAM as semantic, legal issues. Of course, the provisions in the new rule to which we object raise legal issues in the sense that the unequivocal language of the new rule would require

recordation of conditions which do not constitute injuries or illnesses and which are unrelated to work in any meaningful way, and such requirements exceed OSHA's statutory recordkeeping authority. More importantly, however, the express language of the new rule reflects deliberate policy choices to extend recordkeeping beyond the realm of objectively verifiable, clearly work-related injuries and illnesses into the area of subjective signs and symptoms with a tangential (if any) connection to the workplace. For example, Mr. Cohen incorrectly asserted that the "caused or contributed to" language of the new regulation could be read in various ways, and would not necessarily mandate a scintilla rule, as the NAM contends. Although Mr. Cohen may be correct as to the "caused or contributed to" language under the current rule, where the language appears only in the interpretive guidelines, he is in error as to the meaning of that same language under the new rule, where the language appears in the regulatory text itself. In the latter case, the Preamble clarifies that OSHA considered a variety of policy choices as to the requisite degree of work-relatedness, and that it deliberately chose the "caused or contributed to" language, supplemented by the "geographic presumption," to include as recordable all cases in which work is "a causal factor," no matter to what degree. 66 Fed. Reg. at 5928-31. As I stated during our meeting, the language of the new regulation clearly establishes a dichotomy between injuries and illnesses which are related to work in any way whatsoever and those which are completely unrelated to work. OSHA explains clearly that "if work contributes to the illness *in some way*, then it is work-related and must be evaluated for its recordability. On the other hand, if the case is *wholly caused by non-work factors*, then it is not work-related and will not be recorded in the OSHA records." 66 Fed. Reg. at 5958 (emphasis added).

Third, Assistant Secretary Spear noted that he would be examining the areas in which the new rule differs from the current regime. In this regard, it is important to consider that, even where the new rule does not purport to change the current system, the principles of the current system are embodied in countless opinion letters and in interpretive guidance, all of which are subject to discretionary enforcement by OSHA, whereas the new rule would codify many of these principles within the regulatory text itself.

Fourth, although Assistant Secretary Spear correctly observed that the recordkeeping rule is not exclusively related to musculoskeletal disorders ("MSDs") and ergonomics, many aspects of the new rule are inextricably intertwined with ergonomics. Indeed, the new recordkeeping log requires identification of MSDs in a separate column, and this dedicated MSD column encompasses far more and different conditions than those captured within the current 7(f) column for cumulative trauma disorders. The Secretary has properly embarked on a series of fora that will address the definition of an ergonomics injury and the determination of work-relatedness, and it is critical that the determination of those issues under the recordkeeping rule be consistent with the Secretary's ultimate conclusions as to ergonomics generally. It makes little sense for employers to be presently required to record as work-related injuries or illnesses those conditions that the Secretary may ultimately conclude are not subject to OSHA's jurisdiction. Accordingly, the new recordkeeping rule should be postponed in order to allow re-examination in light of the decisions resulting from the upcoming fora.

Finally, as discussed above, most of the fundamental issues raised by the NAM reflect affirmative policy choices embodied within the text of the new regulation, and therefore they are not subject to "correction" through interpretive directives. Moreover, such interpretive directives are, of course, subject to change at any time, should OSHA's policymaking priorities shift in the future. We would, however, support the use of interpretive guidance as an interim measure during the pendency of a re-opening of the record. In particular, such guidance would be useful in adopting positive aspects of the new rule which are not inconsistent with current regulatory text.

Thank you again for your attention to these important issues. Please do not hesitate to contact me if I can provide any further information.

Sincerely,

Baruch A. Fellner

BAF/jcs

cc: The Honorable Christopher Spear
Joseph Woodward, Esq.
George Cohen, Esq.
Quentin Riegel, Esq.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | |
|---|---|
| NATIONAL ASSOCIATION OF MANUFACTURERS,<br><br>PLAINTIFF,<br><br>V.<br><br>ELAINE L. CHAO, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR<br><br>AND<br><br>DAVIS LAYNE, ACTING ASSISTANT SECRETARY OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,<br><br>DEFENDANTS. | CIVIL ACTION NO. 1:01CV00575 |

**FIRST AMENDED COMPLAINT**

COMES NOW, Plaintiff, the National Association of Manufacturers, incorrectly identified as the National Association of Manufacturers, Inc. in Plaintiff's original Complaint, by and through its undersigned counsel, and for its Complaint against the defendants, herein states as follows:

**Nature of the Action**

1. This is an action seeking a declaratory judgment that the final "recordkeeping" rule issued by the Occupational Safety and Health Administration of the United States Department of Labor at 66 Fed. Reg. 5916, (the "Final Rule") designed to replace the regulations at 29 C.F.R. Part 1904 and to amend 29 C.F.R. § 1952.4, is arbitrary, capricious, an abuse of discretion, otherwise contrary to law, and *ultra vires*, and seeking an injunction enjoining defendants from implementing the Final Rule and directing defendants to rescind immediately the Final Rule and publish immediately a notice to that effect in the *Federal Register*.

**Parties**

2. Plaintiff, the National Association of Manufacturers, ("NAM") is the nation's largest and oldest multi-industry trade association. The NAM represents 14,000 member companies (including more than 10,000 small and mid-sized manufacturers) and 350 member associations serving manufacturers and employees in every industrial sector in all 50 states. The NAM is headquartered in Washington, D.C. and has 10 additional offices throughout the United States.

3. Defendant, the Honorable Elaine L. Chao, is the Secretary of the United States Department of Labor (the "Secretary"). The Department of Labor published the contested rule in the Federal Register and is responsible for its enforcement. Secretary Chao is sued in her official capacity, and the relief sought extends to all of her successors and to all employees, officers and agents of the Department of Labor.

4. Defendant, the Honorable Davis Layne, is the Acting Assistant Secretary for Occupational Safety and Health of the United States Department of Labor. The contested regulation was published in the Federal Register under the authority of this defendant's predecessor in office, and this defendant and the Occupational Safety and Health Administration ("OSHA") are responsible for its enforcement. Acting Assistant Secretary Davis Layne is sued in his official capacity, and the relief sought extends to all of his successors and to all employees, officers and agents of the Department of Labor.

**Jurisdiction and Venue**

5. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 2201-2202, and pursuant to 5 U.S.C. §§ 611 and 702.

6. Venue properly lies in this Court pursuant to 28 U.S.C. § 1391(e).

**Background**

7. The Occupational Safety and Health Act (the "Act"), 29 U.S.C. § 651 *et seq.*, authorizes the Secretary of Labor to promulgate certain "occupational safety and health standards" for the protection of workers. 29 U.S.C. § 655.

8. The Secretary is also authorized to promulgate certain regulations – not considered occupational safety and health standards – for the purpose of carrying out her duties under, *inter alia*, Sections 8 and 24 of the Act. 29 U.S.C. §§ 657, 673.

9. Specifically, Section 8 of the Act authorizes the Secretary to promulgate regulations as follows:

(a) "Each employer shall make, keep and preserve, and make available to the Secretary or the Secretary of Health and Human Services, such records regarding his activities relating to this Act as the Secretary, in cooperation with the Secretary of Health and Human Services, may prescribe by regulation as necessary or appropriate for the enforcement of this Act or for developing information regarding the causes and prevention of occupational accidents and illnesses. In order to carry out the provisions of this paragraph such regulations may include provisions requiring employers to conduct periodic inspections. The Secretary shall also issue regulations requiring that employers, through posting of notices or other appropriate means, keep their employees informed of their protections and obligations under this Act, including the provisions of applicable standards." 29 U.S.C. § 657(c)(1).

(b) "The Secretary, in cooperation with the Secretary of Health and Human Services, shall prescribe regulations requiring employers to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries and illnesses other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job." 29 U.S.C. § 657(c)(2).

(c) "The Secretary, in cooperation with the Secretary of Health and Human Services, shall issue regulations requiring employers to maintain accurate records of employee exposures to potentially toxic materials or harmful physical agents which are required to be monitored or measured under section 6. Such regulations shall provide employees or their representatives with an opportunity to observe such monitoring or measuring, and to have access to the records thereof. Such regulations shall also make appropriate provision for each employee or former employee to have access to such records as will indicate his own exposure to toxic materials or harmful physical agents. Each employer shall promptly notify any employee who has been or is being exposed to toxic materials or harmful physical agents in concentrations or at levels which exceed those prescribed by an applicable occupational safety and health standard promulgated under section 6, and shall inform any employee who is being thus exposed of the corrective action being taken." 29 U.S.C. § 657(c)(3).

(d) "Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace under subsection (a) for the purpose of aiding such inspection. Where there is no authorized employee representative, the Secretary or his authorized representative shall consult with a reasonable number of employees

concerning matters of health and safety in the workplace." 29 U.S.C. § 657(e).

(e) "Prior to or during any inspection of a workplace, any employees or representative of employees employed in such workplace may notify the Secretary or any representative of the Secretary responsible for conducting the inspection, in writing, of any violation of this Act which they have reason to believe exists in such workplace. The Secretary shall, by regulation, establish procedures for informal review of any refusal by a representative of the Secretary to issue a citation with respect to any such alleged violation and shall furnish the employees or representative of employees requesting such review a written statement of the reasons for the Secretary's final disposition of the case." 29 U.S.C. § 657(f)(2).

(f) "The Secretary and the Secretary of Health and Human Services shall each prescribe such rules and regulations as he may deem necessary to carry out their responsibilities under this Act, including rules and regulations dealing with the inspection of an employer's establishment." 29 U.S.C. § 657(g)(2).

10. Section 24 of the Act authorizes the Secretary to promulgate regulations as follows: "On the basis of the records made and kept pursuant to Section 8(c) of this Act, employers shall file such reports with the Secretary as he shall prescribe by regulation, as necessary to carry out his functions under this Act." 29 U.S.C. § 673(e).

11. The Final Rule at 66 Fed. Reg. 5916, was issued as a regulation and not a health and safety standard. 66 Fed. Reg. 5925. The defendants purport to rely on 29 U.S.C. §§ 657 and 673 as the source of their authority to promulgate this regulation.

12. The Final Rule replaces OSHA's prior recordkeeping rule, codified at 29 C.F.R. Part 1904.

13. Pursuant to the Final Rule, employers are required to keep a Log of Work-Related Injuries and Illnesses ("Form 300") to classify "work-related injuries and illnesses and to note the extent of each case," for each place of employment that is expected to be in operation for at

least a year. *See* OSHA, An Overview: Recording Work Related Injuries and Illnesses (included within the instructions for the recording of work-related injuries and illnesses package provided to employers by OSHA). The Final Rule contains definitions of "work-related" and of "injuries or illnesses" used for the purpose of determining when an employer must record an injury or an illness on Form 300.

14. OSHA promulgated the Final Rule issued at 66 Fed. Reg. 5916 on January 19, 2000, the final full day of the Clinton Administration. It is therefore subject to a sixty-day delay in its effective date, pursuant to President George W. Bush's Chief of Staff, Andrew H. Card's January 20, 2001 Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702, which affects all regulations that were published in the final days of the Clinton Administration. The Final Rule is therefore effective March 1, 2002.

15. The Administrative Procedure Act, 5 U.S.C. § 551 *et. seq.*, permits a court to "hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege or immunity; [and] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A)-(C).

**Count 1**

**OSHA Has Exceeded its Statutory Authority To Promulgate Regulations**

16. Paragraphs 1 through 15 are incorporated by reference as if set forth fully herein.

17. Congressional delegation of rulemaking authority to an administrative agency is delimited by the literal language of its enabling statute. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The Act prescribes such limited rulemaking

power within which OSHA must operate. In promulgating the Final Rule, OSHA ignored the boundaries of the authority that Congress delegated to it in the Act; such action exceeds the agency's statutory authority and is therefore invalid.

### A. OSHA Does Not Have the Authority to Compel the Recordation of Nonwork-Related Injuries

18. Paragraphs 1 through 17 are incorporated by reference as if set forth fully herein.

19. When promulgating the Final Rule, OSHA exceeded its statutory authority because the regulation requires the recordation of injuries and illnesses that have no or insufficient relationship to the workplace.

20. Section 8, 29 U.S.C. § 657, and Section 24, 29 U.S.C. § 673, of the Act authorize the Secretary to promulgate regulations "as necessary or appropriate for the enforcement of [the] Act or for developing information regarding the causes and prevention of *occupational accidents and illnesses.*" 29 U.S.C. § 657(c)(1) (emphasis added).

21. Under this authority, the Secretary is permitted to adopt two forms of recordkeeping regulations: (1) "regulations requiring employers to maintain accurate records of, and to make periodic reports on, *work-related deaths, injuries and illnesses* other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restrictions of work or motion, or transfer to another job" and (2) "regulations requiring employers to keep and maintain records regarding the causes and prevention of *occupational injuries and illnesses*." *See* 66 Fed. Reg. 5916 (emphasis added and internal quotations omitted); 29 U.S.C. §§ 657 & 673.

22. The Act is specifically designed to assure healthful working conditions for employees; OSHA's jurisdictional mandate is limited to those injuries and illnesses that are work-related. *See* 29 U.S.C. § 651. OSHA therefore has no responsibility or authority to regulate injuries or illnesses that occur outside of the workplace or which are otherwise not work-related, or to require employers to record such injuries or illnesses.

23. Despite this lack of authority, the Final Rule will compel employers to record many injuries and illnesses on Form 300 that are either in whole or in part unrelated to employee activities in the workplace. The Final Rule, which purports to address "Occupational Injury and Illness Recording and Reporting Requirements," expands the definitions of "work-relatedness," and "injury or illness" where these definitions will encompass *both* work-related injuries and illnesses *and* injuries and illnesses that are neither attributable to workplace activities nor to events in the work-environment. *See* 29 C.F.R. §1904.5; 66 Fed. Reg. 6080. The requirement that employers record these nonwork-related injuries and illnesses on Form 300 is therefore beyond the scope of authority the Act confers upon OSHA.

24. The Final Rule commands employers to "consider an injury or illness to be work-related if an event or exposure in the work-environment either caused *or contributed* to the resulting condition or *significantly aggravated a pre-existing injury or illness*." 29 C.F.R. § 1904.5(a) (emphasis added). The "caused or contributed" standard amounts to a scintilla rule, mandating that "if work contributes to the illness in some way, then it is work-related and must be evaluated for its recordability." 66 Fed. Reg. 5958. In other words, if pain or another symptom of a nonwork-related injury or illness is experienced at the workplace as a result of normal job duties that would not cause the employee's pain but for the nonwork-related injury or

illness, it is nevertheless the fault of the workplace, and the employer must record the injury or illness.

25. The Final Rule will also attribute many other nonwork-related injuries to the workplace by amending the definition of "preexisting condition." 29 C.F.R. § 1904.5(b)(4) and (5). The rule unjustifiably limits the types of injuries and illnesses that are considered preexisting only to those injuries and illnesses that "resulted *solely* from a non-work related event or exposure that occurred outside the work-environment." 29 C.F.R. § 1904.5(b)(5) (emphasis added). This "solely" standard would force employers to record many nonwork-related injuries and illnesses because of the impossibility of proving the negative—that employment did not contribute whatsoever to the employee's symptoms. Consequently, the Final Rule will require employers to record most, if not all, preexisting employee conditions as work-related injuries or illnesses despite the lack of nexus between the preexisting condition and the workplace.

26. By dictating that employers record injury and illness claims that arise from "[p]ain and other symptoms that are wholly subjective" employers will be compelled to record injuries that are not only unrelated to work but also that may not exist at all. 66 Fed. Reg. 6080. This requirement will encompass unverifiable, nonobjectively diagnosed ailments, which are poorly defined, subjective, often not serious, often of unknown cause, and more often than not due to nonwork-related causes.

27. The Final Rule also creates a geographic presumption that will require employers to assume work-relatedness for all injuries or illnesses that first manifest themselves in the workplace. This presumption, coupled with other standards that require findings of work-

relatedness if there is a scintilla of causation with, or aggravation by, work, will force employers to err on the side of recordation for every injury or illness that is conceivably work-related in some minuscule way.

28. The Final Rule also unnecessarily complicates the determination of whether an injury is work-related by confusing the definition of work-environment. An injury or illness is presumed to be work-related if it results from an exposure in the work-environment. 29 C.F.R. § 1904.5(a). According to the rule, the work-environment includes not only the physical plant in which employees work, but also off-premises locations where employees "are working or conducting other tasks in the interest of their employer." 66 Fed. Reg. 5960. Moreover, the "work-environment" also includes "equipment or materials used by the employee during the course of his or her work." 66 Fed. Reg. 6124. These provisions further confuse the determination of work-relatedness that employers must make under the Final Rule.

29. The geographic presumption described above also deems all events of workplace violence, other than intentionally self-inflicted injuries, as work-related. 29 C.F.R. § 1904.5(b)(2)(vi). The positional theory of causation that OSHA has used to justify this result—the employee would not have experienced the harmful event had not he or she been in the position where he or she was victimized—would attribute events completely outside of the employer's control, including psychopathic behavior, to the employer and require that the employer record such events as workplace injuries.

30. The geographic presumption in conjunction with the significant aggravation doctrine would require employers to record many natural causes of death that occur at the workplace as work-related. *See* 29 C.F.R. § 1904.5(b)(4)(i). Under the Final Rule, if an

occupational event or exposure contributes to the death of an employee with a preexisting condition that is the predominant cause of death, employers are required to record the death as work-related. This will lead to the recordation of all deaths at the workplace because, as described above, just like other preexisting conditions, employers must either prove the negative that the workplace did not contribute in any way to the death or record the death as workplace-related.

31. In addition to ignoring the statutory limitation of work-relatedness, OSHA has implemented recording requirements for specific injuries that likewise exceed OSHA's authority under the Act. For example, OSHA has also exceeded its statutory authority by providing that all hearing loss Standard Threshold Shifts ("STS") of 10 dB(A) must be regarded as illnesses, and classified as serious, and also by providing that absent other evidence, such hearing shifts may be presumed to be occupational in origin simply because the ambient noise level is 85 dB(A) or higher (8-hour time-weighted-average). OSHA's recording trigger under this section is not considered a material impairment by the medical community, by state workers compensation systems, or in applicable OSHA standards. Consequently, the STS of 10 or more dB(A) in either ear that triggers recordability under the Final Rule is not a disabling, serious, or significant injury or illness—a mandatory threshold criterion for recording it on Form 300 under Sections 8 and 24 of the Act.

32. OSHA has no authority to compel the recordation of injuries or illness occurring in an employee's home office. The Final Rule requires the recordation of "[i]njuries and illnesses that occur while an employee is working at home, including in a home office, . . . if the injury or illness occurs while the employee is performing work for pay or compensation in the home, and the injury or illness is directly related to the performance of work rather than to the general home

environment or setting." 29 C.F.R. § 1904.5(b)(7). But, as OSHA has recognized, "the OSH Act does **not** apply to an employee's house" and accordingly OSHA will "not hold employers liable for work activities in employees' home offices." Statement of Charles Jeffress, Assistant Secretary for Occupational Safety and Health, Department of Labor, Before the Subcommittee on Employment, Safety, and Training, Senate Committee on Health, Education, Labor and Pensions (January 25, 2000) (emphasis in original). *See also*, OSHA Directive, CPL 2-0.125 – Home Based Worksites (February 25, 2000). If, as OSHA has stipulated, the Act neither applies to an employee's house, nor to a home office, the provisions in the Final Rule which require the recordation of injuries and illnesses occurring in an employee's home office—where the employer has no control over the office's layout or the equipment used—exceed OSHA's statutory authority.

**B. OSHA Has Disguised A Health and Safety Standard as a Regulation**

33. Paragraphs 1 through 32 are incorporated by reference as if set forth fully herein.

34. OSHA's inclusion in the Final Rule of affirmative mandates to ensure employee health and safety, completely unrelated to the keeping of records, exceeds the authority exercised by OSHA.

35. The Act authorizes the Secretary to issue two types of final rules, "standards" and "regulations." 66 Fed. Reg. 5925. The statutory authority and procedures required to validly prescribe each form of final rule are different, as are the purposes of each form of final rule. *Compare* Section 6 of the Act, 29 U.S.C. § 655, *with* Section 8 of the Act, 29 U.S.C. § 657. *See Chamber of Commerce of the United States v. United Stated Department of Labor*, 174 F.3d 206 D.C. Cir. 1999).

36. The Act defines an "occupational safety and health standard" as "a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652. Consequently, standards are "measures to be taken to remedy known occupational hazards." 66 Fed. Reg. 5925.

37. In contrast to standards, regulations "are the means to effectuate other statutory purposes, including the collection and dissemination of records on occupational injuries and illnesses." 66 Fed. Reg. 5925.

38. The Final Rule, which was promulgated as a regulation, includes provisions that are wholly unrelated to the effectuation of regulatory purposes and/or the collection and dissemination of records on occupational injuries and illnesses, and instead concerns the safety and health of employment and places of employment, including but not limited to the following:

(a) The Final Rule requires that "if a physician or other licensed health care professional recommends days away, [the employer] should encourage [its] employee to follow the recommendation." 66 Fed. Reg. 6126. This employer duty is completely unrelated to recordkeeping or any other valid regulatory purpose and could only be appropriately addressed through a standard.

(b) Similarly, the Final Rule states that employers "should ensure that [an] employee compl[y] with . . . [workplace] restriction[s]" recommended by a physician or other licensed health care professional. 66 Fed. Reg. 6127. For example, if an employee chooses to ignore a physician's musculoskeletal directive to perform "light duty," the employer must choose between allowing the employee the latitude of coping with such transient discomfort or enforcing a

medical directive. This requirement forces employers to ensure that their employees comply with doctors' orders, and it is therefore wholly unrelated to recordkeeping or any other valid regulatory purpose and could only be appropriately addressed through a standard.

(c) These responsibilities impose on an employer an affirmative duty to inquire from an employee the outcome of the employee's consultation with a health care professional following a work-related accident. The employer is therefore faced with the Hobson's choice between the privacy interests of the employee in his or her medical conditions and records, and the regulatory directive to discover the nature of a physician's or other health care professional's diagnosis and recommendation concerning an employee. *See* 66 Fed. Reg. 6126.

**Count 2**
**The Final Rule Which Will Force Employers to Keep Inaccurate Records is Arbitrary, Capricious, and an Abuse of Discretion**

39. Paragraphs 1 through 38 are incorporated by reference as if set forth fully herein.

40. The Final Rule is arbitrary, capricious, and an abuse of discretion because it is antithetical to the legislative purpose of accurate recordkeeping.

41. Count 1 of this Complaint establishes that the definitions of injury or illness and work-related—as well as the geographic presumption and specific recording requirements for hearing loss—will compel the recordation of nonwork-related injuries on Form 300.

42. OSHA claims that the "final rule will produce more useful injury and illness records, collect better information about the incidence of occupational injuries and illness on a national basis, promote improved employee awareness and involvement in the recording and

reporting of job related injuries and illness, [and] simplify the injury and illness recordkeeping system for employers . . . ." 66 Fed. Reg. 5916. Instead, the Final Rule produces less useful information on injuries and illnesses than the regulations it replaced, degrades the quality of the information collected on the incidence of occupational injuries and illnesses on a national basis, and, among other problems, severely complicates the injury and illness recordkeeping system for employers.

43. The decrease in the accuracy of employer injury and illness records will cause OSHA to misallocate its resources as it attempts to reduce injuries and illnesses in locations where the cure for such injuries is beyond employer control.

44. OSHA's mission is to ensure that employers implement measures in the workplace that are designed to minimize workplace injuries and illnesses. A condition that is caused by work is a condition that may be corrected by an employer. On the other hand, a condition with nonwork causes is likely to be one that will occur, or be aggravated, by other circumstances regardless of any measures taken in the workplace. Including in an employer's injury and illness report illnesses and injuries not related to the workplace constitutes arbitrary and capricious conduct as well as an abuse of discretion.

45. In addition to the generally arbitrary and capricious nature of the Final Rule as a whole, particular provisions of the rule are independent examples of arbitrary and capricious decision-making. For example, employees have a reasonable expectation of privacy in all injuries and illnesses recorded by employers pursuant to the Final Rule. Despite this expectation, OSHA has concluded that this expectation of privacy is outweighed by the interests of other workers, but for a limited class of "privacy concern cases"—those cases for which, in OSHA's

judgment, there is a much greater risk of social stigma, and for which harassment and discrimination could result. Consequently, OSHA has required employers to provide information including the names of employees and their injuries to employees and their representatives. OSHA has therefore ignored the feasible and less intrusive alternative available to serve the safety and health interests of employees that releasing the log provides, i.e., providing the log with the names redacted.

**Count 3**
**The Vague and Unenforceable Final Rule is Contrary to Law and Unconstitutional**

46. Paragraphs 1 through 45 are incorporated by reference as if set forth fully herein.

47. The Due Process Clause of the Fifth Amendment to the United States Constitution requires the government to give notice to individuals of government actions that would deprive such individuals of a constitutionally protected interest. The form of notice given must be reasonably designed to ensure that the interested parties will in fact learn of a proposed government action. The OSHA recordkeeping rule is subject to these requirements, but the Final Rule fails to provide the notice due process requires.

48. Under the Final Rule, employers are forced to make various determinations, including but not limited to, whether an injury is solely work-related, whether subjective symptoms reveal an actual injury or illness, and whether an injury or illness arising outside of the workplace, but during the course of the employee's duties for the employer, is work-related. OSHA either provides no direction to guide these determinations or that direction is so vague as to give employers no meaningful guidance.

49. Employers are therefore left to make critical decisions as to whether to record an injury or illness on Form 300 with little guidance from OSHA. If after considering the Final Rule's requirements, the employer does not record, or accurately record, an injury or illness and OSHA later disagrees with the employer's judgment, the employer may then be subject to OSHA citations for violating the recording regulation.

50. OSHA's failure to provide meaningful descriptions of key regulatory terms and concepts violates the Administrative Procedure Act. 5 U.S.C. § 551 *et. seq*.

51. The vagueness and lack of clear standards in OSHA's Final Rule depriving employers of notice as to whether conduct may violate the Final Rule and creating the opportunity for arbitrary and uneven enforcement is a violation of the Due Process Clause of the Fifth Amendment to the United States Constitution.

**Injury**

52. Paragraphs 1 through 51 are incorporated by reference as if set forth fully herein.

53. The Plaintiff NAM's members are required to comply with the Final Rule. As a result of the required compliance, and the deficiencies in the Final Rule cited above, the Plaintiff's members will incur substantial costs.

54. The costs the Plaintiff's members will experience include (1) administering an unclear and ambiguous regulation; (2) challenging adverse recordation determinations; (3) penalties OSHA imposes due to incorrect or inaccurate recordation of an alleged work-related injury; (4) targeted inspections and ensuing citations precipitated by inflated and erroneous lost

work day injury and incidence rates; and (5) adopting abatement measures in an attempt to reduce recorded injuries and illnesses unrelated to workplace hazards.

55. In addition to the financial harm, the attribution of nonwork-related injuries to the Plaintiff's members will cause harm to the Plaintiff's members' reputations with their workers and will result in a loss of goodwill.

**Request for Relief**

WHEREFORE, Plaintiff respectfully requests that this Court grant the following relief:

(a) a declaratory judgment and Order that the Final Rule is (a) in excess of statutory jurisdiction and authority, (b) arbitrary, capricious, an abuse of discretion, otherwise contrary to law, and *ultra vires*, and (c) unconstitutionally vague;

(b) an Order entering a permanent injunction enjoining defendants from implementing the Final Rule and directing defendants to rescind immediately the Final Rule and publish immediately a notice to that effect in the *Federal Register*;

(c) an Order awarding plaintiff its reasonable costs and attorneys' fees in connection with this action; and

(d) an Order granting such other and further relief as the Court deems just and proper.

Respectfully submitted,

Dated: March 23, 2001

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NATIONAL MEAT ASSOCIATION

STATEMENT
OF

ROSEMARY MUCKLOW
EXECUTIVE DIRECTOR
NATIONAL MEAT ASSOCIATION

BEFORE THE

SUBCOMMITTEE ON REGULATORY REFORM AND OVERSIGHT
COMMITTEE ON SMALL BUSINESS
UNITED STATES HOUSE OF REPRESENTATIVES

SMALL BUSINESS ROUNDTABLE

THURSDAY, JUNE 21, 2001
WASHINGTON, DC

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Regulatory uncertainty is devastating to small businesses. A significant consequence of regulatory uncertainty is consolidation. A small business faced with the uncertainty about what rules to follow, whether their business can be profitable, and whether their line of business has become subject to substantial fines and criminal penalties, has huge incentives to exit the business and to move the family's money into passive, less risky investments such as stocks and real estate. Regulatory uncertainty creates real fear among the majority stockholders in closely-held, family businesses, and explains why many of them have sold out during the past decade.

In the meat industry, the past decade has seen unprecedented uncertainty in the following areas:

(a) **Implementation of HACCP (Hazard Analysis Critical Control Point) system, whereby each small plant under inspection is required to develop a HACCP plan for its business.** In some cases, this requires several HACCP plans for different operations. Firms hardest hit include the very small who implemented HACCP in January2000. Their multi-operational, but very small status, means plants are likely to have multiple HACCP plans for a relatively small amount of product. USDA offered token assistance to the small plants, but the real test is occurring now as it gets harder to meet the increasing regulatory pressures and these firms are being reviewed for the adequacy of their plans. The firms identified in the recent New York review are all small or very small businesses; the very small business in San Leandro, CA where the owner shot and killed three officials is a tragedy where frustration with regulation served as a contributing factor.

(b) **USDA reorganized its field operations five years ago, and in the process reduced its field offices from 5 regions and 26 area offices to 18 district offices, which have now been further reduced to 17, one of which today is managing both New York and Philadelphia, thereby reducing the number to 16.** From the perspective of small business, the best federal government is that which is at least within the same time zone and within reasonable driving distance. Many of today's inspection problems occur because of a poorly trained and maintained inspection work force that is so dispersed that it rarely sees immediate supervisors. Poor decisions can have a substantial adverse impact in an industry which handles a highly perishable product. Small businesses are severely harmed in this process.

(c) **USDA developed a microbiological performance standard for *Salmonella* in ground beef.** In 1993, USDA estimated that nearly 2000 firms manufactured ground beef. The overwhelming majority of grinders buy boneless beef and trimmings from other firms, and in so doing, buy *Salmonella* on the raw materials. USDA exercised extreme regulatory authority when it withdrew inspection from a Texas small business that ground meat in November 1999. The company sought and obtained judicial relief. USDA then systematically pressured this company in both the media and at its plant until it had no choice but to suspend operations in September 2000. The District Court decision in favor of the company is now on appeal before the 5th Circuit in New Orleans. The USDA's position is flawed both in terms of the inadequacy of the science

behind the USDA's standard set for a raw meat product, and for its misapplication of its statutory authority to withdraw inspection. The USDA's activities have chilled small business interests in the meat business, and particularly small businesses which supply USDA's commodity program, where the Department set an even stricter buying standard in June 2000 in revenge for losing the Texas litigation.

(d) **Under the statutory authority of the Livestock Mandatory Reporting Act, almost all of the companies required to report the prices at which they purchase livestock and sell meat, with the exception of about eight, are small businesses.** They are faced with additional costs to purchase data development and electronic transmission capabilities, and were given neither recognition nor consideration in the development of the legislation. Implementation is seriously flawed, and programming errors by a contractor working for USDA have already caused substantial damages to both packers and producers. No compensatory relief is contemplated.

(e) **USDA is developing a new performance standard for zero tolerance of *Listeria monocytogenes* for ready-to-eat meat and poultry products.** Again, many small firms are extremely nervous that the standard will simply be impossible for them to meet, because this pathogen, while it is strongly associated with meat and poultry, is different from most other pathogens in that it continues to grow under refrigerated conditions and is widely present in the environment, including homes and schools. A national focus on environmental reduction of this pathogen rather than the narrower focus on zero tolerance in meat and poultry would be more appropriate, but an unlikely goal for a meat and poultry regulatory agency.

(f) **Consolidation in the meat and poultry processing industry has continued at an increased pace in the past ten years.** The federal government elected not to intervene in mergers and acquisitions that have allowed large firms to get even larger. By its regulatory inspection actions, the federal government has provided the fertile ground for large firms to buy up small firms and thereby grow even faster. When a meat plant closes, as the small meat company impacted in the Texas litigation did, then its market share is fair game for the industry giants.

Because uncertainty is so devastating to small business, USDA needs to treat small firms as cooperators rather than as enemies. Regulation should serve the common interest of business and government to provide safe food to consumers rather than be structured as a contest, or even a war between government and industry.


**THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA**
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June 21, 2001

The Honorable Mike Pence
Chairman
Regulatory Reform and Oversight Subcommittee
House Small Business Committee
Washington, DC 20515

Dear Chairman Pence:

The Associated General Contractors of America (AGC) appreciates the opportunity to provide information on the burdensome regulations facing the construction industry. AGC is the nation's largest and oldest construction trade association, founded in 1918. AGC represents more than 33,000 firms, including 7,500 of America's leading general contracting firms. AGC's general contractor members have more than 25,000 industry firms associated with them through a network of 101 AGC chapters. AGC member firms are engaged in the construction of the nation's commercial buildings, factories, warehouses, highways, bridges, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, site preparation, and utilities installation for housing developments.

AGC has enclosed fact sheets about the following issues:

- OPPOSE BLACKLISTING REGULATIONS
- STREAMLINE THE PROCESS FOR APPROVAL OF APPRENTICESHIP PROGRAMS
- LOOKBACK METHOD OF ACCOUNTING
- CASH METHOD OF ACCOUNTING
- PER DIEM ALLOWANCES
- TEMPORARY WORK ASSIGNMENTS
- CLAIM INCOME RECOGNITION – ECONOMIC PERFORMANCE
- RELIEF FROM HOURS OF SERVICE REGULATION

**STREAMLINE THE PROCESS FOR APPROVAL OF APPRENTICESHIP PROGRAMS**

**AGC POSITION**: AGC members cite the shortage of skilled labor as the most significant challenge they face today. AGC has always identified a skilled workforce as the key to a successful construction project (industry). That is why it supports legislation (such as the bipartisan Apprenticeship Enhancement Act of 2000) that would require the U.S. Department of Labor to act expeditiously upon requests for approval and registration of construction industry apprenticeship and training programs.

**HOW IT AFFECTS YOUR BUSINESS**: Most industries and employers across the country are experiencing a critical shortage of skilled workers. Factors contributing to the shortage include worker retirement, strong competition from other job sectors, and an apprenticeship system that was designed at the beginning of the past century. These factors are exacerbated by a huge increase in demand for skilled workers. According to the U.S. Bureau of Labor Statistics, skilled workers made up 20 percent of the labor force in 1950. That percentage has grown to 65 percent of the labor force today.

Today, construction careers include state-of-the-art education programs, high job satisfaction, and good pay for individuals in highly skilled occupations. In short, these jobs offer many Americans who are currently sitting on the sidelines of a booming economy a good chance at success. A key component of building a career in a highly skilled industry is apprenticeship.

The Apprenticeship Enhancement Act promotes accountability in government and will help address the severe shortage of skilled workers. The act imposes a reasonable 90-day time limit on the Department of Labor (DOL) to consider apprenticeship program applications, requiring written decisions for approval or denial, and establishing a process for appeal or judicial review should approval be denied.

An employer's ability to compete on federal and federally assisted construction is affected by the U.S. Department of Labor's approval of its craft training program. There is no requirement for local, state, or federal DOL offices to act promptly upon requests for program approval/registration nor to provide written reasons for nonapproval. There have been cases where local State Apprenticeship Councils have refused to approve programs meeting all federal requirements for years, simply for political reasons. Such refusals have taken place, and continued, even in the face of court orders to the contrary.

**OPPOSITION**: Existing regulations are adequate and no further action from DOL is necessary.

**AGC RESPONSE**: AGC members cite the shortage of skilled labor as the most significant challenge they face today. A skilled workforce is critical on every project and to every company in the construction industry. That is why the U.S. Department of Labor should be required to act expeditiously upon requests for approval and registration of construction industry apprenticeship and training programs.

*For More information, please contact Kelly Krauser of the Associated General Contractors at 703-837-5363.*

**LOOKBACK METHOD OF ACCOUNTING**

**AGC POSITION**: AGC supports efforts to provide relief from the burdensome and confusing lookback method of accounting for long-term construction contracts.

**HOW IT AFFECTS YOUR BUSINESS**: The 1986 Tax Act extensively revised the methods of accounting available for long-term contracts, including enactment of a provision mandating the use of the lookback method for all long-term contracts accounted for on the percentage-of-completion method of accounting (PCM). The lookback method of accounting was adopted to address abuses in the application of the PCM in other industries that have long-term contracts spanning many years. The lookback method essentially requires a construction contractor to file amended tax returns each year for every prior year in which a currently completed contract was in progress. It also requires similar amendments for every year in which post completion changes occur. The difference between the theoretical taxes that would have been due if all facts were known in the year the contract was entered into, and the taxes actually paid in prior years, is calculated. Interest is then calculated on this change in prior-year tax liabilities. The lookback method does not result in any change in total tax liability. It does result in an interest adjustment based on this theoretical change in tax liabilities.

The lookback method is exceedingly complex. It imposes tremendous compliance and administrative burdens on construction contractors. The lookback method diverts valuable time, labor, and resources of construction financial and accounting professionals from worthwhile functions. It poses special problems for smaller contractors that have to hire outside accounting experts in order to calculate lookback.

The Taxpayer Relief Act of 1997 attempted to address this issue by providing an election to forego application of the lookback method if the estimated gross profit recognized in each contract falls within 10 percent of the retroactively determined gross profit for each year the contract was in progress. However, this provision provides no relief from the paperwork burden. Election to apply this provision requires most of the above calculations as well as additional calculations in order to determine whether each contract falls within this 10 percent variance in each prior year.

**OPPOSITION**: The Treasury Department takes the position that the narrow exception to the use of the lookback method currently available excludes those taxpayers for whom the calculations are overly burdensome.

**AGC RESPONSE**: On this point, the Department of Treasury is simply mistaken. The lookback method is an overwhelming burden for both small and large contractors. Further, many contractors receive refunds plus interest, which, in AGC's estimation, makes this a revenue loser for the Department of Treasury.

*For more information, please contact Phil Thoden of the Associated General Contractors at 703-837-5364.*

**CASH METHOD OF ACCOUNTING**

**AGC POSITION:** AGC recognizes the cash method of accounting as a legitimate accounting method for small contractors that adhere closely to the Internal Revenue Code. AGC advocates a statutory classification that construction materials are not "merchandise" or "an income producing factor," updating the small business exemption and mitigating unreasonable retroactive penalties.

**HOW IT AFFECTS YOUR BUSINESS:** For small contractors, the cash method of accounting is the most practical accounting method because it recognizes income and expenses when the cash is actually paid to the company or by the company. The accrual method requires recognition of income before the cash is received; that is, income is recognized when the right to the money arises even though it may never ultimately be received. Under the accrual method, the company is required, in effect, to pay taxes with money it doesn't have, which can be quite a burden for small contractors. The IRS has long favored the accrual method over the cash method, with little thought of small businesses that often find the accrual method a financial burden.

Although I.R.C. §448 places limitations on the use of the cash method of accounting, a specific exception is provided for entities with average annual gross receipts of $5 million or less for three previous taxable years. Accordingly, small contractors should be able to use the cash method of accounting, provided it clearly reflects income. The IRS has largely ignored the $5 million exception for small contractors and has aggressively sought to force the accrual method on small contractors. The IRS has done so by requiring contractors to inventory on-site supplies, because the IRS says that these supplies are an income-producing factor. Once the IRS requires an inventory to be kept, a small contractor must then switch to the accrual method and even pay substantial underpayment penalties.

In a nutshell, the IRS is attempting to ignore certain sections of the Internal Revenue Code which allow the cash method, thus giving the IRS the luxury of using the method of accounting that most aggressively accelerates revenue recognition. The IRS position on the cash method ignores the sections of the Internal Revenue Code specifically allowing corporations with average annual gross revenues of less than $5 million to use the cash method of accounting.

**OPPOSITION:** The IRS believes that many taxpayers are avoiding taxes by using the cash method of accounting.

**AGC RESPONSE**: The cash method of accounting is a legitimate accounting method for contractors with gross revenues under $5 million. A number of recent tax court decisions have been decided in favor of the right of small contractors to use the cash method.

*For more information, please contact Phil Thoden of the Associated General Contractors at 703-837-5364.*

**PER DIEM ALLOWANCES**

**AGC POSITION:** AGC supports efforts in Congress to provide relief from the disallowance of meals and incidental expenses allocated to construction workers who are paid per diem allowances.

**HOW IT AFFECTS YOUR BUSINESS:** Code section 274(n) currently provides that 50% of the amount paid for meals and entertainment are non-deductible business expenses. The IRS has issued Revenue Procedure 2000-39, which sets federal per diem amounts for various locations. The federal per diem is made up of two elements – lodging, and meals and incidentals. The revenue procedure provides that absent an accounting to the employer by the employee, the employer may treat 40% of the per diem, if less than the federal per diem, as meals and incidentals. This 40% is then subject to the non-deductible provisions of Code section 274(n). Therefore, 20% of the employer paid per diem is non-deductible. The revenue procedure does not address a "lodging only" per diem.

Alternatively, the employer can report the per diem as additional W-2 compensation to the employee. Many construction employees are union members and their collective bargaining agreement precludes the employer from reporting the per diem on the members' W-2s. Most contractors pay less than the Federal per diem (typically $30 to $80 per day). The employers reasonably expect the per diem to be used by the employee to be paid for lodging, and in some cases for meals and incidentals. In most cases, job sites are out of town for the employee.

Employers do not have an option regarding the payment of per diems as this is standard practice in the industry and in light of the scarcity of skilled workers in any given job location. **The payment of per diems is an ordinary and necessary business expense.** It is not an excess perk for employees. While it is reasonable for a business to be able to deduct ordinary and necessary business expenses, the IRS has taken the position that any meal expense is not deductible under Code section 274(n). Per diem expenses can represent a significant cost to construction contractors.

**OPPOSITION:** The IRS believes that it has no authority to treat any meal or entertainment expense as deductible in light of the apparent limiting language of Code section 274(n).

**AGC RESPONSE:** Congress should exclude construction workers' per diems from the provisions of Code section 274(n) as these are ordinary and necessary business expenses, provided the per diem paid an employee is equal to or less than the federal per diem rate. The provision of Code section 274(n) would continue to apply to non-per diem meals and entertainment.

*For more information, please contact Phil Thoden of the Associated General Contractors at 703-837-5364.*

**TEMPORARY WORK ASSIGNMENTS**

**AGC POSITION:** AGC supports increasing the "temporary work assignment" definition for construction workers from the present limitation of 12 months to a new limitation of 24 months.

**HOW IT AFFECTS YOUR BUSINESS:** Ordinary and necessary living expenses paid on behalf of or reimbursed to an employee when working away from home on temporary assignments are not subject to taxation to the employee and are deductible business expenses. The construction contracting industry commonly requires its employees to travel to out of town job sites. Construction contracts have become increasingly larger and complex. Many jobs now require more than 12 months but less than 24 months to complete.

Existing tax law requires reimbursements to employees be treated as additional compensation when the work assignment time becomes expected to exceed 12 months. Typically, the employer "grosses up" (includes in gross income) the reimbursement so that the employee is receiving a tax neutral benefit to the expense of the employer and the contracting customer. This gross-up effectively doubles the cost of the employee to the employer.

**OPPOSITION:** Opponents argue that the government should not subsidize the living expenses of employees.

**AGC RESPONSE:** The extension of the temporary assignment period from 12 months to 24 months merely recognizes the mobile nature of the construction work force, the modern complexity and size of contracts as well as reasonable delays outside the control of the contractor. For example, a highway construction contract in Florida that can be completed in 12 months may require up to 24 months to complete in Alaska due to weather and other on-site delays.

*For more information, please contact Phil Thoden of the Associated General Contractors at 703-837-5364.*

**CLAIM INCOME RECOGNITION – ECONOMIC PERFORMANCE**

**AGC POSITION:** AGC believes that taxpayers reporting using the percentage of completion accounting method for long-term contracts should be required to include in the contract amount only items for which the "all events" test has been met.

**HOW IT AFFECTS YOUR BUSINESS:** Most long-term construction contracts (contracts lasting more than one year) are required to be reported under Code section 460 using the percentage of completion method. Contract revenue earned is computed by determining how much of the contract has been completed compared to the total estimated contract amount. The IRS has taken the position that the contract revenue amount should be increased as soon as it is reasonably possible to estimate that payments on it will be received, even when the payments are being disputed between the owner and contractor.

This IRS position is best represented by the findings in *Tutor-Saliba v. Comm'r, 115 TC No 1 (2000)* which ruled that contract revenue is taxable even though there is a payment dispute between the owner and contractor. This position causes a contractor to report a disputed payment as taxable income prior to the time a prudent businessperson would consider the contract to have been changed and income received. The general rule for accrual basis taxpayers is that income generally should not be taxed until the "all events test" is met to assure the receipt of income. Construction contracting and contracting law is very complex. The tax code should respect this complexity and not require a contractor to pay taxes on revenue amounts that are in dispute. The construction industry is the only industry that has been singled out of the economy to cause taxation prior to an economic transfer of value.

Under the findings of *Tutor-Saliba,* a general contractor is required to report as revenue amounts of compensation that are in dispute by the owner, and therefore, the all events test has not been met. At the same time, the contractor is not allowed to take costs attributable to subcontractors and suppliers that have filed claims against the general contractor because the all events test is not met. This is a heads we win, tails you lose provision in favor of the government.

**OPPOSITION:** Opponents feel that the adjustment to the contract amount is required to avoid unreasonable deferrals of income by contractors.

***AGC RESPONSE:*** Contracts are dynamic agreements and should only be modified when agreements as to scope and price are achieved. The all events test should apply to both revenue and costs. To do otherwise causes taxation prior to the creation of income. Regulation 1.460-4(d) contains clear provisions for reporting disputed contract items for contracts reported on the completed contract method. These provisions should apply to all contracts including those reported on the percentage of completion method as has been the longstanding practice of the construction industry.

*For more information, please contact Phil Thoden of the Associated General Contractors at 703-837-5364.*

**RELIEF FROM HOURS OF SERVICE REGULATIONS**

**HOW IT AFFECTS YOUR BUSINESS:** The hours-of-service regulations were first adopted by the Interstate Commerce Commission in 1937. The basic hours-of-service regulations have been essentially unchanged since 1962. The regulations were intended to regulate the long-haul, over-the-road truck drivers, not the short-haul construction drivers. These rules currently mandate the following limits: 1) a maximum of ten hours driving, after which a driver must have at least eight consecutive hours off-duty before he can drive again; 2) a maximum on-duty period of fifteen hours, after which a driver must have at least eight consecutive hours of rest before he can drive again; and 3) a maximum of sixty hours on duty in any seven consecutive days, or a maximum of seventy hours on duty in any eight consecutive days. TEA-21 grants DOT the authority to exempt, grant waivers, and establish pilot programs that would provide individuals or classes of individuals relief from certain commercial motor vehicle regulations, including hours-of-service restrictions.

Many AGC members operate trucks in their construction operations. These members are significantly impacted by the Federal Motor Carrier Safety Administration's (FMCSA) hours of service restrictions. AGC believes that construction industry truck drivers operate under conditions and in a manner that does not lead to the fatigue or alertness problems that impact safe vehicle performance. Therefore, AGC believes that the hours of service restrictions as they exist and as contained in the proposal are unnecessary for construction industry truck drivers.

In 2000, the Federal Motor Carrier Safety Administration (FMCSA) issued proposed regulations that would add additional hours-of-service burdens on construction industry drivers including, eliminating the resetting of the on-duty clock after 24-hours off-duty that Congress established for the construction industry in the 1995 National Highway System Designation Act (NHS). This change was made without the required determination that the reset adversely impacts safety or is not in the public interest. Fortunately, Congress stopped DOT from finalizing these proposed regulations through October 1, 2001.

AGC strongly opposes the proposed regulations and urges the Bush Administration to issue new proposed regulations. AGC believes that the Hours of Service regulations for truck drivers should include distinctions between long-haul truckers and intermittent or short-haul drivers in the construction industry. AGC suggests a separate construction industry driver category that will address the unique nature of construction industry drivers. Specifically, we propose that construction industry drivers be limited to 16 hours of on-duty time in a 24-hour period, and only 12 hours of driving in a 24-hour period. The construction industry driver would be limited to 80 hours on duty in a seven-day period, and 72 hours of driving in the seven-day period. Furthermore, we propose a flexible maximum two-week driving time that would permit construction industry drivers to work around the inclement weather more effectively. We also propose maintaining the

congressionally instituted 24-hour reset, which allows the construction industry driver's accumulated on-duty and driving time to start at zero after 24 hours off duty.

**OPPOSITION**: Tired truck drivers are a major cause of accidents. A restriction on the number of hours and number of days worked is needed.

**AGC RESPONSE**: Construction drivers work differently than long-haul drivers. For example, a study of "mixer drivers" found that 60% traveled less than 10,000 miles annually and 99% traveled less than 25,000 miles annually. In comparison, long-haul drivers travel a maximum of 180,000 miles annually.

Unlike long-haul drivers, construction drivers do not drive monotonous long-haul trips. A study of concrete truck drivers found that the drivers spent only 30% of their on-duty time driving.

*For more information, please contact Brian Deery of the Associated General Contractors at 703-837-5319.*

# REMARKS BEFORE SUMMIT OF THE HOUSE SMALL BUSINESS COMMITTEE'S REGULATORY REFORM & OVERSIGHT SUBCOMMITTEE

by

Betsy Laird, Vice President of Government Relations
International Franchise Association

June 21, 2001
2360 Rayburn Building

**INTRODUCTION**

Good morning, Chairman Pence, members of the Subcommittee, I am Betsy Laird, Vice President of Government Relations for the International Franchise Association, located here in Washington. The IFA is more than 40 years old and is proud to represent the entire franchise community - - franchisors, franchisees and suppliers to franchised businesses.

**IFA'S MEMBERSHIP**

Many of our members began as small businesses and through successfully applying the franchise format, have grown to become such well-known such companies as McDonald's, Marriott, REMAX, Krispy Kreme, Lawn Doctor, Moto Photo, Subway, Mail Boxes, Etc., Meineke Muffler, Blockbuster, Coldwell Banker, and Holiday Inn.

While you recognize many of these brands, it may surprise you to learn that IFA's membership of 800 franchisors and 1,000 franchisees is primarily composed of small businesses with fewer than 50 employees and $5 million in revenue. These are companies that one day will assume their rightful places as part of the American Dream.

IFA is honored to take part in this meeting. As you can imagine, many of our members also belong to other associations present today - - the National Restaurant Association, the American Hotel & Motel Association and NFIB

among them. We share their concerns and support their views on a variety of initiatives discussed here.

## FRANCHISING FUNDAMENTALS

It is important to understand how franchising works. First and most importantly, franchising is not an industry. Rather, franchising is a method of distributing goods or services to consumers used by some 75 industries, including restaurants, hotels, real estate. The franchisor licenses the right to the name or trademark of the business. The franchisee pays for a license to use the trademark and operating system for a period of years.

## REGULATION OF FRANCHISING

Franchising is regulated at the federal and state levels. Since 1979 the Federal Trade Commission (FTC) has required franchise systems to make comprehensive disclosures to potential franchisees prior to the sale of a franchise unit. The purpose of the Franchise Rule and numerous state laws requiring similar disclosures is to provide detailed information explaining the terms of the franchise relationship to potential franchisees so they can make an informed investment decision. In addition, a number of states require franchise companies to register a disclosure document in order to sell franchises in those states. Franchising is probably the only business in which a prospective entrepreneur has access to so much information about a particular business in advance of investing in that business.

**COMPREHENSIVE DISCLOSURE**

These federal and state regulations require disclosure of information relating to more than 20 different topics, including a franchisee's rights and obligations, the cost and any fees the franchisee is required to pay, a list of current and former franchisees and contact information, litigation history, restrictions on the transfer of the franchise and virtually every other aspect of the franchised business. IFA and its members are firmly committed to vigorous enforcement of presale franchise disclosure laws. While many business sectors view government agencies as adversaries, the franchising community commends the FTC for striking the appropriate balance between franchise investor protection and legitimate concerns about overly burdening businesses ready to expand through franchising.

**FRANCHISING WORKS**

The regulatory program in place at the FTC has enabled franchising to flourish, becoming the epitome of entrepreneurship and free enterprise. Consider the astonishing impact of franchising on America's economy! Franchising accounts for more than $1 trillion in U.S. retail sales each year, provides 8 million American jobs, and offers consumers more than 300 thousand franchised locations that are readily identified sites of value, quality and consistency.

**REVISING THE FRANCHISE RULE**

Presently the FTC is in the final stages of revising and streamlining the current Rule. This is a process in which the IFA and its members have been deeply involved and the result of which will be an even more effective Franchise Rule that we support.

**OTHER REGULATORY ISSUES OF CONCERN**

I mentioned earlier that franchising is utilized by many different industries. We have been contacted by several of our members with concerns about very specific regulations affecting them.

- The United States Postal Service recently enacted regulations mandating that commercial mail receiving agency (CMRA) mailbox customers use "pmb" (personal mailbox) or "#" in the place of "suite", which according to the USPS will reduce mail fraud. CMRA customers find this notion misguided.

- Among the numerous inconveniences are the significant costs associated with these rules. There are roughly 10,000 CMRAs in the United States serving approximately 800,000 mailbox customers, many of whom are small business owners, who must now print new business cards, stationery, etc., in order to comply with these new rules.

- CMRA mailbox customers believe that these rules are cumbersome and unfair. In addition to being costly, they presume a boxholder's guilt and are

not based on any substantial data indicating that more mail fraud occurs in CMRAs than through traditional Post Office boxes.

- Continued efforts like this one will make the practice of holding a box at a CMRA even more difficult than it already is. We urge the Subcommittee, at a minimum, to maintain the status quo and in the future, to question the wisdom of other anti-competitive regulations that lack substantive data to support them.

- IFA asks the Subcommittee for assistance in striking proposed revisions to the Fair Labor Standards Act (FSLA) pertaining to the exemption for companionship services in 29 CFR Part 552. What is being proposed is a legacy from the previous Administration. The proposed regulation would no longer permit employers of companions (caregivers) to utilize the exemption from the minimum wage and overtime requirements of the FLSA. Companionship services are those provided to the elderly or disabled or others not able to care for his or her own needs. Our members believe this revision will cost families in need more, as well as making it more difficult to find qualified help for our aging population.

Thank you. I will be happy to answer any questions.

*Representing, Educating and Promoting the Restaurant/Hospitality Industry*

1200 SEVENTEENTH STREET NW, WASHINGTON DC 20036-3097 202/331-5900 FAX: 202/331-2429

NATIONAL RESTAURANT ASSOCIATION

The National Restaurant Association
Regulatory Reform Summit
Subcommittee on Regulatory Reform and Oversight
House Committee on Small Business
June 21, 2001

Founded in 1919, the National Restaurant Association is the leading business association for the restaurant industry, which includes 844,000 establishments around the country. Together with the National Restaurant Association Educational Foundation, the Association's mission is to represent, educate, and promote a rapidly growing industry that currently employs over 11 million people. Ninety-two percent of restaurants in the United States have fewer than 50 employees. The restaurant industry is the cornerstone of the economy, career opportunities, and community involvement. The National Restaurant Association shares many of the regulatory concerns of the associations and industries represented in this room, but we wanted to focus on four issues for the purposes of the discussion today: Food Safety/Agency Coordination; "White Collar" regulation reform; Teen Labor regulations; and, Americans with Disabilities Act.

1. Better Federal agency coordination with regard to food safety

In cooperation with state and local officials, the National Restaurant Association has helped develop effective state food safety regulations and educational materials based upon current science. It is critical that improvements in food safety be science-based and coordinated between federal agencies and the industries that will implement the changes.

We believe the current Food and Drug Administration (FDA) system of food safety regulation is disjointed, inconsistent and in need of a clear food safety focus. The FDA's current system makes it almost impossible for small restaurant operators to comply with varying recommendations and regulations. For example, new U.S. Department of Agriculture (USDA) proposals require that eggs be maintained at 45 degrees Fahrenheit during transport and storage, while the FDA recommends in its Model Food Code a storage temperature of 41 degrees Fahrenheit or below for eggs. Within the last year, we have seen the development and implementation of an egg safety action plan developed by the President Clinton's Council on Food Safety, drafted in cooperation with USDA and FDA representatives, and neither agency addressed this inconsistency.

We are not convinced that the current problems warrant creation of a single food safety agency, but we hold steadfast that the federal agencies must truly work together to address food safety in a consistent and science-based manner. FDA is currently pursuing several disjointed and poorly constructed President Clinton era food safety initiatives that have little to no industry input or coordination with USDA. The most notable Clinton era projects are the Listeria Retail Sampling Program, 2001 FDA Food Code, Egg Safety Action Plan and the Center for Disease Control's (CDC) EHS-net.

In addition, the disjointed nature of the FDA's agenda makes it difficult, if not impossible, for the restaurant industry to consistently develop nationally-consistent training materials for small and larger restaurants that are reflective of the varying food regulations established by both the USDA and the FDA. Furthermore, aggressive oversight of FDA's agenda is necessary to ensure that the agency is moving beyond its work on Clinton Administration policies to focus on the new agenda and priorities of the Bush Administration.

1. "White Collar" Regulation Reform

Federal law requires employers to pay covered employees who work over 40 hours per week an overtime premium of one and one half times their regular hourly pay rate. The law provides that all employees working in "bona fide executive, administrative, or professional capacity are excluded or "exempt" from the wage and overtime standards.

Employees working in these capacities are known as "white collar" employees. Congress delegated authority for making these determinations to the Department of Labor (DOL) which wrote what are known as the "white collar" regulations on this subject. These regulations have not been substantially updated since 1954.

There is a great deal of confusion in the restaurant industry as to the proper classification of employees, particularly restaurant managers and assistant managers. This confusion is a direct result of the outdated and complex DOL regulations, which are in dire need of reform. Given the economic and work place changes over the last 46 years, a fresh look at these regulations is needed to determine whether a consensus can be reached on how to amend them to better suit the modern work place.

3. Teen Labor Regulation Reform

Federal regulations should not discourage employers from hiring qualified teenagers to work in small business establishments, including restaurants. In fact, the regulations should be updated to make it simpler and easier to employ teenagers, who benefit from the work experience by learning skills that will transfer to any occupation.

Two regulatory reform concepts are currently being promoted by the National Restaurant Association:

Provide more flexibility in the working hour requirements for 14/15 year old teens so that they are not required to quit work for the day in the middle of the dinner hour (current federal regulations require 14/15 year olds to cease work on school days at 7:00 p.m.).

Change the regulations to allow 14/15 year olds to cook in restaurants, with certain restrictions. The regulations currently state that minors under 16 years old may not cook, "except at soda fountains, lunch counters, snack bars or cafeteria serving counters," in areas in plain view of customers. This change was first proposed by the Clinton Administration, but to date, no final action has been taken.

4. Americans with Disabilities Act

The Americans with Disabilities Act, which first took effect in 1991, requires places of public accommodation, such as restaurants, to be accessible to and usable by people with disabilities. Over the years, despite an excellent record of industry compliance, there has been a growing trend towards the use of litigation to resolve issues of access. In many instances, restaurant owners who have made a good-faith compliance effort are not given a chance to correct an alleged violation before a lawsuit is filed.

In March, 2001, Rep. Mark Foley (R-FL) introduced the ADA Notification Act (H.R. 914), which would give small businesses a fair chance to review and correct an alleged violation of the Americans with Disabilities Act before a lawsuit may be filed. Specifically, the legislation provides for a 90-day waiting period before a court could get jurisdiction. The companion Senate bill (S.782) was introduced by Sen. Daniel Inouye (D-Hawaii) in April, 2001.

# TIA Small Business Members and their Regulatory Burdens

**GRANT E. SEIFFERT**
Vice President of External Affairs & Global Policy

Thursday, June 21, 2001

House Small Business Committee Roundtable

# TIA Overview

High-Tech Full-Service National Trade Organization

The Voice of Manufacturers & Suppliers of Communications & Information Technology Products & Services

1100+ Large and Small Member Companies

Domestic and International Advocacy

International Offices (Moscow, Beijing, Brussels, Sao Paolo)

Market Development, Trade Promotion Programs

Standards Development Organization (SDO)

SUPERCOMM, Other Trade Shows and Conferences

# TIA Public Policy Priorities

TIA's Mantra for the Communications Industry:
Competition - Liberalization - Deregulation

The Rate of Deployment of High-Speed and Broadband Communications Technologies Must Be Increased (H.R.267)

Additional Spectrum Must Be Made Available in the U.S. for Advanced Wireless Services, Including Third-Generation (3G) Systems

- Spectrum Allocations Should be Harmonized Globally to the Greatest Extent Possible to Maximize Economies of Scale and Facilitate Global Roaming

# Small Business in the Telecommunications Industry

**Small Business members @ TIA are member companies with revenues of less than $35 million**

**Approximately 76% of TIA's 1,100 members fall into this category.**

# The Top 4 Impediments
## to the success of Small Businesses

1. **Market Entry**

2. **Bureaucratic requirements**

3. **Export restrictions**

4. **Access to Capital**

# The Top 4 Impediments
## to the success of Small Businesses
### 1. Market Entry

Passage of the Telecommunications Act of 1996 was a tremendous step toward leveling the playing field for entrepreneurs wanting to provide communications services to customers in an historically monopolistic market.

The requirements on competition in the Act (*i.e.*, §271) on ILECs and RBOCs for equal or open access became the key to unlock the local markets to small businesses. However, less than motivated stakeholders and an inadequate enforcement process has managed to keep these markets from reaping the benefits of competition.

# The Top 4 Impediments
## to the success of Small Businesses

### 2. Bureaucratic requirements

Small businesses simply do not possess the resources or staffs to handle the burdensome regulatory filing requirements companies in the telecommunications industry are forced to comply with.

**EXAMPLE:** one member company bids on government contracts, and sometimes cannot finish trudging through the 2-inch thick terms and conditions and fill out the appropriate forms before the deadline passes. This appears to be less of a problem for larger corporations with in-house legal teams, or a budget to afford significant outside counsel.

# The Top 4 Impediments
## to the success of Small Businesses

## 3. Export restrictions

Many of the export restrictions or sanctions levied against foreign countries rarely accomplish the objective of punishing the target, as European and Asian competitors are only too happy to fill the orders. The outcome tends to be just the opposite of punishment as American companies, usually the small businesses, must bear the brunt of these sanctions because of the loss of customers and revenues while the target country obtains the product from another source.

**Top Priority:** Normalized Trade Relations with China

# The Top 4 Impediments
## to the success of Small Businesses

### 4. Access to Capital

In our current economic environment, access to capital is becoming a constant topic of discussion among all TIA companies, but especially our small business members striving to compete with well-established mega-corporations.

This uncertainty that exists in the marketplace has literally cut off billions of dollars in funding needed to continue making facility upgrades, paying employees, and developing new technologies to keep the businesses competitive, which in turn keeps consumer prices low, unemployment and bankruptcies low, and sales and the economy stable

**Regulatory Concerns Facing the Convenience Store Industry**
**Regulatory Roundtable – Chairman Mike Pence**

**June 21, 2001**

**Credit Cards Charge Backs:** With the rising price of gasoline, many retailers are having increased incidents of customers filling up their tanks, charging it on a credit card and then later claiming it wasn't them. Since there is no signature on the pay-at-the-pump receipt, the retailer is usually responsible for the full transaction.

**Credit Card Fees:** Many retailers are being charged outrageous usage fees by Visa and MasterCard, and there is no remedy. Retailers receive only pennies for each gallon of fuel they sell. Credit card fees range between three and five percent of the value of the sale. This could effectively negate the slim margin the retailer receives from a fuel sale. In a time of higher prices, more consumers are using credit cards to purchase fuel. At the same time, higher prices generally reduce the margin available to retailers.

**Diesel Desulfurization**: In January, the EPA issued a rule phasing in a 97 percent reduction in the sulfur content of on road diesel fuel. This phase-in (80% in 2006, 100% in 2010) places two diesel fuels on the market that cannot be commingled. This stresses the distribution system by requiring pipeline dedicated to one fuel and additional tank wagons to distribute the other. From a marketer perspective, to serve two diesel fuels, operators will have to install an additional, temporary underground storage tank that will become obsolete when the new fuel is fully phased-in after four years. (A new tank costs approximately $50,000 to install.) The only other option is for a marketer to choose one fuel over the other. Because vehicles manufactured after 2007 cannot operate on the higher sulfur level, marketers choosing to sell this fuel lose these drivers as customers. However, if marketers choose to sell the lower sulfur, more expensive fuel, they risk losing customers driving of older vehicles because of the price difference. Legislation (HR 1891) has been introduced to eliminate the phase-in provision of this rule.

**DOT Hours of Service:** In May 2000, the Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA) issued a Notice of Proposed Rulemaking that would update the Agency's Hours-of-Service (HOS) regulations for commercial motor vehicle operators. The revisions are designed to address driver fatigue, which has been demonstrated to be a major factor in CMV-involved crashes. The proposed changes also would update the current HOS regulations, which have been in effect since 1962, to reflect modern realities in the trucking industry. The proposal seeks to standardize on-duty/off-duty rest periods and give drivers regular sleep periods and "weekends" but it is complicated, as it establishes different mandatory rest periods for each of five different motor carrier operations, such as long-haul, regional, and local operations. Trucking companies of all shapes and sizes oppose the proposal, arguing that the changes would not necessarily improve safety because it would add to the number of trucks that are operated on the highways during daylight hours. Motor carriers also argue the proposed changes would overburden an industry that is already

struggling to find qualified professional drivers. Small trucking companies would be particularly affected by the proposal, as they probably would have to add drivers, thus driving up costs.

**Hazardous Materials Transportation Registration Fees:** In December 2000, the Department of Transportation issued a proposed rule to reduce the annual registration fee that offerors and transporters of hazardous materials, including motor fuels, must pay from $2,000 to $500. The $2,000 fee level, instituted earlier last year, resulted in the Research and Special Programs Administration (RSPA) collecting more than $21 million this year, far in excess of the $14.3 million authorized by Congress. As a result, RSPA proposed reducing the annual hazmat registration fee for larger companies from $2,000 to $500 starting in the 2001 - 2002 registration year and continuing through the 2006 – 2007 registration year. Registration fees for smaller companies would remain at the $300 annual level.

DOT announced in May 2001 that, in light of an additional $12 million included in the President's budget for registration fees to fund a portion of RSPA's hazardous materials safety program, it is delaying the proposed fee reduction until October 1, 2001. Robert McGuire, associate administrator for hazardous materials at RSPA was quoted as saying the budget proposal is expected to reverse the planned reduction in hazmat registration fees.

**FinCen Compliance**: In August 1999, the Financial Crimes Enforcement Network of the U.S. Department of the Treasury (FinCen) issued a final rule defining the term "money services business" (MSB) as an agent, branch, or office within the U.S. of any person that exchanges over $1,000.00 per person, per day through, amongst other activities, check cashing, selling or redeeming travelers checks or issuing travelers checks or money orders. MSB's must register by December 31, 2001. In March 2000, FinCen issued a second final rule, requiring MSB's to complete Suspicious Activity Reports (SAR) in cases involving a transaction of at least $2000.00 when a clerk suspects that the transaction involves funds derived from illegal activity, or that the transaction is designed to evade the requirements of the Bank Secrecy Act, or that the transaction serves no legitimate business or other lawful purpose. For these purposes, the $2000.00 threshold would include the aggregate of similar multiple transactions by the same customer in the same day.

**Prompt Notification of Food Stamp Violations:** The convenience store industry has undertaken a comprehensive program to assure that food stamps are used properly. However, the efficacy is this program has been limited due to the behavior of some state and federal enforcement officials. A state or federal agency will conduct a "sting" operation, attempting to catch food stamp fraud, and then will not notify the retailer of the alleged violation for several months. In some cases, the retailer is targeted repeatedly and a series of alleged violations are eventually brought to the attention of the retailer. However, if the retailer had been promptly notified of the original violation, then it could take the proper steps to discipline the clerk or revise its policies. Instead, the food stamp fraud squads seem more intent on penalizing retailers by citing numerous violations (thereby giving the state grounds

to suspend the retailer's ability to participate in the program) than notifying the retailer of a problem so that further violations can be prevented.

**SBREFA Amendments for Indirect Impacts:** Many federal agencies have taken the position that SBREFA does not apply to some important rulemakings, such as the establishment of air quality standards, because no small businesses are directly impacted by the rulemaking -- in fact, no businesses are directly impacted. However, this analysis ignores the fact that once these standards are in place, regulations implementing the standards are then proposed and implemented that severely impact small businesses. At that point, the federal agency asserts that it has no choice -- it must implement the standard. This "Catch-22" should be addressed by amending SBREFA to call for a small business analysis when the rulemaking would have an indirect impact on small businesses.

AeA

June 13, 2001

**Employers Should Not Be Subject to New and Duplicative Reporting of Stock Option Compensation**

**Background**

- General Rule. Income from the exercise of nonqualified stock options is generally taxable as wages for income and social security tax purposes upon exercise pursuant to Code section 83. Specifically, the spread between the fair market value at exercise and the option price is taxable compensation income and reportable as wages on Form W-2 (boxes 1, 3, and 5).

- Code V. Announcement 2000-97 ac d employers of a new Code "V" to be used on the 2001 Form W-2, box 12, to report separately the amount of compensation received upon exercise of nonstatutory stock options. Announcement 2001-7 advised employers that the reporting requirement under Code V was optional for 2001 Forms W-2, implying that the requirement would be mandated for years after 2001.

**Legal, Practical, and Policy Considerations**

- No Tax Effect. Code V reporting would have no tax effect, because income from nonstatutory options is already required to be reported to IRS and to employees in boxes 1, 3 and 5 on the W-2 as compensation. Accordingly, such income is already subject to appropriate income and social security taxes.

- No Benefit to Employees. Code V reporting would have no beneficial impact on employees because stock option compensation is already disclosed to them (as part of the nonqualified stock option program and/or as part of their pay stubs).

- No Other Tax-Related Purpose. Employers are currently required to report 18 different items in Box 12 on Form W-2. All of these items have readily apparent compliance purposes. In particular, each item is important for one or more of the following reasons: (1) the proper calculation of social security benefits (codes A, B, C, D, E, F, G, M, N, R, S and T); (2) compliance with welfare or pension limitations (codes C, D, E, F, G, H, R, S and T); (3) information about non-taxable fringe benefits not otherwise

reported on Form W-2 (codes J, L and P); or (4) the employee's individual taxes on Form 1040 and accompanying forms (codes A, B, K, L, M, N, Q, R and T). None of these purposes justify separately reporting income from nonstatutory stock options.

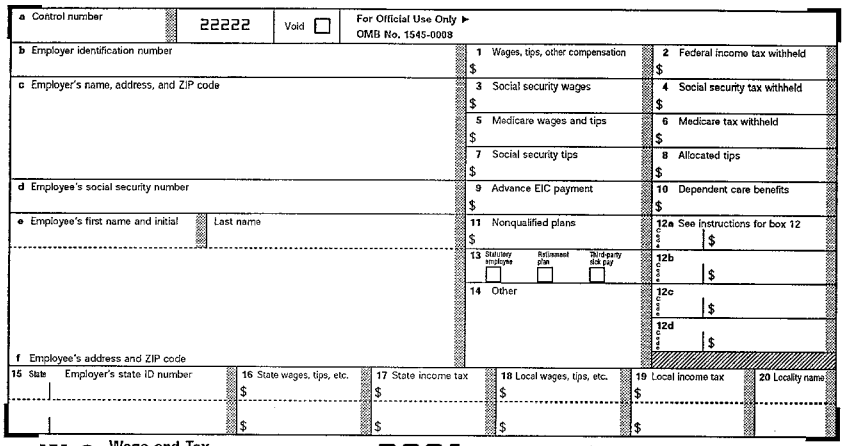
- Needless Administrative Burdens and Costs. Code V reporting would impose additional administrative burdens and costs on employers, including payroll system redesign. Although Treasury may find it more convenient to have such information on W-2s for its statistical and economic models, information on nonstatutory stock options is available at other locations (e.g., SEC filings, etc.). In any case, it is inappropriate to impose additional costs and burdens on employers without a demonstrated immediate compliance justification.

- Questionable Legal Validity. The Code (sec. 6051) specifically lists the items that are required to be separately stated on Form W-2, including such other information "as the Secretary may by regulations prescribe." Nonstatutory stock options are not listed specifically in the Code and no regulations have been proposed or issued requiring their disclosure. Accordingly, the Internal Revenue Service (IRS) does not have the legal authority to impose this disclosure requirement.

- No Public Input. Because no regulations were proposed to implement Code V reporting, there was no opportunity for formal public comment. In addition, there was no coordination through the Information Reporting Program Advisory Committee, which would have allowed at least informal comments by those affected.

**Recommendation**

The separate reporting requirement for nonstatutory stock options should be permanently withdrawn. Accordingly, we recommend that Announcement 2000-97 be rescinded as soon as possible.



| | | | |
|---|---|---|---|
| a Control number 22222 Void ☐ | For Official Use Only ► OMB No. 1545-0008 | | |
| b Employer identification number | 1 Wages, tips, other compensation $ | 2 Federal income tax withheld $ | |
| c Employer's name, address, and ZIP code | 3 Social security wages $ | 4 Social security tax withheld $ | |
| | 5 Medicare wages and tips $ | 6 Medicare tax withheld $ | |
| | 7 Social security tips $ | 8 Allocated tips $ | |
| d Employee's social security number | 9 Advance EIC payment $ | 10 Dependent care benefits $ | |
| e Employee's first name and initial / Last name | 11 Nonqualified plans $ | 12a See instructions for box 12 $ | |
| | 13 Statutory employee ☐ / Retirement plan ☐ / Third-party sick pay ☐ | 12b $ | |
| | 14 Other | 12c $ | |
| f Employee's address and ZIP code | | 12d $ | |

| 15 State / Employer's state ID number | 16 State wages, tips, etc. | 17 State income tax | 18 Local wages, tips, etc. | 19 Local income tax | 20 Locality name |
|---|---|---|---|---|---|
| | $ | $ | $ | $ | |
| | $ | $ | $ | $ | |

Form **W-2** Wage and Tax Statement — 2001 — Department of the Treasury—Internal Revenue Service

**Copy A For Social Security Administration**—Send this entire page with Form W-3 to the Social Security Administration; photocopies are **not** acceptable.

Cat. No. 10134D

**For Privacy Act and Paperwork Reduction Act Notice, see separate instructions.**

**Do Not Cut, Fold, or Staple Forms on This Page — Do Not Cut, Fold, or Staple Forms on This Page**

## Instructions *(Also see Notice to Employee on back of Copy B.)*

**Box 1.** Enter this amount on the wages line of your tax return.

**Box 2.** Enter this amount on the Federal income tax withheld line of your tax return.

**Box 8.** This amount is **not** included in boxes 1, 3, 5, or 7. For information on how to report tips on your tax return, see your Form 1040 instructions.

**Box 9.** Enter this amount on the advance earned income credit payments line of your Form 1040 or 1040A.

**Box 10.** This amount is the total dependent care benefits your employer paid to you or incurred on your behalf (including amounts from a section 125 (cafeteria) plan). Any amount over $5,000 also is included in box 1. You must complete **Schedule 2 (Form 1040A)** or **Form 2441,** Child and Dependent Care Expenses, to compute any taxable and nontaxable amounts.

**Box 11.** This amount is (a) reported in box 1 if it is a distribution made to you from a nonqualified deferred compensation or section 457 plan or (b) included in box 3 and/or 5 if it is a prior year deferral under a nonqualified or section 457 plan that became taxable for social security and Medicare taxes this year because there is no longer a substantial risk of forfeiture of your right to the deferred amount.

**Box 12.** The following list explains the codes shown in box 12. You may need this information to complete your tax return.

**Note:** *If a year follows code D, E, F, G, H, or S, you made a make-up pension contribution for a prior year(s) when you were in military service. To figure whether you made excess deferrals, consider these amounts for the year shown, not the current year. If no year is shown, the contributions are for the current year.*

**A**—Uncollected social security or RRTA tax on tips (include this tax on Form 1040. See "Total Tax" in the Form 1040 instructions.)

**B**—Uncollected Medicare tax on tips (include this tax on Form 1040. See "Total Tax" in the Form 1040 instructions.)

**C**—Cost of group-term life insurance over $50,000 (included in boxes 1, 3 (up to social security wage base), and 5)

**D**—Elective deferrals to a section 401(k) cash or deferred arrangement. Also includes deferrals under a SIMPLE retirement account that is part of a section 401(k) arrangement.

**E**—Elective deferrals under a section 403(b) salary reduction agreement

**F**—Elective deferrals under a section 408(k)(6) salary reduction SEP

**G**—Elective deferrals and employer contributions (including nonelective deferrals) to a section 457(b) deferred compensation plan

**H**—Elective deferrals to a section 501(c)(18)(D) tax-exempt organization plan (see "Adjusted Gross Income" in the Form 1040 instructions for how to deduct)

**J**—Nontaxable sick pay (not included in boxes 1, 3, or 5)

**K**—20% excise tax on excess golden parachute payments (see "Total Tax" in the Form 1040 instructions)

**L**—Substantiated employee business expense reimbursements (nontaxable)

**M**—Uncollected social security or RRTA tax on cost of group-term life insurance over $50,000 (former employees only) (see "Total Tax" in the Form 1040 instructions)

**N**—Uncollected Medicare tax on cost of group-term life insurance over $50,000 (former employees only) (see "Total Tax" in the Form 1040 instructions)

**P**—Excludable moving expense reimbursements paid directly to employee (not included in boxes 1, 3, or 5)

**Q**—Military employee basic housing, subsistence, and combat zone compensation (use this amount if you qualify for EIC)

**R**—Employer contributions to your medical savings account (MSA) (see **Form 8853,** Medical Savings Accounts and Long-Term Care Insurance Contracts)

**S**—Employee salary reduction contributions under a section 408(p) SIMPLE (not included in box 1)

**T**—Adoption benefits (not included in box 1). You must complete **Form 8839,** Qualified Adoption Expenses, to compute any taxable and nontaxable amounts.

**V**—Income from exercise of nonstatutory stock option(s) (included in boxes 1, 3 (up to social security wage base), and 5)

Box 13. If the "Retirement plan" box is checked, special limits may apply to the amount of traditional IRA contributions you may deduct. Also, the elective deferrals in box 12 (codes D, E, F, G, H, and S) (for all employers, and for all such plans to which you belong) are generally limited to $10,500. Elective deferrals for section 403(b) contracts are limited to $10,500 ($13,500 in some cases; see Pub. 571). The limit for section 457(b) plans is $8,500. Amounts over these limits must be included in income. See "Wages, Salaries, Tips, etc." in the Form 1040 instructions.

Note: *Keep Copy C of Form W-2 for at least 3 years after the due date for filing your income tax return. However, to help* ***protect your social security benefits,*** *keep Copy C until you begin receiving social security benefits, just in case there is a question about your work record and/or earnings in a particular year. Review the information shown on your annual (for workers over 25) Social Security Statement.*

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**H.R. 68 TO AMEND THE FEDERAL FOOD, DRUG & COSMETIC ACT**

**RELATING TO THE DISTRIBUTION CHAIN OF RX DRUGS**

**FMI POSITION PAPER**

## INTRODUCTION

The Food Marketing Institute (FMI), on behalf of its supermarket members operating approximately 8,000 pharmacy departments throughout the United States, strongly supports legislation (H.R. 68) introduced by Reps. Jo Ann Emerson (R-MO) and Marion Berry (D-AR). H.R. 68 is an important proposal that relates to the sale and distribution of prescription drugs in the United States. The purpose of the legislation is to clarify Congressional intent relating to the Prescription Drug Marketing Act of 1987 (PDMA) and to require reasonable accountability in the sale of prescription drugs by secondary wholesalers.

## REASONS WHY H.R. 68 IS IMPORTANT

The introduction of H.R. 68 is in response to some very onerous final regulations that have been issued by the Food and Drug Administration (FDA). The FDA rules are based on the agency's interpretation of PDMA. In brief, FDA believes it is obligated by the PDMA law to promulgate regulations that require a wholesaler who does not purchase pharmaceutical products directly from the manufacturer to provide their customer accounts with a complete history or "pedigree" of all prior sales of the product traced all the way back to the manufacturer. Without such a "pedigree" or sales history, it will be illegal under the FDA regulations for a secondary wholesaler to resell pharmaceutical products. Ironically, the FDA rules do not require a drug manufacturer or a wholesaler who buys directly from the manufacturer to provide a sales history to subsequent purchasers

It is estimated that FDA's regulations which become effective April 1, 2002, will force some 4,000 small business companies that currently distribute prescription drugs to close down or to drop pharmaceuticals as a product line. These secondary wholesalers play an extremely important role in drug distribution in the United States. They service mostly low-volume customers, such as independent pharmacies, rural health clinics and nursing homes. These are the types of accounts that large, full-line drug wholesalers can't profitably serve in the same efficient manner that a small wholesaler can. Thus, the FDA

rules will greatly reduce patient access to life-saving medications, especially in under served areas and rural communities.

Additionally, FDA's regulations will unnecessarily trigger increases in prescription drug prices. This will occur due to less vigorous competition in the distribution of pharmaceutical products. With secondary wholesaler banned from selling prescription drugs, pharmaceutical manufacturers will be able to establish exclusive marketing and distribution schemes with so-called authorized distributors which will lead to higher prices. Moreover, supermarkets with pharmacy departments and chain drug stores will be precluded from buying prescription drugs from secondary wholesalers who often have lower prices than full-line authorized distributors. Secondary wholesaler offer more attractive prices because they will forward buy in anticipation of a manufacturer's price hike or they will purchase excessive inventories of product from an authorized distributor at significant discounts that are then passed along to retail pharmacies. As such, prescription drugs will become less affordable to patients, especially seniors, under the FDA regulations.

**FDA REGS PROVIDE NO ADDITIONAL PROTECTION TO PATIENTS**

FDA has stated that its final regulations are needed in order to protect the health and safety of patients. This is simply not the case. The drug distribution system has been functioning safely and efficiently without placing consumers at risk for more than a dozen years since the enactment of PDMA and without FDA's "pedigree" requirement for certain transactions. This is because the PDMA established significant safeguards to protect consumers from counterfeit, adulterated, misbranded and expired products. Included in these safeguards was the important requirement for State licensing of all wholesaler distributors of prescription drugs and compliance with Federal standards relating to the storage, handling and recordkeeping of pharmaceutical products. To the extent that all drug wholesalers are already required by FDA to maintain extensive records of all transactions, which are subject to inspection by FDA and by State Boards of Pharmacy, the pedigree requirement is unnecessary and duplicative.

**KEY PROVISIONS IN H.R. 68**

H.R. 68 makes minor changes to two provisions of the PDMA in order to clarify Congressional intent relating to the distribution of prescription drugs by wholesalers. First, H.R. 68 would define an authorized distributor as a wholesaler who purchases directly from a pharmaceutical manufacturer. Secondly, H.R. 68 provides new language to simplify the detailed sales history requirement for wholesalers by requiring written certification when prescription drugs are purchased from an authorized distributor rather than directly from the manufacturer. In other words, written certification would be similar to a pedigree, but much less costly and burdensome State and Federal agencies

would have access to written certifications for verification purposes and firms would be subject to criminal penalties if these documents are found to be falsified.

**ORGANIZATIONS SUPPORTING H.R. 68**

In addition to FMI's endorsement of H.R. 68, the following organizations are on record in support of the Emerson-Berry legislation: National Community Pharmacists Association (NCPA), National Association of Chain Drug Stores (NACDS), American Pharmaceutical Association (APhA), Healthcare Distribution Management Association (HDMA), International Academy of Compounding Pharmacists (IACP), Pharmaceutical Distributors Association (PDA) and the American Veterinary Distributors Association (AVDA).

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REGULATORY REFORM – SMALL BUSINESS ISSUES

1. The Federal Wage and Hour Law does not allow private employers to offer their employees compensatory time off in lieu of paid overtime, despite the fact that government employees, since the 1930s, have had this option. The exceptions to this policy, which include professional administrative and management employees is relatively limited in scope so the vast majority of employees do not have this option and benefit.

The original purpose of the compensatory time exception was to retain employees, during the great depression, and to limit actual costs to governmental entities who may not have been able to otherwise pay for needed overtime. This is exactly the same position that small employers are now in but are prevented, without any real justification, from offering their employees compensatory time in lieu of overtime. This amounts to a discrimination against non-governmental employees, that cannot be justified either historically or in light of today's economy, that creates an unnecessary burden on both employers and employees. The option for compensatory time in lieu of overtime should therefore be extended to all employees, not other wise exempt from this portion of the Wage and Hour Law, and especially to small businesses.

2. OSHA, while responsible for the laudable goal of a safe and healthy workplace, places all of the burden for compliance on the employer, rather than sharing the responsibility for safe and healthy work conditions between both employers and employees. While employers can be cited and fined for allegedly unsafe conditions or unsafe acts committed by employees, there is no similar enforcement method for an employee who refused, either directly or through indifference, to comply with the OSHA law, regulations and standards, despite the employer's best efforts.

When originally written, it is my understanding that the OSHA law required both employers and employees to comply with it's terms and was to have a mechanism whereby employees who violate the OSHA law regulations and standards could, when appropriate, be cited and fined for the violation, rather than placing all of the burden on the employer. The enforcement language regarding employees, was stricken, with the rational that the employer "could always fire or otherwise discipline the employee." This simplistic approach ignored the existence of union and other employment contracts and other state and federal laws that, in many cases, make dismissal and discipline of employees difficult, if not impossible.

Court decisions have dismissed OSHA citations and penalties against employers when the employer was able to prove employee error – that despite the fact the employer did everything reasonable under the circumstance, through training and enforcement, to prevent the occurrence of the violation, the employee, through his own efforts, committed the violation, which could not, under the circumstances, have been prevented by the employer.

The defense of employee error should be amended into the OSHA law. The OSHA law itself should also be amended to allow the appropriate citation and penalty of employees who violate the OSHA standards and regulations, when an employer is found to have done everything reasonable under the circumstances to comply. This is not a radical suggestion. The Province of Ontario, as an example, has statutory language which allows this to occur and has been successful in both enforcing the Province's safety and health rules and regulations as well as job site safety.

3. The OSHA standards and regulations are overwritten and, all too often require an attorney to interpret. As a general rule, there is something very wrong when the explanation, contained in a standard or regulation's preamble goes on for hundreds of pages and the regulation itself is relegated to two or three pages of the Federal Register. Federal agencies, such as OSHA, as exemplified by the recently revoked OSHA Ergonomics Program Standard, appear to be moving away from the legitimate goal of plain language standards that would encourage understanding and compliance by the average employer and, instead, relegate small businesses to a complicated structure of standards and regulations that almost defy compliance.

The OSHA standards, and especially the 1910 General Industry Standards, are, for the most part, still overwritten and too complex for an employer to find, review and determine which portions of the General Industry Standard would affect his work site. The standards themselves should be reviewed. Redundant language should be stricken, and the entire General Industry Standard be compressed, simplified and reorganized into a more manageable and understandable document.

4. The Federal OSHA system has made some attempts to simplify the appeal process for employers as exemplified by the E-Z hearing process, which eliminates, in a number of cases, the need to follow the federal rules of civil procedure, including discovery and interrogatories. Many state plans, such as Maryland, have a very streamlined, simplified review process of informal conferences and formal hearings that are purely administrative in nature rather than quasi judicial. In order to reduce costs of appeal and to simplify the process, especially for the small businessman, it is submitted that the Federal OSHA appeal

process should be simplified for all citations and all employers and that the requirement for the Federal Rules of Procedure be dropped in lieu of a simplified administrative process as in done in a number of the state plan states.

5. If the goal of the OSHA law, regulations and standard is compliance, a citation and penalty process should be further modified to allow an employer to offset any civil penalties that may be assessed for an alleged violation of the OSHA law, regulations and standards by the documented amount spent to correct the condition, retrain employees or make any other corrections or actions to abate the hazard. High fines unfairly affect the small businessman, do not encourage compliance and, in many instances, may mitigate against full compliance, especially if an employer has a finite amount of resources to correct the condition.

6. Health insurance reform should be pursued. One of the major costs for any employer, especially a small businessman, is the cost of health insurance for employees, which many times is exacerbated by the existence of state mandated coverage that may not even be needed or desired by the employees, given the age of the workforce and other considerations. In order to mitigate this cost and improve benefits, associations, such as the NFDA, should be able to issue a health plan to it's members that allows a cafeteria approach to benefits that can be more tailored to the actual employer's worksite and the needs of the employees. This nationwide health plan, would be exempt from state insurance laws, and mandated benefits.

7. There are 50 diverse workers' compensation state laws. All too many times this diversity leads to "form" shopping, duplication and sometimes fraud, such as when an employer in one state cannot determine the existence of a previous claim, for the same alleged injury, filed and paid for by an employer of another state. There should be a central clearing house to allow employees in all states, through their workers' compensation insurance carriers, to determine whether or not the employee, claiming the work-related injury, has made the same claim against other employers in other states. There also should be an effort to bring consistency to the various state definitions of accidental injury, and questions such as average weekly wage and extent of benefits. In order to do this, and retain workers' compensation as a state system, the workers' compensation law should be studied by the U. S. Department of Labor and reform recommendations made, through a model code, to bring consistency and efficiency to the various workers compensation laws. This would help both employers and employees and could reduce insurance costs, especially for small businessman.

**NATIONAL FUNERAL DIRECTORS ASSOCIATION**
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Listed below is a regulatory issue that impacts a funeral home's environmental compliance. Because of the complex and cumbersome requirements and the cost of compliance to funeral directors, this is an appropriate subject for regulatory reform.

Applicability of the Resource Conservation and Recovery Act (RCRA) to Funeral Homes

Most funeral homes do not generate waste that meets the definition of "hazardous waste" under RCRA and if a funeral home does generate hazardous waste, it does so in the most minute quantities. That is because the characteristics and constituents of most of the products that funeral homes use are not hazardous or toxic within the definition of RCRA. There are, however, a couple of exceptions. For example, EPA maintains that some products that funeral homes use for surface spot removal contain halogenated compounds, which, when discarded, are likely to be hazardous wastes. These products are typically applied in very small quantities with a cotton swab or cotton gauze. The cotton swab or the cotton gauze is then considered by EPA to be a RCRA-regulated hazardous waste, when discarded, because it contains the halogenated compound.

To meet the requirements of RCRA as applied by EPA to these cotton swabs and cotton gauze, a funeral home is required to obtain a RCRA generator identification number, store the swabs and gauze in special receptacles for a defined period of time, and dispose of the swabs and gauze, using a licensed hauler that is required to take the swabs and gauze that the funeral home has stored to a permitted hazardous waste disposal facility, often at a distance from the funeral home. These requirements are extraordinarily complex and very expensive in view of the nature of the waste and the fact that the waste does not pose the kind of environmental hazard that RCRA was intended to address. Even the less onerous requirements that apply to a conditionally exempt or small quantity generator of hazardous waste are too onerous under the circumstances. A statutory or regulatory exemption from RCRA for the disposal of this kind of waste would be quite sensible.

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## Environment


## AmeriScan: June 19, 2001

**FLORIDA REFORMS ENVIRONMENTAL ENFORCEMENT RULE**

**TALLAHASSEE, Florida,** June 19, 2001 (ENS) - Governor Jeb Bush has signed landmark legislation overhauling the lengthy process for resolving less serious environmental violations in the state of Florida.

The Environmental Litigation Reform Act makes Florida the first state in the Southeast, and just the seventh state in the country, to establish comprehensive administrative penalty authority for resolving environmental violations. The law also makes Florida the first state in the nation to pay for mediation with funds from penalties collected from environmental violations.

"This legislation allows the state to resolve less serious violations quickly and efficiently, so we can focus our resources on pursuing and prosecuting the most serious environmental offenders," said Governor Bush.

The law creates two new options mediation and an administrative legal process through which individuals and businesses can resolve less serious environmental violations. Up to eight hours of mediation will be paid out of the Ecosystem Management and Restoration Trust Fund, which is funded by penalties collected for environmental violations.

The legislation also establishes an administrative penalty schedule, which sets specific penalties for specific environmental violations.

"The new law brings clarity, consistency and predictability to the process, which are fundamental to ensuring fairness and equity in our justice system," said state Department of Environmental Protection Secretary David Struhs. "The taxpayer will no longer have to foot the bill for years of litigation to resolve less serious environmental violations. It allows everyone to have their day in court, but is designed to prevent less serious environmental problems from turning into lengthy and expensive legal battles."

* * *

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- ESA - Mike Linzey, Brad Crabtree
- Wetlands - " " " "
- Ethanol Trade.
- Ergo - Shannon

Dan - Ron Ryan

# Select Issues of the American Farm Bureau

- SSR EPA - Forest Svc. and Fish and Wildlife
- HOS

## Transportation

I. Inland Waterway Improvement -- finish the Upper Mississippi/Illinois River Navigation Study (ACOE) prior to drafting of WRDA 2002 and start improving locks and dams.

II. Hours of Service -- more than 1/2 of agricultural commodities move to final point of sale or export on a truck; further restrictions on the hours drivers may drive in moving these commodities will impose severe handicaps on the efficient movement of these commodities.

III. Truck Weight -- important in part for the reason cited above; trucking has not had a productivity-improving increase in weight limits in more than twenty years. Allowing states to permit the appropriate use of heavier trucks with appropriate safety equipment will make truck transportation more competitive with barge and rail where such alternatives are not available.

IV. Rail Competition -- many agricultural producers and the elevator operators that ship their commodities are captive to a single rail service provider; these shippers need non-discriminatory treatment and access to competitive service providers.

## Environment

I. Animal Feeding Operations -- The Environmental Protection Agency issued a rulemaking proposal on January 12, 2001 called the "National Pollutant Discharge Elimination System (NDPES) Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs)." The rule will (a) increase the number of farms classified as CAFOs to approximately 39,000 by reducing the threshold level to be a CAFO from 1,000 animal units to either 500 animal units or 300 animal units if there is a discharge to waters; (b) redefine runoff from agricultural fields as a point source by requiring the land application of waste from a CAFO to be performed subject to a permit nutrient plan that is a part of the water quality permit; and (c) require the co-permitting of contract growers and processors. Designation as a CAFO also brings with it exposure to "citizen suit" provisions of the Clean Water Act.

- We are troubled by the impact of this proposal on family farms and ranches. Properly funded, voluntary, incentive based programs that promote manure utilization, not an expansion of regulation, will improve water quality.
- The current CAFO definition of 1,000 animal units should not be changed.

II. Agricultural Air Quality -- Due to lawsuits, new interpretations of existing law and new regulations under the Clean Air Act and other statues, agriculture is increasingly being targeted for air quality regulation. Emissions of particulate matter (dust) from field operations and livestock, ammonia and hydrogen sulfide from livestock, and smoke from agricultural burning, have all been identified by the EPA as agricultural sources of air pollution. AFBF believes the same needs to be reviewed to identify agriculture's true emission of these pollutants prior to any regulation.

- USDA needs funding for livestock emissions research now

III. Total Maximum Daily Loads -- The Total Maximum Daily Load (TMDL) rule will bring agriculture and other nonpoint sources into water regulation. Congress acted to delay the implementation of the new rule until after October 1, 2001. A regulatory approach that imposes costs on producers is not efficient or effective for farmers in meeting water quality goals. The state-generated data on impaired waters that EPA uses to justify the TMDL approach to nonpoint sources has been shown to be flawed and inadequate to support nonpoint source TMDLs.

- We believe the rule exceeds the authority of the Clean Water Act.
- The TMDL rule should be withdrawn.

IV. Wetlands -- Section 404 of the Clean Water Act requires anyone who is conducting a dredging or filling activity in the "waters of the United States" and adjacent wetlands to obtain a permit from the Army Corps of Engineers. The regulatory reach goes well beyond the literal interpretation of "navigable waters" or "waters of the United States." The recent Supreme Court ruling in the SWANCC case clarifies that federal jurisdiction does not extend to "isolated" wetlands. While Section 404 provides for an exemption from individual permit requirements for normal farming, silviculture and ranching activities, this exemption has been plagued by inconsistent and varying interpretations at the local level.

- Congress should establish a comprehensive policy that balances the protection of wetlands with protection for land uses.
- EPA and the Corps of Engineers must not block the SWANCC decision and maintain their jurisdiction over 'isolated' wetlands through 'guidance' documents.

V. Headwaters v. Talent case -- In the Headwaters v. Talent Irrigation District case (March 12, 2001) the Ninth Circuit held that a NPDES permit was required for the direct application of an aquatic herbicide to water. This decision has had a direct impact on the use of aquatic herbicides and will also impact mosquito control efforts and could be extended to involve other pesticide uses. EPA has issued guidance to their regional administrators stating that 'civil water enforcement priorities should not change and enforcement against any direct application of pesticides to waters of the US in accordance with the FIFRA label will be a low enforcement priority until EPA develops a concerted national approach on how to best regulate those activities.' This policy is effective through December 2001.

- We are concerned that EPA will move to require pesticide applicators to comply with the Clean Water Act on top of FIFRA.

## Federal Lands

I. Forest Service Planning Rules -- Many farmers and ranchers rely on the availability and use of Forest Service lands to graze livestock and round out their ranch units. The new Forest Service rules represent a fundamental shift in management philosophy from the statutorily mandated multiple use of forest lands to an "ecological sustainability" concept that emphasizes restoration of conditions to pre-European settlement days. The goals and objectives of the new rule are vague and indefinite, and incapable of measurement.

Contrary to multiple use requirements, the new rules would allow the designation of areas as unsuitable for particular uses. The rules also do not integrate Endangered Species Act or NEPA considerations into the forest planning process, thereby subjecting producers to the same disruptions from citizen suits and court injunctions that have plagued them in he past.

II. Forest Service Roadless Policy --This policy, based upon a 22-year-old inventory, overlays blanket prohibitions against roadbuilding and logging in over 28% of National Forest lands. This "one size fits all" policy usurps the management prerogative of local forest supervisors to adapt to local conditions and needs, such as threats of wildfires and pest outbreaks that might threaten adjacent private lands. The roadless policy also threatens the status of existing uses within roadless areas as well as access to private lands across roadless areas.

III. Forest Service Transportation Policy -- Forest uses, such as grazing and access to and through national forest depend on a reliable and adequate road system. This policy would emphasize building no new roads and the decommissioning of old roads. It is not based on transportation considerations but on environmental considerations. We are concerned that by making it more difficult to get approval for new roads that it is not adequately flexible to respond to changing conditions or future needs for new or better roads. We are also concerned that the emphasis on decommissioning roads and the possible less rigorous repair of existing roads will mean decreased access to many areas to and through national forests for rural residents, especially the elderly, disabled or people with young families.

IV. Endangered Species Critical Habitat Designations – The Fish and Wildlife Service is required to consider economic impacts of critical habitat designations under the Endangered Species Act. It has traditionally studied only the incremental increase in economic impact from listing a species to critical habitats. The 10th Circuit Court of Appeals recently ruled that this interpretation is incorrect. The Court held that the agency must consider the entire economic impact of designating an area as critical habitat. The agency has not implemented this change.

- The Office of Management and Budget might monitor these rules to ensure the court decision has been complied with.

## Pesticides

I. Food Quality Protection Act --The Environmental Protection Agency's new pesticide law as of 1996, requiring all pesticide food tolerances re-review under new safety standards. AFBF is working to create a fair pesticide risk assessment process under the FQPA and achieve fair risk assessments for all pesticides that are reviewed under this act.

- USDA needs increased funding for the Office of Pest Management Policy and other FQPA related programs, and EPA should not move forward on pesticide re-registration decisions before science policies complete.

II. Methyl Bromide -- The pesticide fumigant Methyl Bromide is being phased out under the Clean Air Act due to its perceived ozone depleting qualities. AFBF is working to link the phase down or phase out of the product to the registration of an effective, affordable alternative. Methyl Bromide is a irreplaceable fumigant used across the country in the production of fruits, vegetables and other commodities.

- Need increased funding for USDA Methyl Bromide Research.
- Need Quarantine/Pre-Shipment rules out soon and for those rules to be written broadly.
- Need EPA critical use exemption rules out before 2005.

IV. Plant Pesticide Rule (Plant Incorporated Protectants) - EPA has proposed a rule on how to regulate genetically engineered plants under FIFRA. This rule has been in development stages for more than ten years. AFBF is working to secure a fair rule that does not over extend EPA's regulatory authority into areas of crop registration in which they currently do not hold.

- We support the version released in late 2000, and this rule should be published as soon as possible.

## Energy

I. Waiver Denial -- Denial of the request from California for a waiver from the oxygenate standard for reformulated gasoline would send a strong signal to investors and farmer owned coops to build ethanol plants. The industry produced 2 billion gallons of ethanol last year and projects a 20 to 30 per cent increase in 2001.

II. Natural Gas -- The increased use of natural gas for electricity generation is causing huge increases in fertilizer costs. The electric generation industry needs to seek a more diverse fuel mix. We support expansion of the use of clean coal, hydro and nuclear technology.

III. Sources of Energy -- Farmers have the opportunity to provide energy to the country. Examples are ethanol, biodiesel, biomass (for electric generation), methane from livestock operations and siting for windmills and micro-hydroelectric production. There

needs to be a strong signal from the federal government before the needed capital investment can be secured.

## Biotechnology & Conservation

I. Biotechnology -- The Farm Bureau supports the continued development of agricultural products enhanced through biotechnology. We recognize the need to maintain the integrity of the U. S. regulatory process and maintain consumer confidence in the U.S. food supply. It is important that government efforts be coordinated in support of biotechnology and insure continued consumer confidence and marketability of biotech products domestically and abroad including adequate research funding.

II. Conservation -- Farmers and ranchers are under increased pressures from all levels of government to provide enhanced environmental protection. Adequate NRCS conservation program and staff funding is essential for agricultural producers to address these increased pressures. EQIP funding technical assistance are particularly important.


**THE SMALL BUSINESS LEGISLATIVE COUNCIL'S**
**STATEMENT FOR THE RECORD**
**FOR THE**
**REGULATORY SUMMIT**
**JUNE 21, 2001**

The SBLC is a permanent, independent coalition of 80 trade and professional associations that share a common commitment to the future of small business. Our members represent the interests of small businesses in such diverse economic sectors as manufacturing, retailing, distribution, professional and technical services, construction, transportation, tourism and agriculture. Our policies are developed through a consensus among our membership. Individual associations may express their own views. For your information, a list of our members is enclosed. The regulatory issues that are of most concern to SBLC are expanding the Small Business Regulatory Enforcement Fairness Act (SBREFA), clarifying cash accounting rules, and protecting small businesses from superfund liability.

SBREFA

There is nothing more annoying to the small business community than when the IRS issues a proposed rule and the authors have no understanding of the practices of the small businesses to be covered by the rule. OSHA and the EPA have also been identified in the past as agencies guilty of acting without a solid understanding of an industry. The 104th Congress fixed the problem in the case of EPA and OSHA by enacting the Small Business Regulatory Enforcement Fairness Act (SBREFA), which amended the Regulatory Flexibility Act (RFA). It mandates that all OSHA and EPA rules covered by the RFA must include a panel review process to take into account small business concerns.

Those two agencies must collect information on small business ***before*** they finish development of a proposed rule. The law requires OSHA and EPA to increase small business participation in agency rulemaking activities by convening a Small Business Advocacy Review Panel for a proposed rule with a significant economic impact on small entities. The Small Business Advocacy Review Panel must be convened to review the proposed rule and to collect comments from small businesses. For such rules, the agencies must notify SBA's Chief Counsel of Advocacy that the rule is under development and provide sufficient information so that the Chief Counsel can identify affected small entities and gather advice and comments on the effects of the proposed rule. Within 60 days, the panel must issue a report of the comments received from small entities and the panel's findings, which become part of the public record.

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For a variety of reasons, the panel requirement was not imposed on the IRS. This omission should be corrected. If there is one agency with ongoing rulemaking responsibilities that have an impact on small business, it is the IRS. Some provisions of SBREFA apply only to the IRS when the interpretative rule of the IRS will "impose on small entities a collection of information requirement." The IRS has embraced an extraordinarily narrow interpretation of that phrase. As a result the IRS has evaded compliance and continues to be a costly burden to small business. Therefore, legislation should expand the current definition of what constitutes an IRS proceeding for the purposes of triggering all of the IRS's responsibilities under SBREFA, including convening of panels.

The language in Section 603 of Title 5, which includes IRS interpretative rules under the Regulatory Flexibility Act has created confusion and a giant loop-hole. Therefore, Sec 603 of Title 5 should be reworded to state: "In the case of an interpretative rule involving the internal revenue laws of the United States, this chapter applies to interpretative rules (including proposed, temporary and final regulations) published in the Federal Register for the codification in the Code of Federal Regulations."

SBLC strongly endorses Senate bill, S. 849, the "Agency Accountability Act of 2001." S. 849 will add the IRS to the list of agencies covered under SBREFA. SBLC believes the House should pursue similar legislation.

Cash Accounting

The IRS imposes inventory accounting requirements on cash basis service providers if the service provider provides "merchandise" in conjunction with the service (for example, a landscape contractor provides the plant material for the landscape project or a flooring installer provides wood flooring). Once a determination has been made that the taxpayer must use inventory accounting for the merchandise, the IRS can then require the taxpayer to use accrual accounting for tax purposes.

Under the accrual method of accounting, tax liability occurs before a business actually receives payment for the service provided. Therefore this becomes an issue of timing and has a pronounced negative affect on small business. Small business service providers find it more difficult than larger businesses to pay taxes on payment that have not been received for service provided. Internal Revenue Code Sec. 448 C sets forth a $5 million dollar gross receipts test, which Congress intended to provide a true safe harbor for small businesses seeking to use cash method of accounting. Consequently, the only statutory basis for the small business tax accounting safe harbor in the Revenue Procedure 2000-22 requires that the threshold be set at $5 million. **Yet the Treasury Department interprets Sec. 448 as establishing a mandatory floor for accrual accounting rather than setting an explicit ceiling for a cash accounting safe harbor. Therefore, legislation is needed to mandate a $5 million safe harbor.**

SBLC supports S. 336 and H.R. 656, the "Cash Accounting for Small Business Act of 2001." Both these bills establish a $5 million safe harbor from accrual accounting for small businesses.

Superfund Liability Protection

The Superfund program has been a major source of unjustified burdens for small businesses. In particular, as the implementation of the law evolved over the years, it has drawn small business into unnecessary and expensive litigation. Under the current Superfund laws, small businesses can be "charged" with potential liability even if they disposed of minor quantities of waste. Although they may not ultimately be held responsible, small businesses owners waste time and money extracting themselves from the process.

On May 22nd, the House of Representatives passed the "Small Business Liability Protection Act," H.R. 1831, by a vote of 419-0. SBLC believes that H.R. 1831 will restore some measure of common sense to the Superfund liability process and keep many small businesses from being pulled into the responsibility assessment process.

In closing, SBREFA, cash accounting, and superfund liability protection are the three vital regulatory issues facing small businesses. SBLC will seek to pass legislation that will provide regulatory relief for small businesses.

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