WHAT IS THE BUSH ADMINISTRATION'S RECORD IN REGULATORY REFORM?

HEARING

BEFORE THE

SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES AND REGULATORY AFFAIRS

OF THE

COMMITTEE ON GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

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WHAT IS THE BUSH ADMINISTRATION'S RECORD IN REGULATORY REFORM?

WEDNESDAY, NOVEMBER 17, 2004

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES AND REGULATORY AFFAIRS,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:12 a.m., in room 2154, Rayburn House Office Building, Hon. Doug Ose (chairman of the subcommittee) presiding.

Present: Representatives Ose, Schrock, Tierney, Kucinich, and Van Hollen.

Staff present: Barbara F. Kahlow, staff director; Lauren Jacobs, clerk; Megan Taormino, press secretary; Greg Dotson, Alexandra Teitz, and Krista Boyd, minority counsels; and Cecelia Morton, minority office manager.

Mr. OSE. Good morning.

Welcome to today's hearing of the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs. Today's subject matter is "What is the Bush Administration's Record in Regulatory Reform?"

Three years ago, the Small Business Administration estimated that, in the year 2000, Americans spent $843 billion to comply with Federal regulations. The report concluded, "Had every household received a bill for an equal share, each would have owed $8,164." The report also found that, in the business sector, those hit hardest by Federal regulations are small businesses. Regulations add to business costs and decrease capital available for investment and job creation.

As an owner of small businesses, I am especially aware of the need to relieve existing regulatory and paperwork burdens. This is my twelfth and final hearing as a Government Reform subcommittee chairman toward that end. This problem is also important to the administration. The fourth point in the President's February 2004 6-Point Economic Growth Plan was "streamlining regulations and reporting requirements."

Heritage scholar James Gattuso, who is with us today, analyzed the Bush record. In his September 28, 2004 paper entitled "Reining in the Regulators: How Does President Bush Measure Up?," he found, "So far, he has done much better than his recent predecessors at limiting the growth of regulations. However, he has a much weaker record on eliminating existing rules." Therefore, reviewing the base of existing rules remains a critical component in

this matter. As a consequence, on September 22nd, Congressman Gresham Barrett introduced, with my co-sponsorship, H.R. 5123, "Major Regulation Cost Review Act of 2004." This bill would require agencies to review all major rules—that is, those imposing cost of $100 million or more—within 10 years of issuance, including using a standard governmentwide cost-benefit analysis methodology.

Because of congressional concern about increasing costs and incompletely estimated benefits of Federal rules and paperwork, in 1996, Congress required the Office of Management and Budget to submit its first regulatory accounting report. In 1998, Congress changed the report's due date to coincide with the President's Budget. In the year 2000, Congress made this a permanent annual reporting requirement. Besides requiring a regulatory accounting statement and an associated report assessing the impacts of Federal rules, Congress has required OMB to annually include recommendations for regulatory reform.

To date, OMB has issued six final regulatory accounting reports and one draft report that has not yet been finalized. The Clinton administration issued the first three; the Bush administration issued the last four. I believe you will see over on the chart a recitation of that. The Clinton administration's reports only included one recommendation for reform, that being electricity restructuring. The Bush administration sought public nominations in its 2001, 2002 and 2004 draft reports. In sum, the result was 71 nominations in 2001 and 316 nominations in 2002. The number of nominations received in 2004 is unknown to us. I believe Chart 2 has a list of the nominations that have been received. Two of the four agencies with the most rules nominated are with us today, those being the Environmental Protection Agency and the Department of Labor.

Today, our hearing will examine the nomination process and the reform results to date. We will pay particular attention to public nominations affecting small business and several existing rules issued or to be issued by EPA and the Department of Labor. These include the Toxic Release Inventory, New Source Review, and mercury, and the Department of Labor's implementation of the Family and Medical Leave Act. This subcommittee has previously heard testimony about the burdens associated with Toxic Release Inventory and the Family and Medical Leave Act.

I look forward to the testimony of our witnesses. They include: Dr. John Graham, who is the Administrator of the Office of Information and Regulatory Affairs at OMB; Mr. Stephen Johnson, who is the Deputy Administration at EPA; Mr. Howard Radzely, who is the Solicitor at the Department of Labor.

Did I pronounce that correctly?

Mr. RADZELY. Close.

Mr. OSE. Correct me.

Mr. RADZELY. Radzely.

Mr. OSE. Radzely? All right.

And, Mr. Thomas Sullivan, who is the Chief Counsel for Advocacy at the Small Business administration.

Our second panel includes Mr. William Kovacs, who is the vice president for Environment, Technology and Regulatory Affairs at

the U.S. Chamber of Commerce; Mr. Todd McCracken, president of the National Small Business Association; Ms. Nancy McKeague, who is the sSenior vice president for Michigan Health and Hospital Association, who will be representing the Society for Human Resource Management; Mr. James Gattuso, who is a research fellow in regulatory policy at the Heritage Foundation; Ms. Catherine O'Neill, who is an associate professor at Seattle University School of Law, representing the Center for Progressive Regulation; and Mr. John Paul, who is the supervisor for the Regional Air Pollution Control Agency in Dayton, OH, representing the State and Territorial Air Pollution Program Administrators.

I want to welcome everybody to the hearing today. I do want to advise everybody that the caveat by which we were able to be moved from 2247 and allowed in here is that we are done by 12:45 at the latest.

[The prepared statement of Hon. Doug Ose follows:]

Chairman Doug Ose
Opening Statement
What is the Bush Administration's Record in Regulatory Reform?
November 17, 2004

Three years ago, the Small Business Administration (SBA) estimated that, in 2000, Americans spent $843 billion to comply with Federal regulations. SBA's report concluded, "Had every household received a bill for an equal share, each would have owed $8,164." The report also found that, in the business sector, those hit hardest by Federal regulations are small businesses. Regulations add to business costs and decrease capital available for investment and job creation.

As a former owner of small businesses, I am especially aware of the need to relieve existing regulatory and paperwork burdens. This is my 12th and last hearing as a Government Reform Subcommittee Chairman towards this end. This problem is also important to this Administration. Point #4 in the President's February 2004 6-Point Economic Growth Plan was "[s]treamlining regulations and reporting requirements."

Heritage scholar James Gattuso, who is with us today, analyzed the Bush record. In this September 28, 2004 paper entitled, "Reining in the Regulators: How Does President Bush Measure Up?," he found, "So far, he has done much better than his recent predecessors at limiting the growth of regulations. However, he has a much weaker record on eliminating existing rules." Reviewing the base of existing rules is critical. As a consequence, on September 22nd, Congressman Gresham Barrett introduced, with my co-sponsorship, H.R. 5123, "Major Regulation Cost Review Act of 2004." This bill would require agencies to review all major rules (imposing $100 million or more) within 10 years after issuance, including using a standard government-wide cost-benefit analysis methodology.

Because of Congressional concern about the increasing costs and incompletely estimated benefits of Federal rules and paperwork, in 1996, Congress required the Office of Management and Budget (OMB) to submit its first regulatory accounting report. In 1998, Congress changed the report's due date to coincide with the President's Budget. In 2000, Congress made this a permanent annual reporting requirement. Besides requiring a regulatory accounting statement and an associated report assessing the impacts of Federal rules, Congress required OMB to annually include recommendations for regulatory reform.

To date, OMB has issued six final regulatory accounting reports and one draft report that has not yet been finalized. The Clinton Administration issued the first three; the Bush Administration the last four. The Clinton Administration's reports only included one recommendation for reform: electricity restructuring. The Bush Administration sought public nominations in its 2001, 2002 and 2004 draft reports. In sum, the result was 71 nominations in 2001 and 316 nominations in 2002. The number of nominations received in 2004 is unknown to us. Two of the four agencies with the most rules nominated are with us today: the Environmental Protection Agency (EPA) and the Department of Labor (DOL).

Today, the Subcommittees will examine the nomination process and the reform results to date. We will pay particular attention to public nominations affecting small business and several existing rules issued or to be issued by EPA and DOL. These include EPA's Toxic Release Inventory (TRI), New Source Review, and mercury, and DOL's implementation of the Family and Medical Leave Act (FMLA). This Subcommittee has previously heard testimony about the burdens associated with TRI and FMLA.

I look forward to the testimony of our witnesses. They include: Dr. John D. Graham, Administrator, Office of Information and Regulatory Affairs, OMB; Stephen L. Johnson, Deputy Administrator, EPA; Howard M. Radzely Solicitor, DOL; Thomas M. Sullivan, Chief Counsel for Advocacy, SBA; William Kovacs, Vice President, Environment, Technology and Regulatory Affairs, U.S. Chamber of Commerce; Todd O. McCracken, President, National Small Business Association; Nancy McKeague, Senior Vice President, Michigan Health & Hospital Association, representing the Society for Human Resource Management; James L. Gattuso, Research Fellow in Regulatory Policy, The Heritage Foundation; Catherine O'Neill, Associate Professor, Seattle University School of Law, representing the Center for Progressive Regulation; and, John A. Paul, Supervisor, Regional Air Pollution Control Agency, Dayton, Ohio, representing the State and Territorial Air Pollution Program Administrators.

November 10, 2004

MEMORANDUM FOR MEMBERS OF THE SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES AND REGULATORY AFFAIRS

FROM: Doug Ose

SUBJECT: Briefing Memorandum for November 17, 2004 Hearing, "What is the Bush Administration's Record in Regulatory Reform?"

On Wednesday, November 17, 2004, at 10:00 a.m., in Room 2247 Rayburn House Office Building, the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs will hold a hearing on the Administration's and the public's recommendations for regulatory reform, which are a part of the Office of Management and Budget's (OMB's) statutorily-required annual regulatory accounting statement and associated report, and the Bush Administration's response. The hearing is entitled, "What is the Bush Administration's Record in Regulatory Reform?"

Background

In 1996[1], Congress required OMB to submit its first regulatory accounting report by September 30, 1997. In 1997, Congress continued this requirement. In 1998, Congress changed the report's due date to coincide with the President's Budget. Finally, in 2000, Congress made this a permanent annual reporting requirement. Besides requiring a regulatory accounting statement and an associated report assessing the impacts of Federal rules, the 1996 and 1997 laws required OMB to "submit to the Congress a report that provides .... (4) recommendations from the Director and a description of significant public comments to reform or eliminate any Federal regulatory program or program element that is inefficient, ineffective, or is not a sound use of the Nation's resources." The 1998, 1999, and 2000 laws simply required OMB to include "recommendations for reform" with its annual regulatory accounting statement and analysis of the impacts of Federal regulation.

[1]The requirements for OMB's regulatory accounting reports were enacted as: Sec. 645 of the Treasury, Postal Services and General Government Appropriations Act for 1997 (P.L. 104-208); Sec. 625 of the Treasury and General Government Appropriations Act for 1998 (P.L. 105-61); Sec. 638 of the 1999 Omnibus Consolidated and Emergency Supplemental Appropriations Act (P.L. 105-277); Sec. 628 of the Treasury and General Government Appropriations Act for 2000 (P.L. 106-58); and Sec. 624 of the Treasury and General Government Appropriations Act for 2001 (P.L. 106-554).

To date, OMB has issued six final regulatory accounting reports - in September 1997, January 1999 (dated 1998), June 2000, December 2001, December 2002, and September 2003. In addition, in February 2004, OMB issued its next report in draft for public comment. The Clinton Administration issued the first three; the Bush Administration issued the last four. The hearing will examine the Bush Administration's process for identifying its own candidates and evaluating the public's nominations, and its progress in responding to them for regulatory and paperwork reform results.

Clinton Administration

The prior Administration's September 1997 report stated, "we also sought comment on regulatory programs or program elements" (p. 65). However, the end result was that OMB included no reform recommendations in its report either identified by OMB or as a result of public nominations. The January 1999 report stated, "We also sought comment on regulatory programs or program elements ... We received 35 comments from members of the public and representatives of business groups, public policy institutions, public interest groups, and governmental entities" (p. 83). The report identified various agency regulatory initiatives in the November 1998 Unified Agenda of Federal Regulatory and Deregulatory Actions and then only included one specific recommendation for reform: electricity restructuring. The June 2000 report did not mention any OMB request for public comment, identified various agency regulatory initiatives in the November 1999 Unified Agenda, and did not include any other specific OMB or public recommendations for reform.

Bush Administration

During the Bush Administration, OMB issued three final and one not-yet-finalized draft regulatory accounting reports (in December 2001, December 2002, September 2003 and February 2004, respectively). OMB asked for public regulatory reform nominations in 2001, 2002 and 2004, i.e., not in 2003. In sum, the result was 71 nominations in 2001 and 316 nominations in 2002. OMB has not yet finalized its 2004 report; therefore, the number of nominations received in 2004 is unknown to us.

In its May 2001 draft 4th report, OMB asked for public comments on "specific regulations that could be rescinded or changed that would increase net benefits to the public by either reducing costs and/or increasing benefits" (66 FR 22054). OMB's December final 4th report stated, "We received 71 suggestions from 33 commentators involving 17 agencies that contained the requested information" (p. 61). OMB sorted the 71 into three categories: high priority ("we are inclined to accept and look into the suggestion"), medium priority ("we need more information"), and low priority ("we are not convinced at this point of the merits of the suggestion") (p. 62). The 23 high priority included: 8 Environmental Protection Agency (EPA), 5 Department of Labor (DOL), 2 Agriculture, 2 HHS, 2 Interior, 1 Education, 1 Energy, 1 Transportation, and 1 EEOC.

OMB's titles for the 8 EPA were: Mixture and Derived from Rule, Proposed Changes to the Total Maximum Daily Load Program, Drinking Water Regulations: Cost-Benefit Analysis, Economic Incentive Program Guidance, New Source Review (NSR), Concentrated Animal

Feeding Operations (CAFOs) Effluent Guidelines, Arsenic in Drinking Water, and Notice of Substantial Risk – TSCA. The 5 DOL were: OFCCP's "60-2" Regulation – The Economic Opportunity Survey, Procedures for Certification of Employment Based Immigration and Guest Worker Applications, Proposal Governing "Helpers" on Davis-Bacon Act Projects, Overtime Compensation Regulation, and Recordkeeping and Notification Requirements (Wage and Hour Division).

In 2002, OMB changed the "ranked" system it used to categorize the 2001 nominations to an "agency-initiated" process. OMB justified this modification for two reasons: "(1) the large volume of nominations (316 in 2002 compared to 71 in 2001) strained OMB's ability to develop an informed list of priority nominations for consideration by agencies and (2) giving agencies the task of evaluating the nominations allowed them to bring to bear their extensive knowledge and resources and encouraged them to develop a sense of ownership about reform" (p. 22, 9/22/03 report). OMB's December 2002 final 5th report indicated the status of the 23 "high priority" nominations in 2001 and mentioned the result of its March 2002 draft report's request for additional nominations not only of regulations and regulatory programs "in need of reform" but also nominations of agency guidance documents (67 FR 15033). The report stated, "OMB received comments on 267 regulations and 49 guidance documents from approximately 1,700 individuals, firms, trade associations, non-profit organizations, academics and government agencies" (p. 75).

OMB's February 2003 draft 6th report did not ask for additional public nominations of regulatory reforms candidates. Instead, it sought public comment in the following three areas: "(1) Guidelines for regulatory analysis; (2) Analysis and management of emerging risks; and (3) Improving analysis of regulations to *[sic]* homeland security" (68 FR 5492).

OMB's September 2003 final 6th report sorted the 316 *(267+49)* nominations in 2002 into 3 categories: "(1) issues already subject to recent or current review by Cabinet agencies (and EPA); (2) issues concerning independent agencies; and (3) issues that warranted consideration by Cabinet agencies (and EPA) as reform candidates" (p. 21). OMB included 92 rules and 12 guidance documents in category (1), 49 rules and 2 guidance documents in category (2), and 126 rules and 35 guidance documents in category (3). Then, the report provided further categorization for the 265 *(92+12+126+35)* rules and guidance documents in categories (1) and (3). Of these, OMB identified 45 as "new," 109 as "completed or ongoing," 30 as "undecided," and 81 as "low priority or unnecessary" (Table 7, pp. 24-25). The four Executive Branch agencies with the most "new" were: 17 EPA (8 rules and 9 guidance documents), 11 Transportation (10 rules and 1 guidance document), 6 DOL (5 rules and 1 guidance document), and 6 HHS (all rules).

OMB's titles for the 8 EPA rules were: Regulatory Reform for Handling Refrigerants, Chemical Plant Safety Standards, Protections for Farm Children from Pesticide Exposures, Definition of Volatile Organic Compound, TRI Alternate Reporting Threshold (Form A), Export Notification Requirements, Storage for Reuse, and TRI Form R Reporting. The 9 EPA guidance

documents were: EPA Index of Applicability Decisions; "Once In, Always In" Policy; TRI Reporting Forms and Instructions; TRI Reporting Questions and Answers; Waterborne Diseases; Integrated Risk Information System; Economic Benefit of Noncompliance in Civil Penalty Cases; Site-Specific Risk Assessments in RCRA; and, Submetering Water Systems. The 6 DOL rules and guidance documents were: Medical Certification (FMLA), FLSA Administrative Exception, Explosives and Process Safety Management (OSHA), Sling Standard (OSHA), Bloodborne Pathogens Standard (OSHA), and Multi-Employer Citation Policy (OSHA).

In OMB's February 2004 draft 7th report, OMB asked for public nominations of reforms relevant to the manufacturing sector and stated, "OMB is especially interested in suggestions to simplify IRS paperwork requirements " (p. 27). OMB's 2004 final 7th regulatory accounting report has not yet been issued.

Hearing

The hearing will also specifically explore public nominations affecting small business and several existing rules issued or to be issued by DOL and EPA, including but not limited to DOL's rules for the Family and Medical Leave Act (FMLA), and EPA's rules for its Toxic Release Inventory (TRI), New Source Review (NSR), and mercury.

The hearing is expected to conclude that OMB and the agencies need to devote more effort to reviewing existing problematic rules nominated by the public for regulatory reform.

The invited witnesses for the November 17, 2004 hearing are: Dr. John D. Graham, Administrator, Office of Information and Regulatory Affairs (OIRA), OMB; Stephen L. Johnson, Deputy Administrator, EPA; Howard M. Radzely, Solicitor, DOL; Thomas M. Sullivan, Chief Counsel for Advocacy, Small Business Administration; William Kovacs, Vice President, Environment, Technology and Regulatory Affairs, U.S. Chamber of Commerce; Todd O. McCracken, President, National Small Business Association; Nancy McKeague, Senior Vice President, Michigan Health & Hospital Association, representing the Society for Human Resource Management; James L. Gattuso, Research Fellow in Regulatory Policy, The Heritage Foundation; Catherine O'Neill, Associate Professor, Seattle University School of Law, representing the Center for Progressive Regulation; and, John A. Paul, Supervisor, Regional Air Pollution Control Agency, Dayton, Ohio, representing the State and Territorial Air Pollution Program Administrators.

Mr. OSE. I am pleased to recognize my friend from Massachusetts for the purpose of an opening statement.

Mr. TIERNEY. I thank the chairman and the witnesses for coming here today to share their information with us.

Mr. Chairman, before we get started, let me informally say that I understand this is probably the last subcommittee hearing that you will be chairing before you retire, and I want to thank you for the evenhandedness and the fairness with which you have conducted yourself in this committee. I know people expect things like this to be said at the end of a period, but, in fact, in this case it is absolutely true. You have shown good leadership here; you have shown evenhandedness; you have been fair; you have allowed us to have hearings on issues that we thought were important. And, while we disagreed, we generally did that respectfully, which I think is important. And, if we can impart that on the body at large, maybe things would go well on a grander scale. But, I thank you for the work that you have done and for your service to your country.

Mr. OSE. Thank you.

Mr. TIERNEY. Thank you.

Now, this hearing is obviously one on the Bush administration's record on regulatory reform. In my opinion, at least, I think the administration deserves a failing grade in its regulatory efforts. In the name of making regulations more flexible, this administration has taken unprecedented steps to weaken and dismantle important environmental, health, and safety protections.

Today, I plan to focus on the administration's proposal for controlling mercury pollution from power plants. I had asked the chairman to hold a hearing on EPA's rulemaking on mercury emissions, and, although the subcommittee's schedule didn't allow for another hearing to address that issue, I am happy that the chairman agreed that this is an important enough issue that it needed to be addressed within the context of today's hearing.

The administration's proposed regulation for controlling mercury emissions benefits industry, but it fails to protect the public health and environment. I think one of the more ironic aspects is even the industry representatives within EPA's working group made recommendations that were stronger than some of the EPA recommendations in terms of controlling mercury.

The administration's proposal and the process that it has followed in developing its proposal are fundamentally flawed. I think it was probably stated better in an article in the Environmental Law Reporter, which indicates that it was an "effort to avoid the clear implications of science, law, economics, and justice." That, in fact, seems to be the case.

Coal-fired power plants emit tons of mercury pollution into our air each year that pollutes our waters and then is absorbed by the fish that we eat. According to EPA scientists, approximately 630,000 infants are born in the United States each year with blood mercury levels at unsafe levels. In fact, our children, as well as everybody else in our society, deserve the right to live in pollution-free and poison-free environments.

Despite the clear need for strong clean air controls of mercury pollution, the EPA issued a proposal last year that was shockingly

inadequate. The Clean Air Act requires a much larger reduction of mercury production in much less time than EPA's proposal. It is not surprising that the substance of EPA's proposal is so weak, considering that parts of EPA's proposals were literally copied from memos prepared by industry lobbyists.

As a part of its rulemaking, EPA is required to analyze the effects of a full range of options for controlling emissions. EPA's own advisory group recommended that the EPA analyze more stringent options than EPA's proposal, but EPA refused to do so. In fact, Dr. Graham and I hopefully will discuss that I had asked some questions at one of our previous hearings about his agency's role in working with the EPA on that, and I, despite two runs at that, have not gotten adequate answers yet, and hope we can explore that because I want some direct responses, as opposed to what I have gotten so far.

Responding to public criticism on the point, Administrator Leavitt promised in March that EPA would conduct more analysis. Yet, despite requests from citizens, Members of Congress, States, and the EPA's own bipartisan advisory group, it appears that EPA has still not performed the required analysis. The Los Angeles Times recently quoted one EPA employee as saying, "We get talk but no action from the Administrator."

So, Mr. Johnson, I am hopeful that today we will find out where EPA is in terms of performing the additional analysis promised by the Administrator and where EPA is in terms of issuing a strong rule on mercury emissions that complies with the mandates of the Clean Air Act.

It is the administration's responsibility and obligation to protect the hundreds of thousands of children being poisoned each year by unsafe levels of mercury. This administration must implement a strong and protective rule, and I look forward to our witnesses' testimony and the questions and answers, Mr. Chairman. Thank you.

Mr. OSE. I thank the gentleman.

Gentleman from Virginia? Gentleman from Ohio.

Mr. KUCINICH. Thank you very much, Mr. Chairman. I would like to echo Mr. Tierney's remarks about your chair's work for this country on this committee, and it has been an honor and a privilege to work with you.

I would like to focus my remarks on what are the most egregious examples of the administration's efforts to gut our environmental and health protections: the weakening of mercury and air standards from coal-fired power plants. Mercury emissions from coal-fired power plants are the single biggest reason our fish consumption advisory specifically for mercury contamination in 45 States as of 2003—45 States. The CDC says that roughly 8 percent of American women of childbearing age have levels of mercury in their bodies that exceed what is considered safe for the fetus. A more recent study from the University of North Carolina puts the number closer to 20 percent.

A review of some of the health effects highlights the need to be cautious. Mercury concentrates in certain nerves in the body, often at the end of nerves, and alters the nerve cell's ability to function. That is why early signs of mercury poisoning include numbness and tingling in the extremities. The nerve cells are dying. It makes

sense, then, that the brain, which contains so many more nerves, is where the health damage is, and most vulnerable are those whose brains are still developing.

Mercury crosses the placental barrier, which is normally supposed to help keep pollutants away from the fetus. In fact, some newer studies show that the concentrations in the fetus are often higher than the concentrations in the mother. If the mother eats enough mercury-contaminated fish, the child could suffer from low birth weight, small head circumference, severe mental retardation, cerebral palsy, deafness, blindness, and seizures.

The symptoms can occur even when there are no symptoms of mercury poisoning in the mother, again because the mercury concentrates in the child. If the dosage to the fetus is lower, the damage will be subtler and will occur later in the child's development. But, the damage can still be profound. Studies found deficits on behavioral tests like test of attention, fine motor function, language, drawing abilities, and memory that were linked to low level mercury exposure in the womb.

Low level poisoning scenarios especially are insidious. It is likely that these health problems may never be noticed, much less definitively linked to mercury from coal-fired power plants, so we may never know the collective damage that is done. These children sometimes become disadvantaged before they even take their first breath of air.

You know, there is no reason for it. The excuse we keep hearing from the administration is that technology is not adequate to achieve the 90 percent end of pipe mercury reductions from coal-fired power plants that the public is calling for. Yet, the Public Service Electric and Gas Company fully supported a bill in Connecticut that requires a 0.6 lb. per trillion btu, or 90 percent control efficiency. PSEG is one of the largest electric generating companies in the United States, with over 16,000 megawatts of electric generating capacity, operating or under development in New Jersey, New York, Pennsylvania, Ohio, Indiana, and Connecticut.

In their testimony, the Connecticut State Legislature, in support of the bill, had this to say: "We consider environmental performance to be one indicator of overall business performance, and experience has taught us that proactive steps to improve environmental performance can often lead to better bottom line results."

Why are we making environmental protection and profit mutually exclusive?

Mr. Chairman, reducing mercury from power plant stacks, as much as technology will allow us to go a long way toward correcting the ongoing mercury poisoning of Americans, especially those with the least ability to defend themselves, our children. One of the biggest power generators in the country is on record as saying that not only is the pollution reduction technology available, but it is good business to use it. I look forward to hearing what the EPA will be doing to achieve no less than the best public health protection which the American people deserve. Thank you.

[The prepared statement of Hon. Dennis J. Kucinich follows:]

Statement of Dennis Kucinich
Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs

November 17, 2004

Thank you Chairman Ose for the opportunity to speak at this important hearing.

I would like to focus my remarks on what is one of the most egregious examples of this Administration's efforts to gut our environmental and health protections: the weakening of mercury in air standards from coal-fired power plants.

Mercury emissions from coal-fired power plants are the single biggest reason that there are fish consumption advisories specifically for mercury contamination in 45 states as of 2003. 45 states. The CDC says that roughly eight percent of American women of childbearing age have levels of mercury in their bodies that exceed what is considered safe for the fetus. A more recent study from the University of North Carolina puts the number closer to 20%.

A review of the health effects highlights the need to be cautious. Mercury concentrates in certain nerves in the body, often at the end of the nerves and alters the nerve cell's ability to function. That's why early signs of mercury poisoning include numbness and tingling in the extremities – the nerve cells are dying. It makes sense, then, that the brain, which contains a lot of nerves, is where much of the health damage is. And the most vulnerable are those whose brains are still developing.

Mercury crosses the placental barrier, which is normally supposed to help keep pollutants away from the fetus. In fact some newer studies show that the concentration in the fetus is often higher than in the mother. What does that mean for the fetus?

If the mother eats enough mercury-contaminated fish, the child could suffer from low birth weight, small head circumference, severe mental retardation, cerebral palsy, deafness, blindness, and seizures. The symptoms can occur

even when there are no symptoms of mercury poisoning in the mother, again, because the mercury concentrates in the child.

If the dosage to the fetus is lower, the damage will be subtler and will occur later in the child's development, but are still profound. Studies found deficits on behavioral tests like tests of attention, fine motor function, language, drawing abilities, and memory that were linked to low levels of mercury exposure in the womb. Note that these ailments are what's called subclinical. In other words, you, as a parent, might not even notice that your child isn't as dextrous or smart or attentive as she could have been if she weren't exposed to mercury. This is to say nothing of the effects on adults.

That's what makes the low level poisoning scenarios especially insidious: it is likely that these health problems will never even be noticed, much less definitively linked to mercury from coal fired power plants. So we may never know the collective damage we're doing. And these kids are disadvantaged before they even take their first breath of air.

Worse, there's no reason for it. The excuse we keep hearing from this administration is that the technology is not adequate to achieve the 90% end-of-pipe mercury reductions from coal-fired power plants that the public is calling for. And yet Public Service Electric and Gas Company (PSEG) fully supported a bill in Connecticut that requires a 0.6 pound per trillion BTU or 90% control efficiency. PSEG is one of the largest electric generating companies in the US with over 16,000 megawatts of electric generating capacity operating or under development in New Jersey, New York, Pennsylvania, Ohio, Indiana, and, Connecticut. In their testimony to the Connecticut State legislature in support of the bill, they had this to say:

> We consider environmental performance to be one indicator of overall business performance, and experience has taught us that proactive steps to improve environmental performance can often lead to better bottom line results. That said, we never take our eye off of bottom line results. In our view, environment and economics are inseparable, and, as with many things in life, the secret to success is finding the balance. We are pleased to be here today (testifying in support of the mercury emission restrictions mentioned above), because we believe we have found that balance.

Reducing mercury from power plant stacks as much as technology will allow would go a long way toward correcting the ongoing mercury poisoning of Americans -- especially those with the least ability to defend themselves, our children. One of the biggest power generators in the country is on record as saying that not only is the pollution reduction technology available, but its good business to use it.

I look forward to hearing what EPA will be doing to achieve no less than the best public health protection we can give.

Mr. OSE. I thank the gentleman.

Gentleman from Maryland.

Mr. VAN HOLLEN. Thank you, Mr. Chairman, and thank you for conducting this hearing. I will be brief. My colleagues have covered some of the issues I wanted to raise, and we will obviously have an opportunity during the questioning.

But, I would want to say, with respect to the mercury issue, that we know that 45 States in this country have issued warnings with respect to the consumption of fish. In my State of Maryland, the Chesapeake Bay has been identified as one of those areas where people are told, on the one hand, that fish is one of the healthiest things you can eat. On the other hand, they are told that pregnant women and young children can't eat it, and are advised not to eat it because of the potential on brain development and other health issues.

I think we all agree that we should do something about it. The question is should we do everything we can to reduce mercury emissions by as much as possible. And, that is where I think that so far EPA has been falling far short, both in terms of dragging its feet in coming up with a strong response and proposal, and to the extent that its proposals seem to me not to address the issue as comprehensively and to the extent that we are able to do it and still be cost-effective in doing so.

So I do look forward to pursuing that issue as we go through the hearing today. Thank you, Mr. Chairman.

Mr. OSE. I thank the gentleman for his brevity.

All right, our typical hearing here is without prejudice; we swear in all of our witnesses. We are not making any judgment, that is just the standard operating procedure in this committee and in this subcommittee.

Again, I want to remind everybody, not only this panel, but the next panel, that we are under a time constraint, that we have to be out of here by 12:45. I will proceed to swear these witnesses in.

So, if you would all please rise and raise your right hands.

[Witnesses sworn.]

Mr. OSE. Let the record show that the witnesses answered in the affirmative.

We are joined on this panel by the four individuals I previously introduced. Our first witness on the first panel is Dr. John Graham, the Administrator for the Office of Information and Regulatory Affairs, the Office of Management and Budget.

Dr. Graham, welcome. We have received your written statement; it has been entered into the record; I have read it. You are recognized for 5 minutes.

STATEMENTS OF DR. JOHN D. GRAHAM, ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET; STEPHEN L. JOHNSON, DEPUTY ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY; HOWARD M. RADZELY, SOLICITOR, DEPARTMENT OF LABOR; AND THOMAS M. SULLIVAN, CHIEF COUNSEL FOR ADVOCACY, SMALL BUSINESS ADMINISTRATION

Mr. GRAHAM. Thank you, Mr. Chairman, and good morning, members of the subcommittee. I cannot think of a more appropriate

topic for this committee than the subject of oversight of OMB and the agencies on streamlining the existing sea of Federal regulations that burden our economy.

Before I make a few remarks about the modest progress that we have made in the first term of President Bush, I want to emphasize the magnitude of the challenge that we are facing.

Since OMB began to keep records in 1981, there have been 109,710 final regulations adopted by various Federal agencies. And, of these, OMB has received 20,029.

Sad as it is to say, most of these regulations have never been looked at to determine whether they actually accomplished the purpose for which they were adopted, or what their actual costs and benefits to the public have been. During President Bush's first term, we initiated, as the chairman indicated, a modest program of public participation in the nomination of regulations and guidance documents to be reformed or, if they were outmoded, to be rescinded or modernized.

In the year 2001, OMB received 71 nominations from 33 public commenters. My staff evaluated these 71 nominations and determined that 23 of them should be treated as high priority by Federal agencies. Today, I am pleased to report that Federal agencies have taken at least some action, a proposed rule or a final rule, with regard to 17 of those nominations, or 75 percent of the priority nominations.

In the year 2002, OMB again requested public nominations of rules that should be modernized or rescinded. We also sought rules that needed to be extended or expanded, and in an important innovation, we included guidance documents and paperwork requirements, as well as rules within that solicitation. We also engaged in an extensive outreach effort to the public to alert them to the availability of this opportunity.

We received a larger response in 2002 than in 2001, much larger than we expected. In fact, we received 316 distinct reform nominations from more than 1700 commenters across the public. We reviewed these nominations as best we could, given the number of them, determined that 109 of them were already the subject of agency consideration, and referred 51 of them to the independent agencies for their consideration; and that left 156 nominations that we referred to the cabinet agencies and EPA.

In the year 2002, OMB did not attempt to define high priority reforms for two reasons: the sheer volume of the reforms exceeded our capacity to evaluate them effectively and, second, we felt that the agencies, if they were to set the priorities, might take greater ownership in the regulatory reform process, rather than being instructed by OMB which are the high priorities. We have not yet finished a precise accounting of what has happened on these 156, but at the subcommittee's request we have made an estimate, and there are about 55 of them for which some action, a proposal or a final action, has been made, or about 35 percent of the 156.

We did not request nominations in 2003. As you can tell, we and the agencies were still busy with 2002. And, we also revamped OMB's regulatory analysis guidelines in the year 2003 through the same public comment process.

In February of this year, we again solicited reform nominations, but we took a different tac and we took a clear focus on the manufacturing sector of the U.S. economy. It is the sector that is most heavily regulated, as estimated by the burdens on small and medium-sized manufacturers, as well as the industry as a whole. We have received, since February, 189 distinct reform nominations from 41 commenters, and we are in the process of evaluating those, and we plan to publish by the end of this year a process by which agencies will evaluate and make decisions on these nominations.

Mr. Chairman, in conclusion, we have had a modest, but aggressive, effort to try to bring some of these existing regulations and guidance documents into public light for reform, for modernization, or, where they are no longer necessary, for their rescission. I want to remind you, however, that the total number of reform nominations we receive should not be confused as the total number of meritorious reform opportunities. Not all the nominations that we receive are well argued from a standpoint of economics, from science, or from law; hence, there is a process of agency evaluation that is necessary, and we should expect that only a fraction of those nominations would actually be acted upon.

Thank you very much, and I look forward to the questions.

[The prepared statement of Mr. Graham follows:]

STATEMENT OF
JOHN D. GRAHAM, PH.D.
ADMINISTRATOR,
OFFICE OF INFORMATION AND REGULATORY AFFAIRS
BEFORE THE
SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES
AND REGULATORY AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES

November 17, 2004

Mr. Chairman, and Members of this Committee, I am John D. Graham, Ph.D., Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget. Thank you for inviting me to this hearing and for giving me the opportunity to testify today on the immense challenge of modernizing and streamlining the sea of existing federal regulations. Before discussing the modest progress we have made, I would like to remind everyone of the magnitude of the challenge we face.

To the best of our knowledge, no one has ever tabulated the sheer number of federal regulations that have been adopted since passage of the Administrative Procedure Act, or since some earlier historical benchmark. Since OMB began to keep records in 1981, there have been 109,710 final rules published in the Federal Register by federal agencies. Of these published rules, 20,029 were formally reviewed by OMB prior to publication. Of the OMB-reviewed rules, 1,073 were considered "major" or "economically significant" rules, primarily because they were estimated to have an economic impact greater than $100 million in any one year.

Sad as it is to say, most of these existing federal rules have never been evaluated to determine whether they have worked as intended and what their actual benefits and costs have been. During President Bush's first term, OMB initiated a very modest program to take a second look at a limited number of these existing regulations. These re-evaluations are based on the principles of public participation, agency evaluation, and OMB review of agency actions.

In 2001 OMB requested public nominations of rules that should be rescinded or modified, with an emphasis on rules that were obsolete or outmoded. We received 71 nominations from 33 commentators involving 17 federal agencies. OIRA staff evaluated these nominations and determined that 23 of the nominations should be treated as "high priority" review candidates by federal agencies. Today I am pleased to report that federal agencies have taken at least some action (e.g., a proposed or final rule) on 17 (or nearly 75%) of these reform nominations. These actions include FDA's final rule requiring that *trans*-fat be added to the Nutrition Facts Panel, and DOL's final rule modernizing the overtime provisions of the Fair Labor Standards Act. In most cases, these actions have been summarized in Appendix C of our 2003 final Report to Congress, which provides an item-by-item summary of the status of each reform nomination. Subsequent to the publication of that report, several of the rulemakings nominated for reform have been the subject of judicial actions. In one case (DOE's revised standards for air conditioners) our action has been overturned by a federal court. In another case (EPA's safe harbor for routine maintenance under the New Source Review program), our action has been

stayed by a federal court pending review of the rulemaking on the merits. And in yet another case, our action (DOT's modernized hours-of-service rule for truckers) was overturned by a federal court but then reinstated by Congressional action. Overall, OMB regards the 2001 solicitation as a successful endeavor.

In 2002 OMB again requested public nominations of rules that should be rescinded or modified. We also sought nominations of rules that needed to be extended or expanded and, in an important innovation, included guidance documents and paperwork requirements as well as rules within the scope of the solicitation. After an extensive outreach effort to the public, we received a larger response in 2002 than in 2001, much larger in fact than we expected. We received 316 distinct reform nominations from more than 1,700 commenters. After an intensive OMB staff review of these nominations, including consultation with agencies, we determined that 109 of the nominations were already under consideration at agencies. Another 51 were referred to independent agencies. The remaining 156 nominations were referred to agencies for their consideration. In 2002 OMB did not attempt to define "high priority" reforms for two reasons: (1) the large volume of nominations exceeded the capabilities of OIRA staff to evaluate them and (2) the agencies, we felt, might take greater ownership of reforms if they determined which were to be treated as a priority. Chapter 2 of the 2003 final Report to Congress provides more information about this process.

We have not yet finished a precise accounting of how many of the 156 reform nominations have resulted in some agency action (e.g., a proposed and/or final rule). However, our preliminary estimate -- based on information in our 2003 Report to Congress and some limited follow-up with agencies -- is that approximately 55 (about 35%) of these nominations have resulted in agency action.

We did not request nominations in 2003 because that was the year that we revamped OIRA's regulatory-analysis guidelines. The result was the publication of OMB Circular A-4, which now governs agency preparation of economically significant proposed rulemakings, and will be in force starting in January 1, 2005 for economically significant final rulemakings. Although it is too early to draw conclusions on how A-4 has impacted agency rulemakings, the preliminary judgment of OMB's professional staff is that it has improved the analysis of proposed rules.

In February 2004 we again solicited reform nominations, but with a clear focus on the manufacturing sector of the U.S. economy. The manufacturing sector faces a relatively large regulatory burden when compared to other sectors of the economy, and thus the need to streamline burden on the manufacturing sector is essential. As with the 2002 nominations, we requested nominations of guidance documents and paperwork requirements as well as regulations. We also offered additional guidance to commenters on how to suggest reforms. We asked that commenters try and make a benefit-cost case for the reform, as many of the rules that are potential reform candidates undoubtedly generate substantial benefits. We also recommended that commenters focus on reforms that agencies can move forward on without statutory change. Our experience with previous years taught us that these are the types of reform suggestions that are likely to lead to agency actions. In response to this solicitation, we have received 189 distinct reform nominations from 41 commentators. We are in the process of

evaluating these 189 nominations and intend to publish a plan for agency evaluation of these suggestions later this year.

Looking back at our experience over the last four years, we offer the following observations for the Subcommittee's consideration. First, when OMB designates a reform nomination as a "high priority candidate" for agency consideration, the result may be a higher likelihood of agency action. Second, full funding of the President's request for OMB would enable us to continue to make progress on regulatory reform. Third, bureaucratic incentives make it difficult for agencies to engage in the review of existing rules when they are focused on meeting obligations for new rules, often under statutory or court deadlines. Finally, the total number of reform nominations from the public should not be misinterpreted as the total number of meritorious reforms. Not all suggestions from the public are well grounded in scientific, economic and legal analysis.

Thank you very much for the opportunity to participate today in this very important hearing.

Table 1: Status of Reform Nominations

Year	# of Nominations considered for Agency Actions*	# of Agency Actions
2001	23	17
2002	156	55
2004	189	NA
*In 2001, this column is the number of actions designated as high priority by OMB. In 2002, this column is the number of nominations referred to agencies for their consideration.		

Mr. OSE. Thank you, Dr. Graham.

Our next witness is Mr. Stephen Johnson, who is the Deputy Administrator at U.S. Environmental Protection Agency.

Sir, we have received your testimony, also, in its written form, and it has been entered into the record; it has been read. You are recognized for 5 minutes to summarize.

Mr. JOHNSON. Thank you very much, and good morning, Mr. Chairman.

Mr. OSE. You need to turn the button on there. There you go.

Mr. JOHNSON. Thank you. Again, good morning, Mr. Chairman, Mr. Tierney, and members of the subcommittee. Thank you for the opportunity to appear before you today to discuss improvements in EPA's regulatory development process and the Agency's response to public nominations for regulatory reform. I certainly appreciate the chairman's and the subcommittee's leadership in promoting regulatory improvements.

In my first appearance before Congress as President Bush's nominee for Deputy Administrator, I stated my belief that the best way to fulfill our responsibility to protect public health and the environment is to promote transparency in our work and base our decisions on sound science. I have maintained that focus and I am proud to say that improving our regulatory actions and other significant policy decisions continues to be a top priority for EPA under Administrator Leavitt's leadership.

Early in her tenure, former EPA Administrator Whitman established a task force to examine EPA's regulatory development process and to make recommendations for improvement. The recommendations from that task force have become the basis for significant improvements in EPA's decisionmaking and regulatory process. I would like to provide a brief update for you on our progress.

As one of our first steps, the Agency significantly strengthened the quality of scientific and policy analysis. We appointed a science advisor from EPA's Office of Research and Development who has seven full-time employees dedicated to supporting the use of science in rulemaking; we appointed an economic advisor from EPA's Office of Policy, Economics and Innovation; and have added more staff to EPA's National Center for Environmental Economics to bolster our economic analyses.

To ensure that we consider a broader set of regulatory options, EPA created a new Regulatory Analysis and Policy Division. Its primary responsibility is to ensure that EPA's senior management takes all pertinent scientific findings, relative benefits and costs, and policy issues into account in our decisionmaking. The Agency is also revising our economic guidelines to be consistent with OMB's new Circular A–4 guidance. To further improve our economic analysis and consistency with OMB guidance, the Agency is now establishing special economic work groups for all economically significant rules.

In addition to these forward-looking improvements, EPA takes seriously its responsibility to review and respond to the public nominations for regulatory reform. That process includes prioritizing all nominations for appropriate attention and action. In some cases, we have initiated certain reforms or maintained exist-

ing efforts to improve an agency program. In other instances, we found that no change was needed or that statutory constraints would prevent modification.

I am pleased with EPA's overall track record in responding to these nominations. Of the 70 regulatory reform nominations received between 2001 and 2002, we consider our response complete for 44 nominations. That is 63 percent. I am also pleased to note that the latest OMB report on Federal regulatory benefits and costs finds that, over the past 10 years, EPA is responsible for two-thirds to three-fourths of the total economic benefits of Federal regulation achieved by EPA, USDA, DOE, HHS, HUD, Labor, and DOT combined.

Now, while we can't yet measure the full range of benefits achieved by our programs, the quantifiable benefits alone exceed the costs by a factor of between 1½ to 6. Although the reform nomination process has not always resulted in rule revisions, it has led us to either confirm our approach, or to recognize the need and begin to make revisions.

I would like to highlight an instance where the process has led to a better outcome. Under the Safe Drinking Water Act, EPA issued guidance in June 2000 that subjected apartment buildings with more than 15 units and submetering systems to the same Federal drinking water requirements that govern public water systems that sell water. Public comments revealed why this decision needed reconsideration. By passing water from a regulated public water source to tenants, the apartments were not creating any adverse health effects that needed further regulation. Nonetheless, it imposed a regulatory burden on apartment owners and discouraged water conservation.

After considering the comments, the Agency issued revised guidance that now provide States with flexibility to exclude apartment owners from regulation and actually reflects EPA's interest in encouraging water conservation. This outcome not only demonstrates the value of public involvement in reviewing our actions, but serves to illustrate the broader challenge we face in reaching consensus in the regulatory arena, for EPA's new guidance has now precipitated litigation aimed at limiting State discretion in determining the applicability of Federal standards. Nonetheless, we strongly believe the process helps EPA to identify and resolve problems facing the regulated community.

I have described other examples in my written testimony, including those of interest that have been mentioned already this morning, including mercury, the New Source Review Program, and the Toxic Release Inventory.

In closing, I would like to say that EPA has taken significant steps under this administration to improve the quality and credibility of our actions. These include strengthening our regulatory development process, investing in sound science and analysis, and supporting and responding to public input. I believe these actions have created a solid foundation for improving our effectiveness and for accelerating progress toward our Nation's environmental goals.

Thank you for the opportunity to testify, and I look forward to taking your questions.

[The prepared statement of Mr. Johnson follows:]

Testimony of Stephen L. Johnson,
Deputy Administrator
U.S. Environmental Protection Agency
before the
Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs
of the
Committee on Government Reform
U.S. House of Representatives

November 17, 2004

Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to appear before you today to discuss the status of the Environmental Protection Agency's (EPA) efforts to improve the way the Agency develops regulations and guidance documents. More specifically, I appreciate this opportunity to discuss EPA's progress in responding to nominations for regulatory reform made by the public and included in recent Office of Management and Budget (OMB) regulatory accounting reports.[1]

EPA publishes hundreds of regulations and guidance documents each year – some that are simple and non-controversial and some that are highly complex. EPA has taken numerous steps in recent years to improve our action development process, along with the quality of the supporting scientific, economic, and policy analysis. The Agency has also strengthened our partnerships with states and other external stakeholders, which EPA considers extremely important for achieving our environmental goals. These steps have strengthened the credibility and quality of our policy decisions and, in turn, have helped EPA fulfill its mission more efficiently and effectively.

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[1] *See*, Making Sense of Regulation: 2001 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates of State, Local, and Tribal Entities (December 2001); Stimulating Smarter Regulations: 2002 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates of State, Local, and Tribal Entities (December 2002); Informing Regulatory Decisions: 2003 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates of State, Local, and Tribal Entities (September 2003); and Informing Regulatory Decisions: 2003 Draft Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates of State, Local, and Tribal Entities (February 2004).

Recent Improvements to EPA's Action Development Process

Improving the underlying analysis of EPA's regulatory and non-regulatory actions (such as guidance documents) has been a consistent theme of the Agency and this Administration. One of the first actions taken by former EPA Administrator Christine Todd Whitman after arriving at the Agency was to form a task force to examine EPA's action development process and make recommendations for improving it. The task force concluded that the process was basically sound, but that it could be improved in several ways. It found that EPA managers, scientists, and economists should be more actively involved throughout the action development process. The task force also identified a need for more in-depth analysis to support action development, more careful consideration of policy alternatives, and more effective consultation with co-regulators and stakeholders. EPA has worked to implement the task force's recommendations, and I would like to highlight our progress in several areas.

To strengthen the quality and consistency of scientific and policy analysis supporting our regulatory decisions and significant non-regulatory actions, EPA has taken several steps. First, EPA appointed a Science Advisor from the Office of Research and Development (ORD). The Science Advisor is staffed by seven full time employees dedicated to supporting the use of science in rulemaking and other Agency decisions. ORD has also increased both staff and monetary resources for EPA's Integrated Risk Information System, an electronic database of information on human health effects that may result from exposure to various chemicals in the environment. In addition, EPA appointed an Economic Advisor from the Office of Policy, Economics, and Innovation (OPEI) and has added more staff resources to OPEI's National Center for Environmental Economics (NCEE) to further support and strengthen economic analyses in rulemakings.

To sharpen our regulatory and policy analysis and to ensure the Agency does not overlook sound and potentially better policy alternatives, the Agency created the Regulatory Analysis and Policy Division within OPEI. This Division's primary responsibility is to ensure that Agency's senior management has all of the pertinent information needed to take scientific findings, relative benefits and costs, and policy issues into full consideration before making decisions. This includes actively participating in priority regulation and policy development, conducting timely and effective policy analysis, and ensuring that Agency decision processes are invested with high quality and timely information.

EPA has also provided significant input to the Office of Management and Budget (OMB) as OMB developed its guidance to agencies on conducting regulatory analysis.[2] At the request of OMB, the Director of NCEE co-chaired an interagency review group that provided expert feedback to OMB on the draft guidance. EPA also provided OMB with Agency comments. Although Circular A-4 is largely consistent with the current version of *EPA's Guidelines for Preparing Economic Analysis*, it does describe several new analytic expectations. For this reason, as well as to incorporate state-of-the-art improvements regarding economic analysis, EPA is in the process of revising its own *Guidelines*. A full draft of the revised document is expected to be completed in Spring 2005 for peer review, with the final document expected in late Summer 2005. EPA is also holding training sessions on Circular A-4 for EPA's analytic staff to highlight the new expectations regarding economic analysis. In addition, in May 2004, I requested that a special economics workgroup be established for each of the Agency's economically

[2] OMB's guidance, referred to as Circular A-4 (September 17, 2004), provides guidance to Federal agencies on the development of regulatory analysis as required under Section 6(a)(3)(c) of Executive Order12866, "Regulatory Planning and Review," the Regulatory Right-to-Know Act, and a variety of related authorities. The Circular also provides guidance to agencies on the regulatory accounting statements that are required under the Regulatory Right-to-Know Act.

significant rules to further improve the Agency's economic analysis and ensure consistency with OMB guidance.

The aforementioned actions are examples of steps the Agency has taken to strengthen our regulations and policies. These actions have resulted in heightened attention to scientific, economic, and policy issues in EPA's action development process.

Agency Process to Respond to Regulatory Reform Nominations

Congress requires that OMB submit an annual Report to Congress that estimates the total annual costs, benefits, and impacts of federal rules and paperwork – in the aggregate, by agency, and by rule.[3] Each Spring, OMB publishes its draft report and then solicits comments on the content of the report and on any regulatory actions or guidance documents the public believes should be nominated for reform before finalizing the report (usually at the end of the year).

On December 21, 2001, OMB published its annual Report entitled *Making Sense of Regulation: 2001 Report to Congress on the Cost and Benefits of Regulations and Unfunded Mandates on State, Local, and Tribal Entities*. Of the 71 nominations for reform, 24 pertained to EPA regulations and guidance documents. OMB categorized 8 of

[3] The requirements for OMB's regulatory accounting reports were enacted as: Sec. 645 of the Treasury, Postal Services and General Government Appropriations Act for 1997 (P.L. 104-208; Sec. 625 of the Treasury and General Government Appropriations Act for 1998 (P.L. 105-61); Sec. 648 of the 1999 Omnibus Consolidated and Emergency Supplemental Appropriations Act (P.L. 105-277); Sec. 628 of the Treasury and General Government Appropriations Act for 2000 (P.L. 106-58); and Sec. 624 of the Treasury and General Government Appropriations Act (P.L. 106-554).

these 24 candidates as "high priority,"[4] all of which were given serious consideration by EPA.

On March 18, 2002, OMB published its draft 2002 Report and received approximately 1,700 public comments in response. OMB's Office of Information and Regulatory Affairs (OIRA) conducted a preliminary review of these comments and identified 316 rules and guidance documents that were nominated for reform. In the final Report released on December 18, 2002 entitled *Stimulating Smarter Regulations: 2002 Report to Congress on the Cost and Benefits of Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, OIRA referred 20 regulations and 17 guidance documents to EPA for evaluation. OIRA requested that EPA complete an initial review of these 37 nominations by February 28, 2003 and report on the Agency's recent, ongoing, or future activities concerning the issues raised by the public commenters.

In response to OMB's request, EPA created a process to review these nominations. First, EPA circulated the list of 37 regulations and guidance nominations to each of our program offices to provide a response, including information on what the final product, goal or objective would be and any milestones (anticipated or completed) with estimated or actual dates of completion. After analyzing those responses, the Agency categorized the nominations as follows: 17 "actions already under review;" 4 "will investigate;"and 16 "low priority." EPA met with OMB's OIRA Administrator, Dr. John Graham, to discuss our initial review on February 26, 2003, thereby meeting the February 28 deadline set out in the 2002 Report. As a follow-up to the meeting, OMB asked EPA to provide an update on the additional 29 regulations and guidance documents nominated for reform in

[4] "High priority" was defined as meaning that the points raised in the nomination were valid and that the Agency should evaluate the practicality and feasibility of the suggested reform.

the 2002 Report but not previously referred to EPA for response. EPA provided the additional requested material to OMB as part of our official response on April 11, 2003.

On December 5, 2003, OIRA's Dr. Graham requested from EPA an updated implementation schedule, with monthly milestones, that detailed the Agency's plan for addressing all nominations that had not been resolved. This included the 21 nominations from the 2002 Report listed as "action already under review" or "will investigate," along with the 29 additional items that OMB asked for information on from the 2002 Report. EPA responded to this request and, on January 20, 2004, EPA met with OIRA to discuss our updates on all 50 aforementioned nominations. At that time, EPA categorized 22 as being completed, 15 as on target with our previously reported milestones and proposed dates of completion, and 13 as having new projected dates of completion.

Though both the 2001 and 2002 Reports contained nominations for regulatory reform, OMB's final report published on September 22, 2003, entitled *Informing Regulatory Decisions: 2003 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities* primarily focused on the release of *OMB's Circular A-4 Guidance* and published Agencies' responses to the 2002 nominations. The 2003 Report did not nominate any regulations or guidance documents for reform.

OMB has not yet published the final 2004 Report. We have reviewed the draft 2004 Report that was published on February 2, 2004, entitled *Informing Regulatory Decisions: 2004 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*. The draft 2004 Report focuses on the manufacturing industry and specifically requests commenters to suggest reforms that would improve "manufacturing regulation by reducing unnecessary costs, increasing

effectiveness, enhancing competitiveness, reducing uncertainty and increasing flexibility."

EPA is pleased with the Agency's overall track record on responding to nominations from OMB's regulatory accounting reports. Of the 70 regulatory reform nominations received between 2001 and 2002,[5] EPA considers its response complete for 44 nominations (63%). This number includes: those nominations for which the Agency took the comments that were nominated into consideration when taking action; those for which the Agency had previously addressed or considered the commenter's suggestion; and those where the Agency seriously considered the comment, but nevertheless disagreed with the commenter's recommendation. Of the remaining 26 nominations, 18 are those for which the Agency has actions underway via notice-and-comment rulemaking, peer review, and other Agency processes designed to ensure the final products are based on the best and most current information. Three of the remaining nominations are those that are part of ongoing Agency programs that are being continually improved and five of the remaining nominations are those for which the Agency is still considering the best approach to address the outstanding issues raised by commenters.

Progress on Specific Regulatory Reform Nominations

As the actions I have just described show, EPA has taken the process of responding to public nominations for regulatory reform very seriously. This process has proven to be very helpful to focus our attention on issues in our regulations or guidance that may warrant changes or may need to be clarified for the regulated community. Although our review of the nominations has not always led us to change our decisions, it has challenged

[5] This includes the 66 nominations raised in the 2002 Report and referred to EPA for response (several of which were also nominated in the 2001 Report), along with an additional 4 actions that were nominated in the 2001 Report only.

us to scrutinize specific regulations and policy directives, and to either confirm our approach or recognize the need for revision.

The nominations for reform that were raised in the 2001 and 2002 Reports cover a wide range of issues. I would like to highlight a specific nomination with a particularly favorable result related to submetering water systems and then will address specific nominations for reform in which the Subcommittee expressed an interest: (1) the New Source Review (NSR) program; and (2) the Toxics Release Inventory (TRI) program. The Agency has made substantial progress in both of these areas. Before discussing these issues, I would like to very briefly address the Subcommittee's interest in mercury. No regulations or guidance documents related to mercury were nominated for reform in either the 2001 or 2002 OMB Reports. However, the Agency is on track to issue its first-ever rule to regulate mercury emissions from power plants by March 15, 2005. To ensure that the proposed mercury rule be based on the best available information, the Agency has been and continues to analyze the risks posed by mercury in the environment and the degree to which those risks can be reduced by regulating mercury from power plants.

Now, I would like to talk about a guidance document issued by EPA in June, 2000 related to submetering water systems. The memo interpreted the term "selling" under the Safe Drinking Water Act (SDWA) as applying to submetering of individual tenants by owners of multifamily dwellings. Submetering means installing separate water meters on each apartment and billing each tenant for their actual water use, rather than including a fixed water charge in the rent that is unrelated to use. The effect of this interpretation was to subject multifamily dwellings with more that 15 units to regulation as public water systems under the SDWA if they engaged in submetering.

Commenters raised concerns that: (1) studies have shown that submetering significantly reduces water usage by providing an incentive for water conservation; (2) multifamily dwellings that practice submetering do not store or treat water and there are no associated adverse health impacts resulting from submetering; and (3) EPA's June 2000 interpretation of the term "selling" imposed substantial regulatory burden on owners that engaged in submetering and thus, discouraged the practice. After considering the comments and looking into the issue, the Agency issued a revised policy on December 23, 2003 (68 FR 246) changing its interpretation of how SDWA applies to submetered properties. The revised policy clarifies that a property owner who installs submeters to track usage of water by tenants on his or her property will not be subject to SDWA regulations -- i.e., will not be considered to be selling drinking water -- solely as a result of taking the administrative act of submetering and billing. Although EPA's revised policy is focused on submetered apartments and other residential properties, states are given the flexibility to determine whether, and how, to best track other properties that submeter. In general, the scope of the revised policy is not intended to extend to properties with large distribution systems, or to those that serve a large population or a mixed commercial/residential population. In addition, EPA is sponsoring further study on this issue and intends to seek public comment on the relationship of rental unit billing systems to water conservation and revise our policy accordingly.

New Source Review

NSR reform has been one of EPA's highest priorities under this Administration because of the more than 10 years of history on the need for reform from a variety of stakeholders. The NSR program was well known to be overly complex and burdensome, resulting in uncertainty for industry, delayed projects that businesses need to maintain their competitiveness, and sometimes led to results that actually discouraged environmentally beneficial projects. NSR also was identified as a high priority for regulatory review in

OMB's 2001 Report. Likewise, the Administration's 2001 National Energy Policy Report entitled *Reliable, Affordable, and Environmentally Sound Energy for America's Future*, recommended that EPA review NSR's impact on the utility and refinery industries.

In response to this review and the longstanding calls for reform, in June 2002, EPA recommended a series of high-priority reforms to streamline the program and provide greater regulatory certainty and flexibility, while also maintaining strong environmental protection. EPA went to work to carry out these recommendations expeditiously. The recommended NSR reforms are contained in three rules – EPA has finalized two of the rules, and intends to propose a third.

The first rule, known as the NSR Improvement Rule, includes a set of major improvements to the NSR program that will provide greater regulatory flexibility and certainty, and will remove barriers to – and create incentives for – environmentally-beneficial projects.[6] EPA finalized the NSR Improvement Rule in December 2002 and it became effective in March 2003. In response to several legal challenges, the Agency is defending this rule in Court – oral arguments are scheduled for January, 2005. In the meantime, EPA is also working with state and local agencies to provide them the necessary approvals to begin running NSR programs under this new rule.

[6] One specific reform included in this rule relates to plantwide applicability limits (PALs). To provide facilities with greater flexibility to modernize their operations without increasing air pollution, facilities that agree to operate within strict site-wide emissions caps called PALs will be given flexibility to modify their operations without undergoing NSR, so long as the modifications do not cause emissions to violate their plantwide cap.

The second NSR rule is the Equipment Replacement Provision. This rule is a critical step toward providing certainty as to when equipment replacements automatically are excluded from NSR requirements because they are routine maintenance, repair and replacement activities, and when further review may be necessary. It will promote safe facilities by removing a significant impediment to the replacement of damaged or deteriorating parts. It will also maintain requirements that facilities go through NSR review in appropriate circumstances.

The Agency proposed the Equipment Replacement Provision in December 2002 and finalized the Equipment Replacement Provision in October 2003. The Equipment Replacement Provision has been challenged in the Court of Appeals for the District of Columbia and has not yet become effective because it was stayed by the Court until there is a final decision in the case. As a result of petitions filed with EPA, the Agency agreed to reconsider various aspects of the Equipment Replacement Provision through a second public comment process. EPA is currently reviewing the numerous comments it received and considering the Agency's response.

The third NSR improvement rule is intended to address remaining issues, including how to determine whether NSR applies to sources with multiple, interconnected emissions units (de-bottlenecking) and to sources with multiple construction projects (aggregation), and how to handle variants of the plant-wide applicability limits (PALs) based on allowable emissions.

More to the point, the President has directed EPA to continue our success in improving our national air quality with smarter regulations. Our Clean Air suite – Clear Skies or the Clean Air Interstate Rule, coupled with the Nonroad Diesel Rule and other existing state and federal control programs brings nearly 90% of the counties in the Eastern U.S. most

affected by EPA's new health-based air quality standards into attainment with the new ozone and particulate matter rules. The Clean Air Suite also will minimize the conflict, litigation, and delay of programs such as NSR, and locks in the certainty needed to create new jobs and opportunity, especially in urban areas. We can accomplish this with a much smaller financial impact to consumers and businesses compared to what you might otherwise pay under existing Clean Air Act programs. The Clean Air Suite the Agency is implementing minimizes the possibility that the power sector would fuel switch to natural gas to comply with air standards under the current Clean Air Act, and will likely avoid the higher natural gas prices that would inevitably result. In addition, attainment gains through these programs will reduce the need to require further costly reductions from the manufacturing sector.

Toxics Release Inventory (TRI)

I will now turn to EPA's efforts to improve TRI. Since its implementation in 1987, TRI has been the centerpiece of the Agency's right-to-know program, and it has proven to be a very useful tool for assisting communities in protecting their environment and for making businesses more aware of their chemical releases. Before I describe our response to the recommendations in OMB's reports, I would like to share information about the recent TRI modernization initiative. This initiative was announced in May to increase the use of electronic reporting and data management tools, moves that will reduce the amount of time between when data are submitted and reported and greatly improve data quality. For the 2003 reporting year, ninety-three percent of the TRI reporting community used our award winning software, TRI-Made Easy (TRI-ME) to submit their data. In addition, electronic submissions over the Central Data Exchange (CDX) are up 50% (from 22% for 2002 data). This new electronic system provides a seamless way to transmit data from reporters to EPA over the Internet, and in the near future, will enable simultaneous report to EPA and state governments with the click of a button. We are proud of these

developments, and believe they will help address some of the concerns that led the public to nominate TRI as a reform target.

In the midst of these improvements, in September 2002, EPA initiated a stakeholder dialogue process to identify opportunities to reduce the burden on facilities reporting under the TRI program. Our goal was to publish a rule that would reduce burden associated with the TRI reporting requirements while simultaneously continuing to provide valuable information to the public consistent with the TRI law. The Agency prepared a white paper laying out five options for streamlining TRI reporting, and received 700 public comments in response. The options included increasing reporting thresholds for small business, and for classes of chemicals or facilities, and introducing a "no significant change" option as measured against a baseline reporting year.[7] The formal comment period on the White Paper ended in early 2004, but we continue to seek input – the Agency's most recent meeting with stakeholders was held as on October 19, 2004.

The public input we have received will inform our TRI improvement efforts. To provide burden reduction as quickly as possible, we are pursuing a two-tiered approach:[8] a

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[7] Under the "no significant change" option, a business filing a TRI report could report using a surrogate, or an indicator, to assess whether or not a facility's reportable quantities of a TRI chemical have varied significantly from one reporting year to the next based on criteria laid out by EPA. This indicator of change would need to be an appropriate indicator of changes (or lack of change) in reportable quantities. If the projected change was small from one year to the next, a facility could instead report "no significant change" to EPA with an expedited submission, thereby reducing unnecessary reporting while still providing EPA with an indicator of reportable amounts. This special expedited submission could be allowed for a specified number of years (e.g., 1-3 years). One important challenge of this "no significant change" option is identifying an appropriate indicator for reliably determining when there has been a significant change in chemical release and waste management quantities, thereby enabling EPA to accept this indicator as a proxy for a full report.

[8] EPA has examined the public input and identified a number of potential changes to the TRI regulations. At this time, all of the options are still under consideration.

proposed rule covering the more complex issues raised in the options presented in the white paper, to be proposed in Fall 2005, and a separate, expedited rulemaking covering simpler, streamlining revisions to the reporting forms. We anticipate the latter rule will be proposed in December 2004.[9]

The Agency has another initiative under way that could affect TRI reporting. As you know, in 2001 EPA lowered the TRI reporting threshold for lead and lead compounds to 100 pounds. Currently, we are evaluating the scientific approach we use to assess hazards and risks associated with metals. A draft framework for evaluating metals is undergoing interagency review. Following that review the EPA Science Advisory Board will evaluate the draft framework.[10] Once the new framework is complete, EPA will assess its implications with respect to current TRI and other EPA program requirements.

Conclusion

The Agency has an important responsibility to ensure the quality and credibility of every regulatory and policy decision. Under this Administration, EPA has taken important actions to improve the quality and credibility of our regulations and guidance documents. We have strengthened our regulatory process, invested in sound science and analysis, and been supportive of and responsive to public involvement. I believe these actions have

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[9] The rule scheduled for proposal this December includes a review of all sections of TRI Forms R and A. EPA is identifying portions of the forms that may be streamlined or eliminated without giving up important data. EPA is also looking at ways to use data already collected by other EPA programs to reduce duplicative collection, through information technology such as web services. The rule scheduled for proposal in 2005 will follow up on one or more options from the white paper, and may include, for example, a proposal to implement the "no significant change" option discussed previously.

[10] The current schedule for this activity calls for a review at a Science Advisory Board peer review meeting in late January 2005, with the draft framework being finalized in November 2005.

created a solid foundation for improving our regulatory effectiveness and for accelerating progress toward meeting our nation's environmental goals.

Thank you for the opportunity to testify today. I would be happy to answer any questions that you may have.

Status of EPA Nominations

The following table outlines EPA's initial response to the regulatory reform nominations, whether or not EPA considers our response complete, and any milestones with estimated or actual dates of completion. Please note that "considering comment" is not a guarantee EPA will implement all of the commenter's suggestions and "no action necessary" means EPA had either previously addressed the commenter's concerns or disagreed with the suggestions. Also:

- Actions in **bold** were nominated for reform in both 2002 and 2001 and had been categorized as "high priority" by OMB in 2001.
- Actions in *italics* were nominated for reform in both 2002 and 2001.
- All other actions were nominated in 2002 unless otherwise noted.

Categorizations:

- "Response Complete" - those nominations for which the Agency took the comments raised by nominations into consideration when taking action, those for which the Agency had previously addressed/considered the commenter's suggestions, and those where the Agency seriously considered the comment, but nevertheless disagreed with the commenter's recommendation.
- "Initiated Reform" - actions are underway via notice-and-comment rulemaking, peer review, and other Agency processes designed to ensure the final product is based on high quality and timely information.
- "Continuous Improvement" - these actions are part of ongoing Agency programs that are continually improved.
- "Under Consideration" - the Agency is still considering the best approach to address outstanding issues related to the action.

Title	Initial Reaction/Complete?	Milestone w/ Estimated or Actual Dates of Completion
Response Complete (44 nominations)		
Motor Vehicle Emission Standards for Greenhouse Gases	*Considering Comment/Complete*	*Notice of Denial of Petition published September 8, 2003*
EPA Index of Applicability Decisions	Considering Comment/Complete	FR Notice published February 13, 2003
Protections for Farm Children from Pesticide Exposures	Considering Comment/Complete	Litigation is ongoing but EPA considers response to comment complete
Storage for Reuse	Considering Comment/Complete	FR notice published September 7, 2004
Submetering Water Systems	Considering Comment/Complete	Final policy memorandum signed on December 16, 2003
PCB Spill Cleanup Policy	Considering Comment/Complete	Completed internal review, no further action planned
Spill Prevention Plans	Considering Comment/Complete	Final rule published on April 17, 2003 extending compliance dates and outreach
New Source Review	**Considering Comment/Complete**	**Final rules published on November 7, 2003 and October 27, 2003. Stay granted December 24, 2003.**
Guidance: New Source Review	Considering Comment/Complete	Final rule published on October 27, 2003.
Definition of Solid Waste	*Considering Comment/Complete*	*NPRM published on October 28, 2003*
RCRA Subtitle C Hazardous Waste Regs	**Considering Comment/Complete**	**Conducted internal and external stakeholder meetings. Performance Track rule published April 14, 2004 focused on extension of hazardous waste accumulation time**

Title	Initial Reaction/Complete?	Milestone w/ Estimated or Actual Dates of Completion
Chemical Plant Safety Standards	Considering Comment/Complete	EPA plans to review the RMP database after RMP submissions and updates are received (ongoing) and will prepare findings in early 2005.
Stormwater Construction General Permit	Considering Comment/Complete	Final rule published July 1, 2003
Drinking Water Standards for Emerging Contaminants	Considering Comment/Complete	Final notice published July 18, 2003
Heavy-Duty Engines and Highway Diesel Fuel Sulfur	*No action necessary/Complete*	*Final rule published on January 18, 2001*
Protection from Pollution from Diesel Engines	No action necessary/Complete	Final rule published on January 18, 2001
Tier 2 Motor Vehicle Emission Standards	*No action necessary/Complete*	*Final rule published on February 10, 2000*
Guidance: Improving Air Quality/Economic Incentive Program	**No action necessary/Complete**	**Guidance issued January 19, 2001**
Worst-Case Scenario	*No action necessary/Complete*	*Final rule published August 04, 2000*
Arsenic in Drinking Water	**No action necessary/Complete**	**Final rule was effective May 22, 2001**
Concentrated Animal Feeding Operations	**No action necessary/Complete**	**Final rule published February 12, 2003. Guidance published November 3, 2003**
Effluent Guidelines for Metal Parts and Machinery	No action necessary/Complete	Final rule published May 15, 2003

Title	Initial Reaction/Complete?	Milestone w/ Estimated or Actual Dates of Completion
Guidance: Clean Water Act Jurisdiction	No action necessary/Complete	ANPRM published January 15, 2003
Risk Assessment for Rodenticides	No action necessary/Complete	Released preliminary comparative ecological assessment in January 2003
Ban on Chromated Copper Arsenate	No action necessary/Complete	Granted cancellation on March 17, 2003
Investigating Title VI Administrative Complaints	No action necessary	
Improving Air Quality Through Land Use Activities	No action necessary	
Superfund Indirect Costs	No action necessary	
TRI: Lowering Reporting Thresholds for PBT Chemicals	*No action necessary*	
TRI Lead Reporting	No action necessary	
Collection of Health Screening Data	No action necessary	
Food Quality Protection Act Policy Papers	No action necessary	
Pesticide Registration Notices	No action necessary	
RCRA Spent Catalyst Policy	No action necessary	
NPDES and Sewage Sludge Monitoring Reports	No action necessary	
Stormwater Phase I	No action necessary	

Title	Initial Reaction/Complete?	Milestone w/ Estimated or Actual Dates of Completion
Stormwater Phase II	No action necessary	
Drinking Water Standards for Radionucleides	No action necessary	
Definition of Fill Material	No action necessary	
Ecoregional Nutrient Criteria Documents	No action necessary	
Withdrawal of State Delegations	No action necessary	
High Production Volume (HPV) Chemical-Testing Program Voluntary Children's Chemical Evaluation Program Endocrine Disruptor Screening Program (2001)	No action necessary	
Importation for Special Classes of Merchandise (2001)	No action necessary	
Filter Backwash Recycling Rule (2001)	No action necessary	
Initiated Reform (18 nominations)		
Notification of Substantial Risk (TSCA) - (2001)	Considering Comment	EPA has established a new TSCA 8(e) web page that contains guidance, previous 8(e) submissions, and new submissions posted within two weeks of receipt. EPA is also working on a package that would make policy clarifications.

Title	Initial Reaction/Complete?	Milestone w/ Estimated or Actual Dates of Completion
Regulatory Reform for Handling Refrigerants	Considering Comment	Administrator's signature on NPRM for "Split System" expected December 2004
"Once In, Always In" Policy	Considering Comment	Administrator's signature expected February 2005
Economic Benefit of Noncompliance in Civil Penalty Cases	*Considering Comment*	*FR Notice expected November 2004*
TRI Alternate Reporting Threshold (Form A)	Considering Comment	Two part proposed rule under development; first (quick fixes) to be published December, 2004; second (more complex issues) August, 2005
TRI Lead	Considering Comment	Final rule was promulgated January 2001. Will consider revisions based on completion of Metals Framework
TRI Form R Reporting	Considering Comment	Changed Form R (for RY2003) to break out on-site and off-site disposal. Additional Form R changes are being considered in Burden Reduction Initiative (see dates above)
TRI Reporting Forms and Instructions	Considering Comment	Being considered in context of Burden Reduction Initiative (see above)
TRI Reporting Questions and Answers	Considering Comment	Q&A's currently at OMB for review. Will published once released.
Waterborne Diseases	Considering Comment	Draft Report expected early 2005
Site-Specific Risk Assessments in RCRA	Considering Comment	Final rule expected June 2005

Title	Initial Reaction/Complete?	Milestone w/ Estimated or Actual Dates of Completion
Best Available Retrofit Technology	*Considering Comment*	*SNPRM published May 5, 2004. Final rule expected April 2005*
1997 EPA Standards for Ozone and Particulate Matter	*Considering Comment*	*Final Rule Phase II expected December 2004. Final Rule for PM2.5 Implementation expect June 2005*
Guidance: Cancer Risk Assessment	Considering Comment	Final guidelines expected December 2004
RCRA Burden Reduction Initiative	Considering Comment	Final rule expected August 2005
Groundwater Rule	*Considering Comment*	*Final rule expected April 2005*
Disinfection Byproduct Rule	Considering Comment	Final rule expected July 2005
Guidance on Drinking Water Affordability	**Considering Comment**	**Proposal expected May 2005**
Continuous Improvement (3 nominations)		
Integrated Risk Information System	Considering Comment	EPA continues to complete review of assessments and add to IRIS database
Total Maximum Daily Load	**Considering Comment**	**Further discussion required**
Sanitary Sewer Overflows	Considering Comment	Report to Congress signed August 6, 2004. Final rule expected November 2007
Under Consideration (5 nominations)		
Definition of Volatile Organic Compound	Considering Comment	Administrator's signature on ANPRM expected December 2004

Title	Initial Reaction/Complete?	Milestone w/ Estimated or Actual Dates of Completion
Export Notification Requirements	*Considering Comment*	*Legislation is still pending. Will revisit status of legislation with the renewal of the ICR in 2006, which actually begins in early 2005.*
RCRA Cement Kiln Dust	Considering Comment	Considering publication of NODA by June 2005. Final rule expected October 2006
Radon in Drinking Water	Considering Comment	Final rule expected December 2005
Removal Credits for POTWs	Considering Comment	Further discussion required

Mr. OSE. Thank you, Mr. Johnson. I am appreciative, in particular, of the chart that you attached to the end of your testimony.

Our next witness is the Solicitor of Labor at the U.S. Department of Labor. That would be Mr. Howard Radzely.

Sir, welcome. We have received your written statement; it has been entered into the record; it has been read. You are recognized for 5 minutes.

Mr. RADZELY. Mr. Chairman and distinguished members of the subcommittee, thank you for the opportunity to appear before you today to discuss the Department of Labor's efforts to strengthen worker protections while reducing unnecessary regulatory burdens on the economy.

The Department takes seriously its responsibility to protect worker safety and health, retirement security, pay, and equal access to jobs and promotions. Over the years, advances in safety, health, science, and technology, as well as changes in the law, have rendered many Department regulations outdated or even unnecessary. As a result, we have adopted, revised, or eliminated regulations in an ongoing attempt to protect workers without imposing unnecessary and costly burdens on the economy. We recognize the economic costs that regulations place on the regulated community, and have pursued alternatives to rulemaking whenever feasible.

At the outset, I would like to mention the Department's successful effort to streamline our regulatory agenda in such a way that it now provides a realistic and manageable number of regulatory initiatives, allowing us to focus our attention and resources.

While continuing our commitment to strengthening protections for the American work force, we are also trying to reduce the regulatory costs and burdens for employers, which will help employers to create jobs.

Our multifaceted approach to regulatory reform, compliance assistance, and vigorous enforcement is working. Workplace fatalities in 2002 fell to the lowest level in the history of the Bureau of Labor Statistics' National Census of Fatal Occupational Injuries, and the fatality rate was unchanged in the recently released 2003 census. Mining fatalities in particular are at their lowest level since 1910, when records were first kept.

In fiscal year 2003, DOL's Wage and Hour Division recovered more than $212 million in previously unpaid back wages, the largest amount collected in 11 years and a 21 percent increase in a single year. And, data released last month by the Employee Benefits Security Administration show a record-breaking 121 percent increase in enforcement results. The Agency protected $3.1 billion in retirement, health, and other benefits for workers and their families.

As this subcommittee recognizes, one important regulatory tool is the process for addressing the public's reform nominations that are included in OMB's annual reports to Congress on the costs and benefits of regulations. In considering what regulations to promulgate, revise, or withdraw, we evaluate many factors, including input from the public through the OMB nominations process, stakeholder meetings, industry experience, experience with previous regulatory initiatives in a given area, as well as possible alternatives to regulation.

OMB's 2001 report to Congress included 16 Labor Department nominations, 5 labeled by OMB as priority candidates for reform, and the 2002 report included 35, some of which overlapped with the earlier nominations. These nominations were wide-ranging, including proposals to develop new regulations or to revise or rescind regulations and guidance documents.

After consulting with OMB's Office of Information and Regulatory Affairs, we provided OMB with a table describing our plans for each referral. As requested by this subcommittee, I have included charts with my written testimony that describe the status of each of the 2001 and 2002 nominations. The charts reflect many actions we have taken that are consistent with the public nominations. In some cases, however, agencies decided not to take action or could not take action on particular nominations for policy reasons or because action would require legislation rather than regulation.

The subcommittee also specifically requested that I discuss the Department's plan to address public recommendations having to do with the Family and Medical Leave Act. Three of the 2001 nominations and four of the 2002 nominations address the FMLA. Congress also held a number of hearings over the years at which stakeholders identified various FMLA issues, many of which were also raised by the public nominations. In addition, Federal courts, including the U.S. Supreme Court, have invalidated several provisions of the FMLA regulations.

The Department held stakeholder meetings to receive informal feedback on how the regulations are working. In particular, we invited more than 20 groups, representing employees, unions, employers, women's and family advocacy groups, elder groups, and others with experience working with the regulations to share their views about the rules. The Department intends to carefully consider the public's views, the court decisions, and our experience in administering the regulations before deciding what action, if any, is appropriate to take.

Mr. Chairman, I look forward to responding to any questions you or the other members of the subcommittee may have.

[The prepared statement of Mr. Radzely follows:]

STATEMENT OF HOWARD M. RADZELY
SOLICITOR OF LABOR
U.S. DEPARTMENT OF LABOR

BEFORE THE

SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES AND REGULATORY AFFAIRS

COMMITTEE ON GOVERNMENT REFORM

U.S. HOUSE OF REPRESENTATIVES

November 17, 2004

Chairman Ose and distinguished Members of the Subcommittee:

Thank you for the opportunity to appear before you today to discuss the Department of Labor's efforts to strengthen worker protections while reducing unnecessary regulatory burdens on the economy. As requested by the Subcommittee, my testimony will address the Department's overall progress in responding to the public's reform nominations that were included in the Office of Management and Budget's (OMB) annual reports to Congress on the costs and benefits of regulations.

The Department takes seriously its responsibility to protect worker safety and health, retirement security, pay, and equal access to jobs and promotions. Over the years, advances in safety, health, science, and technology -- as well as changes in the law --have rendered a number of Department regulations outdated or even unnecessary. As a result, these advances have required us to revise or eliminate regulations and to consider and adopt new rules and new approaches that ensure strong protections for workers without imposing unnecessary and costly burdens on the economy.

As we explained when we published our Regulatory Agenda last June, the Regulatory Flexibility Act and Executive Order 12866 require the Department to provide the public with a list of all regulations that the Department expects to have under active consideration for promulgation, proposal, or review during the coming one-year period. The Department's fall 2004 Regulatory Agenda, which should be published in the next few weeks, will include approximately 80 items upon which we expect to make significant progress or to complete within the next twelve months. This Agenda is more focused and realistic than ever before, reflecting the most important, necessary regulatory items that address workers' health and safety, security, and other rights that could not be protected effectively by using other tools at the Department's disposal, such as compliance assistance, voluntary partnerships, and nonbinding guidance documents.

The Department's Regulatory Agenda is now a meaningful document that employers, employees, and the public can easily obtain, understand, and rely upon. Reflecting only those items that we expect to have under active consideration during the coming year, our Regulatory Agenda reduces the burden on our economy of regulatory uncertainty while better protecting the health, safety, and other working conditions of the American workforce.

The Department recognizes the economic costs that regulations place on the regulated community. In light of this burden, the Department has pursued alternatives to rulemaking whenever feasible and has attempted to minimize the costs of any regulations while ensuring that strong worker protections are in place. The Department makes use of all available tools to strengthen worker protections. For instance, to use an example raised in OMB's reports, rather than issue a new regulation, the Department's

Occupational Safety and Health Administration (OSHA) addressed the hazards of metalworking fluids by developing a best-practices guide and making it available on its Web Site. This effectively protected workers without delaying other regulatory priorities that the Department listed in its Regulatory Agenda.

To continue to use OSHA as an example of the Department's approach to protecting workers without needlessly burdening the economy, OSHA has developed many programs to help businesses comply with its regulations and standards and to promote workplace safety in a cost effective manner. For instance, in 2003, OSHA's training programs reached more than 300,000 employers and workers. Moreover, through its Strategic Partnership Program, OSHA has entered into extended, cooperative relationships with groups of employers, employees, and employee representatives to identify safety and health problems, and has crafted agreements to accomplish tasks, such as training employees and developing site-specific safety and health management systems, that strengthen protection for employees while minimizing the economic burdens. There are currently 215 active partnerships, of which 102, almost half, directly involve small businesses.

Further, under its Voluntary Protection Program (VPP), OSHA has established cooperative relationships with management and labor groups at workplaces that have implemented a comprehensive safety and health management system. The extraordinary commitment by employers and employees to safety and health at these sites produces bottom-line results: the average VPP worksite has an injury rate 52% below the average for its industry. OSHA's Web Site and Small Business Handbook are also valuable tools to better protect the working conditions of the American workforce while assisting

employers with regulatory compliance. The Department's overall approach allows OSHA to focus enforcement on industries with the highest accident and fatality rates and on employers with a history of repeat and willful violations.

The Department is continuously evaluating its regulatory enforcement tools to ensure that they provide strong employee protections in a cost effective manner. For instance, addressing a high priority nomination that OMB identified in its 2001 Report to Congress on the Costs and Benefits of Regulation, the Employment Standards Administration's (ESA) Office of Federal Contract Compliance Programs (OFCCP) is currently evaluating the effectiveness of its Equal Opportunity (EO) Survey as a selection device for enforcement. In its nomination, the public suggested that there should be a less burdensome way to collect the information in the EO survey, while still ensuring compliance. OFCCP retained an outside expert to systematically study the effectiveness of the EO Survey in identifying contractors who are most likely to have engaged in systemic discrimination. An accurate selection model based on survey results will enable OFCCP to allocate its resources efficiently and avoid investigating contractors who are not likely to have engaged in systemic discrimination. We expect to receive a detailed report from our expert early next year.

Our multi-faceted approach to regulatory reform, compliance assistance, and vigorous enforcement is working. In the occupational safety and health area, workplace fatalities in 2002 fell to the lowest level in the history of the Bureau of Labor Statistics' National Census of Fatal Occupational Injuries, and the fatality rate remained unchanged in the recently-released 2003 census. In addition, a drop in fatalities among Hispanic workers during each of the two most recent years is particularly encouraging because

deaths among this group had been rising every year since 1995. Encouraging, too, is the fact that fatal work injuries among foreign-born Hispanic workers declined last year for the first time since the census began. In 2003, the Mine Safety and Health Administration (MSHA) reported the fewest number of fatalities since 1910, when records were first kept.

Furthermore, in fiscal year 2003, ESA's Wage and Hour Division recovered more than $212 million in previously unpaid back wages -- the largest amount collected in 11 years and a 21% increase in a single year. These back wages went to more than 342,000 workers, an increase of nearly 30%. And, data released last month by the Employee Benefits Security Administration (EBSA) show that the agency had its best year ever, with a record breaking 121% increase in enforcement results that protected $3.1 billion in retirement, health, and other benefits for American workers and their families. In short, the Department's approach to regulatory reform, compliance assistance, and strong enforcement is clearly working.

As this Subcommittee recognizes, one important regulatory tool is the process for addressing the public's reform nominations that are included in the Office of Management and Budget's annual reports to Congress on the costs and benefits of regulations. In considering what regulations to promulgate, revise, or withdraw, we evaluate many factors, including input that is received from the public through the OMB nominations process, stakeholder meetings, industry experience, experience with previous regulatory initiatives in a given area, and alternatives to regulation.

Beginning with its 2001 report on the costs and benefits of regulations, OMB solicited suggestions from the public on specific regulations that could be rescinded or

changed that would increase net benefits to the public by either reducing costs or increasing benefits. Where possible, OMB asked that the public specifically identify obsolete or outmoded rules. In 2002, OMB expanded its request for reform suggestions to include agency guidance documents. OMB ultimately presented the public's suggestions to agencies as "public nominations" for reform. With regard to the Department, OMB's 2001 report included 16 nominations, while the 2002 report included 35 nominations for our review, some of which overlapped the earlier nominations. These nominations were wide-ranging, including proposals to develop new regulations, revise current regulations, rescind regulations, and revise guidance documents.[1] In general, OMB directed agencies to review the newly-referred items on the basis of three criteria: efficiency, fairness, and practicality. OMB also asked agencies to consider budgetary constraints, statutory mandates, and other relevant factors. After analyzing the public nominations, the Department generally categorized its responses to the nomination referrals according to the following criteria: (1) whether immediate action would be taken; (2) whether future action would be taken; and (3) whether no action was planned for the particular nomination. After consultation with OMB's Office of Information and Regulatory Affairs (OIRA), the Department provided OMB with a table describing the Department's plans for each referral, and provided subsequent updates to OMB.

As requested by the Subcommittee, charts providing brief descriptions of the status of each of the 51 nominations from 2001 and 2002 are attached to this testimony. Among other things, the charts reflect many actions taken that are consistent with public

[1] The Department did not prepare formal responses on the 2001 nominations; OMB had simply prioritized the public's nominations and asked the agency to give consideration to five "high priority" candidates.

nominations. In some cases, however, agencies decided not to take action or could not take action on particular nominations for policy reasons or because action would require legislation rather than regulation. For example, after careful examination of the issue, MSHA determined not to revise its explosives standard because the current regulations have proven to be effective and there is no compelling safety and health reason for making revisions. Similarly, ESA determined it could not take action on a public recommendation to allow employees to "make-up" time for medical appointments in the same pay period, rather than in the same week, because this change would require amending the Fair Labor Standards Act (FLSA).

The Subcommittee also specifically requested that I discuss the Department's plan to address public recommendations regarding the Family and Medical Leave Act (FMLA). The final regulations implementing the FMLA were published in 1995. Since then, as employers have attempted to implement the regulations and employees have attempted to utilize the FMLA's benefits, the Department has received feedback suggesting possible revisions to the regulations, including the nominations to OMB. In addition to the OMB nominations process, Congress has held a number of hearings over the years at which stakeholders identified the positive attributes as well as possible issues with these regulations. Furthermore, federal courts – including the United States Supreme Court -- have invalidated several provisions of the FMLA regulations.[2]

[2] For instance, the U.S. Supreme Court invalidated an FMLA regulation that required an employer to designate the leave taken by employees as FMLA leave or else be prohibited from counting it against an employee's 12-week FMLA entitlement. *See Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002). In addition, a number of appellate courts have stricken another FMLA regulation that requires employers to treat certain employees as eligible for FMLA leave, even though they do not meet the FMLA's eligibility definition. *See, e.g., Dormeyer v. Comerica Bank-Illinois*, 223 F.3d 579 (7th Cir. 2000).

The Department held a series of stakeholder meetings to receive informal feedback on how the regulations are working. The Department invited more than 20 groups representing employees, unions, employers, women's and family advocacy groups, elder care groups, and others with experience working with the regulations, to share their views about the rules. The Department intends to consider carefully the court decisions, the public's views, and the agency's experience administering the regulations before deciding what action, if any, is appropriate to take.

To conclude my testimony, I would like to briefly describe some of the regulatory actions listed on the Department's Regulatory Agenda for Fall 2004, which should be published soon. As I mentioned earlier, our Agenda's list of some 80 items provides a realistic and manageable number of regulatory initiatives that will focus Department attention and resources. These items demonstrate DOL's approach to strengthening protections while diminishing burdens on the economy. Here are a few examples:

As part of its efforts to reform regulations for the 21st Century, OSHA's Standards Improvement Project will streamline a number of health standards by removing language that is outdated, duplicative, unnecessary, or inconsistent, without diminishing employee protections. These changes will reduce the time and effort needed to understand and comply with these standards.

Consistent with the Secretary's priority for ensuring pension and health benefits security, the Employee Benefits Security Administration (EBSA) will provide further guidance addressing the nondiscrimination, access, portability, and renewability provisions added to the Employee Retirement Income Security Act (ERISA) by the Health Insurance Portability and Accountability Act (HIPAA). In addition, EBSA will

address a recurring concern expressed by employers regarding compliance with a 1994 regulation requiring the deposit of employee contributions to 401(k) and other retirement plans as soon as the contributions can reasonably be segregated from the employer's general assets. Another EBSA initiative on the Regulatory Agenda addresses the chronic problem of 401(k) and other individual account plans that have been abandoned by their employer sponsors. The ERISA Advisory Council specifically requested that the Department address this issue.

The Secretary's emphasis on meeting the needs of the 21st century workforce is also reflected in the Employment and Training Administration's plan to issue regulations implementing recent changes to the Trade Adjustment Assistance program, and to streamline the permanent labor certification process to improve the effectiveness of the program. The permanent labor certification process was one of the candidates for reform suggested by the public in both 2001 and 2002 and identified by OMB in the 2001 report as a "high priority review" item.

Finally, the Administration's commitment to protecting the employment rights of service members as they return to the civilian workforce is reflected by the Veterans' Employment and Training Service's (VETS) recently proposed regulations implementing the Uniformed Services Employment and Reemployment Rights Act (USERRA).

Mr. Chairman, the Department is proud of its achievements in streamlining its Regulatory Agenda since 2001. In doing so, we have provided clarity in our regulations for employers, workers, and the public at large. We have considered the important input received from the public, both as part of our formal regulatory process, OMB's public nominations process, and other outreach efforts. We also have tried to reduce the

regulatory costs and burdens for employers, which will help employers to create jobs, while at the same time continuing our commitment to strengthen protections for the American workforce.

Mr. Chairman, this concludes my testimony. I would be glad to respond to any questions you may have.

STATUS OF DEPARTMENT OF LABOR NOMINATIONS[1]

FROM 2001 OMB REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF REGULATIONS

OMB Report Page No.	Nomination	Status
73	OFCCP's 60-2 Regulation – Affirmative Action Plans	OFCCP completed a directive addressing this issue in March, 2002.
74	OFCCP's 60-2 Regulation – the Equal Opportunity Survey	OFCCP has engaged an outside contractor to study the effectiveness of the survey in identifying noncompliant firms and expects to receive the study in 2005.
75	OFCCP Scheduling Letter	OFCCP solicited public comment on this collection burden earlier this year. The Information Collection Request (ICR) regarding the Paperwork Reduction Act (PRA) clearance is pending at OMB.
76	VETS Annual Report for Federal Contractors	VETS completed rulemaking in October, 2001.
77	OSHA Occupational Injury and Illness Record Keeping and Reporting	OSHA issued final rules in July, 2002, and June, 2003.
78	OSHA Consultation Program	OSHA is not contemplating any action; legislation would be required.
79	ETA Procedures for Certification of Employment Based Immigration and Guest Worker Applications	ETA expects to issue final rules later this year regarding the permanent employment of aliens and H-2B reform.
80	ESA Proposal Governing "Helpers" on Davis-Bacon Act Projects	ESA is not contemplating any action. Prior efforts at rulemaking from 1979 to 2000 were litigated successfully by opponents of the rules and also resulted in Congressional appropriation holds.
81	ESA Definition of "Any employee employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesman."	ESA issued a final rule in April, 2004.

[1] We recognize that the information supplied is not in the format requested by the Subcommittee; *i.e.*, the charts do not identify a particular nomination as either "accepted," "rejected," or "partially accepted." There are several reasons why such categorization was not possible. As an initial matter, we note that OMB did not request agency feedback in this manner, nor is it reflected in OMB's reports. Moreover, some nominations detail multiple concerns with an issue, thus making it extremely difficult to precisely or singularly label the Department's response. In a number of instances, the Department had previously initiated, or was already considering, regulatory or nonregulatory action to address one or more of the issues detailed in a nomination. While our action, or contemplated action, may be consistent with a nomination, it would not be accurate to simply state that the nomination was accepted. In some instances, the Department determined that legislative changes would be required. As formulated, these charts reflect the actions actually taken by the Department with regard to the public nominations. In addition, please note that OMB's final 2004 report has not been released.

OMB Report Page No.	Nomination	Status
82	ESA Overtime Compensation Regulation Regarding Bonuses	ESA is not contemplating any action; legislation would be required.
83	ESA Accrual of Compensatory Time	ESA is not contemplating any action; legislation would be required.
84	ESA FMLA Definition of "Serious Health Condition"	ESA is reviewing its FMLA regulations, which includes an evaluation of its experience administering the rules and input from stakeholders, court decisions, and the public nominations.
85	ESA FMLA Limits on How Employees May Take Intermittent Leave	ESA is reviewing its FMLA regulations, which includes an evaluation of its experience administering the rules and input from stakeholders, court decisions, and the public nominations.
86	ESA FMLA Information Needed for Employer to Designate Leave	ESA is reviewing its FMLA regulations, which includes an evaluation of its experience administering the rules and input from stakeholders, court decisions, and the public nominations.
87	ESA Service Contract Act Reform of Wage Determination Process	ESA plans to streamline the process for obtaining wage determinations and to update the occupational index. The NPRM regarding the Wage Determinations OnLine is expected later this year, and the occupational index update is expected in December, 2005.
88	ESA FMLA Record Keeping and Notification Requirements	ESA is reviewing its FMLA regulations, which includes an evaluation of its experience administering the rules and input from stakeholders, court decisions, and the public nominations.

FROM 2002 OMB REPORT TO
CONGRESS ON THE COSTS AND BENEFITS OF REGULATIONS

OMB Reference No.	Nomination	Status
12 (Guidance)	ESA Coordination of FMLA with other Leave Policies	ESA is reviewing its FMLA regulations, which includes an evaluation of its experience administering the rules and input from stakeholders, court decisions, and the public nominations.
13 (Guidance)	ESA OFCCP Guidance on Equal Employment Opportunity	OFCCP's actions are consistent with the applicable 1997 guidance from OMB. OFCCP is currently working with OMB in connection with EEOC's revisions to the EEO-1 form.
14 (Guidance)	OSHA Inspection Procedures and Interpretive Guidance for Control of Hazardous Energy (Lockout/Tagout)	OSHA is developing a Directive, which is expected in April, 2005.
15 (Guidance)	OSHA Compliance Directive, Application of the Permit-Required Confined Spaces Standards	OSHA is developing a Directive, which is expected in May, 2005.
16 (Guidance)	OSHA Multi-Employer Citation Policy	OSHA had discussions and exchanged correspondence with several organizations (including the petitioners) on developing guidance to further clarify the responsibilities of the general contractor.
75	ETA Birth and Adoption Unemployment Compensation	ETA completed rulemaking in October, 2003 to repeal the Birth and Adoption Unemployment Compensation rule.
76	ESA FMLA Regulations	ESA is reviewing its FMLA regulations, which includes an evaluation of its experience administering the rules and input from stakeholders, court decisions, and the public nominations.
77	ESA FMLA Medical Certification	ESA is reviewing its FMLA regulations, which includes an evaluation of its experience administering the rules and input from stakeholders, court decisions, and the public nominations.
78	ESA Computer Professional Exemption	ESA issued a final rule in April, 2004.
79	ESA White Collar Exemption	ESA issued a final rule in April, 2004.
80	ESA FLSA Administrative Exemption	ESA issued a final rule in April, 2004.
81	ETA Permanent Labor Certification	ETA expects to issue a final rule later this year.
82	ESA Service Contract Act Reform of Wage Determination Process	ESA plans to streamline the process for obtaining wage determinations and to update the occupational index. The NPRM regarding the Wage Determinations OnLine is expected later this year, and the occupational index update is expected in December, 2005.
83	ESA Davis Bacon Act/Service Contract Act Inclusion of Pension and Benefit Plans	Current regulations already permit the inclusion of self-insured benefit programs. ESA is not contemplating any action to change the DBA/SCA thresholds; legislation would be required.

OMB Reference No.	Nomination	Status
84	ESA SCA Wage Increases and Benefit Improvements	ESA plans to streamline the process for obtaining wage determinations and to update the occupational index. The NPRM regarding the Wage Determinations OnLine is expected later this year, and the occupational index update is expected in December, 2005.
85	ESA FLSA Medical Leave	ESA is not contemplating any action; legislation would be required.
86	ESA FMLA Across the Board Penalties	ESA is reviewing its FMLA regulations, which includes an evaluation of its experience administering the rules and input from stakeholders, court decisions, and the public nominations.
87	ETA H-1B LCA	ETA is not contemplating any action because most provisions sunset for applications filed after October 1, 2003.
88	MSHA Explosives Standard	MSHA has determined not to take action on this issue because the current regulations have proven to be effective and there is no compelling safety and health reason for making revisions.
89	ESA OFCCP Affirmative Action and EO Survey	Affirmative Action: OFCCP completed a directive addressing this issue in March, 2002. EO Survey: OFCCP has engaged an outside contractor to study the effectiveness of the survey in identifying noncompliant firms and expects to receive the study in 2005.
90	OSHA Explosives and Process Safety Management	OSHA plans to revise, clarify, and update the existing explosives standard to reflect new technology and the current state-of-the-art while removing regulations that conflict jurisdictionally with those of ATF and DOT. Although the nomination title refers to "process safety management," the commenter did not address this particular issue.
91	OSHA Hexavalent Chromium	OSHA is conducting a rulemaking to address the hazards posed by exposure to hexavalent chromium, and issued an NPRM in October, 2004.
92	OSHA Hazard Communication	OSHA is not contemplating any action because it already explicitly recognizes electronic availability of MSDSs as satisfying the requirement for employee access. OSHA's Web Site consolidates all available hazard communication information. Guidance documents on different aspects of the rule are in various stages of completion — public comments have been received on two of them. OSHA also entered into alliances that address hazard communication issues.
93	OSHA Lead in Construction	OSHA will conduct a 610 review under the Regulatory Flexibility Act beginning in December, 2004.
94	OSHA Payment for Personal Protective Equipment	OSHA is conducting a rulemaking and recently re-opened the record to collect information on "tools of the trade." OSHA is evaluating these comments.
95	OSHA Crystalline Silica	OSHA completed a SBREFA review in 2004. The draft risk assessment is being prepared, and OSHA expects to peer review the risk assessment early next year.

OMB Reference No.	Nomination	Status
96	OSHA Sling Standard	OSHA is updating all standards relating to voluntary consensus standards. The sling standard will be reviewed and updated as part of that project. The first phase of the project is currently at OMB for review. The sling standard will be addressed in a later phase. OSHA is preparing a guidance document regarding the use of slings in the workplace, which is expected in June, 2005.
97	OSHA Tuberculosis Standard	OSHA withdrew its proposed rulemaking in December, 2003.
98	OSHA Walking/Working Surfaces	OSHA has been collecting information regarding the current state of the art with regard to fall protection and other issues, as well as updating its cost analysis. OSHA plans to re-open the record in December, 2004 to collect comments on the updated cost figures and information in other areas.
99	OSHA Process Safety Management of Highly Hazardous Chemicals	OSHA has arranged to make available through its Web Site a new manual to provide assistance to employers, and has an active alliance with key parties regarding reactive chemicals.
100	OSHA Bloodborne Pathogens Standard	OSHA solicited public comment on this collection burden. The ICR regarding the PRA clearance is pending at OMB.
101	OSHA Metalworking Fluids	OSHA is not contemplating any regulatory action. OSHA has addressed the hazards of metalworking fluids by developing a best-practices guide and making it available on its Web Site in 2001.
102	OSHA Recordkeeping for Work-Related Injuries, Illnesses and Fatalities	OSHA issued final rules in July, 2002, and June, 2003.
103	OSHA Ergonomics Standard	OSHA is addressing this issue through the issuance of guidelines, enforcement, compliance assistance, and input from the National Advisory Committee on Ergonomics.
104	EBSA Claims Procedures	EBSA completed rulemaking in November, 2000, and is not contemplating any further action.

Mr. OSE. Thank you. I am also appreciative of the chart you attached to the end of your testimony.

Our fourth witness on the first panel is Mr. Thomas Sullivan, who is the Chief Counsel for Advocacy at the U.S. Small Business Administration, and in many respects the father of this hearing.

Sir, you are recognized for 5 minutes. We have received your testimony; it has been entered into the record and we have read it.

Mr. SULLIVAN. Thank you, Chairman Ose. Before I begin, I want to recognize this as your last hearing as chairman. Your commitment to hold government accountable to how it affects the taxpayer has helped small businesses throughout the country. Thank you.

The Office of Advocacy is an independent office within the SBA; therefore, the comments expressed in the written and oral statement do not necessarily reflect the position of the administration or the SBA.

In general, the Office of Advocacy believes that the public nomination process is beneficial, and that the process can and will be an effective tool for regulatory reform. My office has itself participated in this process by representing the views of small business regarding needed reforms and by communicating these reforms to the Office of Management and Budget in 2002, 2003 as far as procedural reforms, and then in the 2004 call earlier this year.

Of the 68 total regulatory reform nominations prioritized by OMB and the agencies between 2001 and 2003, according to my office, 14 can now be considered complete. This number may seem low, though, compared to my colleagues' written statements, and I should explain why.

Because my office is charged with independently representing the views of small business, I am characterizing regulatory reform nominations as implemented or completed as viewed by a small business interest who may have commented in this process. As such, my office takes a more narrow view of whether the specific nomination was addressed. For that reason, I have not counted as completed or implemented those reform nominations where a decision was made not to move forward or reform nominations that are on track in a proposed rule.

I make the parallel to major league baseball coming to Washington, DC. There are some who are very excited about major league baseball coming to Washington, DC. There are others who remain skeptical, until the first pitch is had, on whether or not it actually happens.

Now, the reforms that have been implemented are significant, ranging from revisions to EPA's Clean Air Act New Source Review Program to the updating and simplification of the Department of Labor's overtime compensation rules. Despite the success of this call for reform endeavor, we have a lot of work to do for the process to work best. For example, Health and Human Services issued an interim final rule a few years ago containing standards for the use of patient restraints in hospitals. The 1-hour restraint rule is especially burdensome for small and rural hospitals because it requires treating physicians to make a face-to-face assessment of a patient within 1 hour of initiating restraint or seclusion. CMS has failed to adequately analyze the impact of its 1 hour restraint rule on small entities or to revise the rule to reduce its burdens, despite

stating its intention to do so in OMB's 2003 final report to Congress.

In other cases, implementing small business reform recommendations have proven to be a time-consuming endeavor. An example is the longstanding effort to reform reporting requirements under EPA's Toxic Release Inventory program. This program requires facilities, including small businesses, to report each year on toxic chemical releases and other waste management activities. Since 2001, OMB has received numerous nominations for TRI reforms designed to reduce reporting burdens that appear to have little corresponding public benefit. These reforms include EPA's accepting simplified reports, setting higher reporting thresholds in some situations, and allowing less frequent reporting where there is no significant year-to-year change at a facility.

Small business stakeholders began pursuing these types of TRI reforms as far back as 1992. With the added impetus of this public reform nomination process, rulemaking action on these reforms is now anticipated to get underway shortly.

How could this reform nomination process be improved? Well, first I think that information should be provided in a transparent process, which really is the hallmark of John Graham's tenure at OIRA about the status of ongoing rule reforms. The annual report and the charts that show agencies leadership on these reforms is certainly a step in the right direction. There could be more transparency to where they are in the pipeline.

Stakeholder involvement is necessary at every stage in the rule reform process. Agencies certainly should take consideration of the reform nomination seriously and Congress should stay involved in the process.

In conclusion, from the perspective of small business, the public rule reform nomination process is working and it is worthwhile. Although the process can be improved, it has the potential to be a major tool for improved regulatory analysis in the accountability of Federal agencies to the public.

Thank you for allowing me to present these views.

[The prepared statement of Mr. Sullivan follows:]

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Testimony of
Thomas M. Sullivan
Chief Counsel for Advocacy
U.S. Small Business Administration

U.S. House of Representatives
Committee on Government Reform
Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs

Date:	November 17, 2004
Time:	10:00 A.M.
Location:	Room 2154 Rayburn House Office Building Washington, D.C.
Topic:	"What is the Bush Administration's Record in Regulatory Reform?"

Created by Congress in 1976, the Office of Advocacy of the U.S. Small Business Administration (SBA) is an independent voice for small business within the federal government. The Chief Counsel for Advocacy, who is appointed by the President and confirmed by the U.S. Senate, directs the office. The Chief Counsel advances the views, concerns, and interests of small business before Congress, the White House, federal agencies, federal courts, and state policy makers. Issues are identified through economic research, policy analyses, and small business outreach. The Chief Counsel's efforts are supported by offices in Washington, D.C., and by Regional Advocates. For more information about the Office of Advocacy, visit ***http://www.sba.gov/advo****, or call (202) 205-6533.*

Chairman Ose and Members of the Subcommittee, good morning and thank you for giving me the opportunity to appear before you today. My name is Thomas M. Sullivan and I am the Chief Counsel for Advocacy at the U.S. Small Business Administration (SBA). Congress established the Office of Advocacy to represent the views of small entities before Federal agencies and Congress. The Office of Advocacy is an independent office within the SBA, and therefore the comments expressed in this statement do not necessarily reflect the position of the Administration or the SBA.

The Subcommittee requested Advocacy's view of the process for identifying reform candidates, and, from the perspective of small business, the progress that has been made over the past four years in implementing those reforms.

In general, Advocacy believes that the public nomination process is beneficial, and that the process can and will be an effective tool for regulatory reform. Advocacy has itself participated in this process by representing the views of small business regarding needed reforms, and by communicating these reforms to the Office of Management and Budget (OMB) in 2002, 2003 and earlier this year. To date, Advocacy estimates that Federal agencies have implemented nearly one fifth of the rule reform nominations identified by OMB and agencies in 2001-2003. Additional important reforms are anticipated to be completed over the next year. Because most of these reforms require agencies to go through rulemaking, we are encouraged by the overall progress that has been achieved so far.

Unfortunately, however, agencies have yet to implement many of the reforms nominated by the Office of Advocacy. In some cases, agencies have apparently been reluctant to seriously consider these reforms. In other cases, the process has progressed

slowly and has required sustained efforts by stakeholders to keep agencies focused on reforms. During the past three years, we have learned that stakeholders need to take ownership of the process and understand that their involvement does not end at the time the nomination is made. Federal agencies and OMB should also look at ways to communicate periodically the status of reform nominations to stakeholders. Moreover, Congressional oversight can play an important role in reinforcing the importance of the public nomination process, and in ensuring that agencies give serious consideration to implementing nominated reforms.

Background

The "Regulatory Right-to-Know Act"[1] requires the Office of Management and Budget (OMB) to prepare an annual Report to Congress on the costs and benefits of federal regulations. Since 1997, these Reports to Congress have also included a call for public nominations of regulations that could be updated or otherwise reformed. In its May 2001 draft Report to Congress, for example, OMB called for nominations from the public on "specific regulations that could be rescinded or changed that would increase net benefits to the public by either reducing costs and/or increasing benefits."[2] In response, OMB received a total of 71 nominations for regulatory reform. Of these 71 nominations, OMB made the determination that 23 should be pursued as "high priority" nominations.[3] *See* Appendix A.

[1] 31 U.S.C. § 1105 note, Pub. L. 106-554, '1(a) [Title VI, '624], Dec. 21, 2000, 114 Stat. 2763, 2763A-161.
[2] Draft, *Making Sense of Regulation: Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on States, Local, and Tribal Entities* (May 2001).
[3] The other 48 nominations were deemed to be of lower priority or were believed to be ongoing projects by agencies.

Subsequently, in its March 2002 draft Report to Congress, OMB called for public nominations of rules whose reform would increase overall net benefits to the public, as well as regulations and paperwork requirements that impose disproportionate burdens on small entities without an adequate benefit justification.[4] OMB received 316 nominations from the public, including sixteen nominations from the Office of Advocacy.[5] *See* Appendix B. OMB categorized the 316 nominations received into three groups: (1) rules already subject to recent or current review by Cabinet agencies (and EPA); (2) rules involving independent agencies; and (3) rules that warranted further consideration by Cabinet agencies (and EPA) as reform candidates. The third category consisted of 126 rules and 35 guidance documents, which OMB in turn referred to the agencies in question for evaluation and prioritization. OMB also asked the Office of Advocacy to provide assistance by identifying "rules that offer potential to reduce unjustified regulatory burdens on small business."[6] Advocacy responded with a list of 30 priority reforms taken from the larger list sent to the agencies.[7] *See* Appendix C. Based on responses from the Federal agencies and the suggestions from the Office of Advocacy, 45 rules and guidance documents were ultimately identified as "new candidates" for reform.[8] *See* Appendix D.

In the February 2003 Report to Congress, OMB requested public comment on, among other things, ways to ensure that agencies adequately analyze the impacts of their

[4] *See* 67 Fed. Reg. 15014, 15015 (March 28, 2002).
[5] Letter to John Morrall, Office of Information and Regulatory Affairs, Office of Management and Budget, from Thomas M. Sullivan, Chief Counsel for Advocacy (May 28, 2002); available at www.sba.gov/advo/laws/comments/omb02_0528.pdf.
[6] Office of Management and Budget, Memorandum for the President's Management Council (December 20, 2002); available at www.whitehouse.gov/omb/inforeg/print/pmc_agency_response_regreform.html.
[7] Letter to John Graham, Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, from Thomas M. Sullivan, Chief Counsel for Advocacy (February 6, 2003); available at www.sba.gov/advo/laws/comments.
[8] *See* Table 9, "New Reforms Planned or Underway – Regulations" and Table 10, "New Reforms Planned or Underway – Guidance Documents" in *Informing Regulatory Decisions: 2003 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities* (September 2003) at 26-34; available at www.whitehouse.gov/omb/inforeg/2003_cost_ben_final_rept.pdf.

regulations.[9] Advocacy recommended that the annual regulatory analysis submitted by agencies to OMB should include a specific analysis of small business impacts.[10]

Is the Public Rule Reform Nomination Process Working?

Given that more than three years have passed since the 2001 reform nominations were submitted to OMB, it is appropriate to ask whether the process is yielding regulatory reforms. From the perspective of the Office of Advocacy, the public nomination process is working. Of the 68 total regulatory reform nominations prioritized by OMB and the agencies between 2001 and 2003, fourteen can now be considered complete. *See* Appendix E. These reforms are significant, ranging from revisions to the Environmental Protection Agency's Clean Air Act New Source Review program to the overhaul of the Department of Labor's Overtime Compensation rules.

We anticipate that several additional reforms will be implemented within the next year. These reforms are expected to include revised rules on highway work safety zones, vehicle roof crush standards, labeling of food allergens, and design standards for buildings where government records are stored.

The majority of the 68 priority rule reforms require the respective agencies to conduct a rulemaking to change existing regulatory requirements. Even where an agency is fully committed to implementing a reform, depending on the complexity of the issue, it typically takes 12-36 months to complete a rulemaking. Keeping this fact in mind,

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[9] *See* 68 Fed. Reg. 5492 (February 3, 2002).
[10] *See* Testimony of Thomas M. Sullivan, Chief Counsel for Advocacy, before the House Committee of Government Reform, Subcommittee of Energy Policy, Natural Resources and Regulatory Affairs, "How to Improve Regulatory Accounting: Costs, Benefits, and Impacts of Federal Regulations – Part II" (February 25, 2004); available at www.sba.gov/advo/laws/testimon.html.

Advocacy is encouraged by the overall progress that the public nominations have achieved so far.

Unfortunately, however, only two of Advocacy's 30 high-priority nominations from OMB's 2002 call for regulatory reform nominations have been implemented by the agencies at this point in time.[11] In some cases, agencies appear to be disinterested in implementing these reforms. For example, the predecessor agency to Health and Human Services' Centers for Medicare and Medicaid Services (CMS) issued an interim final rule containing standards for the use of patient restraints in hospitals. The one-hour restraint rule is especially burdensome for small and rural hospitals because it requires treating physicians to make a face-to-face assessment of the patient within one hour of initiating restraint or seclusion. CMS has failed to adequately analyze the impact of its one-hour restraint rule on small entities or to revise the rule to reduce its burdens, despite stating its intention to do so in OMB's 2003 Final Report to Congress.[12]

In other cases, implementing small business reform recommendations have proven to be a time-consuming endeavor. An example is the longstanding effort to reform reporting requirements under the Environmental Protection Agency's (EPA) Toxics Release Inventory (TRI) program. This program requires facilities, including small businesses, to report each year on toxic chemical releases and other waste management activities. Since 2001, OMB has received numerous nominations for TRI reforms designed to reduce reporting burdens that are appear to have little corresponding

[11] Department of Labor, Fair Labor Standards Act Administrative Exemption and Computer Professional Exemption. In addition, the Department of Transportation has finalized a rule on hazardous materials training, but the final rule does not address the concerns of the Office of Advocacy and other reform nominators.

[12] *See* Office of Management and Budget, *Informing Regulatory Decisions: 2003 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities* (September 2003) at 26; available at www.whitehouse.gov/omb/inforeg/2003_cost_ben_final_rpt.pdf.

public benefit. These reforms include EPA accepting simplified reports, setting higher reporting thresholds in some situations, and allowing less frequent reporting where there is no significant year to year change at a facility. Small business stakeholders began pursuing these types of TRI reforms as far back as 1992. With the added impetus of the public reform nomination process, rulemaking action on these reforms is now anticipated to get underway in 2005.

For Small Businesses, Is the Public Nomination Process Worthwhile?

Advocacy believes that the public nomination process is important. This process currently affords small businesses and their representatives a way to initiate meaningful regulatory reform efforts. Small business stakeholders tell Advocacy that they view the public nomination process as a meaningful way to be heard by OMB and the agencies and to pursue reforms in an open and transparent system.

In a larger sense, Advocacy views the public's ability to nominate rules for reform as a major element in OMB's ongoing effort to improve regulatory analysis and the accountability of regulatory agencies. OMB responded to Advocacy's 2003 call for regulatory analyses to include a specific accounting for small business impacts by finalizing OMB Circular A-4.[13] This Circular, which became effective in 2004, requires agencies for the first time to publicly identify the effects of their regulations and programs on small business. Coupled with OMB's public nomination process, small business has a greater ability to identify small business impacts from regulations and to seek reform of those regulations where appropriate. Over time, we believe that Circular

[13] Office of Management and Budget, Circular A-4, *Regulatory Analysis.* (September 17, 2003) at 46; available on the OMB webpage at http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf.

A-4 will encourage agencies to more closely consider small business concerns at every stage of regulatory action.

How Could the Public Reform Nomination Process Be Improved?

The public rule reform nomination process shows great potential, but it can be improved in several ways:

Provide better information about the status of ongoing rule reforms.

Small business stakeholders have told us that they become frustrated when follow-up information about the progress (or lack of progress) on a reform is not provided to the public. Possible mechanisms for providing this information include establishing a Rule Reform Clearinghouse on OMB's website, or ensuring that agencies update the status of specific rule reforms in their Semiannual Regulatory Agenda published twice a year in the *Federal Register*.

Stakeholder involvement is necessary at every stage in the rule reform process.

In order to be successful, stakeholders must be prepared to work with an agency for several years to obtain a rule reform. Their involvement clearly does not end when the reform nomination is made.

Agencies should take consideration of the reform nominations seriously.

Federal agencies should work with OMB and stakeholders in good faith to identify appropriate candidates for reform and implement the reforms. This will improve overall confidence in the reform process and the fairness of individual agencies. Agencies should work to provide OMB and the public with accurate information about the status of rule reforms.

Congress should stay involved in the process.

Congressional oversight can play an important role in reinforcing the overall importance of the public nomination process, and in ensuring that agencies give fair and full consideration to implementing nominated reforms.

Conclusion

From the perspective of small business, the public rule reform nomination process is working and it is worthwhile. Federal agencies have implemented about one-fifth of the rule reforms identified by OMB and Agency leadership in 2001-2003, and additional reforms are likely to be completed in the coming year. Although the process can be improved, it has the potential to be a major tool for improved regulatory analysis and the accountability of Federal agencies to the public.

Thank you for allowing me to present these views. I would be happy to answer any questions.

Appendix A

OMB's 2001 "High Priority" Rule Reform Nominations[14]

Agency	Regulation
Department of Agriculture/Forest Service	Forest Service Planning Rules
Department of Agriculture/Forest Service	Roadless Area Conservation Regulations
Department of Education	Regulations Related to Financial Aid
Department of Energy	Central Air Conditioner and Heat Pump Energy Conservation Standards
Department of Health and Human Services	Standards for Privacy of Individually Identifiable Health Information
Department of Health and Human Services/Food and Drug Administration	Food Labeling: Trans Fatty Acids in Nutrition Labeling, Nutrient Content and Health Claims
Department of Interior/National Park Service	Amendments to National Park Service's Snowmobile Regulations
Department of Interior/Bureau of Land Management	Regulations Governing Hardrock Mining Operations
Department of Labor/Office of Federal Contract Compliance Programs	Office of Federal Contract Compliance Programs' "60-2" Regulation – The Equal Opportunity Survey
Department of Labor/Employment and Training Administration	Procedures for Certification of Employment Based Immigration and Guest Worker Applications
Department of Labor/Employment and Standards Administration	Proposal Governing "Helpers" on Davis-Bacon Act Projects
Department of Labor/Wage and Hour Division	Overtime Compensation Regulation
Department of Labor/Wage and Hour Division	Record Keeping and Notification Requirements
Department of Transportation/Federal Motor Carrier Safety Administration	Hours of Service of Drivers; Driver Rest and Sleep for Safe Operation
Equal Employment Opportunity Commission	Uniform Guidelines for Employee Selection Procedures
Environmental Protection Agency	Mixture and Derived From Rule
Environmental Protection Agency	Proposed Changes to the Total Maximum Daily Load Program
Environmental Protection Agency	Drinking Water Regulations: Cost-Benefit Analysis
Environmental Protection Agency	Economic Incentive Program Guidance
Environmental Protection Agency	New Source Review
Environmental Protection Agency	Concentrated Animal Feeding Operations (CAFOs) Effluent Guidelines
Environmental Protection Agency	Arsenic in Drinking Water
Environmental Protection Agency	Notice of Substantial Risk – TSCA

[14] *Making Sense of Regulation: Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on States, Local, and Tribal Entities* (December 2001), Table 7, "High Priority Regulatory Review Issues" at 63-64.

Appendix B

Advocacy's 2002 Reform Nominations[15]

US Postal Service	Commercial Mail Receiving Facilities
Labor/OSHA	Sling Standard
Labor/OSHA	Recordkeeping for Work-related Injuries

Environmental Protection Agency	Toxic Release Inventory (TRI) – Lead and Lead Compounds; Lowering Reporting Thresholds
Environmental Protection Agency	TRI; Addition of Chemical and Petroleum Wholesalers to TRI Reporting
Environmental Protection Agency	TRI; Form A
Environmental Protection Agency	Regulation of Hazardous Wastes
Health and Human Services/OCR	Limited English Proficiency (LEP) Guidance
Department of Justice/Drug Enforcement Agency	Hemp Food Products
Heath and Human Services/CMS	1-Hour Restraint Rule
Department of Interior/National Park Service	Snowmobile Phaseout in Yellowstone, Rockefeller, Grand Teton National Parks
Health and Human Services/CMS	Medicare Program; Revisions to Payment Policies and 5-year review
Health and Human Services/CMS	Certificates of Medical Necessity
Internal Revenue Service	Monthly versus Semi-monthly Federal Employment Tax Deposits
Internal Revenue Service	Partnership Investments in Small Business Stock

[15] Letter from the Office of Advocacy to OMB (May 28, 2002). This letter is available on Advocacy's webpage, http://www.sba.gov/advo/laws/comments/#2002.

Appendix C

Small Business Priority Reforms Identified in Response to OMB's Request for Office of Advocacy Review[16]

Health and Human Services/CMS	1-Hour Restraint Rule
Health and Human Services/CMS	Medicare Program; Revisions to Payment Programs and 5-year Review
Health and Human Services/CMS	Certificates of Medical Necessity
Department of Justice/Drug Enforcement Agency	Hemp Food Products
Department of Labor	Computer Professional Exemption under Fair Labor Standards Act
Department of Labor	Fair Labor Standards Act Administrative Exception
Department of Labor/OSHA	Lead in Construction
Department of Labor/OSHA	Sling Standard
State Department	Flight Simulators
Department of Transportation	Disadvantaged Business Enterprises
Department of Transportation/RSPA	Emergency Preparedness
Department of Transportation/RSPA	Hazardous Materials Training Requirements
Internal Revenue Service	Flexible Spending Accounts
Internal Revenue Service	Monthly versus Semi-monthly Federal Employment Tax Deposit
Internal Revenue Service	Partnership Investments in Qualified Small Business Stock
Environmental Protection Agency	Toxic Release Inventory Alternative Reporting Threshold (Form A)
Environmental Protection Agency	Export Notification Requirements
Environmental Protection Agency	Storage for Reuse Regulations (PCBs)
Environmental Protection Agency	TRI: Lowering Reporting Thresholds for PBT Chemicals
National Archives and Records Administration	Disposition of Federal Records
US Post Office	Commercial Mail Receiving Agencies
Health and Human Services/OCR	Limited English Proficiency (LEP) Guidance
Department of Justice	Guidance on Federal Prison Industries
Department of Labor	Coordination of Family Medical Leave Act with other Leave Policies
Environmental Protection Agency	Toxic Release Inventory Reporting Forms and Instructions
Environmental Protection Agency	TRI Reporting Questions and Answers and other Guidance
Small Business Administration	Guidance on Credit Unions
Federal Communication Commission	Telephone Number Portability
Federal Communication Commission	Broadband Access to Internet over Cable
Federal Communication Commission	Remedying Interference to Public Safety Communications in the 800 MHz Band

[16] Letter to John Morrall, Office of Information and Regulatory Affairs, Office of Management and Budget, from Thomas Sullivan (May 28, 2002); available at www.sba.gov/advo/laws/comments/omb02_0528.pdf.

Appendix D

Final 2002 "New Candidates" for Regulatory Reform[17]

Department of Agriculture	Salmonella Performance Standards
Department of Agriculture	Phytosanitary Certificates for Seeds
Department of Agriculture	Swine Production Contract Library
Department of Health and Human Services/CMS	75% Rule
Department of Health and Human Services/CMS	**One-Hour Restraint Rule**
Department of Health and Human Services/FDA	Standard of Chemical Quality – Uranium
Department of Health and Human Services/FDA	Labeling of Carmine
Department of Health and Human Services/FDA	Labeling of Food Allergens
Department of Labor	Medical Certification
Department of Labor	**FLSA Administrative Exception**
Department of Labor/OSHA	Explosives and Process Safety Management
Department of Labor/OSHA	**Sling Standard**
Department of Labor/OSHA	Bloodborne Pathogens Standard
Department of Transportation/ Federal Aviation Administration	Flammability Standards for Thermal/ Acoustic Material
Department of Transportation/FHA	Contract Requirements for Minor Transport. Projects
Department of Transportation/Federal Highway Admin.	Historic Preservation Requirements
Department of Transportation/Federal Highway Admin.	Traffic Operations
Department of Transportation/Federal Highway Admin.	Highway Work Zone Safety
Department of Transportation/NHTSA	Roof Crush
Department of Transportation/NHTSA	Door Locks
Department of Transportation/NHTSA	Bumper Strength
Department of Transportation/NHTSA	Side-Impact Protection
Department of Transportation/Coast Guard	Marine Safety Manual
Department of Transportation/RSPA	**Hazardous Materials Training**
Treasury/IRS	**Flexible Spending Accounts**
Treasury/IRS	Mortgage Revenue Bond Purchase Price Limits
Environmental Protection Agency	Regulatory Reform for Handling Refrigerants
Environmental Protection Agency	Chemical Plant Safety Standards
Environmental Protection Agency	Protection for Farm Children from Pesticides
Environmental Protection Agency	Definition of Volatile Organic Compound
Environmental Protection Agency	**TRI Alternate Reporting Threshold (Form A)**
Environmental Protection Agency	**Export Notification Requirements**
Environmental Protection Agency	**Storage for Reuse**
Environmental Protection Agency	TRI Form R Reporting
Department of Labor/OSHA	Multi-Employer Citation Policy
Environmental Protection Agency	EPA index of Applicability Decisions
Environmental Protection Agency	"Once In, Always In" Policy
Environmental Protection Agency	**TRI Reporting Forms/Instructions**
Environmental Protection Agency	**TRI Reporting Q & As**
Environmental Protection Agency	Waterborne Diseases
Environmental Protection Agency	Integrated Risk Information System
Environmental Protection Agency	Economic Benefit of Noncompliance in Civil Penalty Cases
Environmental Protection Agency	Site-Specific Risk Assessments in Resource Conservation and Recovery Act cases
Environmental Protection Agency	Sub-metering Water Systems

[17] *See* Table 9, "New Reforms Planned or Underway – Regulations" and Table 10, "New Reforms Planned or Underway – Guidance Documents" in *Informing Regulatory Decisions: 2003 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities* (September 2003) at 26-34: available at www.whitehouse.gov/omb/inforeg/2003_cost_ben_final_rpt.pdf. The items in **bold** are Advocacy's high-priority nominations.

Appendix E

Regulatory Actions Completed by the Agencies

Agency	Regulation	Year of Nomination
Department of Labor/Wage and Hour Division	Overtime Compensation Regulation	2001
Department of Interior/National Park Service	Amendments to National Park Service's Snowmobile Regulations	2001
Environmental Protection Agency	New Source Review	2001
Environmental Protection Agency	Proposed Changes to the Total Maximum Daily Load Program	2001
Department of Transportation/FMCSA	Hours of Service of Drivers/Driver Rest and Sleep for Safe Operation	2001
Department of Health and Human Services/FDA	Food Labeling: Trans Fatty Acids in Nutrition Labeling, Nutrient Content and Health Claims	2001
Department of Health and Human Services/CMS	75% Rule	2002
Department of Transportation/Coast Guard	Marine Safety Manual	2002
Treasury/IRS	Mortgage Revenue Bond Purchase Price Limits	2002
Environmental Protection Agency	Sub-metering Water Systems	2002
Environmental Protection Agency	Index of Applicability Decisions	2002
Department of Agriculture	Salmonella Performance Standard	2002
Department of Agriculture	Swine Production Contract Library	2002
Department of Health and Human Services/FDA	Standard of Chemical Quality – Uranium	2002

Mr. OSE. I thank the gentleman.

All right, our normal procedure here is that we go through a series of 5 minute rounds of questions. So, for instance, it would be me first, then Mr. Tierney, then Mr. Schrock, then Mr. Kucinich, then Mr. Van Hollen.

Again, I want to remind everybody of our time constraint and the fact that we have a second panel yet. Also, to the extent that questions don't get asked, we do have the ability to submit them in writing to you, and we would certainly appreciate timely responses to those.

I am going to recognize myself here.

Dr. Graham, about 2 months ago we notified your office that we were going to do this hearing. And, I want to note that Mr. Johnson, Mr. Radzely, Mr. Sullivan have attached charts to their testimony regarding the specific questions for status reports on certain things within their respective agencies, but I also note that the written statement you gave us did not have such a chart, and I am trying to followup on that. I understand that your forthcoming report will include some of the information that we would hope to have reflected in that chart. I am familiar with the 2003 report to Congress that included information up to that time. I am looking for an update since that time. When do you expect to be able to give us that information?

Mr. GRAHAM. A perfectly reasonable question. Let me just clarify that we were aware several months ago that this hearing was scheduled, but the request for the chart details by agency, all those years of nominations, status of all of them, we received that on November 1st.

Mr. OSE. OK.

Mr. GRAHAM. So what is happening is we have been working on the final report to Congress, which has a lot of that information in it. But, as I look at the November 1st letter, I think even when the report comes in, there are going to be few areas where we are going to need to supplement that with additional material, and we will. But, the real reason is just the recalcitrant spirit of the OMB staff.

Mr. OSE. I can't believe that.

Mr. GRAHAM. I didn't think you would.

Mr. OSE. I am interested in even if it is an interim report or a draft report or something. I think the word some of the witnesses have used today, I am trying to make the process as transparent as possible so that if there are things that others might look at that list and say, hey, what about this, what about that, this would give them a chance to do so, even if it is unofficial in nature. So, I come back to my question. Recognizing your sworn testimony about the recalcitrance of the OMB staff, when do you think we will be able to get this information of an interim nature?

Mr. GRAHAM. Well, you will have the final report to Congress certainly by the end of the year, and then once you have had a chance to examine that and see whether or not it meets the need, then it seems to me we should have some dialog on what additional information is required.

Mr. OSE. What is the current status or in what form is the information today? For instance, if I walked over to your office with you

after this hearing is over at 12:45 p.m., what would you be able to show me?

Mr. GRAHAM. Well, we have a variety of charts, more than one, certainly, reflecting all of the agencies of the Federal Government, and they are organized by different topic areas. But, they don't include some of the specific information that is in your November 1st letter, and for us to obtain that information will require a data call to a variety of agencies beyond SBA, Labor, and EPA. You are receiving, obviously, that information from these agencies today. So just to give you a concrete example, the independent agencies that we referred nominations to, we have not had a data call to them on what has happened at the independent agencies. Even within the cabinet level agencies, we don't have an updated data call to them. So we have some work to do to fill out all the specifics, but we have a substantial amount of information in that report that does directly address the aspects of the question that you have in your November 1st letter.

Mr. OSE. I am willing, in what time I have remaining, to help in any way I can to get this information or to provide influence, whatever may be evaporating as quickly as we sit here. But to the extent that I can, I would need to see what you already have. Would you be willing to provide that to me?

Mr. GRAHAM. I can check on that. Of course, it is all part of the report itself, and it is not going to be that long until the report is ready. So, I would ask you to consider the possibility of just waiting a few weeks to get the actual full report, and then we can discuss that. But I am open to persuasion. If it is very important, you have to have this information within a couple weeks, we will do our best to get you information in a couple weeks.

Mr. OSE. Well, I was somewhat amused; I felt like I was listening to my obituary up here earlier. But, I am afraid that after December my obituary becomes real, so to the extent that I could get it, again, I want to reiterate that I would be willing to help.

Mr. GRAHAM. Well, I think that the hearing itself has been extremely constructive to get these questions out, and we appreciate your asking not only OMB, but the agencies for this information. That is very constructive and helpful.

Mr. OSE. Would you forward to me the stuff that you have?

Mr. GRAHAM. Well, that is a pretty general question. So if you could sharpen that up a little bit, I am happy to do the best I can.

Mr. OSE. All right, we will go through a series of questions, since my time has expired. But I will refine the question sufficiently and we will come back on a second round.

Mr. GRAHAM. That is fine.

Mr. OSE. Mr. Tierney.

Mr. TIERNEY. Mr. Johnson, just in following up on my opening statement, where is EPA in terms of performing the additional analysis on the mercury rule that Administrator Leavitt promised and has yet to do?

Mr. JOHNSON. Let me start by saying, Mr. Tierney, that we certainly agree with you that mercury is a toxic material that needs to be dealt with and dealt with in as expeditious and effective manner as possible. Also, as a reminder to all of us, mercury today is

not regulated in coal-fired power plants, so we will be regulating mercury for the first time in the history of the United States.

We have now received over 500,000 comments on our proposed regulation to regulate mercury in coal fired power plants for the first time. The more than 500,000 comments we received include many, many analyses and a range of assumptions. As you are well aware, as with any models, whether they model mercury deposition or something else, it is whatever the assumptions that go into those models are what really count.

Where we are today is that we have gone through the more than 500,000 comments and we will be, in the next few weeks, issuing a Notice of Data Availability, a NODA, as it is referred to, which will highlight those analyses and those issues which we feel are going to be critical to informing us to our ultimate decision on regulating mercury from power plants.

Having said that, I want to also assure you that we intend to meet our court deadline of March 15th. So we will be issuing this NODA in the next few weeks, there will be a public comment period, and based upon those comments and whatever analyses that we need to do to make an informed science-based decision, that is what we will do.

Mr. TIERNEY. You say you are going to meet your court deadline. That whole court deadline would seem to be a case that was under the assumption that it was going under a whole different section of the rulemaking process than the EPA has gone under. You're still working just on the cap and the trade approach?

Mr. JOHNSON. We proposed, as you are probably well aware, three options. One option deals with a strict MACT control, MACT stands for Maximum Achievable Control Technology, and then two cap and trading programs, one under Section 111 of the Clean Air Act and the other under Section 112 of the Clean Air Act. There are advantages and disadvantages. We certainly see the advantages of the cap-and-trade. Given our experience with the acid rain program, we believe we can achieve a greater reduction in mercury from coal-fired power plants using a cap-and-trade rather than a MACT approach, again, based upon the information that we had at the time that we proposed this rule. But, we have proposed these options, and these options are all options that we are considering as part of the final rulemaking.

Mr. TIERNEY. I won't burden everybody by going into it at this point in time, but obviously I have some serious concerns about the delay, which I don't think benefits anybody that needs protection under this rule; also, about the insistence on ignoring the advice of people in working groups that have been set up to provide that type of assistance on that. So, maybe some of the other witnesses will get a little bit further into just what has been going on here, but I hope at some point the Administrator and EPA realizes that people are serious about this and the continued obfuscation isn't really helpful on that.

I will stop at this point, because I want to talk to you at a little more length, Dr. Graham. I will just yield back.

Mr. OSE. Gentleman from Virginia.

Mr. SCHROCK. Thank you, Mr. Chairman.

Dr. Graham and Mr. Sullivan, how many of the 2001 OMB deemed high priority and 2002 Agency-accepted nominations were intended to benefit small businesses? And, can you quantify any results to date in paperwork burden reduction hours or regulatory burden financial relief?

Mr. GRAHAM. I don't have those numbers off the top of my head, and I would defer to Tom on the question of their small business impact.

Mr. SULLIVAN. I am happy to fill in some of the data. Although I wasn't at Advocacy for the 2001 nominations and my office actually didn't specifically nominate rules under that call, my office was very involved in a number of these rules, and actually some of them ended up not only achieving their original purpose, but also saving small business money. For instance, in the Department of Energy air conditioning conservation standards, while it was at a 10 percent efficiency standard, it was proposed to be raised to 30 percent efficiency. Small businesses worked with Department of Energy, EPA, Dr. Graham's office through that call and ultimately were able to convince the regulators to go to a 20 percent efficiency, and we measured a cost savings because of that of $130 million for small business.

Another example is the Department of the Interior National Park Service's snowmobile regulations. Again, because of small businesses' interaction with the Federal Government to convince them of less burdensome alternatives, a 1-year postponement saved small entities $15 million.

Now, both of those examples unfortunately have ended up in the courts and the cost savings may just be on paper, not realized in the wallets. But, it is an example of how agencies were receptive to small business input.

Last, but certainly not least, Department of Transportation proposed changes to the hours of service requirements, and two changes, one is exempting some motorcoach businesses and another removing the requirement for electronic onboard recorders, saved small businesses $180 million in first-year compliance costs, and that certainly is a success, although the original proposed changes of hours of rest and sleep requirements, which continues to be a nomination for reform from small entities, is not something that the Department of Transportation has decided to act on.

Mr. SCHROCK. I am hoping there were more than just those.

Mr. SULLIVAN. Those are three. Within the overtime regulations, there were two high priority small business nominations identified not only by my office, but by a number of folks who may be represented on the next panel. Both the white collar exemption clarification and the administrative staff exemption built into the final overtime regulations produced cost savings for small business but we are not able to piece out the specific provisions as how they benefit small business from a dollars perspective.

Mr. SCHROCK. Tom, in your testimony you had some useful charts here about your office's nominations, including your top 30 priority reforms. How many of these total nominations did Advocacy submit to OMB in 2001, 2002, and 2004? I know you weren't there in 2001. How many were accepted? And, besides Labor's overtime rule and EPA's new source review rule, which specific regula-

tions or guidance documents were performed to date? And one more. I will followup, if you want me to. How many of the completed actions were major or economically significant rules?

Mr. SULLIVAN. Congressman Schrock, I will try my best to hit each of these questions. If I don't, I am happy to respond to the committee in writing following the hearing.

In 2001, again, my office did not submit nominations specific to the call. In 2002, my office submitted 16 nominations. Dr. Graham's office then assessed all of the comments, worked with my office under a Memorandum of Understanding to kind of cull in the high priority. We suggested 30 high priority related to small business. Of that, in the kind of final cut, 10 were identified as being the responsibility and having the stewardship of agency leadership to take action. Of those, 2 that related to the overtime rules were in fact acted on to the satisfaction of the small businesses who commented.

And, again, the way I described my characterization of narrowing down the implementation and successful completion to 2 of the broad universe is unique to my office's perspective, it is not the way that others are characterizing a job as a completed action from a decision point on whether or not they took action on specific nominations.

Mr. SCHROCK. Thank you.

Thank you, Mr. Chairman. My time is up.

Mr. OSE. I thank the gentleman.

Mr. Kucinich.

Mr. KUCINICH. Thank you, Mr. Chairman.

I have some questions for Mr. Johnson. The administration's process for developing mercury rules was so disturbing to five EPA employees and several former EPA officials that they felt the need to speak out to the media, among them the Los Angeles Times. The Times reported, in March 2004, that long-time EPA staff revealed they were told by political appointees at the EPA not to undertake the required scientific and economic analysis of EPA's mercury proposal. While the EPA's decision not to listen to its own scientists and advisory panel was disturbing in and of itself, it apparently did listen to certain industry interests, with language copied verbatim from memos prepared by industry lobbyists. EPA officials on the administration's mercury rulemaking, former officials such as Bruce Buckheit, former Director of EPA's Air Enforcement Division, retired last December, said, "There is politicization of the work of the Agency that I have not seen before." Russell Train, who was head of the EPA during both the Nixon and Ford administrations, is quoted as having said, "The Agency has strayed from its mission in the past 3 years."

This hearing gives us an opportunity to look into the culture of rulemaking relating to the administration's role with the industry and industry's role in actually writing regulations that benefit the industry and are adverse to public health. You, of course, are aware that the industry actually wrote the administration's proposed mercury rule in the sense that what was published in the Federal Register contained numerous paragraphs of verbatim language supplied by two separate industry advocates. You are aware of that, are you?

Mr. JOHNSON. I am aware that there was that language included, yes.

Mr. KUCINICH. Yes, OK.

Mr. JOHNSON. After the fact.

Mr. KUCINICH. Now, let me ask you this. The President and EPA administrators and other government officials have touted the rule that relates to a 70 percent reduction in mercury emissions by 2018. That is what was said publicly, but isn't it true that the EPA's own models project that mercury emissions will not fall by 70 percent until 2025, or even later, 20 years from now? Isn't that correct?

Mr. JOHNSON. I won't say that it is not correct. What I mean by that is, again, it is a model and it depends upon what assumptions one uses. What our experience in the cap-and-trade program for acid rain is, in fact, that we achieved better reductions and faster reductions than what was projected by our original model.

Let me go back to the first comment that you made. In many ways, I am unique among the political appointees because I have been a career civil servant at EPA and have been at EPA for 24 years now, and have been involved in a lot of rulemaking. My experience in rulemaking is for those rules that are highly controversial, highly charged rules, such as mercury, it is not surprising that there are differing opinions about the process, the assumptions, or what have you; and you have mentioned a number. I think the important thing, certainly from my perspective as the deputy administrator, is that we, the Government, we, the EPA, need to regulate mercury.

Mr. KUCINICH. But, let me ask you something, Mr. Johnson, if I may?

Mr. JOHNSON. Yes, sir.

Mr. KUCINICH. How can the public have any confidence in EPA if it has openly acknowledged that the industry is writing the regs?

Mr. JOHNSON. The industry did not write the regs, sir. There are many comments that the Agency receives during its preliminary process in developing regulation. We have information from academic institutions, from environmental organizations, from the general public.

Mr. KUCINICH. But, it is true that you acknowledge that in the rule published in the Federal Register relating to the administration's proposed mercury rule, that you have paragraphs that are verbatim that were supplied by the industry. So, I ask you again how can the public, which is now getting all this information about the adverse effects of mercury poisoning on themselves and their children, how can they have any confidence at all? Tell the people how can they have confidence?

Mr. JOHNSON. Well, again, one is we have a lot of information coming from a variety of sources, and it is not unusual that information is put into a proposal. And, this is a proposed regulation. The good news is this is an open, transparent process. The Agency has laid out what we believe the options are for regulating mercury from coal-fired power plants for the first time. We have made all of our analyses available. As I have just mentioned, we are going to be highlighting additional data to help inform our ultimate decision on mercury. But, the confidence that the American people

should have is, yes, that EPA is on watch and we are going to be regulating mercury from coal-fired power plants for the first time in the history of the United States.

Mr. KUCINICH. Mr. Chairman, I know you have to move on. I just think it would be important to resubmit for the record a letter that was sent to the EPA by our ranking member, Henry Waxman, of the full committee and Tom Allen, which really challenges this notion of transparency, because members of this committee had to demand of the EPA what is going on with respect to the contact between the administration and industry advocates. So I thank the Chair.

[The information referred to follows:]

Congress of the United States
House of Representatives
Washington, D.C. 20515

February 12, 2004

The Honorable Michael O. Leavitt
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Governor Leavitt:

We are writing regarding reports that portions of EPA's proposal to address mercury air pollution have been copied word-for-word from industry lobbying materials.

Specifically, it appears that EPA has proposed a regulatory approach to mercury air pollution that in part is copied word-for-word from memos prepared by the law firm Latham & Watkins, which represent some of the largest polluters in the country. This is particularly troubling because two key EPA officials who worked on the proposal were previously employed by Latham & Watkins.

On January 31, 2004, the *Washington Post* reported that an EPA proposal published on January 30, 2004, "is similar to recommendations from two memos sent to federal officials by" Latham & Watkins.[1] The article explains the remarkable connections between EPA's proposal and the Latham & Watkins' memos:

> A side-by-side comparison of one of the three proposed rules and the memorandums prepared by Latham & Watkins — one of Washington's premier corporate environmental law firms — shows that at least a dozen paragraphs were lifted, sometimes verbatim, from the industry suggestions.[2]

It does not appear to be in dispute that EPA used the Latham & Watkins language to make the substantive proposals that Latham & Watkins advocated. The *Washington Post* quotes one Latham & Watkins representative who states that it is "gratifying" that the law firm's work had been "cut and paste[d]" into EPA's rulemaking. Additionally, Jeffrey Holmstead, EPA's Assistant Administrator for Air and Radiation, confirmed that the language had originated from

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[1] *Proposed Mercury Rules Bear Industry Mark*, Washington Post (Jan. 31, 2004) (online at http://www.washingtonpost.com/wp-dyn/articles/A64630-2004Jan30.html).

[2] *Id.*

outside of the agency. He stated, "That's not typically the way we do things, borrowing language from other people."[3]

However, it is unclear how the Latham & Watkins language entered EPA's rulemaking process. As you know, Mr. Holmstead and his chief counsel, Bill Wehrum, worked for Latham & Watkins before joining the EPA. Both Mr. Holmstead and Mr. Wehrum have had high profile roles in this rulemaking.

The Administration's public statements on this matter appear to be less than completely transparent. In the January 31, 2004, *Washington Post* article, Mr. Holmstead stated "it came to us through the interagency process." He also stated, "Neither Bill [Wehrum] nor I had any idea this language came from Latham & Watkins. . . . Our technical folks . . . used it." The *Post* reports:

> According to Holmstead, the law firm's language was part of the public record and was passed along to the EPA by the White House budget office and the Energy Department.[4]

This appears to be at odds with press accounts of this rulemaking from just over a month ago. On December 30, 2003, the *Washington Post* reported that a senior White House adviser said: If you had to pick one person, it was Jeff Holmstead in EPA's air office who played the key role in development of the cap-and-trade approach to regulation of mercury emissions."[5]

We are deeply concerned that EPA's rulemaking process has been improperly influenced by industry at the potential cost of the health of future generations of children. Congress and the American people need to know how industry lobbyists came to write a significant portion of an EPA formal rulemaking proposal.

Therefore we request that you provide us with all communications (whether written, electronic, or oral) relating to mercury air pollution between EPA officials and the law firm Latham & Watkins, other industry law firms, electric utilities, and other outside parties since January 1, 2003. Additionally, please provide us with information on any meetings that took place since January 1, 2003, between EPA officials and representatives or employees of Latham & Watkins, including a list of the participants and the nature and purpose of the meeting.

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[3] *Id.*
[4] *Id.*
[5] *EPA Led Mercury Policy Shift; Agency Scuttled Task Force That Advised Tough Approach*, Washington Post (Dec. 30, 2003).

Additionally, please explain if Latham & Watkins memos were docketed in the rulemaking process. If not, please explain why such influential documents that formed the basis for EPA's proposal were not docketed.

Please provide answers to each question and responsive documents no later than February 18, 2003. Thank you for your immediate attention to this issue.

Sincerely,

Henry A. Waxman
Member of Congress

Tom Allen
Member of Congress

Mr. OSE. I thank the gentleman.

Before I recognize Mr. Van Hollen and just advise Mr. Tierney that we have had a little bit of a change in plans. We are being advised by the full committee that our time here is limited to 12:15 p.m. So, the plans that evolves here is that our questions of this panel and next panel will be limited to one round due to the time constraints, and that questions will be necessarily submitted to you in writing.

Mr. Van Hollen.

Mr. VAN HOLLEN. Thank you, Mr. Chairman.

First, let me just say, Dr. Graham, I agree with you that it is obviously important to review regulations to determine whether or not they are accomplishing the purpose we set out originally to accomplish. And, if they are not accomplishing them, we should either get rid of them or revise and modernize them to suit the purpose. I think you would also agree that where we identify a need for an additional rule to protect the public health, we should move forward. And where we identify it, we should move forward in the best way and based on the best evidence; and that is what leads me to the questions with respect to the mercury rulemaking.

Mr. Johnson, you say in your testimony that EPA is interested in ensuring that the proposed mercury rule be based on the "best available information." I think that is something we would all agree; we should have the best available information. But, that is what leads me to my question, because best available information, it seems to me, requires exploring all the options; and EPA did create a working group. We have somebody who is here who is going to testify later, Mr. John Paul, who was a co-chair of that working group; he represents State and local air pollution control officers. In his testimony, he says, "As part of our report, we recommended that EPA analyze through mathematical modeling the mercury control levels recommended by the various stakeholders. EPA agreed to that recommendation and scheduled a working group meeting to review and discuss the modeling results. Unfortunately, in April 2003, the working group was informed by EPA via e-mail that the modeling was postponed indefinitely. Furthermore, the indefinite postponement turned out to be permanent."

Since then you have had just a series of correspondence going back and forth to EPA administrators from Members of Congress, from environmental groups, from all other stakeholders on this question of why EPA isn't doing the modeling of the working group options, the working group that was created and established by EPA itself for this purpose. In these letters, there are all sorts of statements. In March of this year, Administrator Leavitt recognized that the analysis was not complete and finished to fix it, saying, in one of his responses, "I want it done well and I want it done right."

Nothing has happened since then. We have heard really what amounts to a lot of excuses from Assistant Administrator Holmstead saying that first we had insufficient resources to model mercury because EPA was modeling the clear skies proposal.

I guess my question to you is, having established the working group, having received the benefit of the recommendations, having, at least at the staff level of the EPA, agreed to model the rec-

ommendations that were set out, does EPA intend, as part of its analysis, to model the recommendations of the working group that it established? I just want a simple yes or no answer so we can cut through a lot of the back and forth.

Mr. JOHNSON. Well, I was not there, involved with the decision or in the beginning of making that decision to accept or not to accept, so I don't know the specifics of what that work group did recommend. What I can say is that the Administrator has been very public that he will require whatever analyses that are necessary to be able to make a sound scientific and good public policy decision with regard to mercury.

Mr. VAN HOLLEN. Well, let me just ask you, because we have a timetable now.

Mr. JOHNSON. Yes, sir.

Mr. VAN HOLLEN. You have said that EPA intends to move forward by the March 15th date, is that right?

Mr. JOHNSON. Yes.

Mr. VAN HOLLEN. OK. We are now in November. It seems to me that, if the EPA is going to model these results, it needs to make a decision, yes or no. I am simply asking whether or not, as of today, as of today, you are the Deputy Administrator, EPA intends to model the recommendations of its work group?

Mr. JOHNSON. We will be doing whatever modeling is necessary to make the decision by March. I don't know——

Mr. VAN HOLLEN. I am just trying to get on the record. We have had all this back and forth. We got a letter in response to Mr. Waxman today from a letter he wrote back in June. We have everybody here; a lot of people are wondering how to interpret all this. I just want a yes or no of whether you are going to model those recommendations?

Mr. JOHNSON. We will be using models to make our final decision. What specific models, what data input and all, that is what the public comment process is about. We have 500,000 pages of comments. We have over multiple analyses on all sides of the issues with all kinds of assumptions, and we are going to be issuing a Notice of Data Availability to be able to highlight the range and the depth and the breadth of those kinds of assumptions, because we want to get additional public comment to help understand what is fact, what is fiction, what is gray, what is white versus black. So that information will then help us to make a decision. If we have to do additional modeling to make the decision, then we will do additional modeling to make the decision.

We are also mindful of the Administrative Procedure Act which, if we come up with a new model that hasn't been used before, then, under the Administrative Procedure Act, we have to go through a public comment period for that. Those are all part of the factors. At this point in time what I can say is that we are going out with a Notice of Data Availability, highlighting the models, highlighting those issues and the data that we have received that we believe are pivotal in making an informed judgment; and we want public comment, and public comment quickly, so that we can make the best scientifically sound decision as well as good public policy decision.

Mr. VAN HOLLEN. All right.

Mr. Chairman, if I could just ask how much time would be required to model?

Mr. OSE. Mr. Van Hollen, we are going to have one more round.

Mr. VAN HOLLEN. Oh, we are? OK. I am sorry.

Mr. OSE. Two minutes each on this panel.

Mr. VAN HOLLEN. Got you. Thank you.

Mr. OSE. Dr. Graham, your testimony is that on November 1st we sent you a request for a chart indicating the status of each nomination from 2001, 2002, and 2004 nominations processes, the chart indicating whether a nomination was accepted or rejected; and then what was the actual or expected publication dates for any proposed or final rules derived from that nomination; and whether or not if a reform candidate was only partially accepted, please so indicate.

You have information in your office that perhaps incompletely addresses that question, but we don't yet have it in our possession. My question is will you send it to us, whether complete or incomplete, the information that would be responsive to this request, on or before November 30th of this year?

Mr. GRAHAM. November 30th? We certainly can give you a partial response, no question. But, for example, the 2004 information, that is deliberative information. That is not coming to you until a report comes out.

Mr. OSE. All right. That is fine.

Mr. GRAHAM. For example. Also, there you have an analysis of whether what we did was similar to or different than the commenter. That is a very substantial body of work. That will not be done by November 30th.

Mr. OSE. All right.

Mr. GRAHAM. I will give you the best we can get to you by November 30th.

Mr. OSE. I appreciate that.

Mr. Radzely, what is the timetable for the Department's issuance of proposed revisions for the various family leave implementing documents, including the non-binding guidance, the paperwork requirements, and what I refer to as the other regulatory provisions, such as recordkeeping and the like?

Mr. RADZELY. Mr. Chairman, the Department is still reviewing the stakeholder comments, the congressional hearings on this issue, the OMB nominations, and the court cases to determine what, if any, actions to take regarding the regulations, and we hope to have a decision some time next year as to what, if any, actions to take.

Mr. OSE. When you say next year, what do you mean? I mean, is that January or is that December?

Mr. RADZELY. At this point we are still reviewing the volume of material that we have, and we hope to make a decision as to whether to take any action at some point next year.

Mr. OSE. Are you going to wait until you have a final decision on all of it before you release any of it, or is it going to come out in dribs and drabs?

Mr. RADZELY. We are reviewing all of the nominations that we have received and all the comments that we have together, and at the point where we decide what, if any, actions to take, if there are

discreet actions, I presume the Department will take them at an appropriate time. But I, at this point, do not know what, if any, action we are going to take, so I can't say specifically whether it will be one or multiple actions.

Mr. OSE. All right.

I am going to exercise a little discretion of the Chair. I don't know to whom this question needs to be directed, whether it is Dr. Graham or Mr. Johnson, but I know that my friends on the other side of the isle have sent letters regarding mercury to which they have not received answers. And I have to tell you, whether I am on one side of the isle or the other, as near as I can tell, under the constitutional oversight provisions that we enjoy here, we are entitled to that information. I am going to recognize my friend Mr. Tierney to expand on this, but this is an issue that, as chairman, I will tell you it has my attention.

Mr. TIERNEY. Well, Dr. Graham, let me get right to that, because the last time you were here I asked you some important questions about the mercury rulemaking at EPA. After the hearing I sent you a handful of followup questions, which is why I was reticent to have followup questions today, because we don't have a good track record with this. You did not address specifically the responses to my questions. Your initial request had about a page and a half of very general comments. I wrote to you again on October 15th, asking you to respond. At 7 last Friday night, this most recent Friday night, somebody faxed over a letter that still, in my estimation, fails to answer those questions directly. Let me give you an example.

Through EPA's advisory group, State, industry, and environmental stakeholders developed three options for levels of mercury controls. The advisory panel recommended that EPA perform a modeling analysis of each of these options. Yet, for the past year and a half, EPA has failed to conduct this analysis. I asked you whether you agree that the recommendations for necessary analytical work made by the EPA's public advisory group on the mercury rulemaking should be given substantial weight. All you responded to me was a general statement, "In any important rulemaking, including its mercury regulation, EPA considers a number of important factors. . . . All of these factors go into the Agency's decisions regarding the appropriate analysis to undertake, for example, in considering the input of this working group."

I am looking for a specific answer to that question. Has OIRA taken a position on whether the EPA should comply with the advisory group's recommendations? And, if so, what is the position?

Mr. GRAHAM. Considered, yes. Substantial weight, not necessarily.

Mr. TIERNEY. I also asked you: "In the mercury rulemaking, does OIRA support analysis of a full range of regulatory options for controlling mercury?" You replied, "We have indeed encouraged EPA to perform a rigorous comparison of the cap-and-trade versus MACT alternatives."

I wanted to know, and I still want to know, whether OIRA supports analysis of a full range of regulatory options, including options more stringent than either of EPA's proposals. Can I have a clear answer on that?

Mr. GRAHAM. Well, full range?

Mr. TIERNEY. Full range.

Mr. GRAHAM. OK, the Executive Order 12866 does not require a full range of all—what do you mean by that, full range?

Mr. TIERNEY. Well, including options that were more stringent than either of EPA's proposals.

Mr. GRAHAM. I think that in the comments that Mr. Johnson mentioned there are substantial number of comments and analyses done on proposals more stringent and less stringent than the proposal. By definition, they will in fact be considered.

Mr. TIERNEY. Would you support that they are considered?

Mr. GRAHAM. They will be considered because they are in the public comment process.

Mr. TIERNEY. Is part of that the advisory group's recommendations?

Mr. GRAHAM. In your question before you asked me whether I was aware of the specifics of the advisory committee recommendations, and I told you that I was not. But, ideas and models and recommendations are part of the public comment process, they will be considered.

Mr. TIERNEY. Well, Mr. Johnson, I didn't get that direct inference from you in the last round of questions with Mr. Van Hollen. Are you willing to be as direct?

Mr. JOHNSON. Yes. Yes.

Mr. TIERNEY. You will consider and run those models?

Mr. JOHNSON. Whatever is in our public comments, we will consider all of that.

Mr. GRAHAM. Mr. Tierney, those models are already run. Those are models that were run with the same model that EPA uses, but outside parties contracting the model. They have run those models and submitted them as part of the public record.

Mr. TIERNEY. Well, to date they just don't seem to have given much credence or much attention.

Mr. JOHNSON. Mr. Tierney, that is why we are putting and identifying those models and those analyses as part of our Notice of Data Availability, because we now have them, and there is a wide range of assumptions and conclusions from those model analyses. That is why we want people to look at them, comment on them, and particularly focus on those areas of the assumptions.

Mr. TIERNEY. Well, maybe I am a little cynical, but it seems to me that you are trying to kill everybody with an overwhelming amount of information to keep delaying this thing, and I hope that is not the case. It seems somebody could target this and we could get right to the bottom of it and we can get some work done here if you listen to your own advisory working group and you follow it along and did that. I don't see that being done; I see trying to switch from Section 112 to 111. I hope not, but it seems like somebody welcoming a lawsuit to delay things further under that premise. If you keep enlarging the amount of information out there and the work done on this thing, we will never get a rule, and kids continue to live in a poisoned atmosphere. So, I just hope that is not the case.

Mr. GRAHAM. Mr. Tierney, the advisory committee does not have the authority to require EPA to stay within Section 112 of the Clean Air Act.

Mr. TIERNEY. I understand that.

Mr. GRAHAM. The administration supports a market-based approach, and we believe the authority exists under 111. That is perfectly adequate to guide the policymaking of the administration.

Mr. TIERNEY. There is a lot of discussion on that, and there should be even more.

Mr. GRAHAM. We are delighted to have it, sir.

Mr. TIERNEY. Very few people agree with you on that.

Mr. GRAHAM. Absolutely.

Mr. TIERNEY. You have a fringe group on that area. Essentially, this whole thing has gone on for years under the premise of Section 112. At the last second this administration comes in and takes a pivot and drives the whole thing in a different direction.

Mr. GRAHAM. That is because this administration believes in market-based approaches to environmental policy, Mr. Tierney.

Mr. TIERNEY. Would that they believed more in science.

Mr. GRAHAM. We certainly agree that it should be implemented with science.

Mr. TIERNEY. Then, we would get something done here to stop kids from being poisoned.

I have one last question I want to go over, if I may. In your role as Director of OIRA, you have emphasized how important it is for agencies to incorporate into rulemaking an analysis of the cost the rule will have on those who have to comply with it and the benefits of the proposed rule. You have not at all been reticent in strongly advising agencies on analytical and even science and policy decisions and rulemaking. In this case EPA failed to conduct even the most basic analysis necessary to understand the cost and benefits of various control options.

Don't you agree that EPA should conduct this analysis as recommended by its own advisory panel?

Mr. GRAHAM. I certainly think they should do benefit analysis of the rulemaking, including the benefits to children, both the health benefits and long-term economic benefits to those children.

Mr. TIERNEY. Well, we can only hope that we get some action, and relatively soon. Thank you.

Mr. OSE. Dr. Graham, to followup on Mr. Tierney's questions, have you done a prompt letter to EPA regarding that particular issue?

Mr. GRAHAM. Have I yet?

Mr. OSE. Yes.

Mr. GRAHAM. No, sir.

Mr. OSE. OK.

Mr. Van Hollen for 1 minute.

Mr. VAN HOLLEN. Thank you, Mr. Chairman.

Dr. Graham, you made a couple comments I wanted to respond to. I would put it in the form of a question, but we don't have time. I also support market-based approaches to many of these issues. I am an original cosponsor of legislation to do that with respect to carbon dioxide, as the House cross-file to the McCain-Lieberman bill on global warming issues. Where it works, the difference here

we are talking about is mercury. Mercury is listed as a hazardous pollutant under Section 112 of the Clean Air Act.

Now, under cap-and-trade, as you know, one company, one generator of pollution can buy the ability to not have to put on the pollution control equipment. That means that in the immediate surrounding of that area people could be subject to pollution from that. The difference is we are dealing with mercury, which is described under Section 112 as a hazardous pollutant. That is why the cap-and-trade approach is questionable under this particular scenario, when it is not questionable when you are dealing with pollutants that have more of an aggregate global impact and are not necessarily toxic at the local level. I think that is why the working group specifically recommended against a cap-and-trade approach.

So, I am for market-based approaches too, where it makes sense and where it is in the public health interest, but I am not for it when it results in people in the immediate area surrounding a power plant being subject to mercury poisoning.

Mr. GRAHAM. Would you like me to respond? Actually, EPA's modeling shows that the largest power plants, the only ones that may have sufficient mercury to cause a localized problem, in fact have the largest reductions under the cap-and-trade program and, hence, provide greater protection for residents near those facilities.

Mr. VAN HOLLEN. That would be great if they decide to exercise the option to do the pollution control.

Mr. GRAHAM. But, that is what the modeling says, that they will in fact do that.

Mr. VAN HOLLEN. Then the only question remaining is shouldn't we do—from your earlier response to me it sounds like you hadn't, but shouldn't we do all the modeling of all the different options, including the options put forward by the working group, to make sure—the question is whether there are different assumptions in these models, and what assumptions are being made. It seems to me that what you are creating, as I understand it, by not doing the mathematical modeling of the working group, you are creating a suspicion that doesn't have to be there, that you are not exercising your full authority to examine all available options. So, the question is, OK, model it and see what the results are, and then compare your results. But, the question is whether all available options, that reasonable people can agree or based on some reasonable assumptions, have been modeled so we can reach fair comparisons.

Mr. OSE. May I suggest that you follow this line of questioning in writing to the witnesses?

Mr. VAN HOLLEN. Yes. I would be happy to. Thank you. Thank you, Mr. Chairman.

Mr. OSE. I want to thank this panel. I apologize for the dilemma of location today. I do appreciate all four of you appearing and providing testimony. To the extent that we have followup questions, we will forward them to you as quickly as possible. And, as always, we appreciate timely responses. The record will be open for 10 days on this. Believe me, there are additional questions we didn't get to due to time constraints.

Gentlemen, thank you. You are excused.

Could we have the second panel gather immediately?

While we are getting set up for the second panel, I will advise everybody that the equipment being arrayed here, the setup of that will continue; it is done to facilitate the hearing that will commence in this room at 1. If you have any complaints about that, you should take it to the chairman of the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs.

OK, before you sit down, let us get you all sworn in. Please rise. All six witnesses are at the witness table. Please raise your right hands.

[Witnesses sworn.]

Mr. OSE. Let the record show all the witnesses answered in the affirmative.

All right, we are going to change the rules here a little bit, given our time constraints. We have received each of your written statements, and they have been entered into the record. We have read each of your written statements. Unfortunately, as opposed to the normal 5 minute period of time that you are going to have to summarize, we are going to reduce that to 2 minutes for each of you. Any objections?

All right, our first witness on the second panel is Mr. William Kovacs, who is the vice president for Environment, Technology and Regulatory Affairs of the U.S. Chamber of Commerce.

Mr. Kovacs, you are recognized for 2 minutes.

STATEMENTS OF WILLIAM KOVACS, VICE PRESIDENT, ENVIRONMENT, TECHNOLOGY AND REGULATORY AFFAIRS, U.S. CHAMBER OF COMMERCE; TODD O. MCCRACKEN, PRESIDENT, NATIONAL SMALL BUSINESS ASSOCIATION; NANCY MCKEAGUE, SENIOR VICE PRESIDENT, MICHIGAN HEALTH AND HOSPITAL ASSOCIATION, REPRESENTING THE SOCIETY OF HUMAN RESOURCE MANAGEMENT; JAMES L. GATTUSO, RESEARCH FELLOW IN REGULATORY POLICY, THE HERITAGE FOUNDATION; CATHERINE O'NEILL, ASSOCIATE PROFESSOR, SEATTLE UNIVERSITY SCHOOL OF LAW, REPRESENTING THE CENTER FOR PROGRESSIVE REGULATION; AND JOHN A. PAUL, SUPERVISOR, REGIONAL AIR POLLUTION CONTROL AGENCY, DAYTON, OH, REPRESENTING THE STATE AND TERRITORIAL AIR POLLUTION PROGRAM ADMINISTRATORS

Mr. KOVACS. Thank you, Mr. Chairman. Without using up too much of my time, since this is your last hearing, I want to thank you for all of your efforts over the years.

Mr. OSE. Enough of the obituaries. Get to your subject matter.

Mr. KOVACS. Regulatory reform has been a bipartisan issue for 30 years. Presidents Carter, Bush, and Clinton used executive orders to move the issue forward and examine regulations on a regular basis. This administration has chosen to use the regulatory right-to-know, and they have accepted public nominations. It has been a fine process for us in the sense that it has gotten us to talk to our members, but the biggest problem with the process is there are no timely updates and it is very difficult to find out where the regulations might be in the process. In fact, the Chamber actually contacted every single person who nominated a regulation, both the business and environmental groups and other non-profits. Virtually

throughout the entire list of nominations, most, 70 percent did not know where their regulations were in the process and couldn't identify how they were moving through; and that is something that I think can be easily corrected.

You have three tools, very quickly: one, there are the executive orders, which really do give the President and the agencies the right to go in and examine the regulations; No. 2, you have now the public nomination process; and, three, I would just like to refresh everyone's recollection, you also have Section 610, which was passed as part of the Regulatory Reform Act, where every single agency is required to provide a plan for how they are going to systematically review regulations, and that is something the Congress has had for oversight for almost two decades and has never really used.

So, if we are going to make a difference right now in how the regulatory process is reviewed, I would suggest that Congress and these hearings show what oversight can do. You would get a lot of answers to your questions. Two, you have the White House, who could issue an executive order to enforce Section 610 and tell the agencies it is serious. And, three, I think as part of the OIRA nomination process, they could do what is required under 610, and that is to link it to the unified agenda. If you have all three of those processes in place, you do have a way in which, over a regular basis—and that is the key, regular, systematic basis—Congress could ask the agencies to undertake the 610 reviews and to undertake the nominations; and that way we don't worry, 4 or 5 years later, that we didn't get the kind of information we need.

Thank you.

[The prepared statement of Mr. Kovacs follows:]

STATEMENT OF WILLIAM L. KOVACS
VICE PRESIDENT
U.S. CHAMBER OF COMMERCE
BEFORE THE
COMMITTEE ON GOVERNMENT REFORM
SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES AND REGULATORY AFFAIRS
U.S. HOUSE OF REPRESENTATIVES
ON THE SUBJECT OF "WHAT IS THE BUSH ADMINISTRATION'S RECORD IN REGULATORY REFORM?"
NOVEMBER 17, 2004

Mr. Chairman and members of the subcommittee, thank you for inviting me here today to testify about the Office of Management and Budget's (OMB) efforts to improve the quality of federal regulations by obtaining public nominations of federal rules that should be reformed, revised, or eliminated. I am William Kovacs, Vice President of Environment, Technology, and Regulatory Affairs at the U.S. Chamber of Commerce (U.S. Chamber). The U.S. Chamber is the world's largest business federation, representing more than three million businesses of every size, sector, and region. More than 96% of the U.S. Chamber's members qualify as small businesses.

The U.S. Chamber cares deeply about the cost and quality of federal regulations, and believes firmly that every federal agency should periodically review and assess the continued need for, and relevance of, the rules it enforces. Before beginning, it is worth noting that the cost of federal regulations have become truly staggering. According to a widely cited report sponsored by the United States Small Business Administration's Office of Advocacy (SBA's Office of Advocacy), the annual cost of all federal regulations is estimated to be $843 billion.[1] This amount is only $17 billion more than all federal discretionary spending in 2003,[2] and $144 billion less than all individual income taxes paid in 2003.[3] The annual cost of environmental regulations alone is $197 billion,[4] which is $3 billion more than all corporate income taxes that were paid in 2003.[5] The impact of federal regulations is especially severe on small businesses. For example, the SBA's report shows that the annual cost of all federal regulations is, on a per employee basis, $6,975 for firms with fewer than 20 employees–nearly 60% higher than the $4,463 for companies with 500 or more employees.[6]

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[1] W. Crain and T. Hopkins, *The Impact of Regulatory Costs on Small Firms*, Report RFP No. SBAHQ-00-R-0027 for The Office of Advocacy, U.S. Small Business Administration (July 2001).
[2] See Table 8.7 - Outlays for Discretionary Programs: 1962 – 2009; Budget of the United States Government - Fiscal Year 2005, Historical Tables.
[3] *Treasury Department Gross Tax Collections: Amount Collected by Quarter and Fiscal Year, 1987 – 2004.* SOI Bulletin, Historical Table. Excel ver. 4. Issued Quarterly, Internal Revenue Service, Statistics of Income Division.
[4] Ibid, Footnote 1, Page 25.
[5] Ibid, Footnote 3.
[6] Ibid, Footnote 1, Page 3.

In my testimony today, I want to make three key points:

1) Repeated attempts have been made over the years by presidents and Congress alike to require federal agencies to periodically review, revise, and, when appropriate, eliminate unnecessary regulations, but these efforts have met with limited success.
2) OMB's current public nominating process is valuable, but its lack of transparency makes it difficult, if not impossible, to determine what is being done with the nominations.
3) It is very important that these efforts at regulatory reform continue and become ingrained in agency practices.

I. REPEATED ATTEMPTS HAVE BEEN MADE OVER THE YEARS BY PRESIDENTS AND CONGRESS ALIKE TO REQUIRE FEDERAL AGENCIES TO PERIODICALLY REVIEW, REVISE, AND, WHEN APPROPRIATE, ELIMINATE UNNECESSARY REGULATIONS, BUT THESE EFFORTS HAVE MET WITH LIMITED SUCCESS

In seeking to confront the growing cost, complexity, and burden of federal regulations, there have been a number of attempts to require federal agencies to periodically evaluate the continued benefit and value of federal regulations. These efforts are commonly referred to as regulatory "look back" requirements[7] and have been initiated through a variety of executive orders, statutory provisions, and OMB directives.

A. Executive Orders

Over the years, several presidents have required federal agencies to periodically review existing regulations to determine whether they should be modified or eliminated. These efforts are documented in a series of reports issued by the General Accounting Office (now known as the Government Accountability Office) (GAO) to a Senate subcommittee in the late 1990s.[8] As GAO reported:

- These efforts began when President Carter issued Executive Order 12044, Improving Government Regulations, in 1978. The Executive Order established requirements for the centralized review of regulations, the preparation of regulatory analyses, and the consideration of alternatives, and also required federal agencies to "periodically" review their existing regulations.[9]

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[7] See, for example, *Stimulating Smarter Regulation: 2002 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local, and Tribal Entities,* Office of Management Budget, 2002, Pages 70-71.

[8] *Statement of L. Nye Stevens to Government Affairs Subcommittee on Financial Management and Accountability*, GAO/T-GGD-96-185, September 25, 1996, Pages 14-16.

[9] Ibid, Footnote 8. Executive Order 12044, *Improving Government Regulations*, stated that the periodic review of regulations was necessary to determine: whether the regulations are as clear and simple as possible; achieve legislative goals effectively clearly and efficiently; and do not impose unnecessary burdens on the economy, individuals, private organizations, or State and local government. See, 43 *Federal Register* 12661 (March 24, 1978).

- The process continued in 1992 when President Bush sent a memorandum to all federal agencies calling for a 90-day moratorium on new proposed regulations. During this time the agencies were to "evaluate existing regulations and programs and to identify and accelerate action on initiatives that will eliminate any unnecessary regulatory burden or otherwise promote economic growth."[10]

- In 1993, President Clinton enhanced this process with the issuance of Executive Order 12866, Regulatory Planning and Review.[11] Section 5 of the order requires that each federal agency, beginning in 1994, submit a program to OMB's Office of Information and Regulatory Affairs (OIRA) to "periodically review its existing significant regulations to determine whether any such regulations should be modified or eliminated ..."[12]

- President Clinton also ordered a "page by page" review of all regulations in 1995, seeking to "eliminate or revise those that were outdated or in need of reform."[13]

While well intentioned, none of these presidential efforts has resulted in a systematic review, identification, and elimination of burdensome or outmoded federal regulations. Indeed, nearly all of the items listed in the spring 2004 edition of the *Unified Agenda of Federal Regulatory and Deregulatory Actions*[14] (Unified Agenda) involve new regulatory proposals, and the Unified Agenda does not even list existing regulations subject to review under Section 5 of Executive Order 12866.

B. Section 610 of the Regulatory Flexibility Act

By far, the most widely cited statutory "look back" requirement for federal agencies is Section 610 of the Regulatory Flexibility Act of 1980 (Regulatory Flexibility Act).[15] Section 610 of the act specifically requires each federal agency to develop a plan for the periodic review of regulations that have, or will have, a significant economic impact on a substantial number of small entities. The purpose of the review is to determine whether each rule should be retained, amended, or rescinded (consistent with the objectives of the underlying statute) to minimize its impact on small entities.

Under the Section 610 review process, each federal agency must publish annually in the *Federal Register* a list of the existing rules that it plans to review in the coming year.[16] Agencies are required to describe the rules, note why they are needed, and invite public comment on them.

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[10] Ibid.
[11] Ibid.
[12] 58 *Federal Register* 51735 (September 30, 1993). According to Executive Order 12866, *Regulatory Planning and Review*, all significant regulations selected for review are required to be included in the agency's annual Regulatory Plan, which becomes incorporated into the *Unified Agenda of Regulatory and Deregulatory Actions* (Unified Agenda). The review of existing rules under Executive Order 12866 applies to all "significant" regulations, which encompass a broad range of rules affecting businesses of all types and sizes.
[13] Ibid, Footnote 8.
[14] See, http://cur.cs.umass.edu/ua.Spring2004/databases.html.
[15] 5 U.S.C. 601 et seq
[16] While Section 610 does not require federal agencies to use the Unified Agenda for these notices, most agencies do because it is a convenient way to compile and publish this information.

The agencies must consider the continued need for the rule, any public complaints/comments received from the public about the rule, the rule's complexity, whether it overlaps, duplicates, or conflicts with other rules, and any conditions that have changed since the rule's adoption. Section 610 also requires that all rules in existence at the time the law became effective, 1980, must be reviewed within 10 years (i.e., January 1, 1991), and that any new rule must be reviewed within 10 years of the date it became effective.

Like the presidential efforts to require federal agencies to review and eliminate outmoded regulations, Section 610 has been widely perceived as ineffective for reviewing existing regulations. For example:

- In the late 1990s, GAO conducted a series of studies on agency compliance with Section 610, and concluded that agency compliance was inadequate.[17] GAO found that agencies were confused about which rules were covered by Section 610. Agencies were also confused about how, and when, to assess the economic impact of rules, and how to provide proper public notice about the reviews being conducted. GAO also noted that various terms applying to Section 610, such as "significant economic impact" and "substantial number of small entities," were unclear and needed clarification.

- Another study, sponsored by the SBA's Office of Advocacy,[18] concluded that Section 610 "has been the weakest and least utilized provision of the [Regulatory Flexibility Act]."[19] Specifically, the report notes that few of the total number of rules in existence are actually reviewed. Further, the reports notes that Section 610 does not specifically require any regulatory changes and the law's public participation provisions have been ineffective. The report recommends the creation of a database where all rules that significantly impact small entities (either because they currently have, or previously had, a significant economic impact on a substantial number of small entities) can be listed, and for SBA's Office of Advocacy to issue an annual score card of agency compliance.[20]

C. OMB's Regulatory Reform Nominating Process

Under the current Bush administration, OMB has sought to identify regulatory reform suggestions through a process of direct public nominations. While OMB could use Section 5 of Executive Order 12866, which requires the periodic review of existing regulations, OMB has relied instead on authority granted by Congress under the Regulatory Right-to-Know Act.[21] The Regulatory Right-to-Know Act requires OMB to issue an annual report to Congress on the costs and benefits of regulations, including recommendations for reform. OMB has candidly

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[17] Ibid, Footnote 8.
[18] *An Evaluation of Compliance with the Regulatory Flexibility Act by Federal Agencies*, CONSAD Research Corporation, April 15, 2001 (Revised July 16, 2001).
[19] It should be noted that several of the reforms recommended by GAO and the SBA's Office of Advocacy-sponsored study have been implemented, including the creation of an index of Section 610 reviews in the Unified Agenda, the issuance of a compliance guidance by SBA's Office of Advocacy, and better coordination between SBA's Office of Advocacy and OIRA (as a result of Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking*).
[20] Ibid, Footnote 16, Pages 59-60.
[21] 31 U.S.C § 1105 note, Pub. L. 106-554, § 1(a), December 21, 2000.

acknowledged that "while broad reviews of existing regulations have been required [under previous and existing Executive Orders], they have met with limited success."[22] For this reason, OMB stated that it would establish a "modest process" for accepting public nominations of agency rules to review and improve.[23] Accordingly:

- In 2001, OMB requested nominations of regulations "that if rescinded or changed would increase public welfare by either reducing costs or increasing benefits."[24] In response, OMB received 71 reform nominations from a variety of stakeholders and academic institutions. Of these, 23 were designated by OMB as "high priority" reform candidates and forwarded to the respective federal agencies for action.

- In 2002, OMB requested public nominations of burdensome regulations and guidance documents to reform, rescind, or revise. OMB noted that it was particularly interested in nominations from three specific areas: 1) reforms to existing regulations that, if adopted, would increase overall net benefits to the public (including extending or expanding existing regulatory programs, simplifying or modifying existing rules, or rescinding outmoded or unnecessary rules); 2) regulations, guidance documents, and paperwork requirements that impose especially large burdens on small entities; and 3) problematic guidance documents that should be reformed.[25] OMB received some 1,700 comments from a broad cross-section of interested parties. The nominations encompassed some 316 individual regulations and guidance documents across 26 federal agencies.[26]

- Finally, in 2004,[27] OMB specifically requested nominations of regulations and paperwork burdens that had a negative impact on manufacturing (especially those negatively impacting small and medium-sized businesses). OMB has yet to post the full list of nominations on its Web site, so it is not clear how many individual nominations were received, or how many are duplicates from previous years.

For the reasons described in the following discussion, the OMB effort has been one of limited success.

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[22] Ibid, Footnote 7, Page 70.
[23] Ibid. Page 71.
[24] *Making Sense of Regulation: 2001Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local, and Tribal Entities.* Office of Management Budget, 2002, Page 4.
[25] *Draft Report to Congress on the Costs and Benefits of Regulations*, 67 *Federal Register* 15015 (March 28, 2002).
[26] Because OMB received so many nominations in 2002, it divided the reform candidates into three categories: Category 1 included nominations already undergoing agency review (including some of the 2001 submissions); Category 2 included nominations of independent agencies (not subject to OMB oversight); and Category 3 included nominations that were forwarded to executive branch agencies for evaluation (and possible action). OMB forwarded all of the nominations to the respective agencies for review, but specifically asked them to evaluate and prioritize the "Category 3" nominations. OMB established a specific timeframe within which the agencies were asked to respond.
[27] In 2003, OMB did not request public nominations of reform candidates, but rather sought comment on its revised Circular A-4, *Regulatory Analysis*, for conducting regulatory impact analysis.

II. OMB's Current Public Nominating Process is Valuable, But ts Lack of Transparency Makes it Difficult, if not Impossible, to Determine What is Being Done With the Nominations

The OMB nominating process, while valuable, suffers from two basic deficiencies: 1) the review process lacks transparency; and 2) OMB fails to provide the public with timely updates about the status of nominations.

For example, OMB provided an update on the 2001 "high priority" nominations in its final 2003 report, but the update includes only a few brief sentences about each nomination, making it difficult to know how the nominations are being reviewed, what transpired in the review process, or where things stand with respect to the completion of the process. In addition, the information provided is dated (now more than a year old), making it useless to rely upon and no doubt leading to duplicate nominations of the same regulations in succeeding years. The information provided about the active 2002 nominations suffers from the same drawbacks, and, as noted previously, OMB has not yet posted a list of the manufacturing-related nominations submitted in 2004.

To ascertain the current status of the OMB nominations, last summer the U.S. Chamber contacted all of the nominators of the active nominations from 2001 and 2002 and requested an update on the status of their nominations. While some of the nominators were familiar with their nominations, many did not know what had been done with them and were, not surprisingly, frustrated with the entire process. This hardly instills confidence that regulatory reform is being taken seriously or will succeed.

III. It is Very Important That These Efforts at Regulatory Reform Continue and Become Ingrained in Agency Practices

The U.S. Chamber believes that it is important to require every federal agency to periodically review its existing regulations to assess their continued benefit and value. This vital effort should continue and be strengthened to ingrain the practice of periodic review into federal agency procedures. However, it seems obvious that the difficulty of imposing retroactive regulatory review requirements on federal agencies has been underestimated. There appears to be greater resistance to this process on the part of federal agencies than many believed would arise. That said, there are still a number of specific reforms that could be undertaken to improve and strengthen the process. Specifically:

A. What Congress Could do Today

- Congress should maintain vigorous oversight of agency compliance with Section 610. Congressional committees should insist that federal agencies under their jurisdiction identify regulations in need of review, report to Congress on when these reviews will take place, and provide information on the results of the reviews.

- Congress should clarify that every regulation must undergo a Section 610 review if the regulation had a significant economic impact on a substantial number of small entities: 1) when the rule was first promulgated; or 2) during the 10-year timeframe for review established by Section 610. Congress should not accept the excuse that agencies are confused as to the timing for the reviews and should make the timing for reviews very clear.

B. What the SBA Office of Advocacy Could do Today

- The SBA's Office of Advocacy should incorporate Section 610 training into the current Regulatory Flexibility Act training it is performing in accordance with Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking.

- The SBA's Office of Advocacy should maintain on its Web site a list of Section 610 reviews currently underway, and include a hyperlink to the regulation in the Unified Agenda. The inclusion of an index of Section 610 reviews in the Unified Agenda has been an important reform that has increased the visibility of the Section 610 review process.

- The SBA's Office of Advocacy should prepare a score card on Section 610 compliance, including recommendations for reform.

C. What the White House and OMB Could do Today

- The president should issue an executive order requiring that any significant regulation, as defined by Executive Order 12866, be reviewed within 10 years of its promulgation, and should include a formal regulatory impact analysis (in accordance with OMB Circular A-4, Regulatory Analysis). The regulatory impact analysis should consider whether initial cost and benefit forecasts were accurate, and assess the expected future costs and benefits of the rule, as well as any feasible alternatives.

- OMB should continue its public nominating process as an interim measure, but it must provide more timely, accurate, and transparent information on the status of the regulatory nominations.

- OMB should post all of the nominations it receives on its Web site, and provide timely status reports about them. Further, any items slated for action by OMB, or by an agency, also should be posted in the Unified Agenda, with a hyperlink to the OMB Web site list.

- OMB should also issue formal guidance to federal agencies about how agencies should review regulatory nominations, and provide specific criteria to be used to assess the merits of each nomination.

- OMB should require that a separate index of active OMB nominations be included in the Unified Agenda, as has been done with Section 610 reviews.

CONCLUSION

There has been a long-standing effort to require every federal agency to periodically review the continued need for, and relevance of, the rules it enforces. This process is critical to ensuring that regulations are sound, balanced, and cost-effective. Congress must not abandon its oversight role in this area, particularly since reform efforts led by OMB are subject to change with each new administration's personnel and priorities. Accordingly, the U.S. Chamber applauds the subcommittee for holding this hearing today. It is abundantly clear that burdensome, costly, or outmoded rules greatly impede the ability of businesses to create new jobs or offer better benefits to their employees.

The U.S. Chamber is grateful for the opportunity to present its views and recommendations about this important topic.

Mr. OSE. I thank the gentleman, and for his attempt at kind words. I didn't mean to be rude; I have just got to move.

Mr. McCracken for 2 minutes.

Mr. MCCRACKEN. Thank you very much. I will try to be very brief as well, and condense my statements.

Bottom line, I represent the small business community; I am the president of the National Small Business Association. Fundamentally, what I think this hearing is about, and what we are all trying to achieve, is instead of constantly looking at all the new rules coming down the pike, and how to keep them in check and how they can be made to be usable and achievable by the small business community, it is at least as important, if not in some cases more important, to continue to look at what is already on the books, to see how they can be revised, simplified, and done away with in some cases. That is usable.

As Mr. Kovacs mentioned, we have had on the books for more than 20 years the Section 610 review, which has been almost entirely not complied with. That is why we have been pleased, the last few years, the administration has adopted this process for accepting nominations, so that we can at least begin to do some level of review of the regulatory burden that the small business community faces.

So, I am loathe to criticize or to suggest that is a bad idea, because it is certainly a big step forward from where we have been, but we think there is a lot more than can be done in that process. It is clear to the typical juror that perhaps, I would think, that the OIRA may need a few more resources. We constantly hear how they are overburdened, and it is not hard to see that there is some validity to that charge. We also think, though, as Mr. Kovacs said, that there is a significant role for Congress to play here as well. If Section 610 review were coupled with meaningful oversight, particularly by the authorizing committees of the agencies, that those various agencies report to, I think that we could see an enormous impact and sort of get the attention of those agencies.

The other thing that I would—and these are very brief remarks—point to is something that a lot of speakers have hit on today, which is the visibility of the process, the ease with which we can find out how this review is actually happening. I mean, some of that was illustrated earlier in the last panel, where even the head of OIRA has a hard time presenting all the information that you might expect. Now, how can a citizen or a trade group out there that submitted comments expect to know what in the world is happening to those comments?

But, in closing, I really appreciate all that this subcommittee has done over the last few years in moving this ahead, and we look forward to more work. Thank you very much.

[The prepared statement of Mr. McCracken follows:]

NSBA
National Small Business Association

TESTIMONY OF

TODD MCCRACKEN, PRESIDENT

THE NATIONAL SMALL BUSINESS ASSOCIATION

What is the Bush Administration's Record in Regulatory Reform?

Before the House Government Reform Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs

November 17, 2004

Thank you, Chairman Ose, Ranking Member Tierny, and members of the committee. As president of the National Small Business Association (NSBA), I am pleased to join the distinguished Chairman for his last hearing on this very important issue. Over the last 2 years, NSBA has testified before you 4 times and worked side-by-side with your staff to pursue our common goal of regulatory reform for small business.

NSBA is the nation's oldest nonpartisan small business advocacy group, reaching more than 150,000 small businesses across the country. In May of 2004, we submitted comments on the *Draft 2004 Report to Congress on the Costs and Benefits of Federal Regulations issued by the Office of Management and Budget* (OMB). While keeping our scope broad and urging the need for a strong OMB and even stronger Office of Advocacy to ensure that regulators understand small business's need for regulatory restraint, we focused on two specific issues we have found particularly troubling for our members; Toxic Release Inventory (TRI) and No-Fax Regulation. For purposes of my testimony, I'd like to also address the 800-pound gorilla we like to call the IRS, and the massive regulatory burden imposed through the complex and outdated tax code.

Background

We all know what the numbers say: federally mandated paperwork equates to 8 billion hours with the IRS accounting for 80 percent of that figure. The Small Business Administration reports that the average per-employee cost of all federal regulation for companies with fewer than 20 employees is approximately $6,975, 60 percent higher than what large companies pay. In many cases, paperwork is a burden imposed after a business enterprise has taken steps to comply with the regulation in question.

By their very nature, unnecessary federal regulation and paperwork burdens discriminate against small businesses. Without large staffs of accountants, benefits coordinators, attorneys, or personnel administrators, small businesses are often at a loss to implement or even keep up with the overwhelming paperwork demands of the federal government. Big corporations have already built these staffs into their operations and can often absorb a new requirement that could be very costly and expensive for a small business owner.

As I mentioned earlier, NSBA has participated in various hearings with this committee as well as with the Small Business Committee. Based on those hearings, there is an apparent lack of accountability and oversight for many of the regulatory actions taken by agencies. The Draft Report by OMB is important and necessary as a means to examine the benefits and costs of various regulations. That being said, NSBA believes that the Draft Report could stand to be more comprehensive and inclusive of small business issues. Of all Federal regulations finalized in 2003, the Draft Report examined less than 2 percent due to standards regarding major vs. non-major rules and transfer rules. Furthermore, independent agency rules were also exempted from the Draft Report. We believe that information regarding cost-benefit analysis on non-major rules as well as those from independent agencies would be helpful in getting a firm grasp on the overall burden imposed on small businesses.

That being said, I acknowledge the difficult job OMB, and especially Dr. Graham as the Administrator of the Office of Information and Regulatory Affairs (OIRA), has ahead of it in working to reduce the regulatory burden. As OMB is an office with limited resources, I can

certainly understand the tenuous position that exists in attempting to take-on broad regulatory reform. But it must be done.

Toxic Release Inventory (TRI) - Environmental Protection Agency (EPA)
A painful thorn in the side of many small manufacturers, TRI has significantly reduced thresholds on reporting for usage of certain chemicals and releases. This is an annual process that is incredibly time consuming, complex and costly. In April of 2003, NSBA member Vic Schantz testified before this committee on the problems he faces in dealing with the TRI.

Mr. Schantz owns and operates a 130-year-old family-owned pipe-organ building business that was started by his great grandfather. Their annual sales volume is $7.5 million, and they build about 20 custom-designed, hand crafted instruments per year. Due to the nature of his business and his minimal use of lead, he has been affected by the EPA Toxic Substances Reporting Inventory (TRI). This mandated report that was due in June 2003 for the first time caused great headaches for Mr. Schantz. Due to EPA's lowering of the threshold for reporting from 10,000 lbs. of lead used per year in a business to a mere 100 lbs. per year, Mr. Schantz now faces a significantly increased paperwork burden. Through their Web site, which includes 195 pages of instruction on how to complete the two different forms, the EPA estimates that both forms will take approximately 82 hours combined, to complete. Mr. Schantz charges clients $50.00 per hour for labor costs. That amounts to $4,100 additional cost to report on lead usage that is just barely over the minimum level. In an environment that is still caustic for small manufacturers, surely the administration doesn't intend to create additional barriers to doing business in the U.S.

The EPA is continuing to examine the issue, and we applaud that, however NSBA believes not enough is being done to help entrepreneurs like Vic Schantz. With 2002 TRI reporting on Form R creating nearly 3.8 million total hours of paperwork burden for industry, it is no wonder OMB has directed EPA to more closely examine methods to improve this rule. As a small business advocate, NSBA is willing to voice our concerns with the EPA's TRI regulations. I do, however want to offer our praise to EPA as they are currently examining ways to reduce the burden caused by TRI to small business. I encourage further discussion on the issue and would support action taken to effectively raise thresholds for small businesses, and allow for simplified reporting as "no significant change" where applicable.

No-Fax Regulation (Telephone Consumer Protection Act of 1991) - Federal Communications Commission (FCC)
The regulations regarding no-fax were published in June of 2003 from the FCC would force any small business or association to maintain a written statement of consent from customers to receive faxes from that business or association. As anyone in business knows, the fax machine is an important tool for communicating. NSBA recommended that the rule be withdrawn or language changed from "written consent" to "previous existing business relationship". The FCC recently released a continuing resolution extending the stay on that rule. As it currently stands, the FCC has extended the date for businesses to have on file written consent in order to fax individuals back to June 30, 2005.

While the OMB has expressed concern over this rule, it is now in the hands of Congress. The House of Representatives has passed H.R. 4600, the "Junk Fax Prevention Act", and the Senate Commerce Committee approved S. 2603, a companion bill, but the Senate has yet to act. I thank you for your action on H.R. 4600 and hope that your counterparts in the Senate will act as well.

Tax Simplification

Though not an integral part of our comments submitted to the OMB earlier in the year, I cannot in good conscience sit here and talk about regulatory reform and paperwork reduction without mentioning the crushing burden imposed by the IRS. Again realizing that my comments are most likely a better fit for another committee, it is so important to note again and again, that the IRS accounts for 80% of the paperwork burden Americans face. As NSBA board member and CPA Paul Hense told this committee earlier this year, the underlying problem with tax paperwork is a painfully complex tax code. While he jokingly applauded that complexity as driving business to his door, he knows first-hand as an accountant, a small business owner and small business advocate that something must be done.

NSBA has historically supported fundamental tax reform. The tax code as it currently exists is unacceptable. Compliance costs are a dead weight loss to the economy. Complexity harms those looking to create businesses and aids those looking to avoid paying their fair share. The code decreases our national competitiveness and exposes us to international tax disputes like the Extraterritorial Income Exclusion Act rewrite recently passed after much debate and contention.

It is understandably difficult for Congress to resist trying to fix small parts of the code in fits and starts. Many organizations like our own have legitimate quarrels with the IRC. However, the continuation of small fixes only further degrades the entire system. Many proposals before Congress provide for fundamental tax reform that would vastly reduce compliance costs for individuals and businesses while collecting government revenues in a more efficient manner than we have today.

A better approach would be the adoption of the Fair Tax. The Fair Tax would repeal the entire IRC and replace it with a single rate national sales tax on the purchase of all new goods and services at the final point of consumption, while providing a rebate to families equal to the cost of essential goods and services. The Fair Tax would collect the same amount of tax revenue as current law while allowing consumers to see the actual cost of government with every purchase. The Fair Tax would do away with complicated tax returns and depreciation tables freeing individuals to spend their time more wisely.

Fundamental tax reform is an important goal for the future. I hope that members of this committee, while focusing on the important task of reducing regulatory burden, keep the ultimate goal of tax reform in mind.

Conclusion

The regulatory climate we find ourselves in today is not easy or welcoming to small businesses. We support strong OMB oversight of the Federal agencies' rule-making process. The work

done by Dr. John Graham in the Office of Information and Regulatory Affairs is certainly a good start, but not enough has been done. Dr. Graham has testified before this committee on a number of occasions, and commented that it is not OIRA's duty to police the agencies' compliance with paperwork and regulatory reduction. While that may or may not be the case, there has got to be somebody within the federal government who can and will ensure that small business is not being exploited by regulators who simply do not understand the results of their actions.

It is NSBA's goal that some of the very helpful laws passed can be realized and fully complied with. The Regulatory Flexibility Act (RFA) directs federal agencies to consider the impact of new regulations on small businesses and analyze alternatives that would minimize impact on small-businesses and make those alternative analyses available for public comment. The first law to address the issue, the RFA was followed by the Small Business Regulatory Enforcement Fairness Act (SBREFA) which gives the Chief Counsel for the Office of Advocacy authority to file amicus briefs on behalf of small business when an agency is non-compliant with the RFA as well as mandating issuing agencies to provide compliance assistance with any proposed rule. Finally, the Small Business Paperwork Relief Act (SBPRA) requires the Office of Management and Budget (OMB) to publish an annual list of compliance assistance resources, mandates each federal agency to establish a single point of contact to act as a liaison for small business, and to work on paperwork reduction.

It is clear to me that Congress has a grasp on the significant problem regulatory and paperwork burden poses for small businesses. You have passed laws, created and strengthened the Office of Advocacy which serves as federal government's primary watch-dog for small businesses, and continue to ask the tough questions. Yet we continue to see regulations promulgated that are not in compliance with the aforementioned statues and unduly harm small business. Agency compliance is a must.

Representing small businesses across the country, I can tell you that the diligence of this committee in reforming the regulatory climate is not only appreciated, but needed. Small business owners ought to be given the latitude to do what they do best: create jobs. Regulatory burdens that force Vic Schantz to read through 195 pages to understand how to complete a form is not only preventing him from growing his business, it is preventing him from carrying on a 4-generation tradition passed down through his family.

In the Chairman's statement addressing the Administration's Record in Relieving Burden on Small Business, January 28, 2004, Chairman Ose stated that, "As a former owner of various small businesses, I am especially disappointed... Congress wants and America's small businesses deserve results - fewer hours spent on government paperwork and lower compliance costs to increase productivity for job creation." We couldn't agree more.

I'd like to thank you in particular, Chairman Ose for your continued dedication and attention to small business, our members are better off because of the work you and your staff have done. It has been NSBA's pleasure to work with you over the past years and we wish you all the best in your future endeavors.

I thank you for your time and welcome any questions the committee may have for me.

Mr. OSE. I thank the gentleman.

Our next witness is Ms. Nancy McKeague, senior vice president for Michigan Health and Hospital Association.

Ma'am, you are recognized for 2 minutes.

Ms. MCKEAGUE. I am here specifically to discuss with you the Family and Medical Leave Act and the problems which have resulted in the workplace for us attempting to abide by the regulations. I am assuming, for the sake of brevity, that you are familiar with the FMLA. And I would like to tell you that our members believe that the FMLA has made an important contribution by providing a supportive environment for employees and their families in their time of need.

As the mother of six children, and as someone who has personally utilized leave under the FMLA, I support the intent of the law. However, the spirit of the law has been undermined when the complexities of the statute have left employers guessing how best to comply with it, while still leaving employees guessing as to what leave is protected under interpretations I don't believe Congress ever considered.

In enacting the FMLA, Congress stated that the term "serious health condition" is not intended to cover short-term conditions for which treatment and recovery are very brief, recognizing that it is expected that such conditions will fall within the most modest sick leave policies. The DOL regulations as originally developed, however, do not follow Congress's intent.

Unfortunately, the real victims of this confusion are the employees themselves. The most prevalent method used by employers to cover work during FMLA leave is to assign it temporarily to other coworkers. With the FMLA interpretations requiring little or no notice, this often results in requiring unscheduled overtime by coworkers. Work coverage for questionable, unscheduled leave absences has been especially challenging in the health care arena, where adequate coverage with qualified staff can involve issues as critical as life or death. Employee morale issues are also extremely important in the hospital setting, and my understanding is that DOL also has some public comments on that point.

I have attached a chart to my testimony, which is also displayed here, which I will leave you to take a look at as you see fit. But, I would like to note that our compliance involves 69 regulations and 29 processes, and may require us to process up to 17 documents for a single leave situation. The FMLA's implementing regulatory interpretations issued by the previous administration have left employers and HR professionals struggling with management of intermittent leave, communications with physicians, and difficult determinations as to whether a serious health condition exists within the meaning of the FMLA.

There are additional information and examples of specific instances in my written testimony, Mr. Chairman, and I would be glad to respond to any questions.

[The prepared statement of Ms. McKeague follows:]

TESTIMONY OF

NANCY McKEAGUE

SENIOR VICE PRESIDENT

MICHIGAN HEALTH AND HOSPITAL ASSOCIATION

ON BEHALF OF

THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT

AND

THE FMLA TECHNICAL CORRECTIONS COALITION

ON

REGULATORY REFORM AND PAPERWORK INFLATION

BEFORE

THE GOVERNMENT REFORM COMMITTEE

SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES AND REGULATORY AFFAIRS

U.S. HOUSE OF REPRESENTATIVES

NOVEMBER 17, 2004

Mr. Chairman and Members of the Subcommittee:

Good morning. I am Nancy McKeague, Senior Vice President of the Michigan Health and Hospital Association (MHA). Located in Lansing, Michigan, the MHA represents Michigan's nonprofit community hospitals and health systems in the legislative and regulatory process. Our mission is to advocate for Michigan's hospitals and the patients they serve. I am also here today representing the Society for Human Resource Management (SHRM), and the SHRM-founded Family and Medical Leave Act (FMLA) Technical Corrections Coalition. SHRM and the Coalition commend the members of the Subcommittee for their interest in the important issues of regulatory reform and paperwork inflation.

The membership of MHA includes all 145 nonprofit acute care community hospitals in Michigan, along with 18 health systems and affiliated clinics, nursing homes and other facilities. Michigan is the last state in the nation where all of the acute care hospitals are nonprofit, a heritage of which we are most proud. In fiscal year 2002 our hospitals provided nearly $994 million in uncompensated health care, and more than $220 million in reduced-fee or free programs and services. In addition to the nearly 200,000 people we employ directly, we are privileged to have 37,000 hospital volunteers. More information about the MHA can be found at www.mha.org.

SHRM is the world's largest association devoted to human resource management. Representing more than 190,000 individual members, the Society serves the needs of HR professionals by providing the most essential and comprehensive set of resources available. As an influential voice, SHRM is committed to advancing the human resource profession to ensure that HR is an essential and effective partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 500 affiliated chapters within the United States and members in more than 120 countries. Visit SHRM Online at www.shrm.org.

The FMLA recordkeeping and notification requirements have historically been of great concern to SHRM members, since they are charged with implementing the FMLA in large and small companies across the nation. SHRM has long recognized its special responsibility to encourage compliance with the FMLA. SHRM welcomes opportunities to educate members of Congress on the FMLA since our members have experienced numerous difficulties in their good faith efforts to comply with its record keeping and notification requirements.

In 1997, SHRM founded the FMLA Technical Corrections Coalition (www.fixfmla.org) which is a diverse, broad-based nonpartisan group of leading companies of all sizes and associations. Members of the Coalition are fully committed to complying with both the spirit and the letter of the FMLA and strongly believe that employers should provide policies and programs to accommodate the individual work-life needs of their employees. At the same time, the Coalition believes that the FMLA regulations should be improved by streamlining compliance and

eliminating administrative problems in order to better protect the employees Congress aimed to assist when the FMLA was enacted.

I. The FMLA: Ripe for Regulatory Review

A. Background on FMLA Interpretation Problems

Certainly, the FMLA has made an important contribution by providing a supportive environment for employees and their families in a time of need. The spirit of the law, however, is not well served when the complexities of the statute leave employers guessing how to best comply with it as well as leave employees guessing what leave is protected under ever-changing legal interpretations.

Through SHRM, HR professionals desire to work closely with regulators and others to clarify the original intent of the law so that it more effectively protects the employees Congress intended to assist. MHA hospitals are often the largest employer in the communities where they are located and, as a result, are able to set an example for other employers. At the same time, MHA hospitals have a unique perspective on, and understanding of, the special challenges of medical leave – both for employers and patients. I am also aware of the enormous FMLA compliance challenges confronting smaller employers.

The FMLA is a prime example of a very well intended law, which has resulted in unnecessary confusion and litigation because of problematic regulatory interpretations and inconsistent guidance. The FMLA interpretations are vague and contradictory. The Department of Labor's (DOL) final FMLA implementation regulations became effective for private sector employers on April 6, 1995. The FMLA was enacted to allow eligible employees up to twelve (12) weeks of unpaid leave for birth or adoption, or foster care (family leave) or for the "serious health condition" of the employee, the employee's child, or the employee's spouse ("medical" leave). The "family" leave part of the FMLA has typically not been difficult to implement and administer in the workplace. However, because of vague and expansive interpretations as well as contradictory court rulings, the "medical" leave component of the FMLA has become increasingly complex to administer. The expansive regulatory definition and varying interpretations of what constitutes a "serious health condition" make administering leave far too complicated and subject to misinterpretation and inconsistent applications.

The cumulative impact of the ever-changing regulatory definitions at MHA hospitals is that it diverts critical resources away from patient care and increases health care costs due to administrative burdens. I would like to draw your attention to **Chart A: "FMLA Flowchart"** (attached) which illustrates the complexity of the FMLA compliance process. FMLA compliance problems have interjected significant legal uncertainties into organizations' decision-making processes. For example, the inability to address attendance in the context of the FMLA legal morass has had a chilling effect on the expansion of paid leave policies. It would be

wonderful if all private sector employers voluntarily expand paid leave policies for their workers. However, in order to facilitate the expansion of paid leave policies, the current problems with the FMLA's regulations and interpretations must be addressed first, because they serve as a disincentive for companies to offer or expand paid leave benefits.

B. The FMLA Has Received More Nominations for Improvement than any Other Federal Regulation

In 2002, the Office of Management and Budget (OMB) asked the public to nominate federal regulations that should be improved. Of all government regulations, the FMLA regulations (*29 CFR part 825, 1/6/95)* received the highest number of nominations for improvement. In fact, more than a thousand comments were received urging OMB to implement FMLA corrections so the regulations could be applied more effectively. Both SHRM and the FMLA Technical Corrections Coalition submitted extensive comments nominating the FMLA regulatory review and revision.

Again, this year, in response to the OMB's specific request for "public nominations of promising regulatory reforms," SHRM and the FMLA Technical Corrections Coalition reaffirmed the need for FMLA reform. **We now hope that technical corrections will be made to the FMLA to address compliance and recordkeeping problems so that the law can be enforced more consistently and more effectively and so that it will better protect the employees Congress intended to assist when the FMLA was enacted.**

C. An FMLA Litigation Explosion has Resulted from Misinterpretations

In a survey by Spencer Fane Britt & Browne LLP, 68 federal lawsuits **challenging the validity** of the DOL's FMLA regulations have been filed since the FMLA was enacted.[1] The Federal courts are holding that various DOL regulations are invalid. The United States Supreme Court struck down a portion of the existing DOL regulations in the first FMLA case before it. (*Ragsdale v. Wolverine Worldwide, Inc.*, No. 00-6029, Mar. 19, 2002). Although the Court focused on one particular section of the DOL regulation, there are a number of other sections that impose "across the board" penalties that will not meet the Court's standard. Consequently, other FMLA regulations that include penalty provisions are now in question, will probably not withstand judicial scrutiny, and will likely be held invalid by the courts unless the DOL amends the regulations.

In light of the historic *Ragsdale v. Wolverine Worldwide, Inc.* decision and the fact that many other sections of the FMLA regulations are similarly inconsistent with Congressional intent, an increasing number of lawsuits challenging FMLA regulations are expected. Without

[1] Spencer Fane Britt & Browne LLP, August 2004 *Survey of Court Decisions Reported by Westlaw® Involving Challenges to the Validity of the FMLA Regulations.*

modification, continued adherence to these interpretations likely will result in unnecessary litigation that will cost all parties (employees, employers, unions and the courts) additional time, effort, and resources. This would be avoidable if the regulations could be corrected to properly reflect original Congressional intent.

D. Problems are Reflected in National Surveys

The SHRM® 2003 FMLA Survey found that organizations clearly want to follow and support the spirit and intent of the FMLA, and in many cases offer protections beyond the law[2], but appear to find obstacles in expanding leave options. As a result, human resources professionals are calling for more clarification and education on such issues as overall compliance, managing intermittent use of leave, determining serious health condition coverage, and communicating with care providers and physicians. A review and modification of FMLA recordkeeping and notification requirements is necessary.

Unfortunately, the greatest cost of the FMLA interpretive problems is to employees themselves. Two DOL studies, as well as the SHRM® 2000 and 2003® FMLA Surveys, have confirmed that the most prevalent method used to cover work when employees are out on FMLA leave is to assign the work temporarily to other onsite employees. With the FMLA interpretations requiring little or no notice, employers have had to require unscheduled overtime in order to cover absent employees, which is frequently unwelcome. According to the 2004 Commerce Clearing House Unscheduled Absences Survey, unscheduled absences are now at a five-year high (2.4 percent in 2004, up from 1.9 percent in 2003)[4]. Work coverage for questionable unscheduled absences has been especially challenging in the health care industries and is particularly difficult for smaller employers.

Compliance challenges with the FMLA are not a new phenomenon. Even a survey conducted by the prior Administration's DOL confirmed FMLA implementation problems. The DOL report found that the share of covered establishments reporting that it was somewhat easy or very easy to comply with the FMLA declined 21.5% from 1995 to 2000.[5]

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[2]The SHRM® 2003 FMLA Survey found that 59% of HR professionals surveyed report that their organization offers job protected leave beyond the FMLA and 63% of HR professionals surveyed report that they make exceptions to the FMLA requirements to offer more flexibility to employees.
NEED APPROPRIATE SURVEY CITE. (59% of HR professionals surveyed report that their organization offers job protected leave beyond the FMLA and 63% of HR professionals surveyed report that they make exceptions to the FMLA requirements to offer more flexibility to employees.)
[4] 2004 Commerce Clearing House Unscheduled Absences Survey, Chicago, IL, November 2004.
[5] Balancing the Needs of Families and Employers Family and Medical Leave Surveys, U.S. Department of Labor, 2000 Update, released January 2001.

II. Specific FMLA Interpretation and Compliance Problems

A. Serious Health Condition Interpretations and Non-Regulatory Guidance Have Been Problematic

In enacting the FMLA, Congress stated that the term "serious health condition" is not intended to cover short-term conditions for which treatment and recovery are very brief, recognizing that "it is expected that such conditions will fall within the most modest sick leave policies."[6] The DOL regulations as originally developed by President Clinton's administration do not follow Congress' intent. Instead the regulation for "serious health condition" is expansive and defines the term as "including, among other things, any absence of more than three (3) days in which the employee sees any health care provider and receives any type of continuing treatment (including a second doctor visit, or a prescription, or a referral to a physical therapist)." Essentially, the broad definition mandates FMLA leave in situations where an employee sees a health care provider once, receives a prescription drug, and is instructed to call the health care provider back if the symptoms do not improve. That was not the intended purpose of Congress when the FMLA became law. The regulations also define as a "serious health condition" any absence for a chronic health problem, such as arthritis, asthma, or diabetes, even if the employee does not see a doctor for that absence and is absent for fewer than three days.

Most of the medical leave taken under the FMLA has been for employees' own illnesses, most of which were previously covered under sick leave and/or paid time off policies. Clearly, this goes against Congress' intent, but the DOL regulations as originally developed offer little help to determine whether these types of illnesses are covered by the FMLA. It does not help that the DOL's opinion letters issued by President Clinton's administration have been inconsistent and somewhat vague, leaving employers and workers guessing what the DOL and the courts will deem to be "serious." The following excerpts from DOL opinion letters highlight the difficulty human resource professional's face in complying with the Act:

- April 7, 1995 DOL opinion letter No. 57 states that "The fact that an employee is incapacitated for more than three days, has been treated by a health care provider on at least one occasion which has resulted in a regimen of continuing treatment prescribed by the health care provider does not convert minor illnesses such as the common cold into serious health conditions in the ordinary case (absent complications)."

- December 12, 1996 DOL opinion letter No. 86 states that letter No. 57 "expresses an incorrect view," that, in fact, with respect to "the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc.," if any of these conditions met the regulatory criteria

[6] H.R. REP. NO. 103-8, at p. 40 (1993).

> for a serious health condition, e.g., an incapacity of more than three consecutive calendar days that also involves qualifying treatment (continuing treatment by a health care provider), "then the absence would be protected by the FMLA. For example, if an individual with the flu is incapacitated for more than three consecutive calendar days and receives continuing treatment, e.g., a visit to a health care provider followed by a regimen of care such as prescription drugs like antibiotics, the individual has a qualifying 'serious health condition' for purposes of FMLA."

Inclusion of all these various absences in the definition of "serious health condition" has inadvertently changed the FMLA statute into a national sick leave policy—something that Congress specifically sought to avoid.[7] Confusion over the definition of "serious health condition" has a ripple effect on many other aspects of the FMLA's medical leave administration, for example, the use of intermittent leave and certification and verification issues.

When read with the other interpretations, the very expansive definition of "serious health condition" suggests that any time an employee has missed work for three (3) days and reports feeling ill, the employer (e.g., the manager) must inquire as to whether the employee's condition is one that would make them eligible for FMLA. As a result, employers must attempt to determine whether an employee who does not come to work for three (3) or more days is entitled to FMLA protection. More often than not, even minor ailments entitle an employee to FMLA coverage.

B. Intermittent Leave Tracking is Very Difficult

The issue of intermittent leave continues to be extremely difficult for human resources professionals. In fact, intermittent leave is identified most often by SHRM members as an extremely significant problem to administer. The SHRM® 2003 FMLA Survey found that human resource professionals believe that the DOL regulation is unreasonable and that a slight modification (e.g., allowing for no less than ½ day increments) would help them more effectively administer the Act.

Example:

In the healthcare industry, managing intermittent leave is particularly difficult. Given the expansive definition of "serious health condition" and the broad entitlement to intermittent leave, employers are put in a very difficult position when employees use intermittent leave. One hospital in Macomb County, Michigan said, "The costs associated with these absences are phenomenal. In health care, most all positions have to be replaced when a worker is absent.

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[7]The Family and Medical Leave Act of 1993, Public Law 103-3, Sec. 403 states: "ENCOURAGEMENT OF MORE GENEROUS LEAVE POLICIES. Nothing in this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act."

Those replacement hours are typically paid at time and one-half or double time. It also creates morale issues among staff."

Ailments such as migraine headaches, allergies, asthma, and back pain have all recently been the subject of intermittent certification in MHA hospitals. In these situations, employees must be allowed up to 480 hours off of work to tend to these conditions. More often than not, the leave time comes without any advance notice. It may come moments before a shift begins, during a shift or at the end of the day. The regulations prohibit employers from requiring an employee to provide a note once the employer has received an initial certification for an ongoing condition. For example, a certification for intermittent leave for migraine headaches may say, "employee may be absent intermittently, 3-4 times per month." As a result, employers must arrange to cover the employee's patient care responsibilities without advance notice in an effort not to adversely impact patients or the remaining valued employees. Additionally, none of the intermittent absences subject the employee to any coaching or counseling on absenteeism until after the expiration of the 480 hours, or 60 days. Even then, the employer's policy on unscheduled absenteeism would not be implicated until the unprotected absences have already reached an intolerable level.

Another hospital in West Michigan said, "The biggest problem with the FMLA by far is employee abuse of intermittent leave. Most people think of the FMLA as providing for blocks of leave after the birth of a child or to recuperate from a major illness or surgery. The FMLA does provide for this type of leave, but it also allows an employee to take leave in small increments or at unpredictable times. The most problematic is leave for "chronic conditions." Under the current regulatory scheme, an employee may obtain a physician's certification stating that the employee has a chronic, recurring condition – such as migraines or asthma – that may episodically flare up, and that the employee will need intermittent leave as a result. With that certification, the employer must provide the employee with intermittent leave whenever the condition flares up ... the employer is not allowed to require an employee to verify that the absences were indeed caused by the chronic condition."

An example from mid-Michigan: "*We currently have two employees who are approved for intermittent FMLA leave due to their own chronic health conditions. Both are either absent or tardy for 85% of their scheduled shifts. We have attempted to adjust their work schedules with a later start time, however the problem persists. It is very difficult for the department to cope with this rate. They need the employees to be working,* ***and the coworkers of these individuals feel they are taking advantage of the system.*** *We are preparing to request second opinion independent medical evaluations. It was well known that one employee attended a concert last Thursday night. The same employee then called in under intermittent FMLA leave for Friday's shift. We can request recertification, however for intermittent leave, the regulations state that an employee does not have to be treated by a physician for each FMLA-related absence."*

Intermittent leave is an important component of the FMLA; however, the expansive definition of serious health condition has changed the nature of most types of intermittent leave. Treatments such as chemotherapy, radiation, and kidney dialysis were the types of conditions contemplated by Congress, but are among the more infrequent uses of FMLA intermittent leave. It is much more common to have multiple employees in a single department or work unit certified for intermittent leave for conditions such as migraine headaches, back aches, allergies, etc. which Congress assumed would be covered under an employer's sick leave plan rather than the FMLA. The natures of these conditions make advance planning for staffing virtually impossible.

C. Medical Certification Needs to Be Clarified

The Certification of Health Care Provider form (WH-380) may be used to certify a serious health condition under the FMLA. However, due to the limits imposed by the FMLA regulations, the employer's health care provider cannot contact the employee's health care provider unless the employee grants the employer permission. Nor can the employer's health care provider obtain the usual documentary support for a disability determination. These limitations either lead the employer to deny FMLA coverage due to lack of sufficient certification or to grant FMLA coverage despite the lack of sufficient factual support just to avoid a dispute.

The SHRM® 2003 FMLA Survey found that:

- Over half of respondents said they have had to grant FMLA requests that were not legitimate due to the FMLA regulations and the interpretations of those regulations.
- Approximately one-third (35%) of respondents were aware of employee complaints in the last 12 months from co-workers because of another worker's questionable use of FMLA leave.

This rule also applies to the certification, or fitness for duty report, that the employer is entitled to upon the employee's return. The regulations state that "a health care provider employed by the employer may contact the employee's health care provider with the employee's permission, for purposes of clarification of the employee's fitness to return to work. No additional information may be acquired. The employer may not delay the employee's return to work while contact with the health care provider is being made."[8] For hospital employers whose employees are in safety sensitive positions, these restrictions on contacting the physician are not just burdensome, but can create unnecessary risk to patients and co-workers.

[8] 29 CFR 825.310

Examples:

A hospital in Oakland County, Michigan has reported that:

"The biggest issue we have here with the FMLA specifically pertains to medical documentation. We are still not clear as to when it's okay to ask for medical information. We are also unclear as to our rights when we receive incomplete medical documentation from the treating physician. We consistently see missing beginning and end dates to the leaves. We also see physicians approve leaves for an employee's lifetime. We see circumstances where the treating physician makes a diagnosis out of his or her scope of practice."

Another large health system operating on a multi-state basis reports 2-3 calls daily for legal assistance relating to FMLA questions:

"The calls come from every state in which we have hospitals or other facilities. There is no state-specific pattern to the calls. In others words, the calls do not come disproportionally from our Michigan hospitals. We also have problems arising from 29 CFR 285.111(2) defining health care provider by including quite a list of "any other persons" determined to be capable of providing health care services."

"In one recent situation we had an employee who returned with a fitness for duty evaluation from her physician following back surgery. The note indicated that she was fit to "return to full duty." This employee was a nurse in the Critical Care unit and had various lifting, pushing and pulling requirements that we questioned. The employee refused to allow us to talk with her physician. Under the FMLA regulations, this employee needed to be returned to her position without delay. Subsequent observations of this employee indicated that she was unable to perform her job duties and she was subsequently removed from patient care pending an evaluation."

Problems faced in determining the validity of an employee's FMLA certification need to be addressed by clarifying that sufficient certification under the FMLA must allow employers to verify FMLA leave and an employee's fitness to return in the same way they verify other employee absences for illness, while at the same time protecting employee privacy in the process. This will allow employers and health care providers to communicate so that health care providers understand the requirements of the employee's job, which will better enable them to determine whether the employee is fit to return to service. This clarification would simply give the employer more information upon which to determine whether or not a leave request qualifies under the FMLA.

D. Lack of Advance Notice is an Issue

As discussed previously, FMLA medical leave does not need to be taken continually, but may be taken in small increments (minutes) and without advance notice. According to the SHRM® 2003 FMLA Survey, less than half of employees (48%) schedule the leave in advance. Once an employee receives a certification for an ongoing condition, leave can be taken on numerous occasions intermittently for the same condition and without advance notice. The practical application of this aspect of the FMLA has presented staffing challenges in the workforce and raised employee morale issues, especially in instances when repeated instances of leaves are questionable.

Example:

A hospital in the Detroit area reports that:

Employers are not able to require advance notice of an employee's need for FMLA leave. Current FMLA regulations require an employee to give notice of the need for FMLA leave 'as soon as is practicable', which usually means within a day or two of learning of the need for leave. However, employees who are chronically tardy may wait one or two days to notify the employer that the tardiness resulted from an FMLA-covered reason. This is untenable for employers, who need to promptly monitor attendance and discipline. Also, in most cases, there is no reasonable excuse for the employee's delay in providing notice.

One recent example involved a health care employee with a significant history of absenteeism. This employee was told that she could not have any unexcused absences for the next 90 days. This employee knew that absences due to her asthma, which had previously been certified as intermittent leave, and absences due to her workers' compensation injury would not be counted against her. On the 89th day, the employee called up and said she wouldn't be at work because her back hurt and she would be going to the doctor. After confirming that the absence was not due to her asthma or workers' compensation leave, the employer counseled this employee. The employee saw her physician who gave her anti-inflammatory medication and told her to alternate between ice and heat when her back hurt. As a result, the employee was eligible for FMLA and the employer's counseling had violated the FMLA.

III. Specific Recommendations

SHRM, MHA, and the FMLA Technical Corrections Coalition unconditionally support the spirit of the FMLA. However all believe that at a minimum, the following areas should be addressed to provide for clearer and stronger enforcement of the Act and to allow employers and human resource professionals to more effectively implement the law:

Serious Health Condition Misinterpretations:

Restore the regulatory definition of "serious health condition" to reflect serious conditions as intended by Congress in the Act's legislative history and withdraw or replace the December 12, 1996 DOL opinion letter No. 86 with more appropriate guidance.

Intermittent Leave:

Minimize unnecessary tracking and administrative burdens while maintaining the original intent of the law, by permitting employers to require employees to take "intermittent" leave (FMLA leave taken in separate blocks of time due to a single qualifying reason) in four hour increments.

Certification:

Allow employers to verify FMLA leave in the same way that other employee absences for illness are verified. Employers should be permitted to communicate with health care providers to ensure that they understand the requirements of the employee's job and the employer's willingness to make alternative work (such as "light duty") available to the employee.

Request for Leave/Notification Requirements:

It would be helpful to shift the burden to the employee to request that leave be designated as FMLA leave. This would address concerns about employers having to pry into the employee's and the employee's family's private matters. Additionally it would help eliminate personal liability for employer supervisors who should not be expected to be experts in the vague and complex regulations. Certainly the current two (2) day notification period for designation of leave as FMLA leave should be expanded.

SHRM, MHA, and the FMLA Technical Corrections Coalition hope that these administrative processes can be clarified in the context of overall FMLA technical corrections so that the FMLA works as intended. SHRM and the Coalition strongly support legislation that has been introduced in Congress (S. 320 and H.R. 35) that would require FMLA implementing regulations to be reissued in accordance with the original Congressional instructions provided in the legislative history. However, the DOL could simply correct the regulatory misinterpretations, thus avoiding the need for corrective federal legislation.

Additional information and examples are contained in the May 2002 comments submitted to OMB by SHRM and the FMLA Technical Corrections Coalition.

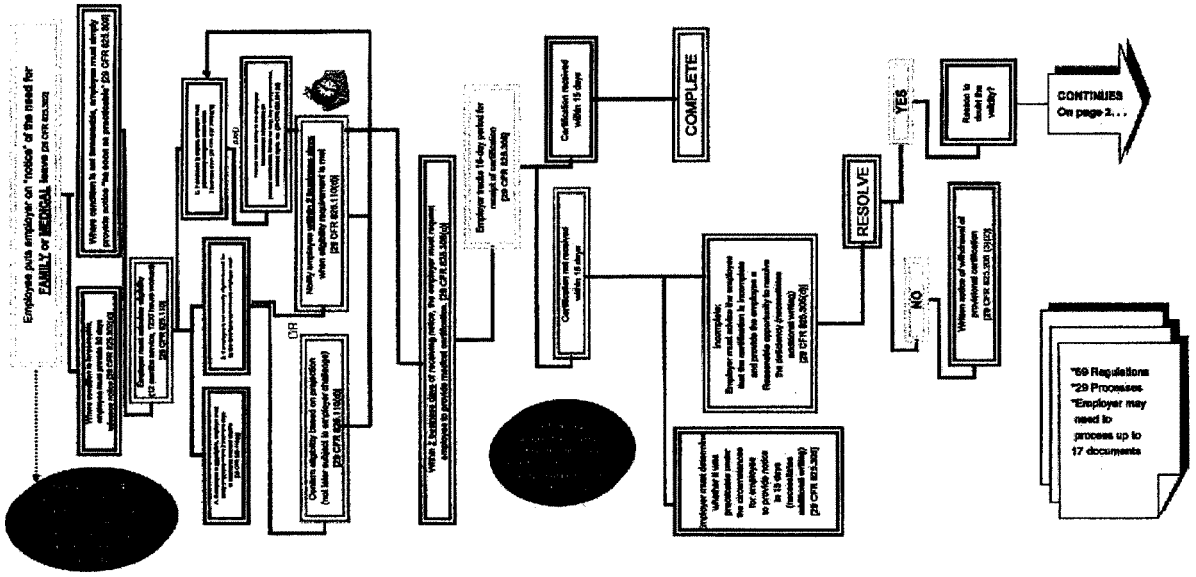
IV. Conclusion

The FMLA's implementing regulations and interpretations have left employers and human resources professionals struggling with the management of intermittent leave, communications with physicians and often difficult determinations as to whether a "serious health condition" exists within the meaning of the FMLA.

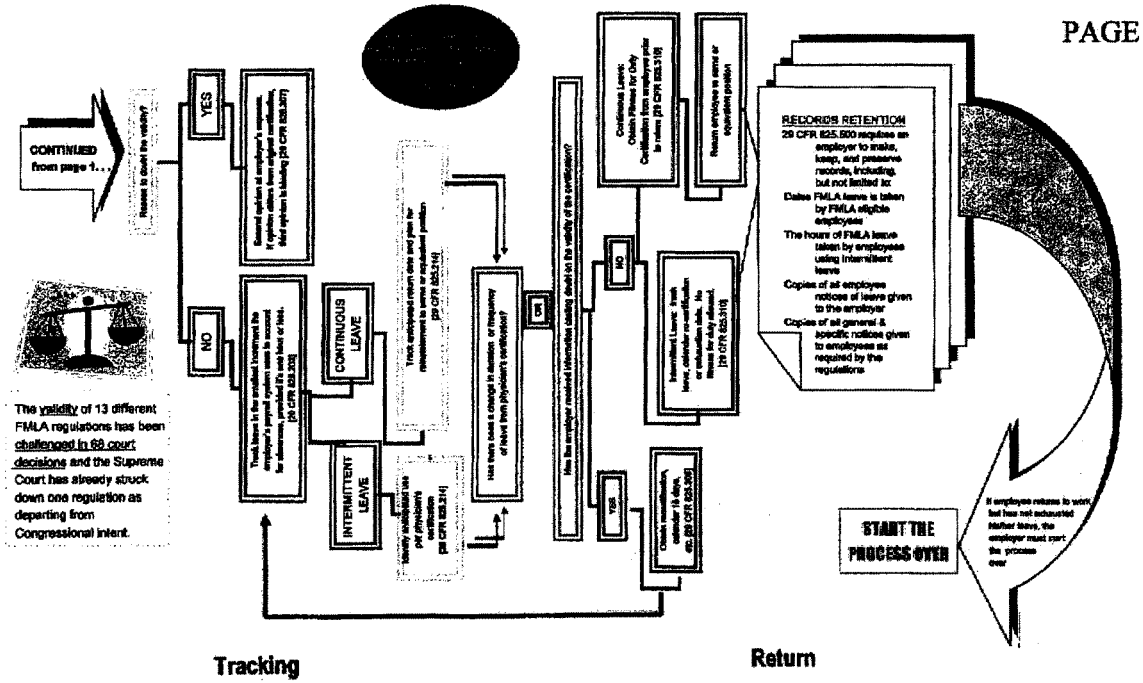
Difficulties associated with FMLA's medical leave have led to unnecessary compliance problems and an inconsistent application of the law. The FMLA is a good law that has become inadvertently too complex. The regulatory complexities are diverting important human resources and increasing the costs of providing health care and offering other services.

I hope that this review of the need for FMLA technical corrections is helpful. I would be happy to answer any questions the Subcommittee may have.

FMLA COMPLIANCE FLOW CHART



November 17, 2004
Testimony of Nancy McKeague
Society for Human Resource Management and
FMLA Technical Corrections Coalition



The validity of 13 different FMLA regulations has been challenged in 68 court decisions and the Supreme Court has already struck down one regulation as departing from Congressional intent.

November 17, 2004
Testimony of Nancy McGeegue
Society for Human Resource Management and
FMLA Technical Corrections Coalition

Mr. OSE. I thank the gentlelady. For the record, this is your chart over here?

Ms. MCKEAGUE. Yes, sir, it is.

Mr. OSE. All right.

Our next witness is Mr. James Gattuso, who is a research fellow in Regulatory Policy at the Heritage Foundation.

Sir, welcome. You are recognized for 2 minutes.

Mr. GATTUSO. Thank you, Mr. Chairman. I want to thank you for summarizing some of my points in your opening statements. I hope that saves me a few seconds on my statement.

Mr. OSE. I thank the gentleman for his comment.

Mr. GATTUSO. As you had mentioned in your opening statement, the Bush administration, I believe, has done a good job at slowing the train of excessive regulation. Many fewer new costly regulations are being adopted, saving taxpayers and consumers a lot over the past few years.

However, that train has not been reversed; unnecessary and excessive regulations are not being reviewed adequately and taken off the books when they need to be. Some numbers on that: OIRA has already released numbers looking at the totals on cost-benefit analyses by the agencies on the cost of new regulations averaging, during the Bush administration, $1.5 billion per year, which is still a lot, but much less than the $5.7 billion or $8.5 billion per year under the two previous administrations. So, there is an improvement there.

My own study looking at major regulations, as reported in the GAO data base under the Congressional Review Act, shows that the Bush administration has been reporting approximately seven major pro-regulatory rules per year during its tenure, as opposed to 20 new pro-regulatory major rules under the Clinton administration. That is a significant difference.

However, as I say, the train has not been reversed. It is still true that, under both administrations, the number of deregulatory actions has only been about a quarter of the total number of rulemakings. In other words, the number of actions increasing regulation outnumbered the numbers of actions decreasing regulation by a factor of 3 to 1, and that is relatively constant during both the Bush and the Clinton administrations. So, I believe there is clearly work to be done to examine and decrease, where appropriate unnecessary regulation.

This committee has already reported legislation in that regard which I think will be helpful to improve regulatory accounting. I think that is an important step.

There are a number of other additional steps that should be considered. Just very quickly, those include: strengthening OIRA. I believe OIRA needs to be the cop on the beat to provide independent analysis and review of new regulations. Right now OIRA staffers are outnumbered 4300 to 1 by staffers at regulatory agencies. I think they need to have a stronger presence.

Congress needs to have a stronger presence. Congress should establish its own regulatory analysis office, similar to the existing Congressional Budget Office, to provide an independent review of regulations.

There should be a regulatory review office in each regulatory agency charged with reviewing, analyzing, and considering the costs and benefits of new rules so that analysis and that consideration begins in the agencies, not when it leaves the agencies. Similarly, there should be a designated regulatory czar, an individual in each agency with personal responsibility for ensuring that regulatory review and analysis remains a focus in each agency.

And, last, I think independent agencies should be required to submit cost-benefit analysis to OIRA. I believe ideally they should be subject to the full regulatory process. If that is not possible, at the very least, those analyses should be submitted to OIRA for nonbinding review. Thank you, Mr. Chairman.

Mr. OSE. I thank the gentleman.

Our next witness is Ms. Catherine O'Neill, who is an associate professor at Seattle University School of Law and a member scholar for the Center for Progressive Regulation.

Ma'am, welcome to our subcommittee. You are recognized for 2 minutes.

Ms. O'NEILL. Thank you, Mr. Chairman and members of the committee.

EPA's mercury rule shows an agency that has wandered far afield from a commitment to rational regulation. I would like to focus on three points.

First, there is no question that the science shows that mercury poses a grave threat to the health of children and other Americans. Second, EPA's rule fails to address mercury contamination nationally, and actually increases it locally. EPA's preferred option, a cap-and-trade approach, is weak. It delays a final cap on emissions until 2018, and, even 2 years later, in 2020, EPA's own models, on the most generous assumptions, show that emissions will be reduced, at most, 61 percent.

Further, the emissions picture would be even worse in some regions. EPA's cap-and-trade approach would permit 11 times more mercury in the upper Great Lakes States in 2010 than a properly conducted MACT approach. This is illustrated by the chart on the right and a comparison between the blue line, showing cap-and-trade, and the green line, showing the much more substantial reductions under a properly conducted MACT for the upper Great Lakes States. Even in 2020 we see that cap-and-trade would permit six times more mercury in this region than would a properly conducted MACT approach.

Of particular concern, EPA's cap-and-trade approach would likely beget hot spots. Hot spots are localized areas of concentrated mercury emissions and, ultimately, exposure. EPA's own models reveal significant hot spots in the upper Great Lakes States of Michigan, Minnesota, and Wisconsin. In these three States in this region, mercury would decline only 27 percent by the year 2020, and locally emissions would actually increase at 20 out of the 44 facilities located in these three States. These hot spots would coincide with a Great Lakes population, where even the average person is more likely to eat fish caught from local waters.

Third, EPA's rule is not only weak, it is unjust. Who is left unprotected? EPA itself acknowledges that anyone who regularly eats fish may not be protected by its rule. This includes recreational

fishers on lakes and rivers across the Nation, it includes low-income families in our urban areas who depend on fish for food, and it includes tribal fishers in the Great Lakes and elsewhere exercising treaty rights.

Notably, EPA concedes that those left unprotected by its rule are disproportionately tribes, communities of color, and low-income communities. Having said this in the Federal Register, however, EPA does nothing to address the injustice. Instead, EPA instructs these groups, and particularly children and women of childbearing age, to reduce or eliminate fish from their diets in order to avoid the risks of mercury. Thus, rather than take real steps to reduce the risks at the source, EPA shifts the burden to those who are exposed and asks them to protect themselves. This is not EPA "on watch," but EPA asking those at risk to protect themselves.

This shift introduces its own adverse health effects as fish, a staple food, is placed virtually off limits. Consider the extraordinary burden on a young girl who must avoid fish throughout her childhood until age 20, and then throughout her childbearing years to age 49.

In sum, EPA ought to produce regulations that are scientifically defensible, legally supportable, and just. The proposed mercury rule fails on all three counts.

Thank you.

[The prepared statement of Ms. O'Neill follows:]

Testimony of

Catherine A. O'Neill
Associate Professor, Seattle University School of Law
and
Member Scholar, Center for Progressive Regulation

before the

Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs

of the

House Committee on Government Reform

November 17, 2004

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Mr. Chairman and members of the Committee, thank you for the opportunity to appear before you today to testify on behalf of the Center for Progressive Regulation (CPR) regarding the Environmental Protection Agency's (EPA) proposed mercury rule for coal-fired utilities. I have submitted several attachments to my written testimony, and I request that they be made part of the record.

CPR is an organization of academics specializing in the legal, economic, and scientific issues surrounding federal regulation. CPR supports regulatory action to protect health, safety, and the environment and seeks to inform policy debates on these issues through research and commentary.

EPA's mercury rule is the work of an agency that has wandered far afield from a commitment to rational regulation. EPA's rule would offer a generous break to coal-fired utilities. But it would imperil the health of a generation of children and others in the United States. It would allow contamination of a staple food and a resource on which many depend for their livelihood.

EPA's rule has generated a raft of criticism from states, cities, tribes, industry, and members of the public. This public outcry is not surprising, given the procedural irregularities that have come to light, given the creative interpretations of the Clean Air Act on which EPA's proposal rests, and given, most importantly, the threat to public health posed by mercury contamination of the human food chain.

CPR would like to focus today on three concerns with the EPA's proposed mercury rule.

There Is No Question That Mercury Poses a Grave Threat to Americans' Health

Mercury is a potent neurotoxin. Exposure to even small amounts of methylmercury *in utero* or during childhood can lead to permanent neurological damage. Yet one in six women of childbearing age now has blood mercury levels that pose a risk to the developing fetus. This number nearly doubles when one considers Native American and Asian-American women – fully 31.5% of these women have blood mercury levels above the limit established by EPA. The most recent data have revealed other risks from methylmercury as well, including adverse effects on the cardiovascular systems of adult men. A report released last month by the University of North Carolina found that an extremely high proportion of the general population – one in five – has mercury in their systems above EPA's limit. In short, there should be no question that mercury poses a grave threat to the health of children and others in the United States. The National Academy of Sciences reached just this conclusion in 2000, and the scientific data gathered since have continued to buttress this conclusion.

Americans are exposed to mercury when they eat fish from contaminated waters. Vast expanses of our nation's waters are currently contaminated to the level that they are under fish consumption advisory for mercury. As of 2003, 45 states and several tribes

have issued advisories placing fish caught in some or all of their waters "off limits" for human consumption. In addition, 100% of Lakes Superior, Michigan, Huron and Erie are under mercury advisory. This is an extraordinary indictment.

The EPA's response to this widespread contamination has been guided less by scientific rationality than by political expediency. Thus, while EPA has required some industries to take real steps to reduce their mercury emissions – municipal waste combustors, for example, have reduced mercury emissions by 90% – EPA has asked little of the utility industry. Quite the contrary, EPA has gone to extraordinary – and often legally questionable – lengths to delay and diminish reductions required by the Clean Air Act. Yet coal-fired utilities dominate anthropogenic mercury emissions in the United States. And, according to EPA, coal-fired utilities are likely the source of some 29% of the mercury deposited to U.S. waters; their contribution to more localized deposition is likely even higher in many places.

EPA's Rule Perpetuates Mercury Contamination Nationally and *Exacerbates* It Locally

The EPA has proposed two alternative approaches, neither of which would require coal-fired utilities to do much to reduce their mercury emissions until well into the next decade. Its first offering is a "MACT" or "maximum achievable control technology" standard. Its second – and preferred – option is a cap-and-trade approach.

A MACT standard is the end result of the ordinary process for regulating air toxics under section 112 of the Clean Air Act. MACT standards typically require emissions reductions on the order of 90% in three years. Yet the MACT standard that EPA fashioned here for coal-fired utilities is far off that mark – EPA would settle for only 29% reductions by 2008. EPA arrived at this unambitious figure using methods, moreover, that are insupportable and unprecedented. Indeed, one is left to wonder whether EPA produced such an indefensible MACT standard chiefly to portray the cap-and-trade approach favorably by comparison.

EPA's cap-and-trade approach, however, is itself legally suspect and unfathomably weak. It puts a cap on mercury emissions in two phases, with the final cap to be delayed until 2018. Even two years after this date, in 2020, EPA's own models show that emissions would only be reduced by 61% (under the most generous set of assumptions). A 61% reduction at the end of the next decade is a far cry from a 90% reduction in a few years. Further, my analysis shows that the emissions picture would be even grimmer in some regions: EPA's cap-and-trade approach would permit eleven times more mercury emissions in the upper Great Lakes states in 2010 than would a properly conducted MACT approach; even in 2020, cap-and-trade would permit six times more mercury in this region than would MACT. The calculations supporting these projections are set forth in an article that will appear in the December issue of the *Environmental Law Reporter*, Attachment A to this testimony.

Of particular concern, my analysis shows that EPA's cap-and-trade approach would likely perpetuate or exacerbate "hot spots." Hot spots are localized areas of concentrated mercury emissions or deposition and, ultimately, exposure. Hot spots have always been the leading public health concern with cap-and-trade programs that allow trading of toxics. Perhaps sensitive to this concern, EPA conducted modeling for mercury that allows us to predict the outcome of trading before committing to the cap-and-trade approach. Importantly, this allows us to identify the winners and losers in the hot spot lottery. By way of illustration, I analyzed EPA's data for the upper Great Lakes states of Michigan, Minnesota and Wisconsin, and found a likelihood of significant hot spots here under cap-and-trade. Regionally, mercury emissions would decline only 27% under cap-and-trade. Locally, emissions would actually *increase* at 20 out of the 44 utilities – including several of the very largest sources in these three states. These hot spots would coincide with a Great Lakes region where even the general population is more inclined to catch and eat fish from local waters, and where other groups, for example the various Ojibwe and other tribes, are highly dependent on fish. Although EPA acknowledges the potential for hot spots in the preamble to the rule, it claims that it "does not expect and local or regional hot spots." EPA, however, does not appear to have tested this claim empirically.

EPA's Rule Is Not Only Weak but Unjust

EPA's rule utterly fails to protect a large swath of the U.S. population. EPA points out that someone eating only modest amounts of fish from scattered waters will be adequately protected by its rule. Who is left unprotected? EPA itself acknowledges that *anyone* who *regularly* eats fish may not be protected by its rule. This vulnerable population includes recreational fishers on lakes and rivers across the nation; low-income families in urban areas who depend on fish for food; tribal members in the Great Lakes and elsewhere exercising their treaty rights. This vulnerable population also includes anyone eating fish in line with the American Heart Association's recommendation of two fish meals per week.

Notably, those left unprotected by EPA's rule are disproportionately Native peoples, Asian-American and Pacific Islanders, other communities of color, and low-income communities that depend on fish. Amazingly, EPA admits this in the preamble to the rule. Having identified those affected, however, EPA does nothing to address the injustice that results.

Instead, EPA instructs these groups – and particularly children and women of childbearing age – to reduce or eliminate fish from their diets in order to "avoid" the risks of mercury contamination. Thus, rather than take steps to reduce meaningfully the sources of these risks, EPA shifts the burden to those who are exposed and asks them to protect themselves. Among other things, this approach introduces its own adverse health effects, as fish – an excellent source of protein and other nutrients – are placed virtually off limits. Consider the extraordinary burden on a young girl, who must avoid fish throughout her childhood until age 20 and then throughout her childbearing years until age 49 – EPA's rule would place this onus on her for over half her life. EPA's embrace

of risk avoidance is also a particular affront to the fishing tribes of the Great Lakes and elsewhere, for whom fishing and consuming fish are also culturally important and treaty-guaranteed practices.

EPA's turn to risk avoidance here – where the science and law so compellingly call for risk reduction – may in fact be an example of a larger and troubling trend in this Administration. Rather than stay true to the goal that "sound science" undergird regulatory decisions, senior political appointees systematically ignored the science demonstrating adverse health effects of low-level mercury exposure, as well as modeling demonstrating unacceptable spikes in pollution at the local level. In sum, EPA ought to produce regulations that are scientifically defensible, legally supportable, and just. The proposed mercury rule fails on all three counts.

Thank you for the opportunity to appear before you today. I would be pleased to answer any questions you may have.

Mr. OSE. I thank the gentlelady for her testimony.

Our final witness on the second panel is Mr. John Paul, who is the supervisor of the Regional Air Pollution Control Agency of Dayton, OH, and vice president of the Association of Local Air Pollution Control Officials.

Sir, welcome to our subcommittee. You are recognized for 2 minutes.

Mr. PAUL. Thank you, Mr. Chairman.

I would like to comment today on the regulatory reform process and how the mercury rule is an example of how this could have gone right, but, in fact, how it went wrong.

You have heard a lot of comments and testimony with regard to what are the proper components of regulatory reform. You heard Mr. Sullivan say you need stakeholder involvement. You heard Mr. Johnson say you need an open and transparent process.

The utility MACT working group which I co-chaired fit exactly that formula for 18 months and over 14 meetings. We had all the stakeholders that were involved; we had State and local agencies; we had the utility industry; we had environmental groups; we even had equipment vendors. We had great discussions of what were the potential issues, what were the different stakeholder positions on those issues. However, that process broke down, as you heard, in April 2003, when we were scheduled to get together to discuss and see the modeling results of the stakeholder recommendations as promised by EPA. But, instead, we were informed by EPA that meeting was indefinitely postponed.

Now, unfortunately, even as the co-chair of the working group, I didn't find out that the working group had in fact been disbanded until I read about it in August in the Atlanta Journal Constitution paper. So this was a process that had all the ingredients of being good reform, but then broke down.

In the 18 months and the 14 meetings, never once was cap-and-trade mentioned. Not once. Never once did the administration come to us and say this is great that you are talking about the different options under Section 112, but our preferred approach is Section 111.

I feel that had this really been the preferred approach, and had they really wanted to use the working group that they had assembled, that this could have been done, that they could have come to us, they could have said devote two meetings to discussing this. As important as the modeling was, the discussion of the modeling was also important. You have heard that also. The assumptions that go into the model, those need to be challenged and discussed.

So I would just say that the mercury rule is an example of how reform could be done, but how it was not done. I would also add that this is not an isolated event with the administration. we have been treated the same way with New Source Review. They have an opportunity to talk to the stakeholders and to get all of the stakeholders together. State and locals implement the rules. We really feel we need to be talking with them about the rules so that we can avoid situations where EPA promulgates rules and then ends up in court over those rules.

Thank you very much.

[The prepared statement of Mr. Paul follows:]

James M. Eagen III
Chief Administrative Officer

Office of the
Chief Administrative Officer
U.S. House of Representatives
Washington, DC 20515–6860

February 10, 2005

Flexible Spending Accounts Informational Briefings To Be Held February 15 - 17

Dear Members, Committee Chairs, Resident Commissioner, Delegates, House Officers, Support Offices and Staff:

The Committee on House Administration has announced that Members and employees of the House will be able to participate in the Federal Flexible Spending Accounts (FSAFEDS) program beginning April 1, 2005. Informational briefings about the new Federal Flexible Spending Accounts program will be held from Tuesday, February 15 through Thursday, February 17. These briefings will be conducted by the CAO's Office of Human Resources and SHPS, the administrator for the FSAFEDS program.

The Open Enrollment Season for this new benefit begins on Tuesday, February 22, 2005, and will run through Friday, March 11, 2005. The Federal Flexible Spending Accounts program will become effective April 1, 2005.

The following is a schedule of the briefings:

Tuesday, February 15		**Wednesday, February 16**		**Thursday, February 17**	
9:00 – 10:30 am	1539 LHOB	9:00 – 10:30 am	1539 LHOB	9:00 – 10:30 am	224 FORD
11:00 am – 12:30 pm	1539 LHOB	11:00 am – 12:30 pm	1539 LHOB	11:00 am – 12:30 pm	224 FORD
1:00 – 2:30 pm	1539 LHOB	1:00 – 2:30 pm	1539 LHOB	1:30 – 3:00 pm	1539 LHOB
		3:00 – 4:30 pm	1539 LHOB	3:30 – 5:00 pm	1539 LHOB

Flexible Spending Accounts provide an excellent way for all House employees to reduce their costs for out-of-pocket health care costs and dependent care costs. A Health Care Flexible Spending Account pays for the uncovered or un-reimbursed portions of qualified medical costs. A Dependent Care Flexible Spending Accounts allows you to pay eligible expenses for dependent care with pre-tax dollars.

For additional information about this program, visit the FSAFEDS Web site at www.FSAFEDS.com or contact the Office of Human Resources at 202-225-2450.

Sincerely,

Jay Eagen
Chief Administrative Officer

STAPPA / ALAPCO

STATE AND TERRITORIAL AIR POLLUTION PROGRAM ADMINISTRATORS

ASSOCIATION OF LOCAL AIR POLLUTION CONTROL OFFICIALS

S. WILLIAM BECKER
EXECUTIVE DIRECTOR

STATEMENT OF JOHN A. PAUL
SUPERVISOR
REGIONAL AIR POLLUTION CONTROL AGENCY
DAYTON, OHIO
AND
VICE PRESIDENT
ASSOCIATION OF LOCAL AIR POLLUTION CONTROL OFFICIALS
BEFORE THE
HOUSE COMMITTEE ON GOVERNMENT REFORM
SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES
AND REGULATORY AFFAIRS
NOVEMBER 17, 2004

Mr. Chairman and Members of the Committee, my name is John Paul and I am the Supervisor of the Regional Air Pollution Control Agency – a six-county local agency centered in Dayton, Ohio. Thank you for inviting me to provide testimony on the Bush Administration's four-year record in regulatory reform. I offer this testimony from a number of perspectives – as the director of a local agency whose primary mission is to protect public health; as the vice president of STAPPA and ALAPCO – the two national associations of state and local air pollution control officials; and as the co-chair of EPA's Utility MACT Working Group.

State and local air agencies across this country take very seriously the finding of Congress as stated in the Clean Air Act, "that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or

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created at the source) and air pollution control at its source is the primary responsibility of States and local governments" (CAA Section 101 (a)(3)). We obviously have a major stake in the environmental reforms initiated by this administration, especially those governing New Source Review; Interstate Transport; Diesel Emissions; and the control of toxic emissions, primarily mercury, from coal-fired utility boilers. All of these measures have significant impacts on our ability to provide healthful air for our citizens to breathe and I could comment extensively on each. However, given available time, I will concentrate my testimony today on the control of emissions of mercury from coal-fired boilers.

In August of 2001, EPA established the Utility MACT Working Group under the Clean Air Act Advisory Committee to provide input to EPA regarding federal air emissions regulations that would maximize environmental and public health benefits in a flexible framework at a reasonable cost of compliance, within the constraints of the Clean Air Act. This working group consisted of representatives of industry, the environmental community, and state and local agencies. I co-chaired the working group, which met 14 times over a period of 18 months. I delivered the working group's report to the Clean Air Act Advisory Committee in October of 2002. As a part of our report we recommended that EPA analyze through mathematical modeling the mercury control levels recommended by the various stakeholders. EPA agreed to that recommendation and scheduled a working group meeting to review and discuss the modeling results. Unfortunately, in April of 2003, the working group was informed by EPA, via email, that the modeling was postponed indefinitely. Furthermore, the "indefinite postponement"

turned out to be permanent. EPA has never conducted the modeling recommended by the working group and we have never been afforded the opportunity to meet and discuss the issues further. Without further input from the working group EPA proposed its rules for controlling mercury emissions from coal-fired utility boilers on January 30, 2004.

In February, STAPPA and ALAPCO presented testimony at each of EPA's three simultaneous hearings on their proposed rules to control emissions of hazardous air pollutants from utilities. This morning, I would like to briefly summarize the seven major concerns we expressed at those hearings.

First, the proposed emission limits for mercury are extremely weak. EPA's proposal under Section 111 of the Clean Air Act calls for an interim emissions cap to be achieved by 2010 that, in fact, does not require *any* additional control of mercury beyond the co-benefits expected from other programs aimed at reducing emissions of sulfur dioxide and nitrogen oxide. EPA has indicated it expects this interim mercury cap to be set at 34 tons per year. Moreover, while EPA specifies a 15-ton final cap to be achieved in 2018, the agency acknowledges in its proposal that mercury emissions could reach 22 tons (or only a 54-percent reduction) in 2020, when banking and trading are utilized. We believe this does not adequately reflect what is technologically feasible and falls far short of what is needed to provide appropriate public health and environmental protection. Instead, STAPPA and ALAPCO recommend emission limits that would result in actual mercury emissions reductions between 85-90 percent.

Second, we are very concerned that the deadlines in the Section 111 proposal are extremely protracted. While the settlement agreement under which EPA is operating calls for the agency to issue final utility standards for hazardous air pollutants by March 2005, with compliance by 2008, EPA's proposal postpones final compliance until 2018 and, as mentioned, would allow compliance to be delayed even further, perhaps for many years, due to banking and trading. We believe this extraordinary delay in compliance is inappropriate and counter to the mandate of the Clean Air Act and the settlement agreement.

Third, STAPPA and ALAPCO are extremely concerned that EPA is proposing on a national basis to allow trading of mercury emissions between utilities. Not only do we question the legality of mercury trading, we are also very concerned that trading could lead to serious "hotspot" problems around the country. We recommend that EPA abandon this approach.

Fourth, by using Section 111 of the Clean Air Act to regulate mercury and nickel emissions from utilities, EPA has ignored other important statutory obligations under Section 112 of the Clean Air Act. For instance, EPA is disregarding the mandate to examine other hazardous air pollutants including, but not limited to, arsenic, chromium, cadmium, dioxins and hydrogen chloride. In addition, while Section 112 requires EPA to evaluate and address the risks that remain eight years after a MACT standard is issued, Section 111 circumvents those requirements and does not mandate a future evaluation of residual risk.

Fifth, STAPPA and ALAPCO strongly believe there is no justification for EPA to take such a huge legal risk by regulating mercury under Section 111 of the Clean Air Act when Congress clearly intended that mercury, like other hazardous air pollutants, be regulated under Section 112. Adoption of a Section 111 rule will undoubtedly be the subject of protracted legal battles, which will further delay the protection of public health and the environment.

Sixth, even EPA's proposal under Section 112 is flawed, particularly with respect to emission limits. The EPA proposal sets MACT levels that would result in national emissions of 34 tons per year, which is clearly not consistent with the legislative mandate for calculating MACT under Section 112. Astonishingly, these levels are even less stringent than the recommendations made by industry representatives during the EPA-sponsored utility MACT development stakeholder process.

Finally, we feel compelled to comment on the process EPA used to develop these proposed standards. STAPPA and ALAPCO representatives were involved in the formal, one-and-a-half year Federal Advisory Committee Act (FACA) stakeholder process that EPA sponsored to develop the utility MACT. As I mentioned earlier, I co-chaired that workgroup at EPA's request. The workgroup consisted of federal, state, local, industry and environmental group representatives, who thoroughly analyzed all issues related to the regulation of toxic air pollution from utilities. In its January 30th proposals, EPA completely disregards the stakeholder group's deliberations. For example, during the

stakeholder process, the group never considered the possibility of substituting Section 111 for Section 112. In addition, the FACA workgroup dismissed the possibility of trading mercury emissions between utilities. Furthermore, notwithstanding the recommendations of the FACA workgroup, EPA failed to analyze more stringent control options to reduce mercury emissions. It is unacceptable that EPA would abandon the efforts of the agency's FACA workgroup and propose a rule that represents such a marked departure from what the stakeholders considered and recommended.

What EPA Should Do

In light of the very serious public health threat posed by mercury and the tremendous shortcomings of EPA's proposal, the agency should abandon its preferred option under Section 111 of the Clean Air Act and revise its approach under Section 112 to conform with the statutory mandates for MACT. In particular, STAPPA and ALAPCO recommend that EPA promulgate a national mercury cap on the order of 5 to 7.5 tons. Further, EPA should also act promptly to conduct the modeling analyses the Utility MACT Working Group recommended, and reconvene that workgroup for discussions of the modeling parameters and results.

Conclusion

The control of emissions of mercury from coal-fired boilers has been an issue of concern for thirty years. The public expects EPA to adopt rules that are protective of its

health and welfare. It expects EPA to be EPA. So do state and local air pollution control agencies, and so should Congress. We join the public in desiring a utility MACT rule that is truly protective of public health and welfare. The critical opportunity is before us and it must not be sacrificed.

Once again, thank you for inviting me to present my views on this very important issue. I will be happy to answer any questions you might have.

Mr. OSE. I thank the gentleman for his testimony.

We are going to do 2-minute rounds here up on the panel.

Mr. Gattuso, you served in the Bush 41 administration in the Vice President's office, and your research that you have done at The Heritage Foundation indicates that little effort or progress—I am not clear which—has been spent focusing on rules that were in place prior to January 20, 2001. What steps do you recommend that the administration take regarding rules that were in existence prior to January 20, 2001? Who at the White House, for instance, could intervene here? Would OMB prompt letters be useful? What is your thinking on this?

Mr. GATTUSO. I think the answer is not really a mechanical one. There are lots of mechanisms that should be put in place and could help, but the answer really has to be one in terms of priority for the administration and for involvement and engagement within the agencies themselves. I think the efforts to reduce regulatory taxes, as it were, must be a priority of the administration and that priority must be communicated by the President himself. I think over the last year the President has made statements regarding regulatory reform much more prominently in his public discussions than he had in the past, so it is becoming a priority. That is a very good sign. A more active and engaged OIRA, more resources at OIRA also would be helpful.

Mr. OSE. If the burden placed by regulation since January 20, 2001 is X, whatever X is, what is the burden for rules that predate January 20, 2001? In other words, are we nibbling at the elephant or are we actually taking a bite out of the elephant? I am trying to figure out where we ought to be spending our time.

Mr. GATTUSO. Well, I don't have numbers of how much it has increased, but——

Mr. OSE. What is your sense?

Mr. GATTUSO. The number of new regulations that impose new burdens have outnumbered the rules that have decreased burdens by a factor of about 3 to 1. So there have been, I believe, if you look at major rules, several dozen major rules, so you can do the math on that.

Mr. OSE. I didn't state my question very well. We will come back to that.

Mr. Tierney.

Mr. TIERNEY. Mr. Paul, it seems to me that there were members of industry as part of the group that you were working with, am I right?

Mr. PAUL. Yes.

Mr. TIERNEY. Isn't it accurate that some of the recommendations that came out of that industry group were actually stricter or for stricter controls of mercury than the recommendations EPA ultimately came forward with?

Mr. PAUL. Yes. The recommendations from industry varied between 26 and 31 tons per year of emissions, what is actually in the MACT rule as 34 tons per year.

Mr. TIERNEY. What further work would your working group have done, if you hadn't been disbanded, unbeknownst to you?

Mr. PAUL. The biggest thing we would have done would have been to look at the modeling results from the working group rec-

ommendations. The good thing about that is you had the environmentalists at the table, you had the industry at the table, and they challenge each other back and forth. So there would have been a full venting of those modeling results and the assumptions that went into them. That is the biggest thing that we would have done.

Mr. TIERNEY. Thank you.

Ms. O'Neill, I look and see the EPA, they set four or five guiding principles for going forward with a rule on the coal-fired utilities. The first one was the final rule that concentrated on the need to protect children and pregnant women. In your estimation, have they come even close to doing that with the two proposals they made?

Ms. O'NEILL. I think that is perhaps the most troubling aspect of the EPA's rule. They cite this as one of their guiding principles, and yet it utterly fails children and women. This is troubling especially in the face of the National Academy of Sciences' finding. The National Academy of Sciences, as you know, at the direction of Congress, completed a study in 2000, and they found, "the risk to children of women who eat fish is likely to be sufficient to result in an increase in the number of children who have to struggle to keep up in school and who may require remedial classes or special education."

In the face of this finding, nonetheless, EPA hopes to delay real regulation of mercury for an entire decade, again, viewed most generously. This threatens an entire generation of children. Studies show that currently up to 76 percent of the fish samples in the United States are contaminated at levels that are not safe for a young child. To the extent that EPA asks children and women to curtail their fish consumption, it looks to deprive them of a nutritious, healthy source of food and other nutrients. And given the widely heralded benefits of eating fish, I think this move by EPA is unconscionable. Again, it is contrary to the National Academy of Sciences' direct recommendation not to address the problem by means of fish consumption advisory, but to actually reduce methylmercury in fish.

Mr. TIERNEY. Thank you.

Mr. OSE. Gentleman from Virginia.

Mr. SCHROCK. Thank you, Mr. Chairman.

Mr. Kovacs and Mr. McCracken, I am going to ask you the same question, one of the same questions I asked of Dr. Graham and Mr. Sullivan. How many of the 2001 OMB deemed high priority and 2002 agency accepted nominations benefited small businesses? And, can you quantify any results to date in paperwork burden reduction hours or regulatory burden financial relief?

Mr. KOVACS. That would be a question that, if it was going to be addressed at all, I think that the only people with the analysis would be SBA's Office of Advocacy, but I can give you some general numbers on the regulatory structure.

Regulations cost the American public about $850 billion annually, which is equal to about the entire non-Defense budget of the United States. When you get into specific questions such as, let us say, health and safety regulations, the burden is about 40 percent more on small business than it is on large business. In other words, if you look at per employee lost, it is about $6,000 for a small busi-

ness; whereas it is about $4,000 for a large business. That is too big of a number, but that is about what we have.

Mr. SCHROCK. Mr. McCracken.

Mr. MCCRACKEN. I don't have a lot to add to that, in all candor. It is very hard to come up with a specific number. Almost any regulation affects small business. What is operative, of course, is the degree to which it affects how many businesses. But, I think probably few people would dispute probably the single-most significant regulation that has been reformed that has benefited small business directly has been the overtime standards.

Mr. SCHROCK. Thank you, Mr. Chairman.

Mr. OSE. Gentleman from Maryland, 2 minutes.

Mr. VAN HOLLEN. Thank you, Mr. Chairman.

Ms. O'Neill, Dr. Graham, in response to a question I asked, said that their modeling had showed that the cap-and-trade approach would actually get you more significant reductions in mercury than other options they looked at. One of the big questions here is compared to what. Could you expound a little bit more on your findings with respect to cap-and-trade versus MACT?

Ms. O'NEILL. I think there are two parts to the response to that question. In the first, if you look at a properly constructed MACT—as you know, the administration has proposed a MACT approach that is quite lenient; it requires only 29 percent reductions, as opposed to the typical 90 percent reduction. If you compare the cap-and-trade approach to MACT as proposed by the administration, then cap-and-trade fares decently. However, if you compare cap-and-trade to a legally supportable MACT standard, then I think you will find that cap-and-trade actually fares quite poorly by comparison: you have a delay in reductions. You have actually very unambitious reductions. It generally imposes weak caps and delays them for a very long time.

The second point of comparison is the hot spots problem. With MACT you have a facility-by-facility approach, facility-by-facility attention to contamination and a guarantee of, ideally or typically, 90 percent control, or on that order, at the plant. With cap-and-trade, as a result of trading, you may have sources that in fact increase their emissions. As my analysis of EPA's own models show, this is in fact what you have at, as I mentioned, 20 out of 44 facilities in the upper Great Lakes. This is a very large number, an astounding number, and you have very modest reductions in this region, only 29 percent. So you have real problems with local hot spots under cap-and-trade that simply don't exist under, again, a properly conducted MACT.

Mr. VAN HOLLEN. Thank you.

Mr. OSE. Second round, 1 minute each.

Mr. Kovacs, in terms of regulatory burden existing prior to January 20, 2001, as compared to OIRA's focus on rules since January 20, 2001, where is the greatest burden, is it rules that existed before or rules that have been adopted since?

Mr. KOVACS. This time I am going to slow down and take my 2 minutes. I don't think anyone really knows. If you look at the Section 610 reviews, the agencies are planning to review about 42 rules out of about 109,000. A lot of the historic rules have become actually business standards, so if you wiped out the entire regu-

latory process, you would actually wipe out some standards. This is why the 610 process is so important, is that the agencies need to sit there and really focus on what are the rules that everyone can live with and what are the rules that are causing problems, and are out of joint.

It is just like today I am hearing a lot about mercury and NSR, and I don't want to jump into that side of the debate because it is really two separate hearings, but the mercury rule has been around for a long time. So has NSR. Twenty, 30 years into the rulemaking process. The mercury rule finally came about as a result of the *Bush* v. *Gore* decision. A day later Carol Browner then decided to make the finding that a hazardous air pollutant. That was pursuant to a consent mercury is decree. So, we have regulation by litigation in there, which is a huge problem. The agencies can't tell you where consent decrees are, but they are spawning regulations.

So, what you need to do is go back to a systematic process, and I think that will give you your answers.

Mr. OSE. Mr. Tierney.

Mr. TIERNEY. I think it is stunning, to stay on this mercury thing a little bit, that under both of the EPA's proposals, they would not require anything to be done beyond what has to be done under separate EPA rulemaking to control sulfur dioxide and nitrogen oxides before 2018. So essentially its idea on mercury is do nothing for that period of time.

Now, one of the excuses they give for that is that EPS claims that there is no commercially available technology to control mercury emissions. We have indications that is inaccurate and pretty much a red herring.

Mr. Chairman, I would like to ask unanimous consent to put in testimony that was given before the Senate by the Institute of Clean Air Companies, which is a trade association for pollution control manufacturers.

Mr. OSE. Without objection.

[The information referred to follows:]

INSTITUTE OF CLEAN AIR COMPANIES

Senate Democratic Policy Committee

Hearing on EPA Proposal to Regulate Mercury Emissions from Power Plants

Testimony of the Institute of Clean Air Companies (ICAC)
Presented by David C. Foerter, Executive Director

Friday, July 9, 2004

Good morning. I'm Dave Foerter, Executive Director for the Institute of Clean Air Companies ("ICAC" or "the Institute").

The Institute is the nonprofit, national association of companies that manufacture, supply, and service air pollution control and monitoring systems for a broad range of air pollutants, including mercury from power plant and industrial sources. The Institute represents a diverse group of approximately eighty companies dedicated to air pollution control. As such, the Institute represents the full range of competing technologies, rather than any single technology. In the few minutes I have here this morning, I'll begin with the "bottom-line."

Our industry believes that a 50 to 70 percent reduction from current mercury emissions of 48 tons per year is feasible by 2008 to 2010. As a result, over the next 4 to 6 years, it is reasonable and cost-effective to achieve a utility mercury budget of 14 to 24 tons. The air pollution control industry has both the technology and the resources to exceed the magnitude of NO_x, SO_2, $PM_{2.5}$, and mercury reductions, and in a shorter time frame than proposed by the U.S. Environmental Protection Agency (EPA).

It is important to remind ourselves that air pollution control technology markets have historically worked well. Studies show that the certainty of regulatory drivers spurs technical performance and cost improvement. And total costs fall dramatically as control technology moves from R&D to full-scale commercialization. It is reasonable to assume that even with the tremendous technological achievements already made, the traditional successful operation of the air pollution control market will also apply to the development and enhancement of mercury emission controls. The key to well-functioning markets is regulatory certainty. If the goal is technological innovation, then it is important to enact a clear, certain, performance-based mandate. While the Institute advocates flexibility in meeting control requirements, that compliance flexibility should be considered only after setting emissions budgets that adequately protect public health and make use of the capabilities of control technology.

One technology in particular, activated carbon injection, has been used for at least a decade in the waste to energy industry to achieve mercury reductions of at least 80 to 90 percent. This technology has been successfully transferred to the power sector for

commercial use. Activated carbon injection provides a relatively low cost solution, with very little capital investment and relatively low operating costs. In addition, control performance can be increased and operating cost decreased, if activated carbon injection is coupled with fabric filter particulate control devices. In an intensive effort over the last five years, this technology has been rigorously demonstrated through the Department of Energy's (DOE) Clean Coal Power Initiative at full scale on electric power plants, with additional demonstrations to be completed by 2005. The demonstrations identified and addressed power sector mercury control issues, but, more importantly, dramatically removed potential barriers and enhanced the technology. R&D has already matured to full-scale demonstrations and are applicable to a wide range of coal types and existing equipment configurations. Many of these project teams include utility end-users as well as technology developers, which indicates the wide-ranging, cooperative effort underway. The success of this work and other applications, have now all but obscured the 1999 Information Collection Request (ICR) data that was used by EPA to propose the MACT floor. EPA's data shows that existing controls not intended to reduce mercury, had a side-benefit of removing other pollutants, including mercury. In fact, reliance on the 1999 ICR data promotes switching between coal types to achieve compliance, while the more current data shows economical compliance can be achieved without coal switching.

As we have informed EPA and others, a growing number of companies offer commercially available mercury control technologies for sale to the electric power sector. In fact, there are an increasing number of electric utilities actively procuring these technologies and services. Several other technologies are in various stages of development and commercial availability, ready to compete as compliance options under the Utility MACT program. We believe that Congress or EPA does not have to pick technology winners and losers; the marketplace is adept at doing so. The course of technology development is too unpredictable to say what the best approach will be and experience strongly indicates that there will not be one universal approach.

The rapid development of mercury control technologies make it feasible for the electric power sector to cost effectively reduce significantly more mercury emissions than called for under the proposed Utility MACT program. Assuming the implementation of a MACT program requiring control at each plant, it is estimated that a 50 percent reduction from the current emission level of 48 tons of mercury down to 24 tons is achievable. To achieve greater levels of control, there will be performance differences at each site due to differences in coal, equipment, and flue gas characteristics. At some power plants mercury control technology can reduce mercury emissions by 90 percent or greater. Therefore, if a mercury control program included compliance flexibility it is expected that a 70 percent reduction in emissions (down to 14 tons of emissions) is achievable.

Even within the MACT program constraints, EPA can provide compliance flexibility to achieve a high level of mercury control under the Utility MACT timeline without negatively affecting generation. Some of these mechanisms have been used in previous EPA regulations, both MACT and acid rain rules, such as: long term averaging, limits that specify a percent removal and emission rate, early reduction incentives such as those used under the Title IV NO_x provisions or Section 112 (i) (5) and (6), or a safety net approach that requires significant reduction with some flexibility for difficult applications. It is important that flexibility include the performance that is achievable by technology, rather than a prescription for a particular technology.

The air pollution control industry has already achieved commercial readiness of mercury control and measurement technologies, even without the certainty typically provided by regulatory or legislative market drivers. Mercury control technology is available today at the reasonable cost of 0.1 to 0.3 cents per kW-hr, compared to and average retail rate of 8 cents per kW-hr. Mercury control technologies are currently available for a range of coals and equipment and will be available for every utility configuration and every coal type in the near future. Mercury reductions of 50 percent (24 tons of emissions) are achievable by 2008 to 2010, and up to a 70 percent (14 tons of emissions) would be achievable by all utilities if there were some flexibility in regulation or legislation.

On behalf of the more than 130,000 men and women in our nation that work to supply air pollution control and monitoring technology for stationary sources, we congratulate efforts to develop meaningful and flexible approaches to control emissions from the electric power sector. Dollars spent on compliance are recycled in the economy, generating jobs in construction, materials fabrication, and engineering. The Institute predicted that multi-pollutant control requirements would create 300,000 new U.S. jobs.

Thank you for this opportunity to testify. I look forward to your questions.

# # #

For more information go to www.icac.com or contact ICAC at 202.457.0911

Mr. TIERNEY. And essentially they indicate that there are a growing number of companies that offer commercially available mercury control technologies for sale to the electric power sector, and that a 50 to 70 percent reduction in current mercury emissions is feasible by 2008 or 2010.

Ms. O'Neill, Mr. Paul, do you think that the clean air companies are correct or do you think that the administration is correct?

Mr. PAUL. Mr. Chairman, Mr. Tierney, I would agree with that, and I would point out that the Department of Energy technology development goal is for 50 to 70 percent mercury capture by 2005 for bituminous plants; by 2007 for lignite and sub-bituminous plants. The longer term goal is to develop advanced mercury control technologies that can achieve 90 percent or greater capture, and that would be commercially available by 2010. There is a lot of progress that has been made on this. There is progress that is being made every day.

If they were to stick with a cap-and-trade, if they were to set a cap of 90 percent control and put it by 2010, 2012, it could be met. So, they could be aggressive on this. They also could write a good MACT standard and meet that also.

Mr. OSE. Ms. O'Neill, do you have anything to add? Briefly.

Ms. O'NEILL. I would just add that sources are achieving these levels of control right now. If you look at the average, and this is the average of the best performers, they are achieving 95 percent removal rates right now. And there have been independent studies that have been entered into the record during the public comment period that have separately come to this same conclusion, that 90 percent control is, in fact, achievable.

Mr. TIERNEY. Thank you.

Mr. OSE. Mr. Schrock.

Mr. SCHROCK. Thank you, Mr. Chairman.

I don't mean to keep picking on Mr. Kovacs and Mr. McCracken, but another frequent public nomination for regulatory and paperwork reform was the EPA's TRI, the Toxic Release Inventory. How have the current rules and paperwork requirements negatively affected your members, and what factors do you think have contributed to EPA's delay in reducing this burden on small businesses?

Mr. KOVACS. Well, you have always got to balance. I mean, certainly paperwork, it is what kind of paperwork, it is how many forms. My understanding right now is that EPA is really moving toward some type of an electronic reporting system, and it should cut down on the paperwork, and it puts everything in real time. But, people really have to understand what that is going to mean in terms of public criticism. I think the biggest single problem that the government has is the amount of time that is addressed on paperwork, but a lot of that, if you really look at it, is the Internal Revenue Code; that is probably about 60 percent of all the paperwork.

So, when you get into these regulatory issues, you have to sort of slice and dice and decide, OK, where is the analysis. That is why we keep on coming back and saying we need a systematic approach rather than an ad hoc approach.

Mr. SCHROCK. Mr. McCracken.

Mr. MCCRACKEN. One of the problems with TRI is the kind of cliff effect that happens, because a lot of small businesses are exempt under a threshold approach, and that has dramatically changed recently for some forms of chemicals. We had a member who testified before this committee last year who was an organ manufacturer who, of course, uses lead in that work, and the threshold reporting went from 10,000 to 100 pounds. He is just over that, so he is caught up in this from no regulation to a fairly extensive reporting burden that is fairly extensive for him to comply with.

That needs to be addressed. We hope EPA is working on that, but, again, we are not really sure where that fits right now in EPA's overall guidance, and that is why we think that there needs to be a lot more openness about this process.

Mr. SCHROCK. Thank you.

Thank you, Mr. Chairman.

Mr. OSE. Mr. Van Hollen.

Mr. VAN HOLLEN. Thank you, Mr. Chairman.

Mr. Paul, you stated in your testimony that you first learned via e-mail that EPA was going to postpone the working group, and that you saw in the Atlantic Journal Constitution that it was permanently disbanded. One question is why do you think they disbanded the working group? A pretty simple question. I don't know if the answer is simple or not.

The second question relates to a response we received from EPA in a letter that Mr. Waxman had sent them, a response we received today, that EPA has now raised concerns about its own integrated planning model, the IPM, and says that it wants to fix those before doing remodeling. Apparently, it now believes that some of the assumptions in the IPM model are inconsistent with the Agency assumptions with respect to the near-term availability of control technology. I wondered if you had any comments on this recent development and whether that could have been addressed earlier.

Mr. PAUL. Well, that is exactly why the process needs to be open and transparent. We don't know why they disbanded the working group. We suspect it is because they decided that their preferred option was to go with Section 111, and that had never been discussed.

With regard to the modeling assumptions and problems that are coming up now, once again, that is exactly the type of thing that needs to be discussed with all the stakeholders, so that you can have a full conversation about that and challenge the different assumptions. A good reform process is open and transparent. This one was an open and transparent process for 18 months, and then it stopped; and then, we got a proposal, a preferred approach, something which we believe is very weak.

Mr. OSE. I thank the gentleman.

In wrapping up, I want to first thank the witnesses for joining us today. We have additional questions that we will be submitting to you in writing. We would appreciate timely response. The record itself will be left open for 10 days. I thank you for joining us today.

To my friend from Massachusetts, I wish you well. I thank you for your leadership here.

To my friend from Virginia, I wish you well too.

Mr. Van Hollen, we are going to leave this to you.
We are adjourned.
[NOTE.—Additional information is on file with the subcommittee.]
[Whereupon, at 12:16 p.m., the subcommittee was adjourned.]
[Additional information submitted for the hearing record follows:]

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY AFFAIRS

November 30, 2004

The Honorable Doug Ose
Chairman, Subcommittee on Energy Policy,
Natural Resources and Regulatory Affairs
Committee on Government Reform
U.S. House of Representatives
B-377 Rayburn House Office
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your letter of November 18, 2004, enclosing additional questions as a follow-up to your November 17, 2004 hearing on Regulatory Reform. I appreciated the opportunity to testify before the Subcommittee.

Enclosed is the Office of Management and Budget's two lists of available information on the progress of regulatory reforms, which we agreed to give to you by November 30, 2004. Please keep in mind that these two lists ("accomplishments" and "promising proposals") were developed for a different purpose and, as I mentioned at the hearing, are only partially responsive to your request. Also enclosed is the data call we put out to the agencies requesting more-detailed information on their progress on all of the 2001 and 2002 regulatory reform nominations. We will update our list based on this data call, and respond to the rest of your follow-up questions, by December 10, 2004. If you would like any additional information, please contact me at your convenience.

Sincerely,

John D. Graham, Ph.D.
Administrator

Enclosures

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

NOV 24 2004

MEMORANDUM FOR SELECTED AGENCIES

FROM: Donald R. Arbuckle
Deputy Administrator, Office of Information and Regulatory Affairs

SUBJECT: Agency Status Updates on Regulatory Reform Nominations

We are requesting that you provide us with an update of the status of the Office of Management and Budget's (OMB's) 2001 and 2002 regulatory reform candidates, as explained below. Please send your responses by **COB Friday, December 3, 2004** to Dominic Mancini at dmancini@omb.eop.gov. If you have any questions, please contact either Dominic at 202-395-7658 or Don Arbuckle at 202-395-5897.

Regulatory Reform Nominations Update

I. In 2001, OMB received 71 nominations from 33 commenters involving 17 agencies. OMB identified 23 of the 71 nominations as "high priority review" candidates. Appendix E of our 2001 Report to Congress on the Costs and Benefits of Regulation lists the 71 nominations, and Appendix C of the 2003 Report updates the public on the status of these high priority candidates. Please review the list of high priority 2001 nominations and provide OMB with an update of your agency's activity and actual or expected publication dates of any proposed or final actions. In addition, please indicate whether or not action was taken on any of the 48 non-high priority 2001 suggestions. If the reform resulted in a proposed or final rule, please provide OMB with a brief description of the rulemaking and a Federal Register citation for that publication.

II. In 2002, OMB received 316 nominations from over 1700 commenters. We determined that 109 of the nominations were already under consideration at agencies. Another 51 were referred to independent agencies. The remaining 122 rules and 34 guidance documents OMB referred to agencies for their evaluation as possible reforms. After reviewing the public nominations and consulting with OMB and with the Office of Advocacy, agencies: (1) identified 34 rules and 11 guidance documents as "new" reform candidates; (2) were undecided about pursuing reforms of another 26 regulations and 4 guidance documents; and (3) concluded that the remaining 62 rules and 19 guidance documents addressed issues that were unnecessary or were lower priority, given the other competing demands on their resources. Chapter 2 of the 2003 final Report presents an item-by-item status report of these nominations.

Please review the list of the 109 reform nominations already under consideration by the agencies listed in Table 15 of the 2003 Report, the "viable reform candidates" listed in Tables 9 and 10 of the 2003 Report, and the "undecided" reforms listed in Tables 11 and 12 of the 2003 Report, and provide OMB with an update of your agency's activity and the actual or expected publication dates of any proposed or final actions. Agencies should also indicate to OMB whether action was taken on any of the reform candidates your agency originally decided not to pursue, which are listed in Tables 13 and 14 of the 2003 Report. For all updates, please include a brief description of the action taken and, if the reform resulted in a proposed or final rule, a FR citation for that publication.

OMB Reports to Congress on the Costs and Benefits of Regulation are available at http://www.whitehouse.gov/omb/inforeg/regpol-reports_congress.html.

Regulatory Reform Accomplishments		
Issue Area	**Agency/Rule**	**Summary/Status**
Education	ED: Federal Family Education Loan Program and Financial Aid Regulations	The Department of Education published on November 1, 2002 the final regulation for Federal Student Aid Programs. The rule reduces administrative burden for program participants and provides participants with greater flexibility to serve students and borrowers. The new regulations eliminate the "12-hour rule" that restricted financial aid for students enrolled in distance education and other non-traditional term programs. In addition, colleges and universities will no longer be required to coordinate a borrower's monthly payments unless the borrower has initiated a request.
Environment	USDA: Environmental Quality Incentives Program for Farmers (EQIP)	USDA issued a final EQIP rule in May 2003, implementing new provisions contained in the 2002 Farm Bill. This rule includes national priorities that guide application-funding decisions at the state and local level. These national priorities give a preference to applications that address water quality concerns in impaired watersheds, air quality concerns in non-attainment areas, at-risk species concerns, and protection of high-value wetlands. The use of national priorities is expected to increase the environmental benefits generated by the program by focusing on the most pressing natural resource concerns.
Environment	EPA: Reducing Emissions from Recreational, Off-Road Vehicles	In November 2002, EPA adopted new standards to reduce pollutants for the first time from several groups of non-road engines, including large industrial engines, snowmobiles, and all-terrain vehicles. When fully implemented, these standards will remove more than 2 million tons of pollution each year -- the equivalent of removing the pollution from more than 32 million cars every year. Much of this reduction in emissions results from the control requirements for engines used in industrial settings. The health benefits of this action are significant, including annually avoiding approximately 1,000 premature deaths. EPA estimates the long-term fuel savings of this action will be approximately 800 million gallons per year, at a savings of $770 million annually. EPA estimates the rule will cost about $190 million annually.
Environment	DOI and Army Corps of Engineers: Everglades Restoration Project	These final regulations guide the $8 billion joint Federal-State restoration of the Everglades and provide a strong foundation for implementation of the long term restoration plan and its 68 separate project components, including interim hydrologic and ecological goals, use of sound science, peer review, adaptive management, and broad stakeholder participation at every step in the process. These regulations, which were developed by the Corps of Engineers in close consultation with the Department of the Interior and the State of Florida, will help ensure that the long term goals of the Comprehensive Everglades Restoration Plan are achieved.
Environment	EPA: Effluent Guidelines for Metals Products and Machinery	In December 2000, EPA proposed a rule under the Clean Water Act establishing new discharge standards for facilities that manufacture metal products and machinery. The proposed rule would have cost $2 billion annually and affected over 50,000 facilities in 18 different industry sub-sectors. After the proposed rule was published, EPA received detailed analyses indicating that the benefits analysis was flawed because most of the sources covered by the proposal were already controlling discharges under the existing regulatory requirements. Once the analysis was corrected, it became clear that the costs of the proposal greatly exceeded the benefits and that most affected facilities already were using appropriate pollution control technology. In May 2003, EPA issued a substantially scaled back final rule, which imposed tailored requirements costing about $14 million per year, a savings of almost $2 billion per year.

Regulatory Reform Accomplishments		
Issue Area	**Agency/Rule**	**Summary/Status**
Environment	EPA: Effluent Guidelines for Stormwater Runoff from Construction Sites	In the Spring of 2002, EPA submitted to OMB a draft proposed rule under the Clean Water Act to set national standards for stormwater runoff from construction sites. The draft proposal included post-construction standards that would have significantly increased federal involvement in State and local land-use decisions. During interagency review, concerns were raised that this proposal could have raised the average cost of new homes by $1000 to $2200, preclude 135,000 to 325,000 low-income families from owning a new home, eliminate up to 18,000 jobs, shut down as many as 800 construction firms, unduly burden about 150,000 small businesses, impeded highway construction, and even create unintended health and safety risks associated with stormwater retention ponds. Because of these concerns, and because the adverse ecological impacts to streams from stormwater are largely local in nature, EPA ultimately decided to work with State and local governments on implementing the existing stormwater program rather than issuing burdensome new Federal regulations. This approach will be more effective, better tailored to local needs and resources, and will yield cost savings of over $4.1 billion per year.
Environment	EPA: Brownfields Program	On January 11, 2002, President Bush signed into law the Small Business Liability Relief and Brownfields Revitalization Act. This landmark legislation will help hundreds of American communities turn thousands of environmental eyesores into productive community assets. This law expands EPA's Brownfields program, boosts funding for assessment and cleanup, enhances roles for State and Tribal response programs, and clarifies Superfund liability. By promoting the cleanup and redevelopment of contaminated industrial sites, this law will improve the environment, protect public health, create jobs, and revitalize communities. As required by the Act, EPA issued a proposed rule in August of 2004 to clarify the Superfund liability provisions. EPA is also providing a substantial amount of support for this program to fund grants for states, tribes, and local communities.
Environment	EPA: General Reforms of the New Source Review Program	The New Source Review (NSR) program requires major sources that modify their production operations in a way that increases emissions to undergo a rigorous review to assure that the source is well-controlled and that the projected increase in emissions will not adversely affect air quality. This rule makes five changes to the NSR program including: (1) an updated method for establishing an actual emissions baseline; (2) a method for calculating emissions changes to determine the applicability of the NSR program; (3) provisions for setting facility-wide emissions caps, known as Plantwide Applicability Limits; (4) a Clean Unit exclusion; and (5) a streamlined approach to adopt Pollution Control Projects. These changes to the NSR program will provide sources with more flexibility to respond to rapidly changing markets and to undertake pollution control and prevention projects.
Environment	EPA: Reform of the New Source Review Program: Routine Maintenance, Repair, and Replacement Activities	This rule clarifies what component replacement activities are "routine maintenance, repair, and replacement" and therefore exempt from NSR requirements. The rule exempts from cumbersome case-by-case review certain "identical" or "like-kind" component replacements costing less than 20% of the affected process unit. This will promote routine component replacements and facility upgrades. To help ensure that adverse environmental effects will not occur, the rule contains safeguards, including the cutoff for equipment replacements costing more than 20% of the affected process unit, a requirement that the basic design parameters of the unit cannot be changed, and a bar on exceeding applicable emissions limitations. In addition, the full panoply of Clean Air programs that are the primary means for achieving emissions reductions from existing sources will continue to protect and improve the nation's air quality.

Regulatory Reform Accomplishments		
Issue Area	**Agency/Rule**	**Summary/Status**
Environment	EPA: Conserving Water through the Submetering of Water Systems	On December 16, 2003, EPA issued a final policy memorandum revising EPA's interpretation of Safe Drinking Water Act (SDWA) applicability to submetered properties. This revised interpretation will promote water conservation by allowing building managers to meter and bill tenants separately for water without triggering a host of duplicative SDWA requirements. This revised interpretation only applies when a building obtains its water from a regulated water system that already provides SDWA compliant water. EPA is currently studying whether additional water conservation benefits could be obtained by expanding the policy to buildings that bill but do not separately meter residents for water (again, provided that they obtain water from a regulated water system meeting all SDWA requirements).
Environment	EPA: Reducing Emissions from Non-Road Diesel Engines	EPA in collaboration with OMB/OIRA, developed the Non-Road Diesel rule to reduce by 90% the amount of SO_2, NO_x and PM exhaust from off-road engines used in mining, agriculture and construction. These gains can only be accomplished through a dramatic reduction in the sulfur content of diesel fuel and installation of new control equipment on engines. EPA estimates that the benefits will far outweigh the costs: the present value of benefits over the period from 2004 to 2036 is estimated to be $805 billion using a 3% discount rate and $350 billion using a 7% discount rate, while the present value of costs over the same period is estimated to be $27.1 billion using a 3% discount rate and $13.8 billion using a 7% discount rate.. The rule is expected to prevent 6,400 premature deaths in 2020 and 12,000 in 2030.
Environment	EPA: Effluent Guidelines for Concentrated Animal Feedlots	In December 2000, EPA published a proposed rule expanding the Clean Water Act permitting requirements for concentrated animal feeding operations (CAFOs) and strengthening the effluent guidelines for those facilities. The proposed rule would have affected 35,000 farms, including many smaller farms, and cost about $900 million annually. In February 2003, EPA published the final rule on CAFOs. The final rule focuses on 15,000 large farms that account for most of the pollution from this sector. For the first time, these large farms will be required to control runoff of manure from their fields. Smaller farms are generally addressed through a voluntary USDA program that provides grants and technical assistance to address runoff and other environmental concerns. However, they may be subject to regulatory controls in cases where their runoff is linked to specific water quality problems. EPA estimated the cost of the final rule at $360 million annually, of which about $300 million would fall on large CAFOs. Fresh water benefits from reduced runoff at large CAFOs were estimated in the range of $200 to $350 million annually. Additional non-monetized benefits include reduced runoff from small and medium CAFOs and reduced impacts on marine waters.
Environment	EPA: Watershed Rule (Total Maximum Daily Load – TMDL)	The July 2000 Watershed Rule revised the existing requirements for States to prepare lists of impaired waters and to develop total maximum daily loads (TMDLs) for the waters on these lists. The most significant change was to require that implementation plans be developed for each TMDL and approved by EPA. Commenters argued that the prescriptive, procedural approach adopted in the 2000 rule undermined the benefits of a watershed approach to addressing water quality. In particular, the requirement for up-front EPA approval of implementation plans was thought to limit State flexibility, impede adaptive management, and unduly interfere in State water pollution control programs. The rule was withdrawn by EPA in March 2003, following public notice and comment.

Regulatory Reform Accomplishments		
Issue Area	**Agency/Rule**	**Summary/Status**
Financial	Treasury/IRS: Domestic Relations Tax Reform Act Rules – Burden Reduction	This action regards a family's use of a corporate redemption or corporate dividend to divide a family business on the occasion of an owner's divorce. Treasury published a final regulation on January 13, 2003 permitting taxpayers relief under the regulation if the taxpayers enter into an agreement to specify the tax treatment agreed to by the spouses. The agreement must have been in effect on the date of the final regulation. This remedy is intended to resolve a situation resulting in conflicting court opinions regarding the prior regulation.
Financial	Treasury/IRS: 2002 Form 1040A and Schedules, U.S. Individual Income Return – Burden Reduction	This form is used by individual taxpayers to report their taxable income and calculate their correct liability. Changes made by Treasury include the deletion of two worksheets, as well as further revisions to the number of lines, Code references, and the size of worksheets. These changes were made throughout Form 1040A, instructions, and schedules, reducing paperwork burden on taxpayers by over 5 million hours. Form 1040A is used by taxpayers who do not itemize and have less than $50,000 in taxable income.
Financial	Treasury/IRS: U.S. Individual Income Tax Return, 2002 Form 1040 – Burden Reduction	This form is used by individual taxpayers to report their taxable income and calculate their correct tax liability. Treasury decided to increase the threshold for filing Schedule B (Form 1040 – used to itemize interest and ordinary dividends) to $1,500, so that fewer taxpayers will be required to file it. This reduced burden on the public by over 12 million hours.
Financial	Treasury/IRS: U. S. Corporation Income Tax Return, 2002 Form 1120 and 1120-A and Schedules – Burden Reduction	Forms 1120 and 1120-A are used by corporations to compute their taxable income and tax liability and verify that it has been correctly computed. Corporations with total receipts and assets of less than $250,000 are no longer required to complete Schedules L, M-1 and M-2 of the 1120. These same corporations are no longer required to complete Parts III and IV of the 1120-A. Furthermore, Code references were revised throughout the form and instructions to clarify and reduce burden. Changes made throughout Form 1120, schedules, and instructions by adding lines, and adding 1 form attachment further clarified how to complete the forms. These changes reduced burden by over 36 million hours.
Financial	Treasury/IRS: U.S. Income Tax Return for an S Corporation, 2002 Form 1120S and Schedules – Burden Reduction	Form 1120S and its schedules are used by S corporations, generally small businesses, to figure their tax liability and report their income and other tax-related information. IRS uses the information to determine the correct tax for S corporations and their shareholders. Under the IRS Burden Reduction Initiative, corporations with total receipts and assets of less than $250,000 are no longer required to complete Schedules L and M-1. This will reduce burden by over 14 million hours.
Financial	Treasury/IRS: Research Tax Credit – Burden Reduction	Final Treasury regulations issued in December 2002 provide rules for determining which research activities are eligible for the research credit. These final regulations were issues after an extensive public comment process and replaced earlier regulations issued in January 2001 that had been criticized as being too subjective and narrow. The new final rules provide more objective guidance for determining credit eligibility and further the purpose of encouraging research activities in the U.S.

Regulatory Reform Accomplishments		
Issue Area	**Agency/Rule**	**Summary/Status**
Financial	Treasury/IRS: Consumer-Directed Health Plans	In an effort to increase employee involvement in health care decision-making and consequently reduce the increase in health care costs, many employers are establishing more consumer-directed health plans. In addition, Congress, as part of the Medicare Prescription Drug Improvement and Modernization Act of 2003, allowed Health Savings Accounts (HSAs) as a way for consumers to have more health choices. The IRS and Treasury have facilitated the establishment of these types of arrangements by providing a series of guidance measures, which addressed outstanding issues in the establishment and operation of HSAs. In addition, the IRS and Treasury provided guidance that detailed how employers could establish Health Reimbursement Arrangements, an employer-provided "account," which could be used by an employee solely to pay for qualified medical expenses. In addition, to facilitate these account-based medical plans (including flexible spending arrangements), guidance was issued that detailed how debit card technology could be used in conjunction with these arrangements.
Financial	Treasury/IRS: Employer-Based Retirement Savings Plans	The IRS and Treasury have issued multiple pieces of regulatory guidance that provided updated rules for employers to use in operating employer-based retirement savings plans, such as the 401(k) plans, 403(b) plans and 457 plans. These updated rules reflect legislative changes over the last 15 years and provide needed simplification in the administration of these plans. Final regulations were provided to set out the rules for the provision in the Economic Growth and Tax Relief Reconciliation Act of 2001 for catch-up contributions for participants over age 50 that participate in these employer-based savings plans and the minimum distribution requirements that apply to these plans and IRAs and to update the rules regarding 457 plans. Proposed regulations have been issued to update the rules for 401(k) plans and 403(b) plans.
Financial	Treasury/IRS: Mortgage Revenue Bond Purchase Price Limits	States may issue mortgage revenue bonds to provide below-market rate mortgages to certain first-time home buyers. The home prices are limited to no more than 90% of the average purchase price for homes with the area in which the home is located. Prior to 2004, the purchase price limits had not been adjusted since 1994. In 2004 IRS and Treasury updated the limits to reflect recent market conditions. This change resulted in more homes purchased by first-time buyers being eligible for the below market rate mortgages.
Financial	Treasury/OCC: Bank Activities and Operations: Real Estate Lending and Appraisals	Treasury's Office of the Comptroller of the Currency (OCC) issued a final rule addressing the applicability of certain types of state laws to national banks' deposit-taking and lending activities. The rule lists particular types of state laws that it preempts. This rule preempts without the need for further analysis, those types of state laws for which substantial precedent existed prior to the adoption of the rule - recognizing the interference they pose to the ability of Federally chartered institutions to operate under uniform standards. This rule preempts state laws that impermissibly affect national bank deposit-taking and lending powers and contains a new uniform standard to combat predatory lending. It prohibits a bank from making any loan based predominantly on the foreclosure value of the borrower's collateral, without regard to ability to repay. Further in making a loan, a national bank shall not engage in unfair or deceptive practices.

Regulatory Reform Accomplishments		
Issue Area	**Agency/Rule**	**Summary/Status**
Financial	Treasury/OCC: Fair Credit Reporting Rules	Treasury issued two regulations addressing consumer protection provisions of the Fair and Accurate Transactions Act of 2003 (FACT Act). (1) On March 28, 2004, OCC issued a proposed rule that would implement provisions of the FACT Act restricting the circumstances in which consumer reporting agencies may furnish consumer reports containing medical information. The FACT Act prohibits creditors from obtaining or using medical information pertaining to a consumer in connection with any determination of eligibility for credit, and restricts the sharing of medical information and related lists or descriptions among affiliates. (2) On July 15, 2004, the OCC published for comment, a proposed regulation to implement the affiliate marketing provisions in section 214 of the FACT Act. The proposal generally prohibits an institution from using certain information about a consumer it receives from an affiliate to make a solicitation to them unless the consumer has been given the opportunity to opt out of the solicitation. An institution that has a pre-existing business relationship with the consumer would not be subject to this marketing limitation.
Health and Safety	USDA: Reducing *Listeria monocytogenes* in Ready-to-Eat Meat and Poultry Products	*Listeria monocytogenes* is a pathogen that can cause listeriosis, an uncommon but potentially fatal disease in immunocompromised persons. Listeriosis is also a major concern in pregnant women because the illness can cause fetal death. Listeriosis outbreaks have been traced to both contaminated hot dogs and lunch meats. On June 6, 2003, USDA published an interim final rule, "Control of *Listeria monocytogenes* in Ready-to-Eat Meat and Poultry Products," that requires establishments that produce ready-to-eat meat and poultry products to establish controls that prevent products from *Listeria monocytogenes* contamination. According to USDA, the rule imposed costs on firms of approximately $16.6 million per year, while the rule generated benefits, in the form of fewer cases of listeriosis, of approximately $44 million to $154 million per year.

Regulatory Reform Accomplishments		
Issue Area	**Agency/Rule**	**Summary/Status**
Health and Safety	USDA: Bovine Spongiform Encephalopathy (BSE or "Mad Cow Disease")	On December 23, 2003, BSE was confirmed in a cow in Washington State. BSE has been linked to variant Creutzfeldt-Jakob Disease (vCJD), a disease that can destroy the human nervous system. On January 12, 2004, USDA adopted a number of additional measures to address BSE: • An Interim final rule, "Prohibition of the Use of Specified Risk Materials for Human Food and Requirements for the Disposition of Non-Ambulatory Disabled Cattle", that banned "specified risk materials" (SRMs) -- e.g., the vertebral column from cattle 30 months and older, all non-ambulatory disabled cattle ("downers"), and mechanically separated meat from the food supply. • An Interim final rule, "Meat Produced by Advanced Meat/Bone Separation Machinery and Meat Recovery (AMR) Systems", that prohibited the use of SRMs in AMR systems and imposed quality control criteria to ensure that the products of AMR systems meet the definition of meat. • An Interim final rule "Prohibition of the Use of Certain Stunning Devices Used to Immobilize Cattle During Slaughter", that prohibited the use of air-injection stunning for slaughter. In addition, USDA has undertaken an intensive animal health testing program designed as a one-time effort that will provide a snapshot of whether BSE is present in the U.S. This program is designed to test over 200,000 cattle, and will be able to detect BSE in the cattle population even if the true rate is as low as 1 in 10 million. In July 2004, USDA and HHS also published a joint Advanced Notice of Proposed rulemaking (ANPRM) to request comment on additional measures that may be taken to address BSE. FDA also issued an interim final rule, "Use of Materials Derived from Bovine and Ovine Animals in FDA-Regulated Products," that banned, consistent with USDA's restrictions, SRMs, all non-ambulatory disabled cattle, and mechanically separated meat from FDA-regulated human food (including dietary supplements) and cosmetics.
Health and Safety	HHS/FDA: Consumer Food Labeling for Trans-Fat Content	Based on the strong scientific link between the consumption of *trans* fat and coronary heart disease, on July 11, 2003 FDA issued a final rule requiring the disclosure of *trans* fat content on nutrition labels. Information on the amount of *trans* fat in food products will allow consumers to consider the amount of *trans* fat in their food purchasing decisions, and the attention to *trans* fat content will provide an incentive to food manufacturers to reduce the amount of *trans* fat in their products. The rule is expected to produce billions of dollars in health benefits by reducing thousands of fatal and non-fatal heart attacks. FDA estimates the final rule's ratio of benefits to costs to be about 100 to 1.
Health and Safety	HHS/FDA: Bar Code Rule to Reduce Medication Errors	FDA issued a final rule on February 26, 2004 to require certain human drug and biological product labels to have bar codes. The rule will help reduce the number of medication errors in hospitals and other health care settings by allowing health care professionals to use bar code scanning equipment to verify that the right drug (in the right dose and right route of administration) is being given to the right patient at the right time. The rule also requires the use of machine-readable information on blood and blood component container labels to help reduce medication errors. The rule is expected to prevent 25,000 adverse events and blood transfusion errors annually over the next 20 years. FDA estimated this rule's benefits about $5.2 billion per year and costs of about $670 million per year.

Regulatory Reform Accomplishments		
Issue Area	**Agency/Rule**	**Summary/Status**
Health and Safety	HHS/FDA: Qualified Health Claims for Omega-3 Fatty Acids	The FDA will now allow producers the opportunity to make a qualified health claim for reduced risk of coronary heart disease (CHD) on conventional foods that contain eiscosapentaenoic acid (EPA) and docosahexaenoic acid (DHA) omega-3 fatty acids. Typically, EPA and DHA omega-3 fatty acids are contained in oily fish, such as salmon, lake trout, tuna and herring. These fatty acids are not essential to the diet; however, scientific evidence indicates that these fatty acids may be beneficial in reducing CHD. The new qualified health claim for omega-3 fatty acids should help consumers make healthier and more informed decisions by enabling them to identify foods that contain Omega-3 fatty acids. A qualified health claim on a conventional food must be supported by credible scientific evidence.
Health and Safety	HHS/FDA: Generic Drug Rule	New regulations streamlined the process for making safe, effective generic drugs available to consumers by limiting a drug company to only one 30-month "stay" of a generic drug's entry into the market for resolution of a patent challenge. The rule also established changes in the FDA's review procedures, intended to help improve the speed and reduce the cost of determining that a new generic drug is safe and effective. The changes in the regulations were estimated to result in savings to consumers of an estimated $35 billion over 10 years, by making generic alternatives to certain more costly brand-name drugs available more quickly by avoiding time-consuming legal delays. The improvements in the efficiency of review procedures, which will require changes by both FDA and generic manufacturers, are expected to save consumers billions more, by reducing the time for determining that most new generic drugs are safe and effective, and therefore can be made available to patients.
Health and Safety	HHS/FDA: Prohibition on the Sale of Dietary Supplements Containing Ephedra	FDA issued a final rule prohibiting the sale of dietary supplements containing ephedrine alkaloids (ephedra) because such supplements present an unreasonable risk of illness or injury. This FDA rule reflects what the scientific evidence shows – that ephedra poses an unreasonable risk to those who use it. Under the Dietary Supplement Health and Education Act of 1994, FDA may remove a dietary supplement from the market if it presents a significant or unreasonable risk of illness or injury when used according to its labeling or under ordinary conditions of use. FDA's final regulation presents a framework for applying this unique statutory standard. Given FDA's assumptions regarding the underreporting rate of ephedra-related health effects, they estimate the rule will lead to approximately 40-50 fewer illnesses and 7-12 fewer deaths per year tied to ephedra use, at a cost of between $7 and 90 million per year.
Health and Safety	DOL/OSHA and HHS/FDA: Promotion of Automated External Defibrillators	In July 2001 OMB suggested that OSHA consider steps to promote the use of automated external defibrillators (AEDs) in the workplace. AEDs are a proven lifesaving technology that, when used promptly and properly, increases the rate of survival after cardiac arrest. In response to OMB's request, OSHA initiated a three-pronged educational effort: an informative Technical Information Bulletin, a more detailed AED Safety and Health Topics Web page providing comprehensive information on how employers can design and implement AED programs, and a brochure entitled "Saving Sudden Cardiac Arrest Victims in the Workplace." OSHA's alliance program is promoting AED use in collaboration with the American Heart Association and the National Safety Council. OSHA has also contracted with Eastern Research Group to quantify the extent of AED use in the workplace and identify barriers to the widespread dissemination of this lifesaving technology. Additionally, FDA recently approved AEDs for use by the general public without a prescription.

Regulatory Reform Accomplishments		
Issue Area	**Agency/Rule**	**Summary/Status**
Health and Safety	Treasury: Health Claims in Alcohol Labeling and Advertising	On March 3, 2003 Treasury's Alcohol and Tobacco Tax and Trade Bureau issued a final rule on the use of health claims and other health-related statements in the labeling and advertising of alcohol beverages. The rule allows the use of truthful and non-misleading health claims and health-related statements in the labeling and advertising of alcohol beverages. Health claims must be adequately substantiated by scientific evidence and properly detailed and qualified. Also the claims must disclose the health risks associated with alcohol consumption. This will enable consumers to make healthier, more informed choices with regard to consumption of alcoholic beverages.
Health Care	HHS/CMS: Medicare Prescription Drug Discount Card	This interim final regulation is designed to help people who are covered by Medicare with the cost of prescription drugs. The regulation outlining the new drug discount card program was the first action resulting from the Medicare Prescription Drug Improvement and Modernization Act of 2003. The program provides Medicare beneficiaries with discounts on the cost of their prescription drugs and is an interim benefit available to seniors until January 2006 when Medicare begins covering prescription drugs.
Health Care	HHS/CMS: Streamlining Skilled Nursing Facilities Reporting Burden	Skilled nursing facilities (SNFs) are required to submit resident assessment data in order to administer the appropriate payment rate methodology. The burden associated with this is the SNF staff time required to complete the Minimum Data Set (MDS), encode the information, and transmit the data. The new resident assessment tool takes half the time to use as the old one. This will reduce burden by over 3 million hours.
Health Care	HHS/CMS: Emergency Medical Treatment and Labor Act	On August 29, 2003, HHS issued a final rule clarifying hospital obligations to patients who request treatment for emergency medical conditions under the Emergency Medical Treatment and Labor Act (EMTALA). The rule is designed to ensure that people will receive appropriate screening and emergency treatment, regardless of ability to pay, while removing barriers to the efficient operation of hospital emergency departments. For example, the rule clarified that the EMTALA requirements do not apply to off-campus locations that are not Emergency Departments, and do not apply to admitted patients.
Health Care	HHS/CMS: Streamlining the Outcome and Assessment Information Set for Home Health Agencies	The Outcome and Assessment Information Set (OASIS) is a system used by home health agencies to submit treatment information required for Medicare reimbursement. CMS streamlined the assessment instrument and submission requirements, resulting in a reduction in the number of required items by nearly 30 % and reducing the amount of time required to complete the instrument by over 25%. Additionally, CMS has implemented clear instructions that remove the requirement that Home Health Agencies collect OASIS information on non-Medicare/Medicaid paid patients. Home Health Agencies are, however, allowed to continue to use the OASIS tool to collect data on these patients if their business processes make this desirable. These changes reduced reporting burden over 2,400,000 hours per year.
Health Care	HHS/CMS: State Discretion about Anesthesia Services	The rule, finalized on November 15, 2001, permits States to determine which professionals are permitted to administer anesthesia services and the level of supervision required. The additional flexibility provided to States allows for better access to care, particularly in rural areas, by making it easier for licensed health professionals, such as Certified Nurse Anesthetists to practice.
Health Care	HHS/CMS: Reducing Burdens under the Medicare Secondary Payer Provision	The Medicare Secondary Payer (MSP) provision specifies the conditions under which parties other than the Medicare program have primary responsibility to pay for health care services. On March 29, 2004, in compliance with the Medicare Modernization Act, CMS issued an instruction package, which relieved hospital laboratories of the burden of collecting MSP information for reference laboratory services. These changes save an additional 255,000 hours of paperwork burden.

Regulatory Reform Accomplishments		
Issue Area	**Agency/Rule**	**Summary/Status**
Homeland Security	HHS/FDA: Bioterrorism Act Rules	HHS issued two regulations under the Bioterrorism Preparedness and Response Act of 2002 to bolster the safety and security of America's food supply. The new regulations enable better-targeted efforts to monitor and inspect imported foods. The rules allow quick identification and notification of food processing companies and other establishments involved in any deliberate or accidental contamination of food. These requirements represented the latest steps in ongoing efforts to respond to bioterrorism threats. (1)Registration of Food Facilities – this regulation required domestic and foreign facilities that manufacture, process, pack, or hold food for human or animal consumption in the US to register with FDA by December 12, 2003. Registration is one of several tools that would enable FDA to act quickly in responding to a threatened or actual attack on the US food supply. In the even of an outbreak of foodborne illness, such information would help FDA and other authorities determine the source and cause of the event. (2) Prior Notice of Imported Food – this regulation requires the submission to FDA of prior notice of food, including animal feed that is imported or offered for import into the US. The information must be submitted and confirmed electronically as facially complete by FDA for review no more than 5 days and no less than 8 hours (for food arriving by water), 4 hours (for food arriving by air or land/rail), and 2 hours (for food arriving by land/road) before the food arrives at the port of arrival.
Homeland Security	DHS: Student Exchange Visitor Information System	DHS published a final rule on December 11, 2002 implementing the Student Exchange Visitor Information System (SEVIS). SEVIS is an internet-based system that provides users with access to accurate and current information on nonimmigrant foreign students, exchange visitors, and their dependents. SEVIS enables schools and sponsors to transmit electronic information and event notifications, via the Internet, to DHS, the Bureau of Immigration and Custom Enforcement (ICE) and the Department of State (DOS) throughout a student's or exchange visitor's stay in the United States. The rule reduces the public burden associated with reporting and retaining paper-based forms and streamlines the process for collecting information on nonimmigrant foreign students, exchange visitors and their dependents.
Homeland Security	HHS/CDC: Requirements for Select Agents	HHS established requirements regarding possession and use in the United States, receipt from outside the United States, and transfer within the United States of select agents and toxins. This includes requirements concerning registration security risk assessments, safety plans, security plans, emergency response plans, training, transfers, record keeping, inspections, and notifications. The interim final rule, implementing provisions of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, provides protection against misuse of select agents and toxins whether inadvertent or the result of terrorist acts against the US homeland, such as terrorist acts involving anthrax. In response to public comments the final rule streamlines reporting requirements, clarifies inspection criteria, and provides performance based standards for securing select agents.
Homeland Security	DHS: Procedures for Handling Critical Infrastructure Information	This rulemaking establishes the procedures necessary to fulfill the provisions of the Critical Infrastructure Information (CII) Act of 2002. It establishes uniform procedures for the receipt, care and storage of CII voluntarily submitted to the Federal government. These procedures apply to all Federal agencies that receive, care for or store CII.

Regulatory Reform Accomplishments		
Issue Area	**Agency/Rule**	**Summary/Status**
Homeland Security	DHS: United States Visitor and Immigrant Status Indicator Technology (US VISIT) Program	DHS published two interim final rules for the US VISIT Program, an integrated, automated entry-exit system that records the arrival and departure of aliens; verifies aliens' identities, and authenticates aliens' travel documents through comparison biometrics, The first rule established US VISIT for arrivals at air and sea ports of entry and authorized a limited number of pilot exit programs. The second rule expanded US VISIT to the 50 busiest land ports of entry and expanded coverage to include travelers from Visa Waiver Program countries
Homeland Security	DHS: Designating Aliens for Expedited Removal, and Border Crossing Card Initiative	The Expedited Removal notice authorized the DHS to place in expedited removal proceedings any or all members of the following class of aliens: aliens determined to be inadmissible who are present in the US without having been admitted or paroled following inspection by an immigration officer at a designated port-of-entry, who are encountered by an immigration officer within 100 air miles of the US international land border and who have been physically present in the US continuously for the 14-day period immediately prior to the date of the encounter. The Border Crossing Card interim final rule extended the period of time which Mexican Border Crossing Card (BCC) holders can remain in the United States without obtaining additional immigration documents. The rule expanded this time from 72 hours to 30 days to help expand cross-border commerce.
Homeland Security	DHS: Implementation of National Security Maritime Initiatives	The maritime security requirements published by the Coast Guard in a final rule on Oct. 22, 2003 replace temporary rules originally issued in July 2003. The final rules effect significant changes in security practices within all segments of the maritime industry, including cruise ships, container ships, and offshore oil platforms. Designed to protect the nation's ports and waterways from a terrorist attack, the requirements require the development and implementation of security plans for vessels and facilities that have a higher risk of involvement in a transportation security incident.
Homeland Security	Treasury: Terrorism Risk Insurance Program	The Terrorism Risk Insurance Program (TRIP) has created a temporary Federal program that establishes a system of shared public and private compensation for insured losses resulting from certain types of terrorist acts. • Interim Guidance Notices – To provide necessary guidance to the insurance industry in complying with TRIA before formal regulations could be developed, Treasury issued a series of 3 interim guidance notices immediately following TRIA's November 22, 2002 effective date. Among other things, they provided clarifications to TRIA's disclosure and "make available" requirements, the insurance entities eligible to participate in the Program, and the timing and method of issuing required disclosures. • Interim Final Rules – While the interim guidance process was being pursued, Treasury simultaneously began formal rulemaking to incorporate and supercede the interim guidance notices. The rules set forth the purpose and scope of the Program, key definitions, requirements for disclosures insurers must make to policyholders and their "make available" obligation under TRIA.
Homeland Security	DOT/FAA: Cockpit Doors and Related Security Rules	The FAA implemented several rules to enhance flight and airport security in the aftermath of September 11th. These security improvements included strengthened doors on airplanes, improved baggage and cargo screening, airspace restrictions, photo identification requirements for pilots, additional background checks for baggage screeners, and the establishment of a general aviation security program.
Homeland Security	Treasury/IRS: Post September 11th Administrative Relief	As part of the federal government's rapid reaction to the events of September 11th, beginning as early as September 12, 2001, Treasury issued 20 items of guidance providing administrative relief to alleviate the tax burden on individuals and businesses affected by the attacks.

Regulatory Reform Accomplishments		
Issue Area	**Agency/Rule**	**Summary/Status**
Housing	OFHEO: Public Disclosure of Financial and Other Information	On May 29, 2002, OMB sent a letter prompting OFHEO to consider rulemaking to strengthen the corporate governance of Fannie and Freddie and require certain public disclosures. OFHEO issued a final rule on April 2, 2003 to ensure the safety and soundness of the Fannie Mae and Freddie Mac. The rule also implements an agreement reached in July 2002 between OFHEO and the Securities. Under OFHEO's final rule, Fannie and Freddie would satisfy OFHEO's disclosure requirements by complying with the SEC's disclosure requirements under the Securities Exchange Act of 1934. These disclosures include reports to shareholders, proxy statements, and monthly earnings and business summaries.
Housing	OFHEO: Risk Based Capital Standards	On July 19, 2001, the Office of Federal Housing Enterprise Oversight issued a rule establishing capital standards for Fannie Mae and Freddie Mac pursuant to the Federal Housing Enterprise Safety and Soundness Act of 1992. The rule was amended and fine tuned on February 13, 2003. The two Federally chartered enterprises provide liquidity and support to the secondary mortgage markets. The rule models the portfolios and balance sheets of the two enterprises and sets up a stress test based on extreme interest rate environments and economic conditions to determine what level of capital they would need to weather such financial conditions. Thus the rule increases the financial safety and soundness of our mortgage markets and financial system
Housing	HUD: Housing Goals for Government-Sponsored Entities	By law HUD sets housing goals for the two Government-Sponsored Enterprises (GSEs) that are mortgage intermediaries: Fannie Mae and Freddie Mac. A final rule published on November 2, 2004 affects GSEs starting January 1st. The final rule helps make homeownership more affordable for persons of low or moderate incomes and those in areas that are "underserved" with affordable housing. Congress expects these federally-chartered GSEs to lead the rest of the mortgage market in making housing affordable. In fact, the GSEs have usually lagged the market. The goals are minimum performance standards. For each type of homeowner, tenant, or community that the GSEs were chartered to help, the final rule sets the minimum shares of each GSE's business that serves these housing goals. The GSEs would keep up with market forecasts, with no risk to their finances. A pre-rule published at the same time asks for public comment on how to resolve a difficult detail. Low-income homeowners are slower than others to refinance their fixed-rate mortgages when rates drop. Consequently, periods of extensive refinancing, like 2003, have relatively few affordable mortgages and so make it more difficult for the GSEs to meet their goals. Although HUD has the authority to deal with such circumstances all parties wanted HUD to propose a mathematical procedure for these times. The pre-rule solicits suggestions for developing an acceptable procedure.
Labor	DOL: Birth and Adoption Unemployment Compensation	The Department of Labor removed regulations allowing States to provide partial wage replacement through unemployment compensation, for parents taking approved leave to care for a newborn or newly adopted child. This rule, issued on October 9, 2003, will protect the availability of already scarce unemployment trust funds for the involuntarily unemployed by preventing their use by individuals on voluntary leave.

Regulatory Reform Accomplishments		
Issue Area	**Agency/Rule**	**Summary/Status**
Labor	DHS: Forms I-140 and I-485	DHS published an interim final rule on July 31, 2002 allowing concurrent filing of forms I-140 and I-485. The previous rules only allowed for an immigrant worker to file the Application To Register Permanent Residence or Adjust Status, Form I-485, after the alien's underlying Immigrant Petition for Alien Worker, Form I-140, had been approved. Due to these requirements, there were growing delays and backlogs from the time the Form I-140 was filed with the legacy INS until the alien worker was able to file Form I-485 and obtain interim benefits such as permission to travel and an Employment Authorization Document. Concurrent filing eliminates the delay that took place between approval of the Form I-140 worker petition and the subsequent filing of the Form I-485 adjustment application.
Labor	DOL: White Collar Exemption (541 Overtime)	The final rule implements the exemption from minimum wage and overtime pay for executive, administrative, professional, outside sales and computer employees. These exemptions are often referred to as the FLSA's "white collar" exemptions. To be considered exempt, employees must meet certain minimum tests related to their primary job duties, and in most cases must be paid on a salary basis at not less than minimum amounts specified in these regulations. The final rule simplifies complex "duty" tests, raises the exempt salary thresholds in the salary level test, allows for deductions from pay for disciplinary suspensions, and creates a "safe harbor" for employers who make improper salary deductions that are isolated or inadvertent. The final rule strengthens overtime protections of 6.7 million workers earning $23,660 or less, including 1.3 million salaried "white collar" workers newly eligible for overtime who will gain approximately $375 million in additional earnings every year. The final rule ensures that employees can understand their rights to overtime pay, employers can readily determine their legal obligations, and DOL can more vigorously enforce the law.
Labor	DOL: Labor Organization Annual Financial Report (LM-2)	This final rule revises the Form LM-2, which is used by the largest labor organizations to file annual financial reports. The purpose of this reform is to improve the transparency and accountability of labor organizations to their members, to increase the information available to members of labor organizations, and to make the data disclosed in such reports more understandable and accessible. The rule requires Form LM-2 filers to file reports that identify "major" receipts and disbursements, and to allocate disbursements among the categories provided in the form (e.g., contract negotiation and administration, organizing, political activity, lobbying, etc.). It also requires covered labor organizations to report the assets, receipts, liabilities, and disbursements of organizations that meet the statutory definition of a "trust in which a labor organization is interested."
Land Management	USDA: Conservation Security Program for Farmers	USDA issued a final rule implementing the Conservation Security Program (CSP), a newly created program supporting the conservation efforts of agricultural producers. CSP is unique in that it provides payments to agricultural producers who meet the eligibility requirements for their existing conservation efforts, as well as for new conservation practices and activities they undertake during their contracts. CSP rewards producers that have addressed soil and water quality concerns, and encourages them to address additional resources.

Regulatory Reform Accomplishments		
Issue Area	**Agency/Rule**	**Summary/Status**
Land Management	DOI/MMS: Deep Gas Royalty Relief	In January 2004, the Department of Interior's Minerals Management Service (MMS) issued a final rule creating new incentives for natural gas development in hard-to-reach areas of the Gulf of Mexico. The accelerated production expected to result from these incentives will help to meet expected increases in demand and ease price volatility until additional supplies become available. The rule will save American consumers an estimated $570 million a year and help to ensure the nation's energy security by boosting domestic production. Although most of the gains to consumers will be offset by losses to producers, the agency did find that this rule will result in a net social gain of approximately $30 million per year. Because this rule would only apply to those operators who have current active leases and existing infrastructure, it is not expected to have significant adverse environmental effects.
Land Management	DOI, USDA, Commerce: Healthy Forest Initiative	The three Departments have promulgated several regulations to promote the implementation of healthy forest projects. The USDA Forest Service amended its rule limiting project appeals by the public to the early stages of the decision-making process, to expedite project decisions and allow faster implementation. The DOI's Bureau of Land Management (BLM) promulgated a final rule which allows wildland fire management decisions to be effective immediately when public lands are at substantial risk from wildfires. Additionally, the DOI's Office of Hearings and Appeals amended its rules to expedite its review of wildland fire management decisions. The Departments of the Interior and Commerce also issued joint Endangered Species Act (ESA) counterpart regulations that accelerate ESA reviews for projects that support the National Fire Plan on federal lands.
Procurement	DOD: Defense Federal Acquisition Regulation Supplement	In December 2002, DOD completed a burden reduction initiative that will reduce annual paperwork burden on its contractors and contract applicants by over 14 million hours. The requirements for contract solicitations are Defense's second largest information collection and many Defense Department contracts are targeted to and awarded to small businesses. This burden is to apply for benefits and for contracts to provide goods and services under the Defense Federal Acquisition Regulation Supplement (DFARS), a supplement to the Federal Acquisition Regulation. The higher burden for collection of information increased costs and delays.
Procurement	DOD: Acquisition Management Systems and Data Requirements Control List	This list is used in contracts for supplies, services, hardware, and software, necessary to support design, testing, manufacture, training, and the operation and maintenance of procured items. DOD implemented new business processes and improved policies that reduced information requirements. Enabling electronic transmittal of required information further reduced the burden on contractors. The initiative reduced burden by over 26 million hours.
Procurement	DOD: Information Collection in Support of the DoD Acquisition Process (Solicitation Requirements).	An offeror must submit to DoD a variety of procurement-related information in response to DoD solicitations. As a result of business process re-engineering and improved acquisition policies, information requirements were reduced. Enabling electronic transmittal of required information further reduced the burden on contractors. This reduced burden by over 14 million hours.
Procurement	DOD: Contract Bundling	Contract Bundling is the practice of grouping a number of different contract requirements into a single large contract. This practice can lead to reduced small business participation in Federal contracting by making the contracts too large for them to handle. Prompted by the President's Small Business Agenda, the Small Business Administration and Federal Acquisition Regulation Council published a final rule amending the Prime Contracting Assistance regulations on October 20, 2003, that restricted contract bundling, ensuring increased opportunities for small businesses to participate in Federal contracts.

Regulatory Reform Accomplishments		
Issue Area	**Agency/Rule**	**Summary/Status**
Transportation	DOT/FAA: Sport Pilot Certification Rule	This FAA final rule enables the safe development of a new area of aviation by establishing new certification requirements for light-sport aircraft (small, single-engine, and low performance aircraft designed for one or two passengers). The rule also establishes requirements for light-sport plane pilots and repairmen. The lower costs associated with the production and development of light-sport aircraft are expected to foster growth in general aviation and the current pilot population.
Transportation	DOT/FWHA: Highway Work Zone Safety	On November 20, 2003, the FHWA published a final rule including provisions for greater use of high-visibility clothing and barricade devices to improve safety for highway construction workers. It also contained a new section on fluorescent pink signs to alert drivers to traffic incidents and increased letter size on street signs and turn-path pavement markings at intersections meant to help older drivers. For pedestrians, the FHWA has included "animated eyes," "countdown signals" and "in-street" pedestrian signs. Additionally, there are new provisions to help pedestrians with disabilities such as the use of barriers to assist in safe navigation of walkways and audible devices to communicate sign information will assist visually impaired individuals. Other items to improve safety are longer stopping distances, more warning signs, sequential chevron panels, nighttime lighting requirements and flashing lights on STOP/SLOW paddles.
Transportation	DOT/FRA: Electronic Submission; Hours of Service Regulations	The Department of Transportation has undertaken a number of initiatives to reduce paperwork burden through the use of automation and electronic reporting. For example, the Hours of Duty records, used by railroads to account for the time that covered employees spend on the job were converted from a paper to an electronic format. To date, both time and cost burdens have been substantially reduced. The conversion from a paper to an electronic format reduced the burden on railroads by over 772,000 hours.
Transportation	DOT/FRA: Whistle Bans on Highway-Rail Grade Crossings	This FRA rule requires locomotive engineers to continue to sound horns at highway crossings unless communities create "quiet zones" by installing new crossing safety equipment or prove that the risk is low for accidents at a crossing that has gates and flashing lights. In all cases, an engineer can sound a horn whenever he believes there is an emergency. In addition, horns would be sounded no more than 15 to 20 seconds before reaching a crossing, rather than in accordance with the current quarter-mile rule. The rule also set new standards for the minimum sound level and, for the first time, the maximum sound level that can emanate from a locomotive horn. The rule effectively balances the safety of motorists with the desire of communities near railroad tracks to get some sleep at night.
Transportation	DOT/NHTSA: Corporate Average Fuel Economy (CAFE) Standards	In April 2003 NHTSA published a final rule raising light-truck, fuel-economy standards for the first time in a decade. NHTSA estimates that the fuel savings for consumers who purchase 2005-2007 vehicles will more than pay for the compliance costs of this rule. The rule will reduce oil consumption by 3.6 billion gallons over the life of these vehicles.
Transportation	DOT/NHTSA: Fuel System Safety Standard B Vehicle Fires	In December 2003, NHTSA published a final rule upgrading its fuel system integrity standard. This upgrade increases the test speed for rear crashes from 30 mph to 50 mph and increases the test speed for side crashes from 20 mph to 33.5 mph. The upgrade also uses a heavier barrier with a more aggressive face to better replicate a crash with another vehicle. This upgrade will ensure that people who survive high-speed crashes will not die in a fire caused by a fuel leak from the crash. The new rear impact requirements will be phased-in, beginning September 1, 2006, with compliance of all new vehicles required by September 1, 2008. All new vehicles will be required to comply with the new side impact requirements beginning September 1, 2004.

Regulatory Reform Accomplishments		
Issue Area	**Agency/Rule**	**Summary/Status**
Social Services	Faith Based Initiative	The Faith-Based Initiative has been active in implementing the principles of the Executive Order 13279 through regulations. Faith-Based Organizations have for many years been an integral part of social services and safety net programs in this country. To a large extent, these regulations seek to ensure Faith-Based Organizations the opportunity to compete on equal footing for Federal funding and to eliminate unequal burdens on grantees that are Faith-Based in nature. Faith-Based centers at seven agencies (Ed., HHS, HUD, DOJ, DOL, USDA, and USAID) have promulgated thirteen final rules, including general rules that cover the funding delivered by six agencies, three regulations implementing Charitable Choice statutes, a DOL regulation implementing the amendment of EO 11246, and three regulations changing discriminatory language in specific HUD, VA, and DOL programs. Two additional rules have been proposed and are yet to be finalized, one of which is a general regulation covering a seventh agency.
Social Services	HHS: Language-Assistance Services for Limited English Proficient Individuals	On August 8, 2003 HHS issued revised LEP guidelines, which explain when and how providers should make appropriate interpretation and translation services available for people who need this help. The guidelines are based on a framework developed by DOJ, with modifications designed to reduce regulatory burden on health care providers, such as by allowing LEP individuals to use family and friends as translators.
Social Services	USDA: Food Stamp – Social Security Combined Application Project	The Food and Nutrition Service and the Social Security Administration have signed a memorandum of understanding to approve state agencies to operate Combined Application Project (CAP) demonstrations. These projects simplify enrollment procedures for both caseworkers and the elderly and disabled recipients by relying on technology, standardized benefits and streamlined application procedures for providing food stamp benefits to one-person households eligible for both Food Stamps and Social Security Income. To date, 3 CAP projects (MS, WA, and NY) have been implemented. Several other States are in the process of implementing the CAP project. Early evidence indicates that the CAP project increases participation and lowers administrative costs.
Transportation	DOT: Deregulation of Computer Reservations Systems	Computer reservations systems (CRSs) provide software to travel agents to allow them to book airfares posted from air carriers. The 20-year-old CRS rules were intended to prevent carriers from using the CRS systems they owned at that time from undermining other carriers' ability to compete. After a comprehensive review, DOT concluded that the rules are no longer necessary and existing enforcement mechanisms can address any anticompetitive or consumer deception problems. DOT's January 2004 final rule eliminated the CRS rules. Industry estimates that the elimination of these rules will save consumers $1.9 billion per year.
Transportation	DOT/NHTSA: Modernized Hours of Service For Truck Drivers (HOS)	The new HOS rules allow truck drivers to drive 11 hours after 10 consecutive hours off-duty. Also, drivers may not drive beyond the 14th hour after coming on duty, following 10 hours off duty. The old HOS rules allowed 10 hours of driving within a 15-hour on-duty period, after 8 hours of off-duty time. Similar to existing rules, drivers may not drive after 60 hours on duty within a consecutive 7-day period or 70 hours on duty in a consecutive 8-day period. The new, science-based rule makes significant strides in providing commercial drivers a 24-hour work/rest schedule in line with the body's circadian rhythm. The longer off-duty time allows drivers to have more regular schedules and increases the opportunity for quality sleep. This is consistent with fatigue- and sleep-related studies considered in development of the rule that indicate the amount and quality of sleep a person receives has a strong influence on alertness.

Regulatory Reform Accomplishments		
Issue Area	**Agency/Rule**	**Summary/Status**
Transportation	DOT/NHTSA: Collection of Annual Registration Fees	In its final rule issued on January 9, 2003, RSPA reduced the hazmat registration fee for all persons who transport or offer for transportation certain categories and quantities of hazmat. For large businesses the fee used to be $1975 annually. It was reduced to $275. For small businesses it was $275 and now is $125.

Promising Regulatory Reform Proposals		
Issue Area	**Agency/Rule**	**Summary/Status**
Education	ED: Title IX and Single-Sex Schools	The Department is changing the regulations implementing Title IX of the Education Amendments of 1972, which prohibits sex discrimination in federally assisted education programs. A proposed rule, published on March 9, 2004, would expand flexibility for recipients that may be interested in providing single-sex schools or classes.
Environment	EPA: Stormwater Permits for Small Oil and Gas Drilling Operations	In this final action, EPA delayed for two years -- until March 1, 2005 -- its requirement that small oil and gas drilling operations obtain permits for stormwater runoff during construction of the site. The impacts on these operations were not analyzed when EPA established the original permit requirement because EPA believed most such operations would be eligible for an exemption as sites less than 1 acre in size. However, new information showed that this assumption was incorrect. Following President Bush's Executive Order 13211 requiring energy impacts analysis, EPA decided to gather additional data to determine if imposing permitting requirements on these operations would result in a significant energy impact. EPA also decided to evaluate the applicability of the statutory exemption for oil and gas exploration to these facilities. Based on current information, environmental impacts from such operations appear to be minimal. There should be at least $55 million in annual cost savings to the affected 30,000 drilling starts each year.
Environment	EPA: Integrated Risk Information System (IRIS)	IRIS is a database containing information on human health effects that may result from exposure to various substances found in the environment. IRIS was initially developed for EPA staff in response to a growing demand for consistent information on chemical substances for use in risk assessments, decision-making and regulatory activities. IRIS is now broadly used by all sectors of society. Comments from the public have included the suggestions that the IRIS process be more transparent and better documented. There are also concerns that it contains outdated information. EPA has expanded the IRIS staff and revised the internal review processes used to review database submissions. EPA is continuing to work on ensuring compliance with the pre-dissemination standards in the OMB and EPA Information Quality Guidelines.
Environment	EPA: Cancer Risk Assessment Guidelines	The Guidelines for Carcinogen Risk Assessment are designed to provide EPA staff and decision makers with guidance for developing and using carcinogen risk assessments, as well as transparency for interested parties with respect to EPA's assessment methods. Final guidelines were last published in 1986. The agency requested comment on updated in drafts in 1996, 1999, and 2003. The 1999 draft is currently designated as the interim guidance. In conjunction with the 2003 draft, EPA released the first draft of its "Supplemental Guidance for Assessing Cancer Susceptibility from Early Life Exposures to Carcinogens." This supplemental guidance was reviewed by the Agency's Science Advisory Board (SAB) in March of 2004. EPA is in the final stages of preparing guidance that will replace the 1986 (and the 1999 draft interim) guidelines. The document, which includes the Agency's response to public comments and concerns raised by the SAB, is designed to ensure compliance with the pre-dissemination standards in the OMB and EPA Information Quality Guidelines. These updated Guidelines will be submitted for interagency review shortly.
Environment	EPA: Utility Mercury Reductions Rule	On December 15, 2003, EPA issued a proposal to substantially cut mercury emissions from coal-fired power plants. The rule would permanently cap emissions from coal-fired power plants and provide companies with flexibility to achieve early reductions of mercury. This is the first time EPA has proposed to regulate mercury from coal-fired power plants; when it is fully implemented, the rule will cut mercury emissions by nearly 70 percent.

Promising Regulatory Reform Proposals		
Issue Area	**Agency/Rule**	**Summary/Status**
Environment	EPA: Metals Assessment Framework	In response to widespread concerns from stakeholders, EPA has been working for the past three years on a new framework for assessing the environmental hazards of metals. This effort reflects a growing consensus within the scientific community that the "persistent, bioaccumulative toxic" (PBT) approach has limited usefulness for inorganic metals for several reasons, including 1) bioaccumulation appears to be inversely related to ambient concentration in many cases, 2) the PBT framework does not adequately account for fate and transport, 3) trace amounts of metals are essential for many organisms, and 4) because elemental metals are naturally occurring, many organisms have developed mechanisms for sequestering them (e.g. in bone) that may not correlate well with hazard. EPA is about to launch a Science Advisory Board review of the current draft of the framework, which will ultimately serve as the basis for hazard assessment for metals across EPA program areas.
Environment	EPA: Beach Act Pathogen Standards	In July of 2004, EPA issued a proposed regulation to improve standards for water quality monitoring at our nation's beaches. The new rule will ensure that more protective, health-based standards for infections pathogens are in place in all coastal recreational waters nationwide, including both coastal and Great Lakes beaches. This will support improved beach monitoring programs, tougher permitting to prevent wet weather sewage overflows, and reduced transmission of waterborne diseases.
Environment	EPA: Paperwork Burden Reduction Initiative under the Resource Conservation and Recovery Act	A proposed rule was published in 2002 that would significantly reduce the paperwork burden imposed under the Resource Conservation and Recovery Act (RCRA). The rule establishes higher chemical use thresholds for small businesses (facilities below these thresholds would not have to report). EPA wants to ensure that only the information actually needed to run the RCRA program is collected. EPA estimates that the initiative will reduce burden by 929,000 hours and save $120 million annually.
Environment	EPA: Definition of Solid Waste	EPA published a proposed rule on October 28, 2003, that would revise the definition of "solid waste" under the Resource Conservation and Recovery Act (RCRA). This rule would expand the universe of industrial wastes, including various spent solvents, sludge and other wastes that would be eligible for the recycling exemption under RCRA. Successfully expanding recycling of industrial wastes would be environmentally beneficial and yield large cost savings by reducing disposal costs. EPA also proposed an option that would allow a wider use of recycling. EPA estimated its primary option could save about $200-$300 million annually compared with current regulations.
Environment	EPA: Best Available Retrofit Technology	The Clean Air Act addresses visibility in national parks and wilderness areas, in part, by requiring best available retrofit technology (BART) on certain major sources emitting pollutants that impair visibility. In 2001, EPA proposed BART guidelines to assist states in identifying BART-eligible sources, determining which sources may be anticipated to contribute to visibility impairment, and conducting a technical analysis of possible controls. EPA's 1999 regional haze rule allows States the option of implementing an emissions trading program or other alternative measure instead of requiring BART. In 2004, in response to a court ruling, EPA re-proposed its BART guidelines to provide states with greater flexibility in determining which sources may be anticipated to impair visibility, and to require states to consider visibility improvement when making a BART determination. EPA also stated that it expects the final Clean Air Interstate Rule (CAIR) to satisfy the BART requirements for affected electrical generating units (EGUs) that are covered pursuant to the final CAIR. EPA believes that such an approach will increase net benefits over source-specific BART.

Promising Regulatory Reform Proposals		
Issue Area	**Agency/Rule**	**Summary/Status**
Environment	EPA: Disinfection Byproducts Rule and Long Term Surface Water Treatment Rule	These rules, proposed on August 18, 2003, will reduce exposure to potentially harmful disinfection byproducts (DBPs) in drinking water, while at the same time maintaining and enhancing protection against pathogens, particularly cryptosporidium. Under the new rules, drinking water systems will be required to monitor for cryptosporidium in their source water, and depending on results, increase their removal rate by up to 300 fold. They will also have to ensure that customers in all parts of the distribution system receive water that meets standards for DBPs, rather than only ensuring that water meets the standards on average, as is currently the case. This is important because harmful DBPs can form disproportionately in parts of the distribution system, after water leaves the treatment plant. The rules reflect consensus recommendations of a broad range of drinking water stakeholders including environmental groups, consumer advocates, drinking water utilities, and State and local governments.
Environment	EPA: Interstate Clean Air Rule: Reducing Pollution from Coal-Fired Powerplants	In December 2003, EPA proposed the largest air pollution reductions since the passage of the Clean Air Act Amendments of 1990. The proposed rule would reduce the interstate transport of pollutants that contribute to unhealthy levels of particulate matter and ozone. The proposed rule would establish a modern trading system to cut power plant emissions of SO_2 by 70% and NOX by 65% in 30 states (mostly located East of the Mississippi River.) EPA estimates that the final CAIR rule will yield benefits of $80 billion per year – with reductions of 13,000 premature deaths, 18,000 non fatal heart attacks – and impose costs on the electric utility sector of $2.5 to $4 billion per year.
Environment	EPA: Paperwork Burden Reduction in the Toxic Release Inventory Program	EPA has undertaken several initiatives to streamline and strengthen the TRI reporting program. These include an enhanced version of its award winning TRI Made Easy (TRI-ME) software; a white paper soliciting comment on various burden reduction approaches, including enhanced use of Form A, higher reporting thresholds for some classes of chemicals and facilities, and "no significant change" certification in lieu of comprehensive annual reporting; and revisions to its instruction, guidance and Q&A documents.
Environment	EPA: Spill Prevention Plans	EPA finalized a Spill Prevention, Control, and Countermeasures (SPCC) rule in July 2002. This rule was designed to prevent discharges of oil into navigable waters of the United States, and to contain those spills after they occur. Facilities subject to the rule must prepare and implement plans to prevent such discharges and respond to spills. Regulated entities believe that the cost of compliance with SPCC requirements could be reduced by hundreds of millions of dollars without diminishing the environmental benefits. In 2004, EPA published a list of clarifications to the rule, developed by the Agency during the course of settlement proceedings. EPA also extended, by one year, the deadline for facilities to amend and implement their SPCC plans. EPA recently announced its intention to consider specific changes to the SPCC rule.
Environment	DOE: Greenhouse Gas Guidelines	As part of the Administration's effort to encourage proactive, voluntary reductions of greenhouse gas emissions, DOE's Guidelines for Voluntary Greenhouse Gas Reporting will strengthen the process for entities to assess, calculate and report greenhouse gas reductions to DOE. DOE will then process and disseminate the data in a publicly available database. A proposed rule, published on December 5, 2003, increases the requirements that the voluntary participants must meet with respect to data quality, and thereby strengthens the credibility of the emission reduction claims.

Promising Regulatory Reform Proposals		
Issue Area	**Agency/Rule**	**Summary/Status**
Health and Safety	USDA: Animal Identification	Currently the U.S. does not have a comprehensive system that can quickly and effectively identify individual animals or groups; the premises where they are located; and the date of entry to that premise. Such information enhances disease preparedness by allowing the U.S. to identify and locate any animals exposed to disease and will facilitate stopping the spread of that disease. On Dec. 30, 2003 the USDA announced that they would expedite the implementation of a national animal identification system for all species after the discovery of a BSE positive cow in Washington State. On April 27, 2004, USDA announced the framework for implementation and initiated phase I of their plan for a National Animal Identification System (NAIS). In July 2004, USDA and FDA published a joint ANPRM seeking further comment on the implementation of a national animal ID system. Implementation of the system is prioritized to address cattle first, then moving to other types of livestock. While much has been done, more remains.
Health and Safety	HHS/FDA: Consumer Food Labeling for Trans-Fat Content	On July 11, 2003, FDA published a final rule that requires manufacturers to list the amount of *trans* fat on nutrition labels on food packaging. However, the final rule left some issues unresolved such as establishing definitions of specific content claims for *trans* fat (e.g., *trans* fat free), qualifying criteria for *trans* fat in current nutrient content claims for saturated fat and cholesterol, lean and extra lean claims, and health claims that contain a message about cholesterol-raising lipids. Under the Nutrition Labeling and Education Act food producers may not use nutrient content claims or health claims that are not explicitly defined by FDA in a regulation. In addition, FDA did not provide recommendations on the consumption of *trans* fat. To address these issues, FDA published an advance notice of proposed rulemaking along with the final rule to solicit information and data that could be used to develop new nutrient content claims and health claims about *trans* fat as well as other information on food labels to help consumers in maintain healthy dietary practices.
Health and Safety	DOL/OSHA: Ergonomics Guidelines for Industry	In November 2000, OSHA issued an "ergonomics" regulation designed to address musculo-skeletal disorders (MSDs) such as carpal tunnel syndrome, bad backs and tendonitis. The rule would have required employers with an employee who reported experiencing an MSD to implement a wide-ranging ergonomics program. OSHA estimated that the cost of the rule would have been over $4 billion annually. Industry estimated that the costs of the rule were $90 billion annually. In March of 2001, Congress passed a historic and bipartisan joint resolution overturning the ergonomics regulation under the Congressional Review Act. President Bush signed the joint resolution. In this Administration, OSHA is developing targeted, non-binding guidelines to reduce MSDs rather than issue cumbersome rules. So far, OSHA has published final Guidelines for Retail Grocery Stores. OSHA expects to publish similar guidelines shipyards and poultry processing and to select additional industry or task-specific guidelines.
Health and Safety	DOL/OSHA: Reducing Occupational Exposure to Hexavalent Chromium	With this rule, OSHA proposed to amend its existing standard for employee exposure to hexavalent chromium (Cr(VI)) based upon a determination that employees exposed to Cr(VI) face a significant risk to their health at the current permissible exposure limits and that the proposed standard could significantly reduce that risk. The rule proposes to change the current permissible exposure limit from 52 micrograms of Cr(VI) per cubic meter of air to 1 microgram per cubic meter of air. OSHA also proposes ancillary provisions for employee protection such as preferred methods for controlling exposure, respiratory protection, protective work clothing, hygiene practices, and medical surveillance.

Promising Regulatory Reform Proposals		
Issue Area	**Agency/Rule**	**Summary/Status**
Health and Safety	HHS and USDA: Update of the Dietary Guidelines for Americans and the Food Guide Pyramid	*Dietary Guidelines for Americans* provide science-based advice to promote health and to reduce risk for major chronic diseases through diet and physical activity. By law, the Secretaries of the Department of Health and Human Services (HHS) and the Department of Agriculture (USDA) issue a report at least every 5 years that "shall contain nutritional and dietary information and guidelines for the general public." Every 5 years, an expert Dietary Guidelines Advisory Committee is appointed to make recommendations to the Secretaries concerning revision of *Dietary Guidelines for Americans*. The 2005 Dietary Guidelines Advisory Committee report includes recommendations on reducing consumption of foods high in trans fatty acids and increasing consumption of foods rich in omega-3 fatty acid. On May 23 2003, OMB sent a prompt letter to HHS and USDA concerning trans fat and omega-3.
Health Care	HHS: HIPAA - Standards for Protecting the Privacy of Individually Identifiable Information (Medical Privacy Rule)	This regulation initially issued in 2000 and subsequently revised and simplified by HHS in 2002, put in place a large number of requirements intended to protect the privacy of individual medical records. However, implementation has been confusing and burdensome for the medical community and additional reform may be required. Commenters recommend that the rule should be refined and clarified to reduce administrative and compliance costs.
Homeland Security	DHS: Support Anti-Terrorism by Fostering Effective Technology (SAFETY Act)	DHS published an interim final rule with request for comments implementing the SAFETY Act provision of the Homeland Security Act of 2002. Through this rule, DHS provides critical incentives for the development and deployment of antiterrorism technologies by providing liability protections for sellers of "qualified antiterrorism technologies" and others. The final rule revised and simplifies the Safety Act application kit.
Labor	DOL/Vets: Uniformed Services Employment Reemployment Rights Act (USERRA)	This rule would set forth regulations for the USERRA program, in operation since 1994 through technical assistance and operating guidance. Under USERRA, eligible service members who leave their civilian jobs for military service are entitled to return to their jobs with the seniority, status, and rate of pay they would have attained had they not been on duty. USERRA also assures they will not suffer discrimination in employment because of military service or obligations. This is a rule that should ease the transition home for service members currently in the field. It should be received neutrally by employers, who should already be aware of its obligations and have been seeking clarification to the current implementation framework.
Land Management	USDA: Roadless Rule	On July 16, 2004, USDA issued a proposed rule governing the management of inventoried roadless areas in the National Forest Service lands in the lower 48 states. This rule will replace the 2001 Roadless rule which prohibited, with certain exemptions, all road construction and reconstruction in National Forests. The proposed rule allows state governors to petition USDA to issue state-specific rules addressing roadless area management. This rule responds to criticism that USDA failed to consider states' concerns when it promulgated the 2001 rule – in particular, the difficulty of tailoring a national rule to address unique local conditions. The rule also takes steps that will lead to more sustainable forest management.
Land Management	USDA/NFS: Forest Planning	Commentor recommended the 2000 Forest Planning rule be revised to avoid polarizing the public and wasting agency resources. The Forest Service issued a new proposed planning rule in December 2002 and is working to finalize it based on public comments. The new rule will focus on adaptive management and monitoring to streamline the planning process and result in more timely agency actions.

Promising Regulatory Reform Proposals		
Issue Area	**Agency/Rule**	**Summary/Status**
Transportation	DOT/NHTSA: Reform of Corporate Average Fuel Economy (CAFE) Standards	The Administration earlier had asked Congress to provide broader authority to reform and improve the CAFE program. In the absence of Congressional action, NHTSA has focused its efforts on reforms that can be achieved with existing authority and has used as guidance the recommendations of a National Academy of Science report. NHTSA published in December 2003 an ANPRM seeking comment on possible ways to improve CAFE. For model years 2008 and beyond, NHTSA is considering reforms of the CAFE program that will facilitate even greater fuel savings, without risk to passenger safety or jobs in vehicle manufacturing. The ANPRM discusses several options for restructuring the program for light trucks (i.e., SUVs, vans, and pickup trucks).
Transportation	DOT/NHTSA: On-Board Crash Recorders	In June 2004, NHTSA published a proposed rule to establish defined protocols to be used in the incorporation of Event Data Recorders (EDRs) into motor vehicles. These devices provide critical crash information that aid investigations of the causes of crashes and injuries, and make it possible to better define safety problems and develop more effective future safety initiatives. Among the proposals are ones to (1) require that the EDRs voluntarily installed in light vehicles record a minimum set of specified data elements useful for crash investigations, analysis of the performance of safety equipment, and automatic collision notification systems; (2) specify requirements for data format; (3) increase the survivability of the EDRs and their data.
Transportation	DOT/NHTSA: Side-Impact Protection	In May 2004, NHTSA published a proposed rule to upgrade the federal motor vehicle safety standard established to protect vehicle occupants in side impact crashes. First, it would upgrade the standard by requiring that all light passenger vehicles protect front-seat occupants against head, thoracic, abdominal and pelvic injuries in a vehicle-to-pole test simulating a vehicle's crashing sideways into narrow fixed objects like telephone poles and trees. Second, this proposed rule would upgrade the standard's existing vehicle-to-vehicle test that requires protection of front- and rear-seat occupants against thoracic and pelvic injuries in a test that uses a moving deformable barrier to simulate a moving vehicle's being struck in the side by another moving vehicle. When fully implemented, the proposed upgrade is estimated to save 700 to 1000 lives and prevent 900 to 1000 serious injuries over the life of each year's new vehicle fleet, at a cost of $1.6 billion to $3.6 billion per year.

ONE HUNDRED EIGHTH CONGRESS

Congress of the United States

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COMMITTEE ON GOVERNMENT REFORM

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November 27, 2004

BY FACSIMILE
The Honorable Stephen L. Johnson
Deputy Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Mr. Johnson:

This letter follows up on the November 17, 2004 hearing of the Government Reform Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, entitled "What is the Bush Administration's Record in Regulatory Reform." Please respond to the enclosed followup questions for the record from Congressmen Tierney, Waxman, Van Hollen, and Kucinich.

Please hand-deliver the agency's response to the Subcommittee majority staff in B-377 and the minority staff in B-350A Rayburn House Office Building not later than December 17, 2004. If you have any questions about this request, please call Subcommittee Staff Director Barbara Kahlow on 226-3058.

Thank you for your attention to this request.

Sincerely,

Doug Ose
Chairman
Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs

Enclosure

cc The Honorable Tom Davis
The Honorable John Tierney

Questions for the Record
Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs
Hearing Held on November 17, 2004
for Stephen L. Johnson, Deputy Administrator, EPA
from Ranking Member John F. Tierney, Ranking Member Henry A. Waxman,
Representative Chris Van Hollen, and Representative Dennis J. Kucinich

1. At the hearing, and in a letter from Assistant Administrator Holmstead referenced during the hearing, the Administration suggested that there is no need for EPA to conduct an Integrated Planning Model (IPM) analysis of any option to establish mercury control requirements that are more stringent or that would take effect sooner than EPA has proposed. The Administration's rationale appears to be that because parties outside the federal government, such as states, industry and environmental organizations, have conducted IPM analyses of alternative control requirements, EPA can rely on those analyses in considering whether to adopt more stringent standards than the agency has proposed. Is this in fact the Administration's position?

2. We have concerns about EPA's apparent intent to rely solely on alternatives identified and analyzed by outside parties as a sufficient basis for considering any option more stringent than EPA's preferred approach.

   a. Does the Administration believe that all of those analyses conducted by outside parties are directly comparable to the agency's own analyses of its proposed approaches? Does the Administration believe that any of those analyses conducted by outside parties are directly comparable to the agency's own analyses of its proposed approaches? I.e., is it possible to make an apples-to-apples comparison between the emissions reductions and costs estimated for each of the alternatives modeled by each of the outside parties and the emissions reductions and costs that EPA estimated would occur under each of EPA's proposals? If so, please identify which alternative control scenario analyses are directly comparable to EPA's analyses of its proposed control options.

   b. If it is not possible to make an apples-to-apples comparison with respect to any of the scenarios modeled by an outside party, is the information at least sufficiently comparable to allow a serious consideration of the relative benefits and costs of the alternatives vis a vis EPA's proposals?

   c. If this is not the case, how do these outside analyses in any way substitute for EPA conducting its own analyses of more stringent alternatives to EPA's proposal?

   d. Did any of the outside parties model each of the recommendations for mercury control levels recommended by EPA's advisory group? Did any of the outside

parties model any of the recommendations for mercury control levels recommended by EPA's advisory group? If not, how do these outside parties' analyses substitute for EPA conducting its own analyses of the advisory group's recommendations?

3. The IPM model incorporates EPA's assumption that ACI is capable of achieving a 90% reduction in mercury emissions In its letter of November 17, 2004 to Representative Waxman and other members, and during the hearing, EPA stated that it will not conduct additional modeling until the Agency updates the IPM model to revise its assessments about the near-term availability of technology. EPA indicated that it no longer believes that plants burning any type of coal would be able to install ACI and achieve a 90% reduction in mercury emissions prior to 2011.

   a. When did EPA first incorporate the emission modification factors (EMFs) for ACI into IPM that reflect a 90% removal capacity when ACI is used with a fabric filter? What process did EPA use to reach this decision? Were other federal entities such as EIA, OMB, and/or CEQ involved? What was the technical basis for EPA's position?

   b. In Congressional correspondence with EPA on this issue since March 2003, it does not appear that EPA identified a concern about the performance of ACI in 2008 prior to a letter dated August 19, 2004. When did EPA first revise its previous position that ACI (or related technologies when used in combination with a fabric filter) will be capable of achieving a 90% reduction in mercury emissions on all coal types by 2008?

   c. What is the new technical basis for EPA's new position? What newly available information (since EPA last addressed the question of the EMFs for ACI) clearly indicates that ACI used with a fabric filter will not be able to achieve a 90% reduction in mercury emissions on all coal types by 2008? Please indicate the date on which EPA received such information and the source of such information. Please provide copies of such information or citations to the docket numbers for documents in the public docket.

   d. During the summer of 2002, EPA's advisory group engaged in extensive discussions with EPA about revisions to assumptions in IPM that the advisory group believed needed to be made. Members of the advisory group memorialized their recommendations to EPA in memoranda and comments sent to the Agency. Did EPA make changes to IPM based on recommendations from the advisory group?

   e. If so, what changes did EPA make?

f. Specifically, did EPA revise the EMFs for ACI, and if so, approximately when did EPA make those revisions?

4. In his letter of November 17, 2004 to Representative Waxman and other members, Assistant Administrator Holmstead took a new and extreme position on the near-term capabilities of ACI. He stated, "ACI will not be available on all coal types until after 2010." Read literally, this statement appears inaccurate, as ACI has, in fact, already achieved mercury emissions reductions in demonstrations on plants burning bituminous, sub-bituminous, and lignite coals.

   a. To clarify, is EPA's position that: (1) although ACI can be installed before 2011 on plants burning any type of coal and will achieve some emissions reductions with respect to all coal types, even in combination with a fabric filter ACI will not, until after 2010, achieve a 90% emissions reduction for all coal types; or (2) ACI actually cannot be installed until after 2010 on plants burning some types of coal (and/or if installed, will not achieve any emissions reductions on plants burning some types of coal)?

   b. If EPA believes ACI actually will not be able to be used prior to 2011 to achieve any level of emissions reductions on plants burning certain coal types, please provide EPA's technical support for that position. Please explain why the full-scale demonstrations showing that ACI reduces mercury emissions from sub-bituminous and lignite coals do not contradict EPA's new position.

   c. If EPA believes that ACI with fabric filters will not achieve a 90% removal rate on all coal types prior to 2011, but will achieve some removal rate on all coal types, when did EPA first reach that conclusion? Why did EPA not revise IPM accordingly at that time? What removal rates does EPA now believe ACI, in combination with a fabric filter or other particulate control device, will be able to achieve by 2008 for: (1) bituminous; (2) sub-bituminous; and (3) lignite coals?

5. In the summer of 2002, some industry members of the advisory group recommended changes to the EMFs for ACI. For example, Cinergy stated: "The model should assume that ACI in combination with a retrofit fabric filter will achieve 80%-90% removal. In addition, the model should have the option for ACI with an existing ESP with a 50%-60% removal." The Utility Air Regulatory Group (UARG) stated that the mercury removal efficiency for ACI in a cold-side ESP "should be limited to 65%."

   a. Did any member of the advisory group prior to April 2003 suggest that ACI would not be available before 2011 to achieve at least some level of control for all coal types and that IPM should be revised accordingly? If so, please provide all documents related to such suggestion (or provide the docket identification numbers for such documents if they are in the docket).

b. Did EPA make any or all of these changes to IPM recommended by the industry members of the advisory group? If so, which changes did EPA make and when did EPA make them?

6. In the regulatory context, it is well-understood and well-documented that regulatory requirements commonly drive substantial advances in control technology. Regulation creates a market demand for control technology that leads both to improved performance and reduced cost. In fact, while EPA has often been unable to predict the precise technological improvements that would be driven by the adoption of control requirements, such advances routinely occur, and EPA sometimes accounts for such improvements in projections of the costs of proposed regulatory requirements. It appears that EPA much more rarely projects that no improvements would be possible in a given control technology over a multi-year timeframe. Please identify any examples of a precedent where, with respect to a proposed regulation, EPA made a definitive assumption that no control technology would become available (or a certain category of control technologies would not become available) within five years of the date of the regulation, when such control technologies had already performed successfully in full-scale multi-day demonstrations.

   a. What is EPA's technical basis for definitively predicting the time frames in which ACI and other sorbent technologies (applied in combination with particulate controls) would *not* develop?

   b. With multiple companies achieving rapid improvements in mercury control technologies, and with numerous demonstrations of ACI on a variety of plant configurations burning different types of coal, how can EPA possibly be confident that ACI will not be able to achieve a 60% or 90% level of control (depending upon the amount of sorbent used and particulate controls in place) by 2008, as IPM currently assumes?

   c. The trade association for control technology vendors, the Institute of Clean Air Companies, states that a 50-70% mercury emissions reduction is feasible by 2008 to 2010. What does EPA know that the pollution control industry does not about the future availability of mercury control technology?

7. At the hearing and in the November 17, 2004 letter, the Administration stated that EPA will not conduct additional modeling (such as modeling the recommendations of the advisory group) until the Agency updates the IPM model to revise its assumptions about the near-term availability of technology. The Administration also refused to state whether or not, prior to finalizing the rule, it would analyze the control level recommendations made by the stakeholder advisory group, despite Rep. Chris Van Hollen's repeated requests for a simple yes or no answer to this question. However, it

appears that by: (1) failing to conduct this analysis over the past 18 months; (2) now taking the position that changes to the model are necessary before conducting the modeling; and (3) failing previously to make such changes, EPA has in fact all but precluded the possibility of conducting this modeling prior to finalizing the rule by March 15, 2005, given timing constraints.

a. How long would it take to make the changes to the EMFs for ACI and any other changes to IPM that EPA is now considering?

b. Does EPA agree that before making a regulatory decision that depends on any new modeling, EPA would need to allow for public comment on those modeling results?

c. If EPA believes there is any feasible timeframe under which EPA could complete changes to IPM, model the advisory group's recommendations, allow for public comment on those analyses, and then finalize the rule by the March 15, 2005 deadline, please describe the timing under which each of those actions would need to occur.

d. If EPA cannot provide the timeline requested above, why does the Administration continue to refuse to admit that in fact it *will not* analyze the recommendations developed by the stakeholder advisory group?

8. At the hearing, Dr. Graham appeared to say that the Administrative Procedure Act requires that EPA take public comment prior to finalizing any changes to the assumptions incorporated in IPM.

a. Is this the Administration's position? If so, please provide the legal basis for the argument that IPM is a rule subject to APA section 553, or any alternative rationale for this position.

b. Has EPA always taken public comment on proposed changes to assumptions incorporated in IPM? Has EPA ever taken public comment on proposed changes to assumptions incorporated in IPM? If so, please provide examples including citations to federal register notices.

9. At the hearing, the Administration witnesses made statements to the effect that this rule, once finalized, would constitute the first time that mercury from coal-fired power plants were regulated. Yet mercury emissions from new coal-fired power plants are currently limited on a case-by-case basis pursuant to section 112(g). Does the Administration agree that mercury emissions from new coal-fired power plants are currently regulated? If not, why not?

10. By design, EPA's proposal for a cap-and-trade program under section 111 of the Clean Air Act would allow utilities to make a business decision as to whether to install mercury pollution controls on a coal-fired power plant or to purchase emission "allowances" from power plants that have installed controls. We have serious concerns about the potential for "hot spots" of mercury deposition that could contaminate waterways and fish populations near power plants that purchase allowances rather than controlling the plant's mercury emissions. EPA stated in its proposed rule that it "does not expect any local or regional hot spots." Furthermore, the Administration stated at the hearing that under EPA's cap-and-trade proposal, it anticipates that the power plants that are the largest emittors of mercury will install mercury controls.

    a. Has EPA done an analysis to project emissions levels plant-by-plant under EPA's cap-and-trade proposal? If so, please provide such analysis or the docket number for it.

    b. Under the modeling that EPA has performed on its cap-and-trade proposal, how many coal-fired power plants are projected not to install mercury-specific controls even after 2018? Do these include some plants with relatively high current levels of mercury emissions?

    c. Has EPA done any numeric analysis to evaluate the potential for local or regional depositional hot spots or human exposure hot spots under its cap-and-trade approach? If so, please provide such analysis or the docket number for it.

11. One of the witnesses, Professor Catherine O'Neill, testified that her analysis of EPA's own modeling data shows the potential for significant concerns about hot spots in the upper Great Lakes states of Wisconsin, Minnesota, and Michigan. Of the two largest emitters in this region, she points out that one is projected to increase its mercury emissions by 2020 under the cap-and-trade proposal. Many other sources in this region are projected to increase their emissions or reduce them only modestly under the cap-and-trade proposal. For example, Professor O'Neill refers to projections that as of 2020, emissions will have increased at 7 of 19 sources in Michigan, 7 of 10 sources in Minnesota, and 6 of 15 sources in Wisconsin. Overall, according to Professor O'Neill, EPA's proposal would produce a regional reduction in mercury emissions of only 27% percent from current levels by 2020, which is significantly less than the national reduction projected for that date.

    a. Has EPA specifically analyzed the effect of its cap-and-trade proposal on local and regional mercury deposition in the upper Great Lakes region? If so, what were the results of EPA's assessment? If not, does EPA intend to conduct such an assessment?

b. What, if any, evidence does EPA have to show that, under its cap-and-trade proposal, specific waterbodies in the upper Great Lakes region and communities that consume fish from those waterbodies: (1) will not be exposed to higher levels of mercury in 2010 and 2020 than they are today; and (2) will be exposed to lower levels of mercury in 2010 and 2020 than they are today? Absent such evidence, on what basis can EPA assert that there is no potential for hot spots in this region?

12. Professor O'Neill states that 100% of the inland lakes and 100% of the abutting Great Lakes in this region are under fish consumption advisories, and she cites evidence that the population in this region consumes substantially more fish than the general population consumes on average. She also emphasizes that Native Americans in this region consume even larger quantities of fish, and that native women of child-bearing age are likely exposed to methyl-mercury at levels far above EPA's reference dose. Other subpopulations in other regions are likely similarly at risk.

a. Does the Administration agree that a key goal of the mercury rule should be to provide a substantial reduction in mercury exposures for the most vulnerable subpopulations?

b. What, if any, evidence is there that EPA's proposal would meet this criterion?

The information has not yet been provided for the record

September 16, 2004

The Honorable Doug Ose
Chairman
Subcommittee on Energy Policy, Natural Resources
and Regulatory Affairs
Committee on Government Reform
B377 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman:

I am writing to request a hearing on the Environmental Protection Agency (EPA)'s rulemaking on mercury emissions from power plants. With only a few weeks remaining before Congress recesses again, it is particularly important that this issue be addressed expeditiously. I respectfully request that you schedule a Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs hearing on this issue.

Coal-fired power plants in the United States emit many tons of mercury pollution each year into the air that falls into and pollutes lakes, rivers, streams, and the ocean. The resulting methylmercury in the water is absorbed by fish and then consumed by humans.

Last month, EPA released its annual national fish advisories list. EPA's list revealed that forty-five states, including California and Massachusetts, issued warnings about mercury contamination in state waters.[1] According to EPA scientists, approximately 630,000 infants are born in the United States each year with blood-mercury levels at unsafe levels.

EPA has concluded that mercury is a hazardous air pollutant subject to regulation. In December 2000, EPA concluded that regulating mercury emissions from power plants was "appropriate and necessary." EPA is therefore required under the Clean Air Act to regulate mercury emissions by requiring that power plants install the maximum achievable control technology (MACT). EPA is required by a court-approved settlement to issue a final rule regulating mercury emissions by March 15, 2005.

[1] Environmental Protection Agency, *National Listing of Fish Advisories Fact Sheet* (Aug. 2004).

To date, the rulemaking process EPA has conducted is fundamentally flawed. As a part of its rulemaking, EPA is required to analyze the effects of a full range of options for controlling mercury emissions. EPA's own advisory group recommended that EPA analyze options under section 112 of the Clean Air Act that were identified by the group and that are more stringent than EPA's proposals. Prior to issuing its proposals last December, EPA refused to do the analysis recommended by the advisory group, in violation of the Clean Air Act's directives.

Responding to public criticism on this point, Administrator Leavitt promised in March that EPA would conduct more analysis. Yet, despite requests from citizens, Members of Congress, States, and EPA's own advisory group, it appears that EPA has not performed the required analysis of more protective options than EPA proposed.

In December 2003, EPA proposed two different approaches to regulate mercury emissions. One of EPA's proposals is to implement a MACT standard under section 112 which would only reduce mercury emissions by 29 percent by 2008 and fails to take into account available control technology. However, EPA's preferred approach is to implement a cap-and-trade program under section 111 of the Clean Air Act. This approach violates the Clean Air Act by failing to meet the directives of section 112. EPA purports that its approach would reduce mercury emissions from power plants by 70 percent starting in 2018. However, currently available technology allows coal-fired power plants to achieve over 90 percent reduction in mercury emissions according to EPA data.

Mercury pollution from power plants is an important and pressing public health issue that deserves proper oversight. EPA's regulation of mercury pollution from coal-fired power plants has been a long time coming and it is important that EPA get it right. It would be appropriate for the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs to exercise its oversight authority by investigating whether EPA is taking appropriate actions to finalize a rule that complies with the Clean Air Act and is protective of public health.

I look forward to working with you on this pressing matter.

Sincerely,

John F. Tierney
Ranking Minority Member
Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs

September 16, 2004

The Honorable Doug Ose
Chairman
Subcommittee on Energy Policy, Natural Resources
and Regulatory Affairs
Committee on Government Reform
B377 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman:

As we discussed yesterday, I believe it is important that the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs conduct a hearing on the status of the Environmental Protection Agency (EPA)'s ongoing rulemaking regarding mercury. I appreciate your willingness to address this issue, along with others, at a future hearing on regulation. I am attaching a letter (prepared prior to our conversation) detailing why EPA's rulemaking on mercury requires the Subcommittee's oversight.

This environmental, health, and safety issue is sufficiently important and complex to warrant a full hearing. However, if you choose to address this topic as a portion of a broader hearing, I respectfully request that at a minimum you invite an EPA witness able to address this issue in depth as well as allow a sufficient number of minority witnesses to address mercury and other issues.

I thank you again for your cooperation and look forward to working with you on this matter.

Sincerely,

John F. Tierney
Ranking Minority Member
Subcommittee on Energy Policy, Natural
Resources and Regulatory Affairs

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