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RE: Impact of Federal Regulations on Domestic Manufacturing (Docket No. 170302221-7221-01); DOC-2017-0001-0001

The U.S. Chamber of Commerce (Chamber), the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America's free enterprise system, offers these comments in response to the Department of Commerce's request for information about the effects of federal permitting and other regulations on domestic manufacturing, and other agency policies. These recommendations are grouped as follows:

Recommendations By Agency

The regulations identified in the chart on the following page are intended to be representative of the types of regulations that burden domestic manufacturing.

Agency	Policy Recommendation
Government-wide / Multi-Agencies	1. Permit Streamlining 2. Reducing Permitting Burdens for Technology Infrastructure 3. Rationalizing Agency Enforcement Guidelines and Decisions
Department of Homeland Security	1. STEM Optional Practical Training (OPT) Extension 2. H-4 Work Authorization Rule
Department of Homeland Security & Department of Labor	Interim Final Rule (IFR) Governing the H-2B Program
Department of Justice	Unfair Immigration-Related Employment Practices
Department of Health and Human Services	Section 1557 Non-discrimination
Equal Employment Opportunity Commission	1. Workplace Wellness/Genetic Information Nondiscrimination Act and ADA Regulations 2. Compensation and Hours-Worked Reporting (EEO-1 Form)
Internal Revenue Service	1. Reporting Requirements under Sections 6055 and 6056 pursuant to the ACA 2. Nondiscrimination Testing for Frozen Defined Benefit Plans
Departments of Treasury and Labor and the Pension Benefit Guaranty Corporation	Electronic Disclosure for Benefit Plan Notices
Department of Labor (OSHA)	1. Revised Silica Standard 2. Injury and Illness Reporting Regulation with Anti-Retaliation Provision 3. Reliance on the General Duty Clause to Enforce Ergonomic Requirements 4. Global Harmonization Standard (GHS)/Hazard Communication Standard (HCS) 5. Letter of Interpretation on Union Walk Around Rights 6. OSHA Hierarchy of Controls Policy 7. Revised Beryllium Standard
Department of Labor (Wage and Hour Division)	1. Overtime Regulation 2. Employee Misclassification and Joint Employment Under the Fair Labor Standards Act 3. Wage and Hour Division Replacement of Opinion Letters With Administrator's Interpretations 4. Wage and Hour Division Enforcement Policies
Securities and Exchange Commission	1. Conflict Minerals 2. Pay Ratio 3. Mine Safety Reports

Board of Governors of the Federal Reserve	Regulation Q&Y Risk Based Capital for Activities of Financial Holding Companies Related to Physical Commodities
Environmental Protection Agency	1. National Ambient Air Quality Standards for Ozone 2. Waters of the U.S. 3. Self-Audit Enforcement

Division I: Permit Streamlining

For the last seven years the Chamber has focused, organized and lead the national effort to understand the cross-cutting barriers to an efficient federal permitting process. Therefore, our comments will focus on the impact of citizen suits on the delay of projects and the fact that Congress in 2015 passed Fixing America's Surface Transportation Act, Pub. L. 114-94, title XLI, (FAST–41), which provides for a transparent, coordinated and time-limited review of all projects in the nation that exceed $200 million. It also provides a substantially reduced statute of limitations on lawsuits to stop the projects. FAST–41 is currently being implemented with approximately 32 projects on its dashboard. Our hope is that as part of this comment period, there will be a recognition that coordination between the President's Executive Orders and Memoranda on infrastructure and FAST–41 is essential in order to continue the progress being made streamlining the permitting process by front-loading and coordinating information on the project so as to avoid later delays.

A. Introduction

In 2009, in the middle of the Great Recession, the Chamber initiated a study to answer similar questions concerning barriers to permitting. In 2010, it unveiled *Project No Project*, an initiative that assessed the broad range of energy projects that were being stalled, stopped, or outright killed nationwide due to "Not In My Back Yard" (NIMBY) activism, a broken permitting process, and a system that allows limitless challenges by opponents of development. Results of the assessment are compiled onto the *Project No Project* Website (http://www.projectnoproject.com). This was the first-ever attempt to catalogue a wide array of energy projects being challenged nationwide.[1]

Through *Project No Project*, the Chamber found consistent and usable information for 351 distinct projects, including 22 nuclear projects, 21 transmission projects, 38 gas and platform projects, 111 coal projects and 140 renewable energy projects:

[1] In 2016 the National Post of Canada undertook a similar study of barriers to permits and reached similar conclusions to Project-No-Project. See Arrested Development: http://business.financialpost.com/features/arrested-development

Full descriptions for each project are available on the *Project No Project* Web site.

The results of the inventory are startling. One of the most surprising findings was that it is just as difficult to build a wind farm in the United States as it is to build a coal-fired power plant. In fact, over 40 percent of the challenged projects identified are renewable energy projects. Often, many of the same groups urging us to think globally about renewable energy are acting locally to stop the very same renewable energy projects that could create jobs and reduce greenhouse gas emissions. NIMBY activism has blocked more renewable projects than coal-fired power plants by organizing local opposition, changing zoning laws, opposing permits, filing lawsuits, and using other long delay mechanisms, effectively bleeding projects dry of their financing.

B. The Economic Study and Estimating Lost Opportunities

When we set out to compile the *Project No Project* inventory, we expected to find 50, or even 100 projects. The fact that we (quite easily) topped 350 is absolutely shocking. It became clear from our research that the nation's complex, disorganized regulatory process for siting and permitting new facilities and its frequent manipulation by NIMBY activists constitute a major impediment to economic development and job creation. Which gave rise to the next question: how much money exactly is sitting on the sidelines due to this problem?

The study has produced several significant and insightful findings. For example, the study found that successful construction of the 351 projects identified in the *Project No Project*

inventory could produce a $1.1 trillion short-term boost to the economy and create 1.9 million jobs annually during the projected seven years of construction. Moreover, these facilities, once constructed, continue to generate jobs once built, because they operate for years or even decades. The study estimated that, in aggregate, each year of operation of these projects could generate $145 billion in economic benefits and involve 791,000 jobs.

C. Top-Level Findings From the Study

Challenges to construction permits were at every level of government. Local impediments included zoning restrictions as well as traffic congestion and nuisance actions. The state level challenges were to conditions in the permit and concern over the adequacy of environmental reviews. At the federal level the challengers delayed the approval of permits by:

1. Using the Citizen Suit provisions in federal environmental statutes[2] and related provisions for the award of attorney fees combined with claims of inadequate environmental impact statements under the National Environmental Protection Act (NEPA);
2. Exploiting the absence of time limits on NEPA allowed challengers to continually raise questions on the sufficiency of the reviews; and
3. Effectively manipulating the fact that there was little coordination between state and federal efforts.

D. Citizen Suits Impact on Permits

Burdens and significant delays in securing permits occur well before the application for a permit is filed. For decades environmental groups have used citizen suit provisions in 20 environmental statutes to challenge all types of projects, land restrictions and permit requirements relating to the projects. These advocacy groups stop many types of activities by asserting endangered species are on or near the property; that activity is in a Clean Air Act non-attainment zone; or that an environmental impact review is insufficient or permit conditions are not adequate for the project. These lawsuits can take years to resolve and the delay not only impacts the ability to apply for a permit, but long delays can also impact financing of the project.

Many of these concerns were addressed by Congress in December 2015 with FAST–41 through the establishment of strict time requirements, coordination between agencies and states, and the reduction of the statute of limitations from six years to two years. What is needed is to

[2] *See* 15 U.S.C. § 2619 (Toxic Substances Control Act), 16 U.S.C. § 544m(b) (National Forests, Columbia River Gorge National Scenic Area), 16 U.S.C. § 1540(g) (Endangered Species Act). 30 U.S.C. § 1270 (Surface Mining Control and Reclamation Act), 30 U.S.C. § 1427 (Deep Seabed Hard Mineral Resources Act), 33 U.S.C. § 1365 (Clean Water Act), 33 U.S.C. § 1415(g) (Marine Protection, Research and Sanctuary Act), 33 U.S.C. § 1515 (Deepwater Port Act), 33 U.S.C. § 1910 (Act to Prevent Pollution form Ships), 42 U.S.C. § 300j-8 (Safe Drinking Water Act), 42 U.S.C. § 4911 (Noise Control Act), 42 U.S.C. § 6305 (Energy Conservation Program for Consumer Products), 42 U.S.C. § 6972 (Resource Conservation and Recovery Act), 42 U.S.C. § 7604 (Clean Air Act), 42 U.S.C. § 8435 (Powerplant and Industrial Fuel Use Act), 42 U.S.C. § 9124 (Ocean Thermal Energy Conservation Act), 42 U.S.C. § 9659 (Superfund Act), 42 U.S.C. § 11046 (Emergency Planning and Community Right-to-Know Act); 43 U.S.C. § 1349(a) (Outer Continental Shelf Lands Act), 49 U.S.C. § 60121 (Natural Gas Pipeline Safety Act)

ensure that the administration's permit streamlining efforts are consistent with FAST–41 activities already being administered by the Office of Management and Budget (OMB).

E. Requiring Coordination Between EO 13766 and FAST–41 Will Accelerate Permit Streamlining

Within its first few days, the current administration made it clear through executive action that getting infrastructure projects reviewed, permitted and built would be a high priority. On January 24, 2017, President Trump released four executive memoranda and one executive order relating to infrastructure and permitting. Most significantly, under Executive Order 13766, the Chairman of the Council on Environmental Quality (CEQ) is directed to identify "high priority" infrastructure projects, and then work with federal agencies to establish permitting schedules for those projects.

Specifically, under EO 13766, the CEQ Chairman, any Federal agency or a governor may submit a project to CEQ that it thinks qualifies as "high priority." After considering the "project's importance to the general welfare, value to the Nation, environmental benefits, and other such factors as the [CEQ] Chairman deems relevant," the CEQ Chairman determines whether the project qualifies as "high priority." If it does, the CEQ Chairman coordinates with other relevant agencies to establish expedited procedures and deadlines for completing environmental reviews of the project. If an agency fails to meet a deadline, they must provide to the CEQ Chairman a written explanation for the delay.

Also relevant to this discussion is the January 24, 2017, Executive Memorandum titled "Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing." Under that memorandum, the President tasked the Department of Commerce with exploring the obstacles to domestic manufacturing, including the permitting of infrastructure. As you know, the Department of Commerce must gather stakeholder input on the topic, and prepare a study and recommendations to the President on how to address the identified obstacles.

Many of the concepts underlying these recent executive actions – early coordination, setting deadlines, requiring accountability – are embedded in FAST-41. The permit streamlining provisions of FAST-41 will bring greater efficiency, transparency, and accountability to the federal permitting review process. Its coverage is very broad, including infrastructure, energy, and aviation, broadband and manufacturing projects. Bringing better coordination and predictability to the permitting process should translate into job creation, economic growth and new development. Some of the key provisions of FAST-41 include:

- Establishing a permitting timetable, including intermediate and final completion dates for covered projects, i.e., those over $200 million or subject to federal permitting review requirements so they will benefit from enhanced coordination;

- Designation of a Lead Agency to coordinate responsibilities among multiple agencies involved in project reviews to ensure that "the trains run on time;"

- Providing for concurrent reviews by agencies, rather than sequential reviews;

- Allowing state-level environmental reviews to be used where the state has done a competent job, thereby avoiding needless duplication of state work by federal reviewers;

- Requiring that agencies involve themselves in the process early and comment early, avoiding eleventh-hour objections that can restart the entire review timetable;

- Establishing a reasonable process for determining the scope of project alternatives, so that the environmental review does not devolve into an endless quest to evaluate infeasible alternatives;

- Creating a searchable, online "dashboard" to track the status of projects during the environmental review and permitting process;

- Reducing the statute of limitations to challenge a project review from six years to two years; and

- Requiring courts, when addressing requests for injunctions to stop covered projects, to consider the potential negative impacts on job creation if the injunction is granted.

While there have been permit streamlining provisions for specific activities, this is the first time there has been any type of comprehensive structure that coordinates the environmental review process for large infrastructure projects throughout the nation, both public and private.[3]

The current administration's prominent focus on permitting and infrastructure can be coupled with the reforms already established under FAST-41, in order to lead to an even more dynamic streamlining of the federal permitting and environmental review process for infrastructure projects. For example, any projects that the CEQ Chairman deems as "high priority" pursuant to EO 13766 could be placed on the Permitting Dashboard and, where appropriate, benefit from the FAST-41 streamlining provisions already enacted and being implemented.

OMB, CEQ and the other agencies involved have done a tremendous amount of quality work in the past 15 months getting FAST-41 up and running and beginning to implement it. There is still work to be done, however, including coordinating the FAST-41 efforts with other permitting and infrastructure initiatives introduced by the Trump administration in the last couple of months. We would recommend that with respect to the Executive Memorandum on permitting obstacles to domestic manufacturing, the Secretary of Commerce should include in his report recommendations that the administration continue to promote, encourage, and facilitate the implementation of FAST-41.

Also, we would encourage the Secretary of Commerce to coordinate with OMB and the Chairman of CEQ on implementing FAST-41, along with the January 24 Executive Memoranda

[3] In the vein of permit streamlining, a related concept that may be helpful in alleviating permitting burdens is improving the process for air permits. One option that may be worth exploring is that, under 74 FR 51418 (October 6, 2009), EPA has the authority to allow for more flexibility in air permitting, such as allowing for permits that "advance-approve" changes at manufacturing facilities.

and Executive Order on permitting and infrastructure. All of these concepts can work together, and could be implemented through the FAST-41 framework. The common goal of all of these initiatives – making the permitting process for infrastructure more efficient and workable – can be achieved if the relevant federal agencies, states, the business community, and other stakeholders work together.[4]

Division II: Reducing Permitting Burdens for Technology Infrastructure

Regulations and permitting requirements that directly apply to only non-manufacturing companies can also have a profound impact on manufacturing. For example, the manufacturing sector will also derive benefits from reducing the regulatory burden on infrastructure development. Wireless and additional fiber for broadband represent infrastructure that will spur innovation and productivity in manufacturing. According to a study by Accenture, the wireless technology that will be necessary to develop Smart Cities that rely on sensors for public safety, traffic alleviation, and telemedicine "is expected to create 3 million new jobs and boost annual GDP by $500 billion, driven by a projected $275 billion investment from telecom operators."[5] The deployment of broadband will require manufacturing of wireless cellular equipment and backhaul fiber-optic cables that will be the backbone of the connected economy and the Internet of Things. Manufacturers outside the telecommunications industry will benefit from increased broadband deployment as well because faster broadband speeds will enable them to use high-tech sensors capable of maximizing production efficiency at their facilities.

The manufacturing sector currently does not fully enjoy the benefits of broadband deployment because federal regulations are slowing down internet infrastructure buildout. According to House Communications & Technology Subcommittee staff, with regard to permitting broadband infrastructure on federal lands, "navigating the labyrinth of the federal government's permitting process is often unwieldy and opaque. Duplicative review requirements, disparities in process from field office to field office, lack of clear direction, and unexplainable delays have stymied those seeking to construct towers, attach antennas, or trench fiber across public rights of way."[6]

To curb federal requirements that inhibit the deployment communications infrastructure, federal regulators should enact permitting rules based on principles of FAST-41 that eliminate duplicative processes and accelerate reviews when possible. For example, agencies like the Department of Interior should be able to bypass duplicative permitting requirements with regard to historic preservation reviews. Policymakers should also implement "shot clocks" to reduce

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[4] The current reform effort is analogous to two projects undertaken in the mid-2000s. The Department of Commerce's report Manufacturing in America, https://www.nist.gov/sites/default/files/documents/tpo/sbir/DOC_MFG_Report_Complete-2.pdf, and OMB's Regulatory Reform of the U.S. Manufacturing Sector, https://georgewbush-whitehouse.archives.gov/omb/inforeg/reports/manufacturing_initiative.pdf. Both projects yielded valuable recommendations for regulatory reform.

[5] "Smart Cities: How 5G Can Help Municipalities Become Vibrant Smart Cities," Accenture Strategy at 3 (2017) *available at* http://www.ctia.org/docs/default-source/default-document-library/how-5g-can-help-municipalitiesbecome-vibrant-smart-cities-accenture.pdf.

[6] House Communications & Technology Staff Memo for Hearing Entitled "Broadband: Deploying America's 21st Century Infrastructure," (Mar. 17, 2017) *available at* http://docs.house.gov/meetings/IF/IF16/20170321/105740/HHRG-115-IF16-20170321-SD002-U1.pdf.

the time that agencies review permitting applications for broadband providers. Congress can also expedite broadband deployment by requiring that federally-funded infrastructure projects include conduits for fiber-optic cable. Smart regulations and permitting rules like shot clocks and streamlined review will spur the investment in broadband and manufacturing required to build smart cities.

Division III: Immigration Regulations Affecting Manufacturing

Many U.S. manufacturers rely on the talent and skills of legal immigrants. Some recent regulations help U.S. employers meet their workforce needs while others are detrimental to economic growth.

A. STEM Optional Practical Training (OPT) Extension (81 Fed. Reg. 13040)

a. **Summary:** The STEM Optional Practical Training Extension provides manufacturers with a very important bridge to keep well educated people who have gone to college at U.S. universities to stay here and contribute to our nation economically. This extension only covers individuals who have graduated with STEM degrees from U.S. universities where the student is working in a field that is directly related to the student's major area of study and the student's employer uses the U.S. Citizenship and Immigration Service's E-Verify system to verify the work authorization status of its workers.

b. **Action Requested:** The final STEM OPT Extension rule should be left intact.

c. **Rationale:** Many manufacturers recruit workers on college campuses across the United States, especially for engineering and other STEM-based occupations. OPT allows foreign born college graduates from U.S. colleges to stay in the country, work here, and "receive training" at a U.S. employer. Generally, OPT only lasts for one year, but under the STEM OPT extension, students who graduate with a STEM degree from a U.S. college can stay in the United States for up to three years post-graduation to work and receive training. This rule is helpful to our manufacturing companies as they seek to hire top talent; undermining the effectiveness of this program would harm U.S. manufacturers by limiting their access to the "best and brightest." Moreover, undoing this rule would remove an important incentive for employers to participate in E-Verify, which could negatively impact our nation's efforts at enforcing immigration law.

B. H-4 Work Authorization Rule (80 Fed. Reg. 10284)

a. **Summary:** The H-4 work authorization rule allows a spouse of an H-1B visa holder (designated as an H-4 visa holder) to apply for a work permit when the employer of the H-1B worker is petitioning for that individual to become a lawful permanent resident. Generally, H-4 spouses are not allowed to obtain work authorization in the United States. This rule provides a sensible tool to help companies retain their talent in the United States by eliminating an important quality of life issue for the families of the H-1B visa holders.

b. **Action Requested:** The final H-4 Work Authorization Rule should remain intact.

c. **Rationale:** Many manufacturers hire H-1B specialty occupation workers as engineers or in various other STEM occupations. Oftentimes, the company will decide to employ that individual as a permanent worker. Unfortunately, the long

backlogs in the Employment-Based Immigrant Visa categories sometimes force individuals to wait for years, even as long as 10 years, to become a Lawful Permanent Resident and receive their green card. During the pendency of the petition for permanent residency, the H-1B worker may lose out on promotions or being given new responsibilities, as these changes might conflict with other requirements under the law that could jeopardize the validity of their green card petition. Providing H-4 spouses of this select group of H-1B workers the ability to obtain work authorization in the United States helps mitigate the impact of forgoing promotions for the principal H-1B worker and provides incentives for these workers to stay in the United States and continue contributing to our nation's economy.

C. Interim Final Rule (IFR) Governing the H-2B Program (80 Fed. Reg. 24042)

a. **Summary:** While the H-2B program (seasonal nonagricultural workers) is generally thought of as a way for hotels, seafood processors, and landscaping companies to meet their temporary labor needs, manufacturers who produce seasonal niche products also rely on the H-2B program to fill their labor needs. The current IFR that governs the program imposes several new requirements upon employers, some of which clearly exceed the statutory authority granted under the Immigration and Nationality Act (INA), while others are antithetical to normal market functions and add unnecessary costs on compliant employers that are committed to hiring legal workers.

b. **Action Requested:** The Department of Labor (DOL) and the Department of Homeland Security (DHS) need to review and reform regulations governing the H-2B program to reflect realities of the marketplace and the practical way in which employers hire, while protecting American workers.

c. **Rationale:** The requirements of the Interim Final Rule governing the H-2B program impose arbitrary wage requirements that force employers to pay significantly above-average wage rates to hire legal workers, and add wage guarantees for hours that workers did not work. The rule also vests certifying officers at the Office of Foreign Labor Certification (OFLC) with unfettered authority to arbitrarily increase the recruitment requirements of employers, as well as conduct auditing activities that the OFLC was never intended to perform. The auditing functions contemplated in the IFR have traditionally been conducted by DOL's Wage and Hour Division and should remain there. These requirements create so much uncertainty that the businesses, particularly small businesses, which rely upon the program for their labor needs have trouble expanding their operations.

D. DOJ Rule on Unfair Immigration-Related Employment Practices (81 Fed. Reg. 53965)

a. **Summary:** This rule will be harmful to all types of businesses, including manufacturers. In changing the definition of discrimination in the context of unfair immigration-related employment practices, the rule contradicts statutory language. The rule also greatly expands the statute of limitations for the filing of these complaints against employers. Moreover, the rule places so much emphasis on the anti-discrimination analysis in the employment verification context, that manufacturers, and many other businesses, will be deterred from performing due

diligence in the hiring process to ensure that prospective employees have legal status to work.

b. **Action Requested:** The Department of Justice (DOJ) should rescind this rule or conduct a rulemaking to remove the worst elements of this rule.

c. **Rationale:** The changes to the definition of discrimination under this rule mean that alleged victims are no longer required to show intent or any purposeful action that is discriminatory in nature. This contradicts the statutory text that requires a showing of "knowing and intentional discriminatory activity." The expanded definition of "hiring" to include all forms of recruitment and other activities associated with the "onboarding" of an employee also exceeds statutory authority. The statute clearly only covers "recruitment for a fee" and onboarding includes several post-hiring activities not covered by the statute. The regulation also changes the time limit for the Office of Special Counsel for Unfair Immigration Related Employment Practices to investigate an employer before they need to file a claim from 390 days to five years.

   Finally, the regulation forces employers to spend more resources protecting against discriminatory practices at the expense of their I-9 employment verification efforts. Under the INA, even if employers fully comply with the I-9 process they can still end up hiring unauthorized workers because employers are not allowed to look behind the documents being offered by a potential employee so long as they look "facially valid." Doing so may expose them to a lawsuit based on unfair immigration related employment practices. By expanding the definition of discrimination to include otherwise legitimate business practices, this rule reduces employers' ability to diligently perform their duties under the INA to ensure that the individuals they hire are in fact legally present in the United States.

Division IV: Health Regulations Affecting Manufacturing

Like other employers, manufacturers provide health insurance benefits to their employees. A number of the regulations implemented as a result of the Affordable Care Act are unnecessarily burdensome on employers.

A. <u>ACA Section 1557 Non-discrimination (81 Fed. Reg. 31376)</u>

a. **Summary:** The Affordable Care Act (ACA) includes a provision that prohibits discrimination on the basis of race, color, national origin, sex, age or disability in certain health programs and activities. Specifically "an individual shall not, on the grounds prohibited under title VI, of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, or Section 504 of the Rehabilitation Act of 1973, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any health program or activity, any part of which is receiving Federal financial assistance, or under any programs or activity that is administered by an executive agency or any entity established under Title I of the ACA (or amendments)."

b. **Action Requested:** Establish a safe harbor so that as long as the taglines go out at least twice per year, notice requirements are deemed to have been satisfied.

(FYI—taglines are a sentence written in multiple non-English languages that tell the consumer they can obtain language assistance services by calling a phone number).

c. **Rationale:** In an effort to implement this provision, the Department of Health and Human Services' Office of Civil Rights has imposed a new regulatory regime on all programs of an entire entity based solely on the fact that one program administered by that entity receives federal dollars. This means that an employer, such as a manufacturer, who has a self-insured health plan which is administered by an entity that also offers a fully insured health plan on the health insurance exchange must comply with exceedingly costly and onerous administrative notice requirements. Most notably, entities would be required to post a notice of consumer rights providing information about communication assistance; and post taglines in the top 15 languages spoken by individuals with Limited English Proficiency nationally, indicating the availability of such assistance. Sending communications with taglines translated into 15 languages adds nearly four pages in length which increases the cost of printing and mailing materials.

B. <u>EEOC Workplace Wellness/Genetic Information Nondiscrimination Act and ADA Regulations (78 Fed. Reg. 33158, 81 Fed. Reg. 31126, 81 Fed. Reg. 31143)</u>

a. **Summary:** The ACA includes a provision that permits employers to vary premiums by 30 percent and up to as much as 50 percent for workplace wellness programs. In 2013, the Departments of Treasury, Labor, and Health & Human Services (the Tri-Agencies) issued regulations implementing this provision which permitted employers to vary the maximum total health-contingent wellness program incentive to 30 percent of the total cost of coverage under the group health plan (including 30 percent of the family or dependent coverage costs where applicable) and to 50 percent for tobacco cessation programs. The Equal Employment Opportunity Commission (EEOC) issued two other final rules regarding the application of the Genetic Information Nondiscrimination Act (GINA) and the Americans with Disabilities Act (ADA) to workplace wellness programs which differ (and contradict) the Tri-Agencies' Regulations.

b. **Action Requested:** Revise the EEOC's regulations to reflect and be consistent with the rules issued by the Tri-agencies.

c. **Rationale:** The EEOC's rules extend the 30 percent incentive limit under health-contingent wellness program to participatory programs, which the Tri-Agency Regulations do not limit. Participatory wellness programs do not include any condition for obtaining a reward-based incentive that turns on an individual satisfying a standard related to health. A health-contingent wellness program requires an individual to satisfy a standard related to a health factor to obtain a reward. The EEOC's inclusion of participatory wellness programs is unnecessary and reduces the available incentive to participate in such programs.

In addition, the final ADA rule excludes the additional 20 percent incentive available under the Tri-Agency Regulations for wellness programs related to tobacco cessation if the program includes biometric screening or other medical examinations that test for the presence of nicotine or tobacco. The EEOC states, however, that a tobacco smoking cessation program that merely asks employees

whether or not they use tobacco (or whether or not they ceased using tobacco upon completion of a program) does not include disability-related inquiries or a medical examination and thus could qualify for the 50 percent incentive.

The EEOC's 30 percent exclusion is significant because it could affect affordability as well as reduce incentives for participation. Moreover, verification is particularly essential to incentivize the difficult task of tobacco cessation. Further, and of great importance, is that the final rules still calculate the 30 percent incentive based only on the total cost of self-only coverage, while the Tri-Agency Regulations base the calculation on the total cost of coverage for the individual and any spouse or dependents to whom the wellness programs are available where family or dependent coverage is selected. Again, this reduces the incentive to participate.

C. Reporting Requirements under Sections 6055 and 6056

a. **Summary:** The ACA imposes several new annual reporting requirements, the specific objective of which is to inform the IRS and individuals about who has access to minimum essential coverage (MEC), and when an employer-shared responsibility assessment might be owed. In addition, these requirements are intended to facilitate the determination about who is eligible for premium assistance. To help the IRS know who is offered MEC, Internal Revenue Code Section 6055 requires insurers, self-funded plans and other providers of MEC (employers) to report certain information to the IRS. The IRC Section 6056 reporting requirement obligates employers subject to the employer-shared responsibility rules of the ACA, specifically employers employing 50 or more employees (known as "applicable large employer" or "ALE"), to report certain information annually to the IRS, as well as provide related benefit statements to employees.

b. **Action Requested:** Permit employers to voluntarily report information about their health plan for the current plan year to increase the accuracy of eligibility determinations for exchange tax credits. Ease reporting burdens for employers who voluntarily report prospective health plan information by only requiring Section 6056 statements for employees or dependents receiving an advanced premium tax credit (rather than issuing them for the whole workforce). Eliminate the requirement that employers and insurers collect and remit dependent's social security numbers.

c. **Rationale:** Challenges in collecting social security numbers for employees and their dependents along with submission difficulties that result in general error messages in response to submissions that involve often times thousands of records are increasing costs and administrative challenges for manufacturers.

Division V: Pension Regulations Affecting Manufacturing

Many manufacturers offer retirement benefits to their employees. Some current regulations impose an unnecessary burden on employers.

A. Nondiscrimination Testing for Frozen Defined Benefit Plans (81 Fed. Reg. 4976)

a. **Summary**: Many manufacturing companies that once offered defined benefit plans to their workers have transitioned to 401(k) plans. Many designed their transition to allow older, long-service employees who were close to retirement to maintain their then-current defined benefit pension plan. However, as these grandfathered employees continue to work, they are becoming highly compensated employees. And since no additional employees are entering the plan, the ratio of non-highly compensated employees is becoming smaller and the plans can no longer pass the nondiscrimination testing.

b. **Action Requested**: The Treasury Department (IRS) should amend the nondiscrimination regulations to deem companies that passed nondiscrimination testing at the time of the plan freeze as continuing to pass as long as no significant amendments are made to the plan.

c. **Rationale**: Without this change, employers will be forced to hard freeze their plans meaning that the grandfathered employees will no longer be able to continue to accrue benefits under the traditional pension plan.

B. Electronic Disclosure for Benefit Plan Notices

a. **Summary**: For all companies—and particularly manufacturers—complicated and unduly burdensome administrative requirements are a disincentive to providing voluntary benefit plans. Plan sponsors are required to provide a wide array of notices to workers – many of which are ignored. In addition, most of these notices must be provided in paper and for those that can be provided electronically, the rules differ depending on the regulating agency.

b. **Action Requested**: DOL, Department of the Treasury, and the Pension Benefit Guaranty Corporation (PBGC) should create a single, uniform electronic disclosure standard to avoid complications with varying standards. In addition, the standard for electronic delivery should be updated to encourage the use of electronic delivery and to allow—for those plan sponsors that so choose—that electronic delivery be the default delivery option for benefit notices.

c. **Rationale**: Modernizing the restrictive rules on electronic delivery can allow for the provision of important information without it being submerged in an avalanche of rarely used information and at significantly reduced costs for the employer.

Division VI: OSHA Issues Affecting Manufacturing

U.S. manufacturers are required to provide a safe workplace for their employees. Unfortunately, some of the regulatory mandates issued by the Occupational Safety and Health Administration impose unnecessary burdens and costs on employers without improving workplace safety.

A. Revised Silica Standard (81 Fed Reg. 16286)

a. **Summary:** One of the high-profile regulations issued by OSHA during the Obama administration was the issuance of a revised standard for exposure to respirable crystalline silica, or finely ground quartz or sand. Silica is found in many manufacturing settings such as foundries, glass making, porcelain

manufacturing, paint manufacturing, brick manufacturing, as well as other settings such as construction and fracking. Under the previous standard, deaths from exposure to silica declined over 93% since 1968. Despite this success, the new standard dramatically reduces the exposure limits from100 µg/m^3 to 50 µg/m^3 for general industry and maritime, and 250 µg/m^3 to 50 µg/m^3 for construction. The final rule took effect on June 23, 2016, after which industries have one to five years to comply with most requirements, based on the following schedule: Construction - June 23, 2017, one year after the effective date; General Industry and Maritime - June 23, 2018, two years after the effective date; Hydraulic Fracturing - June 23, 2018, two years after the effective date for all provisions except Engineering Controls, which have a compliance date of June 23, 2021. The standard is being challenged in court based on OSHA not adequately demonstrating a "significant risk," and whether it is technologically and economically feasible (statutory requirements for an OSHA standard).

b. **Action Requested:** The revised silica standard should be reviewed for possible changes, although these may involve a new rulemaking.

c. **Rationale:** This standard could potentially cause several types of manufacturing to leave the United States, and will greatly increase the costs of fracking that has led to significantly lower energy costs and less expensive sources for hydrocarbon chemical stocks.

B. Injury and Illness Reporting Regulation with Anti-Retaliation Provision (81 Fed. Reg. 29624)

a. **Summary:** On May 12, 2016, OSHA published the "Improve Tracking of Workplace Injuries and Illnesses" final rule which has two parts. The first requires employers to submit electronically to OSHA their injury and illness records. OSHA intends to post the injury and illness records on the internet for anyone to see. The second, anti-retaliation provision, specifies that employers must have a "reasonable" policy in place for employees to report their injuries or workplace safety violations and commentary in the preamble suggests that certain drug testing and safety incentive programs would be "unreasonable."

Additionally, OSHA grants itself the authority to enforce the anti-retaliation provision under the whistleblower provisions of the OSH Act even if no employee files a complaint. The regulation is being challenged in court, but is currently in effect. The anti-retaliation policy requirement is in effect, and the first submissions are due July 1, 2017, although OSHA has not yet created the internet portal for submitting records.

b. **Action Requested:** OSHA's intention to post safety records on line is part of the preamble to the final regulation, as are the agency's comments about post injury drug testing and safety incentive programs. As such they are mere guidance and can be modified or cancelled with little effort or procedure, through a compliance directive or other device. The regulatory requirement to submit records electronically remains problematic as does the vagueness of the requirement to have a "reasonable" policy and these should be reviewed for possible new rulemakings to revise or eliminate.

c. **Rationale:** The statute does not authorize OSHA to publish, such as posting online, raw safety data of this type. Furthermore, posting safety records online will provide unions and trial attorneys with information that can be taken out of context and used in organizing campaigns, or form the basis of lawsuits. OSHA's intent to enforce the "reasonable" policy for employee reporting of injuries as a violation of the whistleblower protections without an employee complaint directly contradicts the statute that explicitly requires an employee complaint to trigger the whistleblower protections. What constitutes a "reasonable" policy is impossible to tell from the regulatory text suggesting a "void for vagueness" issue, while OSHA's examples of what would be "unreasonable" in the preamble commentary to the final regulation, essentially constitute a "backdoor" rulemaking as these clarifications are mere guidance but OSHA points to them to explain how employers should comply.

C. <u>OSHA's Reliance on the General Duty Clause to Enforce Ergonomic Requirements and Circumvent Congress' Intention to Reject the Ergonomics Standard Under the CRA</u>

a. **Summary:** Since the ergonomics regulation was struck down by the Congressional Review Act (CRA) in 2001, and OSHA is unable to issue a new regulation, the agency under the Obama administration signaled its intention to use the General Duty Clause (GDC) to issue citations for ergonomics. To issue a citation under the GDC, OSHA has to show that there is a "recognizable hazard" and available measures to abate the hazard.
b. **Action Requested:** OSHA should cease attempting to issue citations under the General Duty Clause for ergonomics violations.
c. **Rationale:** OSHA's threat of enforcement has caused various employers, including those in manufacturing, to reconfigure their workplaces in the desire to avoid a citation. Furthermore, whether an employee suffered a work-related ergonomics injury is often not clear as such injuries are generally the product of a multitude of factors including general health and wellbeing, family history, and non-work related activities that are all outside the control of the employer. There is also continuing medical and scientific debate about what constitutes a musculoskeletal disorder and the best way to treat one.

D. <u>Global Harmonization Standard (GHS)/Hazard Communication Standard (HCS) (77 Fed. Reg. 17574)</u>

a. **Summary:** Early in the Obama administration, OSHA revised the HCS, which requires labeling and information sheets for hazardous chemicals and mixtures, by harmonizing it with an international set of labels. Included in the revised GHS were new provisions that increased its burden and complication.
b. **Action Requested:** The GHS rule should be reviewed for ways to make it less burdensome and more consistent with how manufacturers and other employers covered by it actually operate.
c. **Rationale:** Application of the GHS criteria is cumbersome, expensive and highly technical, making it extremely difficult for medium and small companies to comply. What previously took a couple of hours to evaluate now takes days. Specific problems include: adding "combustible dust" as a hazard despite the absence of a specific definition of the hazard and the fact that combustible dust is

not a hazard intrinsic to any specific chemical—it is the product of circumstances and several variables; a too stringent definition of "articles" which would exempt them from requirements for labels and Safety Data Sheets; and SDSs for objects that are not generally considered hazardous chemicals.

E. Letter of Interpretation on Union Walk Around Rights

a. **Summary:** In a February 2013 letter responding to a United Steelworkers December 2012 request, OSHA issued an interpretation that union representatives could now accompany an OSHA inspector on walk around inspections at non-union workplaces if selected as the employee representative. This interpretation is being challenged in court.
b. **Action Requested:** This letter should be rescinded.
c. **Rationale:** The OSH Act permits employees to have a representative accompany an OSHA inspector and OSHA regulations have said that that representative "shall be" an employee of the company being inspected unless a non-employee provides some specific expertise such as language skills or technical expertise. OSHA thus changed the meaning of their regulation by expanding the exception to include union representatives in non-union workplaces. This interpretation could be extremely helpful to unions in their organizing campaigns.

F. Hierarchy of Controls Policy

a. **Summary:** OSHA policy requires employers to proceed through a specific hierarchy of controls when determining how to protect employees from hazards: engineering controls such as ventilations systems; then work practice controls such as wetting down dusts; then administrative controls such as limiting the amount of time an employee can be exposed to a hazard; and lastly personal protective equipment (PPE) such respirators, or eye and ear protections. Under this hierarchy, employers are required to demonstrate that the more expensive options do not achieve adequate protection before they can rely on PPE which is typically the least expensive and most easily implemented.
b. **Action Requested:** The hierarchy of controls should be reviewed with the intent of making it more flexible and allowing employers to use less expensive, but still appropriately protective options including expanded use of PPE.
c. **Rationale:** Many types of PPE have improved tremendously over the years through new technology. For instance, respirators have advanced from mere paper dust masks to sophisticated portable supplied air systems that give the employee fresh air in a protected breathing space, in some cases they are more like portable engineering controls than PPE. Unfortunately, OSHA still treats all PPE as the last option without taking into account the advent of new technology. This is a particular problem with regulations like the new silica standard where PPE has been used for years and is one of the reasons the fatality rates from silica exposure have come down so dramatically. Allowing greater use of PPE would significantly reduce the cost and compliance problems for the silica regulation and others.

G. Revised Beryllium Standard (82 Fed. Reg. 2470)

a. **Summary:** The major producer of beryllium (Materion) and the United Steelworkers negotiated, on their own, for several years and finally agreed on a revised Be standard. They presented this to OSHA. OSHA's proposed regulation reflected the agreement, but the final regulation, issued on January 6, 2017, did not and expanded coverage to several industries that were not originally included, such as shipbuilding and construction. The new standard is being challenged in court.

b. **Action Requested:** The revised beryllium standard should be reviewed and stayed with the goal of ultimately revising it to be consistent with the proposal that reflected the negotiated agreement between industry and union representatives.

c. **Rationale:** Among the additional provisions that were not part of the proposal, OSHA added dermal contact as a hazard without any lower limit, so Be is now "radioactive," and cannot be touched; liability inducing preamble language, e.g., positive Be blood test result is an adverse health effect; and change rooms/showers are now required.

Division VII: Wage and Hour Issues Affecting Manufacturing

Like all employers, U.S. manufacturers are subject to regulations imposed by the Department of Labor's Wage and Hour Division. Unnecessary and overly burdensome requirements ultimately increase cost for manufactures and depress employment.

A. Overtime Regulation (81 Fed. Reg. 32391)

a. **Summary:** The Obama administration's controversial and disruptive overtime regulation would have had seriously negative impacts on manufacturing employers, particularly with respect to their administrative employees. It is currently blocked by a preliminary injunction issued by a federal judge in Texas. The judge's ruling suggests that a permanent injunction is very possible.

b. **Action Requested:** The Trump administration should promulgate a new overtime regulation that specifically avoids the signature problems of the Obama regulation: there should be no automatic escalator, not even every three years as was the case with the Obama regulation; and the salary increase should be modest and consistent with the lowest salaries associated with exempt duties.

c. **Rationale:** The previous adjustment to the salary threshold was finalized in 2004 and is currently not reflective of salaries associated with exempt duties. The federal court has made clear that any salary threshold should be a proxy for these duties and so any new salary level should be a modest adjustment. Not only does the Fair Labor Standards Act (FLSA) not give the DOL Secretary authority to impose an automatic escalator clause, it also specifies that such increases shall be done through rulemakings.

B. Administrator's Interpretations (AI) on Employee Misclassification and Joint Employment Under the Fair Labor Standards Act

a. **Summary:** The former Wage and Hour Administrator issued two AIs making broad pronouncements on key areas of FLSA law and significantly shifting how

employers, including manufacturers, would be treated. Both of these AIs should be withdrawn or significantly amended. The AI on Misclassification of Employees sets the terms for whether a worker will be considered an employee or independent contractor and changes the focus from the previous "control test"—the degree to which the employer controlled the output and working conditions of the worker—to an "economic realities" test that includes many factors and downplays the control test. The economic realities test seeks to establish whether the employer benefited from the worker's efforts, with the economic reality leading to the worker being classified as an employee.

The AI on Finding Joint Employment under the FLSA builds on the National Labor Relations Board's (NLRB's) decision in *Browning Ferris* to enhance the ability of the Wage and Hour Division to find joint employment relationships and thus attach one employer's FLSA violations to another. The AI creates two different types of joint employment relationships: horizontal and vertical. Horizontal relationships exist where an employee works for different employers that share common ownership or control. This form of joint employment has existed previously and is generally well understood. Vertical joint employment exists where one employer performs functions for another employer such as a subcontractor or vendor handling specific services like IT or payroll. Vertical joint employment means that the "host" employer would be liable for any FLSA violations committed by the other employer, often a small or smaller and specialized company.

b. **Action Requested:** These AIs should be withdrawn.
c. **Rationale:** Under the economic realities test, an employer will not be able to tell if they have properly classified a worker unless they have classified them as an employee, or Wage and Hour conducts an audit. The AI explicitly states that the FLSA should be interpreted broadly to establish as many employees as possible and therefore providing them with minimum wage and overtime protections. Vertical joint employment is a new concept and also relies on the economic realities test to establish joint employment under the FLSA. Both AIs are intended to expand the ability of the Wage and Hour Division to impose penalties on employers for FLSA violations.

C. Replacement of Opinion Letters With AIs

a. **Summary:** Relatedly, the Wage and Hour Division under the Obama administration discontinued the long standing practice of providing responses to employers about specific compliance questions known as Opinion Letters. These were replaced by the AIs which were issued by the administrator as he chose, were not fact specific, and as noted above tended to represent changes to how the law was enforced.
b. **Action Requested:** DOL should resume issuing Opinion Letters that provide fact specific answers to employer questions.
c. **Rationale:** Opinion letters provide employers with much more useful information, are driven by fact specific requests, and are less likely to result in changes to how the law is enforced.

D. Enforcement Policies Under the Obama Wage and Hour Division

a. **Summary:** During the Obama administration, the Wage and Hour Division adopted the position of universally imposing liquated damages (double the amount owed to employees) and civil money damages thereby multiplying the penalty paid by the employer. The Wage and Hour Division regarded every violation as warranting these penalties that Congress designated for the most severe cases such as those where there is no suggestion that the employer acted in good faith; the Division did not want to acknowledge the possibility of a good faith disagreement.

b. **Action Requested:** This approach to enforcing the FLSA should be abandoned.

c. **Rationale:** This enforcement tactic tends to hinder the investigation's goal of getting any unpaid wages to the affected employees as quickly as possible. Under previous administrations, the incentive for an employer to settle an investigation was the threat of liquidated or double damages and civil money penalties if a suit were to be filed. By insisting on imposition of these penalties during the investigative stage, the agency may actually encourage employers to engage in litigation. This results in delaying the employees from receiving the back wages allegedly due. Furthermore, the Portal to Portal Act seems to reserve the discretion for assessing liquidated damages or civil money penalties to the court.

Division VIII: EEOC Regulation Affecting Manufacturing

The following EEOC action has a direct, negative impact upon U.S. manufacturers:

A. Compensation and Hours-Worked Reporting (EEO-1 Form)

a. **Summary:** Beginning in 2018, employers with 100 or more employees (both private industry and federal contractors) will be required to submit data on employees' W-2 earnings and hours worked broken down by ethnicity, race, and sex, and sorted into 10 job categories. The current EEO-1 form was expanded from 180 data cells to 3660 data cells.

b. **Action Requested:** The new form should be withdrawn through a *de novo* Paperwork Reduction Act review conducted by the Office of Information and Regulatory Affairs within OMB.

c. **Rationale:** The expansion of the EEO-1 form was achieved through a Paperwork Reduction Act clearance procedure instead of the traditional Administrative Procedure Act rulemaking. Time spent by employers reporting on this new form and costs associated with developing information systems to accurately do so will rise dramatically, despite claims by the Equal Employment Opportunity Commission (EEOC) to the contrary. Further, because non-discriminatory variables are not accounted for and the job groups and pay bands are arbitrary, this data will provide EEOC with no insight as to whether an employer's pay practices are discriminatory. Finally, the EEOC fails to set forth appropriate safeguards to ensure that this sensitive information remains confidential, and unions and other interest groups are expected to use this information to embarrass employers.

Division IX: Dodd-Frank and Federal Reserve Requirements

While the Dodd-Frank Wall Street Reform and Consumer Protection Act was ostensibly a response to the financial crash, it also imposed a number of burdensome and unnecessary requirements on U.S. manufacturers.

- **A.** *Conflict Minerals* (Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act). This rule requires companies to report if they use one of the four designated conflict minerals in any of their manufacturing processes. This requires businesses to go through their supply chain. While a federal court threw out the disclosure on constitutional grounds, companies must still engage in the burdensome reporting and data collection.
- **B.** *Pay Ratio* (Section 956 of Dodd-Frank). This section requires companies to determine and publish a ratio between the median average pay of all workers in a ratio to CEO pay. This disclosure is designed to embarrass businesses and cause dissension within the workplace. It is also being used by some municipalities to impose a new tax based upon the ratio.
- **C.** *Mine Safety Reports* (Section 1506 of Dodd-Frank). Mining companies must file safety reports with the Securities and Exchange Commission. Such information is already filed with other agencies such as OSHA.
- **D.** *Regulation Q&Y Risk Based Capital for Activities of Financial Holding Companies Related to Physical Commodities*. This proposed rule seeks to severely limit the ability of banks to hold and trade physical commodities, which can have a detrimental effect on manufacturers with respect to accessing, at reasonable prices, key commodities.

Division X: EPA

U.S. manufacturers are unnecessarily burdened by a number of regulations issued by the Environmental Protection Agency (EPA) which increase the cost of doing business. Listed below are a few examples of those regulations.

A. Ozone

Currently, EPA is required under the Clean Air Act to review the National Ambient Air Quality Standards (NAAQS) for ozone and the other five criteria pollutants every 5 years. That review period should be extended to 10 years. Unrealistically short five-year "review cycles" for ozone and other air quality standards lead to overlapping regulations. These five-year deadlines are regularly exceeded by EPA and inevitably result in "sue-and-settle" agreements. Instead, a 10-year review schedule for NAAQS would be more feasible, allowing for environmental improvements while bringing more certainty to regulators and the regulated community.

Regarding ozone transport from international sources, the Chamber has long implored EPA to consider international emissions in its regulation of air pollutants. In fact, in 2006, the Chamber petitioned EPA for a rule implementing Clean Air Act Section 179B, which requires the agency to protect U.S. states and regulated entities from suffering regulatory and economic burdens due to foreign emissions. Specifically, Section 179B

eases nonattainment penalties on states able to show that they would be in attainment "but for" emissions emanating outside of the United States. Despite these efforts, the impacts of international emissions on ozone levels in the United States continue essentially to be a non-factor in the imposition of ozone standards. This is a critical flaw in the review, setting and implementation of the ozone NAAQS because international emissions have added to, and increasingly will add to, domestic ozone levels, causing areas in the United States to be in non-compliance.

B. Waters of the U.S. (WOTUS)

Since EPA's WOTUS rule is presently stayed by the courts and the administration has directed it to be reviewed, revised, or repealed, it is an appropriate time for the administration to clean up a regulatory mess that has been dragging on for decades. The administration should clearly differentiate between federal interstate waters and waters of the states. For more than 200 years the federal government regulated interstate waterways and the states regulated intrastate waters. While that split may be too rigid, it is important that EPA's revised definition make clear that federal jurisdiction is limited to interstate waters and only those adjacent waters that directly flow into and adversely impact interstate waters. All other waters are waters of the state. This distribution of power keeps federalism alive and recognizes the important role of the states in environmental protection.

As part of the review and potential revision of the WOTUS rule, EPA should ensure that the Sec. 404(e) Nationwide Permit program is maintained and that any revisions to WOTUS do not create uncertainty in the Nationwide Permits program. Furthermore, EPA should seek to craft any WOTUS revisions such that they increase the certainty for obtaining Sec. 404(e) individual permits. Finally, EPA should seek to increase the transparency and fairness of other Clean Water Act restrictions, such as TMDLs.

C. EPA Self-Audits

EPA should be more reasonable in its enforcement of environmental regulations, especially with regard to small businesses. Specifically, the agency should allow for self-reporting and self-audits by regulated entities without the threat of penalties. For example, EPA has used company infrared camera images to press enforcement actions, when the images had been part of a privileged self-audit to determine compliance. The EPA self-audit policy should be updated to narrow such abuse of privileged data. Self-reporting should be encouraged as a means of enhancing compliance.

Division XI: Rationalizing Agency Enforcement Guidelines and Decisions

The American business community generally, and American manufacturers in particular, bear a heavy regulatory burden that is exacerbated by over-aggressive government enforcement actions. Agencies are routinely empowered to investigate and levy fines and penalties under a wide range of statutes and regulations. Furthermore, recent estimates suggest that tens of thousands of regulations may be criminally enforced. The threat of excessive and duplicative

enforcement can complicate companies' efforts to comply with regulations while conducting their day-to-day operations.

To be rational, effective, and fair, federal agencies' enforcement policies should be designed to (1) impose appropriate penalties on companies and individuals who engage in misconduct; (2) afford those who believe they are wrongfully accused a meaningful opportunity to test the government's charges against them; (3) allow the courts to serve as the ultimate arbiter of the facts and interpreter of the laws that govern the area, assuring fair notice of what the law requires; and (4) recognize companies' efforts to adopt and operate effective corporate compliance programs.

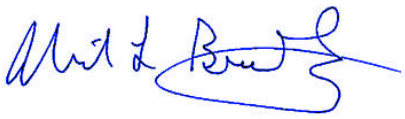
With the adoption of the Federal Sentencing Guidelines for Organizations nearly 20 years ago, the Sentencing Commission recognized the significant value of corporate compliance programs for both preventing proscribed activity and achieving larger public policy goals, including the more efficient functioning of federal government programs. The Department of Justice has also recognized the value of compliance programs. When considering whether to charge a corporation, the U.S. Attorneys' Manual (USAM) directs prosecutors to determine, among other things, whether a company has a well-designed compliance program. More recently, the department's National Security Division and Fraud Section have issued guidance that emphasizes the value of corporate compliance efforts.

In particular, the department's recent guidance makes clear that companies that detect, remediate, and disclose potential violations of foreign bribery and export control statutes will receive reduced penalties and the department may, in some cases, decline to pursue an enforcement action. Agencies throughout the government could build on these programs' principles by offering companies that strive to comply with regulations meaningful assurances that their efforts will be considered prior to initiation of and during enforcement proceedings. This would encourage investments in compliance programs, increase regulatory compliance, and strengthen relationships between the private and public sectors.

Conclusion

The Chamber applauds President Trump and Secretary Ross for their focus on the effects of federal permitting and regulations on domestic manufacturing and also for their leadership in promoting the vibrancy of this vitally important sector of the American economy. We look forward to working with the new administration as it proceeds on this and other issues. If you need anything from us in the meantime, please do not hesitate to contact me at 202-463-5310.

Sincerely,



Neil L. Bradley