ROUNDTABLE ON REGULATORY ISSUES

ROUNDTABLE

BEFORE THE

SUBCOMMITTEE ON REGULATORY REFORM AND OVERSIGHT

OF THE

COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

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ROUNDTABLE ON REGULATORY ISSUES

Tuesday, March 17, 2005

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON REGULATORY REFORM AND OVERSIGHT,
COMMITTEE ON SMALL BUSINESS
Washington, D.C.

The Subcommittee met, pursuant to call, at 2:07 p.m. in Room 2360, Rayburn House Office Building, Hon. W. Todd Akin [chairman of the Subcommittee] presiding.

Present: Representatives Akin, Kelly and Poe.

Chairman AKIN. I do not have a gavel, but let us bring the meeting to order here.

Ms. VELAZQUEZ. He is ready to go.

Chairman AKIN. Let me just say though usually what we do is we have witnesses come in, and everybody speaks a certain amount of time; not quite as many witnesses as we have here.

The purpose of this meeting is really to help us set priorities particularly for this year, but for the next two years, and so what I was thinking about instead of having it be quite so formal is everybody go around and make opening statements and that sort of stuff would be rather to try to have a more free-flowing just like a regular business meeting.

The thing that we are trying to understand is particularly in terms of regulatory burden on small business. Where are those problems coming from? If you were made king for a day and you got one wish or whatever it is where would you go? I think those are the kinds of directions we want to go.

Let me at least do my opening statement. I do not want to disappoint the staff certainly.

Ladies and gentlemen, I would like to call this meeting to order. Welcome, everybody, and thank you for your participation today. I was recently honored to be selected Chairman of the Regulatory Reform and Oversight Subcommittee of the House Committee on Small Business.

I look forward to working with all of you, especially our distinguished Ranking Member from Guam, Congressman Bordallo—

Ms. VELAZQUEZ. No, no, no. Congresswoman.

Chairman AKIN. Congresswoman.

Ms. VELAZQUEZ. Practice.

Chairman AKIN. All right. Thank you.

—as we address the immense regulatory burden affecting small businesses. Too often efforts to reform and reign in overreaching regulations have met with resistance from the government bureaucracy even when it is in the hands of a small business-friendly Administration.

This is my first official action as Chairman of this Subcommittee. I hope to take from this event and develop some priorities that we will focus on for the 109th Congress.

In a time when our economy relies so greatly on small business to keep our country moving, we cannot afford to stifle that progress by continuing to add cost and regulations to disadvantage these businesses. Half of our national workforce is employed by small businesses. Two-thirds to three-quarters of new jobs are created by small business.

Now it is time. We must do everything in our power to limit the reach of regulations and lower the cost of regulations to small business.

I look forward to the testimony of all our participants. I ask that you hold your—we are not going to do the hold opening statements. We are just going to have a free-for-all here. I think that covers the beginning.

Ranking Member?

Ms. VELAZQUEZ. Well, thank you very much. Congresswoman Bordallo from Guam is the Ranking on this Subcommittee, and she is in Guam today. Anyway, I am here. I am the Ranking Member from the Small Business Committee.

I just want to tell you that this might be the only Committee where things try to get done because we truly believe that there is no Republican nor Democratic approach to deal with that issues that are important to small businesses.

We all say that small businesses are the job creators in our economy, and if we want to get this economy back on track we have to create and help the government to create a climate that is conducive for you to do what you do best.

One issue that is important to me and to the Democratic Members of the Small Business Committee is to see how can we reduce regulation and paperwork to the extent that yesterday I held a roundtable with small business groups from across the country to deal with the issue of the proposed regulation on the size standards and what impact it is going to have on small businesses.

The economic impact that the proposed changes to RESPA, for example, will have on small businesses in the real estate industry, that is another issue that I have been dealing with.

Examining how the proposed Do Not Fax rule will impact small firms and the new requirements of Sarbanes-Oxley, many of which impose regulatory burdens on smaller companies and are creating barriers to capital markets for these small firms.

We want to do what is right on behalf of small businesses, and the best way to do it is by listening. One thing that I asked yesterday to everyone who was represented or sitting down around the table was if there is one thing that you know in terms of regulation that will help your industry, your company, what may that be? I know about the only way we could reduce regulation is by starting here in Congress.

Welcome, all, and thank you very much for being here today.

Chairman AKIN. Thank you.

Just before we get started I do want to recognize the Honorable Tom Sullivan, who has been kind enough to join us and I think probably about one of the best friends small business could have.

Tom works hard at trying to review the kinds of rules and regulations that are written by various agencies, federal agencies, and to try to see that those things are not oppressive or unnecessarily burdensome.

We appreciate the consistent advocacy that you provide, Tom. If you would like to make a statement or two you can, or we will just get started.

Mr. SULLIVAN. Sure.

STATEMENT OF THE HONORABLE THOMAS SULLIVAN, U.S. SMALL BUSINESS ADMINISTRATION

Mr. SULLIVAN. Thank you, Mr. Chairman and Ranking Member.

I guess I will just let the cat out of the bag about what my office's secret is. Our secret is working with the Small Business Committee. I think it is something that certainly the Chair and the Ranking Member know and all the staff know, but not many other folks really know that.

At the Office of Advocacy at the Small Business Administration we have a team of economists who try to measure all of your impact on the economy and then push it out to policymakers so they have greater sensitivity to how their policies affect small business.

We also have a team of lawyers, and the lawyers enforce a law called the Regulatory Flexibility Act. Basically this law requires that every federal agency consider their impact on small business before they regulate. I mean, that is really the stress point of the Regulatory Flexibility Act.

Now, we use any method available to convince agencies to follow that law. One of those methods is when they maybe are straying from the path a little bit we work very closely with this Committee and, believe it or not, they tend to get back on the path pretty quickly when the Chairman of the full Committee and the Chairmen of the Subcommittees and the Ranking Member all join together to say we will not tolerate unfairness in how regulatory agencies treat small business.

That stick for our office has been very, very effective. There is absolutely a shoulder-to-shoulder fighting that goes on cooperatively to make sure that regulatory agencies listen to all of you.

Mr. Chairman, if I were king for a day and had that one wish in the regulatory world it would be that uniformly agencies not

only listen to all of you before they make regulations that affect you, but actually act on your recommendations. That would be my one wish. It is also ironically my job, so we will make sure to try to make that wish come true as best we can.

It is a pleasure to be here, and I too am going to learn from the different business organizations so that you all can help my office prioritize for the coming year and the coming years ahead.

Thank you, Mr. Chairman.

[The Honorable Sullivan's statement may be found in the appendix.]

Chairman AKIN. Thank you very much.

Okay. I think we are just going to jump in. I was happy with your question as an opening question. I just want to know if you had one thing or even one area of red tape and regulations as troublesome, let us talk about that.

The next thing I am going to ask so you know kind of where I am going also would be my background in engineering. I came out of the business world and slid down the totem pole of life all the way into politics.

The one thing we used to talk about is the old 80/20 rule. I have to believe that red tape, probably like many things, follows that; that 80 percent of the nasty red tape may come from a particular source, so I am going to be asking sort of categorically where problems come from as well.

If anybody wants to jump in, you are just welcome to start with your pet excessive red tape. No problem with red tape?

Mr. STALKNECHT. Since I am over on this side of the table maybe I will jump in first.

STATEMENT OF PAUL STALKNECHT, AIR CONDITIONING CONTRACTORS OF AMERICA

Mr. STALKNECHT. I am Paul Stalknecht. I am president and CEO of the Air Conditioning Contractors of America. We have roughly about 5,000 members nationwide, almost all of which are in small business.

Two issues that we really have—I am going to take two. The first one is to thank Chairman Akin for being a co-sponsor of a bill to accelerate the depreciation rules for HVACR equipment. We appreciate your support of that. That would be my one wish.

My second wish would be that many of our members are concerned about the issues that we discuss here today, but being parochial we have one issue. Refrigerants are an integral part of our industry and heavily regulated by the EPA. The Clean Air Act amendment signed into law in 1990 created additional regulations for the handling and recycling of refrigerants containing chlorine, commonly known as CFCs, and hydrofluorocarbons, HCFCs. They are under currently 608 of the regulations.

The Clean Air Act contains a strong enforcement system for violators of those rules. Fines can be up to $27,000 a day. Unfortunately, EPA has not actively enforced the Section 608 recovery rules.

The bad actors in the industry are not recovering and recycling ozone depleting refrigerants, and they are unfairly competing against good contractors who are doing so. Some significant loopholes exist involving the unintentional and inadvertent leak of refrigerants and the sale of some of the refrigerants.

What we are asking for is actually we support the regulations, but we would ask for the EPA to strongly enforce its existing regulations and put all small contractors in the HVACR industry on a level playing field.

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

Chairman AKIN. Okay. What was the first thing that you mentioned before that? I am sorry.

Mr. STALKNECHT. It was a bill that you co-sponsored. It was regarding the accelerated depreciation of HVACR equipment.

Chairman AKIN. Right.

Mr. STALKNECHT. Right now you can depreciate over a 39 year lifespan. The equipment will only last 15 or 20 years. We are asking to accelerate that up to about 15.

Chairman AKIN. Others? Yes. Just to bring you up to speed, this is a little bit more informal structure. We are trying to find out where are some problems with red tape, and because of the time schedule of votes coming up soon instead of introducing each witness we are just basically letting people go and talk.

Yes?

STATEMENT OF FRANCIS COLLINS, ADVANCED DIGITAL SOLUTIONS, COMPUTING TECHNOLOGY INDUSTRY ASSOCIATION

Mr. COLLINS. My name is Francis Collins, first of all. I am with Advanced Digital Solutions. We are a local small computer reseller.

Chairman AKIN. If you could pull the mike closer to yourself that would probably help too. Thank you.

Mr. COLLINS. Again, I am Francis Collins. I am with Advanced Digital Solutions. We are a small systems integrator, a computer reseller in Fairfax, Virginia.

My concern primarily is not so much what we face nowadays, but what we see coming down the pike specifically related to computer recycling. Right now we are looking at a hodgepodge of rules and regulations being enacted by the states that are going to create a tremendous burden on us, the small companies.

Most people think of computer sales and the issues related. If you look at IBM and Dell, the large companies, they still only represent probably about 40 or 50 percent of the total system sales in the country.

The majority of the sales are from countries such as ourselves, and we are very concerned that the computer recycling rules as they are presently popping up piecemeal from state-to-state are

going to create a tremendous burden for us because we are small here, but we do sell into Florida. We sell into California. We sell into Texas.

I would like to see some action relative to specifically any rules that are enacted that specifically looks at the majority of the computer manufacturers in the country who are small business based as opposed to the large resellers like Dell and that earnings are specifically taken into account.

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

Chairman AKIN. I do not even know what computer recycling is. When I recycle, I throw it in the garbage.

Mr. COLLINS. There you go. Right now you are talking probably 40 to 50 percent of the recycled waste nowadays is technology related, so it is all CFC related. It is plastics-based. It leaks mercury. It leaks lead. It leaks arsenic, et cetera.

There is a move afoot for the manufacturers to start footing the recycling bill, so if you buy a new computer there is a $50 fee tacked onto the new computer that allows the manufacturer to recoup the cost of recycling that computer so it does not go into a landfill.

The idea is to try to get some encouragement somewhere so they do not get thrown away, so when your monitor is dead you do not put it out for the trash man.

Chairman AKIN. Are you advocating that we should put like a cost on computers so that when they are recycled—like a recycled tire kind of thing?

Mr. COLLINS. Yes. What specifically looks like is going to be coming down the pike is that if I sell a monitor I am responsible for recycling the old one.

Chairman AKIN. And you are advocating that we should have laws that do that?

Mr. COLLINS. I am advocating that if there are laws that are enacted we are not looking at how they affect Dell, IBM, HP, but you look at how they affect Advanced Digital Solutions and the other 40 percent of the computer resellers who are selling these.

Dell, HP, they could absorb those regulations. It would put us out of that business.

Ms. KELLY. Can you sell recycled computer parts reclaimable with the new parts?

Mr. COLLINS. I guess that is the question. It is apparently not enough reclaiming that it has become an industry that is profitable. There is enough waste out there right now that if there were money to be made doing that it would not be a problem. You would have companies knocking on your door.

Ms. KELLY. Kind of like batteries?

Mr. COLLINS. It is like batteries. I do not know what the economics of that industry are, but the reality is that you do not have anybody coming knocking on your door saying hey, do you have an old monitor that you want to give me so I can recycle it?

The business has not developed, which to me implies that there is no economic incentive to do it or no profit motive to do it, so it really becomes a cost burden to somebody, whether it is the taxpayer, whether it is the manufacturer, whether it is the folks like me who are putting them out in the field.

At some point I agree wholly that from an environmental standpoint it needs to be addressed. Who is bearing the burden of that cost? We are really just looking at the small business community. There are needs, and the expense of the regulatory burden is addressed when this subject comes up.

I am not sure that it is within this Committee that that legislation would fall, but if it is environmental and if there are going to be regulations at some point it is going to cause us probably either significant expense or probably to get out of the business just with some of the things we have seen coming out of the states.

Chairman AKIN. Okay.

Ms. KELLY. Can I ask another question?

Chairman AKIN. Go ahead.

Mr. COLLINS. Sure you can.

Ms. KELLY. My concern is that [inaudible] I believe, and if we can work [inaudible].

Mr. COLLINS. Absolutely.

Ms. KELLY. [Inaudible].

Mr. COLLINS. Are you talking in the context of—

Ms. KELLY. [Inaudible.]

Mr. COLLINS. In other words, if I am going to be a collector of old computer parts and a recycler of the elements contained within, that is a business. I am the person who is selling the new computer who has now potentially got a regulatory burden to see what is going to happen to the old computer.

If there is an avenue established where I could easily turn that over to a recycler, and if it incurs an additional $20 per computer cost to the consumer, like I said, somebody has to pay for that somewhere along the line.

There are plenty of statistics both environmentally in terms of the volume of waste that is being generated, as well as the volumes and values of the recyclable elements within that. Right now there is a whole industry where that stuff is just shipped overseas, and you end up with all these poisons leaching into, you know, the backyards of poor countries.

What we could see happening is there are going to be a lot of regulations coming up with this because it is a big problem in the environmental space, and I do not deny that at all. It is going to become a problem for us. The larger companies—

Chairman AKIN. I think the purpose of what we are doing here is to just take a look in a very general perspective, so let us save the solution of this—

Mr. COLLINS. Okay.

Chairman AKIN. —to more specific kinds of meetings.
Other topics? Yes, Ken? Go ahead.

STATEMENT OF KEN CLAYTON, AMERICAN BANKERS ASSOCIATION

Mr. CLAYTON. Thank you, Mr. Chairman. Mr. Chairman, my name is Ken Clayton, and I work for the American Bankers Association.

I think Mrs. Velazquez and Mrs. Kelly are very familiar with some of our issues, but maybe to give you a sense of what our institutions face and how that then translates to them as small businesses and to those that they serve, the small businesses they lend to, since 1990 801 new regulations have been issued for banks by bank regulators, and that does not count other things that come out of the SEC, that come out of accounting regulators, that come out of FTC and other agencies that have some kind of jurisdiction over our industry. That has a significant consequence on small businesses.

I would note to you we meant to bring today we have a 600 page summary of regulations for our institutions in terms of how they can learn to work with the regulatory burden they have to work under. We are a heavily regulated industry.

Now, how does that translate into—

Chairman AKIN. Who issues those regulations?

Mr. CLAYTON. Well, there is a group of five major bank and credit union regulators, as well as others, so the Fed, the FDIC, the OCC, the OTS, and there are others. We are heavily regulated as the case might be.

I guess we are trying to point out two things here. One is that if you looked at the 9,000 or so banks that are out there this year, out there now, approximately 8,000 of them are small businesses. They are under $500 million in assets. Three thousand of those actually are 25 or fewer employees. They have a significant burden on them when you think about it not just in training them the first time, but when we have staff turnover we have to train them again.

Those institutions, some of the things they do, are clearly in terms of trying to protect safety and soundness. They try to protect consumer protection laws. They likewise also try to perform government services. We help fight money laundering. We help dis-

cover terrorist financing. We help the IRS try to kind of deal with tax evasion issues, so we do a lot of things on behalf of the government that unfortunately the cost of such regulation gets passed on to consumers.

Let me just leave you with two big numbers to think about.

Chairman AKIN. Ken, are you the state banks?

Mr. CLAYTON. No. Both. We are talking about the whole thing.

Chairman AKIN. Federal and state?

Mr. CLAYTON. Federal and state.

Chairman AKIN. Okay.

Mr. CLAYTON. Although I would note that a lot of regulation comes out of the federal government and that the states then supplement that, so it is not just—banks are highly regulated, and I think the Financial Services Committee Members can actually kind of probably fill you in more than you would want to know on some of that.

As a practical matter we looked at some of the numbers here. It turns out that some research done in 1990 by some surveys we did along with the Federal Reserve is that the total cost of bank compliance at that time was somewhere between $27 billion and $42 billion per year. That is a lot of money in any case.

When you start though thinking about how it translates into real dollars being lent to real companies and the small businesses that your Committee has jurisdiction over, if you were to be able to cut 20 percent of that regulation and turn it back into capital the way things with leveraging we could probably provide probably close to $55 to $83 billion in additional funding. That is real jobs for real people in real communities.

Now, you asked if there were a couple of areas that we would focus on. Again, Mrs. Velazquez and Mrs. Kelly are very familiar with this, but we talked a little bit about the Sarbanes-Oxley Act and some of its unintended consequences.

As a practical effect, accounting firms are now charging our community banks two to three times what they were charging last year, not necessarily because they pose a higher risk, but because they have responsibilities under the Sarbanes-Oxley Act that then translate into higher costs to the businesses they serve.

So we would ask you to kind of focus in on some of those unintended consequences and recognize that, while still recognizing that there is a value in the law and not trying to undercut that law, but recognizing that different institutions get treated disproportionately, and I think small businesses are the ones that get the kind of raw end of that deal.

The second thing is dealing with the Bank Secrecy Act regulation, which deals with money laundering and financing and issues like that. It has a significant interest in our ability to do business. It costs a lot of money. Mrs. Kelly is smiling because she knows

there is a lot of interest on the Committee in various places at the Treasury Department and otherwise on this issue.

It costs a lot of money to comply with. Banks, if they do it wrong, are subject to potentially millions and millions of dollars in penalties, so it has a real impact in terms of cost to the institutions and cost of their human and capital resources.

On the other hand, it also affects our ability to serve businesses. I will give you an example. Grocery stores, convenience stores, gas stations that provide check cashing services to low income people that may be living from month to month that may not be part of the traditional banking system.

If they are bringing a paycheck that is around $1,000, if they bring it in they have to be considered money services businesses regulated by the Treasury and subject to all the money laundering rules. If they do not do it right, the potential is that the bank that that company, the convenience stores or the gas station, whoever does business with them, can be subject to liability and penalties in the $1 million range for the failure of that company to do it right.

What is happening is that our institutions are going to have to stop doing business with those companies because they cannot deal with the infrastructure. Yes, there is I guess a minute risk that there is a chance of somebody trying to funnel money into the banking system for illegal reasons, but as a practical matter these are real businesses, traditional, legitimate and are trying to be helpful to their communities but will be denied banking services as a result of somebody's unintended consequences.

I will just leave that with you.

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

Chairman AKIN. Thank you. So the source of that regulation is very specialized, and it is a whole series of Committees?

Mr. CLAYTON. Well, it is mostly the House Financial Services Committee and the Senate Banking Committee.

I will tell you when I look at our laws—I had a compilation of laws—it is 1,500 pages. That does not count the regs that come out of that too. We are heavily regulated, but the impact is significant not just to us, but to the people we serve because we cannot make the loans.

Again, for every dollar we get to save we can lend $7 out. That is where you get these big numbers of billions and billions of dollars that can be lent to small businesses that can employ more people in their communities.

All we ask in addition to some specifics is that Congress, wherever you are sitting, be mindful of the impact, some of these unintended consequences. While there may be something that needs to be addressed that is a problem, recognize that there are consequences to the solution that may be more costly than the problem itself.

Mr. SULLIVAN. Mr. Chairman, actually I would like to point out to many of the folks who are around the table who are all affected really by unintended consequences of the Sarbanes-Oxley law.

There is a little glimmer of hope in that the SEC Commissioner has in fact established a Small Business Advisory Task Force or team and so right now as far as striking when the iron is hot please try to familiarize yourself with that advisory group and get in your parochial issues so that they are on the table or on the radar screen.

You see certainly the leadership in Congresswoman Kelly, Congresswoman Velazquez and Congressman Akin. Once that advisory committee starts chugging along it is certainly appropriate for the Financial Services and Small Business Committee to simply ask them how is their work going and how are they addressing some of these unintended consequences.

It really is I think up to all of us to exploit that good news to the extent possible so that SEC has a full acknowledgement of the unintended consequences coming out of that task force.

Ms. VELAZQUEZ. I would like to ask you if given the fact that these small banks not only are small businesses, but also are providing services not only to low income communities, but small companies, firms, given that there is a role for the Office of Advocacy to work with them and this task force and be a bridge.

Mr. SULLIVAN. Yes. Actually, we have a secret insider over at the American Bankers Association. James Ballantine is a great friend of our office. Ken, we work with him a great deal and really want to thank the Bankers Association and, I mean, all of the folks who are here.

You all keeping my office busy is what makes us effective. They actually were fantastic to point out an ill-conceived proposal by Department of Treasury about a year and a half ago, and because of their activism on—I am going to screw up the name. I apologize. It was the non-resident alien interest reporting proposal.

Did I get it right, Craig? Something like that.

Because of the Bankers' activism, we were able to convince Treasury to withdraw it, so we will continue to do that, Congresswoman.

Ms. KELLY. Mr. Sullivan, what are some of the government agencies you've been working with?

Mr. SULLIVAN. The answer to the Congresswoman about which agencies we have established good relationships with. SEC actually, the Securities and Exchange Commission, we have seen some good progress.

The OCC we have not established the same level of relationships that we should, so one of the priorities that I am going to take back is perhaps we should try to establish some better relationships there.

Thank you for that comment.

Mr. CLAYTON. We would be glad to help you.

Mr. SULLIVAN. Thanks.

Chairman AKIN. Thank you, Ken.

Let us move on. Mr. Crowe?

STATEMENT OF DAVID CROWE, FEDERAL REGULATORY & HOUSING POLICY AREA, NATIONAL ASSOCIATION OF HOME BUILDERS

Mr. CROWE. Thank you, Congressman. My name is David Crowe. I am with the National Association of Home Builders. I hold the title of Senior Staff Vice President for Regulatory Issues, so this is a very appropriate chance to address three Members of Congress, as well as the SBA Advocacy Office.

I submitted suggestions for six different issues. I certainly will not go through every one of those. I will say that they run the gamut of federal agencies, so you have your pick of lots of places to dwell on with the home builders, which is a very concentrated small business industry.

Four out of five of our members build fewer than 25 homes a year. We are an industry of very small companies. There are a few obviously very large national companies, but the bulk of the industry is small businesses run by usually a proprietor and maybe even that person's spouse or some other close relative and so these businesses are very affected by the sorts of things you are hearing about.

We appreciate your giving us the opportunity to talk to you today. I will raise one issue that I think probably if I had to pick one, if I was forced on one, and I will stick with that admonition, is EPA.

E.P.A. is charged with the job of making sure that the waters of the United States are clean, a laudable goal, a reasonable thing to do, but they have approached the home building industry like it is a factory with a pipe coming out of the end of it and so they are dealing with the home building industry in an entirely inappropriate way to stop runoff from construction sites, which is the industry's contribution to pollution if you will, dirt in the water. That is what we do.

As a consequence of this overregulation of the industry and attempt to stop water runoff, they are citing our members for paperwork violations, which is also a very onerous task to begin with. The agency requires constant reporting, daily inspections, plus they are compounded by various levels of government taking on effectively the same operation.

E.P.A. has actually assigned this authority to 45 of the states. Five have decided and the District has decided not to do it, but 45 states said we will take on that responsibility, but EPA has not stepped back completely from enforcement so we still get the double or even triple whammies because local governments will also step in.

Our industry is not saying we should not do our job in making sure that the runoff is protected and contained. What we are concerned with is that the agency is looking at this as a paperwork issue and not as a viable environmental issue.

I also have wonderful examples at Fish and Wildlife, at HUD and at Rural Housing Service, but I will let you read our submitted testimony for that.

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

Chairman AKIN. David, I think what I am hearing you say is we sort of stepped out of the realm of common sense, and they are just basically handpicking you with a lot of bureaucracy as opposed to have we done anything to the environment or has there really been any serious problem with runoff. That is not it. The serious problem is you have not filled out the paper the right way, right?

Mr. CROWE. No. You said it exactly right, Congressman.

Chairman AKIN. If you had to pick one agency, EPA is tough?

Mr. CROWE. It is very tough.

Chairman AKIN. Worse than IRS?

Mr. CROWE. Yes, actually. In our industry's case, I would say that we hear many more complaints about EPA and Fish and Wildlife than we do about IRS.

Chairman AKIN. In some other forums I have had I asked people what would be the thing that is the biggest source of red tape, and what I heard is that EPA probably generates more—I mean the IRS generates more for businesses in general, so it is interesting to hear you say that.

Any questions on Home Builders?

[No response.]

Chairman AKIN. Go ahead, Rob.

STATEMENT OF ROB GREEN, FEDERAL AFFAIRS, NATIONAL RESTAURANT ASSOCIATION

Mr. GREEN. Thank you, Mr. Chairman. I will be brief. I know you have a series of votes coming up. Rob Green, National Restaurant Association.

Chairman AKIN. Rob, I do not mean to pick on you or anything. They have called us for a vote here pretty quick, so we are going to have to scoot right along.

Mr. GREEN. Yes. I will make it as short as I can.

Chairman AKIN. Yes.

Mr. GREEN. Restaurants. You all know our industry. We are big chains, and we are independents. Seven out of 10 have fewer than 20 employees.

The ADA has posed some issues for the restaurant industry. The Department of Justice puts out what is known as the Americans

With Disabilities Accessibility Guidelines, which instructs businesses how to comply with the ADA. Our members want to comply with the ADA and we advise all of our members to be in compliance with ADA.

There is a new rulemaking out from the DOJ which will substantially redo the requirements for certain businesses under the ADA, and in particular for restaurants it will impact parking spaces, employee work areas such as kitchens and even dining rooms, and it will involve for small businesses potentially huge reconstruction/remodeling costs.

We are currently trying to work with DOJ. We are submitting comments. It is not only the restaurant industry that is concerned. There are a number of other organizations and companies that are very, very concerned that these new guidelines reflect the fact that small businesses—it is challenging with the resources they have.

They are in current compliance with the ADA, but the new guidelines might put them out of compliance, and it is a very significant cost.

Another ADA issue is frivolous lawsuits. In certain parts of the country there are some unscrupulous lawyers that go look for restaurants that are not in total compliance or apparently not in compliance or there is question about compliance with ADA and file lawsuits to try to get some relief for their client. In many cases these are indeed frivolous.

Because of the unique nature of the restaurant industry, our members are very small. They are doing the best they can. We are asking for just a limited period of time if there is a lawsuit to understand what the lawsuit is about and to mitigate the problem if appropriate.

We are currently in discussions with the disability community, with other folks on the Hill, to try to come up with a solution that would not infringe upon the rights of the disabled, but would eliminate these types of drive-by lawsuits.

Last, but not least, the SBA size standards. Congresswoman Velazquez did have a roundtable yesterday. The SBA did have a proposal, which has since been withdrawn last year, but there is a new notice, an advance notice of proposed rulemaking, on the table to try to streamline and simplify the current number of size standards to a smaller number.

The restaurant industry is just concerned that the last proposal did disproportionately impact the industry. It would have taken a lot of restaurants out of the classification of small business.

Issues that we are concerned about are the part-time nature of our workforce. The average employee works about 24 hours per week compared to 33 hours for a typical industry, and many of our employees are seasonal. Some restaurants are only open six months out of the year, and in the summertime restaurants employ seven percent more employees than in the wintertime. Any proposal from SBA should recognize that.

It also takes a lot more employees for a restaurant to earn an equal amount of revenue for another business. One employee in the restaurant industry generates $38,000 worth of revenue.

If you look at other industries, even convenience stores, one employee generates $210,000 worth of revenue, so we are a lot more

labor intensive so the size standard issue is one we are watching very closely.

Thank you.

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

Chairman AKIN. Thank you very much.

Mr. SULLIVAN. Mr. Chairman, Rob was being really polite about the frivolous lawsuits. The lawsuits that he is talking about are extortion. Make no bone about it.

Congressman Foley has had a bill before the House in the past. It is worth looking at anew. It is the worst type of lawsuit abuse.

Chairman AKIN. Thank you.

We have got just a few more minutes. We have to catch the train to get on over to do our voting. I am trying to think. How many more people would like to kick in on this meeting?

Mr. HEARNE. I will take less than one minute.

Chairman AKIN. Okay. Less than a minute. Two? I do not mind if we want to try and do it in three minutes. We probably can do it in three minutes.

Okay. Let us just go real fast.

STATEMENT OF MICHAEL HEARNE, LAFAYETTE FEDERAL CREDIT UNION, CREDIT UNION NATIONAL ASSOCIATION

Mr. HEARNE. My name is Mike Hearne. I am president and chief executive officer of Lafayette Federal Credit Union in Kensington, Maryland.

We recently started a small business lending program and for the record have submitted some detailed comments, but I just wanted to let you know that most of the things that I have complaints about as far as regulations are addressed in the Credit Union Regulatory Improvement Act, which should be crossing your desk again this spring.

Primarily though what we are looking at is the arbitrary nature of the limits on business lending to credit unions. I think access to capital is always one of the big issues facing small businesses. We are right now currently limited to 12.25 percent, 12.25 percent of our assets, which in effect means that a $500 million credit union is only half as competent at making business loans as a $1 billion credit union, which just is not the case.

There is a point where you are too small to really run a program. You do not have the investment capacity. My credit union, for instance, happens to be SBA's credit union and USAID's. My board members are all MBAs, finance folks, accountants. They know exactly what they are getting themselves into.

We have 50 years' worth of small business lending experience on staff, and I think it is just arbitrary that we can make half as many loans as say a $600 million firefighters federal credit union.

I would like to certainly see that addressed. There are different ways to regulate the safety and soundness of business—

Chairman AKIN. Are those in your comments, your written testimony?

Mr. HEARNE. Yes.

Chairman AKIN. Good. Thanks. We better scoot to—

Mr. HEARNE. Okay. Our last thing is please fund the SBA fully. They are a big help to the industry and small business.

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

Mr. CLAYTON. Mr. Chairman, we would welcome the opportunity to participate in that discussion. I will leave it at that.

Chairman AKIN. I was thinking you might, yes.

STATEMENT OF DON PARRISH, REGULATORY RELATIONS, AMERICAN FARM BUREAU

Mr. PARRISH. Don Parrish from the American Farm Bureau Federation. We represent farmers and ranchers, the quintessential small business.

Most of the issues that we focus on and where we are running up against problems is the issues in dealing with land use and water. Obviously that is the EPA in terms of water quality regulations and how far you can extend the jurisdictional reach of the Clean Water Act.

I mean, we have ditches and uplands being called waters of the U.S. and farmers being regulated as to what they can do next to them. That is a real concern for us because being able to maintain our operations so that we can be productive and competitive in world markets is hugely important.

I am going to leave it at that. Waters of the U.S., endangered species with Fish and Wildlife Service, all of those. I mean, 80 percent of the endangered species in this country are on private lands, and if you manage endangered species you manage private lands. That is a huge and costly burden for individual farmers.

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

STATEMENT OF JOHN STROCK, ASSOCIATED BUILDERS AND CONTRACTORS

Mr. STROCK. I will be quick because I know Craig wants to get in here as well. I am John Strock. I represent Associated Builders and Contractors.

The issue I want to bring up quickly is OSHA's misguided direction as far as new and proposed regulations. They seem to be focusing far too much on small regulations that are not killing people every day, and it takes away attention from falls and caught-betweens and the big four fatality causing incidents in construction. We would like to see that addressed.

We have addressed it several times through the Advisory Committee on Construction Safety and Health, and that is just an issue that we would like to see addressed if you guys can help.

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

Chairman AKIN. You will have to make it quick.

Mr. PURSER. Thank you.

Chairman AKIN. We have to leave for votes.

STATEMENT OF CRAIG PURSER, NATIONAL BEER WHOLESALERS ASSOCIATION

Mr. PURSER. Craig Purser. I am with the National Beer Wholesalers Association.

Lots of regulatory concerns. We are creatures of regulation to a certain extent, but a non-regulatory issue that is the number one issue for my members is permanent repeal of the death tax.

If I leave you with one message I would be practicing advocacy malpractice if I did not make that my number one issue. These folks have waited long. They are family owned and operated businesses. They are privately held, and they need some permanent relief in order to plan for the future.

Thank you very much.

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

Chairman AKIN. That was brief. If you would like to make any other additional comments maybe you could take the comments for us.

The REPORTER. Absolutely.

Chairman AKIN. We are going to have to shoot over and vote or we will have a little black mark for not getting our votes in.

Thank you all. The hearing will be closed, but you will be able to make comments up here if you would like. Thank you.

[Whereupon, at 2:48 p.m. the Subcommittee was adjourned.]

Opening Statement
March 17, 2005
Regulatory Reform and Oversight Subcommittee Roundtable on Regulatory Reform
W. Todd Akin, Chairman

Ladies and Gentlemen, I would like to call this meeting to order. Welcome, everybody, and thank you for your participation today. I was recently honored to be selected Chairman of the Regulatory Reform and Oversight Subcommittee of the House Committee on Small Business and I look forward to working with all of you, especially our distinguished Ranking Member from Guam, Congresswoman Bordallo, as we address the immense regulatory burden affecting small businesses.

Too often, efforts to reform and reign in over-reaching regulations have met with resistance from the government bureaucracy, even when it is in the hands of a small business-friendly administration.

This is my first official action as Chairman of this Subcommittee and I hope to take from this event and develop some priorities that we will focus on for the 109th Congress.

In a time when our economy relies so greatly on small businesses to keep our country moving, we cannot afford to stifle that progress by continuing to add costly regulations that disadvantage these businesses. Half of our national workforce is employed by small businesses and two-thirds to three-fourths of net new jobs are created by small businesses.

Now is the time we must do everything in our power to limit the reach of the regulators and lower the cost of regulation to small businesses.

I look forward to the testimony of all of our participants. I ask that you hold your opening statement to no more than 3 minutes to allow time for discussion.

Opening Statement
Thomas M. Sullivan
Chief Counsel for Advocacy
U.S. Small Business Administration
Subcommittee on Regulatory Reform and Oversight
House Committee on Small Business
March 17, 2005

I would like very much to thank Chairman Todd Akin for inviting me to participate in this roundtable. Just as he believes in the value of listening to his small business constituency in determining his priorities, so do I.

The Office of Advocacy is your office of Advocacy. It belongs to the small business community. The value of listening sessions like this is that they become the litmus test in determining whether we are doing the right thing or not.

It is the mission of the Office of Advocacy to work within the Federal rulemaking process to ensure that rule makers are sensitive to the impact of their actions on the small business community—with the further thought that their actions can be guided in a way that achieves their goals without being needlessly harmful to small businesses.

That was the reason the office was established over twenty-eight years ago and is what we are still charged with doing.

We cannot possibly do our job without the active input of the small business community. We need to know which regulations are most burdensome. We need to know what is coming down the pike that is going

to cause you trouble in the future. We need to know where we can best put our limited resources to work to help you the most.

I often talk about the team of lawyers at the office who work so diligently to try to get agencies to do the right thing. I also talk about the team of economists who give us the data and research we need to fight bad agency proposals. A third and vital component is the outreach efforts of the office to work with our association and Congressional partners. Our direction comes from you.

I certainly am looking forward to the dialogue today. I will be offering some of my thoughts on things that we see as hot issues. Mostly, however, I intend to join the Congressman in hearing what you have to say and taking guidance from that.

Again, thank you Congressman Akin for including me and thank you all for sharing your thoughts and priorities.

House Committee on Small Business

Subcommittee on Regulatory Reform and Oversight

Testimony on Behalf of the Air Conditioning Contractors of America

Paul Stalknecht, President and CEO

March 17, 2005

Good afternoon Chairman Akin and members of the small business lobbying community. On behalf of the Air Conditioning Contractors of America (ACCA), I would like to thank the subcommittee for holding this regulatory roundtable on the regulatory burdens facing small business or for the opportunity to testify on a regulatory burden facing our industry.

ACCA represents nearly 5,000 members across all 50 states. Our small business contractor members employ the men and women who design, install and maintain heating, ventilation, air conditioning, and refrigeration (HVACR) systems across all 50 states. 75,000 employees in the HVACR industry are employed by ACCA member companies.

While our members continue to face many regulatory burdens in running their small businesses, one issue that has become a specific problem to our members is the lack of enforcement by the Environmental Protection Agency (EPA) of existing laws regulating the use of ozone-depleting refrigerants including chlorofluorocarbons (CFCs) and hydrochlorofluorocarbons (HCFCs).

In 1990, President George H.W. Bush signed the Clean Air Act Amendments (P.L. 101-549) that established national policy on these types of refrigerants among other goals. One important component of this legislation was that it would reduce and eventually eliminate use of CFC and HCFC refrigerants used in air conditioning and refrigeration. Section 608 of the Clean Air Act specifically addresses reducing the production, use and emissions of ozone depleting substances. Section 608 also promotes the recapture and recycling of these ozone-depleting products and created the National Recycling and Emission Reduction Program to address this issue.

The National Recycling and Emission Reduction Program regulations were issued by EPA under Section 608 and established five main requirements regarding the recycling, emissions reduction and disposal of refrigerants used in air conditioning equipment. EPA developed these rules as directed by the Clean Air Act.

The Clean Air Act also mandated that EPA restrict the sale of CFCs and HCFCs to EPA-certified technicians who have been trained in the proper care and handling of these gasses. Currently only HVACR technicians who have passed refrigerant certification may legally purchase CFC and HCFC agents.

In addition to these requirements, the Clean Air Act also created enforcement procedures under Title VII. The enforcement policy covers several areas of violations including falsifying documents, selling covered refrigerants to unlicensed individuals, tampering with monitoring devices, and knowingly releasing CFCs and HCFCs into the atmosphere. The Clean Air Act established that the EPA Administrator, in consultation with the United States Attorney General, could level civil penalties of up to $27,500 per day per violation of the act and revoke the operating certificates of reclaimers. The Clean Air Act also permits the EPA Administrator to make awards of up to $10,000 to individuals who report violations of the Clean Air Act.

The HVACR industry recognizes the importance of the provisions of the Clean Air Act regarding refrigerants and the industry wholly supports the goals of the legislation. ACCA's member contractors work daily with these ozone depleting agents and understand the need to be a responsible steward of the environment we all share. However, the industry has become increasingly concerned over the lack of enforcement shown by the EPA regarding these agents. As the Clean Air Act states, EPA is the federal agency responsible for enforcing the Section 608 requirements and yet our industry sees very little enforcement, which allows a growing number of individuals to circumvent the system while responsible contractors attempt to comply with these requirements.

Of great concern to our industry is the lack of a national recycling program for the proper disposal and recycling of refrigerants. The lack of a viable national refrigerant recycling program is viewed by ACCA members as a major problem and creates significant obstacles for our members. Most ACCA contractors act in good faith by attempting to reclaim and recycle refrigerant even though it is expensive and not convenient for them to do so. Furthermore, it puts these contractors at a competitive disadvantage to contractors who do not follow required procedures. The establishment of a national recycling program would help address this problem by making it easier for contractors to recycle refrigerant and follow the requirements of the Clean Air Act.

Our industry remains committed to complying with the requirements of the Clean Air Act but we cannot do this unless there is a fair playing field for all participants. As long as EPA declines to enforce its own regulations regarding refrigerants then the playing field will remain tilted against our members. In addition to enforcement, ACCA members feel that it is imperative that EPA also remove the loopholes in Section 608. One glaring loophole in Section 608 is that it is not illegal to recover refrigerants into a cylinder that "inadvertently" contains a hole. By allowing this loophole to exist, EPA indirectly condones the actions of bad actors to circumvent the integrity of the regulations compared with contractors who follow the regulations. These bad actors then get an unfair competitive advantage over good actors by pricing their services below what a reputable contractor can offer a consumer because they are not following the law regarding

refrigerants. ACCA members strongly feel that the federal government should not support this business practice by not enforcing its own regulations but rather enforce its regulations regarding refrigerants so that bad actors know that they will be caught and heavily fined if they violate the Clean Air Act Amendments. By enforcing its own rules, EPA can go a long way towards supporting a level playing field for all small business HVACR contractors.

Thank you Mr. Chairman for the opportunity to testify on this important issue for ACCA members across the country.

House Small Business Regulatory Reform and Oversight Subcommittee Roundtable Testimony

The Computing Technology Industry Association (CompTIA) is an association composed almost entirely of small information technology (IT) businesses whose primary business model is based on improving the productivity of our members' customers by introducing and expanding their use of information technology. The vast majority of the customers of our member companies are themselves small businesses in every business sector. According to the ReferenceUSA database of the 71,620 companies in the NAICS category 44312 (updated code for SIC 5734), which includes the vast majority of companies in the IT industry, 69,981 of those companies have fewer than 100 employees. The most common type of small business in our industry is one that provides information technology (IT) services to other small companies. These include troubleshooting, repair, networking, advising clients on the most efficient software/hardware alternatives and many other services needed by small businesses.

Many federal regulations affect IT companies in the same way they affect other small businesses, and other regulations can have a greater or lesser impact on a particular small business sector. One recent regulatory simplification that has helped all small businesses, and our industry more than others, is the simplification of federal depreciation laws for small companies. Congress temporarily raised the small business annual capital expensing limits from $25,000 to $100,000 several years ago, saving small businesses that prefer this option the hassles of prorating and keeping track of their expenses for capital goods like computers. We think this simplification should be made permanent.

Computer hardware and software accounts for about 1/3 of the capital goods expensed by small businesses. Since the useful life of most computer hardware is considerably less than its 5 year "useful life" as determined by Congress, expensing encourages small businesses to continue to invest in these rapidly improving tools that can greatly improve small business productivity. Technology has spread through the business community to the point that many midsize and large companies make near-optimal use of information technology's potential, yet many small U.S. businesses have yet to take full advantage of its potential. In an increasingly globally competitive world it is important that Congress make the $100,000 small business expensing limits permanent so that U.S. small businesses remain competitive domestically and abroad.

In addition, even though small businesses are in most cases the indirect beneficiaries, a permanent Research and Development tax credit would also help drive the creation of new and more sophisticated technology that would greatly increase small business productivity.

Education and Training was the top priority in a recent CompTIA survey of small IT companies. Technology changes rapidly, and this means that small IT companies and/or their employees must continuously invest in expensive training to upgrade their skills and industry certifications. This is an issue for small businesses in every sector, for a growing

number of small companies are finding it cost effective to train their office manager or other staff in some of the less sophisticated core IT skill sets that reduce their dependence on IT service companies. According to the U.S. Department of Labor, around 92 percent of all IT professionals work in non-IT companies, and 80 percent of those professionals are working for small companies. As global competition intensifies, the dependency on fluent and flexible IT skills will only grow. Not surprisingly, much of the need for those skills will be from U.S. small businesses.

For American small businesses, many IT jobs go unfilled because there aren't enough people with the right skills to fill them. Where this occurs, companies are put at a competitive disadvantage, having either to forego their labor requirements, import skilled labor, or go offshore for their workforce needs, or worse, forego business opportunities. Reasons that may cause this kink in the pipeline include: a mismatch between employer skills demand and worker training and education; the high hurdles that small businesses experience when investing in training; and, the often unappreciated need for constant retraining and re-skilling of IT workers in the face of rapid technological changes.

We recently surveyed some of CompTIA's small business partners to assess the challenges they face in training their workforce; the level of importance of training; whether on-the-job training is included as part of the training program; and, what solutions are needed by small businesses.

What we already know is that most small businesses in the IT arena are operating on narrow margins. Thus it is increasingly important for small IT businesses to equip employees with essential technical training in order to support their client's complex business systems. Each customer's IT environment is different and rapidly changing. Small businesses are leaner and thus require highly skilled employees to perform multi-specialized IT functions efficiently. As a small business, the only way for them to achieve their growth strategies is by utilizing a highly competent workforce to support their customer's business objectives.

What we continue to find is that in order to remain competitive, the small business see workforce training and certification as a means to differentiate themselves from or level the playing field with the large organizations. Training and certification provides them with a competitive edge or at the very least, an opportunity to compete.

Echoed throughout this industry are statements made by contractors that they can't find a qualified SME – and "qualified" means having a skilled, trained and certified workforce. As a business, you can no longer be a "generalist". As technological solutions grow more complex encompassing multivendor environments requiring interoperability and substantial service support, their clients are requiring a more competency-based approach to their investment in IT. So, specializing, doing it well and having a well-trained and skilled workforce is today's challenge faced by the typical small business solution provider. Conversely, the small business user of IT is finding it increasingly necessary to hire or train in-house IT staff to manage the interface between their business

professionals and the IT infrastructure needed to support them effectively. In both these cases, businesses recognize the value of investing in training for personnel.

Underlying that challenge is the cost of training. Small businesses, especially those in the secondary/tertiary markets, are challenged by the sheer costs of training our workforce. Providing training and certification is costly to implement and manage. Because of these cost challenges, small businesses also need to evaluate alternative means of training, such as e-learning.

The current federal system of supporting post secondary training for the people who are needed to make small IT businesses work is in need of improvement. Currently federal funding for such training flows to small businesses indirectly through Workforce Investment Boards (WIBs)at the state level. The process is determined by the Workforce Investment Act (WIA), which is currently being reauthorized. While the mandate for business representation on WIBs is good in principle, in practice small businesses in our sector and many others are underrepresented The result is that training funds that could have helped a displaced worker gain information technology skills that could lead to a rewarding and well paid IT career with a small business are instead all too often spent on training for low paying jobs in service industries where the potential for significant career advancement is substantially less. We suggest the small business committee investigate how WIA could be modified to make it a better tool for advancement into rewarding careers, particularly with small businesses, since small businesses find the high costs of training even more of a barrier to productivity growth and competitiveness than do most large companies.

Though unrelated to regulation another tool that can be very helpful to encourage small businesses to invest in workforce training is the TRAIN Act, which provides tax credits for worker training. Small Business Committee Chairman Manzullo, several other committee chairmen and the co chairs of the House Internet Caucus cosponsored this bipartisan bill last year. It will soon be reintroduced in the 109th Congress. We would encourage all members of the House Small Business Committee to contact the lead sponsor, Congressman Jerry Weller, and join in as original cosponsors of this year's legislation.

Many small IT companies sell to the federal government, either directly or as subcontractors to large IT companies. For these companies in particular Small Business Administration's (SBA's) size standards are of particular importance. It is especially important that SBA work very closely not only with small business industries, but in cases like the IT sector where there are many diverse business models, with subsets of an industry to assure that any changes in size standards are fair and equitable. Another federal procurement issue important to small businesses is contract bundling, the process of assembling diverse product and/or service procurements into one package, in some cases for little reason other than administrative convenience. Since bundling by its nature eliminates bidding opportunities for small businesses, it should be limited to instances where it can be demonstrated that administrative savings more than offset the savings that could be accrued through increased competition from small business providers.

The Small Business Administration is going through an exercise of reviewing the existing size standards for various industries to see if size standard revisions are appropriate. This is a commendable effort, but there are substantial risks if it is not done properly. Within industries like information technology there are literally dozens of very different business models, and the demographics in terms of the number of firms, their average size as well as the distribution size-wise within the many different business models varies considerably. There is probably no single small business size standard, whether it s express in dollars or in employee counts, that would be appropriate for all companies in the NAICS category 44312. We believe that SBA would be well advised to go slow on this effort in order to assure that it gets full input from affected parties in every subset of the IT sector and other business sectors. There is no reason that any deadline should be imposed on SBA, nor is there any reason that multiple size standards cannot be determined within various sectors to be fair and even-handed to the different business models within the sector.

Other sensitive issues with regulatory implications are intellectual property, where Congress must continue to protect all legitimate intellectual property. The numerous proposals to restrict the immigration of IT professionals into the U.S. and prevent IT and other services from being contracted outside of the U.S., would constitute often counterproductive and costly regulation of the private sector. Privacy is a sensitive security issue that is especially important to the IT sector. It is critically important that steps be taken to improve the security of private information. While there may be a need for thoughtful legislation it is important to note that a business customer survey conducted by CompTIA revealed that the majority of security breeches are caused not by failures in software but rather through human error. This again points to the need for increased information technology training, particularly in the area of IT security. No legislation can prevent security breeches or prevent the risk of piracy of private information if the workers in charge of maintaining network security are untrained or poorly trained in security practices.

Statement of Kenneth J. Clayton
On Behalf of the American Bankers Association
Before the
Subcommittee on Regulatory Reform and Oversight
Of the House Committee on Small Business
March 17, 2005

Mr. Chairman and members of the Subcommittee, my name is Ken Clayton. I am Chief Legislative Council of the American Bankers Association, the largest banking trade association in the country and one that represents the interests of all size banks – small, medium and large. Many of these banks are small businesses themselves. All of them represent the "funding lifeline" to small businesses across America.

In my capacity at the ABA, I have the opportunity to meet with community bank CEO's from all over the country on a regular basis. I can assure you that the ever-increasing regulatory burden, and its impact on their bank's ability to serve their local communities, is at the forefront of these CEO's concerns.

I would like to make three key points today:

First, regulatory burden is not just a minor nuisance for banks – it permeates every aspect of our day-to-day business, from

frontline tellers to bank CEOs. And, in many instances, this burden is unnecessary.

Banks are highly regulated entities both at the Federal and state levels. We are closely examined for safety and soundness purposes. We are required to comply with a myriad of consumer protection regulations. We assist the government in a wide range of policy and law enforcement functions, from anti-money laundering efforts, to assisting the IRS in combating tax evasion, to uncovering terrorist financing.

Yet, in many instances these regulatory requirements make little sense. For example, banks across the country are currently facing demanding, and often inconsistent, directives on how they must comply with new anti-money laundering rules, and are potentially subject to millions of dollars in penalties if they get it wrong. As another example, how many home buyers actually read the stack of documents required to be provided to consumers when they seek a home loan? We suspect few.

It short, banks face a mountain of regulation, not all of it needed. While bank customers – be they individuals or small businesses – never see the infrastructure required to support these

government-imposed compliance requirements, the magnitude of that investment, both in human capital and technology, leads to higher costs for everyone.

As a second point, policymakers must recognize the cumulative nature of bank regulation and its impact on a bank's ability to function. In recent testimony before the House Financial Services Committee, FDIC Vice-Chairman John Reich indicated that, since 1990, ***801 new regulations have been issued by bank regulators.*** Regardless of a bank's size, complying with these, and other pre-existing regulations, is an enormous burden for bank staff.

Of particular significance to this Subcommittee is the cumulative impact of this regulatory burden on the small business segment of the banking community – community banks. In fact, it is these banks that carry the heaviest regulatory load, and face the real threat of being regulated right out of business. Nearly 8,000 of the nation's almost 9,000 banks have less than $500 million in assets, and 3,350 of these banks have fewer than 25 employees. I would also note that approximately 93% of all banks in Missouri are below this $500 million in assets figure. These community banks provide the banking services to people in small towns across

America, yet these same community banks do not have the manpower to run the bank and to read, understand and implement the thousands of pages of new and revised regulations they receive every year.

To illustrate the magnitude of this burden on small banks, consider this: Each year the ABA publishes a reference guide that summarizes the requirements embodied in thousands of pages of regulations. This **summary** is ***600-pages long*** and will be even longer in the future to cover new responsibilities under the USA Patriot Act and expanded HMDA reporting requirements.

The **third, and final, point** that I would like to leave with you today is the detrimental impact that this mounting regulatory burden has on the small businesses – and the local communities – that banks serve.

Based upon research done in the 1990's, the total cost of bank compliance is somewhere between *$27 billion and $42 billion per year*. This is an enormous figure, and does not include compliance costs associated with the USA Patriot Act, the Sarbanes-Oxley Act, and certain other new laws and regulations. If this burden could be reduced by 20 percent and directed to

capital, it would support additional lending of between *$55 billion - $83 billion.*

In sum, regulatory burden is an enormous drain on bank resources. It harms banks, which are small businesses themselves. It harms the small businesses these banks serve. And it harms the local communities where they both are located. We welcome Congress' willingness to look into this important subject.

Thank you for considering our views.

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

By
National Association of Home Builders
March 17, 2005

Good afternoon Madam Chairman, my name is David Crowe. I am the Senior Staff Vice President for Federal Regulatory and Housing Policy at the National Association of Home Builders. I am pleased to have this opportunity to testify today on behalf of the 220,000 member firms that comprise the NAHB federation.

The National Association of Home Builders is pleased that the chairman requested NAHB to testify on the important issues of federal regulations and their impacts on small businesses. The home building industry is dominated by small businesses so regulations that have a disproportionate impact on small businesses have a significant impact on our industry. As evidence of the dominance of small firms, about four-in-five of our member firms build fewer than 25 homes a year. Because the home building industry is made up of many small firms, all competing for the same home buyers, the industry is very competitive. In addition to giving the home buyer the best buy for their dollar, the intense competition means that most builders make a decent profit for their efforts but not a large profit. Good competition also means that builders cannot absorb extra costs that result from inefficient regulations. Regulations that raise the cost of construction, slow the process or add unnecessary requirements ultimately raise the cost of housing to the home buyer or apartment renter. Therefore, the concerns that I bring to you today on behalf of the home builders are concerns that the regulations cited below push some people out of the housing market or require them to use a large share of their income for housing.

At this afternoon's roundtable discussion, I would like to provide the Subcommittee with examples of six regulations that have negative impacts on the home builder, particularly the small home builder. The examples that I would like to mention concern the following regulations:

- FHA Mortgage Insurance for Small Multifamily Properties
- Section 8 Housing Choice Vouchers and Seniors Assisted Living Facilities
- Management and Oversight for RHS Multifamily Properties
- Clean Water Act NPDES Storm Water Permitting Program
- Clean Water Act Section 404 Wetlands Permitting Program
- Endangered Species Act Critical Habitat Designations

FHA Mortgage Insurance for Small Multifamily Properties

Background

Federal Housing Administration (FHA) insurance plays a key role in the availability of financing for affordable rental housing for working families, but currently it is not a viable system for funding small (5-50 unit) multifamily rental properties. The program's legal and processing costs make it infeasible for use on smaller properties. The FHA mortgage insurance program requires small projects to provide essentially the same documentation as large projects, including a Phase I Environmental report, architecture/engineering certifications, construction cost analysis, mortgage credit analysis, appraisal, market review, and asset management review

(financial statements and sample pro forma). Once financed, small properties are subject to the same regulatory and enforcement regime as large properties, which is disproportionately burdensome and costly for smaller properties operating on significantly lower cash flows and with fewer management staff.

HUD modified the small projects program some time ago, but the modifications were not significant enough to make the program workable. Financing for small multifamily projects actually shares more characteristics with single-family loans, but HUD has not considered altering the small multifamily program to incorporate single-family standards. Further, the program is not included under the Multifamily Accelerated Processing (MAP) program, which provides streamlined processing for most FHA-insured multifamily loans.

Small Business Impact

Improving the FHA small projects program would help expand financing options for small multifamily affordable housing developments, which currently are quite limited. The problem is especially acute in rural areas. Many lenders do not provide such financing because it is relatively costly to underwrite and service. Community lenders, which typically hold loans in their portfolios, provide less favorable terms than for larger loans.

Possible Cures

NAHB recommends that HUD implement a viable small multifamily project program under Multifamily Accelerated Processing (MAP) to speed processing times and reduce excessive documentation requirements. In addition, HUD should streamline current underwriting standards, taking into consideration the incorporation of the standards for the single-family Section 203(b); the primary single-family mortgage insurance program. HUD should also develop an appropriate set of enforcement standards for smaller properties to reduce costs while ensuring the properties are maintained in good physical and financial condition.

Section 8 Housing Choice Vouchers and Seniors Assisted Living Facilities

Background

Currently, it is extremely difficult to use Section 8 Housing Choice Vouchers in Assisted Living Facilities (ALFs). While vouchers may be used for ALFs, the program rules do not recognize the higher costs associated with building and operating such facilities.

In 2000, the Department of Housing and Urban Development (HUD) issued Notice PIH 2000-41 implementing Section 523 of the "Preserving Affordable Housing for Senior Citizens and Families into the 21st Century Act," which confirms that a public housing authority (PHA) may provide Section 8 housing voucher assistance for seniors who live in an ALF. The intent of the law is to use vouchers to supplement the Medicaid Home and Community Based Waiver Program, which pays for community based or home residential care for Medicaid-eligible frail elderly persons at risk of being placed in hospitals, nursing homes or intermediate care facilities. Use of housing vouchers to assist with rental costs, along with the waivers, is intended to help

frail elderly individuals obtain both housing and the necessary services needed to remain independent and avoid premature institutionalization.

HUD's Notice sets the rules under which vouchers may be used in ALFs to cover all or portions of the assisted living unit shelter costs. (Section 8 housing voucher funds may not be used to pay for meals or services.) However, use of the vouchers in ALFs has been problematic, because the program rules for using housing vouchers in ALFs are the same as for any other rental housing. In particular, the rent must be within the local PHA's rental payment standard and Fair Market Rent (FMR) limits. HUD calculates FMRs based on surveys of rental units in the conventional market, although ALFs are not included in the survey. In many areas, the FMRs and rental payment standards are too low to permit the use of the vouchers in ALFs. Modifications to the current rules for use of vouchers in ALFs should be made to ensure that low-income seniors can live in such facilities.

Possible Cures

NAHB recommends that HUD re-evaluate the methodology for determining FMRs and payment standards used for ALFs. For example, HUD could conduct separate rent surveys for ALFs to get data specific to these types of units and then set a separate FMR for ALFs. Alternatively, HUD could adjust the regular FMRs by some factor to account for the differences in rents (excluding non-shelter costs) between ALF units and conventional market units. HUD could also allow PHAs to set higher payment standards for ALFs than currently permitted.

Management and Oversight for RHS Multifamily Properties

Background

The U.S. Department of Agriculture's Rural Housing Service (RHS) Section 515 multifamily rental housing program provides affordable housing for low-income residents in rural areas across the country. The portfolio consists of over 15,800 properties, but the properties are aging. Inadequate and misguided management oversight and program standards have resulted in severe deterioration of the RHS multifamily rental housing portfolio. Most of these properties are in need of substantial rehabilitation but lack adequate reserves to pay for such improvements. These properties are small in size and typically are owned by small entities or individuals.

The preservation of the RHS' Section 515 properties has been hampered by lack of oversight of management practices, burdensome requirements for property sales and/or transfers, and inadequate funds for repairs and rehabilitation. Program rules are applied inconsistently, depending on the field office, which creates confusion and uncertainty. There is a critical need to identify the scope of the problem and take corrective actions. RHS began this process two years ago and is currently evaluating the recommendations of a consultant who was hired to evaluate the needs of the portfolio and develop recommendations for action. RHS is also in the process of responding to comments on its interim final rule updating its multifamily program regulations, including management practices. However, NAHB believes the RHS will need to implement even stronger reforms than it has currently proposed in its interim final rule.

Possible Cures

NAHB recommends that the RHS establish a uniform system for monitoring Section 515 property management companies. Management fees should be based on a standard bundle of services, with provisions for add-on fees, as appropriate, and the RHS should be required to approve all management fees. In addition, the RHS' ability to remove bad property managers and/or owners should be strengthened by establishing clear performance standards for managers and owners and developing a list of actions that trigger the removal of bad property managers or owners. Finally, the RHS should streamline the process for transferring Section 515 properties, particularly when the agency has an opportunity to facilitate the transfer of a troubled property or one that needs immediate attention to health and safety issues.

Clean Water Act NPDES Storm Water Permitting Program

Background

The Clean Water Act (CWA) was enacted to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." To achieve this goal, the U.S. Environmental Protection Agency (EPA) developed the National Pollutant Discharge Elimination System (NPDES) program. The NPDES program prohibits the discharge of pollutants into "waters of the United States" without a permit. When first enacted, the permit requirements were designed to limit the effluent from industrial processes and municipal sewage treatment. Once these sources were under control, Congress and EPA broadened the program's scope to include more elusive sources, including storm water discharges and municipal runoff. Despite the vast differences between industrial and storm water discharges, EPA pigeon-holed storm water into the ill-fitting industrial discharge program.

Since 1992, EPA has required NPDES permits for storm water discharges from industrial, municipal, and construction sources. While EPA administers the NPDES program, the CWA allows EPA to delegate the program to the states. To date, 45 states have assumed this authority and administer the program (e.g., issue permits, conduct inspections and initiate enforcement actions), although EPA maintains an oversight role. Importantly, the delegated states' programs must be consistent with EPA's federal requirements and may be more stringent if the state so desires. In the other 5 states (AK, ID, MA, NH, NM) EPA is the permitting authority. In addition to the federal program, many states and localities have their own separate programs designed to control erosion and storm water runoff. **Thus, in many areas of the country, construction site operators must comply with multiple storm water regulations, all aimed at improving water quality, yet rarely coordinated to optimally meet that goal.** Further, due to the structure of EPA, with the enforcement and compliance personnel being in a different office than the water program staff, implementation of the NPDES program is inefficient and cumbersome, not to mention oftentimes a lack of coordination between the two.

The NPDES program requires a permit for any construction activity that disturbs 1 or more acres of land or that disturbs a single lot located within a subdivision, regardless of the size

of the lot. For home builders, the NPDES program oftentimes means obtaining a second or even third permit to discharge storm water from the site. In order to be covered by the permit, construction site operators must prepare a Storm Water Pollution Prevention Plan (SWPPP) and file a Notice of Intent (NOI) with EPA or the state permitting agency, then comply with the terms and conditions of the permit (i.e., install and maintain Best Management Practices conduct biweekly inspections, record any plan changes, etc.). While these requirements may seem simplistic, they are quite complex and burdensome. In fact, EPA's guidance for writing the SWPPP alone is over 40 pages long and after following it, a permittee still has no guarantee that he or she is in compliance.

Despite EPA's acknowledgment that there is no mechanism in place to demonstrate compliance, the agency has, nonetheless, identified storm water enforcement as a continuing priority. While enforcement plays an important role in ensuring the success of the NPDES program and improving the health of the nations waters, if it is to be effective it must be predicated by education and compliance efforts, and be focused, timely, predictable and tied to on-the-ground environmental impacts. To date, however, this has not been the case. EPA's Office of Compliance Assistance and its Office of Enforcement appear to have a strained relationship with one another and the Office of Water, making it impossible to follow the traditional "compliance first, enforcement second" process envisioned by most environmental statutes. Further, EPA regularly takes an overzealous approach to instigating investigations and seeking out actionable violations, oversteps its agreement with delegated states, and levies significant fines for paperwork violations that have little bearing on environmental protection. The aim of the CWA is to improve the quality of the nation's waters. To date, EPA's storm water enforcement actions against the building industry have failed to demonstrably contribute to achieving this goal.

Small Business Impacts

The NPDES program requires a permit for every construction activity that disturbs 1 or more acres of land or that disturbs a single lot located within a subdivision, regardless of the size of the lot. In 2003, EPA conducted an information request regarding the cost of filling out the Notice of Intent and completing the Storm Water Pollution Prevention Plan. *See 68 Federal Register 14972 (March 27, 2003), EPA ICR No. 1842.04.* In that request, EPA estimated that filling out an NOI and completing a SWPPP would take about 39 hours and, using EPA's "Estimated Total Annual Cost" and "Estimated Total Annual Hour Burden," would cost approximately $1,300. This equates to an hourly rate of about $33. Based on the experience and input of NAHB's members, we believe this burden to be underestimated by 2-3 times. The following responses were obtained when NAHB asked several of its members about EPA's estimates:

- A Home Builders Association in Bettendorf, IA reported, "An engineer in the Quad Cities who does this work says a lot of it depends on the site. He said 39 hours is a reasonable time estimate. The $1,300 is not. The lowest hourly rate in his firm is $60 per hour. It can range up to $100 for one of his Senior Engineers. So here in the Quad Cities 39 hours of engineering on this paperwork runs somewhere between $2,300 to $3,900."

- A developer in Virginia stated, "It will cost us close to $5,000. The engineer's time is probably only about 40 +/- hours, but engineers cost at least $100/hr in this area."

- From a developer in Georgia: "If I try to average a subdivision of about 40 single family detached lots, I spend about $2500 for providing narrative, data, and certification for only the NOI. The pollution prevention plan then ranges from $4000 to $7000."

Clearly, the direct impact of the NPDES program on small businesses is significant.

Further, because the majority of state and local governments have laws, ordinances and regulations regarding the control of erosion and storm water from construction sites, in most instances, the NPDES program requirements are *in addition to* these mandates – creating duplication and confusion over which rules to follow. Similarly, by having more than one authority looking over one's shoulder, construction site operators can be in the unenviable position of never being able to satisfy all masters. For example, even if a state of local inspector is satisfied that a construction site operator has sufficiently complied with the requirements, EPA can override that assessment and find the operator in violation. Considering that the goal of the NPDES program is to improve water quality, if all it is doing is multiplying paperwork and duplicating effort, its effectiveness is suspect.

Finally, by regulating storm water under the NPDES program, EPA has inappropriately allowed storm water discharges to be subjected to the numerous standards and limitations of the CWA, including effluent limitation Guidelines (ELGs) and Total Maximum Daily Loads (TMDLs). This means that certain small businesses will be required to install additional controls or undertake additional measures to meet ELGs or TMDLs, adding costs, delays and another layer of uncertainty to the permitting process – burdens resulting solely from the agency's wrongful application of the NPDES program to storm water discharges.

Possible Cures

EPA has the authority to address many of the challenges associated with the NPDES storm water program to reduce the impacts on small businesses. Specifically, the agency could revise its regulations to:

- Enable construction site operators who receive notices of violation to correct the alleged violation(s) before enforcement actions are initiated.
- Adopt a separate permit for operators who are constructing a single structure (i.e., residence) on a single lot either within or outside of a subdivision. Developing a separate permit for these operators would further clarify their requirements, reduce needless confusion, and result in higher compliance rates as operators are better able to understand what is required of them.
- Consolidate federal, state and local program authority into one entity (including issuing permits, completing inspections and undertaking enforcement actions) so there will be less overlap and more consistency.
- Expand the use and availability of the Expedited Settlement Offer (ESO) to ensure it is a viable alternative to going through the standard enforcement process, which is lengthy and

includes higher fines, complex penalty calculations, and proceedings that often require the permit holder to obtain the assistance of a lawyer.

- Establish a checklist of other methodology that builders and developers can use to demonstrate that they are in compliance with the NPDES requirements.

Clean Water Act Section 404 Wetlands Permitting Program

Background

The U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA), jointly administer the wetlands permitting program under Section 404 of the Clean Water Act (CWA). Section 404 prohibits the discharge of dredged or fill material into "waters of the United States" and "wetlands" without a permit. Because the Section 404 program has, over the years, become a stand in for the wetlands protection program that the agencies wishes it were, the Corps and EPA have continuously broadened their interpretations of their authority to encompass more and more areas and activities. For example, the regulatory definition of wetlands is so broad that it includes areas that look exactly like dry land but are inundated by water for only several days a year, and the term "discharge" has been interpreted to include even the incidental amount of material that falls off the lip of a backhoe bucket during excavation activities. Further, federal jurisdiction has been pushed so far as to include not only those "waters of the U.S." that we all agree should be under federal jurisdiction, but also the entire drainage network including common man-made ditches. Thus, despite the intended limits of the program to include only those activities that *both* constitute filling *and* occur in 'wetlands' or waters, the Section 404 program encompasses vast areas that can be scarcely discerned from their upland counterparts and an array of activities that hardly constitute an addition of materials.

Because of the broad interpretation of what constitutes a "wetland," a "discharge, and a "water of the U.S.," NAHB's members routinely are required to obtain Section 404 permits to complete their developments and construct housing. Of the two kinds of permits available, individual and general, most members try to qualify for the streamlined general permits, which allow various activities to occur in wetlands if they result in only minimal impacts on the environment. Congress has directed the Corps to make general permits available as a means to allow developers around the country to perform similar activities without the delay that usually accompanies the issuance of individual permits. Individual permits, on the other hand, oftentimes take years to obtain as they require extensive scrutiny, plans, and paperwork.

To obtain an individual permit, an applicant must first obtain a jurisdictional determination which depicts the wetlands boundaries on the property, nearly exclusively at the expense of the applicant through hiring wetland consultants. Then the applicant must obtain a state water quality certificate to show that the proposed discharge will not cause or contribute to a violation of any applicable water quality standards. Once the water quality certification is obtained, the permit application is evaluated to ensure that the applicant has avoided and minimized any impacts. In this process, the Corps has the prerogative to review and alter an applicant's land use decisions, such as the number of lots and/or the lot configuration and intended building footprint. Finally, the applicant must provide the Corps with an approvable

mitigation proposal to offset any environmental impacts of the discharge, often costing tens to hundreds of thousands of dollars.

While the Corps likes to represent this program as being straight forward, in reality, it is rife with uncertainty, cumbersome paperwork requirements and lengthy permitting delays. In fact, landowners that do not believe that an area should be regulated as a wetland cannot even challenge this decision in court until they maneuver through the entire permitting process.

Small Business Impact

The Section 404 permit program is highly controversial and causes an extremely heavy regulatory burden on small businesses. Three issues continue to drive the Section 404 debate: (1) the geographic areas over which the Agencies can require permits; (2) the types of activities that require permits; and (3) the unmet statutory requirement to provide expedited approvals for activities that only minimally affect the environment.

Regulated Areas

The Agencies have assumed for over two decades that the CWA grants them authority over virtually all waters and wetlands. The current debate centers on how far the Agencies jurisdiction actually extends (i.e., which waters can they legally regulate).

In 2001, the U.S. Supreme Court specifically ruled in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers,* 531 U.S. 159 (2001), (*SWANCC*) that the Corps could not extend its jurisdiction over isolated, non-navigable, and intrastate wetlands simply by stating that migratory birds utilize them. Because the decision also held that the CWA grants jurisdiction only over "navigable waters," we believe the Corps has no jurisdiction over isolated wetlands whatsoever. The Agencies have consistently resisted implementing the decision, and after issuing an Advanced Notice of Proposed Rulemaking (ANPRM) in January 2003, decided later not to move forward with any rulemaking, much to the chagrin of the regulated community and many other stakeholders. Since 2001, the Corps has been without firm guidance on where its jurisdiction ends. In the absence of direction, and, as documented in a February 2004 GAO study, the Corps' districts have implemented inconsistent and nearly limitless views of jurisdiction using poorly defined or undefined regulatory approaches, including an expansive interpretation of their jurisdiction over "tributaries" and "man-made ditches." *See U.S. Government Accounting Office report GAO-04-297, February 2004.*

The automatic regulation of ditches affects many stakeholders, including states, counties, municipalities, flood control managers, and builders and developers. Every time a developer is required to install a drainage ditch next to a roadway, he or she is establishing an avenue for the Corps to regulate the builder who needs to install a culvert and driveway over that ditch. When one considers that there is an estimated 3.9 million miles of roads nationwide, all of which are required to have adequate drainage, this interpretation has effectively federalized a considerable amount of land. In addition, compounding the permitting requirements, the unpredictability associated with each

Corps having its own rules prevents project managers, land owners and small businesses from knowing how much of a project may be subject to federal control, which severely hinders successful project planning. Finally, because it is not always easy to identify wetlands or their boundaries, landowners must necessarily hire consultants to help determine, at the onset, whether or not they are subject to the rules

Regulated Activities

The CWA specifically focuses on activities that cause a "discharge" into navigable waters as the limit of its regulatory jurisdiction and defines "discharge" to mean an "addition" of a pollutant. 33 U.S.C. § 1342, 1344, 1362(12). In complete contrast to the statute, the Agencies settled *North Carolina Wildlife Fed'n v. Tulloch*, No. C90-713-CIV-5-BO (E.D.N.C. 1992), by agreeing to amend their rules to regulate landclearing and excavation (i.e., removal) activities.

Plainly speaking, the *Tulloch* Rule defines "incidental fallback", or the redeposition of any particle (e.g., any granules of soil that might fall off the lip of the bucket of a backhoe being used to remove material from a wetland), as a "discharge." There have been two Federal Court decisions, *American Mining Congress v. U.S. Army Corps of Eng'rs*, 951 F.Supp. 267 (D.D.C. 1997), and *National Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3.d 1399 (D.C. Cir. 1998), that have found the *Tulloch* Rule to be inconsistent with the statutory language of the CWA. Yet the Corps has continued to advise its field staff to regulate those activities that result in the discharge dredged or fill material as well as those that result in "incidental fallback." In essence, builders and developers continue to need Section 404 permits if they are discharging to or taking from jurisdictional wetlands or water.

Expedited Approval

Nationwide permits (NWPs) are a category of general permits that are universally applicable and may authorize certain types of activities to occur in wetlands or waters of the U.S. if those activities are substantially similar in nature and cause only minimal individual and cumulative environmental impacts. Congress authorized the issuance of general permits in 1977 with the statutory directive when the recognized the need for a viable remedy to reduce the enormous administrative burden on both the agency and the applicant of issuing individual permits.

While NWPs have been issued and reissued since that time, each time they have been reauthorized the Corps has made them less useful by placing severe limitations on the activities and locations for which the permits may be used. Likewise, the Corps has made them more difficult to obtain by attaching more onerous conditions such as buffer requirements, increased paperwork and drawings, and severe restrictions on the acreage of prospective impacts. . This has resulted in a NWP permit that authorize such miniscule impacts as to be totally useless or that end up looking more like an individual permit than a "streamlined" NWP. In fact, according to a study completed in 1999, the average cost to obtain a NWP was nearly $29,000.

The Agencies' broad and unlawful interpretation of the types of activities and geographic extent of their regulatory jurisdiction, as well as the lack of expedited approvals for activities that only minimally affect the environment collectively represent an unlawfully heavy burden on firms involved in the building industry. The results of these issues are two fold: 1) permits are now necessary for projects that simply should not be regulated and 2) permits are costly and difficult to obtain. These results cause costly time delays, project revisions, and mitigation activities that directly affect viability of many projects and ultimately their small business proponents.

Possible Cures

The Agencies can take a number of actions that will remove the problems described above and alleviate the unduly heavy regulatory burden on small businesses. The resolutions to the issues involve the revision of the regulations implementing the Nation's wetlands permitting program. Specifically, the regulations need to be revised to:

- Implement the *SWANCC* decision and specify that isolated, non-navigable, intrastate wetlands are not, under any circumstances, under the program's regulatory jurisdiction and, specifically, that all man-made ditches are not subject to federal jurisdiction;
- Clearly define the terms "adjacent", "tributary" and other related terms in the context of the CWA such that lawmakers, home builders, land owners, and field staff can consistently agree upon the geographic extent of the regulatory jurisdiction of the wetlands permitting program; and
- Comply with the CWA statutory mandate that grants regulatory jurisdiction only over activities that result in "discharges" to waters of the U.S. and clearly indicate that the agencies have no authority over activities that result in "incidental fallback;"
- Implement the statutory mandate that directs the agencies to enact a NWP program that demonstrably reduces the administrative burden on permit applicants caused by the wetlands permitting program.

Endangered Species Act Critical Habitat Designations

Background

Under the Endangered Species Act (ESA), the U.S. Fish & Wildlife Service (FWS) and NOAA Fisheries (formerly the National Marine Fisheries Service), collectively referred to as the Services, are required to designate critical habitat for any threatened or endangered species listed under the Act. Because Congress intended critical habitat to encompass a limited geographic scope, the ESA restricts critical habitat to those "specific" areas "occupied by the species at the time it was listed" and on which are found physical or biological features "essential" to the species' conservation. Despite this mandate, the Services often failed to engage in the rigorous scientific and economic analyses required by the Act. This is because, historically, the Services reoutinely failed to designate critical habitat until under a court order to do so, often citing the lack of data or staffing challenges as the reason for their actions. As a result, **the Services have regularly and improperly included huge swaths of historic, potential, and unoccupied habitat areas within the "critical" habitat designation**. To make matters worse, the Services

have failed to provide either the public or the regulated community access to data relied on as the basis for their critical habitat designation. The following illustrate the problem:

- *Red-Legged Frog*—4.14 million acres designated as "critical" throughout 28 California counties.

- *Pygmy Owl—1.2* million acres proposed to be designated as critical habitat in two southern Arizona Counties. The Services determined that this was the amount needed to protect the 40 pygmy owls known to exist in southern Arizona. In short, FWS determined, with no scientific support, that each known pygmy owl needed 30,000 acres for its conservation. The Services have also refused to provide NAHB or the public access to the pygmy owl location information relied on by the Services to designate critical habitat.

- *Salmon*—designated critical habitat covers "all river reaches accessible to listed [salmon] within the range" of the fish. The final designation rule explains that Salmon critical habitat "consists of the water, substrate, and adjacent riparian zone" of over 150 watersheds, river segments, bays and estuaries throughout northern California, Oregon, Washington, and Idaho. No effort was made to quantify or otherwise specify the identify areas found essential to Salmon conservation.

- *Coastal California Gnatcatcher*—513,650 acres designated as critical habitat covering some of the most expensive real estate in the country, in Los Angeles, Riverside, San Bernardino and San Diego Counties. By the Service's own admission it included developed areas and "other lands" that are "unlikely to contain the primary constituent elements" essential for Gnatcatcher conservation. The Services also failed to identify "core populations" of Gnatcatchers that were being protected.

Similarly, under Section 4(b)(2) of the ESA, the Services are required to conduct a comprehensive economic analysis and to exclude from the critical habitat designation those areas in which the benefit of exclusion (i.e., the costs) outweighs the benefit of inclusion (i.e., the biological benefits to the species). Historically, however, the economic analyses preformed by the Services have failed to consider the full economic impact of the designations and their resultant section 7 consultations (i.e., the project approval process that landowners must complete prior to conducting activities on affected properties). More egregiously, until recently, the Services maintained that there was no additional cost from the designation of critical habitat separate and apart from economic costs due solely to the listing of a species under the ESA. Several courts have ruled against the Services' position, yet the Services have yet to establish a set methodology for completing the required analyses. In the absence of guidance, the Services continue to designate areas that exceed their authority.

The scope of the designation is important because, once designated, the federal agencies are required to consult with the Secretary on any activity that is authorized, funded, or carried out by a federal agency that may *jeopardize* the continued existence of any endangered or threatened species or result in the *destruction or adverse modification* of that species' critical habitat. What is not clear in this directive, however, is what exactly constitutes "jeopardy" or "adverse modification." While the Services have traditionally treated these thresholds as one and the

same, the adverse modification regulation has been declared invalid in two separate circuits since 2001. Despite these rulings, the Services have yet to clarify this terminology.

Finally, in areas of the country affected by multiple critical habitat designations covering the same geographical areas, landowners often invest significant time and resources in developing voluntary comprehensive habitat conservation plans (HCP) in an effort to protect threatened species. However, they face losing the protections/advantages of the HCP if a critical habitat designated is overlain on top of the same area covered by an HCP. While the Services have excluded HCPs from most of their critical habitat designations, there is no policy to do so, leaving landowners with little incentive to invest both the time and financial resources necessary to develop comprehensive HCPs to protect the same species that is intended to receive protections under a critical habitat designation.

Small Business Impact

For developers and builders, the designation of critical habitat means projects can be delayed and require extensive mitigation if they are located in designated critical habitat. For example, if a builder proposes a project that both modifies critical habitat and requires a federal permit (like a Section 404 wetlands permit from the Corps), the permitting agency must consult with the Services to ensure that any impacts are minimal. Additionally, projects within designated critical habitat are typically ineligible for Nationwide Permits under Section 404 of the Clean Water Act. Finally, by definition, critical habitat requires heightened management considerations, which means that projects occurring in critical habitat will be the focus of greater scrutiny by both the Services and environmental groups. In the end, small businesses and landowners suffer from lower density requirements, mitigation costs, project delays, and red tape costs of negotiating for a permit.

For example, the Fish and Wildlife Service (FWS) recently proposed a critical habitat designation in Tucson, Arizona. The cost estimate developed by FWS adds $7,000 to $12,000 per home, due solely to the designation of critical habitat, reducing each developer's revenue by 3 to 8 percent and the average builder's profits by 50-80 percent. Similarly, according to a March 2004 GAO Report small builders and homeowners wanting to construct docks in Lake Washington near Seattle had their permit turn-around time increased from 2-3 months to 2 years due to the consultation requirement associated with the critical habitat designation for salmon. This delay effectively increased permitting costs so that they now account for about 33% of the construction costs for a typical dock, versus the 5% that they represented prior to the consultation requirement. *See U.S. Government Accounting Office report GAO-04-93, March 2004.* These problems are not limited to Arizona and the Pacific Northwest. Currently, California has approximately 33% of the state's landmass covered by at least one critical habitat designation. Often the same geographic area can be affected by multiple critical habitat designations for several different species, thereby increasing permit review delays and the likelihood of permit denials. Because there are currently over 2,000 species listed as endangered, the designation of critical habitat is clearly significant.

Possible Cures

Administratively, the Services could take four steps to resolve the problems small businesses face as a result of critical habitat designation by issuing guidance/regulations that:

- Establish a standard methodology for designating critical habitat, which outlines the factors that the Services are required to consider, such as determining primary constituent elements, defining "essential," how to consider exclusions, when to consider "unoccupied" areas, proper documentation, etc.
- Establish a standard methodology for conducting the requisite economic analysis and determining when particular areas should be excluded from a given critical habitat designation, including defining the geographic scope, assessing level of impacts, determining which economic sector(s) to examine, etc.
- Exclude areas already subject to HCPs or other voluntary conservation measures from the designation of critical habitat, as allowed under 4(B)(2) or 3(5)(A) of the ESA since these are already adequately protected.
- Clearly define "adverse modification" and "jeopardy." While "jeopardy" and "adverse modification" are both part of the ESA's larger "conservation" rubric, they arguably do not impose the same standards for protection or regulate the same activities. As the courts have found, they are different concepts, and need different definitions both in regulation and in practice. The Services should address this conflict through a new rulemaking.
- Create a clearinghouse or other mechanism to provide public access to the information relied on to establish the boundaries of each critical habitat designation during the comment period.

Statement of Robert Green
Vice President, Federal Relations
National Restaurant Association
Regulatory Reform Roundtable
Subcommittee on Regulatory Reform and Oversight
House Committee on Small Business
March 17, 2005

Thank you, Chairman Akin and members of the Subcommittee for the opportunity to participate in this roundtable on regulatory issues.

Founded in 1919, the National Restaurant Association is the leading business association for the restaurant industry, which includes 900,000 establishments around the country. Together with the National Restaurant Association Educational Foundation, the Association's mission is to represent, educate, and promote a rapidly growing industry that currently employs 12.2 million people. Ninety-two percent of restaurants in the United States have fewer than 50 employees and more than seven out of 10 eating and drinking places have fewer than 20 employees. The restaurant industry is the cornerstone of the economy, career opportunities, and community involvement. The National Restaurant Association shares many of the regulatory concerns of the associations and industries represented in this room, but we would like to focus on several issues for the purposes of the discussion today:

Americans with Disabilities Act:

The ADA, a federal law that took effect in 1991, requires restaurants and other places open to the public to be accessible to and usable by people with disabilities. The U.S. Justice Department publishes the Americans with Disabilities Act Accessibility Guidelines (ADAAG) to let businesses know how to comply with the ADA. The rules cover everything from parking facilities to kitchen design.

In November, 1999, the Access Board, a federal advisory organization that helps the Justice Department write the guidelines, recommended more than 800 ADAAG changes. The NRA has been concerned about some of the proposed ADAAG changes. While many would simply clarify existing rules, others could hike the cost of new kitchens, drive-thrus and parking facilities.

The NRA filed comments and testified about its concerns in early 2000, and in November 2002 met with the U.S. Small Business Administration to make sure that the government does not release the new ADAAG rules without taking restaurateurs' concerns into account.

In September, 2004, the U.S. Department of Justice (DOJ) issued an advance notice on its intent to update its Americans with Disabilities Act (ADA) standards based on the new guidelines published by the U.S. Access Board last July. The ADA requires DOJ to publish regulations that include accessibility standards that are consistent with the Access Board's guidelines.

The Association is concerned with a number of new ADA requirements and will be working to lessen the negative impact on the restaurant industry. The new proposed amendments include new specific ADA accessibility guidelines on employee work areas and on removal of architectural barriers as it relates to existing facilities. The guidelines will be the basis for lawsuits and technical compliance actions under the ADA. The deadline for public comments on the proposed new ADA access rules is May 31, 2005.

ADA Lawsuits:

The restaurant industry is committed to accommodating members of the disabled community and are very supportive of the Americans with Disabilities Act. However, there have been a number of documented instances around the country where unscrupulous lawyers have exploited the ADA by filing frivolous lawsuits. These lawsuits typically better serve the interests of the attorney, rather than the disabled. Congress needs to address this issue and offer a solution that is fair to both the business community and the disabled community.

BSE:

The U. S. Department of Agriculture's Animal and Plant Health Inspection Service announced earlier this year that they would amend the regulations regarding the importation of animals and animal products to establish a category of regions that present a minimal risk of introducing bovine spongiform encephalopathy (BSE) into the United States.

These regulations would allow the live cattle, ruminant products and byproducts to be imported into the U. S. from Canada. The USDA is also establishing conditions for the importation of live cattle, products and byproducts from "BSE minimal-risk" regions world wide. The National Restaurant Association supports the USDA actions to continue to protect against the introduction of BSE into the United States, while removing unnecessary prohibitions on the importation of certain commodities from "BSE minimal-risk" regions such as Canada.

The National Restaurant Association remains confident that the animal and public health measures that Canada has in place, including the removal of specified risk material (SRM's) from the human food chain, a ruminant-to-ruminant feed ban, a national surveillance program and import restrictions, combined with existing U.S. domestic safeguards and the additional safeguards announced as part of USDA's BSE minimal-risk rule announced on December 29, 2004, provide the utmost protections to U.S. consumers, restaurants and livestock.

Fats, Oils and Grease (FOG):

Handling of fats, oils and grease has become a growing challenge for restaurants nationwide with six figure fines and associated costs of compliance. The restaurant industry continues to be committed to the environmentally responsible disposal of wastes. As such, the National Restaurant Association looks to work with the EPA to move forward on a more science-based uniform guidance appropriate recommendations for municipalities implementing fats, oils, and grease ordinances.

Additionally, the Association has been working with the United States Small Business Administration to discuss the potential consequences for the restaurant industry regarding adoption of non-science based ordinances nationally. The Association will continue to support all efforts to obtain science-based data on the restaurants' involvement in FOG production.

U.S. Food and Drug Administration -Voluntary National Retail Food Regulatory Program Standards:

The restaurant industry is committed to food safety, food safety education and uniform scientific guidelines which can support the good food handling practices in place within the restaurant industry today. In recent years, the Association has focused on a promoting national uniformity when it comes to food safety. The FDA has recognized the need for science-based uniform food safety guidelines and proper training of individuals who are conducting health inspections using these guidelines in restaurants across the country.

As such, with the guidance and input of federal, state, and local regulatory officials, industry, trade and professional associations, academia and consumers, the FDA has established recommended Voluntary National Retail Food Regulatory Program Standards.

These are voluntary standards that apply to the operation and management of a regulatory retail food program focused on the reduction of risk factors known to cause foodborne illness as well as other factors that may contribute to foodborne illness and on the promotion of active managerial control of all factors that may cause foodborne illness. The Association fully supports these standards and will continue to work with the FDA to ensure that these standards be incorporated at the state and local level.

Dietary Guidelines for Americans 2005:

The *Dietary Guidelines for Americans [Dietary Guidelines]*, first published in 1980, provides science-based advice to promote health and to reduce risk for chronic diseases through diet and physical activity. The recommendations contained within the *Dietary Guidelines* are targeted to the general public over 2 years of age who are living in the United States. Because of its focus on health promotion and risk reduction, the *Dietary Guidelines* form the basis of federal food, nutrition education, and information programs.

On January 12, 2005, the Department of Health and Human Services (HHS) and the Department of Agriculture (USDA) released the sixth edition of *Nutrition and Your Health: Dietary Guidelines for Americans*. The Association has been working closely with both HHS and USDA, submitting comments for consideration as part of the new Dietary Guidelines, as well as taking a proactive role in creating and providing consumer educational materials that underscore the importance of balance, moderation and physical activity.

The restaurant industry has maintained that balance and moderation in diet, coupled with physical activity, is the most sensible and effective approach to attain and maintain a healthy lifestyle. The Association agrees with HHS and USDA on the vital importance of energy

balance – or balancing calories in and calories out – a key component of the new Dietary Guidelines for Americans.

Family and Medial Leave Act (FMLA):

Enacted in 1993, the Family and Medical Leave Act (FMLA) gives eligible employees of companies with 50 or more employees the right to take leave totaling up to 12 weeks annually for a personal serious health condition or for that of a spouse, parent or child; maternity/paternity; or for newborn care.

Under the FMLA, eligible employees are those who have: 1) worked for the company for a total of twelve months (not necessarily consecutive months); 2) worked at least 1,250 hours in the past 12 months; and 3) worked at a site where the company employs at least 50 persons, or multiple sites (within a 75 mile radius) that employ a total of 50 persons.

Broad regulations and interpretations have shifted the medical leave portions of the law far away from Congressional intent, resulting in problems for employers and employees alike. Employers are not sure if health problems like pink eye, ingrown toenails or even the common cold will be considered by the regulators and courts to be "serious health conditions." While the family leave portions of the FMLA have generally worked well, it is the leave for an employee's own serious health conditions that has been problematic.

These "intermittent leave" regulations, along with the vague "serious health conditions" regulations are resulting in employees with absenteeism problems characterizing unplanned and unscheduled absences as FMLA leaves.

Minimum wage:

The starting wage increase proposed recently by Senator Ted Kennedy (D-MA) is the largest increase in the entry-level wage rate ever proposed, and would result in a 41 percent hike in labor costs! Small employers and labor-intensive businesses such as restaurants are most impacted by entry-level wage increases, and are currently facing other significant economic challenges which include exploding insurance and health care costs. The restaurant industry supports higher wages appropriate to the skill levels and experience of its employees, but prefers to let the market determine entry level compensation around the country, rather than force businesses to cope with a one-size-fits-all federal requirement which would make it illegal to work for less than $7.25.

Again, Mr. Chairman, thank you for allowing the National Restaurant Association to participate in this valuable roundtable. I would be happy to answer any questions.

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WRITTEN STATEMENT
OF
MICHAEL HEARNE
PRESIDENT AND CEO, LAFAYETTE FEDERAL CREDIT UNION
ON BEHALF OF THE
CREDIT UNION NATIONAL ASSOCIATION (CUNA)
BEFORE THE
HOUSE SMALL BUSINESS COMMITTEE'S
SUBCOMMITTEE ON REGULATORY REFORM AND OVERSIGHT
ROUNDTABLE ON REGULATORY ISSUES

MARCH 17, 2005

REMARKS OF THE CREDIT UNION NATIONAL ASSOCIATION

TO THE SUBCOMMITTEE ON REGULATORY REFORM AND OVERSIGHT OF THE HOUSE COMMITTEE ON SMALL BUSINESS ROUNDTABLE ON REGULATORY ISSUES

I am Michael Hearne, participating today in the House Small Business Committee's Subcommittee on Regulatory Reform and Oversight Roundtable on Regulatory Issues on behalf of the Credit Union National Association (CUNA), the largest credit union advocacy organization, representing over 90% of our nation's approximately 9,400 state and federal credit unions and their 85 million members. Currently, I am President and CEO of LaFayette Federal Credit Union in Kensington, Maryland, which includes the employees of the SBA in its field of membership.

Just as brief background, I spent seven years in the Small Business Administration's (SBA) Office of the Chief Financial Officer, ultimately directing the Financial Policy Group. I supervised the agency's Financial Improvement Plan (FIP), which resulted in the development of the current financial data structure and all credit program subsidy models. I am very familiar with the SBA accounting, budget reporting, and Management Information Systems. Since leaving the SBA, I have been an independent consultant working with numerous SBA lenders to analyze their loan portfolios and have provided SBA loan sale bidders with historic performance analyses to aid in developing their bids. I have also worked as a consultant to CUNA to help develop a business lending program that would assist well managed credit unions to make member business loans, including SBA 7a borrowings.

CUNA applauds the Chair for holding this roundtable to address the regulatory burdens that impact small business loan activity of financial institutions, and in particular, the regulatory burdens that impact credit unions' ability to better serve their 85 million members.

HELPING SMALL BUSINESS

Title II, Section 203 of the *Credit Union Membership Access Act of 1998* (CUMAA) established limits on credit union member business loan (MBL) activity. There were no statutory limits on credit union member business lending prior to 1998. The CUMAA-imposed limits are expressed as a 1.75 multiple of net worth, but only net worth up to the amount required to be classified as well capitalized (i.e., 7%) can be counted. Hence the limit is (1.75 x .07) or 12.25% of assets for practically all federally insured credit unions.

NEED FOR REFORM OF CREDIT UNION MBL LIMITS

Small businesses are the engine of economic growth – accounting for about one-half of private non-farm economic activity in the U.S. annually. Their ability to access capital is paramount. But this access is seriously constrained by the double-whammy of banking industry consolidation and the CUMAA-imposed limitations on credit union MBLs. Research published in 2004 by the SBA reveals that small businesses receive less credit

on average in regions with a large share of deposits held by the largest banks. Federal Deposit Insurance Corporation statistics show that the largest 100 banking institutions now control nearly two-thirds of banking industry assets nationally. In 1992 the largest 100 banking institutions held just 45% of banking industry assets. Thus, CUMAA severely restricts small business access to credit outside the banking industry at a time when small firms are finding increasing difficulty in accessing credit within the banking industry.

Basic problems with the current MBL limits are:

THE LIMITS ARE ARBITRARY AND UNNECESSARILY RESTRICTIVE. Insured commercial banks have no comparable business lending portfolio concentration limitations. Other financial institutions, savings and loans, for example, have portfolio concentration limitations, but those limitations are substantially less restrictive than the limits placed on credit unions in CUMAA.

THE 12.25% LIMIT DISCOURAGES ENTRY INTO THE MBL BUSINESS. Even though very few credit unions are approaching the 12.25% ceiling, the very existence of that ceiling discourages credit unions from entering the field of member business lending. Credit unions must meet strict regulatory requirements before implementing an MBL program, including the addition of experienced staff. Many are concerned that the costs of meeting these requirements cannot be recovered with a limit of only 12.25% of assets. For example, in today's market, a typical experienced mid-level commercial loan officer would receive total compensation of approximately $100,000. The substantial costs associated with hiring an experienced lender, combined with funding costs and overhead and startup costs (e.g., data processing systems, furniture and equipment, printing, postage, telephone, occupancy, credit reports and other operating expenses) make member business lending a very unpractical option at most credit unions given the current 12.25% limitation. In fact, assuming credit unions could carry salary expense of 2% of portfolio, 76% of CUs couldn't afford to be active member business lenders even if they had portfolios that were equal in size to the current 12.25% of asset maximum. Alternatively, assuming credit unions could carry salary expense of 4% of portfolio, 63% of CUs couldn't afford to be active member business lenders even if they had portfolios that were equal in size to the current 12.25% of asset maximum.

THE LIMITS ARE NOT BASED ON SAFETY AND SOUNDENSS CONSIDERATIONS. There is no safety and soundness reason that net worth above 7% cannot also support business lending. If all net worth could be counted, the actual limit would average between 18% and 19% of total assets rather than 12.25% of total assets.

THE MBL DEFINITIONS CREATE DISINCENTIVES THAT HURT SMALL BUSINESSES. The current $50,000 threshold for defining an MBL is too low and creates a disincentive for credit unions to make loans to smaller businesses because they have to set up a formal member business lending program in compliance with all the requirements of Section 723 of the NCUA's regulations. Compliance with these requirements is very expensive and not cost effective for making loans of such a small amount. Thus, permitting the threshold to rise to $100,000 would open up a significant

source of credit to small businesses. These "small" business purpose loans are so small as to be unattractive to many larger lenders. Simply adjusting the $50,000 threshold for inflation would result in an approximate 33% increase in the threshold to over $65,000. The $50,000 threshold was initially established in 1993 and hasn't been adjusted since that time. In fact, the NCUA was poised to adopt a $100,000 threshold by regulation in 1998 until CUMMA incorporated the $50,000 regulatory definition into statute that year.

Some bankers call credit union member business lending "mission creep." This is simply a preposterous fiction. Credit union member business lending is not new. Since their inception, credit unions have offered business-related loans to their members. Moreover, credit union member business lending shows a record of safety. According to a U.S. Treasury Department study, credit union business lending is more regulated than commercial lending at other financial institutions. In addition, the Treasury found that:

> *"...member business loans are generally less risky than commercial loans made by banks and thrifts because they generally require the personal guarantee of the borrower and the loans generally must be fully collateralized. Ongoing delinquencies – for credit unions, loans more than 60 days past due, and for banks and thrifts, loans more than 90 days past due – are lower for credit unions than for banks and thrifts. Credit unions' mid-year 2000 loan charge-off rate of 0.03 percent was much lower than that for either commercial banks (0.60 percent) or savings institutions (0.58 percent)."*

Not surprisingly, the Treasury also concluded that member business lending "does not pose material risk to the" National Credit Union Share Insurance Fund.

Updated statistics from full-year 2000 through 2003 indicate that the favorable relative performance of MBLs reported in the Treasury study has continued in recent years. Credit union MBL net chargeoffs have averaged just 0.08% over the four-year period since the Treasury study, while the comparable average net chargeoff rate at commercial banks was 1.28% and at savings institutions was 1.11%. MBLs have even lower loss rates than other types of credit union lending, which themselves have relatively low loss experience.

Credit union member business lending represents a small fraction of total commercial loan activity in the United States. At mid-year 2004, the dollar amount of MBLs was less than one-half of one percent of the total commercial loans held by U.S. depositories. Credit union MBLs represent just 3.1% of the total of credit union loans outstanding, and only 17.9% of U.S. credit unions offer MBLs. According to credit union call report data collected by the National Credit Union Administration, the median size of credit union MBLs granted in the first six months of 2004 was $140,641.

An almost two-thirds increase in credit union MBL limits (from 12.25% to 20% of assets, equivalent to the business lending limit for savings institutions) would not cause these numbers to change dramatically.

Raising the current MBL limits would help small business. As noted earlier, small businesses are the backbone of the nation's economy. The vast majority of employment growth occurs at small businesses. And small businesses account for roughly half of private non-farm gross domestic product in the U.S. each year.

Small businesses are in need of loans of all sizes, including those of less than $100,000, which many have said banks are less willing to make.

Moreover, large banks tend to devote a smaller portion of their assets to loans to small businesses. The continuing consolidation of the banking industry is leaving fewer smaller banks in many markets. In fact, the largest 100 banking institutions accounted for 42% of banking industry assets in 1992. By year-end 2003, the largest 100 banking institutions accounted for 65% of banking industry assets – a 23-percentage point increase in market share in just eleven years.

This trend and its implications for small business credit availability are detailed in a recently released SBA paper. The findings reveal "credit access has been significantly reduced by banking consolidation...we believe this suggests that small businesses, especially those to which relationship lending is important, have a lower likelihood of using banks as a source of credit."

In reforming credit union MBL limits Congress will help to ensure a greater number of available sources of credit to small business. This will make it easier for small businesses to secure credit at lower prices, in turn making it easier for them to survive and thrive.

These reforms were incorporated in legislation introduced last year by Reps. Royce and Kanjorski—the Credit Union Regulatory Improvements Act (CURA). We anticipate that this important legislation will be reintroduced in the 109th Congress in a few weeks and we would welcome your support.

OTHER CONCERNS WITH THE REGULATION OF MEMBER BUINESS LOANS

Credit unions are concerned that the regulatory limits on member business lending for construction projects are too restrictive and severely curtail the ability of even large credit unions to support more than one builder in high cost areas, such as Washington, DC, even though the need for such lending is great, particularly in low income areas. These can be productive loans for the credit unions as well as their business members if done correctly but the current limits stymie increased credit union involvement. Also, the loan to value ratios are restrictive in many cases.

In addition, unless a credit union has 9% net worth, and many do, it is required to obtain the person guarantee of a business loan member/borrower. A credit union that has 9% net worth and is a "RegFlex" credit union under NCUA's rules is able to avoid this requirement but credit unions with lower net worth ratios, which are still well-capitalized should be able to make member business loans without securing the member's personal guarantee.

The maturity limits are also restrictive and in effect, curtail member business lending needlessly. The National Credit Union Administration should have the authority to permit longer terms on member business loans.

In general, credit unions run the risk of being regulated right out of sound member business lending programs. By severely restricting the amounts credit unions can lend, the terms, the structure, etc., federal policy forces credit unions to assume the role of lender of last resort, after the borrower has been turned down by the banks.

CREDIT UNION CONCERNS REGARDING SBA'S 7(a) LOAN PROGRAM

Credit unions and CUNA applauds the SBA for its bold steps to permit credit unions greater access to the agency's lending program, particularly the 7a program. In fact, as recently as last month, CUNA honored SBA Administrator Hector Barreto at our Governmental Affairs Conference in Washington, DC, with almost 4,000 credit union officials looking on.

Our concerns about the program relate mostly to the issue of whether the agency has sufficient funding for the 7a program and other vital programs from the SBA. Going forward, we urge Congress to reconsider the importance of the 7a program in helping to support small businesses in this country and improve the funding process for this very significant program.

Meanwhile, we do encourage the agency to consider streamlining the approval process and to take further action to insure the regional offices are current on all SBA policies, including ones on credit unions' access to SBA lending.

CONCLUSION

In summary, Mr. Chairman, CUNA is grateful to the Subcommittee for holding this roundtable discussion on regulatory issues that impact small business lending activities. CUNA looks forward to working with the subcommittee to further act on these very important issues. Credit unions would benefit greatly from reducing unnecessary and costly regulatory burdens; and more importantly, so too would American consumers benefit from the additional savings that credit unions would pass along to their 85 million members.

STATEMENT OF
THE AMERICAN FARM BUREAU FEDERATION
TO THE
ROUNDTABLE ON REGULATORY ISSUES OF THE
SUBCOMMITTEE ON REGULATORY REFORM AND OVERSIGHT
HOUSE SMALL BUSINESS COMMITTEE

March 17, 2005

The American Farm Bureau Federation appreciates the opportunity to submit comments to the subcommittee as it examines the regulatory burdens faced by small businesses, including America's farmers and ranchers. Around the country, our membership is actively engaged in the public policy process at the local, state and national level.

Regulatory reform remains a priority for our membership. Earlier this year, 433 Farm Bureau delegates from around the country assembled in Charlotte, N.C. to consider our public policy priorities for this year. I have attached to this statement the portion of Farm Bureau's policy book which articulates the membership's overall view of regulatory reform.

This policy speaks to a broad range of issues, such as reforms to the *Administrative Procedures Act*; recognition of property rights in rulemaking; use of sound science in rulemaking; use of zero-based budgeting; and sun-setting of federal regulations. Moreover, it reinforces existing procedures in the U.S. House of Representatives.

For instance, Farm Bureau policy expressly affirms the desirability of Congress holding oversight hearings on federal agencies and regulations. Rule X of the Rules of the House of Representatives provides, among other things, that:

> *(d)(1) Not later than February 15 of the first session of a Congress, each standing committee shall, in a meeting that is open to the public and with a quorum present, adopt its oversight plan for that Congress. Such plan shall be submitted simultaneously to the Committee on Government Reform and to the Committee on House Administration. In developing its plan each committee shall, to the maximum extent feasible—*
>
> ...
>
> *((B) review specific problems with Federal rules, regulations, statutes, and court decisions that are ambiguous, arbitrary, or nonsensical, or that impose severe financial burdens on individuals;*

Farm Bureau supports these general efforts to eliminate unnecessary and expensive regulatory burdens that do not reflect congressional intent. More specifically, however, we would like to bring to the subcommittee's attention several specific regulatory issues that are now having, or are likely to have, a significant impact on farmers and ranchers.

Waters of the United States

The Clean Water Act (CWA) defines the term "navigable waters" to mean waters of the United States. The U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency

have defined the term "waters of the United States" to include, among other waters, those waters that are "tributaries." Neither the Corps nor EPA, however, has developed consistent, reasonable definitions for key terms such as "tributary" or "adjacency." The result is troubling, because without such key definitions the regulatory reach of the CWA can potentially include any physical connection or any possible connection as long as a molecule of water – no matter how remote or infrequent – could eventually mix with navigable waters.

It is not hard to see what impact such a regulatory scheme can have on small businesses, including farmers and ranchers. Under this approach, jurisdiction can extend to every sewer, curb, road, gutter, storm drain, culvert, irrigation canal, wash, tire rut and ditch. This result goes well beyond the intent of Congress because it could ultimately require all such conveyances to meet water quality standards and designated and beneficial uses just as rivers, lakes and reservoirs must do.

Designating such inherently local conveyances as "waters of the United States" will not further the purposes of the Clean Water Act. The result, instead, would be a heavier, more expensive regulatory burden borne by farmers and ranchers. If federal regulations continue to be interpreted to extend Clean Water Act jurisdiction to every ditch in the country, then many routine local land use decisions may be subject to legal challenges and federal review and control.

Section 319 of the Clean Water Act

Under Section 319 of the Clean Water Act, states are primarily responsible for developing programs to deal with nonpoint pollution. Consistent with this approach, states should be guaranteed the flexibility to address the issue with reasonable, nonregulatory approaches based on incentives, education and technical assistance. Our experience shows that these are often the most effective means of managing nonpoint source pollution from the perspective of farmers and ranchers.

Under an approach such as this, the proper management of nonpoint source pollution lies in state and local efforts that implement nonpoint source issues in priority areas based on sound scientific assessments that identify water bodies with water quality impairments. All too often allocation of resources to deal with water quality issues are not based on sound science but on anecdotal characterizations of problems. EPA and the states should require the highest degree of scientific rigor and certainty in monitoring and modeling water quality data for nonpoint source program implementation and evaluation.

Lastly, Farm Bureau wishes to emphasize its strong endorsement of existing provisions in the Clean Water Act that provide agriculture operations a stormwater exemption under the law. We have learned of instances in which local efforts, while on their face benign, would have the effect of vitiating the exemption and regulating agriculture. We strongly oppose any effort to weaken the exemption and ultimately undermine congressional intent to exempt agricultural activities from the statute.

Issues Related to Concentrated Animal Feeding Operations (CAFOs)

- The 2nd Circuit Court of Appeals recently ruled in *Waterkeeper Alliance, et. al. v. EPA* on two important issues related to the Clean Water Act. In one instance, the Court affirmed the view of Farm Bureau and others that the agency does not have the authority to require Section 402 NPDES permits of persons based on the person's mere 'potential' to discharge. We applaud the court's logic in this instance and believe it is entirely consistent with congressional intent.

  Secondarily, the court held that nutrient management plans (NMPs) required by the agency are, in effect, effluent limitations and, as such, are open to public notice and comment, just as current NPDES permits are. EPA will now need to revisit this rule, and we intend to work closely with the agency as it responds to the court's ruling to assure that farmers and ranchers are not subject to harassing litigation and unnecessary public pressure. NMPs can cost tens of thousands of dollars for a typical farm operation. We hope members of the Small Business Committee will work with us and the agency as it proceeds in developing a new rule to assure that it does not impose unnecessary and expensive additional financial burdens on farmers and ranchers.

- EPA on January 31 released a voluntary air quality compliance agreement to address emissions from certain animal feeding operations (AFOs). This announcement in the *Federal Register* started a 90-day sign-up period during which eligible farms may voluntarily enroll in the program. In addition, interested members of the public have 30 days to comment on the program. The agency expects to spend two years on the monitoring study and then take approximately 18 months to analyze the data and devise emission control regulations. Emissions regulations appropriate for livestock and poultry operations will then be issued either as a rulemaking or as guidance.

  Farm Bureau has notified its members of this action and we are looking forward to working with the agency on compiling reliable, scientifically sound data that will form the basis of later rulemaking or guidance.

H-2a Reform

The H-2a agricultural temporary worker program enables agriculture to recruit workers from abroad for temporary employment whenever the U.S. Department of Labor (DOL) certifies there is a shortage of U.S. workers. Every year, DOL sets the H-2a minimum wage (the "Adverse Effect Wage Rate" or AEWR) at an amount equal to the average wage of all agricultural workers in a state. Because the wages of higher skilled workers (e.g., crop dusters or engine mechanics) are averaged with those of lower skilled workers, the overall average wage, and therefore the AEWR, is inflated and arbitrarily high. This federal requirement is unique to agriculture. It also increases farmers' costs and serves to make U.S. products less competitive in international markets.

Several federal appeals courts have consistently upheld DOL's authority to revise its AEWR methodology, provided the agency has a rational basis for its decision. Farm Bureau seeks

Congress's assistance in persuading DOL to use its existing authority to limit the wages included in the methodology to a particular occupation in the immediate region where the farmer operates. The minimum wage for a lower skilled H-2a worker should be based only on the wages of workers in the same occupation and immediate region.

Endangered Species Act

The Endangered Species Act (ESA) prohibits the "taking" of listed species, and further requires that any action involving any federal agency in any way must undergo consultation with the U.S. Fish & Wildlife Service or NOAA-Fisheries to determine whether the proposed activity would likely jeopardize the continued existence of the species. These prohibitions and restrictions include actions taken on private property. The act specifically excludes consideration of the economic impact of listing a species. Both of these provisions cause significant regulatory burdens to our members.

Almost 80 percent of species listed under the ESA occur to some extent on privately owned land, and almost 35 percent of these species occur exclusively on private lands. Most of this privately owned habitat is owned by farmers and ranchers.

Under the law, "taking" a listed species includes acts that might alter a species' habitat or harass the species short of actually killing or even injuring it. The prohibitions apply to purely private actions taken on private property, including activities conducted in the normal course of farming and ranching operations. "Taking" is so broadly and so nebulously defined that it inhibits farmers and ranchers from taking many actions on their own lands or using their own property in a manner consistent with their operations. A "taking" can occur on lands where the species might not actually be found but where, because the land is designated as "critical habitat," land use decisions are strictly regulated. The act provides stiff penalties for such "takings."

Also burdensome for farmers and ranchers is the consultation requirement, which mandates that federal agencies consult on any activity authorized, funded or carried out by them that affects a listed species. Thus, federal agencies may be required to consult before extending operating loans to a producer, or before providing technical assistance to a farmer or rancher. Consultation is required before a farmer or rancher can receive a permit from a federal agency or undertake any activity that requires federal involvement.

The law provides for consultation between the "action agency" (the agency involved in the activity) and the Fish & Wildlife Service or NOAA-Fisheries. The law does not require that the farmer or rancher be involved, despite the fact that the farmer or rancher is the "real party in interest" in the activity. The current consultation process provides that decisions affecting the operations of farmers and ranchers are being made behind closed doors by government agencies with little or no stake in the outcome.

National Environmental Policy Act

Farmers and ranchers are burdened by the application of the National Environmental Policy Act (NEPA). The law requires the consideration of the environmental impacts of a proposed federal

action, and if the action is deemed "significant," then a full environmental impact statement (EIS) must be prepared before a decision becomes final. The intent of the law is laudable. The burden to farmers and ranchers, however, results in how the law has been applied.

NEPA is a litigation-driven statute, and policy can be made as much through court decisions as through agency action. This affects farmers and ranchers in a number of ways. First, the process of developing an EIS takes much longer as agencies consider the threat of lawsuits. The NEPA process already causes farmers and ranchers delays through the normal course of operation, but the threat of lawsuits extends the time period.

Secondly, the threat of lawsuits makes federal agencies overly cautious in their preparation of NEPA documents. Agencies will over-analyze in their attempt to make NEPA documents litigation-proof. Additionally, agencies, even in instances when a less rigorous Environmental Assessment (EA) will suffice, will instead prepare an EIS simply because an EIS is more defensible in court. Finally, agencies will do extensive NEPA analysis on actions at the lowest level that may not need it. Thus, both the Forest Service and the Bureau of Land Management are preparing NEPA documents on renewals of livestock grazing permits, even though conditions have not changed. This development caused a bottleneck in renewing permits by both agencies that only temporary legislation could resolve.

Science Used in Decision-making

A common problem faced by farmers and ranchers in dealing with regulation is the lack of scientific basis in agency decision-making. For example, the Endangered Species Act requires that decisions be made on the basis of "the best science available" whether it is credible or not.

A recent example of this is the listing of the Preble's meadow jumping mouse in 1998. Municipalities and landowners in Colorado and Wyoming (the habitat of the species) have spent millions of dollars to comply with the provisions of the act and protect the mouse. A recent study, however, conclusively shows that the Preble's meadow jumping mouse is not a separate subspecies at all and never should have been listed in the first place. The Fish & Wildlife Service has, as a result, proposed de-listing the mouse. But the money spent by landowners and municipalities to deal with this mistake can never be recouped.

The Data Quality Act and implementing regulations and guidelines were enacted to improve the use of science in decision-making. The act requires federal agencies use scientific information in rulemaking to ensure that the information is reliable. The act provides a procedure for the public to challenge any scientific information and to request a correction or retraction of the information by the agency. Finally, recent guidelines require that science used in agency decision-making be peer reviewed to ensure reliability.

Implementation and enforcement of the Data Quality Act will help protect farmers, ranchers and other small business owners from arbitrary and unfounded regulations and decisions.

National Animal Identification System

The U.S. Department of Agriculture (USDA) is currently developing the National Animal Identification System (NAIS). AFBF supports the establishment and implementation of a national animal identification system capable of providing support for animal disease control and eradication, as well as enhancing food safety. We believe that a cost-effective national system of livestock identification, with adequate cost sharing among government, industry and producers, should be established and regulated by an advisory board of producers, processors and USDA. However, we are concerned about the regulatory burden this program could impose on producers if key issues are not satisfactorily resolved in the near future.

A primary regulatory concern is the cost of the NAIS and who will pay the price for a system that ultimately benefits the government, the collective national animal health, and to some degree even the general public. The price tag for the NAIS could be $100 million annually.

Congress only appropriated $33 million for FY05 and USDA only requested $33 million in its FY06 budget. Clearly, this amount is woefully inadequate to meet the funding needs of an effective animal identification program. The federal government must assume a greater share of the financial responsibility if this program is to be successfully implemented in a timely manner. Adequate cost-share funding for producers must be available if producers are expected to participate in a voluntary program. Producers can not and should not bear an unfair share of the costs of establishing or maintaining an animal ID system.

ATTACHMENT

FARM BUREAU POLICIES FOR 2005
Title 86
Regulatory Review and Reform

To achieve long-term regulatory reform, we support a three-year moratorium on all new federal regulations except those essential to the protection of human health and safety.

We urge the administration to begin immediately to review all existing federal regulations in keeping with our policy guidelines for regulatory reform and agency redirection. We also urge the administration to develop a comprehensive annual budget report to the American people on the total cost and impact of regulations on the private economy, the nature of the risks the regulations are supposed to reduce and the alternative methods to achieve lower cost but real risk reductions. Any public hearings affecting agriculture should be scheduled by the government agencies in areas impacted by the proposed regulation.

When a court finds that a federal agency is in violation of the law, the landowner that is in compliance with the agency rules should not be held liable for the agency's error. Landowners should be able to continue under the existing rules until the matter is settled and new rules are properly adopted.

For changes in federal regulations, publication in the Federal Register does not provide sufficient notice for affected parties. Federal agencies should distribute any changes in regulation to affected parties or organizations with an interest in the changes. In addition, they should document the distribution of these regulations.

We support immediate simplification, streamlining and a comprehensive congressional review of the National Environmental Policy Act (NEPA).

Under the NEPA and relevant statutes, agencies should give consideration to economic impacts as they relate to the areas directly affected by the regulations. In addition, government agencies should be required to consider the cumulative impacts of all regulations proposed.

We support the following actions:

(1)New regulations should adhere to the following important principles:

(a)Recognition of property rights as the foundation for resource production.

(b)The regulations are based upon sound scientific data which has been subject to replication and peer review.

(c)A risk assessment analysis should be conducted prior to the promulgation of a regulation.

(d)An estimate of the costs and benefits associated with public and private sector compliance with the regulation must be conducted prior to promulgation of the regulations.

(e)Regulations should allow for flexibility of rules and regulations to fit varying local conditions.

(f) The regulations have been subject to independent analysis and public scrutiny.

(g)Alternatives to regulation have been considered, especially the provision of market-based incentives.

(h)The regulations respect the practicalities of doing business in the industry being regulated.

(i) The presumption of innocence as opposed to the current presumption of guilt should be strengthened.

(j) The adoption of tools that measure the cumulative impact of regulations affecting production agriculture and believe this measurement should be completed prior to the implementation of any regulation impacting agriculture.

(k)We support limiting the ability to intervene in regulatory actions against landowners for environmental problems to adjoining landowners, neighbors, or those directly affected by the alleged violation.

(l) We oppose third parties utilizing federal or state funds (i.e. allocations, grants) for any form of legal assistance to file lawsuits against county, state or federal governments.

(2)Congress should lay down specific guidelines and restraints on the agencies that administer the laws and are given the power to adopt rules and regulations. These guidelines and restraints should include:

(a)authorizing committees to hold oversight hearings on agency regulations; and

(b)regulatory boards and commissions that affect agriculture include representation of those being regulated. Environmental impact statements have become burdensome and costly and should be balanced by consideration of the cost benefit analysis of proposed regulations. Regulators should work with individuals and companies to correct problems through information and education programs rather than through prosecution and/or persecution.

(3)In the future, all acts creating new administrative agencies or giving new responsibilities to existing agencies should include specific termination dates;

(4)The concepts of zero-base budgeting should be adopted as a means of dealing with regulatory reform and obtaining fiscal responsibility;

(5)The comment period for federal rules and regulations should be no less than 60 days;

(6)Government agencies should be required to give advance notice not less than 30 days prior to any field hearing or informational meeting;

(7)All government regulation shall have a sunset provision; and

(8)Congress should fully exercise its authority to review regulatory efforts and override unsatisfactory regulations.

Government agencies should be able to purchase off-the-shelf supplies when the cost is less than $100.

We support revision of the Natural Gas Act of 1937 so that the Federal Energy Regulatory Commission is supported by general revenue funds rather than pipeline fees.

Government inspection services, when demanded by the public and conducted for the benefit of the public, should be funded by general revenue funds. Fines levied by a regulatory agency should not be used to fund that agency, but should be credited to the general fund.

Government agencies, when possible, should schedule and conduct inspections of farms and processing facilities in advance of the busy growing, harvesting and processing seasons.

Orders issued by any agency demanding corrective action should be reasonable and allow adequate time for compliance. At the time of an inspection, the inspector should be required to leave a signed, dated copy of his report with the owner or operator. We support the adoption of laws that specifically prohibit the harassment of citizens by federal, state, county or municipal employees.

We support more vigorous congressional oversight to prohibit regulatory agencies from administering laws to circumvent congressional intent with emphasis on efforts to reform the inspection and rule-making authority of OSHA and EPA.

We oppose the establishment of any consumer agency or council having other than advisory powers.

We support the Surface Transportation Board's role in overseeing pipeline rates.

Statement of Associated Builders and Contractors, Inc.

U.S. House of Representatives
Committee on Small Business

Subcommittee on Regulatory Reform and Oversight
Chairman W. Todd Akin

March 17, 2005

"Regulatory Burden on Small Business"

by

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Associated Builders and Contractors, Inc. (ABC) would like to thank to Chairman Akin and the members of the Subcommittee on Regulatory Reform and Oversight for the opportunity to submit ABC's views to the U.S. House of Representatives' Small Business Committee regarding the regulatory burden on small businesses in the construction industry.

ABC is a national trade association representing 23,000 merit shop construction contractors, subcontractors, material suppliers and construction-related firms in 79 chapters throughout the United States and Guam. The association was started in 1950 when contractors gathered to form an association built on the shared belief that construction projects should be awarded based on merit, to the most qualified and responsible bidder. Their dedication to the merit shop philosophy spread rapidly; in 1970 only 30 percent of the nation's construction was performed by merit shop contractors, yet today merit shop contractors account for more than 75 percent of all construction across the country.

The vast majority of ABC's member are small businesses, some employing no more than two or three workers. These companies endure unreasonable burdens from regulations and simply do not have the staff to comply quickly and easily. The larger companies already have the staffing and other resources to understand the regulations and keep abreast of new agency directives. It is easier for bigger businesses to comply with regulations because they have dedicated resources for this purpose. However, these initiatives, which require additional paperwork, are not easily accomplished by small firms.

ABC members deal with many regulatory issues and the Small Business Administration's Office of Advocacy has been extremely helpful in keeping businesses abreast of new rules.

Occupational Safety and Health Administration

The majority of ABC members face regulatory pressure from the Department of Labor's Occupational Safety and Health Administration (OSHA). ABC is dedicated to advancing safety in the construction industry. However, some regulations and proposed regulations contain mandates that are covered in other current regulations, and some portions are either unnecessary or infeasible in today's construction industry. The transient nature of the industry makes it difficult to comply with some proposed regulations that may work in other industries, but do not transfer well to construction. One barrier we have faced with the Department of Labor is a general lack of knowledge regarding our industry. The Directorate of Construction has taken steps to resolve this issue through further involvement of the Advisory Committee on Construction Safety and Health.

The main issue with regulation from OSHA is their often misdirected focus. The causes of fatalities in construction are overwhelmingly falls, struck by, caught in/between, and electrical shock (the so-called "big four"). Only 6 percent of the investigated fatalities from 1994 to 2002 were from other causes. OSHA had set a goal of a 3 percent reduction in construction fatalities in FY 2003-2004. However, it is unclear what resources are being used to help small and other businesses address the major causes of fatalities that are covered under OSHA rules. OSHA emphasizes hazards such as lead, silica, amputations and ergonomics. These are all issues that are important, but have often been addressed in other rules, and whose risks are diminished through use of personal protective equipment and engineering controls.

Rules, proposed rules, or issues that are in the pipeline for rule development that ABC and other construction representatives are focusing upon include hexavalent chromium, silica, confined spaces, hearing conservation, cranes and derricks, trenching/excavation and electric power generation, transmission and distribution, among

others. Again, these are all important issues, but they are taking too much attention away from the "big four".

An important initiative that ABC became involved in to help our members to comply to new rules and directives is the Department of Labor Partnership for Compliance Assistance Program. The compliance office has been extremely helpful in educating our members on compliance issues and the various avenues by which they may seek compliance assistance, including participation in a number of our national conferences.

Davis-Bacon Act

There continue to be significant problems with the wage and benefits determinations conducted to set rates under the Davis-Bacon Act for Federal construction projects. In a report issued last year, the U.S. Department of Labor's Inspector General questioned the credibility of wage determinations provided by the Employment Standards Administration's Wage and Hour Division.

The Inspector General conducted an audit and discovered errors in almost 100 percent of the reviewed wage reports. The report called for a "representative and unbiased" wage survey process that is statistically viable. A continuing concern is the extensive delay between completing surveys and publishing surveys. The Inspector General recommended that the Department of Labor's Wage and Hour Division base the wage rates on a system similar to that of the Department of Labor's Bureau of Labor Statistics, which the Inspector General says uses statistically valid methodology for conducting national wage surveys. The Department previously rejected the recommendation to use Bureau of Labor Statistics wage statistics for the determinations and opted instead to re-work their current approach. From FY 1997 to 2003 the DOL spent $22 million for Davis-Bacon wage determination improvements that the Inspector General now says has resulted in few improvements. The Inspector General indicates that the roadblocks to using BLS data are not insurmountable and should be revisited.

The entire survey system should be overhauled in order to maximize the data already collected the Department of Labor's Bureau of Labor Statistics and reduce the occurrence of unnecessary surveys to contractors.

Conclusion

Again, we appreciate the opportunity to present the views of Associated Builders and Contractors, Inc. on the regulatory burden that our industry faces, as well as those firms from other industries. I would be happy to answer any further questions you or members of the Subcommittee may have. Thank you.

Roundtable Testimony of
Craig A. Purser
National Beer Wholesalers Association
Subcommittee on Regulatory Reform and Oversight
Committee on Small Business
U.S. House of Representatives
March 17, 2005

Thank you, Mr. Chairman.

I appreciate the opportunity to share some thoughts with you today on behalf the 1,850 members of the National Beer Wholesalers Association (NBWA).

The beer wholesaling industry directly employs more than 92,000 American workers nationwide and the beer industry at large indirectly supports more than 890,000 workers, accounting for more than $30 billion in tax revenues across the country. Many wholesaling companies have been family-owned and -operated since the repeal of Prohibition in 1933.

Regulation is a fact of life for beer wholesalers. We are regulated every day by TTB, the FCC, DOT, NHTSA, EPA, OSHA, the IRS and many other federal agencies. And because of the 21st Amendment, beer wholesalers are strictly regulated by the states through taxation departments, revenue authorities and alcohol beverage commissions.

As Congress reviews and considers legislative and regulatory issues, both current and future, we should ensure that all regulations meet a rational cost/benefit test and are scientifically based.

Beer is delivered by your local wholesaler via truck to supermarkets, package and convenience stores and restaurants and taverns. Drivers generally double as salespeople. Sales, delivery and customer satisfaction is their primary responsibility. They are in and out of their trucks all day, servicing the accounts. In fact, they spend the majority of the time with their engines turned off, ensuring customers have a wide variety of choices at a fair price. A typical delivery driver drives a specific route within a 100 mile radius of the warehouse and spends the night at home with their families each night. They are not long-haul, interstate truck drivers. There are two issues in the area of transportation that are of concern to NBWA members:

The first issue is the Hours of Service (HOS) regulations. The proposed regulation was put forward in 2004 and eliminates an hour of drive time for truck drivers. This regulation would apply to both long and short-haul carriers. Because of this change, beer wholesalers will have to put additional trucks on the road and add routes. Drivers will also push to get their deliveries done in a shorter period of time and will not be allowed to take breaks "off the clock." This will have the adverse effect of increasing driver fatigue, will create an unnecessary sense of urgency for the driver to complete his route in the appointed time, and may have unintended safety consequences as well.

H.R. 623, introduced by Congressman John Boozman (AR-3),would have made it easier for commercial truck drivers to take needed rest breaks, by permitting drivers to take up to two hours of break time during the course of their work day without bumping up against the 14 hour limit. Drivers still would have to meet all other requirements of the new rules, including a minimum of ten hours of rest between shifts, and limitations on daily driving time and weekly on-duty time. While this legislation has run into opposition recently, relief is still necessary.

The second issue is reform of the Commercial Drivers License. Currently, delivery drivers are required to have the same commercial driver's licenses as long-haul interstate drivers. The Commercial Motor Vehicle Safety Act of 1986 requires that all drivers of trucks weighing over 26,000 pounds be licensed by a state government with federal standards. While NBWA fully supports rigorous testing standards for our drivers, it is unreasonable for a driver, engaged in intrastate commerce, where the operation of a truck is but a small part of the employee's job, be subject to the same standards as someone delivering a load from Maine to California behind the wheel of an 18-wheeler.

Beer wholesalers have inadvertently found themselves in the business of training CDL drivers for the large trucking companies. Our member companies are finding themselves providing costly training and licensing fees for CDL drivers, who are then cherry-picked to drive for the long-haul carriers. Under congressional direction, the Department of Transportation is considering a graduated CDL system.

Finally, I would like to talk about an issue that may not be on a future agenda for this subcommittee or a full committee hearing. However, this

issue is absolutely critical to every privately held and family owned business in America. The issue is the permanent repeal of the death tax.

The time has come for Congress to take final action to permanently repeal the federal death tax. Over the last few years, the House of Representatives has made great strides in helping America's small businesses. We continue to wait on the Senate to take action.

Small business owners need certainty when planning for their succession and the long-term viability of their businesses. As long as Congress fails to act, business owners will be forced to divert economic resources from investments that grow businesses, create jobs, and boost the economy. Instead, they will use those funds to pay for estate planners, lawyers and accountants to navigate them through the uncertainties of the current tax structure and execute estate planning vehicles.

Permanent repeal would free up time, money and energy spent on estate planning. This would allow business owners to focus on growing their businesses, creating more jobs and working to stimulate economic growth as a whole. Economic growth will help keep the American economy strong and viable for our future and the future of our children.

Although full repeal will occur in 2010, the death tax burden will return in full force in 2011 due to the sunset language that was included in the Economic Growth and Tax Relief Reconciliation Act of 2001.

Unfortunately, if permanent repeal is not passed, many small business owners and farmers will continue to pay the ultimate price created by the sun setting of death tax repeal — loss of the family business.

H.R. 8, the "Death Tax Repeal Permanency Act of 2005," has been introduced by Reps. Kenny Hulshof (MO-9) and Bud Cramer (AL-5). S. 420, the "Death Tax Fairness Act," has been introduced by Senator Jon Kyl (AZ). Both bills seek full and final repeal of the death tax.

While numerous challenges and opportunities exist in the area of regulatory reform, the burden on small businesses in the form of the "death tax" needs priority attention. We urge Congress to act quickly on behalf America's small business owners by scheduling a vote on permanent repeal. Congress

should make death tax repeal permanency a priority by sending President Bush legislation for his signature.

Mr. Chairman, thank you for the opportunity to share with you our organization's position on these important small business issues.

Testimony of the National Mining Association
Before
Committee on Small Business
Roundtable on Regulatory Issues

By
Bradford V. Frisby
Associate General Counsel
National Mining Association

March 17, 2005

I. Introduction

Thank you for the opportunity to present our remarks to the House Committee on Small Business. The National Mining Association (NMA) is a national trade association that includes the producers of most of the nation's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other firms serving the mining industry. According to statistics from the Department of Labor's Mine Safety and Health Administration, over 96% of the controlling companies in the coal mining sector as a whole, and over 99% of the companies in the metal/nonmetal mining sector, are considered small entities by the Small Business Administration (SBA).

II. Background

The mining of minerals plays an indispensable role in our society by providing products that are essential to our economic security and way of life. In fulfilling that role, NMA members have pledged to conduct their activities in a manner that recognizes the needs of society and the needs for economic prosperity, national security, and a healthy environment. Our members are committed to integrating social, environmental, and economic principles in our mining operations from exploration through development, operation, reclamation, closure, and post closure activities, and in operations associated with preparing our products for further use.

Mining is one of the most heavily regulated industries in the United States. In addition to the general laws that most businesses must comply with such as the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, the Occupational Safety and Health Act, and the Endangered Species Act, mining is subject to several statutes drafted specifically to regulate our industry. Some of these include the Surface Mining Control and Reclamation Act, the Mine Safety and Health Act, and the Federal Land Policy Management Act. All of these laws combine to produce over 4,000 new federal regulations each year.

To ensure that regulations under such laws do not impose unwarranted burdens, Congress has attempted to pass a series of regulatory reform statutes to help improve the process while alleviating the regulatory burden on the public. Some of these laws include the Paperwork Reduction Act, the Regulatory Right-to-Know Act, the Data Quality Act, and the Small Business Regulatory Enforcement Fairness Act. Unfortunately, those laws have not always been successful in providing the necessary tools to ensure that regulations are working the way that they are intended.

III. Existing Regulatory Reforms

Paperwork Reduction Act

The Paperwork Reduction Act (PRA) of 1995 provides the backbone for ensuring that federal agencies do not abuse their authority with respect to collecting information from the public. It generally requires federal agencies to go to the Director of OMB to

get approval for collections of information from the public. It provides public protection by allowing a defense by citizens against any penalties for failing to comply with paperwork collections that are not authorized by OMB. See 44 U.S.C. § 3512.

The PRA also required that paperwork burdens would be reduced by 5-10% each year from 1996-2001. However, despite this law, the Office of Management and Budget reports that the general trend of paperwork burden hours has continued to increase to about 8.1 billion hours in 2003. *See Managing Information Collection, Information Collection Budget of the United States Government, Fiscal Year 2004*, Office of Management and Budget, Office of Information and Regulatory Affairs at p. 4.

Regulatory Right-to-Know-Act

Like the PRA, the Regulatory Right-to-Know Act (31 U.S.C. § 1105 note, Pub. L. 106-554) requires certain regulatory reporting by OMB to the Congress. Specifically, it requires estimates of total annual costs and benefits of Federal rules and paperwork, an analysis of the impacts of federal regulation, and recommendations for reform. However, despite its noble purpose of documenting where federal regulatory costs may exceed their benefits, the report generally aggregates costs and benefits into vague groups of ranges that make identifying useful and specific reform virtually impossible. *See, e.g. Progress in Regulatory Reform: 2004 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, Office of Management and Budget, Office of Information and Regulatory Affairs at p. 3 ("The estimated annual benefits range from $63 to $169, while the estimated annual costs range from $35 billion to $40 billion."). Despite the requirement that the benefits and costs be broken out by major rule, many of the agencies do not provide such information to OIRA because they are not required to do so by law.

Data Quality Act

Another noble attempt at regulatory reform was the passage of the Shelby Amendment, or the so-called "Data Quality Act." Pub. L. 106-554, § 515(a). This law requires OMB to issue guidelines to improve federal data quality. OMB's *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies* require other federal agencies to issue their own information quality guidelines and establish an administrative mechanism allowing the public to seek and obtain the correction of information maintained and disseminated by the agency.

Although there are many good aspects to OMB's efforts in implementing the Data Quality Act, ultimately the implementation of the guidelines is up to each individual agency. Federal agencies possess a tremendous amount of discretion regarding how they implement their own agency-specific guidance that will ultimately govern their own information dissemination (and correction) practices. Agencies determine what categories of information are appropriate for what level of quality; what constitutes "influential" information; what types of information must be reproducible, and what information should or should not be corrected.

Unfortunately, there is no really effective enforcement mechanism under the law. According to at least one Federal District court, there is no private right of action under the Data Quality Act, nor may a court review an agency's decision to deny a party's information quality complaint. *See Salt Institute v. Thompson*, 345 F. Supp. 2d 589 (Dist. VA 2004).

Small Business Regulatory Enforcement Fairness Act

The Regulatory Flexibility Act (RFA) requires federal agencies to analyze their regulations to determine whether they will have a significant economic impact on a substantial number of small entities. This well-intentioned law was routinely ignored by federal agencies until it was amended in 1996 by the Small Business Regulatory Enforcement Fairness Act (SBREFA). Unlike most all of the other regulatory reform statutes passed by Congress, SBREFA included a critical and explicit *judicial review* provision that provides a right to challenge agency non-compliance with the law in federal court. 5 U.S.C. § 611(a). The result of this judicial review provision is that agencies are forced to follow the law, or risk having their rules overturned by Federal court. *See Northwest Mining Association v. Babbitt*, 5 F. Supp.2d 9 (D.D.C., 1998); *See also U.S. Telecom Assn. v. FCC*, No. 03-1414 (D.C. Cir. March 11, 2005).

Since the 1996 amendments to the RFA, federal agencies have vastly improved their regulations affecting small business. According to a report by the U.S. Small Business Administrations' Office of Advocacy, "In FY 2004, more agencies approached the Office of Advocacy requesting RFA training or seeking advice early in the rulemaking process." *Report on the Regulatory Flexibility Act, FY 2004*, Office of Advocacy, February 2005, p. 52. The RFA, along with the judicial review provisions of SBREFA, have resulted in net savings to small businesses of more than $17 billion in first year regulatory compliance costs in FY 2004 and $2.8 billion in ongoing annual costs. *Id.* at p. 1.

IV. Establishing Regulatory Accountability

A. Increase Funding for the Regulators' Regulators

Among all Federal agencies, there are two that stand out as what could be described as the "regulators' regulators." These agencies are the Office of Advocacy in the Small Business Administration, and the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget.

The Office of Advocacy is charged with responsibility for implementing the Regulatory Flexibility Act, described earlier. Advocacy provides critical training for other Federal agencies on the requirements of the Act, and works behind the scenes to ensure that agencies comply with their obligations to consider the impacts that their rules and regulations will have on small entities. The agency also establishes special small business panels that examine, in great detail, regulations of the Environmental Protection Agency and the Occupational Safety and Health Administration. Finally, if the agency fails to comply with the RFA, Advocacy is an independent voice that is not reluctant to

file comments (and is even authorized to file amicus court briefs) on behalf of small business. Funding for this valuable agency should be increased, because it would pay dividends many times over in the form of better and less burdensome regulations on small businesses.

OIRA is the arm of OMB that is in charge of reviewing the thousands of federal regulations that are promulgated by the federal government each year. With a bare bones staff, the agency must focus on the largest and most egregious rules in order to effectively leverage their resources to have an impact on the rulemaking process. Congress should add at least 100 full time employees to OIRA to allow them to develop more in house expertise in various aspects of science, economics, and accounting to provide more of an objective check and balance against federal agencies that promulgate ever more burdensome regulations. Such an investment would result in better rules with higher benefits and lower costs, and therefore would greatly increase the net benefits to society as a whole.

B. Judicial Review

Based on past experience with regulatory reform statutes, statutes with legal enforcement mechanisms, such as the RFA/SBREFA, are much more effective than reform laws that provide only for non-binding guidance like the Data Quality Act or simple reporting such as the Regulatory Right-to-Know Act. Accordingly, in considering regulatory reform proposals, it is critical that any reform legislation include explicit enforcement provisions through judicial review or other means. If the Data Quality Act, for example, was amended to provide explicitly for judicial review, then it would be much more effective in ensuring that federal agencies would improve the quality of the data that they disseminate to the public.

C. Regulatory Budgeting

The federal government spends over 2 trillion dollars a year in discretionary spending. Each year, the President proposes a budget, and Congress debates it, revises it, and approves it. Revenue measures are set to pay for such spending, or money is borrowed, and the federal programs go forward according to these rules. Although far from a perfect system, there is a certain level of accountability, because the decisions that are made on the federal budget are public, accessible, and are made by elected officials who were elected to make such decisions.

By contrast, the federal regulatory system has no real budget, no enforceable rules, and no electoral accountability. Although it is impossible to determine the exact cost of federal regulation, scholars have estimated that such costs are over $800 billion per year in the United States and growing every year. *See Ten Thousand Commandments, An Annual Snapshot of the Federal Regulatory State*, Clyde Wayne Crews, Jr., Cato Institute (2002)(estimating regulatory costs of $ 843 billion in 2000); *See also Profiles of Regulatory Costs, Report to the U.S. Small Business Administration*, by Thomas D. Hopkins, U.S. Department of Commerce, National Technical Information Service, # PB96128038 (November, 1995).

Federal agencies propose rules which hopefully will provide overall net benefits to society, but in most cases there is no requirement that the costs and benefits are adequately analyzed, let alone that the benefits outweigh the costs. In fact, federal agencies are graded only on how much benefit they provide to the public, not on how much cost they impose on the regulated community. Therefore, there is an insatiable appetite for ever-growing regulatory requirements, regardless of cost.

There are two potential ways to solve this problem. One way is for Congress to establish a regulatory budget similar to the federal budget. Agencies could be allowed to impose a certain amount of cost or burden on the public within their permissible regulatory cost budget. But once the burden budget goal is reached, the agency would have to either eliminate other regulatory burdens to justify the new rule, secure Congressional approval for a larger burden budget, or not issue the new rule.

At the very least, when it comes to imposing information collection requirements as part of a rulemaking, agencies should be required to review their existing requirements from the same regulatory program and eliminate any unnecessary or outdated information requests. If not, they should be required to explain why such is the case.

The second way that agencies could be forced to ensure that their rules are providing more net benefits than costs would be to mandate that each agency perform a standardized cost-benefit analysis on each of their regulations. This process could be enforced in the executive branch by OIRA. If agencies were unable to demonstrate that that benefits of the rule outweigh the costs, it would not be promulgated. There are already a number of mechanisms for examining costs and benefits in rules, such as Executive Orders 12866. However, the tools used to enforce these, such as prompt letters and return letters, are not sufficient to ensure that the overwhelming growth of Federal regulations occurs in a manner that ensures that such rules will provide overall net benefits to society.

Thank you for the opportunity to share our views on federal regulations and what Congress can do to make it work better for the American people. We look forward to working with the Committee on improving Federal regulations in the years ahead. If you require any further information please contact me at (202) 463-2643 or via email at bfitsby@nma.org.

Council for Improving Life and the Environment

Associations Representing Heating, Ventilation, Air Conditioning, Refrigeration and Plumbing

January 6, 2005

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

Dear Administrator Leavitt:

The organizations listed to the left represent the broad spectrum of the nation's heating, ventilation, air-conditioning and refrigeration industry. In partnership, we have created the Council for Improving Life and the Environment.

Specifically, this letter is in response to the November 3, 2004, letter the Air Conditioning Contractors of America (ACCA) received from John Fogarty, Acting Associate Director of the Air Enforcement Division at the Environmental Protection Agency (EPA). Mr. Fogarty's letter was seeking to address issues raised by ACCA in its September 20, 2004 letter to Administrator Michael Leavitt concerning the lack of EPA enforcement of the Section 608 refrigerant regulations. While the Council appreciates EPA's response, we remain concerned that EPA has not addressed the serious issues raised in ACCA's previous letter. The lack of enforcement of the refrigerant provisions has a significant impact on the environment, the safety of workers in the HVACR industry, and places a disproportionate financial burden on air conditioning contractors who are mainly small businesses.

As an example of the EPA's Section 608 enforcement, Mr. Fogarty discussed several "Leak Rate" cases against large corporations such as Air Liquide, Earthgrains and Myers' Bakery. However, he did not mention, and to the best of our knowledge, few enforcement actions have been recently undertaken by the EPA relative to venting and sales restrictions.

Our industry feels that EPA must aggressively and consistently enforce its own regulations. Otherwise, bad actors in the industry will ignore the Section 608 regulations knowing that EPA will not instigate any enforce activity.

One of the unintended consequences of EPA's failure to enforce its regulations is safety. Because some unethical contractors exist in the industry, much like in other industries, the risk to unsuspecting HVACR technicians increases. As an example, in violation of EPA regulations, unscrupulous technicians could charge an air conditioning system with a refrigerant that is inappropriate for the application. Subsequent technicians working on that unit could face serious physical harm due to the inappropriate use of higher pressure refrigerants, or refrigerants containing flammable constituents.

In addition to safety, the environment is being impacted by the intentional venting of refrigerants into the environment. As evidenced by the small percentage of refrigerants turned in for reclamation, a significant portion of the servicing community are venting refrigerants or exploiting loopholes in the statutory language that permit inappropriate handling of refrigerants (i.e., it is not illegal to recover refrigerant in a container that contains an "inadvertent" leak).

Additionally, since there are no sales restrictions on HFCs, anyone can procure these refrigerants and undertake service work in areas that they are not licensed for nor experienced in. Because the EPA Clean Air Act provisions are not being enforced there is no negative consequence for violating the regulations creating little incentive for these individuals or

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contractors to follow the law. This has a direct economic and competitive impact within the marketplace as these entities can charge less for the services they provide to unknowing consumers as they are not incurring the extra expense required to properly (and legally) recover and recycle refrigerant. This creates an environment of unfair competition and serves to place a higher economic burden on contractors who are following the regulations.

The members of the Council find this situation to be extremely frustrating. Mr. Fogarty suggested that contractors should merely report bad actors through the EPA's Ozone Hotline. However, we feel that this is an inadequate solution to the issue. We believe a more aggressive pro-active enforcement program is needed. However, if the EPA elects to have a law that relies solely on "whistle-blower" actions to enforce its regulations then the Council submits that such a plan **can only be effective if the EPA has an aggressive follow-up enforcement program in place.**

Our industry realizes that EPA has many responsibilities and mandates to fulfill with sometimes limited resources. However, this issue must be addressed by EPA because it: a) impacts the safety of HVAC employees; b) is good for the environment; and c) creates a business paradigm where honest contractors – being good stewards of the environment, observing workplace safety and following the law – can compete on an level playing field against contractors who otherwise benefit from ignoring the law.

We again extend the offer to work with you and your team to identify solutions to these issues and embrace an approach consistent with existing laws and market forces.

Thank you again for the opportunity to present these views on behalf of the HVACR industry.

Sincerely,

William G. Sutton
Chairman
The Council for Improving Life
and the Environment
President
Air Conditioning & Refrigeration Institute

Paul T. Stalknecht
President & CEO
Air Conditioning Contractors of America

Evan Gaddis
President
Gas Appliance Manufacturer Association

Don Frendberg
Executive Vice President & COO
Heating, Air-conditioning & Refrigeration Distributors
International

Rex P. Boynton
President
North American Technician Excellence

D.L. "Ike" Casey
Executive Vice President & CEO
Plumbing Heating and Cooling Contractors
Association

Robb E. Isaacs
Executive Vice President
Refrigeration Service Engineers Society

ACCA
Air Conditioning Contractors of America

The Essential Partner
For Contractor Excellence

2800 Shirlington Road • Suite 300 • Arlington, VA 22206 • (703) 575-4477 • Fax: (703) 575-4449

September 20, 2004

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

Dear Administrator Leavitt:

I am contacting you today to bring to your attention an issue of serious concern to the entire heating, ventilation, air conditioning and refrigeration (HVACR) industry and to request the assistance of the Environmental Protection Agency (EPA). The Air Conditioning Contractors of America (ACCA) is the nation's largest trade association representing the HVACR contracting industry with nearly 5,000 small business members located in all 50 states.

The ACCA membership is extremely concerned over the lack of enforcement by the EPA of existing laws regulating the use of ozone-depleting refrigerants including chlorofluorocarbons (CFCs) and hydrochlorofluorocarbons (HCFCs). In addition, the industry is also concerned over the lack of EPA policy regarding the use of hydrofluorocarbons (HFCs). We feel that action must be taken by the EPA to address these concerns.

In 1990, President George H.W. Bush signed the Clean Air Act Amendments (P.L. 101-549) that established national policy on these types of refrigerants that would reduce and eventually eliminate use of CFC and HCFC refrigerants. Section 608 of the Clean Air Act specifically addresses reducing the production, use and emissions of ozone depleting substances. Section 608 also promotes the recapture and recycling of these ozone-depleting products and created the National Recycling and Emission Reduction Program to address this issue.

The National Recycling and Emission Reduction Program regulations were issued by EPA under Section 608 and established five main requirements regarding the recycling, emissions reduction and disposal of refrigerants used in air conditioning equipment. EPA developed these rules as directed by the Clean Air Act.

The Clean Air Act also mandated that EPA restrict the sale of CFCs and HCFCs to EPA-certified technicians who have been trained in the proper care and handling of these gasses. Currently only HVACR technicians who have passed refrigerant certification may legally purchase CFC and HCFC agents.

In addition to these requirements, the Clean Air Act also created enforcement procedures under Title VII. The enforcement policy covers several areas of violations including falsifying documents, selling covered refrigerants to unlicensed individuals, tampering with monitoring devices, and knowingly releasing CFCs and HCFCs into the atmosphere. The Clean Air Act established that the EPA Administrator, in consultation with the United States Attorney General, could level civil penalties of up to $27,500 per day per violation of the act and revoke the operating certificates of reclaimers. The Clean Air Act also permits the EPA Administrator to make awards of up to $10,000 to individuals who report violations of the Clean Air Act.

The HVACR industry recognizes the importance of the provisions of the Clean Air Act regarding refrigerants and the industry wholly supports the goals of the legislation. ACCA's member contractors work daily with these ozone depleting agents and understand the need to be a responsible steward of the environment we all share. Unfortunately, the HVACR industry has become extremely frustrated with the lack of enforcement shown by the EPA regarding these agents. As the Clean Air Act states, EPA is the federal agency responsible for enforcing the Section 608 requirements and yet our industry sees very little enforcement, which allows a growing number of individuals to circumvent the system while responsible contractors attempt to comply with these requirements.

Of great concern to our industry is the lack of a national recycling program for the proper disposal and recycling of refrigerants. The lack of a viable national refrigerant recycling program is viewed by ACCA members as a major problem and creates significant obstacles for our members. Most ACCA contractors act in good faith by attempting to reclaim and recycle refrigerant even though it is expensive and not convenient for them to do so. Furthermore, it puts these contractors at a competitive disadvantage to contractors who do not follow required procedures. The establishment of a national recycling program would help address this problem by making it easier for contractors to recycle refrigerant and follow the requirements of the Clean Air Act.

Our industry remains committed to complying with the requirements of the Clean Air Act but we cannot do this unless there is a fair playing field for all participants. As long as EPA declines to enforce its own regulations regarding refrigerants then the playing field will remain tilted against our members. In addition to enforcement, ACCA members feel that it is imperative that EPA also remove the loopholes in Section 608 – a major loophole is that it is not illegal to recover refrigerants into a cylinder that 'inadvertently' contains a hole – that allow bad actors to circumvent the integrity of the regulations. Furthermore, ACCA members strongly feel that Section 608 must be extended to hydrofluorocarbons (HFCs). HFCs are currently being used to replace the CFC and HCFC gasses. Because HFC gasses do not fall under the provisions of the Clean Air Act, a person off of the street may go into a store and purchase a canister of HFC gas and intentionally, or unintentionally, release the ozone-depleting gas into the environment. ACCA feels strongly that HFC regulation must be treated in the same manner as CFCs and HCFCs and be regulated.

Administrator Leavitt, our industry remains committed to being a proper steward of the environment while also providing safe, reliable and energy efficient heating and cooling products to Americans across the country. While our members remain concerned about the lack of enforcement of EPA's policies by EPA, we would like to work with your agency to correct this problem and extend responsible environmental stewardship to HFCs. I would like the opportunity to sit down with you and your staff to discuss these issues and explore ways in which our industry and your agency can work together to resolve these problems and move forward in the future.

Thank you for the opportunity to present the views of our industry on this issue and I look forward to setting up a meeting at your convenience to further discuss these matters.

Sincerely,

Paul Stalknecht

Paul Stalknecht
President and CEO

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

November 3, 2004

Paul Stalknecht
President and CEO
Air Conditioning Contractors of America
2800 Shirlington Road, Suite 300
Arlington, VA 22206

Dear Mr. Stalknecht:

Thank you for your September 20, 2004 letter to Administrator Leavitt concerning the enforcement and implementation of Title VI of the Clean Air Act, pertaining to stratospheric ozone protection. I am pleased to hear that members of the Air Conditioning Contractors of America (ACCA) seek to be good stewards of the earth's atmosphere by obeying and supporting the statutory and regulatory provisions for management of ozone depleting substances (ODS). We appreciate your organization's support for these provisions of the Act which so vitally affect your industry.

Your letter raised two principal issues: a concern regarding enforcement of Title VI, and also a concern regarding a regulatory "loophole" in the program. Specifically, you stated that there was a "lack of enforcement" by EPA of these provisions. You may not be aware of the Agency's work in this area, including several successful cases against large industrial corporations such as Air Liquide, Earthgrains and Meyers' Bakery, all of which resulted in multi-million dollar penalties and injunctive relief to install new non-ozone-depleting refrigerants. EPA agrees that ACCA members who follow required refrigerant practices should not be placed at an economic disadvantage due to the non-compliance of their competitors. We are always concerned that those who abide by the law may face unfair competition from those who cut corners at the expense of the environment. I encourage your members to report violators of the Clean Air Act refrigerant regulations by contacting the Ozone Hotline at (800) 296-1996.

You also cited the lack of a national recycling program for the proper disposal and recycling of refrigerants as a "loophole" in the program. By this, I presume that you are referring to the Clean Air Act's establishment of the National Recycling and Emissions Reduction Program. As required by Section 608(a) of the Clean Air Act, EPA has promulgated regulations (at 40 CFR part 82, subpart F) establishing standards and requirements regarding the use and disposal of class I and class II ozone-depleting substances during the service, repair, or disposal of refrigeration and air-conditioning equipment (i.e., appliances and industrial process

refrigeration equipment). EPA established a national emissions reduction and recycling program with the publication of the Refrigerant Recycling Rule on May 14, 1993 (58 FR 28660). The regulations issued under this program require service procedures that minimize the release and maximize the recovery and recycling of ozone-depleting chlorofluorocarbon (CFC) and hydrochlorofluorocarbon (HCFC) refrigerants. Since 1993, service technicians have been required to obtain and properly use refrigerant recovery/recycling equipment during the maintenance, service, and repair of refrigeration and air-conditioning equipment. In addition, the recycling program established requirements for refrigerant reclaimers and prohibited the sale of used refrigerant unless it has been properly reclaimed by an EPA-authorized refrigerant reclaimer. These efforts are aimed at reducing emissions during service and limiting equipment damage and eventual release of refrigerant into the atmosphere by restricting the resale of used refrigerant.

Section 608(c) of the Clean Air Act prohibits the intentional venting or release of an ozone-depleting substance used as a refrigerant during the maintenance, service, repair, or disposal of air-conditioning and refrigeration equipment. Effective 1995, this prohibition also applies to substitutes for ozone-depleting refrigerants such as hydrofluorocarbons (HFCs). However, Section 608 of the Clean Air Act does not require EPA to regulate the sale or use of substitutes that do not contribute to depletion of the ozone layer, such as HFC substitutes.

EPA addressed the venting and regulation of HFC substitutes in a rulemaking published on March 12, 2004 (69 FR 11946). This rulemaking extended the regulatory structure for CFC and HCFC refrigerants to substitute blends that consist of an ozone-depleting substance. It also incorporates the Clean Air Act statutory prohibition against the venting of substitutes into EPA regulations at subpart F (40 CFR 82.154). While EPA has not extended the regulatory requirements (e.g., sales restriction, technician certification, vacuum requirements) to pure HFC substitutes, it remains illegal to knowingly vent them during the maintenance and service of refrigeration and air-conditioning equipment.

Again, thank you for your letter. If you have any other questions or suggestions on efforts to reduce emissions of ozone-depleting refrigerants and their HFC substitutes, please call Charles Garlow of my staff at 202-564-1088.

Sincerely,

John Fogarty, Acting Associate Director
Air Enforcement Division

cc: Drusilla Hufford, OAR, GPD
Julius Banks, OAR, GPD