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To: John **F.** Morrall III/OMB/EOP@EOP

cc:
Subject: **U.S.** Chamber of Commerce Comments

Dear Mr. Morrall:

Attached are the following two documents:

1) The U.S. Chamber's comments on the Office of Management and Budget's Draft Report to Congress on the Costs and Benefits of Federal Regulations; and

2) The **U.S.** Chamber's Nominations for Regulatory Reform Improvements and Guidance Document Improvements.

If there are any problems with this transmission, please contact Doug Billings at 202-463-5680. Thank you.

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CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

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May 28,2002

Mr. John Morrall
Office of Information and Regulatory Affairs
Office of Management and Budget
NEOB, Room 10235
725 17th Street, NW
Washington, DC 20503

Re: Comments on the Office of Management and Budget's Draft Report to Congress on the Costs and Benefits of Federal Regulations

Dear Mr. Morrall:

The U.S. Chamber of Commerce (U.S. Chamber), the world's largest business federation, representing more than three million businesses of every size, sector, and region, is pleased to provide the following comments on the March 28,2002, Office of Management and Budget (OMB) Draft Report to Congress on the Costs and Benefits of Federal Regulations (the Draft Report)'. The U.S. Chamber is also submitting, with these comments and in response to the request contained in the Draft Report, a number of existing regulations and guidance documents as candidates for regulatory reform improvements.

The Draft Report, which is mandated by the Regulatory Right-to-Know Act, clearly demonstrates the Bush administration's commitment to a meaningful and active Office of Information and Regulatory Affairs (OIRA). The U.S. Chamber shares this commitment, and applauds the Administration for reviving OIRA, which plays a vital role as overseer of the federal regulatory process.

[1] 67 FR 15014.

I. Regulatory Policy Under the Bush Administration: The First Year

As discussed by OMB in the Draft Report, the Bush administration's approach to regulatory policy is in stark contrast to that of the previous administration. The U.S. Chamber believes that the policy and process changes implemented by the Bush administration have significantly improved and will continue to improve the quality of federal regulation.

A. The Return Letter

The greatest improvement is almost certainly the active role OIRA now plays as an overseer of the analysis used by agencies in the rulemaking process. Centralized oversight of the regulatory process is essential to ensure not only that agency actions are consistent with the President's policies, but also that rules are implemented only after a thorough analysis of their impacts. OIRA's demonstrated willingness to return to agencies rules that do not meet these requirements provides the regulated community with confidence that all major regulations have withstood a level of analytical scrutiny that has in the past been too frequently disregarded by federal agencies. The prior administration's failure to use return letters was a major impediment to quality regulation, and their reappearance is therefore, quite welcome.

The return letter is, unfortunately, necessary because of the reluctance on the part of many federal agencies to fully comply with rulemaking requirements. For instance, agencies far too often misrepresent the costs of a rule to avoid requirements under the Unfunded Mandates Reform Act, or fail to adequately consider small business impacts in accordance with the Regulatory Flexibility Act. Until such time as agencies begin to comply with these and other requirements, continued use of returns letters is essential.

I. Regulatory Policy Under the Bush Administration: The First Year

B. Transparency and Presidential Review Memoranda

Another fundamental change that has improved the regulatory process is OIRA's promise to perform its work in a transparent fashion. The Administrator's September 20,2001, memorandum to the President's Management Council on "Presidential Review of Agency Rulemaking by OIRA," mandating that agencies comply with existing rulemaking requirements, and the Administrator's October 18,2001, memorandum, setting forth plans for increased use of the Internet, together set the proper tone for a transparent process.

While disagreements in and among the regulated community, the public interest community, the agencies, the Administration, and others are a healthy part of the regulatory process, a transparent approach to the process offers an assurance that such disagreements will be focused on policy rather than process. W e OIRA's role involves inherent conflict among persons with differing interests, these same people have universally praised OIRA's commitment to transparency. The U.S. Chamber joins in this chorus of approval and encourages OIRA to continue this effort.

C. The Prompt Letter

OIRA's proactive role in the regulatory process, as evidenced by the introduction of the "prompt" letter, is too recently underway to allow for definitive judgments on its value. As a general matter, the U.S. Chamber does not oppose principled regulation, regardless of its origination. OIRA's role as a centralized agency with government-wide responsibilities does allow it a unique perspective on the need for new regulation. Moreover, the U.S. Chamber appreciates that prompt letters can foster a public dialogue that does not always exist when agencies promulgate regulations based entirely on their own policies and political positions. But the prompt letter should be judiciously used, as agencies are most often in the best position to determine the need for regulation in their area. The U.S. Chamber looks forward to analyzing the ultimate results of past prompt letters, and to providing more detailed comments in the future on the general use of prompt letters.

I. Regulatory Policy Under the Bush Administration: The First Year

D. Expanded and Diversified OIRA Staff

Given the vast number of agencies and the range of subject matters involved in OIRA's regulatory oversight role, the U.S. Chamber also supports those provisions of the Draft Report that call for an expanded and diversified OIRA staff, and that announce the formation of a scientific advisory panel. OIRA's mandate to review adequately the various scientific, financial, and statistically based regulations promulgated by federal agencies, virtually demands the increased resources and expertise that are promised by these reforms.

E. Targeted Reviews of Existing Rules

Perhaps the most important aspect of the Draft Report, in the U.S. Chamber's view, is OMB's discussion of targeted agency reviews of existing rules and guidance documents. One of the great failings of the American regulatory system is that there is presently no effective requirement mandating that agencies review outdated regulations to determine whether rescission or modification of the rule is warranted. Too many regulations, once promulgated, remain in effect regardless of their continuing benefit or utility.

Therefore, the U.S. Chamber welcomes OMB's current approach – the request of public nominations for targeted review. As with the prompt letter, OMB's publication of the nominations will generate much-needed public interest and discussion and will, ideally, lead to agency review. But despite OMB's best efforts, adequate review of existing regulations cannot occur absent legislative mandate, The U.S. Chamber therefore, supports statutory changes to provide authority to OMB/OIRA to cause substantive agency review of existing rules.[2]

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[2] The U.S. Chamber has recently undertaken efforts *to* improve agency compliance with Regulatory Flexibility Act §610[2], which is briefly discussed in the Draft Report. Section 610 is, to the U.S. Chamber's knowledge, the only existing statute that requires review of existing regulations. However, Section 610 applies only to those regulations having a "significant economic impact on a substantial number" of small businesses, and agency compliance has been, at best, sporadic. The U.S. Chamber will work to ensure that any statutory framework to increase agency review of existing regulations includes modifications to Section 610 to improve agency compliance.

11. The Costs and Benefits of Federal Regulations

The Regulatory Right-to-Know Act[3] requires OMB to report annually on the total costs and benefits of Federal rules and paperwork. The figures contained in the Draft Report attempt to quantify such costs and benefits for periods between April 1, 1999, and September 30,2001.

The U.S. Chamber understands OMB's difficulty, as discussed in prior years' reports, in adequately performing any analysis of the aggregate costs and benefits of the federal regulations and paperwork requirements of the entire federal government. The task does not easily lend itself to precision. Nevertheless, the U.S. Chamber strongly supports the principles of the Regulatory Right-to-Know Act, and strongly encourages OMB's continued compliance with the statute.

While the information contained in the report has inherent limits, it does provide valuable insight into the regulatory process and its costs. For instance, trends in regulation will become apparent through the compilation and publication of this data. Similarly, the agency-by-agency comparison, also mandated by the Regulatory Right-to-Know Act, provides valuable insight into the cost effectiveness of an agency's rules vis-à-vis other agencies. And the analysis of impacts on small business, yet another requirement of the Right-to-Know Act, can serve as an invaluable tool to demonstrate where disproportionate regulations are harming small business. For these reasons, each of these analyses should be continued and, where possible, enhanced.

Finally, the U.S. Chamber appreciates OIRA's efforts to comply with one more Regulatory Right-to-Know Act requirement – the Act's call for "recommendations for reform" of the regulatory system. The U.S. Chamber believes that OIRA's request for nominations of outdated regulations and improper guidance documents, and OIRA's analyses of the nominations, constitutes commendable and valuable compliance with this aspect of the Regulatory Right-to-Know Act.

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[3] 31 U.S.C. §1105 note.

III. Recommendations for Reform

The Draft Report highlights for comment two reform initiatives: (1) a solicitation of public comments on regulations or regulatory programs in need of reform, and (2) an invitation for public comments on agency practices regarding guidance documents. The U.S. Chamber is pleased to see both of these initiatives identified in the Draft Report, as both represent excellent opportunities for badly needed reform.

A. The U.S. Chamber Nominations

With these comments, the U.S. Chamber is nominating a number of existing regulations and guidance documents for OMB's consideration. Some of the nominations involve a combination of regulation and guidance, both of which the U.S. Chamber believes should be revisited. In addition, we are submitting several rules that are in the proposed stage, but that we believe are important enough, and are at an appropriate stage, to merit OIRA's attention at this time.

Furthermore, the U.S. Chamber believes almost all of the submitted nominations have small business impacts. As mentioned, the U.S. Chamber represents more than three million businesses, approximately 96 percent of which have 100 or fewer employees. Thus, small business concerns have played a substantial role in our consideration and preparation of nominations, and we believe small business concerns should be given particular attention as OIRA and the agencies consider the U.S. Chamber's nominations. In this regard, the U.S. Chamber applauds and supports the Draft Report's discussion of the Administration's enhanced focus on the impact of regulations on the nation's small businesses.

The Draft Report puts forth the Administration's position that any review of existing rules "should be done carefully and openly." The U.S. Chamber fully concurs with this position. Therefore, we have attempted to provide, in a concise manner, a complete description of the nominated rules, the U.S. Chamber's concerns, and our proposed solutions. The U.S. Chamber welcomes an analytical review of the nominations and looks forward to public debate on the proposals.

111. Recommendations for Reform

B. Guidance

The U.S. Chamber shares OMB's particular concern regarding the use and abuse of guidance documents, therefore, we are pleased to nominate several guidance documents as review candidates. Much too frequently, agencies treat guidance documents as "rules," even though they were not subjected to the notice and comment period and other requirements under the Administrative Procedure Act. As OMB correctly notes, rules disguised as guidance present several problems. Perhaps foremost among these is the fact that guidance is generally subject to neither public comment nor independent technical or scientific analyses.

The guidance document issue is endemic in many agencies. During the 106th Congress, the House Committee on Government Reform, while studying the guidance problem, sought information from three particular agencies: the Occupational Health and Safety Administration (OSHA), the National Highway Traffic Safety Administration (NHTSA), and the Environmental Protection Agency (EPA). The results confirm the rampant use of guidance. The Committee determined that, between March 1996 and January 2000, NHTSA had issued 1,225 non-codified guidance documents, EPA had issued 2,653 such documents, and OSHA had issued an 3,374 guidance documents.[4]

Although agency guidance can be a very valuable tool, it must be noted that many times an agency uses guidance so as to avoid the Administrative Procedure Act when issuing controversial policy of general applicability. One such example is EPA's environmental justice guidance[5], one of the nominations submitted with these comments, which compels states to deny or revoke operating permits in areas with large percentages of minority or lower income residents, even though EPA lacks the legal authority to issue regulations of this nature.

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[4] Non-Binding Legal Effect of Agency Guidance Documents, House Report 106-1009.
[5] Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits, http://www.epa.gov/civilrights/docs/interim.pdf See also, Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits, See 65 FR 39682 (June 27, 2000).

III. Recommendations for Reform

B. Guidance (continued)

Clearly, the current standard purportedly applied by agencies – in general, whether a document is "legally binding" – has been ineffective at limiting the number of rules masquerading as a guidance. The problem of improper use of guidance does not, admittedly, lend itself to a simple solution. While guidance documents can play a proper role, the U.S. Chamber strongly believes that OIRA must use its oversight authority to control and limit the use of guidance.

Accordingly, the U.S. Chamber encourages OIRA to issue guidelines to all federal agencies compelling the agencies to err on the side of formal Administrative Procedure Act rulemaking, rather than on the side of guidance. Further, OIRA should prohibit guidance from ever being used to impose substantive requirements on business or individuals. Issuance of these simple guidelines would ensure that OIRA's policies conform to the law as established in *Appalachian Power Company v. Environmental Protection Agency*[6], a case cited in the Draft Report. The implementation of such guidelines would also constitute substantial progress toward stemming the tide of guidance documents being used as if they were legally binding.

The guidance documents identified in the attached nominations present strong examples of agencies improperly treating guidance documents as binding law. We urge the agencies to reconsider their decision to use guidance in these circumstances and, at a minimum, to conduct rulemakings on these issues. The U.S. Chamber will continue to identify specific guidance issued in violation of the Administrative Procedure Act, and will continue to fight such guidance in all appropriate forums.

[6] 208 F.3d 1015 (D.C.Cir. 2000).

The U.S. Chamber appreciates the opportunity to provide these comments, as well as the opportunity to provide the attached nominations. We would be pleased to provide, upon request, further information regarding any of the submitted nominations. We look forward to working with OIRA and the agencies on further improvements to the rulemaking process and, as a result, further improvements to the quality of federal regulations.

Sincerelv.

William L. Kovacs

Enclosures

REGULATIONS
(Some nominations contain both regulation and guidance)

Performance of Commercial Activities

Regulating Agency: Office of Management and Budget

Citation: OMB Circular No. A-76

Authority: 31 U.S.C. 1 *etseq.;* 41 U.S.C. 401 *etseq.;* P. L. 105-270

Description of the Problem:

OMB Circular No. A-76 sets forth the procedures for determining whether the private sector or in-house Government personnel should perform commercial activities. It also provides policy for how and when a federal agency competes a commercial activity with the private sector. The competitive process set forth in the A-76 circular is costly, time consuming, does not accurately reflect the government's cost of doing business, and gives federal employees an unfair competitive advantage.

Competition has proven to provide significant cost savings regardless of who wins, as well as increase innovation, efficiencies and quality of service. A new commercial activity policy is needed, especially as the federal government continues to face budgetary constraints, a decreasing federal workforce and reevaluates our nation's priorities post 9-11. An equal, transparent, consistent competitive process is necessary to ensure the performance of commercial activities is conducted as efficiently and cost effectively as possible. Such a process will also encourage businesses to enter and remain in the federal market, particularly small businesses that generally do not have the staff or financial resources to engage in lengthy competitions.

Proposed Solution: Rescind OMB Circular A-76 and adopt a framework for public-private competitions similar to the process detailed in the Federal Acquisition Regulation *(FAR).*

Economic Impact: Requiring a FAR-type process for public-private competitions will significantly reduce the time and money required to conduct competitions as currently under A-76. It will allow the federal government the authority to purchase best value products and services in a timely fashion, as it encourages competition.

Family Medical Leave Act (FMLA):
Definition of Serious Health Condition

Regulating Agency: Department of Labor (DOL)

Citation: 29 C.F.R. Part 825.114 and DOL Opinion Letter FMLA-86 (December 12,1996)

Authority: 29 U.S.C. Section 2654

Description of the Problem:

Under the Family Medical Leave Act **(FMLA),** covered employers must provide qualifying employees with twelve weeks of leave in any twelve-month period. While employees may take leave for various reasons, they most commonly do so because they cannot work due to a serious health condition or need leave in order to care for a family member with a serious health condition.

The plain language of the act, its legislative history, and an early DOL opinion letter all make it quite clear that the term "serious health condition" does not include minor ailments. Despite this clear mandate, DOL regulation 29 C.F.R. Part 825.114 and DOL Opinion Letter FMLA-86 (December 12,1996) include minor ailments within definition of the term and, by doing so, vastly increase **the** number of FMLA leaves an employer may experience and, consequently, substantially increase the already significant administrative burdens and costs imposed by the FMLA.

Proposed Solution: Rescind DOL Opinion Letter FMLA-86 (December 12,1996) and any similar letters or guidance and revise 29 C.F.R. Part 825.114 so that it explicitly excludes minor ailments from the definition of serious health condition.

Economic Impact: Making the aforementioned changes will return the scope of the FMLA to its original intent, greatly reducing the burdens and costs imposed on employers.

Family Medical Leave Act (FMLA):
Intermittent Leave

Regulating *Agency:* Department of Labor (DOL)

Citation: 29 C.F.R. Parts 825.203, 825.302(f) & 825.303 and DOL Opinion Letter FMLA-101 (January 15,1999)

Authority: 29 U.S.C. Section 2654

Description of the Problem:

The statute permits employees to take leave on an intermittent basis or work on a reduced schedule when medically necessary. According to recent DOL study, almost one fifth of all FMLA leave is taken on an intermittent basis.

Tracking

The FMLA is silent on whether an employer may limit the increment of time an employee takes as intermittent leave to a minimum number of days, hours or minutes. During the notice and comment period for the regulation, many urged the DOL to limit intermittent leave increments to a half-day minimum, expressing concern that smaller increments would prove over-burdensome for employers. Despite these warnings, DOL regulation 29 C.F.R. Parts 825.203 requires that employers permit employees to take FMLA leave increments as small as the "shortest period of time the employer's payroll system uses to account for absences of leave, provided it is one hour or less." Employers, many of which have payroll systems capable of tracking time in periods as small as six minutes, find tracking leave in such small increments extremely burdensome. This is particularly problematic with respect to employees who are exempt from the Fair Labor Standard Act's (FLSA) overtime requirements. Exempt employees are paid on a salary basis and employers are not required to – and normally do not - track their time.

Notice

Scheduling around intermittent leave can be difficult if not impossible for employers because the regulations do not require the employee *to* provide advanced notice of specific instances of intermittent leave. DOL Opinion Letter FMLA-101 (January 15,1999) exacerbates the problem by permitting employees to notify the employer of the need for leave up to *two* days following the absence.

Proposed Solution: Amend 29 C.F.R. Part 825.203 so that it permits employers to require that employees take intermittent leave in a minimum of half-day increments. Also, rescind DOL Opinion Letter FMLA-101 (January 15,1999) as well as any similar letters and amend 29 C.F.R. Parts 825.302 and 825.303 so they require that employees provide at least one week advanced notice of the need for intermittent leave except in cases of emergency, in which case they must provide notice on the day of the absence, unless they can show it was impossible to do so.

Economic Impact: Permitting employers to limit leave to a minimum of half-day increments will greatly reduce the recordkeeping burdens associated with intermittent leave. Requiring employees to provide reasonable notice of absences will reduce employer costs and burdens incurred because of unpredictable employee absences.

Family Medical Leave Act **(FMLA):**
Medical Certification

Regulating Agency: Department of Labor (DOL)

Citation: 29 C.F.R. Parts 825.307 & 825.308

Authority: 29 U.S.C. Section 2654

Description **of** the Problem:

Under the FMLA, an employer may require that an employee who requests leave due to a serious health condition or in order to care for a family member with a serious health condition, provide certification by a health care provider of the serious health condition.

Clarification and Authentication

Regulation 29 C.F.R. Part 825.307 prohibits an employer from contacting the health care provider of the employee or the employee's family member without the employee's permission, even in order to clarify or authenticate the certification. Even with the employee's permission, the employer may not directly contact the employee's health care provider, but must have a health care provider it has hired contact the employee's health care provider to get the information. As a result, it is very difficult, costly and time-consuming for employers to obtain clarification or authentication of certifications.

Intermittent Leave

The statute permits employees to take leave on an intermittent basis or work on a reduced schedule when medically necessary. Under regulation 29 C.F.R. Part 825.308, an employer can require an employee to provide initial certification of need for intermittent leave, but may not require the employee to provide certification for each absence. In fact, the regulation only permits the employer to request re-certification every thirty days. Thus, an employee with certification for intermittent leave can claim that any absence is FMLA qualifying without having to provide medical certification substantiating the claim. This invites abuse.

Proposed Solution: Amend 29 C.F.R. Part 825.307 so that employers may directly contact employee's health care providers in order to authenticate or clarify medical certification. Also, amend 29 C.F.R. Part 825.308 so that employers may require employees to provide certification for each absence.

Economic Impact: Making the aforementioned changes will help ensure that only those leave requests that actually meet the statute's criteria are designated as FMLA leave, thus reducing FMLA-related costs.

Family Medical Leave Act (FMLA):
Requests for and Designation of Leave

Regulating Agency: Department of Labor (DOL)

Citation: 29 C.F.R. Parts 825.208 & 825.302(c)

Authority: 29 U.S.C. Section 2654

Description of the Problem:

Under the existing regulations, an employee requesting leave does not have *to* expressly refer to the FMLA for the leave to qualify under the Act. Rather, the employee need only request the time off and provide the employer with a reason for the requested leave. If the employee does not provide enough information for the employer to determine whether the leave is FMLA qualifying, the employer must follow up with the employee in order to get the necessary information.

Once the request has been made, the employer only has *two* days to determine whether the leave is FMLA qualifying and notify the employee whether or not the leave qualifies and will be counted against the employee's FMLA leave entitlement.

Placing the entire burden on employers to determine if leave requests are FMLA qualifying is inefficient and unreasonable. First of all, it requires employers to **pry** unnecessarily into an employee's private matters. Furthermore, under the current regulations and an applicable DOL opinion letter, absences related to almost any employee or family member illness – no matter how minor – may qualify for FMLA leave. Consequently, employers must investigate almost any request for leave. These investigations can be particularly difficult and time consuming because the regulations make it extremely difficult for employers to contact the employee's or family member's health care provider to obtain clarification or authentication of certifications.

Proposed Solution: Amend 29 C.F.R. Parts 825.208 & 825.302(c) so that the employee must request the leave be designated as FMLA leave in order to invoke the protections of the Act.

Economic Impact: Requiring the employee to request that leave be designated as FMLA leave in order to invoke the protections of the Act will reduce employer costs as a result of investigations into whether each and every employee leave request is FMLA qualifying.

Family Medical Leave Act (FMLA):
Inability to Work

Regulating Agency: Department of Labor (DOL)

Citation: 29 C.F.R. Part 825.114

Authority: 29 U.S.C. Section 2654

Description of the Problem:

Under the FMLA, a qualifying employee may take FMLA leave because he or she is "unable to perform the functions" of his or her job. The intent of the provision was to permit employees who could not work because of a severe illness to take leave without fear of losing their job.

The DOL regulation interpreting the provision, however, is overly broad and contrary to the plan language and the intent of the statute. Specifically, it permits leave when the employee cannot perform any one of the essential functions of the job, effectively limiting an employer's ability to reduce costly employee absences by putting employees with medical restrictions on light duty.

Proposed Solution: Amend 29 C.F.R. Part 825.114 so that it limits FMLA leave to situations where the serious health condition prevents the employee from performing the majority of essential functions of his or her position, rather than just one function.

Economic Impact: Permitting employers to put employees with medical restrictions on "light duty" rather than on leave, when appropriate, will reduce costs associated with employee absences.

Family Medical Leave Act (FMLA):
Attendance Awards

Regulating Agency: Department of Labor (DOL)

Citation: **29** C.F.R. Parts 825.215(c) & 825.220(c)

Authority: 29 **U.S.C** Section 2654

Description of the Problem:

The statute states that leave taken under the FMLA "shall not result in the loss of any employment benefits accrued prior to the date on which the leave commenced."

The regulations include among the protected benefits bonuses for perfect attendance. Thus, under the regulations, even though an employee is absent for up to twelve weeks out of the year on FMLA leave, he or she still is entitled to a perfect attendance award. Ths essentially renders such awards meaningless, and as a result many employers have abandoned attendance reward programs.

Proposed Solution: Amend 29 C.F.R. Parts 825.215(c) & 825.220(c) so that perfect attendance programs are not considered a protected FMLA benefit.

Economic Impact: Unable to ascertain at this time.

Birth and Adoption Leave and Unemployment Insurance

Regulating Agency: Department of Labor (DOL)

Citation: 29 C.F.R. Parts 604.1 *et seq.*

Authority: 42 U.S.C. Sections 503(a)(2)-(3) and 1302(a); 26 U.S.C. Sections 3304(a)(1)-(4) and 3306

Description of the Problem:

The regulations allow states to pay unemployment compensation out of the state's unemployment insurance trust funds to parents who take leave following the birth or adoption of a child. State unemployment insurance trust funds are financed out of employer payroll taxes. The primary purpose of unemployment insurance is to provide a safety net for workers who lose their jobs while they seek new employment. Federal law requires that state unemployment taxes be used solely for the payment of unemployment compensation.

Permitting states to use unemployment funds to compensate persons who are currently employed- regardless of whether those persons are on leave or not- is clearly inconsistent with this federal requirement as well the primary purpose of unemployment insurance.

Furthermore, states should not be allowed to erode unemployment funds by using them to compensate individuals who are not unemployed. It jeopardizes the solvency of unemployment funds and inevitably will result in a need for massive tax increases

Proposed Solution: Rescind 29 C.F.R. Parts 604.1 *et seq.*

Economic Impact: Impact depends on how many states chose to permit use of unemployment funds for this purpose.

Fair Labor Standards Act (FLSA) "541":
White Collar Exemptions to Overtime Requirements

Regulating Agency: Department of Labor (DOL)

Citation: 29 C.F.R. Parts 541.1 *et* seg.

Authority: 29 U.S.C. Section 213

Description of the Problem:

In 1938, Congress enacted the FLSA to ensure that employees obtained a fair day's pay for a fair day's work. Among other things, the Act sets a minimum wage and requires employers to pay time and half to employees who work over forty hours a week.

When it passed the FLSA, Congress recognized that "white collar" employees did not need the protections of the Act, and therefore, exempted "any employee employed in a bona fide executive, administrative or professional capacity" from the Act's minimum wage and overtime requirements. Congress did not define these terms within the Act, leaving that task to DOL.

Unfortunately, DOL has not substantially revised the regulations since 1954. Consequently, the regulatory definition of "white collar" employee is frequently inconsistent with the modern notion of the term, causing much confusion and litigation. Indeed, many highly compensated and highly skilled employees have been classified as "nonexempt" under the regulations, even though classifying them as such is inconsistent with the intent of the statute.

In addition, the regulations impose many restrictions on how employers compensate "exempt" employees (otherwise known as the "salary basis rest"). Among other things, these restrictions prevent employers from offering employees more flexible work schedules and from using essential disciplinary tools, such as one-day suspensions without pay.

Many of these problems were brought to DOL's attention by a 1999 GAO study.

Proposed Solution: Amend 29 C.F.R. Parts 541.1 *et seq.* so the criteria for determining who is "exempt" from overtime requirements is more reflective of the modern workplace. In addition, change the salary basis test so it permits employers to deduct pay for partial day absences and grants employers more flexibility to use suspensions without pay as a disciplinary measure.

Economic Impact: The changes should reduce litigation associated with misclassifications and loss of exemptions because of violations of the salary basis test. The exact benefit will depend on the specific changes.

Employee Retirement Income Security Act:
Claims Procedures

Regulating Agency:	Department of Labor, (DOL) Pension and Welfare Benefits Administration (PWBA)
Citation:	29 C.F.R. Part 2560
Authority:	**29** U.S.C. Section 1135

Description of the Problem:

The regulations, which create procedures for claims made under the Employee Retirement Income Security Act (ERISA) plans, went into effect January 20,2001 and require compliance by July 1,2002.

Contrary to the principles of federal preemption and uniformity that are central to both ERISA and President Bush's "Principles for a Patients' Bill of Rights," the regulations, in many instances, permit state laws to govern issues related claims under ERISA plans. The regulations are also problematic in that they prohibit mandatory arbitration, which is clearly allowed under current law. Lastly, both the United States House of Representatives and United States Senate have passed patient's rights legislation that contains vastly different requirements on these same claims procedures. Therefore, the DOL regulations require compliance with the new standard beginning July 1,2002, but should patients' rights legislation become law this year, a wholly different standard would become law shortly thereafter. It would be an incredible waste of resources for employers and plan administrators to make the costly adjustments to the new regulatory standards, only to make second adjustments to completely different standards shortly thereafter in order to comply with the patients' rights legislation.

Proposed Solution: Suspend the current effective dates pending resolution of the patients' rights legislative debate, seek additional comment on these issues, and proceed with new rulemaking.

Economic Impact: Making the aforementioned changes will help reduce costs related to claims procedures by ensuring that costly adjustments to the new regulatory standards only happen once, rather than twice, in the next few years.

H-1B LCA

Regulating Agency: Department of Labor (DOL)

Citation: 20 C.F.R. Parts 655 & 656

Authority: 8 U.S.C. Sections 1101 *et. seq.*

Description of the Problem:

The regulation goes significantly beyond the scope of the principal authorizing statutes, the Immigration Act of 1990, the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) and the American Competitiveness in the 21st Century Act (AC21), and ignores legislative history and court precedent. The legislation imposes significant logistical and practical burdens on employers and, in doing so, circumvents the stated intent of the authorizing statutes to streamline the process. Finally, the regulations exhibit an overall disdain to the program the agency is charged with regulating.

The regulation is particularly problematic with respect to the treatment of traveling employees, increased paperwork requirements, wage and benefit issues, ignorance and interference with normal business practices and legal commercial transactions.

Lastly, the promulgation of the rules violated the Administrative Procedure Act and the Paperwork Reduction Act.

Proposed Solution: Rescind the regulations and issue a new Notice of Proposed Rulemaking in order to create new regulations which better address the aforementioned problems and the volumes of comments received in response to the Interim Final Rule.

Economic Impact: Approximately 200,000 H-1B petitions are filed annually by employers seeking to initially hire H-1B nonimmigrants or extend or change the status of existing H-1B employees. Addressing the aforementioned concerns would greatly reduce costs associate with the process.

Davis-Bacon Wage Surveys

Regulating Agency: Department of Labor (DOL)

Citation: 29 C.F.R. Parts 5.1, *et seq.*

Authority: **40** U.S.C. Section 276a

Description of the Problem:

The Davis-Bacon Act (DBA) requires employers on federal construction projects to pay wages at or above the wage rate DOL determines is the prevailing wage in the geographic area of the project. In January 1995, federal and state labor officials in Oklahoma received reports of substantial inaccuracies in wage reports relied upon by the DOL in determining the prevailing wage for certain construction projects in the Oklahoma City area. Resulting criminal proceedings helped raise the issue of inaccurate wage determinations to the national level and subsequent General Accounting Office (GAO) investigations and reports revealed substantial deficiencies in the DOL procedures used to determine DBA prevailing wages.

Pressure from the authorizing and appropriations committees in both the United States House of Representatives and the United States Senate, relying in large part on the GAO investigations and reports, led the DOL to undertake significant changes to the entire wage determination process. Those changes included comprehensive surveys, redesigned contractor wage reporting forms, verifications of information reported to DOL, improved technology (hardware and software) for digesting and reporting collected wage information, and reliance on the Bureau of Labor Statistics (BLS) to collect the relevant wage information. The foregoing measures were being implemented in May 1999 when the GAO issued another report on the issue. The GAO noted in the 1999 report that the DOL would have to determine which of the above efforts, or a combination of them, would yield a cost-effective means of establishing the appropriate DBA prevailing wage in a timely and accurate manner before it could amend the DBA regulations.

Proposed Solution: DOL should now have sufficient information on the measures implemented in the late 1990s to issue proposed amendments to the federal regulations governing its prevailing wage determinations. The DOL should be encouraged to do so.

Estimate of Economic Impact: The GAO reports referred to above (GAO/HEHS- 96-130, GAO/T-HEHS-96-166, GAO/HEHS-99-21, GAO-HEHS-99-97) describe in detail the economic consequences of promulgating prevailing wage rates based upon inaccurate data. (See especially GAO/T-HEHS-96-166, pp. 7-8.).

OSHA Sling Standard

Regulating Agency: Department of Labor (DOL), Occupational Safety and Health Administration (OSHA)

Citation: 29 C.F.R. Part 1910.184

Authority: 29 U.S.C. Section 655(b)(1) - (5)

Description of the Problem:

Companies in the lifting, rigging and load security industry typically use slings made of wire rope to lift objects by crane. The current OSHA standard, nearly 30 years old, is considered by many in the industry to be dangerously outmoded, especially when compared to an applicable consensus standard ("B30.9") promulgated by the American Society of Mechanical Engineers (ASME). OSHA inspectors continue to issue citations to companies for failure to meet the outmoded OSHA sling standard even though they meet the requirements of the B30.9 standard. Companies in the industry have made numerous requests of OSHA to issue an updated sling standard. OSHA has not honored this request.

The companies, through their trade associations (Associated Wire Rope Fabricators (AWRF) and the National Association of Chain Manufacturers (NACM)) have recently asked the United States House of Representatives Science Committee, Subcommittee on Environment, Technology & Standards to conduct an oversight investigation of this matter.

Proposed Solution: Promptly commence the rulemaking process to develop a new sling standard, and issue a public enforcement notice citing the ASME B30.9 standard as the sole basis for OSHA citations regarding sling safety until the revised OSHA sling standard is implemented.

Estimate of Economic Impact: The affected companies and their employees will no longer be required to adhere to a dangerously outmoded standard, thus saving noticeable sums in OSHA-inflicted penalties and, more importantly, enhancing the inestimable value of the affected employees' safety.

Waivers Under
Age Discrimination in Employment Act (ADEA)

Regulating Agency: Equal Employment Opportunity Commission (EEOC)

Citation: 29 C.F.R. Part 1625.23

Authority: 29 U.S.C. Section 628

Description of the Problem:

Under the Older Workers Benefits Protection Act of 1990 (OWBPA), a waiver of an individual's right to sue under the ADEA is only valid if it meets certain criteria designed to ensure the waiver is knowing and voluntary. The Supreme Court has held that where there is no question that the waiver agreement does not meet the criteria, an employee may bring action in court challenging a waiver without "tendering back" the consideration that person received in exchange for signing the waiver. The Court did not address whether an employee must tender back the consideration before challenging an agreement that, on its face, meets the OWBPA criteria, or whether employers can include provisions within waivers requiring employees *to* tender back consideration before challenging the waiver.

The regulation, nonetheless, specifically states that a person can never be required to tendered back the consideration before challenging the waiver in court. In addition, the regulation states ADEA waiver agreements may not include provisions that impose any penalties on employees or former employees for breaching the agreement by filing a suit challenging the waiver.

The regulation eviscerates ADEA waiver agreements by permitting employees and former employees to both sue employers for under the ADEA while simultaneously keeping money they received in exchange for a promise not to file such a suit. Consequently, employers are less likely to use ADEA waiver agreements, thus increasing the probability of costly litigation.

Proposed Solution: Amend 29 C.F.R. Part 1625.23 so that it only permits an employee to bring action in court challenging a waiver without "tendering back" the consideration where the waiver is facially invalid under OWBPA.

Estimate of Economic Impact: The suggested changes would increase the likelihood employers would use waivers and thus reduce the likelihood of costly litigation.

OFCCP
***AAPs* and EO Survey**

Regulating Agency: Department of Labor (DOL), Office of Federal Contract Compliance Programs (OFFCP)

Citation: 41 C.F.R. Part 60-2

Authority: Executive Order 11246

Description of the Problem:

A) In the past, contractors have been permitted to develop affirmative action programs (AAPs) consistent with the contractor's management system, often including multiple physical establishments under one AAP. The 2000 revisions of the requirements for federal contractors, however, require AAPs for each physical establishment, unless the contractor reaches agreement providing otherwise with OFCCP. As a result of the revisions, contractors are forced to create, maintain and report on many more AAPs than they had prior to the revisions, unless the contractor comes to an alternative agreement with OFCCP. Unfortunately, negotiating an agreement with the overburdened agency can be a slow and arduous process.

B) OFCCP's Equal Opportunity Survey is sent out to approximately half of the 99,944 federal supply and service contractors. Each contractor receiving the survey has 45 calendar days to complete the form and return it to OFCCP. The survey requires contractors provide general information on each establishment's equal employment opportunity and AAP activities. It also requires combined personnel activity information (applications, new hires, terminations, promotions, etc.) for each Employer Information Report EEO-1 (EEO-1) category by gender, race, and ethnicity as well as combined compensation data for each EEO-1 category for minorities and non-minorities by gender. There are far less burdensome methods of increasing compliance with equal employment requirements.

C) The survey's requirement that employers compile data on applicants has proven particularly burdensome. Applicant, under the survey, is any "person who has indicated an interest in being considered for hiring, promotion, or other employment opportunity." The definition makes no exceptions for persons who apply, but are clearly not qualified for the position sought or persons who apply for positions that are already filled. In addition, the survey fails to take into account that in the age of the Internet, employers may receive hundreds of unsolicited resumes via e-mail every week.

Proposed Solution:

A) Allow companies to report as they always have, by functional groupings. Also develop guidelines for functional AAPs.

B) Eliminate, or greatly simplify and shorten the survey.

C) Define applicant as a person who applies for a specific position and meets the basic qualifications of that position.

Estimate of Economic Impact: Unable to determine at this time.

Open Network Architecture Reporting Requirements

Regulating Agency: Federal Communications Commission

Citation: (2 FCC Rcd. Vol 10, 3035) FCC 87-102, 3/87, CC Docket 85-229,3057 @ 156; FCC 91-382, 11/91, CC Docket 88-2,7677 @ Appendix B

Authority: (104 FCC 2d 958) FCC 86-252, 5/86, CC Docket 85-229, @ Introduction.1

Description of the Problem:

In order to govern the Bell Operating Companies (BOCs) participation in the enhanced services marketplace, the FCC established a regulatory framework of nonstructural safeguards by imposing Comparably Efficient Interconnection (CEI) and Open Network Architecture (ONA) requirements as conditions for the provision of enhanced services by the BOCs. The first reports were filed February 1,1988. In February 1999, the CEI filing requirement was eliminated as being "no longer in the public interest", however, the ONA requirements remain.

ONA has three separate reporting requirements: (1) An annual report of forecasted ONA deployment; (2) a semi-annual matrix report; and (3) quarterly reports for installation and maintenance monitoring.

For the semi-annual report, BOCs must file with the FCC a consolidated nationwide matrix of BOC ONA services and state and federal tariffs. Each BOC files exactly the same report that is prepared by a private contractor. Each BOC must pay the contractor to aggregate the information provided by the BOCs and distribute it back to the BOCs, for each BOC to file with the FCC. An ex parte presentation to the FCC in 1992 confirmed that each BOC was to file the same report; in other words, the report prepared by the contractor was filed 7 times. The redundant filing of this report serves no purpose.

Proposed Solution: The requirement that all BOCs file separate semi-annual matrix reports should be withdrawn. BOCs should be permitted to separately file reports with the Commission, which can subsequently consolidate the information.

Economic Impact: Each BOC is charged thousands of dollars annually for the common report and each BOC incurs additional expenses to file the report. These expenses would be eliminated if the consolidated filing requirement were withdrawn.

GUIDANCE

Fair Credit Reporting Act (FCRA) & Workplace Investigations

Regulating Agency: Federal Trade Commission (FTC)

Citation: FTC opinion letter from staff attorney, Division of Financial Practices, Christopher W. Keller to Judy Vail, Esq. (April 5, 1999); FTC opinion letter from David Medine, FTC Associate Director, Division of Financial Practices, to Susan R. Meisinger (August 31,1999)

Authority: 15 U.S.C. Sections 1681 *et seq.*

Description of the Problem:

In the two above-referenced letters, FTC staff claim that organizations that regularly investigate workplace misconduct for employers, such as private investigators, consultants or law firms, are "consumer reporting agencies" under FCRA and, therefore, investigations conducted by these organizations must comply with FCRA's notice and disclosure requirements. Those requirements include: notice to the employee of the investigation; the employee's consent prior to the investigation; providing the employee with a description of the nature and scope of the proposed investigation; if the employee requests it, a copy of the full, un-redacted investigative report; and notice to the employee of his or her rights under FCRA prior to taking any adverse employment action.

Because it is virtually impossible to conduct an investigation while complying with these requirements and, because employers and investigators face unlimited liability (including punitive damages) for any compliance mistakes, the letters deter employers from using experienced and objective outside organizations to investigate suspected workplace violence, employment discrimination and harassment, securities violations, theft or other workplace misconduct. This perverse incentive conflicts squarely with the advise of courts and administrative agencies, both of which have strongly encouraged employers to use experienced outside organizations to perform workplace investigations.

While the letters affect all employers, they are particularly damaging to small and medium sized companies, which often do not have the in-house resources to conduct their own investigations and, therefore, depend on outside help.

There is no evidence in FCRA's text or legislative history that it was intended to apply to investigations of employee misconduct and the letters misconstrue the Act.

Proposed Solution: Rescind the letters and any similar FTC guidance and letters.

Estimate of Economic Impact: The changes would eliminate the potential of unnecessary litigation stemming from the FTC's misinterpretation of FCRA, thus reducing costly litigation. In addition, the letters deter employers from using experienced outside organizations to perform thorough investigations. The information gleaned from such investigations often enables employers to take measures to avoid future problems in the workplace, including harassment, violence and theft, which can cause employers, employees and the general public loss of life, piece of mind and money.

Environmental Justice Investigation Guidance

Regulating Agency: Environmental Protection Agency

Citation: Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits (epa.gov/civilrights/docs/interim.pdf) (February 5, 1998); See also, Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits. 65 FR 39682 (June27,2000).

Authority: Executive Order 12898

Description of the Problem:
In February 1998, the Environmental Protection Agency (EPA) issued its Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Interim Guidance). The Interim Guidance seeks *to* prevent the industrial development of a community based upon its racial or economic make-up. To implement this program, EPA compels states, which issue a vast majority of EPA permits, to deny or revoke operating permits in areas with large percentages of minority or lower income residents.

The Interim Guidance allows administrative complaints to be brought against a state or local government at any stage of the permitting process, thus creating almost total uncertainty for any facility that is located in a community that has racial or low-income characteristics. The Guidance applies to all state and local governments. By being able to suspend, annul or terminate federal funding for all environmental programs administered by the state or local government for failure to follow the Interim Guidance, EPA imposes conditions in environmental permits that are in addition to conditions imposed by the substantive environmental laws. Yet EPA does so with no statutory authority to implement this program, relying instead on Executive Order 12898 for authority.

The Interim Guidance included a request for public comment, but was published and operative prior to any formal public input. EPA published a Draft Revised Guidance – rather than a proposed regulation -- in June 2000. The Draft Revised Guidance has not been finalized and the Interim Guidance has not been superseded.

Proposed Solution: EPA should immediately withdraw the Interim Guidance. EPA should further cease any efforts to finalize the Draft Revised Guidance. If the agency believes environmental justice principles, in addition to substantive environmental laws, should be applied to the permitting process, EPA should propose regulations under the procedures set forth in the Administrative Procedure Act.

Economic Impact: EPA's actions directly contradict efforts designed to encourage business to locate in inner cities and underdeveloped areas, costing residents of such communities badly needed job opportunities.

Administration of Federal Prison Industries

Regulating Agency: Department of Justice (DOJ)

Citation: DOJ memorandum from Criminal Division Chef, Mary Spearling (January 1994); DOJ memorandums from Federal Bureau of Prisons General Counsel Ira Kirschbaum (November 1997; February 1998)

Authority: 18 U.S.C. 1761 (a) and 4122 (a)

Description of the Problem:

Federal Prison Industries (FPI) originating statute clearly states that the market for prison commodities is other prisons and federal agencies, but 'not for sale to the public in competition with the private sector.' Today, FPI ignores this seemingly clear prohibition by selling services into the commercial market. The decision was made by FPIs Board based on a series of internal Justice Department legal 'opinions' that found that expansion into the commercial market is not in conflict with FPIs enabling legislation. Internal memoranda serves as the basis to allow the United States government to sell commercial services in competition with law abiding, taxpaying businesses, using prison labor being paid $1.35 per hour or less.

The FPI Board reasoned that Congressional debate on *this* provision focused mainly on products; therefore it was not Congressional intent to prohibit FPI from entering the commercial services market. This decision is arbitrary, capricious and beyond the discretion of the Board. It is a reversal of more than sixty years of public policy and it is an expansion that cannot and should not take place by administrative fiat but rather by the passage of a legislative mandate that is a matter of public record.

Proposed Solution: Rescind DOJ memoranda.

Economic Impact: The private sector fuels the economy. The recognition that the DOJ memo is not binding would ensure the private sector, especially small and medium size businesses, would not be adversely impacted by direct competition from a government entity in the commercial market.

EPA Resource Conservation and Recovery Act Guidance

Regulating Agency: Environmental Protection Agency

Citation: Guidance set forth in July 1998 "Human Health Risk Assessment Protocol" (epa.gov/epaoswer/hazwaste/combust/risk.htm); August 1999 "Screening Level Ecological Risk Assessment Protocol for Hazardous Waste Combustion Facilities" (epa.gov/epaoswer/hazwaste/combust.ecorisk.htm); July 2001 "Risk Bum Guidance" (epa.gov/epaoswer/hazwaste/combust/burn.pdf) and other documents

Authority: Resource Conservation and Recovery Act (RCRA), 42 U.S.C. $6901 *et seq.;* RCRA §3005(c); 40 CFR part 270

Description of the Problem:
Certain businesses that burn hazardous waste fuel are subject to emission standards and other operating requirements contained in EPA regulations issued under the Resource Conservation and Recovery Act (RCRA). The regulations contain provisions requiring, under some circumstances and as a permit condition, site-specific risk assessments (SSRAs).

RCRA §3005(b) provides that each application for a permit under the section (for treatment, storage, or disposal of hazardous waste) "shall contain such information as may be required under *regulations* promulgated by the Administrator." In 1984, Congress added an "omnibus" provision to RCRA (§3005(c), providing that permits "shall contain such terms and conditions as the Administrator determines necessary" to protect health and environment.

EPA's regulations under this section merely parrot the statutory language with no further detail. Instead, EPA has issued thousands of pages of guidance documents and memoranda requiring expensive SSRAs – as a condition to permit issuance – under a variety of circumstances. The guidance require the performance of indirect exposure and ecological risk assessments, even though neither the statute nor the regulations discuss such assessments. Despite the fact that the SSRA requirements are contained in a confusing pattern of documents over a number of years, EPA refuses to issue permits if the requirements are not met. Moreover, nowhere in the current guidance does the agency state the threshold at which a level of projected risk will result in a permit denial or greater emissions controls.

Proposed Solution: Immediate repeal all guidance purporting to implement SSRA requirements. After repeal, EPA should assess the need to require SSRAs and, if necessary, undertake a formal rulemaking process under the Administrative Procedure Act.

Economic Impact: Risk assessments required to be performed under the guidance documents can average $500,000 per facility. Withdrawal of the guidance would eliminate this expense unless and until the requirements are properly implemented through a formal rulemaking.

New Source Review

Regulating Agency:	Environmental Protection Agency
Citation:	Guidance on the Appropriate Injunctive Relief for Violations of Major New Source Review Requirements (November 17,1998)
Authority:	42 U.S.C. §§ 7411 (a)(2), (4).

Description of the Problem:

The Clean Air Act (CAA) provides for standards of performance for new stationary sources. **42** U.S.C. § 7411. EPA established a regulatory exclusion from the definition of modification under the new source review (NSR) program, providing that "[a] physical change or change in the method of operation shall not include: (a) Routine maintenance, repair and replacement. . . ." 40 C.F.R. § 52.21(b)(2)(iii)(*a*). At the time these regulations were promulgated, EPA did not provide any significant explanation of this exclusion.

In 1998, EPA decided to take a more aggressive enforcement position in NSR cases. Guidance *on the Appropriate Injunctive Relief for* Violations *of Major* New Source Review Requirements, Memorandum from Eric V. Schaeffer, Director, Office of Regulatory Enforcement to Regional Counsels, et **al.** (November 17,1998). This memorandum, which was not subject to notice and comment, has been interpreted as narrowing the "routine maintenance" exclusion to frequent, traditional, and comparatively inexpensive repairs to maintain existing equipment. "his more aggressive posture was reflected in the proceedings against utilities beginning in November 1999. The new, narrower exclusion has effectively modified a regulation without notice and comment rulemaking.

Proposed Solution: Adopt a new exclusion from the definition of modification by regulation.

Economic Impact: The enforcement memorandum has been used to force utilities to spend hundreds of millions of dollars to meet new performance standards.

Spent Catalysts

Regulating Agency: Environmental Protection Agency

Citation: Letter to Keith Bergseid from Elizabeth Cotsworth (June1,2000); http://yosemite.epa.gov/osw/rcra.nsf/Documents/36FCE39649B91C2F85256936006F6BBF

Authority: 40 C.F.R. $261.32

Description of the Problem:

The Office of Solid Waste and Emergency Response used an unpublished letter to establish an agency interpretation of a regulation. A company official requested an interpretation of the regulatory status of hydroprocessing catalyst under the Resource Conservation and Recovery Act (RCRA). 40 C.F.R. $261.32. EPA opined that the spent catalysts should be classified as spent hydrotreating and hydrorefining wastes, which are subject to hazardous waste regulation. EPA, which has now disseminated the letter on its website, has presented this opinion to be a definitive and enforceable determination of this classification

This is one of numerous examples where EPA has issued unpublished opinion letters, which are then treated as final agency interpretations of its regulations.

Proposed Solution: Require publication of letters establishing an agency interpretation. The cited letter is, effectively, a regulation, and should be subject to notice and comment rulemaking before EPA uses it in enforcement proceedings.

Economic Impact: Unable to determine at this time.

PROPOSED RULES

Permanent Labor Certification

Regulating Agency: Department of Labor (DOL)

Citation: Proposed Rule, 67 Fed. Reg. 30466 (May 6,2002), RIN 1205-AA66, amending 20 C.F.R. Parts 655 & 656

Authority: 8 U.S.C. Sections 1101 *et. seq.*

Description of the Problem:

Since the conception of the "attestation-type" reengineering of the program, DOL has been informed that any reengineering that does not address the underlying assumptions and concepts of individual recruitment as a labor market test, the issues of prevailing wage determinations, and that ignores the real-world recruitment practices of the business community would be problematic. The proposed rule; while creating a new, streamlined attestation-based certification system, does not adequately address those other concerns. .

Proposed Solution: Promulgate final regulations that use a broader approach to the issue of certifying the unavailability of U.S. workers for positions for which foreign nationals are sponsored, including integrating concepts such as those outlined in the Labor Market Information Pilot Program enacted in the Immigration Act of 1990 but never implemented by DOL. The Department could improve the current proposed rule also by incorporating practices it accepts in the current Reduction in Recruitment program that has been operating successfully for several years, and recognizing legitimate employer recruitment efforts as a baseline.

Economic Impact: Unable to determine at this time.

Admission Period For B-1/B-2 Visitors

Regulating Agency:	Department of Justice, Immigration and Naturalization Service (INS)
Citation:	Proposed Rule, 67 Fed. Reg. 18065 (April 12, 2002), RIN 1115-AG43, 8 C.F.R. Parts 214, 235 & 248
Authority:	8 U.S.C. Sections 1101 *et. seq.*

Description of the Problem:

The proposed rule will have a significant adverse impact on business, particularly on the travel and tourism industries. The rules will provide extreme latitude for immigration inspectors to determine the period of stay for visitors, and will limit the ability of visitors to apply for extension of stay, except in cases of "unforeseen circumstances." The uncertainty of whether a longer than 30-day period of stay will be granted will deter some travelers from venturing to the U.S., and will limit the plans of others to the 30 day period – resulting in potentially millions of dollars in lost tourist revenue. The rule also will negatively impact the adult children and parents of temporary workers in the U.S., who have been historically permitted to use the B-2 category to accompany a temporary worker to the U.S.

Proposed Solution: The final rule should clarify the circumstances under which individuals may be admitted for periods longer than 30 days and provide an opportunity to appeal the admission decisions of the immigration inspectors. The final rule should also recognize the circumstances of other categories of long-term visitors including family members of temporary workers.

Economic Impact: One estimate from the Department of Commerce is that visitors who stay longer than 30 days spend an average of $4 billion annually in the U.S.

OSHA Recordkeeping

Regulating Agency: Department of Labor (DOL), Occupational Safety and Health Administration (OSHA)

Citation: 29 C.F.R. Part 1904

Authority: 29 U.S.C. Section 655(b)(1) - (5)

Description of the Problem:

A) The proposed change to the hearing loss threshold is unreasonable and unrealistic and should not be implemented.

B) The definition of musculoskeletal disorder (MSD) must account for the work relatedness, or lack thereof, of the disorder. According to the Congressionally-mandated National Academy of Sciences (NAS) report on musculoskeletal disorders: "None of the common musculoskeletal disorders is uniquely caused by work exposures," ***Executive Summary*** at 1, and "[P]hysical activities outside the workplace, including, for example, those deriving from domestic responsibilities in the home, physical fitness programs, and others are also capable on one hand of inducing musculoskeletal injury and on the other of affecting the course of such injuries incurred at the workplace." *Id.* at 1-5.

C) There are several other issues raised by the new standard including work relatedness, the definitions of injury and illness and changes to the recordkeeping methods that are of concern.

Proposed Solution:

A) Maintain the current hearing loss thresholds, and definition of "material impairment" because: 1) they are scientifically and medically sound; 2) well-known and understood in the regulated industries; 3) well-known and well-understood by occupational safety and health professionals, and; **4)** ascertainable with current widely-used equipment and testing techniques.

B) Include in the definition of "musculoskeletal disorder" the likelihood that the injury may have been caused in whole or significant part by, and/or significantly exacerbated by, factors unrelated to the afflicted employee's work-related activities. Accordingly, absent a significant and ascertainable degree of work-relatedness, the MSD should not be recorded as a workplace injury or illness.

C) Re-examine the changes contained in the new standard to ensure they are an efficient method for achieving OSHA's goals.

Estimate of Economic Impact:

A) The proposed changes to the hearing loss recording criteria are vast and constitute complete revision of OSHA's approach to safeguarding employees' hearing. As such, the changes will necessitate extraordinary expenditures to establish and maintain an entirely new approach to measuring hearing loss, even though the current time-honored standard provides ample safeguards against hearing loss.

(continued)

OSHA Recordkeeping (Continued)

B) The recently-announced OSHA ergonomics program includes measures to address the many glaring gaps (acknowledged and identified by the National Academy of Sciences) in the scientific and medical knowledge concerning MSDs, their work-relatedness, and feasible means of preventing or correcting them. Until the knowledge base on ergonomics and MSDs is more reliable, an estimate of the economic costs, and feasible means of addressing them, is not possible.

C) Unable to determine at this time.

Employer Information Report EEO-1

Regulating Agency:	Equal Employment Opportunity Commission (EEOC)
Citation:	29 C.F.R. Part 1602.7
Authority:	42 U.S.C. Sections 2000e-8, 2000e-12; 44 U.S.C. section 3501 *et seq.*; 42 U.S.C. Section 12117

Description of the Problem:

The regulation requires every employer subject to Title VII of the Civil Rights Act of 1964 that has 100 or more employees, or is a federal government contractor meeting certain criteria, to annually file an Employer Information Report EEO-1 (EEO-1 Report) with the EEOC. Currently, employers must report employee data in nine occupational categories, subdivided by five racial/ethnicity categories, which are further subdivided by gender. The current form expires in November 2002. Proposed changes to the form would expand the occupational and the racial/ethnicity categories, increasing the time and cost associated with filing the EEO-1. While some of these changes may be necessary to ensure the EEO-1 data is reflective of the workforce, many of them are unnecessary and over-burdensome.

Proposed Solution: Make as few changes that increase employer burdens to the form as possible.

Estimate of Economic Impact: Unable to determine at this time.

Timeline: Power Mobility Issues

- November 1995 – OMB and HCFA embark on a significant industry consultation aimed at standardization and streamlining of the Medicare Certificates of Medical Necessity for Durable Medical Equipment (Tab A);

- February to June 1999 -- Correspondence from Stuart Kurlander (Latham & Watkins) re: Region B practices in screening claims for powered wheelchairs (Tab B);

    - HCFA responds to several of the letters above in an April 27, 1999 letter (Tab B);

- October 1, 1999? -- Desk Officer Meeting with Steve Azia (Powell, Goldstein Frazer & Murphy and client, Scooter Store (Tab C);

- October 5, 1999 – Powell, Goldstein, Frazer, & Murphy submits PRA petition to OMB on behalf of Scooter Store describing practices of the Palmetto Region C DMERC (Tab C);

- October 7, 1999 – Meeting with Powell, Goldstein, Frazer & Murphy to discuss October 5th petition. In consultation with OMB, HCFA promptly resolved the matter;

- February 22,2000 --- Duane, Moms & Heckscher files follow-up letter with OMB (Tab C);

- April 27,2000 — Due to continuing interest/concerns in DMERC reviews of CMNs, HCFA/OMB target DME Certificates of Medical Necessity as an issue for discussion at the Administration's Town Meetings (Tab D);

- October 2000 – PRA coverage of the Medicare CMNs expires;

- June 19,2001 – Power Mobility Coalition meets with OMB staff to discuss ongoing concerns (Tab E);

- July 25,2001 – Administrator John Graham testifies before the House Committee on Small Business (Tab F);

- August 3,2001 --- OMB receives four sec. 3517(b) PRA petitions (Tab G);

- August 21, 2001 – OMB receives another 3517(b) petition (Tab H);

- September 21,2001 – OMB and HHS meet with the Power Mobility Coalition to discuss petitions (Tab I);

- December 21,2001 – OMB receives another 3517(b) petition (Tab J);

- January 10,2002 – OMB staff meet with Ruben King-Shaw, Dep. Adm. CMS, to follow-up on petitions;

- March 4,2002 – CMS publishes PRA notice in the Federal Register soliciting comment on reinstatement of approval of the CMNs; and

- May 9,2002 – OMB formally responds to the six petitions above (Tab N).