June 1, 2012

The Honorable Darrell Issa  
Chairman  
Committee on Oversight and Government Reform  
U.S. House of Representatives  
2157 Rayburn House Office Building Washington, D.C. 20515

RE: Sample of Impact of Regulations and Rule Interpretations on Metalworking Manufacturers

Dear Chairman Issa:

On behalf of the National Tooling and Machining Association (NTMA), the Precision Machined Products Association (PMPA), and the Precision Metalforming Association (PMA), please accept these comments in response to your request for examples of ineffective and burdensome regulations and rules interpretations and their impact on metalworking manufacturers in the U.S.

Our members are small and medium-sized manufacturers, averaging less than 75 employees and are typically family-owned, the majority of which are Subchapter S corporations. As you know, regulations impact small businesses much greater than large corporations who have the resources to reduce the burden on their productivity. Many of the guidance opinions issued by federal agencies are overly broad, encompassing production activity not even a focus of the regulation. Increasingly, over the past several years, instead of issuing a new regulation to cover an activity, an agency will issue a new interpretation of an existing rule. The slightest “interpretation” change can halt the production of a manufacturer and cost the employer thousands of dollars a day.

Of particular concern is the increased lack of cooperation and partnership between businesses and agency personnel. For example, for years metalworking industries have maintained an excellent partnership through the OSHA Alliance Program where government, trade associations and business owners come together to improve worker safety and health. However, in the past couple of years, OSHA has reduced the level of cooperation between government regulators and manufacturers, an alarming trend that reduces the Agency’s effectiveness while injuring manufacturers’ ability to compete.

Small and medium-sized middle-market manufacturers such as our member companies are often trapped between their much larger customers and suppliers and government regulators. Even if a regulation does not specifically target small businesses or the metalworking industry, these businesses and their employees still feel the trickledown effect. Broader government policies, such as regulating large emitters of greenhouse gases, exempt many small manufacturers from direct penalties and fines. However, if the cost of manufacturing in America increases for a key supplier or customer, then the cost also increases for small businesses. All actions have unintended consequences and we encourage federal policymakers to examine the impact their actions will have on all sectors of the economy even if targeting a specific industry.
Small Business Regulatory Compliance and Burdens:
The first week of May 2012, the federal government issued 77 new final rules and regulations and proposed 40 new rules. As of May 25, 2012, the year-to-date total for new federal rules and regulations issued was 1,506, filling 31,432 pages. Of these new rules, the government classified 292 as having a significant impact on small businesses. Companies like our members simply lack the resources, financial or personnel, to sort through the thousands of pages of new regulations each year. Compounding this challenge is a lack of knowledge of industry process by regulators who are not familiar with manufacturing and therefore often issue ineffective rules with unintended consequences.

While we welcome the President’s recent Executive Order calling for a retrospective review of new regulations, increasing and improving regulators’ compliance with the Regulatory Flexibility Act (RFA) and the Small Business Regulatory Enforcement Fairness Act is critical. These provisions require agencies to review the effects of their proposed regulations on small entities and to examine alternatives that would minimize the small entity impacts while still meeting the regulations’ purposes. In fiscal year 2011, improved agency compliance with the RFA saved small businesses $11.7 billion in first year regulatory costs and $10.7 billion in annually recurring costs.

In addition to the burden of tracking new regulations, small businesses often lack guidance to comply. For example, the Occupational Safety and Health Administration requires a manufacturing facility to comply with National Fire Protection Association standard 70E for arc flash. Yet OSHA issues relatively little guidance and refers to a 2006 Interpretation Letter which unhelpfully states “OSHA recommends that employers consult consensus standards such as NFPA 70E.” Vague rules and interpretations like this often cause significant confusion among small businesses and prompt an inspector to fine a company for violations even though the agency guidance is vague or misleading.

Another challenge for small businesses is the complexity of complying not only with federal regulations but also, state, county, and city rules that can often conflict with one another or apply additional costs and burdens. For example, the City of Anaheim, CA recently imposed a new permitting requirement on manufacturers who use CNC Milling Machines. City inspectors are literally going business-to-business and issuing fines on site without warnings for lack of compliance with this new city rule. Again, a shift from a culture of cooperation between regulators and businesses to one of fine first, ask questions later.

Specific Federal Regulations:
Below are specific examples of existing and new regulations and rules interpretations that directly negatively impact metalworking manufacturers, reduce our global competitiveness, and restrict our ability to hire employees and invest in our facilities.

EPA TRI (Toxics Release Inventory) Rule
The TRI rule is broken. The rule requires companies to report materials that are being recycled as toxic releases. It requires companies to needlessly report materials which are on site but recycled as if they were released.

The rule does not have a suitable definition of recycling, and the instructions that it provides for reporting scrap metals are unclear. The reporting burden is well beyond that claimed by the agency; our experience shows an average of 56 hours to prepare a TRI Report using Form R—even though there is no release of toxics from our metallic scrap. Strictly the fact that we have large quantities of metallic solids which contain copper, nickel, chromium, manganese and lead, which are ultimately recycled through scrap...
channels, mandates that we report these elements as if they were in fact a toxic release when in fact no actual release occurs.

Currently, manufacturers who send solid scrap metals to a scrapyard must report these items as a “release” under TRI, using Form R, despite the fact that this is the first step in the recycling process. Manufacturers face fines of $32,000 per day for paperwork violations, and for a small manufacturer, the stakes could not be higher—‘why is my scrap metal considered a release, why is it reportable, why is not itself an article since it emits nothing, and why must we report recycling a product as a toxic release?’ A broad interpretation of a “release” by EPA inadvertently creates alarm in the surrounding community and jeopardizes the employers’ operations while adding unnecessary costs and burdens.

Action: EPA needs to define recycling, and provide a less burdensome means of reporting recycled materials than a full Form R report. Exempting legitimately recycled materials such as scrap metal from TRI reporting would save industry at least a million man-hours in needless paperwork preparation.

EPA Nickel Rule

The U.S. Environmental Protection Agency (EPA) announced it is developing a new human health risk assessment for certain nickel compounds under its IRIS (Integrated Risk Information System) program. EPA is working on a proposed schedule and an initial draft. The agency’s nickel IRIS process follows the publication of the European Union’s recent reclassification of over 100 nickel compounds as carcinogens, mutagens and reproductive toxins under the EU Classification, Labeling and Packaging Directive (CLP).

These actions, along with other regulatory developments and increased scrutiny of nickel, have raised concerns for the nickel-producing and nickel-using communities globally and in North America, as they may result in significantly tighter standards or use restrictions and have adverse impacts on nickel-related industrial activities and nickel-containing products.

Nickel is found in thousands of consumer and industrial products, from autos to airplanes to devices used in medical procedures. This proposed rule has the potential to cause massive disruptions in the global supply chain and threaten national and economic security of the U.S.

Action: The EPA should not take unilateral action on a new rule regulating nickel or nickel-containing components without greater review of the impact on nickel users and consumers.

OSHA Employer Safety Incentive and Disincentive Policies and Practices

http://www.osha.gov/as/opa/whistleblowermemo.html

The object of the OSH Act is to ensure that employers provide workers with safe premises where they work. However, a March 12, 2012 OSHA ‘guidance’ memo indicates that safety incentive programs may potentially be a discriminatory violation against disciplined employees and may discourage safety violation reporting. Workplace safety incentive programs are designed to provide employers legitimate tools by which they can effectively manage their company’s safety performance and improve the working environment for employees. This memo deems the provision of incentives for safety performance to be discriminatory which is counterproductive to the OSH Act’s objective.

The memo also deems the employer’s issuance of discipline to an employee for failing to report an injury or illness in a timely manner as discrimination and/or retaliation. This guidance contradicts current OSH Act law when the employer takes rightful action needed to ensure employee compliance as stated in 5(b) of the OSH Act of 1970. OSHA should stand behind the efforts of all employers to assure that the reporting of occupational illnesses and injuries is accomplished on a timely basis. This memorandum contradicts the OSH Act and also usurps the employer’s authority to assure timely reporting, provide
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discipline and incentivize desired behaviors, while the employer is held to performance standards for his firms reporting. 

Action: This memorandum is not about protecting whistleblowers, it is about taking away employers’ authority and ability to manage safety per OSHA Act 5(b). It should be withdrawn.

SEC Conflict Minerals Rule
Section 1502 of the Wall Street Reform and Consumer Protection Act (Dodd-Frank) law imposes Securities and Exchange Commission (SEC) reporting requirements on publicly traded companies if their products contain metals derived from minerals defined as “Conflict Minerals”. OEMs that report to the SEC are required to report annually the use of Conflict Minerals that are “necessary to the functionality or production” of a product that they either manufacture, or contract to be manufactured, that originate from the Democratic Republic of the Congo or an adjoining country. This covers downstream suppliers as well.

Often, small manufacturers in particular, lack knowledge about from where the materials or components originate. For example, many of our members who are automotive suppliers source their raw materials from a service center which can purchase their steel from multiple sources – a long supply chain leaving the small business with little ability to accurately report full sourcing to meet the requirements imposed on their publicly traded customers. The SEC issued a proposed rule implementing Section 1502 in December 2010. A final rule was expected at the end of 2011 but the SEC has been unable to complete it as of May 2012. While this regulation is well intentioned, the unintended consequences on downstream suppliers are significant and can strain customer relationships and lead to lost business for smaller companies.

Action: The SEC should not move forward with this rule and at the very least provide greater clarity in the final rule, including the creation of a category for products of indeterminate origin and a phased-in compliance period.

EPA Metalworking Financial Responsibility Requirements Rule
In 2010, the Environmental Protection Agency (EPA) issued an advanced notice of proposed rulemaking that would require select industries to carry additional financial assurances (insurance) under environmental law if a company handles “hazardous substances”. The EPA also announced businesses classified as Fabricated Metal Product Manufacturing (NAICS 332), Computer and Electronic Product Manufacturing (NAICS 334) and Electrical Equipment, Appliance, and Component Manufacturing (NAICS 335) as industries that the Agency would like to further examine and also require to carry this additional insurance.

The regulation would require facilities subject to the new requirements to establish and maintain evidence of financial responsibility for potential releases of hazardous substances (e.g., insurance policy, surety bond, trust fund, corporate guarantee). These requirements would negatively impact many facilities because financial assurance mechanisms for potential Superfund liability can be very expensive and extremely difficult to obtain for most metalworking companies who pose little risk and already carry insurance.

Action: EPA should stop this proposed rule before implementation and better understand the manufacturing operations of the facilities it proposes to regulate. Expanding the requirement to metalworking companies will not improve workplace or environmental safety and health while reducing manufacturers’ global competitiveness by increasing production costs.

OSHA Lockout Procedure Guidance
Without soliciting public comment, the Occupational Safety and Health Administration (OSHA) has taken an increasingly strict interpretation of lockout guidelines stating that all die setting requires lockout. In 2008, OSHA issued a compliance directive which specifically made clear that any effort to label die or
tool changes as “routine, repetitive and integral to the production operation” (Kershaw interpretation) and therefore not subject to lockout would be rejected. Even now, this is the case despite the changes not being “service or maintenance” related and even when alternative safeguarding is used and when there is no risk of accidental release of energy which could cause a hazard to employees.

Many OSHA offices have historically not cited metal stamping companies when they have a specific lockout procedure using supplemental safeguarding means to assure there is no hazard from accidental energization or release of energy during die setting. However, without updated guidance and a realistic interpretation of the procedures we are seeing more and more citations and less cooperation even when control systems are already in place costing countless employee hours and thousands of dollars. The move away from the Kershaw interpretation is being seen in enforcement in precision machining as well. Action: OSHA must standardize enforcement regarding the need for lockout (unexpected energization) and no need for lockout (routine, repetitive, integral to the production operation). OSHA has in fact changed its position on these issues without any publication or public comment. OSHA should clarify the difference between processes that are routine, repetitive and integral to the production operation and train their enforcement personnel accordingly. Strict interpretation of rules that do not provide additional workplace safety and cost metalworking companies thousands of dollars in lost productivity unnecessarily reduces our manufacturers’ global competitiveness.

Thank you for your leadership on this important issue and we look forward to continuing to work with you on behalf of small and medium-sized businesses manufacturing in America.

Sincerely,

Dave Tilstone   Mike Duffin   William E. Gaskin
President   Executive Director  President
NTMA     PMPA     PMA

About NTMA:
NTMA is the national association representing the precision custom manufacturing industry, which employs more than 440,000 skilled workers in the United States. Its mission is to help members of the U.S. precision custom manufacturing industry achieve business success in a global economy through advocacy, advice, networking, information, programs and services. Many NTMA members are privately owned small businesses, yet the industry generates sales in excess of $40 billion a year. NTMA’s nearly 1,300 member companies design and manufacture special tools, dies, jigs, fixtures, gages, special machines and precision-machined parts. Some firms specialize in experimental research and development work.

About PMPA:
The PMPA is an international trade association representing the interests of the precision machined products industry. While PMPA consists mainly of North America based manufacturers, its members also operate facilities in various industrial markets around the globe. The precision machined products industry consists of a diversified manufacturing base producing highly engineered components to customer specifications using a variety of materials such as: steel, stainless steel, aluminum, brass, and aerospace alloys. Utilizing the latest technology, including CNC turning and milling centers, rotary transfer machines, CNC and automatic screw machines, these companies produce complex parts and
complete assemblies for finished goods such as: automobiles, aircraft, heavy truck, medical devices, appliances, construction equipment and much more. The industry is best described statistically under NAICS 332721.

About PMA:
PMA is the full-service trade association representing the $113-billion metalforming industry of North America—the industry that creates precision metal products using stamping, fabricating, spinning, slide forming and roll forming technologies, and other value-added processes. Its nearly 1,000 member companies also include suppliers of equipment, materials and services to the industry. PMA leads innovative member companies toward superior competitiveness and profitability through advocacy, networking, statistics, the PMA Educational Foundation, FABTECH and METALFORM tradeshows, and MetalForming magazine.