



**Testimony of
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**Hearing on H.R. 2631, the Regulatory Predictability for Business Growth Act of
2015, and H.R. 3438, the Require Evaluation before Implementing Executive
Wishlists (REVIEW) Act of 2015
before the
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Committee on the Judiciary
U.S. House of Representatives
November 3, 2015**

On behalf of the American Forest & Paper Association (AF&PA) and the American Wood Council (AWC) and their members, I want to thank Chairman Marino, Ranking Member Johnson and the other members of the Subcommittee for the opportunity to testify on two bills proposing to make important reforms to the federal rulemaking process: H.R. 2631, the Regulatory Predictability for Business Growth Act of 2015, and H.R. 3438, the Require Evaluation before Implementing Executive Wishlists (REVIEW) Act of 2015. For over 25 years, I have worked on regulatory issues and regulatory reform from the perspective of trade associations, in private practice, at the U.S. Office of Management and Budget's Office of Information and Regulatory, and as senior counsel for the Senate Committee on Governmental Affairs.

AF&PA serves to advance a sustainable U.S. pulp, paper, packaging, and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are committed to continuous improvement through the industry's sustainability initiative - [*Better Practices, Better Planet 2020*](#). The forest products industry accounts for approximately 4 percent of the total U.S. manufacturing GDP, manufactures over \$200 billion in products annually, and employs approximately 900,000 men and women. The industry meets a payroll of approximately \$50 billion annually and is among the top 10 manufacturing sector employers in 47 states.

AF&PA's sustainability initiative - *Better Practices, Better Planet 2020* - is the latest example of our members' proactive commitment to the long-term success of our industry, our communities and our environment. We have long been responsible stewards of our planet's resources. Our member companies have collectively made

significant progress in each of the following goals, which comprise one of the most extensive quantifiable sets of sustainability goals for a U.S. manufacturing industry: increasing paper recovery for recycling; improving energy efficiency; reducing greenhouse gas emissions; promoting sustainable forestry practices; improving workplace safety; and reducing water use.

The American Wood Council (AWC) is the voice of North American wood products manufacturing, representing over 75 percent of an industry that provides approximately 400,000 men and women with family-wage jobs. AWC members make products that are essential to everyday life from a renewable resource that absorbs and sequesters carbon. Staff experts develop state-of-the-art engineering data, technology, and standards for wood products to assure their safe and efficient design, as well as provide information on wood design, green building, and environmental regulations. AWC also advocates for balanced government policies that affect wood products.

We recognize that sensible regulations provide many important benefits, including protecting the environment, health and safety. The paper and wood products manufacturing industry has met many costly regulatory challenges over the years, spending billions of dollars as part of its environmental stewardship. Those investments have led to major improvements in air quality, such as a 22 percent reduction in emissions of nitrogen oxide (NOx) and 42 percent for sulfur dioxide (SO₂) by our pulp and paper facilities since 2000. Unfortunately, the industry faces new regulatory challenges – many driven by lawsuits under the Clean Air Act – that together could impose more than \$10 billion in new capital obligations on the industry over the next decade, a regulatory burden that could be unsustainable.

Along with the cumulative cost, complexity and sheer number of regulations, the uncertainty in the federal regulatory process creates major challenges for investment, capital planning, and job creation.¹ We believe that the two bills before the committee – H.R. 2631 and H.R. 3438 – would help to increase regulatory transparency, harmonize regulatory requirements, avoid wasting limited resources, and increase regulatory certainty.

H.R. 2631

H.R. 2631 would amend the Administrative Procedure Act (APA) to require public notice and comment when agencies issue an interpretive rule that conflicts with or is inconsistent with a previous longstanding interpretive rule. While the Supreme Court recently held in Perez v. Mortgage Bankers Association that the APA does not require

¹ See, e.g., W. Mark Crain and Nicole V. Crain, “The Cost of Federal Regulation to the U.S. Economy, Manufacturing, and Small Business,” prepared for the National Association of Manufacturers (Sept. 10, 2014)(finding that the regulatory burden for the average U.S. manufacturer is \$19,564 per employee per year); Steven Globerman and George Georgopolous, “Regulation and the International Competitiveness of the U.S. Economy,” Mercatus Center, George Mason University (Sept. 2012)(finding that the regulatory environment in the U.S. has become less favorable to private-sector activity in recent years compared to other countries, and declining productivity is a plausible consequence of an increasingly complex and uncertain U.S. regulatory environment).

notice and comment for an interpretive rule that reverses a prior interpretive rule, H.R. 2631 is consistent with the principles of due process, transparency and accountability that are the foundation of the APA.

The traditional means by which an agency can create binding policy is to issue a legislative rule through public notice and comment. If the agency later wants to reverse that binding policy, it likewise must go through public notice and comment under the APA. However, agencies can avoid the notice-and-comment requirements of the APA by doing the same thing through interpretive rules that purport to “clarify” a vaguely worded statute or legislative rule. After Mortgage Bankers, it is clear that the agency can reverse the binding policy reflected in a longstanding interpretive rule by simply issuing a contrary interpretive rule. In other words, an agency can change its binding policy from “X” to “not X” without having provided the public with notice and an opportunity to comment. As a practical matter, by regulating through interpretive guidance rather than legislative rules, an agency often can avoid review not only by the public, but also by the Office of Management and Budget (OMB), the courts, and Congress. That is not a practice that should be encouraged as a matter of good government, transparency or fundamental fairness.

Over the years, many commentators, courts, Congress, OMB, and the Administrative Conference of the United States have expressed concern that agencies too often rely on guidance in ways that circumvent the notice-and-comment rulemaking process. As the D.C. Circuit put it:

“The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in regulations. One guidance document may yield another and so on. . . . Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.”²

Earlier in my career at OMB, I worked on a Bulletin for Agency Good Guidance Practices that, among other things, requires agencies to provide pre-adoption public notice and comment when they issue “economically significant” guidance (both interpretive rules and policy statements).³ The basic idea was that when an agency is going to issue a guidance document that has a major real-world effect, as a matter of good government and fundamental fairness, it should provide public notice and

² Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020 (D.C. Cir. 2000)(striking down emissions monitoring guidance as requiring notice and comment through legislative rulemaking procedures).

³ Under the OMB Bulletin, “‘economically significant guidance’ . . . may reasonably be anticipated to lead to an annual effect on the economy \$100 million or more or adversely affect in a material way the economy or a sector of the economy, except that economically significant guidance documents do not include guidance documents on Federal expenditures and receipts.” OMB Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3439 (Jan. 25, 2009).

comment before finalizing the guidance. Other authorities have gone further to support pre-adoption notice and comment for all significant guidance, not just economically significant guidance, including the Administrative Conference of the United States, the Food and Drug Administration, and the American Bar Association.⁴ H.R. 2631 has a narrower scope by proposing pre-adoption notice and comment for interpretive rules (not policy statements) that conflict with or are inconsistent with prior interpretive rules that have been in effect for a year or more. The bill would help curb the problem of “regulation by guidance.”

H.R. 3438

H.R. 3438 would, pending judicial review, postpone the effective date of “high-impact rules” that “may impose an annual cost of the economy of not less than \$1 billion.” The bill includes an exception to allow high-impact rules to go into effect 60 days after publication in the Federal Register where no judicial review is sought.

The REVIEW Act would help promote certainty, efficiency, and legal integrity in the regulatory process. All too often, regulations requiring major capital investments are struck down in court. Critical investment decisions must be made in time to comply with a regulation, and those decisions typically require sunk costs that cannot be recovered after a rule is subsequently determined to be unlawful. H.R. 3438 would avoid wasting limited resources by ensuring that rules are legally sound before billions of dollars in investments are made.

One example of how this issue affects the U.S. forest products industry is EPA’s Boiler MACT rules. In 2007, about \$200 million in compliance investments were stranded in the paper and wood products industry when a court struck down the 2004 Boiler MACT rules just three months before the compliance deadline. While the rules were reissued in 2013, the new standards for industrial boilers changed significantly, and previous investments proved to be the wrong approaches to achieve compliance. Wasting limited capital undermines the competitiveness of U.S. businesses and impedes growth and job creation.

One suggestion that I would submit for the Subcommittee to consider is to broaden the definition of “high-impact rule” to ensure that highly consequential rules such as the Boiler MACT rules are covered.

⁴ See FDA Good Guidance Practices, 21 C.F.R. 10.115(g) (requiring pre-adoption notice and comment for “Level 1” guidance documents); Recommendations of the Administrative Conference of the United States, Interpretive Rules of General Applicability and Statements of General Policy, Rec. 76-5, 1 C.F.R. 305.76 (1992), available at <http://www.law.fsu.edu/library/admin/acus/305765.html> (recommending pre-adoption notice and comment for nonlegislative rules “likely to have a substantial impact”), Am. Bar Ass’n, Annual Report Including Proceedings of the Fifty-Eighth Annual Meeting 57 (1993)(same). See generally, Paul R. Noe and John D. Graham, “Due Process and Management for Guidance Documents: Good Governance Long Overdue,” 25 Yale J. on Reg. 103 (Winter 2008).

In conclusion, H.R. 2631 and H.R. 3438 take important steps to promote due process, transparency, certainty, efficiency and fairness in the regulatory process. We appreciate and support these efforts, and we would be happy to work with the Subcommittee as it advances these important proposals through the legislative process.