Response to Written Questions Submitted by Hon. John Thune to Rosario Palmieri

Question 1. As I understand it, the executive order issued by the White House on January 30, 2017, does not apply to independent agencies. Your testimony highlighted the limits on the executive branch's ability to direct independent agencies, such as Consumer Product Safety Commission, to help reduce the overall regulatory burden. Can you elaborate on additional steps Congress may need to take to ensure that independent agencies are regulating in a way that promotes U.S. manufacturing without compromising safety?

Answer. President Trump's Executive Order 13771, entitled "Reducing Regulation and Controlling Regulatory Costs," establishes the framework for the President's "one in-two out" regulatory reform initiative. As you note, the Order does not apply to independent regulatory agencies. Though the interim guidance implementing the Order's provisions effecting Fiscal Year 2017 regulatory costs encourages independent regulatory agencies to comply, it is unclear whether these agencies actually will.

The President does not exercise similar authority over independent regulatory agencies—such as the National Labor Relations Board, the Securities and Exchange Commission and the Consumer Product Safety Commission—as he does over other agencies within the executive branch. The rules issued by these agencies can impose significant costs on manufacturers. These agencies are not required to comply with the same regulatory principles as executive branch agencies and often fail to conduct any analysis to determine expected benefits and costs.

Congress should require independent regulatory agencies to conduct cost-benefit analyses of their significant rules and subject their analysis to third-party review conducted by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget or some other office. Consistency across the government in regulatory procedures and analysis would only improve certainty and transparency of the process. The case for the inclusion of independent regulatory agencies in a centralized review of regulations is clear, and Congress should act to make it certain.

There are several legislative proposals that would improve the quality of regulations issued by independent regulatory agencies. Last Congress, Senators Rob Portman (R-OH), Mark Warner (D-VA) and Susan Collins (R-ME) introduced the Independent Agency Regulatory Analysis Act of 2015 (S. 1607, 114th Congress), which would provide the President authority to require independent regulatory agencies to conduct benefit-cost analysis for significant rules and submit them to OIRA for third-party review. Senator Portman is also lead sponsor of the Regulatory Accountability Act (S. 2006, 114th Congress), which would codify analytical requirements and sound regulatory processes for all agencies, including independent regulatory agencies. Senator Amy Klobuchar (D-MN) has introduced the SCORE Act (S. 2294, 114th Congress), which would establish a Regulatory Analysis Division within the Congressional Budget Office to conduct analysis of the prospective impact of economically significant rules, including rules issued by independent regulatory agencies.

Question 2. In December 2014, President Obama observed that, at times, "the regulatory agencies treat every problem like a nail and only have a hammer, and aren't engaging with industry enough to think, all right, here is the problem we're trying to solve, is there a smarter way of solving it." How effective have regulators been in working with industry and incorporating their perspectives?

Answer. The Administrative Procedure Act requires federal agencies to publish in the Federal Register a general notice of proposed rulemaking for substantive rules and provide the public an opportunity to participate in the rulemaking (5 U.S.C. 553). Unfortunately, regulators often make their regulatory determinations (e.g., how and who to regulate) before issuing a notice of proposed rulemaking and before they receive valuable feedback from those entities that are directly impacted by the agency's action. Last Congress, Senators James Lankford (R-OK) and Heidi Heitkamp (D-ND) introduced the Early Participation in Regulations Act (S. 1820, 114th Congress), which would require an agency to publish an advance notice of proposed rulemaking when it considers a major rule. Such a requirement would force agencies to seek public input before they make regulatory decisions.

Congress should also reform current statutory requirements that are designed to improve how agencies interact with stakeholders. The Regulatory Flexibility Act (RFA) requires federal agencies to thoughtfully consider small businesses when developing regulations. If an agency determines that a regulation is likely to have "significant economic impact on a substantial number of small entities," then the agency must engage in additional analysis and seek less burdensome regulatory alternatives. In addition to requiring improved small business analysis, the RFA intended to improve public participation in a rulemaking. The law was amended in 1996 to require the Environmental Protection Agency and the Occupational Safety and Health Administration to empanel a group of small business representatives to help those agencies better consider a rule's impact before it is proposed. In recognizing the importance of this panel process, Congress expanded this requirement to include the Consumer Financial Protection Bureau when it passed the Dodd-Frank Wall Street Reform and Consumer Protection Act.

The RFA's provisions have received universal support from lawmakers, but Congress needs to strengthen the law and close loopholes that agencies use to avoid its requirements. Unfortunately, agencies are able to avoid many important RFA requirements—including holding small business panels—by simply asserting that a rule will not impact small businesses significantly. The law does not explicitly define a "significant economic impact on a substantial number of small entities," so agencies have great discretion in deciding when the RFA would apply to a proposed or final rule. Furthermore, only a small number of regulations require small business-oriented analysis because "indirect effects" cannot be considered. One of the original authors of the RFA, Sen. John Culver (D-IA), intended that the scope of the RFA include direct and indirect effects. The law should be amended to ensure that indirect effects are considered by agencies as Congress intended.

The RFA's requirements are especially important to improving public participation and the quality of regulations, and have saved billions of dollars in regulatory costs for small businesses. In January 2017, Small Business Administration's Office of Advocacy, which monitors compliance with the RFA and assists agencies in meeting the law's requirements, issued its annual report indicating that it helped save small businesses $1.4 billion in regulatory costs. Moreover, Advocacy has saved businesses cumulatively $130 billion in regulatory costs since it began tracking regulatory cost savings in 1998. Imagine the positive impact on regulations if agencies were not able to avoid the RFA's requirements so easily. In addition, despite the success of the small business panel process, it only applies to three agencies.

Question 3. Apart from those discussed in your testimony and at the hearing, are there any other examples of areas in which we can reform our transportation regulations to help get our goods to market more efficiently without compromising safety?

Answer. The Department of Transportation (DOT) needs to keep its regulatory agenda in check so that critical transportation services on which manufacturers rely are not hampered by additional red tape. Some DOT regulations have made transporting finished goods to a consumer and component parts to a shop floor more difficult and more costly.

Regulatory requirements for prescriptive activities are not the best way to improve safety if measuring safety outcomes can provide better incentives and flexibility. Positive Train Control (PTC) is one of the best examples of how a technology mandate could have been more performance-based, which could have achieved better safety outcomes sooner. Had Congress and the Federal Railroad Administration (FRA) required performance standards for the types of incidents prevented by PTC, then railroads could have identified and implemented the best way to achieve those goals, which would have included PTC in tandem with other processes and technologies.

Additionally, on May 1, 2015, the Pipeline and Hazardous Materials Safety Administration (PHMSA) and the FRA issued a final rule mandating that trains hauling certain hazardous materials must install a braking system known as electronically controlled pneumatic (ECP) brakes, which the industry has tested for many years in actual revenue service and largely rejected as unreliable. The U.S. Government Accountability Office has criticized the lack of transparency in the agency's decision-making, and the National Academy of Sciences recently identified weaknesses and gaps in the FRA's analysis and modeling of the technology. This rule would impose a specific solution on the railroad industry that has been shown to provide minimal safety gains at great cost while negatively impacting rail operations.

On March 14, 2016, the FRA issued a notice of proposed rulemaking that would mandate a minimum of two persons must be in the locomotive cab for railroad operations, despite the absence of any sound science that suggests a safety gain would result. Freight railroads currently operate with two person crews in keeping with collectively bargained work arrangements. This command-and-control approach makes more difficult a glide path to technological innovation

allowing railroads to gain necessary efficiencies to compete in the marketplace, at a time when policy makers are encouraging and incentivizing such advancements on the nation's roadways. The railroad industry strongly opposes moving forward on a crew size rule that is not the product of collaborative industry stakeholder discussion.

Granting waivers is a measured approach to bridging past with present and help make regulatory evolution possible. The FRA's waiver authority is appropriately very broad. The regulations provide that, "the Secretary may waive compliance with any part of a regulation prescribed or order issued under this chapter if the waiver is in the public interest and consistent with railroad safety." The Secretary of Transportation and the FRA Administrator should review existing waivers, streamlining them as appropriate and making some permanent in order to provide certainty to the industry and stakeholders. Typically waivers are granted for no longer than five years. The department should expeditiously consider and act on pending waivers, especially those that promote innovation, demonstrate technology or proof of concept, or allow operating practices that are more efficient and consistent with railroad safety, and promptly grant them when appropriate. The FRA should reform the process for granting new waivers with a focus on efficiency, prioritizing technology and collaboration.

Today's manufacturers rely on interstate and global movements of goods and services. Patchwork state regulations and incompatible international standards disrupt supply chains and increase costs for manufacturers, yet have become all too common. Manufacturers support the primacy of the federal government in the regulation of interstate commerce. Manufacturers appreciate the Committee's approval of the Commercial Vessel Incident Discharge Act (S. 168), which would eliminate a regulatory burden hindering interstate and international commerce by replacing multiple federal and state regulations with a single national standard for the regulation of ballast water and other discharges incidental to normal vessel operations. Additionally, as the Committee considers Federal Aviation Administration (FAA) reauthorization legislation, there is an opportunity to improve the FAA certification process for manufactured aviation products. Additionally, any new regulation of the air transport of lithium batteries should ensure that manufactures are in harmony with international standards. The NAM looks forward to working with this Committee to make the United States the best place in the world to build and make things that keep our economy moving.

Response to Written Question Submitted by Hon. Deb Fischer to Rosario Palmieri

Question. As it relates to regulatory reform, I've been a strong proponent of transparency, better cost-benefit analysis, and more stakeholder participation in the process. As chair of the Surface Transportation Subcommittee, I've convened hearings on performance-based regulations, whereby agencies set goals or benchmarks and allow flexibility in achieving those goals. From your perspectives, what are the benefits of moving away from prescriptive regulations towards more goal-oriented regulations?

Answer. Regulators often issue rules that are inefficient, impose unnecessary burdens and harm our ability to innovate and create jobs. If we are to succeed in creating more jobs and growing our economy, we must reform our regulatory system so that manufacturers can innovate and make better products instead of spending hours and resources complying with inefficient, duplicative and unnecessary regulations. For an agency to improve the effectiveness and efficiency of a regulation, it must define the problem that the rule would address. Then, as President Obama asserted in Executive Order 13563, the agency "must identify and use the best, most innovative and least burdensome tools for achieving regulatory ends."

Poorly designed regulations can inhibit innovation and actually make it more challenging to efficiently meet regulatory objectives. Therefore, it is vital that agencies employ sound regulatory principles including the use of performance measures in place of technology or process mandates. Regulated entities will often find more efficient ways to achieve the regulatory objective than regulators could have planned for in advance of implementation. Regulators should, among other things, use the best available science, better calculate the benefits and costs of their rules, improve public participation and transparency, use the least burdensome tools for achieving regulatory ends and specify performance objectives rather than a particular method of compliance to improve the effectiveness of regulatory measures. Agency adherence to each of these regulatory principles is vital if we are to implement fundamental change to our regulatory system that improves the effectiveness of rules in protecting health, safety and the environment while minimizing the unnecessary burdens imposed on regulated entities.