Statement of the U.S. Chamber of Commerce

FOR: **Statement for the Record on the U.S. Environmental Protection Agency's, "National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units – Reconsideration of Supplemental Finding and Residual Risk and Technology Review," 84 Fed. Reg. 2670 (Feb. 7, 2019)**

TO: **U.S. Environmental Protection Agency**

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U.S. Chamber of Commerce Testimony
on
Environmental Protection Agency National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units – Reconsideration of Supplemental Finding and Residual Risk and Technology Review

Washington, DC

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My name is Heath Knakmuhs, and I am Vice President and Policy Counsel for the Global Energy Institute, an affiliate of the U.S. Chamber of Commerce ("Chamber"). The Chamber is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector and region. The mission of the Global Energy Institute is to unify policymakers, regulators, business leaders, and the American public behind a common sense energy strategy to help keep America secure, prosperous, and clean. The Chamber appreciates the opportunity to testify today in support of the Environmental Protection Agency's ("EPA") reconsideration of the supplemental finding and residual risk and technology review of its Mercury and Air Toxics Standards ("MATS"), applicable to coal- and oil-fired electric utility generating units.

The saga of the EPA's MATS rule stands as the poster child for the merits of a court-ordered "stay" when a significant regulatory rulemaking requires multi-billion dollar investment and closure decisions from a regulated industry. Unlike the case with the Clean Power Plan, which was promptly stayed by the Supreme Court before its overreaching mandates were able to take their toll on the electricity sector, the EPA's MATS rule was allowed to proceed apace during its lengthy judicial review. That review spanned from the December 2011 issuance of EPA's then-final MATS rule until the Supreme Court found that same rule to be unlawful in *Michigan v. EPA*,[1] which was issued on June 29, 2015. This ultimate ruling on MATS was issued more than two months after the April 16, 2015 deadline for utility compliance with the MATS rule.[2] Thus, while judicial relief from MATS was finally granted, it was too late to make a practical difference for the hundreds of generating units adversely impacted by the rule.

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[1] *Michigan v. Environmental Protection Agency*, 576 U.S. ___ (2015).

[2] The EPA did provide a one year compliance extension until April 16, 2016, for plants that required additional time to come into compliance, and also had available a two-year extension for any plants subject to extreme circumstances, such as critical reliability concerns.

Pursuant to an exhaustive examination of utility filings and press statements, the Chamber determined that approximately 163 utility generating units across the country were shuttered, due in part to the compliance requirements of the MATS rule, prior to the Supreme Court's decision in *Michigan v. EPA*. Those closures amounted to over 50 GW of electric power generation being permanently closed in the shadow of a rule that was ultimately determined to be unlawful. We believe that these circumstances – specifically, a desire to limit a repeat of EPA's "catch-me-if-you-can" approach to forcing widespread retirements of industrial facilities prior to completion of judicial review of the merits of such actions – played a key role in convincing the Supreme Court to stay the overreaching Clean Power Plan in February 2016.

Recognizing that the EPA's MATS proposal at issue today intends to comply with *Michigan v. EPA*, the Chamber urges the EPA to take an approach of "do no harm" with respect to its compliance obligations. The Supreme Court determined that EPA's MATS rule unlawfully relied upon co-benefits tied to particulate matter reductions to offset the approximate $18 billion in spending on compliance controls (to date), by the industry to comply with the invalidated rule.[3] Meanwhile, merely 4 to 6 million dollars of estimated annual benefits tied to reductions in targeted hazardous air pollutants (i.e. mercury) were predicted to accrue from MATS rule compliance – a cost to direct benefit ratio of more than 3,000 to 1.

Clearly, the EPA's rulemaking processes should be adjusted, on a ***prospective*** basis, to ensure that future "appropriate and necessary" determinations under Clean Air Act section 112 are reached in a manner consistent with *Michigan v. EPA*. However, any effort to rescind the MATS rule at this juncture would quite simply be the regulatory equivalent to closing the barn door after the horse has long since left. In fact, such a rescission has the potential to adversely impact those entities that relied upon effective Clean Air Act regulations to guide their investment and retirement decisions. Regulated entities should not now be put in double jeopardy solely to correct an invalid "appropriate and necessary" finding when parallel and ongoing rulemakings, such as the EPA's already underway costs and benefits rulemaking process,[4] provide an appropriate forum to establish an enduring resolution to the rulemaking shortcomings identified in *Michigan v. EPA*. The Chamber submitted extensive comments responsive to this Advanced Notice of Proposed Rulemaking, expressing therein the need for co-benefits to truly be incidental, rather than the unspoken focus of EPA's regulatory actions.

The Chamber appreciates the EPA's deregulatory efforts across its broad jurisdiction, but the MATS rule should be retained in a manner that protects it against future claims challenging its legitimacy. As such, the Chamber supports the EPA's

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[3] This spending figure includes capital costs on installed equipment and also an estimate of continuing O&M associated with this new equipment. The amount does not include units that retired before the compliance date. The true economic cost of the rule includes the sum of these compliance costs plus the cost of early capital retirements of generating units that still had remaining useful years of life.

[4] *Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process*, 83 Fed. Reg. 27,524 (June 13, 2018).

proposal to not remove coal- and oil-fired electric generating units from the list of affected source categories under section 112 and to retain, in place, the 2012 MATS rule.

Though the costs of implementing the MATS rule greatly overshadowed the hazardous air pollutant benefits, the best option in this instance is for EPA to prospectively ensure that not yet finalized and future rulemakings properly quantify the costs and benefits integral to an "appropriate and necessary" finding. To this end, we are encouraged by the agency's consideration of a concurrent rulemaking to improve the development of cost-benefit estimates across the agency, and recommend that finalization of this proposal is done in a manner consistent with the objectives of the broader cost-benefit reforms.

Additionally, the Chamber encourages the EPA to focus its forthcoming final rule on the completion of the Residual Risk and Technology Review ("RTR") included within its proposed rule. This mandated 8-year evaluation of the remaining risks associated with and the technological effectiveness of the MATS rule is necessary to ensure regulatory certainty with respect to the 80-plus gigawatts of generation that has upgraded to achieve compliance with the MATS rule. Without a completed RTR, a subsequent administration could unnecessarily tighten the EPA's already rigorous hazardous air pollutant standards, notwithstanding the fact that the industry has experienced a nearly 90 percent reduction in mercury emissions over the past decade. Such action could lead to additional investments and power plant closures, all for minimal environmental gain. A completed RTR can insulate this heavily-regulated portion of the industry from this additional uncertainty.

The Chamber appreciates the opportunity to provide comment on the EPA's efforts to conform its MATS regulations to the Supreme Court's guidance in *Michigan v. EPA*. We strongly support the finding by the Court that the cost/benefit analysis made with respect to the original MATS rule was unlawful, but we also urge the EPA to retain the effective MATS regulations while separately and prospectively ensuring that forthcoming Clean Air Act regulations integrate a proper appropriate and necessary finding. In addition, the Chamber encourages the EPA to complete the RTR for the MATS rule to ensure that the reliable, comparatively low-cost electricity powering our economy, is not subject to additional upheaval though future modifications to the stringent and environmentally-responsible standards already in effect through the MATS regulation.