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CalChamber

ALERT

Don't Treat California as a 'Luxury Good'

The Golden State has enjoyed as much prosperity and created as much wealth as any society on the planet.

Its economic output rivals Germany and boasts more than 370 firms with a market cap of more than $1 billion.

The great economic engine powered by California's robust private sector creates and maintains more than 17 million jobs, paying $1.6 trillion in annual wages and salaries. California has the ninth highest median household income of all states.

Taxes on businesses, entrepreneurs, and wage earners sustain hundreds of billions of dollars in state and local government spending, including jaw-dropping budget surpluses over the past couple years.

Affordability Crisis

California may be one of the greatest prosperity generators the world has ever seen. But even so, it's often no match for the toll that the state's relentless cost of living takes on affordability for working and middle-income families. This crisis of affordability — much of it a result of or exacerbated by public policy — is the clearest and most immediate threat to continuing California's greatness.

The Governor agrees. "So as we go forward," Governor Gavin Newsom proclaimed in his 2023 Inaugural

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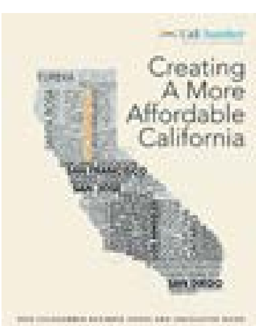
2023 CalChamber Issues Guide Posted on Web



The California Chamber of Commerce ***2023 Business Issues and Legislative Guide*** is available now on the CalChamber website at ***www.calchamber.com/businessissues***.

The focus of this easy-to-reference publication is **Creating a More Affordable California**. This issues guide focuses on affordability because high costs of essentials, from housing to energy, threaten the state's prosperity.

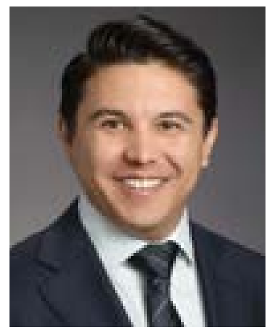
Lawmakers can help reverse the affordability crisis by pursuing some of the sensible, workable ideas presented in this ***Guide***.

Hard copies of the ***Guide*** have been mailed to CalChamber preferred and executive members who signed up to receive the printed ***Guide***.

An e-book edition of the ***Guide***, compatible with smartphones, tablets and desktop computers with an e-book reader installed can be downloaded free at ***www.calchamber.com/businessissues***. A PDF file also is available.

In addition, issue articles can be viewed as web pages and downloaded as individual PDF files. All electronic files include clickable links to many of the sources cited in the issue articles.

Adam Regele Promoted to VP of Advocacy and Strategic Partnerships



Adam Regele

Adam Regele, CalChamber senior policy advocate, has been promoted to the newly created position of vice president of advocacy and strategic partnerships. Regele specializes in environmental policy, housing and land use, and product regulation issues.

In addition, he will be working to expand the CalChamber's relationships to other businesses and associations, not only in California, but also nationally, as California state government continues its repeated attempts to expand oversight and regulation of the business community.

Last year, Regele was lead negotiator for the business community on SB 54, which dramatically changed California's existing recycling framework for all single-use packaging while saving Californians $9 billion a year in taxes by removing a related initiative from the ballot. SB 54 creates a circular economy framework that is the nation's most complex extended producer responsibility program and Regele remains the foremost expert on the ongoing implementation of the law.

See Adam Regele: Page 6

Labor Law Corner

No Pay Secrecy; Bona Fide Factors OK to Justify Pay Differences

Matthew J. Roberts
Labor Law Helpline Manager

We recently gave only one of our employees a merit-based raise after an excellent performance review and asked that employee not to tell others. The employee still told their coworkers and now several of our staff are upset. What can we do about this situation?

Making compensation decisions about your workforce that are both fair and rewarding to top performers can be an important tool to help retain top talent.

There are, however, some possible traps that employers should avoid in this area.

Confidentiality of Wage Increases

In California, wage equality continues to be an important policy issue. To this end, the state passed the Fair Pay Act, which sought to ensure that employees are paid equally for performing substantially similar work.

The Fair Pay Act has been amended several times to increase protection for workers. One of those protections prohibits "pay secrecy." Under the Fair Pay Act, employers cannot prohibit employees from disclosing their own wages; discussing the wages of others; asking about another employee's wages; and aiding or encouraging other employees to exercise their rights under the Fair Pay Act.

Additionally, the National Labor Relations Act, a federal law geared toward allowing employees to act collectively regarding their working conditions, allows employees to discuss their own wages openly as part of that effort.

So, instructing the employee to keep their raise and new wage secret violated both federal and California laws. Ultimately, the employer cannot take any action against the employee for sharing information about their raise and new wage rate.

Justifying Pay Disparity

Of course, the employer was concerned that if other employees found out about the wage increase and that the employee was making more than others, it could create several issues in the workplace.

Although the Fair Pay Act wants employers to pay employees who do substantially similar work the same, the law does allow for differences in pay if the differences are based on legitimate, bona fide factors.

Bona fide factors that may lawfully justify a pay disparity include:

- a seniority system;
- a merit system;
- quantity or quality of work; or
- a factor other than sex, race or ethnicity, such as education, training or experience.

If an employer is using the fourth factor to justify a pay disparity, the

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CalChamber-Sponsored Seminars/Trade Shows

More at ***www.calchamber.com/events***.

Business Resources

California Privacy Rights Act (CPRA) Compliance Webinar. CalChamber and Mariner Strategies. March 15, Online. (800) 331-8877.

Labor and Employment

Welcome Aboard: Compliance Tips for New Hires. Webinar. CalChamber. March 16, Online. (800) 331-8877.

Leaves of Absence: Making Sense of It All Virtual Seminar, April 13–14, August 24–25, September 21–22, Online. (800) 331-8877.

HR Boot Camp Virtual Seminar. CalChamber. May 4–5, Online. (800) 331-8877.

International Trade

2023 Taiwan Trade Shows. Taiwan Trade Center, San Francisco. March 6–November 8, Taiwan and Online. (408) 988-5018.

California International Arbitration Week. California Lawyers Association and California Arbitration. March 13–17, Los Angeles and Online. (916) 516-1760.

How to Leverage Hong Kong as a Hub to Grow Your Sales Across Asia. International Trade Administration, Getting to Global and U.S. Commercial Service. March 16, Online. (800) 872-8723.

Panama and CAFTA-DR Trade Mission. Foreign Agricultural Service, U.S. Department of Agriculture. March 19–23, Panama City, Panama. *trade-missions@fas.usda.gov*.

How to Sell into the Middle East and North Africa (MENA) Market via the Cross-Border Digital Sales Channels. International Trade Administration, Getting to Global and U.S. Commercial Service. April 13, Online. (800) 872-8723.

11th Annual Pan African Global Trade and Investment Conference. Center for African Peace and Conflict Resolution. April 26–30, 2023, Sacramento. *info@panafricanglobaltradeconference.com*.

See CalChamber-Sponsored: Page 7

Job Killer Bills Seek Massive Tax Increase

Once again, pending legislation seeks to impose a massive tax increase upon all forms of personal property or wealth despite California having the highest income tax rate in the country.

The California Chamber of Commerce has tagged **AB 259 (Lee; D-San Jose)** and **ACA 3 (Lee; D-San Jose)** as job killers that will encourage the highest net worth earners in California to leave for states with less punitive tax systems and discourage other entrepreneurs from investing in California innovation, jobs and economy.

In addition, ACA 3 proposes to eliminate the requirement for a two-thirds vote of the Legislature to classify personal property for tax purposes, thus clearing the way for even higher taxes in the future.

New Tax

The measures implicitly acknowledge that rates for existing California income taxes have reached their practical or political maximums, so proponents now propose to devise an entirely new tax never before considered for our state.

Not only is this proposed tax audacious in the amount of new revenue to be raised, estimated by some at $21.6 billion a year, it targets individuals who may have only a fleeting connection with the state — reaching across time and space to seize revenues from successful entrepreneurs and business owners.

These individuals have played a large role in driving California's budget growth and providing the shock-absorbing revenue surpluses that the state will use to offset today's revenue shortfalls.

Constitutional Amendment

ACA 3 proposes that the people of California amend the Constitution to authorize the Legislature to impose a tax upon all forms of personal property or wealth, whether tangible or intangible. The new tax would be administered and collected by the Franchise Tax Board (FTB) and the Department of Justice.

ACA 3 also in effect repeals the State Appropriations Limit law, which applies some discipline to legislative spending and has kept taxes within some reasonable and knowable bounds.

Annual Tax

AB 259, if adopted, imposes an annual tax beginning on or after January 1, 2024, and before January 1, 2026 at a rate of 1.5% of a resident's worldwide net worth in excess of $1 billion or in excess of $500 million in the case of a married taxpayer filing separately.

After January 1, 2026, a tax of 1% upon the worldwide net worth of every resident in this state in excess of $25 million (for married taxpayers filing separately) or $50 million for all other taxpayers in 2026. Worldwide net worth would not include any real property directly held by the taxpayer (but would include indirectly held real property). There would be an additional 0.5% surtax upon worldwide net worth in excess of $500 million for married taxpayers filing separately and $1 billion for all other taxpayers.

Worldwide net worth would be calculated in the manner set forth for calculating the federal estate tax under the Internal Revenue Code and would be the value of all worldwide property owned by the taxpayer on December 31 of each year. The FTB would be authorized to adopt regulations to prevent the avoidance or evasion of the wealth tax.

Harm to Tax Climate

California ranks 48th on the Tax Foundation's 2023 State Business Tax Climate Index. California already has the highest income tax rate in the country (13.3%) while Alaska, Florida, Nevada, South Dakota, Texas, Washington and Wyoming do not impose any income tax.

In addition, California has the highest sales tax rate and gas tax rate in the United States.

The top 5% of California income earners pay 70% of the total personal income tax (PIT) revenue. Losing any of these taxpayers and the revenue they contribute to the state could harm California's General Fund. Thus, these bills will plausibly achieve the exact opposite of their stated intent and drive the state's money away rather than redistributing it.

Furthermore, AB 259 will facilitate nuisance lawsuits under the guise of tax enforcement, create conflicts with existing tax law, and lead to double jeopardy for taxpayers.

California's elected leaders are facing the first revenue shortfalls since the Brown administration. The very last thing the Legislature should be doing is signaling to the most productive and prolific taxpayers in the state that they should consider taking their investments, energy, innovation and tax payments elsewhere.

Staff Contact: Preston Young

CalChamber Member Feedback

"CalChamber's focus on business, compliance and driving positive culture, and their solid working relationships at the State Capitol, complement and align with our company's values and business goals."

Dominick C. Johnson
President
Reyes Beer Division, Los Angeles Market Unit

Don't Treat California as a 'Luxury Good'

From Page 1

Address, "we must continue our quest for an honest accounting of where we've fallen short: on affordability, on housing, on homelessness."

In some ways, the great success of California sowed the seeds of the affordability crisis. Economic growth, the international renown of our high tech, biotech, entertainment and agricultural sectors, and our world class higher education systems, to name a few — these accomplishments can cloud the judgment of elected leaders, leading them to treat California as a "luxury good," believing that residents are willing to pay an ever-increasing cost to live here. This attitude gives rise to expensive and divisive policy initiatives that serve political constituencies and cultural trends, but which do not register with residents and taxpayers.

It costs a lot to make a life in the Golden State.

The good news is that California family income growth has outpaced the nation. Between 2011 and 2021, median inflation-adjusted household income increased by 27% in California, compared with 17% nationally. Hourly wages in California for private sector workers are about one-sixth higher in California than in the nation, and have climbed by 42% over the past decade, compared with a 38% increase nationally.

The typical family and worker is making more in California, which is a good thing, because it sure costs more to live here.

Housing: Biggest Expense

The biggest expense for most Californians is housing, and every year costs grow for both prospective homeowners and renters. California housing costs are infamous nationally and are perhaps the biggest selling point for workers when workplaces are expanded or moved outside of the state.

But most dispiriting is that the cost of housing is among the greatest contributors to poverty in California. According to the Public Policy Institute of California (PPIC), if the cost of housing had held constant at 2013 levels, 800,000 fewer Californians would have been in poverty in 2019. Unless more housing is built for every income level, which is the only solution to high housing costs, no amount of safety net relief can reverse poverty trends in the state.

High-Cost Essentials

In addition to the high cost of housing, Californians also face a "luxury tax" on other essentials. We have among the highest utility rates and gasoline prices in the nation, much of it a direct result of public policy.

The consensus of California's elected officials is to move full speed ahead to make California a world leader to address the root causes of climate change. The resulting policies have created real-world costs for Californians.

California Exodus

Choosing to make California a luxury good means we are pricing ourselves out of the market. Residents and businesses are voting with their feet.

According to the Department of Finance, the current fiscal year marks four straight years of population decline, during which California's population has decreased by about 643,000 residents — more than the combined headcount of Long Beach and Santa Rosa. The preponderance of the CalExodus is to nearby states, to whom we've lost residents every year since 2001.

Historically, residents who left California were different from those who moved into the state. In general, new Californians were more likely to be employed, better educated, and to earn high wages than those who moved away. But in the past five years that trend has changed; the flow of middle-income residents out of the state has accelerated and net gains among higher-income adults have ceased.

Workable Ideas

The Legislature has at hand any number of sensible, workable ideas to reverse the unaffordability trend and promote growth. To name a few:

- **Reform the California Environmental Quality Act** (CEQA) to reduce time-consuming and costly litigation that discourages or prevents construction of new housing, renewable energy projects, and critical water storage.
- **Reject new taxes, and hidden taxes**, that penalize employers for investing or producing in California, and that increase costs or reduce availability of products or services.
- **Restore a just and accessible forum for workplace disputes** by replacing the broken Private Attorneys General Act (PAGA) scheme with a responsive administrative process that puts employees first and reduces costs and uncertainties for employers.
- **Ensure that further greenhouse gas mitigation measures are technology-neutral, cost-effective, and include system reliability and public safety as guiding principles.**
- **Mitigate future employer costs and hiring disincentives** by helping repair the Unemployment Insurance Fund deficit and reforming the program going forward to reduce costs and increasing efficiencies.

Shadow of Reality

California retains significant competitive advantages as a place to start or grow a business. Employers, alongside many elected and community leaders, toil diligently to make California home for their enterprises. But our economic recovery and return to the post-pandemic new-normal is shadowed by the reality of just how much it costs to live in California.

Public policies have created luxury taxes on essentials for living, and make our state increasingly unaffordable for California residents and unattractive to those who might otherwise come here to invest in our economy.

Contact: Loren Kaye

Biden Administration Releases Trade Policy Priorities for 2023

Last week, the U.S. Trade Representative submitted to Congress the Biden administration's trade policy agenda for 2023 and annual report on how the office has worked to implement the administration's trade priorities.

The 2023 Trade Policy Agenda and 2022 Annual Report of the President of the United States on the Trade Agreements Program, released on March 1, is a 354-page report submitted to the Congress pursuant to the Trade Act of 1974 and prepared by the office of the U.S. Trade Representative (USTR).

"USTR's worker-centered trade agenda is realizing President Biden's vision to grow the American economy from the bottom up and the middle out," said U.S. Trade Representative Katherine Tai.

Citing enforcement of the U.S.-Mexico-Canada Agreement and "creating innovative trade arrangements with our allies and partners" as examples, Ambassador Tai said the administration "will continue to pursue an agenda that will deliver sustainable and inclusive economic prosperity for all."

The USTR press release notes that the USTR put the Biden administration's vision into practice in 2022 by launching and negotiating historic trade arrangements with partners in the European Union and Kenya, as well as:

- **The Indo-Pacific Economic Framework for Prosperity (IPEF)**: USTR and the U.S. Department of Commerce are negotiating an innovative trade framework with 13 countries in the Indo-Pacific region that, combined with the United States, represent 40% of global gross domestic product (GDP). The IPEF will tackle 21st century challenges, particularly those exposed during the COVID-19 pandemic and Russia's invasion of Ukraine.
- **U.S.-Taiwan 21st Century Trade Initiative**: The United States and Taiwan, under the auspices of the American Institute in Taiwan (AIT) and the Taipei Economic and Cultural Representative Office in the United States (TECRO), are negotiating a new trade framework that will deepen longstanding economic and cultural ties.
- **Americas Partnership for Economic Prosperity**: Announced in June 2022, the Americas Partnership includes 11 other countries that represent about 90% of the Western Hemisphere's GDP and nearly two-thirds of its people. This initiative will drive the region's economic growth and broadly shared prosperity, tackle the core issues that will define the coming decades, and galvanize greater economic cooperation in the hemisphere.

The USTR fact sheet lists key elements of the 2023 Trade Policy Agenda and 2022 Annual Report as including:

- Engaging with key trading partners and multilateral institutions.
- Standing up for workers' rights,
- Accelerating decarbonization and promoting sustainable environmental practices.
- Supporting U.S. agriculture.
- Bolstering supply chain resiliency.
- Re-aligning the U.S.-China trade relationship.
- Promoting confidence in trade policy through enforcement.
- Advancing equitable, inclusive, and durable trade policy and expanding stakeholder engagement.

Trade Statistics

In 2022, the United States exported a record total of $2.06 trillion in goods to the world and imported $3.24 trillion, creating a goods deficit of $1.18 trillion. U.S. exports increased by 17.56% in 2022, while imports also increased by 14.65%.

California's $185.55 billion of exports in 2022 was an increase of 6.07% from the previous year's total of $174.9 billion, according to U.S. Department of Commerce statistics. California's top five export markets remained the same in 2022, in order: Mexico, Canada, China, Japan and South Korea. For 2022, California's import trade totaled $508.75 billion, an increase of 8.17% from the previous year.

CalChamber Trade Priorities

The California Chamber of Commerce, in keeping with a longstanding free trade agenda and policy, supports expansion of international trade and investment, fair and equitable market access for California products abroad, and elimination of disincentives that impede the international competitiveness of California business.

Specifically, the CalChamber asks that:

- Trade be a priority.
- The revamp of the World Trade Organization address the functioning of the Appellate Body, and support efforts to ensure our trading partners adhere to fair and transparent trade practices while being held accountable when they violate international rules.
- The focus continue on lowering tariffs and nontariff barriers to support the expansion of American exports.
- Trade Promotion Authority is renewed to enable the United States to easily pursue new trade deals.
- Bilateral, regional, and multilateral trade agreements — which are critical to consumers, workers, businesses, farmers and ranchers — continue to be advanced.

Trade as a Priority

California is one of the 10 largest economies in the world with a gross state product of more than $3.5 trillion.

International trade and investment are a major part of the economic engine for the state of California that broadly benefits businesses, communities, consumers and state government. California's economy is more diversified than ever before, and the state's prosperity is tied to exports and imports of both goods and services by California-based companies, to exports and imports through California's transportation gateways, and to inflows and outflows of human and capital resources.

Accordingly, promoting the ability of California companies to compete more effectively in foreign markets continues to be a high priority for the CalChamber, along with attracting foreign business to the state.

Supporting global trade is about helping Main Street businesses. Most exporting firms in California are small and medium-sized businesses. The jobs created in these trade-reliant sectors pay higher wages than their nontrade-related counterparts and create additional jobs in nontraded industries, such as restaurants, retail, hospitality and others.

Staff Contact: Susanne T. Stirling

Employers Don't Need to Count Overtime Twice in Percentage Bonuses

A California Court of Appeals ruled recently in favor of a federal method for calculating percentage bonuses rather than a state method the court said led to double counting overtime.

The court ruled that employers can calculate nondiscretionary percentage bonuses using the federal Fair Labor Standards Act (FLSA) calculation method detailed in FLSA regulations rather than a method described in the California Division of Labor Standards Enforcement (DLSE) Manual, even though the DLSE method would have resulted in more pay (*Lemm v. Ecolab Inc*., 87 Cal. App. 5th 159 (2023)).

Lemm was a route sales manager for Ecolab, which meant he was the primary contact with certain customers, visiting them regularly to provide services and sell products and parts. He was a nonexempt employee who regularly worked more than 12 hours per day and more than 40 hours per week.

Calculation

His compensation was calculated based on an annual Incentive Compensation Plan. Under the plan, his compensation was a combination of hourly wages and a nondiscretionary monthly bonus. The hourly wages, including any overtime or double overtime, were paid every two weeks and were not the issue in this lawsuit — the issue was the bonus and how it was calculated.

Lemm's monthly bonus was nondiscretionary — meaning he was entitled to it whenever he met specified criteria under his compensation plan. When he met or exceeded his target metrics, his gross wages for the month were increased by a percentage specified in the plan.

To calculate the bonus, Ecolab multiplied Lemm's gross wages, including straight time, overtime and double overtime wages, by the applicable percentage. As a result, the bonus necessarily included additional overtime compensation. That calculation method is expressly provided for under the Code of Federal Regulations (CFR) 778.210.

PAGA Lawsuit

Lemm brought a representative suit under California's Private Attorneys General Act (PAGA) alleging he and other route sales managers failed to receive the proper overtime rate as part of the nondiscretionary bonus. He argued that, under the formula set forth in DLSE's enforcement manual Section 49.2.4, nondiscretionary bonus payments must be incorporated into the regular rate of pay, which would affect overtime calculations.

He contended that the DLSE method should have been used over the federal method because the DLSE method resulted in higher pay, and California law favors interpretations more protective of — and favorable to — employees.

Ecolab relied on CFR 778.210, which states that a percentage bonus based on straight time **and** overtime earnings satisfies federal overtime requirements. Ecolab argued that since its bonus was calculated as a percentage of both straight time and overtime, use of the DLSE's formula would result in the double counting of overtime — "overtime on overtime."

Court Ruling

The court agreed with Ecolab, holding that the calculation of the percentage bonus based on both straight time and overtime wages satisfied Ecolab's overtime obligations.

The court also agreed that California's general rule is to choose the interpretation that favors the employee — but giving an employee "overtime on overtime" would be a "windfall" to the employee and inconsistent with the Labor Code and Industrial Welfare Commission Wage Order overtime provisions.

Employers using percentage bonuses as part of their compensation practices should consult with legal counsel about the potential impact of this case on their pay practices.

CalChamber members can read more about Bonuses in the HR Library on *HRCalifornia*.

Not a member? Learn about the benefits of a membership.

Staff Contact: James Ward

Adam Regele Promoted to VP of Advocacy and Strategic Partnerships

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Regele joined the CalChamber in 2018 and was named a senior policy advocate in 2021 in recognition of his efforts on behalf of CalChamber members.

He came to the CalChamber policy team after practicing law at an Oakland-based law firm — Meyers, Nave, Riback, Silver & Wilson, PLC — where he advised private and public clients on complex projects involving land use and environmental laws and regulations at the local, state and federal levels. His extensive environmental and waste regulatory compliance experience includes defending in litigation matters related to the California Environmental Quality Act (CEQA), Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Resource Conservation and Recovery Act (RCRA).

Before joining Meyers Nave, Regele handled state and federal environmental litigation and administrative proceedings as an associate at a Bay Area law firm that focused on environmental, natural resources, land use, labor and local government law.

He served as a federal judicial law clerk to the Honorable Edward J. Davila of the U.S. District Court, Northern District of California, and as a legal fellow with the Oakland City Attorney's Office prior to entering private law practice.

Regele earned a B.S. in environmental science at the University of California, Berkeley, and a J.D. from UC Hastings College of Law, where he was symposium editor and research and development editor for the *Hastings West-Northwest Journal*.

No Pay Secrecy; Bona Fide Factors OK to Justify Pay Differences

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employer has to show that the factor also is job-related and consistent with business necessity.

For example, if an employer uses experience as the bona fide factor to justify disparate pay between two employees, the experience needs to be related to the job that the employees perform and not just "more experience."

For this employer, the employee earned the salary increase because of the quality of their work compared to their peers as reflected in the performance review. So, the employer may rely on this factor to justify why they are paying this employee more than any other that does substantially similar work.

Relying on these factors, employers then can have open conversations with the rest of their employees about why compensation decisions were made after the staff became aware of the raise as well as avoid any potential claims under the Fair Pay Act.

Column based on questions asked by callers on the Labor Law Helpline, a service to California Chamber of Commerce preferred and executive members. For expert explanations of labor laws and Cal/OSHA regulations, not legal counsel for specific situations, call (800) 348-2262 or submit your question at www.hrcalifornia.com.

CalChamber-Sponsored Seminars/Trade Shows

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The Stockholm Model — Creating Sustainable Impact for Society through Collaboration and Innovation. KTH Royal Institute of Technology. May 8–9, San Francisco. 46-8-790 65 50.

Annual Export Conference. National Association of District Export Councils (NADEC). May 9–10, Washington, D.C. *aburkett@naita.org*.

U.S. to EU: How to Sell into European Union via eCommerce. International Trade Administration, Getting to Global and U.S. Commercial Service. May 18, Online. (800) 872-8723.

NAFSA Annual Conference & Expo. National Association of International Educators. May 30–June 2, Washington, D.C. (202) 737-3699. Early bird registration through April 14.

Smart City Expo World Congress (SCEWC). Smart City Expo World Congress. November 7–9, Barcelona, Spain. (704) 248-6875.