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OF THE
UNITED STATES OF AMERICA

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July 12, 2006

Ms. Lorraine Hunt
Office of Information and Regulatory Affairs
Office of Management and Budget
New Executive Office Building
Room 10202
725 17th Street, NW
Washington, DC 20503

Re: Comments on OMB's *Draft 2006 Report to Congress on the Costs and Benefits of Federal Regulations*

Dear Ms. Hunt:

The U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses and organizations of every size, sector, and region, is pleased to provide the following comments on the Office of Management and Budget's (OMB) *Draft 2006 Report to Congress on the Costs and Benefits of Federal Regulations* (Draft Report).¹

INTRODUCTION

Each year, federal agencies issue thousands of new regulations, many of which have significant economic ramifications for the regulated community. And despite repeated efforts by both the administration and Congress to curb the number and cost of federal regulations,² nothing has proven effective.³

¹ *Federal Register* 71 (April 13, 2006): 19213.

² For example, Executive Order 12044, Improving Government Regulations, signed by President Carter in 1978, established requirements for centralized review of regulations and the preparation of regulatory analyses, and mandated that agencies "periodically" review existing regulations. Executive Order 12866, Regulatory Planning and Review, was signed by President Clinton in 1993 and required agencies to review existing regulations to identify which could be modified or eliminated. Section 610 of the Regulatory Flexibility Act requires federal agencies to review regulations every 10 years to determine whether they are meeting their objectives and if they should be rescinded.

³ The cost of regulations increases each year. It should be noted, however, that the rate of the annual increase in regulatory costs has been slower in the current Bush Administration than it has been in the previous three administrations. *Draft 2006 Report to Congress on the Costs and Benefits of Federal Regulations*, page 27.

OMB's most recent Draft Report—if taken at face value—seems to conclude that the benefits to be derived from federal regulations are far greater than the costs associated with them. This is far from accurate.

In these comments, the U.S. Chamber discusses the flaws in OMB's Draft Report by pointing out some of the critical problems with how regulatory costs and benefits are assessed by agencies. These comments also discuss how those problems can manifest themselves in costly rules and regulations, and suggest options for improving the process by which agencies calculate regulatory impacts.

PROBLEMS WITH COST-BENEFIT ANALYSIS

Cost-benefit analysis is a policymaking tool, utilized by federal agencies, to calculate whether the potential benefits of a proposed regulation outweigh the cost of implementing it. Federal agencies are mandated by executive order⁴ to conduct cost-benefit analyses for proposed “major” rules—those expected to have an economic impact of greater than \$100 million—to determine if expenditures for a particular regulatory action are worth the benefits to be received.

The U.S. Chamber is a strong proponent of ensuring that economic considerations are a part of the regulatory decision-making process. Unfortunately, however, cost-benefit analysis is subject to abuse by federal agencies and, therefore, is inadequate in its current form. Until these abuses can be rectified, cost-benefit analysis will never be the strong policymaking tool it was intended to be.

One of the biggest problems with how federal agencies calculate the costs and benefits of a proposed regulation is agency use of *ex ante* studies. *Ex ante* studies are pre-regulation forecasts of what the agency predicts will happen once a rule takes effect. These “educated guesses” are an inadequate form of economic modeling because they do not present the public with a reasonable and true account of the costs of regulatory impacts. Moreover, the U.S. Chamber believes that the use of *ex ante*, or prospective, analysis is subject to frequent abuse by federal agencies because agencies are allowed to determine for themselves which rules are deemed to be major. This raises the possibility of some agencies “gaming” the system by purposefully understating costs or overstating the benefits of proposed regulations to avoid performing an impact analysis.

Ex ante studies also do not account for rules originally deemed to be minor by an agency but which often end up having major impacts. *Ex ante* studies are by their

⁴ Executive Order 12866, Regulatory Planning and Review, *Federal Register* 58 (October 2, 1993): 51735

very nature imprecise estimates of future occurrences. As a result, projected costs and benefits of new regulations are often inaccurate and end up costing businesses significant time and money in regulatory compliance costs.

To its credit, OMB recognized the inherent difficulties with *ex ante* studies⁵ and, as part of the Draft Report issued last year, took comments on ways to improve this accounting method. Whether OMB acts on these comments and takes steps to improve the economic modeling done by agencies remains to be seen.

Another major criticism the U.S. Chamber has of OMB's Draft Report is that it only provides a snapshot of certain regulatory costs and benefits, namely those associated with major rules and regulations. What's worse, OMB only considers cost-benefit estimates for a small fraction of those major rules and regulations. For example, in its 2006 Draft Report, only 13 out of a total of 45 major rules were reviewed by OMB. Moreover, as noted above, many rules deemed minor by the agencies are in fact major in their impact. Nevertheless, OMB excludes cost-benefit estimates for all non-major rules—thus presenting only a partial picture of the true regulatory costs associated with federal regulations. As a result, the final cost-benefit assessment of federal regulations is inaccurate and ultimately misleading to the public.

FLAWS RESULT IN COSTLY REGULATION

When the tools utilized by federal agencies to calculate the costs and benefits of regulations are inadequate, then the figures they produce will be incorrect. A clear example of this can be found in OMB's current Draft Report.

The Draft Report notes that the aggregate benefits for this year are “substantially larger” than those presented in last year's report.⁶ The reason for this dramatic increase in projected benefits is the addition of a U.S. Environmental Protection Agency (EPA) rulemaking—the Clean Air Interstate Rule (CAIR). EPA estimates that CAIR will provide approximately \$50 billion to \$60 billion in yearly benefits, with only \$1.8 billion in annual costs. These benefits are attributable to the reduction in public exposure to fine particulate matter, a hazardous air pollutant.

Yet the projected benefits from CAIR are ultimately misleading because of the wide-range of uncertainty inherent in the cost-benefit analysis of this rule. For

⁵ “[A]n *ex ante* estimate is no more than an informed guess and, like other forms of prospective modeling, the estimates may or may not prove to be accurate once real-world experience with the rule is accumulated and analyzed.” *Draft 2005 Report to Congress on the Costs and Benefits of Federal Regulations*, Office of Management and Budget, *Federal Register* 70 (March 23, 2005): 14735.

⁶ *Draft 2006 Report to Congress on the Costs and Benefits of Federal Regulations*, pg 5.

example, a key assumption made in calculating the benefits is that the inhalation of fine particulate matter is causally associated with a risk of premature death at concentrations near those experienced by most Americans on a daily basis. In other words, EPA simply assumes a causal link in the absence of scientific certainty and this calls into question the integrity of the entire cost-benefit estimate.

RECOMMENDATIONS FOR IMPROVEMENT

The U.S. Chamber recognizes the difficulties that OMB faces in developing beneficial tools for use by reluctant federal agencies charged with calculating the cost and benefits of regulations. In fact, OMB acknowledges that the current regulatory accounting method it utilizes is not satisfactory.⁷ Yet, with the number and cost of regulations skyrocketing, addressing this issue is of the utmost importance.

The U.S. Chamber recommends the following methods for improving cost-benefit analyses:

- Consider all new regulations. Agencies should have to account for all new regulations—both major and minor—and not just those deemed by the agency to be significant. This will solve the problem of agencies “gaming” the system because all regulations will have to have a cost-benefit analysis conducted instead of just those with significant economic impacts. At the very least, OMB should consider all major regulations promulgated by the agencies. The fact that it considered only 13 of 45 major rules is simply not sufficient.
- Use *ex post* validation studies. Instead of the flawed *ex ante* studies currently being used, the agencies should use *ex post* validation studies. *Ex post* validation studies are retroactive assessments conducted by federal agencies of the cost of regulations after they have been implemented. At a minimum, federal agencies should be required to periodically revise and recalculate their earlier *ex ante* estimates based on what actually occurred after the regulations were implemented.
- Do not rely on agency numbers. Currently, OMB merely reports an aggregate of costs and benefits based on figures and calculations provided by the agencies, rather than conducting its own independent analysis. This is almost certainly due to OMB’s limited resources

⁷ 2006 Draft Report to Congress on the Costs and Benefits of Federal Regulations, Pg. 4, Fn. 7: “OMB discusses, in this report and in previous reports the difficulty of estimating and aggregating the costs and benefits of different regulations over long time periods and across many agencies using different methodologies.”

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because the agency has to do the best with what it has available, which means relying on agency calculations. Nevertheless, an independent analysis by OMB (even if it means just randomly checking agency calculations for selected rules) would certainly result in more accurate economic assessments.

Implementing these suggestions would substantially improve OMB's Draft Report, provide a more accurate assessment of the true cost of regulations to the public, and ultimately narrow the degree of uncertainty inherent in the current accounting system.

CONCLUSION

The U.S. Chamber firmly believes that sound science, quality data, reliable environmental and economic modeling methodologies, and transparent weight-of-evidence techniques must be used in assessing regulatory impacts. Without such underlying attention to scientific details, cost-benefit estimates will remain inadequate and inaccurate.

The U.S. Chamber is grateful for this opportunity to present its comments on OMB's *Draft 2006 Report to Congress on the Costs and Benefits of Federal Regulations*.

Sincerely,

A handwritten signature in black ink, appearing to read "William L. Kovacs". The signature is written in a cursive style with a large initial "W".

William L. Kovacs