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To: OIRA_BC_RPT@omb.eop.gov

cc:
Subject: Draft Report Comments

I am attaching comments on the Draft 2004 Report to this e-mail in a WordPerfect document. If you need documents in some other format, such as PDF or Word, please feel free to let me know.

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- Final Comments.wpd

May 20, 2004

Lorraine Hunt
Office of Information and Regulatory Affairs
Office of Management and Budget
NEOB, Room 10202
725 17th Street, NW
Washington, DC 20503

Re: *Comments on Draft 2004 Report to Congress on the Costs and Benefits of Federal Regulations*

Dear Ms. Hunt:

I am submitting the following comments on the *Draft 2004 Report to Congress on the Costs and Benefits of Federal Regulations* on behalf of OMB Watch, a nonpartisan research, analysis, and advocacy center that promotes an open, accountable government responsive to community needs. OMB Watch appreciates the opportunity to comment on the Draft Report, which perpetuates unsound methodologies and calls for new rollbacks of vital protections of the public health, safety, and environment.

I. THE DRAFT REPORT ADVANCES THE BANKRUPT ENTERPRISE OF "REGULATORY ACCOUNTING."

The Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) has been charged with producing this annual report on the costs and benefits of regulations. Perhaps because it recognizes the limited utility of the economistic accounting of regulations' costs and benefits, each year OIRA has devoted decreasing attention to the cost-benefit statement and increasing attention to gratuitous additions, such as this year's argument for scaling back safeguards targeting manufacturers. The "regulatory accounting" methods of the cost-benefit portion of the report continue to provide a warped picture of the network of safeguards which give Americans a quality of life envied worldwide. It is time to consider abandoning these methods altogether.

A. OIRA uses methodologies so unsound that they render the report useless for regulatory policy.

The troubling methodologies of "regulatory accounting" and its associated limitations have been described in great detail elsewhere.[1] Any catalog of these defects is so long that it may well be numbing to the reader. The most profound is that the whole enterprise amounts to much ado about nothing. What does it gain us to know, as OIRA claims, that the total costs of major federal protections from October 2002 to September 2003 ranged somewhere between $1.9 billion and $1.925 billion, or that the rules' benefits ranged between $1.6 billion and $4.5 billion? What value do those figures, or the related figures over a ten-year span, retain when the report adds its caveats:

- The rules covered are only a selection of "major regulations" issued in that time period and exclude all the many protections that continue to provide significant benefits to the public health, safety, and environment even after all the compliance costs have long since been paid.

- The cost figures derive exclusively from the agencies' *ex ante* guesses of compliance costs—guesses which have been shown to overestimate actual costs to a significant degree.

- The figures aggregate cost and benefit estimates from agencies which use methodologies so divergent that the resulting numbers are not comparable in any meaningful way.

- The benefits estimates exclude many benefits that were not quantified and thus are represented in the "total" numbers as mere zeroes. Such omitted benefits include the following:

    - "[R]educed human and ecological risks from antibiotics, hormones, metals, and salts" from pollution regulations governing animal feeding operations.[2]

    - No benefits at all from regulations that flesh out the Family and Medical Leave Act.[3]

    - Non-cancer benefits from Clean Water Act regulations, including "(1) Decreased incidence of systemic toxicity to vital

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1. For a broad discussion of the philosophical problems and logical inconsistencies in standard "regulatory accounting" discourse, see Frank Ackerman & Lisa Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing* (New York: New Press, 2004). For a detailed description of the bias in "regulatory accounting" to inflate measures of "regulatory burden," see Ruth Ruttenberg & Assocs., Public Citizen, "Not Too Costly After All: An Examination of the Inflated Cost-Estimates of Health, Safety, and Environmental Protections," Feb. 2004 (available on-line at <http://www.citizen.org/documents/Not%20Too%20Costly.pdf>.).

2. Draft Report at 15 Tbl.4.

3. Draft Report at 42 Tbl.9.

> organs such as liver and kidney; (2) decreased extent of learning disability and intellectual impairment . . .; and (3) decreased risk of adverse reproductive effects and genotoxicity."[4]

However complex the econometrics that produce the cost and benefit figures, they omit so much and are based on assumptions so unrealistic and distorted that they are of no value to policymakers.

The aggregation of the disparate numbers masks the debatable moral and ethical positions that the numbers represent. The cost and benefit figures submitted by the agencies were derived in part from methodologies that include the following:

- opinion surveys that ask respondents to name a price they would be willing to pay for preserving endangered species, avoiding cancers, and so forth;
- calculations that cash out human lives by converting the number of years of life saved into separate cash equivalents, which inevitably yield lower cash values for the elderly than for the young; and
- discount rates, operating like compound interest in reverse, that lower the value of benefits achieved in the future and make short-term gains excessively valuable in contrast.

These and other troubling methodologies—standard in the world of "regulatory accounting"—assume away the complex moral issues involved and turn what should be decided in democratic fora into assumptions embedded in econometric algorithms. OIRA's use of the results of such methods in its aggregated totals recapitulates these problems and buries them more deeply under the false simplicity of its aggregation.

The severe limitations of these cost and benefit numbers leave us with nothing truly useful for policy-making. At the time that economists were installed in the agencies and at OIRA spending limited resources on compiling these useless numbers, agency budgets have been slashed, and the enforcement of existing protections has weakened. In other words (words that OIRA should appreciate), the cost of these multiple cost-benefit analyses so far exceeds the benefits of the practice that it should be scrapped altogether as an inexcusable waste of resources. Trading the risk of expensive regulation for the risk of harms to the public health, safety, and environment has proven a trade-off too costly to continue.

B. OIRA's use of "regulatory accounting" reveals a hostility to regulatory safeguards.

OIRA has not only replicated the biases inherent in the regulatory accounting enterprise as conducted by the agencies but has also revealed its own biases in the cost-benefit sections of the draft report. One of the caveats above bears closer scrutiny: the annual and 10-year totals of costs and benefits cover only major rules issued during those time periods. Most extant rules pre-date the 10-year window of this draft report, and they continue to protect the public health, safety, and environment even as the costs of compliance with them have diminished. OIRA dismisses all rules pre-dating 1993, saying, "As

4. Draft Report at 45 Tbl.9.

discussed in the 2003 Report, OMB has chosen a 10-year period for aggregation because pre-regulation estimates prepared for rules adopted more than ten years ago are of questionable relevance today" (Draft Report at 4). Granted, the 2003 report does not *discuss* any rationale for that decision but merely asserts the same position with the same language.[5] Still, OIRA's 10-year rule for relevance does not seem to apply elsewhere in the draft report; for example, OIRA relies on an article that draws on 1974 compliance data.[6]

Then there is OIRA's startling coda to its section reviewing international studies of regulation. Arguing that the studies constitute a "pattern of findings" that "provides strong support" for what the administration calls "smarter regulation," the report concludes that the results are consistent with economic theories linking economic growth to "regulatory policies that promote competitive markets, secure property rights, and intervene to correct market failures *rather than to increase state influence*" (Draft Report at 31, emphasis added). That last clause is breathtaking. If OIRA assumes that regulatory policy posits a choice between correcting market failures and increasing state influence, then OIRA takes so dim a view of public safeguards that its continuing role in regulatory affairs is alarming.

II. OIRA IS INAPPROPRIATELY USING THE DRAFT REPORT AS A FORUM FOR SOLICITING A REGULATORY HIT LIST.

As it has in the past, OIRA has opted to make this year's report a vehicle for soliciting nominations for rollbacks of regulatory protections. Notionally, OIRA requests "nominations of promising regulatory reforms" limited only to the criteria of "reducing unnecessary costs, increasing effectiveness, enhancing competitiveness, reducing uncertainty, and increasing flexibility"—criteria which need not result exclusively in scale-backs of regulatory protections. In fact, it is possible that new, more stringent protections of the public health, safety, and environment could meet all those criteria by inducing firms to discover and implement improved efficiencies in operation. Still, OIRA positions its call for "reforms" after arguing that the "cumulative costs of regulation on the manufacturing sector are large compared to other sectors of the economy" and placing that argument "[i]n light of recent concerns about the health of manufacturing in the U.S." (Draft Report 1). OIRA has thus made it quite clear that the only "reforms" truly sought are those that favor the manufacturing sector by rolling back the regulations that create vital protections for the public health, safety, and environment. This use of the annual report to build a hit list of safeguards is troubling, because OIRA has neither the right to compile the list nor the competence to do the right thing with it.

A. OIRA lacks the authority to solicit a hit list of safeguards to be rolled back.

Soliciting the hit list of regulatory protections to be rolled back or watered down is beyond the limited scope for the report that Congress authorized. OIRA is authorized by statute to report the costs and benefits of regulations and make recommendations, if necessary, *to Congress* on reforms to the network of regulatory protections. Congress did not, however, authorize OIRA to open up those

5. *See* 2003 Report at 7 ("OMB has chosen a 10-year period for aggregation because pre-regulation estimates for rules adopted more than ten years ago are of questionable relevance today.").

6. *See* Draft Report at 53 (discussing James article).

protections to an industry free-for-all in which industry identifies its own targets for weakening or rolling back, and Congress definitely did not authorize OIRA to conduct its own series of follow-up actions prompting agencies to implement any hit list.

This hit list project is an arrogation of power utterly without mandate or justification. Congress alone holds the power to regulate conduct harmful to the public interest. In certain complex areas, such as environmental protection and workplace safety, Congress has realized that sound protections require the consultation of experts, in-depth investigations of existing problems, comparisons of a wide array of options, and the participation of a broad cross-section of the public. In order to authorize action while allowing the finer points to be worked out over the time it takes for all these requirements to be fulfilled, Congress authorizes agencies to bring all these resources to bear in the issuance of regulations that give substance to broad statutory mandates. Short-circuiting the agency process to scale back the protections mandated by Congress is not a power OIRA has ever been granted.

OIRA's invitation to compile a new hit list disrupts a system that has been refined over decades. Members of the public seeking changes in regulation have always had two options: they can submit petitions for rule-making to regulatory agencies through 5 U.S.C. § 553(e), and they can always lobby Congress itself. There is a reason that these are the two options: Congress sets the ultimate protective agenda through federal law, and Congress in turn relies on agencies, which have the resources and expertise to unite public voices and scientific wisdom, to draw on those resources in setting their own sensibly balanced agendas for rule-making. OIRA is not merely providing a third alternative; it is disrupting a carefully constructed system that was developed over decades to balance competing public preferences and the insights of scientific experts in the development of important protections. OIRA's economists, even with a handful of scientists to support them, lack both the agencies' institutional competence to make sound judgments and Congress's constitutional authority.

B. OIRA lacks the competence to interfere with regulatory priorities.

Experience has proven the wisdom of the system we have and the folly of the hit list project OIRA proposes. OIRA's 2001 report solicited a hit list that resulted in one regulation being placed on a "high priority" list of rules to be rolled back—just months after OIRA itself had written the agency prompting it to *create* the rule.[7] Rules were added to that "high priority" hit list with little or no justification, despite the sometimes years-long development of a record justifying the issuance of the rules in the first instance and even cost-benefit analyses that, within the controversial terms of "regulatory accounting" discourse, demonstrated net benefits.[8] These inconsistencies only resolve into coherence with the contemplation of OIRA's evident bias toward industry interests, with whom OIRA has contacts that it refuses to disclose to the public, and many of which are the same interests that supported OIRA director John Graham's Center for Risk Analysis.[9]

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7. Joan Claybrook, Public Citizen, Comments to 2002 Draft Report on the Costs and Benefits of Federal Regulation, at 9 (available on-line at <http://www.citizen.org/documents/cb%20comments.pdf>).

8. *See id*. at 8-9.

9. *See id*. at 10.

Leaving agenda-setting to the agencies makes much more sense. The public health, safety, and environmental agencies routinely draw on experts and members of the public who have experienced first-hand the need for sensible safeguards, and some of their career staff members have worked in their fields for so long that they are experts in their own right. They know their issues with a depth and breadth that a handful of economists in OIRA cannot match. OIRA's compilation of an anti-protection hit list and inevitable use of back-door pressure to have that list implemented will only interfere with the judgment of the professionals who have far more expertise to make such decisions.

III. OIRA HAS NOT ESTABLISHED A PLAUSIBLE CASE FOR EXEMPTING MANUFACTURERS FROM PROTECTIONS OF THE PUBLIC HEALTH, SAFETY, AND ENVIRONMENT.

OIRA claims that a hit list to serve manufacturers is needed "[i]n light of recent concerns about the health of manufacturing in the U.S" (Draft Report 1). Such concerns are misplaced. According to the Institute for Supply Management, the health of manufacturing is not a cause for concern and in fact has been quite hardy for some time. The Institute's *Report on Business* found as of March that manufacturing has registered above 50 on its index—a score that indicates expansion—for 10 consecutive months.[10] Said one financial analyst, "Plain and simple, this report tells us that the manufacturing sector is smoking."[11]

What OIRA appears to be exploiting is the concern about the health of manufacturing *jobs* in the United States. The press release accompanying the draft report made that link explicit by including this telling sentence: "The President's Council of Economic Advisors recently reported that, while manufacturing is beginning to share in the economic recovery, the rebound in manufacturing employment has not been as rapid as in other sectors."[12] The implication that rolling back or weakening protections of the public health, safety, and environment will necessarily improve the crisis in manufacturing jobs is dubious at best and ignores the two primary reasons for the loss of such jobs: off-shoring and "productivity" gains. The latter may well be a symptom of the former: although the usual argument is that firms are using fewer employees because of technical advances and management improvements, one commentator urges that many productivity gains are actually the result of off-shoring practices.[13] The off-shoring of these valuable jobs since the advent of certain recent global trade agreements has provoked quite serious "concerns" about the health of high-wage blue-collar employment, and even finance commentator Lou Dobbs has begun to catalog these job losses on his CNN broadcast in a running segment called "The Exporting of America."[14] OIRA has chosen, however, to ignore the off-shoring

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10. *See* Institute for Supply Management, "March Manufacturing ISM *Report on Business*: PMI at 62.5%," press release on-line at <http://www.ism.ws/ISMReport/ROB042004.cfm>.

11. Sue Kirchhoff, "Manufacturing perks up in March," *USA Today*, Apr. 1, 2004, available on-line at <http://www.usatoday.com/money/economy/production/2004-04-01-ism_x.htm>.

12. Office of Management and Budget, "OMB Initiates Review of Manufacturing Regulations," Feb. 13, 2005 (available on-line at <http://www.whitehouse.gov/omb/pubpress/fy2004/2004-05.pdf>).

13. *See* Thom Hartmann, "Exposing the Conservative Straw Man: 'Productivity,'" *Common Dreams News Center*, April 12, 2004 (available on-line at <http://commondreams.org/views04/0412-13.htm>).

14. *See* http://www.cnn.com/CNN/Programs/lou.dobbs.tonight/.

problem altogether and in fact insists that members of the public nominating rules for the hit list should ignore off-shoring as well.[15]

The supporting literature cited in the report does little to support this hit list project. The observations of the discredited Crain and Hopkins study only reveal the unsurprising conclusion that manufacturers bear more compliance costs than other industries. Even if the troubling questions about the underlying methodology of identifying costs attributable to regulations are bracketed, the conclusion that manufacturers bear greater costs than others is, without context, meaningless. The manufacturing sector takes materials and processes them into new products along with waste from the processing and unused constituents of the original materials. It can be dangerous work for employees and can result in hazardous waste products that are released in the environment to everyone's detriment. That manufacturers must do more to protect workers and the environment than, say, retailers does not reveal a problem that needs to be fixed but instead may be evidence that safeguards are wisely targeting those who create the harms from which we need protection.

Further, the draft report cites articles by James and Joshi, Krishnan, and Lave to argue that compliance cost figures "substantially underestimate" the full "regulatory burden."[16] The James article does estimate that the full "burden" of OSHA regulations exceeds the costs of compliance expenditures, but only by a series of sleights of hand. To arrive at what he concludes to be the most reasonable estimate of $33.5 billion, James compares the total annual cost of OSHA compliance estimated by a 1974 National Association of Manufacturers study against the total cost of 25 major rules in 1993, which he discovered was 5.55 times lower than the NAM figure. Here is the trick:

> Assuming that the compliance burden of OSHA regulations in 1993 is at least as great as the compliance burden of OSHA regulations on business establishments in 1974 (and that the 1974 estimate is reasonably accurate), then the total compliance costs of all of OSHA's regulations enforced in 1993 is projected to be at least 5.55 times the total for the 25 major OSHA rules examined in this study.[17]

The assumption that the 1974 NAM estimate is "reasonably accurate" does not hold; as McGarity and Ruttenberg observe, the National Association of Manufacturers is a lobbying organization whose vested interest in overestimating regulatory costs makes its numbers immediately suspect, and there is no evidence that James made any effort at all to verify the NAM data.[18] Moreover, James relies entirely on *ex ante* estimates of compliance costs from OSHA's regulatory impact analyses, which use biased samples, fail to anticipate technological innovations that will drive down actual costs, and other

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15. *See* Draft Report at 57 (requesting that commenters "give[] due consideration to fair and open trade policy objectives" when nominating protections for the new hit list).

16. *See* Draft Report at 53 (discussing Harvey S. James, Jr., "Estimating OSHA Compliance Costs," *Policy Sciences* 31(1998): 321-41, and Satish Joshi, Ranjani Krishnan, and Lester Lave, "Estimating the Hidden Costs of Environmental Regulation," *The Accounting Review* 76.2(April 2001): 171-98).

17. James, *supra*, at 329.

18. Thomas O. McGarity & Ruth Ruttenberg, "Counting the Cost of Health, Safety, and Environmental Regulation," 80 *Tex. L. Rev.* 1997, 2018 & n.120 (2002).

conservative assumptions that routinely overestimate actual compliance costs significantly.[19] In fact, as in the case of the cotton dust rule that is included in James's list of 25 major rules, the actual *ex post* result was rapid compliance that improved competitiveness.[20] The additional assumption that 1993 costs must be at least as great as 1974 costs replicates these same errors by ratcheting up 1993 costs to an inflated 1974 level and by failing to consider that innovations over time could indeed make compliance less costly over a 20-year timespan.

OIRA's call for a new hit list to give away public protections for the private gain of manufacturers is not based on any sound principle and does not respond to any real need. Instead, it is an over-reach of the very limited authority Congress granted OIRA to *report to Congress* on regulatory affairs. The special interests with which OIRA continues to meet in secrecy should not be permitted to steal back the safeguards that protect our public health, safety, and environment.

Sincerely,

J. Robert Shull
Senior Regulatory Policy Analyst

19. *See id*. at 2030-33.

20. *See* Ruth Ruttenberg & Assocs., *supra*, at 27.