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To: John F. Morrall III/OMB/EOP@EOP

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Subject: NFIB Comments on OIRA Draft Report

- Comments to OMB 2002 Report.doc

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Dr. John Morrall
Office of Information and Regulatory Affairs
Office of Management and Budget, NEOB, Room 10235
725 17th Street, NW
Washington, D.C. 20503

Re: Comments on OIRA's Draft Report to Congress and Recommendations for Regulatory Review

Dear Dr. Morrall:

On behalf of the 600,000 small-business owners represented by the National Federation of Independent Business (NFIB), I am writing to offer comments on the Office of Information and Regulatory Affairs'(OIRA) report, ***Making Sense of Regulation: 2001 Report to Congress on the Costs and Benefits of Regulations*** (hereafter referred to as the "Draft Report").

As you hopefully know, unreasonable government regulation, especially onerous paperwork burdens, continues to be a top concern for small businesses. Regulatory costs per employee are highest for small firms, and our members consistently rank those costs as one of the most important issues that NFIB ought to work to change. Therefore, we are pleased to be able to offer our perspective on a number of regulatory regimes which are of concern to us.

First and foremost, NFIB is very pleased with the interest taken in small business issues by OIRA. The formalized relationship between your office and the Office of Advocacy at the Small Business Administration **(SBA),** as discussed on pages 24 and 25 of the Draft Report, is a key step in ensuring that the regulatory burden faced by small businesses will be taken into consideration when new regulations are being addressed. Overall, OIRA's commitment to openness and transparency can only serve to benefit the small business community, which continues to view the federal regulatory state as a near-impenetrable morass of laws and regulations, hard to understand, difficult to deal with, and costly.

The Draft Report references the Crain-Hopkins study prepared for the SBA last year, and we are glad that OIRA has taken notice of their work. This report rightly indicated, with specificity, not only the direct costs that these businesses face, but also the essential role

that small businesses play in our economy. We are glad that OIRA agrees with the conclusions Crain and Hopkins reached.

Process Improvements at OIRA

The Draft Report offered discussion of several continuing changes at OIRA, and NFIB would like to address three: "return letters"; "prompt letters"; and the proposed OIRA Scientific Advisory Board. OIRA's efforts to bring more rationality into the regulatory process are well-received. As the regulatory state grows, the possibility for that state to become politicized is increased considerably. We view it as OIRA's role to be an additional check on that system, a way of keeping politics out.

NFIB is in favor of the decision to once again utilize "Return Letters" as part of OIRA's regulatory toolbox. We agree that agencies must take their responsibilities seriously in creating quality analyses of regulations—and "Return Letters" should prove effective in helping to bring this about. We are also encouraged by the public availability of these "Return Letters", and their easy access on OIRA's website. We hope to see OIRA continuing to rely upon this tool in coming years.

We also applaud OIRA's efforts to be more proactive, and use "Prompt Letters" to "suggest regulatory priorities". It is incredibly helpful for regulatory stakeholders to gain a sense of OIRA's priorities for agency decisionmaking, and the openness of the "Prompt Letter" approach is vastly more informative than the former, informal approach. While we understand the hesitation OIRA faces due to potential legal ramifications, we believe that the benefits far outweigh the risks involved.

We are encouraged by OIRA's efforts to bring a scientific approach to its overall regulatory review efforts. In the same way that unbiased fact-based analyses by other agencies have been beneficial in mitigating the impact of onerous and unnecessary regulations on the economy, the use of truly scientific cost-benefit analyses by OIRA can have extraordinary results. We believe it is absolutely essential to determine whether the benefits of regulations clearly outweigh their costs. We hope that OIRA will exercise careful oversight in the selection process for your Scientific Advisory Panel, and bring together esteemed professionals for reviewing OIRA's various interests. We also hope that NFIB can play a consulting role in this process as well.

NFIB continues to examine the impact that multiple agencies and duplicative regulatory regimes have when dealing with single actions, instances, or individual subjects. It is difficult for one business to improve its operations, for instance, when a particular activity which can be improved must jump through multiple regulatory hoops in the process. If a small business owner has to file paperwork to EPA, OSHA, the Department of Transportation, and perhaps another agency or two, it becomes too problematic and difficult for that small business owner to take those steps which could lead to a marked improvement. It becomes even more difficult when these small business owners are faced with regulations that contradict each other. We hope that OIRA will consider

studying this problem, and we are happy to provide additional information to further that goal.

Recommendations for Regulatory Review

Lead Reporting Requirements Under the Toxics Release Inventory

We believe this regulation to be in violation of agency guidances enacted under the auspices of the 1996 Small Business Regulatory Enforcement Fairness Act. Specifically, that the EPA came to faulty conclusions in its findings that the new standards would not have a significant impact on a substantial number of small entities (SEISNSE). Because of the onerous burdens being placed on small businesses, we have requested that the EPA defer implementing this rule for one year. However, the EPA continues to press forward with the implementation of this requirement.

Furthermore, NFIB believes the following provide additional reasons for review of this regulation:

- Though made effective on **April** 17,2001, reporting obligations were retroactive to January 1,2001, a requirement never before seen in the TRI program.
- Many small businesses, including first time filers, are being forced to reconstruct data without the benefit of needed assistance from EPA.
- The Agency's guidance document was not available in final form until 13 months after the date on which facilities were required to begin recording data.
- The guidance document is long, confusing, and leaves many important questions unanswered.
- The guidance document's treatment of the articles exemption is so unclear that EPA's own regional offices are in disagreement as to its meaning.
- Important reference materials are out-of-date and misleading.
- Compliance workshops were both poorly-publicized and of little practical help.
- Compliance materials have not been made available in a timely fashion, nor have they been sent to first time filers.

Notwithstanding assurances by the EPA to focus on compliance issues for the first year or two of the implementation of the reporting requirements, there is no guarantee that someone who makes an earnest attempt to report accurate and timely information to regulators will not be held liable, should that data later be found to be inaccurate. Strict liability still prevails, and EPA still pursues parties for paperwork violations.

In the end, NFIB believes it has been demonstrated that had the EPA used the analytic approach followed by the **GAO** when that agency reviewed this rule, using the discretion allowed under the Regulatory Flexibility Act, EPA could have chosen not to certify it.

Birth and Adoption Leave and Unemployment Insurance

We also urge rescission of the Birth and Adoption Unemployment Compensation (BAA-UC) rule promulgated by the DOL in 1999. The BAA-UC regulations authorize states to withdraw funds from their unemployment insurance (UI) trust accounts to compensate employees who take leave following the birth or adoption of a child.

By diverting UI trust funds for paid leave, BAA-UC is clearly contrary to Congress's intent under both the Federal Unemployment Tax Act and the Family and Medical Leave Act. Paid leave as authorized under the BAA-UC regulations is not unemployment insurance. Employees who take leave are not "unemployed." Their employers have work for them, but these individuals are not available for work.

BAA-UC will hurt employees, as well as their small business employers. It puts the safety net for unemployed workers at risk by inviting states to spend down unemployment insurance reserves for the entirely unrelated purpose of compensating leave takers. State UI trust fund reserves are needed to assure that funds are available to pay unemployment compensation to jobless employees while they seek new work and to protect against the adverse economic consequences of payroll tax increases needed to finance unemployment benefits.

State UI trust fund reserves are drawn down quickly when the economic cycle turns. Several states, including New York and Texas, have already needed federal loans to pay their UI benefits. In these and many other states, payroll tax increases will be imposed on employers to replenish UI trust funds. Moreover, using UI trust funds for paid leave puts the federal budget itself at significant risk, because the federal government is the financial guarantor for state UI benefits.

A legal challenge to BAA-UC is currently pending in the United States District Court for the District of Columbia. The case is *LPA, Inc.* ***v. Herman*** (No. 00-01505 PLF). The plaintiffs contend that the BAA-UC rule violates the Federal Unemployment Tax Act and the Family and Medical Leave Act. During the Clinton Administration, The DOL (DOL) asked the court to dismiss this lawsuit because no state has enacted a UI-paid leave law. There has been no decision yet on the motion to dismiss or the underlying merits of the case. As a result, UI-paid leave proposals are now under active consideration in New Jersey and other states. It is extremely important that the BAA-UC rule be rescinded before any state enacts a "Baby UI" statute. The judicial system will need years to resolve this issue. In the interim, the continued existence of the BAA-UC regulations fosters unhealthy interest in "raiding" UI trust funds.

We encourage dialogue on positive ways to encourage financial support for parents who take leave following the birth or adoption of a child. However, the misuse of the unemployment insurance program for this unrelated purpose is unwise and unworkable. We recommend that the BAA-UC rule be rescinded, and that OIRA urge DOL to begin the rulemaking process to accomplish this objective as soon as possible.

Family and Medical Leave Act

NFIB suggests for review and revision the Family and Medical Leave Act (FMLA) implementing regulations and associated non-regulatory guidance in order to address compliance problems and to allow for more effective implementation of FMLA protections. This review should include misinterpretations of serious health condition and intermittent leave and the associated notification and certification requirements.

The FMLA's medical leave has not worked as intended due to the DOL's implementing regulations and interpretations. The Labor Department has been inconsistent and vague in its regulations and opinion letters leaving employers and employees guessing as to what the agency and the courts will deem to be a "serious" health condition.

One year, the Department issued an opinion letter stating that the cold, the flu and non-migraine headaches were not serious health conditions (Wage and Hour Opinion Letter, FMLA-57, April 7, 1995). The next year, the DOL issued an opinion letter stating that they might be (Wage and Hour Opinion Letter, FMLA-86, December 12, 1996). This has been very confusing to both employers and employees.

The Labor Department should also rescind Wage and Hour Serious Health Condition Opinion Letter #86 which has caused enormous confusion in the workplace.

The DOL's intermittent leave regulations have also been unnecessarily problematic and have diverted important resources. Allowing an employer to require an employee to take intermittent leave in increments of one-half of a work day would ease the burden significantly for employers both in terms of necessary paperwork and with respect to being able to cover efficiently for employees who are absent.

Because of their small size, this rule does not apply to some of our members. But there is nevertheless an impact on small employers to whom it does apply, and who do not have the human resources staff needed to adequately determine what applies to them and interpret what that application actually entails. Further, because of this threshold level, a perverse disincentive to business growth is created, Why expand beyond that point, if these new regulations are going to apply, and one would need to expend considerable resources in figuring out compliance?

We urge you to review these inconsistencies, and alleviate the interpretive and legal confusion which is actually serving as a disincentive for companies to offer or expand programs, including paid leave policies. This problem, which manifests itself throughout many aspects of the DOL regulations, was recognized by the Supreme Court when it struck down a portion of the regulations in *Ragsdale vs. Woverine Worldwide,* t'he first FMLA Supreme Court Case. NFIB's Bruce Phillips has recently published a study on this issue, and we would be happy to provide OIRA with a copy of it.

White Collar Overtime Exemptions under the Fair Labor Standards Act

We believe that the DOL's white-collar wage and hour rules must be modernized. The regulations define the executive (managerial), administrative and professional employees as exempt from the FLSA's minimum age and overtime requirements. Despite affecting virtually every employer, the white-collar regulations were written between 1938 and 1954 and have not been substantially updated since then.

The Wage and Hour Division predicated the regulations on distinctions in job duties between white-collar and blue-collar employees that made sense in 1954, but are much less applicable today. Overall, the regulations fail to account for the effects that the technological and information revolution have had on the way people work today. For example, "computer keypunch operators" receive frequent mention in the regulations despite the general obsolescence of this term, and, in one instance, an employee's exemption depends upon how he or she is "watching machines."

Because the regulations are so outdated, they cause substantial confusion among employers seeking to comply with the law. For example, under the administrative exemption, most inside sales employees are treated as nonexempt "production employees" because their job is to produce sales of the good or service the employer is selling. Fifty years ago, inside sales employees may have been low-level functionaries. Yet the level of expertise required to perform this job as well as advances in technology (such as the Internet and the fax machine) have blurred the distinction between inside sales employees and outside sales employees, who have been exempt from overtime since 1938.

In order to be considered exempt under the administrative and professional exemptions, employees must exercise discretion and independent judgment. This means that in general, the employee's job must involve "the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered." The person making the decision must have "the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance."

In practice, highly-skilled and well-trained employees who refer to written procedures or practices are generally considered not to exercise discretion and thus are nonexempt under the regulations, notwithstanding the fact that they possess high level skills and knowledge and are well-paid. This can lead to absurd results. In one case, a federal court held that highly-educated network communications specialists who designed, ran and critiqued simulated space shuttle missions for NASA mission control personnel lacked discretion because they routinely referred to complex procedures manuals. Decisions such as these erroneously deny employees who have the skills and abilities to protect themselves in the marketplace the flexibility of being exempt. These decisions are based on regulations that treat employees as if they were working in the 1950s.

The outdated regulations impose substantial costs on small businesses, their employees and the Wage and Hour Division. Again, like the FMLA regulations, most small

businesses do not have the staff with which to adequately interpret these regulations. But in this case, the penalties for noncompliance are far more serious—and have a greater chance of occurring as small businesses are far more likely to have the lines between "employee" and "manager" blurred on a continuous basis.

Substantial needless litigation is generated by the regulations. For example, in one case, it took 11 years of litigation to resolve the issue of whether a senior network news writer and a producer were professional employees exempt from overtime. They were only deemed exempt after the Second Circuit Court of Appeals reversed a lower court decision. Similarly, lack of clarity in the law has forced employers to negotiate multi-million dollar settlements with the DOL involving thousands of their employees, such as retail representatives, personal bankers, and inside sales employees.

NFIB is pleased that the DOL has started a dialogue regarding this issue, but we want to ensure that small business concerns are reflected in the final revisions. Though some organizations are advocating a strict, salary-based exemption test, we believe that such a determination is not that simple. While paperwork simplification is of utmost concern to our members, that may not be the best course of action in this instance.

We believe that a revision to this rule must be a simplification of the current hybrid of the wage test, as well as the responsibility test. Both must reflect the considerations of the modem workplace, as well as basic geographic and economic factors that differentiate businesses from region to region.

Regulations Governing Metal Products and Machinery (MP & M)

This particular regulation is ripe for review by OIRA. One of the most expensive environmental regulations ever proposed ($1.9 billion in annualized costs), the EPA itself admits that the costs far outweigh the environmental benefits ($0.7 billion annually). EPA made numerous flaws in its regulatory analyses, underestimating costs and grossly mischaracterizing the impact of manufacturers on U.S. waterways. EPA has not justified the need for a new rule, and we believe that this extra layer on top of existing Federal rules and local limits is not necessary. Current standards are already sufficient to protect both the environment and public health.

The economic impact of the new rule would be devastating. The total compliance cost for an average business is approximately 6.5% of total sales. EPA's estimate for economic impact of the proposed MP&M rule would double the existing compliance costs for metal finishing facilities. Our members would be unable to pass this additional cost to their customers due to a competitive market in which metal finishing facilities have not been able to raise prices for over a decade.

Requiring compliance with the proposed stringent standards for new sources will force facilities to shut down and limit new growth, because it would require an even higher capital investment and result in higher annualized compliance costs than under the proposed limits for existing sources.

EPA has stated that they will make a large number of modifications to the proposal in the Notice of Data Availability (NODA), which is scheduled for publication. Based upon our understanding, we do not believe that these modifications will satisfy the concerns of the small business community.

New Source Review

New Source Review (NSR) is a regulatory scheme enacted under the auspices of the Clean Air Act to cut emissions of volatile organic compounds (VOCs), nitrogen oxide (NOX) and other hazardous air pollutants, and requires businesses to install costly equipment and seek approval from regulatory agencies before expansion can occur. Not only does this program impede the ability of small businesses to make continuous improvements to their facilities, processes and products, by instituting onerous paperwork requirements with each potential chance being considered, but it will also drive up other, associated costs.

Furthermore, because of unclear guidance, our members are uncertain about whether and how to invest in projects that improve productivity, advance energy efficiency and enhance environmental quality. The regulatory regime impedes the start of projects that increase overall efficiency, affordability and reliability and can prevent projects that control and prevent air pollution. Regulations should not provide disincentives to these goals.

Time delays and costs associated with the NSR program unnecessarily inhibit the ability of small businesses to compete in domestic and international markets, and the program has the potential to add tens, and perhaps hundreds, of billions of dollars in direct and indirect costs to American industry.

Moreover, inexpensive energy is the hallmark of America's strong economy, and any increase in energy prices will disproportionately affect small businesses. With some estimates showing energy costs rising 25% with the implementation of a host of pollution control regimes, and our members operating under tiny margins of profit, it is clear that a drastic shock in their business costs will drive many of them under.

EPA should propose a definition of "routine maintenance, repair and replacement" (RMRR) that accurately and fairly reflects the types of RMRR activities that are routine within specific industries. It should also propose a more realistic emissions increase test to determine whether a non-routine activity constitutes a "major modification" subject to NSR applicability.

Above all, it is important that as a general rule regulations which provide disincentives to the protection of the environment be reviewed and changed as quickly as possible.

Conclusion

The NFIB appreciates the opportunity to participate in this important and essential process. With the cost of regulation being such a high priority for our 600,000 members, we are glad that we could share a number of our regulatory priorities with OIRA, and we are even more glad that OIRA recognizes the tremendous impact the regulatory state has on our members and the small business community. We also want to make it clear that the regulations we have recommended are not the sum total of our concerns, nor are they the entire universe of regulations which ought to be reviewed. We view this as the continuation of a constructive dialogue with OIRA regarding regulations of concern to our members, and the state of regulations overall.

We look forward to working with OIRA on this in the future. Please do not hesitate to contact our office if you have any questions, or require any further information.

Thank you once again.

Sincerely,

Dan Danner,
Senior Vice-president, Federal Public Policy

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