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OF THE
UNITED STATES OF AMERICA

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

Re: Comments on the *Draft 2005 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 of every size, sector, and region, is pleased to provide the following comments on the Office of Management and Budget's (OMB) *Draft 2005 Report to Congress on the Costs and Benefits of Federal Regulations*. Specifically, OMB has requested comments on its efforts to improve federal regulatory accounting methods through the use of **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. Because of the enormous cost of federal regulation, with compliance estimates as high as $850 billion, the U.S Chamber strongly supports the use of **ex post** validation studies to determine the precise cost and impact of "major" regulations—those regulations with a projected economic impact of $100 million or more—after they have gone into effect.

CURRENT COST-BENEFIT ANALYSES USING EX ANTE STUDIES ARE FLAWED

Cost-benefit analysis is a policymaking tool by which the cost of imposing a regulation is weighed against the potential benefit of reducing the harm. For example, in the case of emissions regulation, cost is generally construed as the cost of implementing technology to comply with regulation. Cost-benefit analyses are used

by federal agencies to assess the expected costs and benefits of a proposed regulation. Federal agencies are mandated by executive order[1] to conduct cost-benefit analyses for proposed major rules to determine if expenditures for a particular regulatory action are worth the benefits to be received.

Agencies currently use **ex ante** studies to conduct cost-benefit analyses. **Ex ante** studies are pre-regulation forecasts of what the agency predicts will happen once a rule takes effect. OMB recognizes the inherent difficulties in this type of forecasting:

> *[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.*[2]

Indeed, **ex ante** studies are an inadequate form of economic modeling for assessing the costs and benefits of regulations because they do not present the public with a reasonable and true account of the costs of regulatory impacts. The primary flaw with the current system of **ex ante**, or prospective, analysis is that individual agencies 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.

An example of an agency gaming the system is the U.S. Environmental Protection Agency's (EPA) determination that its extremely controversial Total Maximum Daily Load (TMDL) standard only had an annual impact of $25 million[3]; yet state studies estimated the cost of implementing the TMDL standards at $670 million to $1.2 billion annually[4]. It will take more than 15 years to complete the estimated 40,000 TMDLs that would have to be performed, so there are likely comparable recurring costs in this time period as well.

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[1] Executive Order 12866, Regulatory Planning and Review, 58 Fed. Reg. 51735 (October 2, 1993).
[2] *Draft 2005 Report to Congress on the Costs and Benefits of Federal Regulations*, Office of Management and Budget, 70 Fed. Reg. 14735 (March 23, 2005).
[3] 64 *Fed. Reg.* 46043 (August 23, 1999).
[4] Testimony of David Holm, President, Association of State and Interstate Water Pollution Control Administrators before the House Subcommittee on Water Resources and the Environment, Page 3 (February 10, 2000).

Another flaw with **ex ante** studies is that rules that are originally deemed to be minor by an agency often end up having major impacts. **Ex ante** studies are by their 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.

The U.S. Chamber is not opposed to regulations per se and recognizes that many regulations are sound, sensible, and well founded, and in many instances promote good business practices. That observation notwithstanding, it is absolutely essential that federal agencies fully understand and inform the public of the real-world costs and benefits of their regulatory actions, and that resource expenditures be prioritized, so that we as a nation achieve the maximum protection of human health and the environment with the public and private funds expended.

THE U.S. CHAMBER STRONGLY SUPPORTS EX POST VALIDATION STUDIES

Until now, neither OMB nor government agencies have made any significant attempt to retrospectively assess initial cost-benefit projections. As a result, OMB's reported information, which is based on agency projections of costs and benefits, has not been benchmarked against what actually occurred after the regulations were implemented. **Ex post** validation studies would require agencies to assess the actual costs of a regulation after it has gone into effect, and therefore would be a good first step in accurately identifying the true regulatory burden on the public. Validation studies will also help demonstrate whether initial agency forecasts were sound, thereby engendering greater public confidence in the regulatory process.

The U.S. Chamber believes that validation studies should be required of agencies so that these agencies can revise and recalculate their earlier estimates based on what actually occurred after regulations were implemented. As an added measure, agencies should also be required to make a determination at the conclusion of an **ex post** validation study as to whether particularly onerous rules should continue to be implemented where the compliance costs significantly outweigh the rule's benefits. While the U.S. Chamber appreciates that this would require additional time and resources from the agencies, it is justified by the currently overwhelming cost of regulations to the public.

REGULATORY FLEXIBILITY ACT - SECTION 610

Finally, the U.S Chamber notes that §610 of the Regulatory Flexibility Act[5] requires federal agencies to review the impact of their regulations on small businesses within 10 years of taking effect to determine whether the regulation should be continued, amended, or rescinded. Yet §610 is frequently ignored by federal agencies, decreasing its effectiveness to the agencies and the public.

The U.S. Chamber supports **ex post** validation studies of economically significant regulations as a way to improve agency compliance with §610. Under such a framework, agencies would conduct a periodic **ex post** validation study on the costs and benefits of a regulation, followed by a ten-year review of small business impacts under §610. This would create a transparent process for monitoring regulations, enhance government accountability for its regulations, and increase public confidence in the regulatory process.

CONCLUSION

At the end of the day the public has a right to an honest assessment of federal regulatory costs and impacts, and **ex post** validation studies would certainly help to further this objective. The Chamber thanks OMB for the opportunity to comment on this most important issue.

Sincerely,

William L. Kovacs

[5] 5 U.S.C. §610.