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COMMENTS TO THE OFFICE OF MANAGEMENT AND BUDGET
DRAFT 2004 REPORT TO CONGRESS ON THE COSTS AND
BENEFITS OF FEDERAL REGULATIONS

68 FR 64375

February 20, 2004

Submitted on

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The American Chemistry Council
Arlington, Virginia

I. INTRODUCTION

The American Chemistry Council (“Council”) is pleased to comment on the Office of Management and Budget’s (“OMB’s”) Draft 2004 Report to Congress on the Costs and Benefits of Federal Regulations (68 FR 64375), which was released for public comment on February 20, 2004.

A. The Business of Chemistry & Manufacturing

The Council represents the leading companies engaged in the business of chemistry. Council members apply the science of chemistry to make innovative products and services that make people’s lives better, healthier and safer. The Council is committed to improved environmental, health and safety performance through Responsible Care, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a \$460 billion enterprise and a key element of the nation’s economy. It is the nation’s largest exporter, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

The business of chemistry is a major component of the U.S. manufacturing sector. We accounted for 12% of manufacturing shipments in 2003, with most of these shipments going to support other manufacturing sectors, from automobiles to pharmaceuticals. We are the safest manufacturing industry, with an illness and injury rate of less than half the national average for manufacturing. We are also one of the nation’s critical infrastructures, as our products are essential to national defense, homeland security, and the viability of other critical infrastructures like water and wastewater treatment. Many chemical sector firms are small businesses; indeed, more than one third of ACC’s members meet the applicable SBA small business size standard.

The Council prepares a *Guide To The Business of Chemistry*, updated annually, which provides an economic profile of the chemical industry in the United States and the world. This publication is the comprehensive source of economic and other data about the industry, and documents the essential contributions the business of chemistry makes to society and our economy. The Guide presents a quantitative story of how critical the chemical industry is to the way we live, the brands we use, our personal health, and the economy at large. The 2003 Guide and the most recent update, *Economic Survey: Outlook for 2004 and Beyond*, are included as attachments to the comments.

B. ACC’s Views on Regulatory Costs and Benefits

As a fundamental principle, the Council and its members support health, safety, and environmental protection policies that incorporate risk-based priorities and cost-effective risk management. Essential to realizing such policies are well-conducted assessments of the costs and benefits of intended regulations, consistent with the regulatory principles of E.O. 12866, on “Regulatory Planning and Review.” The Executive Order calls on the

agencies to tailor their regulations by business size in order to impose the least burden on society, consistent with obtaining the relevant regulatory objectives.

The Council recognizes that cost cannot serve as the sole basis for judging the value of federal regulations. Nevertheless, the magnitude of these costs raises serious questions about the cost-effectiveness of our nation's regulatory expenditures. For that reason, the Council welcomes OMB's requests for comments on the Draft 2004 Report to Congress on the Costs and Benefits of Federal Regulations ("Draft Report"). The Council particularly appreciates OMB's interest in receiving comments on the impacts of regulation on manufacturing enterprises, and the opportunity to offer nominations of regulatory reforms relevant to this sector.

The first part of these comments provides an overview of the types and magnitude of costs imposed on the business of chemistry by federal regulations. The second part identifies specific improvements that would significantly improve the cost-effectiveness of five of those regulations. ACC has provided comprehensive comments on previous OMB reports to Congress and many of our comments offered in 2002 and 2003 are relevant to the 2004 draft report. In addition, the Council hopes these comments will assist OMB and others in the Executive Office seeking to improve federal regulatory analysis and management. The Council looks forward to working with OMB on this and similar matters in the future.

II. REGULATORY COSTS BORNE BY THE BUSINESS OF CHEMISTRY

In the year 2000, companies in the business of chemistry spent an estimated \$19.7 billion to comply with all federal regulations. For these companies, this figure is equivalent to \$19,000 per worker per year. The largest share (58%) is due to environmental regulation, followed by economic (15%), tax (14%), and workplace regulation (12%). Compliance with environmental regulation cost the business of chemistry \$11.5 billion in the year 2000. Included in this category are regulations to protect air and water, manage the risks associated with some chemical products, and manage hazardous waste and to remediate contaminated sites. About half of all environmental spending represents a recurring cost associated with pollution abatement control. About 30% of environmental spending is due to one-time capital costs. Hazardous waste and site cleanup represent 20% of environmental spending.

After environmental regulation, economic regulation imposes the biggest burden on the business of chemistry. This category includes the losses in economic efficiency that result from regulatory restrictions on firm entry, output, and pricing. Such regulations impose costs throughout the economy in the form of higher prices, and cost companies in the business of chemistry about \$3 billion annually.

The paperwork burden associated with the federal tax code represents by far the largest paperwork burden on businesses in the United States. In the year 2000, the cost of

maintaining records for, and reporting, federal taxes cost companies in the business of chemistry about \$2.7 billion (in addition to the amount of taxes paid).

The cost of workplace regulation to the business of chemistry represented 0.53% of sales in the year 2000, or \$2.2 billion. About one-third of this spending is for compliance with health and safety regulations, and the remainder for compliance with employee benefits regulation, civil rights regulation, and labor standards.

ACC estimated these figures using a study by Crain and Hopkins (The Impact of Regulatory Costs on Small Firms, Small Business Administration, 2000). Two caveats are in order: First, even though these figures are based on the most complete study conducted to date, some uncertainty (plus or minus 20%) remains. Second, conclusions about the value of regulation cannot be made solely on the basis of cost; information on benefits is also needed.

III. NOMINATIONS FOR REGULATORY REFORM

A. Enhance Comparable Fuels Exclusion

Many legally “hazardous” wastes are classified that way because of their derivation, and in fact are not more contaminated or hazardous than common fossil fuels. Others are “hazardous” because of their ignitibility, another trait they share with many fuels. As a result, EPA promulgated a “Comparable Fuels Exclusion” (CFE) (40 CFR §§ 261.4(a)(16) and 261.38) that excludes from RCRA regulation hazardous wastes that can be and are burned as fuels, and that are not more hazardous than the fossil fuels that facilities would otherwise use. This common-sense exclusion conserves finite fossil fuel resources, in addition to allowing hazardous wastes to be managed with equal safety but at lower cost.

EPA and regulated entities have now had several years of experience with this rule. In light of that experience, ACC recommends that EPA expand the use and utility of the CFE by promulgating enhancements to the existing rule. EPA developed the exclusion to promote protective resource conservation through energy recovery. Congress, in the House and Senate Reports for their respective FY04 VA/HUD & Independent Agencies Appropriations bills, urged EPA’s to reassess and revise the CFE, encouraging EPA to promulgate a rule that allows additional industrial materials to be safely used as fuels. (H. Rep. 108-235 at 102; S. Rep. 108-143 at 96). ACC believes that reform of the CFE would significantly increase the safe reuse of these materials as valuable fuels.

In consultation with EPA, the Council developed and implemented a survey of a subset of our member companies to gauge the volumes and types of material streams that could be used as fuels under an improved exclusion, and to identify priority enhancements to the rule. The survey identified 96 valuable material streams within these members alone, totaling more than 383 million pounds per year, that do not currently qualify for the comparable fuels exclusion, but might under an improved exclusion. The Council

believes that, under an enhanced exclusion, many materials are likely to be identified across other industry sectors that can be safely used as fuels.

The Council has identified significant potential cost savings resulting from reuse of these material streams, ranging up to \$1.28 million per stream per year, and averaging about \$200,000 per stream per year. The cost savings are associated with reduced use of virgin fuel, reduced waste transportation and disposal, and reduced permitting and administrative costs. The Council recommends two key regulatory improvements that could substantially expand the use and value of the exclusion: 1) reduce analytical requirements and resolve analytical problems associated with demonstrating qualification for the exclusion, and 2) provide a flexible compliance demonstration for non-halogenated organic constituents that can be shown to be destroyed in well-operated, efficient combustion systems. Notably, neither of these recommended improvements involves relaxing substantive standards for emissions of hazardous constituents -- rather, they involve simplifying the administration of the program.

B. Revise the Definition of Solid Waste

EPA recently proposed a rule to amend the definition of solid waste in order to encourage recycling (68 Fed. Reg. 61558, Oct. 28, 2003). The Council fully supports EPA's stated purpose for the rulemaking: to encourage and provide new incentives for increased reuse and recycling of materials, including hazardous wastes and hazardous secondary materials, as a significant component of the Agency's "Resource Conservation Challenge." We also agree with the Agency's view that it needs to initiate a rulemaking in response to decisions of the United States Court of Appeals for the D.C. Circuit, which, taken together, have provided the Agency with additional direction regarding its jurisdiction over non-discarded materials.

ACC is encouraged that EPA's proposal included a broad range of potential options for promoting recycling. That breadth provides the Agency with broad latitude to select among these options and to finalize the best alternative. The Council supports the option to exclude all legitimate reclamation from the definition of solid waste, and recommends that EPA promulgate a direct final rule codifying that option. Such an exclusion would significantly enhance resource conservation and recovery, and would most closely meet the Agency's goal of harmonizing its regulatory definition of "discard" with the Court's. Notably, both the House and Senate Appropriations Committees included language, in their respective reports regarding the Agency's FY04 budget, encouraging EPA to promulgate a rule in 2004 revising the regulation of recycling to comport with the decisions of the D.C. Circuit by limiting the definition of "discarded materials" to materials that are "disposed of, abandoned, or thrown away." (H. Rep. 108-235 at 102; S. Rep. 108-143 at 96)

C. Reporting of Releases in Excess of Reportable Quantity

Federal law requires facilities to report immediately to the National Response Center (NRC), and to state and local agencies, whenever they have a release of a hazardous substance or an extremely hazardous substance, over a 24-hour period, above the "Reportable Quantity"(RQ) for that substance. Such reporting gives these agencies early warning of releases and enables prompt response.

All RQs were set by Congress arbitrarily at 10 lbs, with EPA authorized to change that number to a more appropriate number. The Council recommends that the Reportable Quantities (RQs) for two substances -- nitrogen oxide and nitrogen dioxide -- be increased to 100, 1000, or 5000 pounds for combustion sources.

Currently, 40 CFR § 302.4 lists nitrogen oxide and nitrogen dioxide as CERCLA hazardous substances with statutory RQs of 10 lbs. Similarly, 40 CFR Part 355, Appendix A also lists both materials as extremely hazardous substances, again with Reportable Quantities of 10 lbs.

These RQs were set based on discharges to water. By contrast, air emissions of NO and NO₂ pose no hazards to health or the environment at such levels. The low RQs are particularly problematic for combustion sources such as flares, which are used to control VOC emissions. The result is that many such facilities are technically required to give repeated notices to the NRC, state and local agencies that serve no purpose, but which consume the time and resources of all concerned.

Many larger facilities have emissions limits for nitrogen oxides, and EPA has taken the position that NO and NO₂ emissions from such facilities fall under an exemption for "federally permitted" releases. Perversely, smaller facilities without such limits are not eligible for this exemption. Increasing the RQs for nitrogen oxide and nitrogen dioxide to 100, 1000, or 5000 pounds for combustion sources will greatly reduce the reporting burden on owner/operators and the administrative burden on the National Response Center, States, and local reporting entities. Such an action would also allow entities to focus their efforts and resources on other compliance obligations, which is appropriate.

The House Report for EPA's FY03 budget emphasized this issue: "EPA . . . states that it supports, and is apparently willing to move forward with, in accordance with law, an administrative exemption from CERCLA and EPCRA reporting for specific NO and NO₂ releases. The Committee strongly urges the Agency to utilize appropriate, available funding resources to move expeditiously to complete this process." (H. Rep't No. 107-740, at 104). Yet EPA has failed to act. OMB should encourage it to do so.

D. Mass-based Limits under Clean Water Act Permits

The Council recommends that mass-based effluent limits be retained, when NPDES permits are renewed, when process wastewater flows are reduced for purposes of water conservation.

The current EPA rule (40 CFR 414) sets a mass-based effluent limit for a pollutant by multiplying average process wastewater flow times the allowable concentration for that pollutant. If a company implements a water conservation project, it will be penalized when the permit is renewed -- mass limits will be reduced, since the average flows will go down but the regulated concentration will not be adjusted. As a result, the current system discourages facilities from conserving water.

Permittees should be able to retain mass limits when NPDES permits are renewed when process wastewater flows are reduced for purposes of water conservation. If process wastewater flows are decreased for other reasons, the mass limits can be adjusted per the current rule.

E. TSCA 12(b) Export Notification

The Council recommends that EPA establish a low level cut off for Export Notification under TSCA 12(b) (40 CFR 707, Subpart D).

Presently, companies are required to notify EPA when exporting substances or products that contain chemicals listed on the TSCA Export Notification 12(b) List. Currently, there is no low level cut off for this notification. As a result, many notifications are for minor substance/product ingredients or impurities that are not an imminent concern. This activity is a significant cost to industry and a paper work burden to EPA. It is particularly problematic in light of the large number of notifications filed. The scope and number of notifications has also created confusion among importing countries. ACC is also concerned that the current requirements are not fully consistent with U.S. treaty obligations regarding Prior Inform Consent (PIC).

The current situation could be remedied by establishing a low level cut off for Export Notification (ACC recommends 1% or 0.1%).

The TSCA 12b program imposes a relatively small cost on the U.S. chemical industry compared to other environmental reporting requirements,. Any exemptions under the 12b program, however, would reduce substantially the total annual cost.

CONCLUSION

The Council is pleased to have the opportunity to comment on the Office of Management and Budget's Draft 2004 Report to Congress on the Costs and Benefits of Federal Regulations. The Council appreciates OMB's annual exercise to address the effectiveness of regulations and to focus on public policy issues of pressing concern. The 2003 Report's focus on precaution was of great interest to the Council and warranted a thorough and resource intensive response. The draft 2004 Report's focus on the regulatory impact on the manufacturing sector is also of great interest to the Council. The Council hopes that the comments provided and the enclosed *Guide to the Business of Chemistry* will assist OMB and others in the Executive Office who are seeking to improve federal regulatory analysis and management. The Council looks forward to working with OMB on this and similar matters in the future.

For further information on the ACC comments please contact me at 703-741-5233 or Jamie Conrad at 703-741-5166.

Sincerely,

Jim Solyst

Jim Solyst
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