National Association of Manufacturers

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President and CEO

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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

Dear Ms. Hunt:

On behalf of the National Association of Manufacturers (NAM), thank you for the opportunity to comment on the *Draft 2005 Report to Congress on the Costs and Benefits of Federal Regulations* (*Draft Report*). The NAM is the nation's largest and oldest industrial trade association, with membership located in all 50 states and representing all sectors of industry.

Last year, the NAM submitted extensive comments, including those on the cost and benefit estimates. One suggestion then offered to improve the quality of these estimates was for the agencies and/or the Office of Management and Budget (OMB) to perform a "look back" of at least major rules to determine how credible the estimates used during the promulgation process had been. The NAM is therefore pleased to see that this year's report includes a section on "the small yet growing body of literature where analysts have attempted to validate pre-regulation estimates of benefit and cost." We look forward to the comments on this topic from academics and other scholars more expert in the methodology involved and on the availability of reliable studies.

The NAM also was very pleased that last year's section dealing with prong four of the Regulatory Right-to-Know Act (RRKA), which directs OMB to include recommendations for improving regulations in the annual report, asked specifically for public nominations of recommendations to improve regulations that affect manufacturing. The NAM solicited its membership and submitted a number of suggestions. In particular, the NAM told OMB that it most needed to deal with: the Particulate Matter and Ozone National Ambient Air Quality Standards (NAAQS); the Toxic Release Inventory; the Definition of Solid Waste; Spill Prevention Control and Countermeasures; Superfund Amendments and Reauthorization Act (SARA) Title III; the FCC "Do Not Fax" rule; and the Family and Medical Leave Act. On March 9, 2005, after forwarding regulatory improvements nominated by the public to the agencies for evaluation, OMB issued a list of 76 nominations to be acted on. The NAM was pleased to note that all but two of its suggested seven high-profile regulations were included on that list, along with many other, more targeted, regulatory improvement nominations submitted by the NAM. The two that were not included were SARA Title III and the Particulate Matter and Ozone NAAQS, although the latter are being evaluated under a different proceeding.

It was disappointing, however, to note that the 2005 *Draft Report* does not indicate that there will be a section to update the public on what, if anything, the agencies have done to improve the 76 regulations on the March 9 list. The NAM strongly urges OMB to include such an update in its 2005 *Final Report* — with ample notification to the agencies — to help the public and Congress determine which agencies have met their deadlines and which have not made progress. If it is determined that no changes are warranted in response to a particular nomination, OMB should simply include the explanation for that determination.

As the NAM has noted in previous comments on draft reports, and as OMB notes in the 2005 *Draft Report*, a primary goal of any rational regulatory scheme should be voluntary compliance. Dealing with the problems cited in last year's nominations can only help the agencies advance this goal. The NAM has been pleased that several agencies, in particular EPA, have asked us for additional information in order to follow up on our suggestions. Still, there are other agencies, such as OSHA, that have not shown any sign of taking this exercise seriously.

Publicly highlighting what progress, or lack thereof, the agencies involved have made in dealing with the specific regulatory improvement nominations under their pervue will provide an incentive for the agencies not to allow the suggestions to wither. In the past on similar exercises, this is what the agencies have tended to do. OMB cannot let this happen again, and the March 9 list was an excellent next step.

The NAM was also pleased to see a specific discussion of how well the agencies have implemented the Information Quality Act (IQA, Section 515 of the Treasury and General Government Appropriations Act of 2001, P.L. 106-554). While the NAM appreciates that experience with the IQA is still limited, it is of interest that a very high percentage of correction requests have been denied. In particular, the *Draft Report* states that "[o]f the 'influential' correction requests received by the agencies, 1 was partially addressed through a process change, 4 were denied, and 3 were pending. . . . Of the 12 'undetermined' requests, 1 was corrected, 3 were addressed through other mechanisms (e.g. [*sic*], treated as comments), 6 were denied and 2 were still pending at the end of FY03."

The suggestions on how the public can make information correction requests more meaningful are appreciated and useful, but a question not addressed is why the agencies have denied such a high percentage of correction requests in the first place. A discussion about the inclination of agencies to deny the request would be a helpful addition to the final *Draft Report*.

OMB is also missing an opportunity to remind the agencies — especially the Department of Justice — that nowhere in the IQA is there an indication of congressional intent that denials of correction requests are immune from judicial review. The NAM understands that litigation over this issue is under way, but this section of the *Draft Report* should make reference to OIRA Administrator John Graham's memo of June 10, 2002, noting that agencies should not assert in

their IQA Guidelines that denials are not judicially reviewable. (The memo specifically asked agencies to "not include extraneous assertions that appear to suggest that the OMB and agency information quality standards are not statements of government-wide policy." Administrator Graham went on to note that such "statements regarding judicial enforceability might not be controlling in the event of litigation.")

In its July 15, 2002, comments to the Department of Justice (DOJ) on that agency's draft IQA Guidelines, the NAM took strong exception to the assertion that the DOJ IQA Guidelines are not subject to judicial review. Unfortunately, the DOJ position on this matter allowed other agencies to justify taking the same position.

The Center for Regulatory Effectiveness (CRE) has submitted a detailed legal analysis on this question. The NAM agrees with the CRE's conclusion that final agency decisions on requests for corrections of information under the IQA are judicially reviewable under the APA. The CRE has submitted its own comments on this matter, but the NAM attaches them for your convenience, as well as the convenience of other readers of the docket. They are also available over the Internet at http://thecre.com/pdf/20050620.PDF.

Finally, the NAM notes that the *Draft Report* itself did not contain contact information. While it is true that this was available in the *Federal Register* notice, the *Draft Report* asks for comment on several issues and should therefore include guidance on how to offer comment. Forcing a potential commenter to search for another document discourages possibly valuable input, and future draft reports should always include this essential information.

Sincerely,

John Engler

JE/laf
Enclosure