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To: Lorraine D. Hunt OIRA ECON GUIDE/OMB/EOP@EOP

cc:
Subject: U.S. Chamber Comments on Draft Guidelines

Please see the attached comments on the OMB Draft Guidelines for the Conduct of Regulatory Analysis and the Format of Accounting Statements. If there are any problems with this transmission or with the attachment, please reply to this e-mail or contact Doug Billings at 202-463-5680. Thank you.

- COMMENTS - OMB Reg Analysis Guidelines - 05_05_03.pdf

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May 5, 2003

Ms. Lorraine Hunt
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Office of Management and Budget
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Re: OMB Draft Guidelines for the Conduct of Regulatory Analysis and the Format of Accounting Statements

Dear Ms. Hunt:

The U.S. Chamber of Commerce (Chamber), the world's largest business federation representing more than three million businesses of all sizes, sectors, and regions, is pleased to provide the following comments in response to the Office of Management and Budget's ("OMB's") Draft Guidelines for the Conduct of Regulatory Analysis and the Format of Accounting Statements (as set forth in Appendix C to OMB's 2003 Report to Congress on the Costs and Benefits of Federal Regulations, hereafter Guidelines).[1]

The Chamber encourages OMB's effort to improve the quality of regulatory analyses. In large measure, the Chamber considers the Guidelines productive and comprehensive. For instance, OMB's focus on ensuring greater transparency will improve agency accountability and will help to ensure agency compliance with the Data Quality Act. In certain areas, however, we believe there is room for improvement.

[1] 68 FR 5492 at 5513-5525.

I. GENERAL ISSUES

A. OMB's Authority

OMB's primary authority comes from Executive Order 12866, which empowers OMB to review all significant regulatory actions and to provide agencies with "meaningful guidance and oversight."[2] The Executive Order also requires agencies to assess costs and benefits for all significant regulatory actions and, for *economically* significant rules, to assess feasible alternatives.[3] OMB's development and enforcement of regulatory analysis guidelines is therefore entirely consistent with the agency's authority under the executive order. OMB also has additional administrative authority emanating from the Data Quality Act.[4] OMB was statutorily required to implement this act by issuing government-wide guidelines and overseeing each agency's development of agency-specific guidelines. Thus, OMB's administrative authority over the act provides it with an additional basis of authority to enforce guidelines governing the development and use of regulatory analysis. We recommend that OMB (1) more emphatically set forth its authority in its final guidelines; and (2) actively enforce the guidelines once in place.

B. Data Quality

Due to the importance of the data quality law, and because of its unquestionable application to most agency regulatory analyses, the Chamber believes the Draft Guidelines should more prominently focus on agency obligations under the Data Quality Act.[5] However, the data quality law is only briefly mentioned in the Draft Guidelines.[6] The Chamber believes these brief mentions are not in proportion with the considerable role the Act must play in relation to most regulatory analyses. Compliance with the Data Quality Act should be the centerpiece of all agencies' information

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[2] Executive Order 12866, §6(b).
[3] Executive Order 12866, §6(a) (economically significant regulatory actions are those that have "an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities." Executive Order 12866, §2(f)(1)).
[4] Fiscal Year 2001 Treasury and General Government Appropriations Act, Section 515 (P.L. 106-554).
[5] The Data Quality Act was implemented through OMB's *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies*, 68 FR 8452.
[6] 68 FR 5492 at 5519, 5525.

development efforts when regulatory analyses are being prepared. Moreover, it is a requirement of OMB's implementing guidelines.[7]

The implementing guidelines also provide that agencies must meet a "reproducibility" standard for disseminated scientific, financial or statistical information that is deemed "influential." The Draft Guidelines should remind agencies of this important obligation, including the requirement that agencies "include a high degree of transparency about data and methods to facilitate" the required reproducibility.[8]

OMB's information quality guidelines contain an additional requirement (best available science) for risk analyses related to human health, safety, or the environment. The importance of this mandate is obvious – the statistical mechanisms appropriately focused upon in the Draft Guidelines (e.g., discount rates, valuing non-use, etc.) are of little significance if the data to which they are being applied are not the best available. Therefore, the Chamber encourages OMB to also restate and reemphasize the use of the best available science requirement contained in OMB's guidelines implementing the Data Quality Act and in OMB's final regulatory analysis guidelines.

II. SPECIFIC ISSUES

In the Guidelines preface, OMB discusses the fact that it is not always possible to assign monetary values to benefits and costs, but that non-quantifiable benefits or costs still need to be considered. In this respect, the Draft Guidelines state that agencies "should not use non-quantifiables as 'trump cards,' especially in cases where the measured net benefits overwhelmingly favor a particular alternative."[9] This is a particularly important admonition that OMB correctly gives the agencies. Because the regulatory process so frequently involves non-quantifiable costs and benefits, a certain amount of subjectivity is required of those who decide the structure of a final rule. By warning against the use of "trump cards," OMB is merely stating what should be obvious: Subjectivity, when called for, should be exercised in a

[7] 67 FR 8452, 8459 (§III.2).
[8] Agencies are also required to provide public access to certain data under the data access law (commonly referred to as the "Shelby Amendment"), as reflected in OMB Circular A-110, Section _.36.
[9] 68 FR 5492 at 5514.

reasonable manner. The Chamber therefore encourages OMB to retain – and more strongly emphasize – this cautionary language in its final guidelines.

The preface also provides that a "good regulatory analysis" should contain three elements: (1) a statement of the need for the proposed action; (2) *an examination of alternative approaches*; and (3) an evaluation of the benefits and costs of the proposed action *and the main alternatives identified by the analysis*.[10] The Chamber supports the inclusion of all three elements, but believes the second and third elements have particular import. Regulatory analysis should never be an effort to support, justify or rationalize predetermined regulatory outcomes. Instead, agencies should – whenever permitted by law – genuinely consider alternatives that may be more cost effective. Such consideration can only be properly undertaken when the alternatives have been fully analyzed. The Chamber therefore supports, and believes essential, OMB's suggestions and requirements that agencies consider, and where appropriate adopt, alternatives.

A. Why Regulatory Action is Needed

The Chamber agrees with OMB in requiring agencies, as an initial step, to consider why and whether regulatory action is necessary, as well as whether action at the federal level is the best way in which to solve the problem.[11] The Chamber concurs that regulatory action should be limited to circumstances where the market cannot otherwise address the situation, i.e., where there is a "market failure."

However, the Chamber has serious concerns with the statement that new regulation can be justified when "used to reduce unfairness."[12] A similar concern is raised by the statement that "[r]egulatory action may also be appropriate to protect privacy or to promote civil rights or permit more personal freedom."[13] First of all, these statements are very broad and no Agency should ever regulate without specific statutory authority. Agencies should not be provided carte blanche authority by these guidelines to regulate solely in the name of fairness, privacy, or freedom unless regulating to implement a legislative mandate. For this reason, the Chamber suggests that

[10] 68 FR 5492 at 5514 (emphasis added).
[11] 68 FR 5492 at 5514-5515.
[12] 68 FR 5492 at 5515.
[13] 68 FR 5492 at 5515.

OMB strike paragraph "4. Other Social Purposes" under the section "I. Why Regulatory Action is Needed."

B. Alternative Approaches to Consider

The Guidelines set forth a number of alternative regulatory actions that agencies should consider once a decision to regulate has been made. The Chamber supports consideration of the enumerated alternatives and strongly encourages agencies to adopt those alternatives that can effectively achieve the regulatory goal with the least burden to the regulated community. We note the significance of three alternatives.

1. Different Requirements for Different Sized Firms

OMB is correct in reminding agencies of their obligation to consider setting different requirements for firms of different sizes. This is an issue of particular interest to the U.S. Chamber, as 96% of the Chamber's membership consists of small businesses (100 employees or fewer), with approximately 75% of the Chamber's membership coming from firms with 50 or fewer employees.

The disproportionate regulatory impact on small companies firms can hardly be overemphasized.[14] We applaud OMB for continuing to remind agencies of their many obligations under the Regulatory Flexibility Act.[15]

2. Different Requirements for Different Geographic Regions

The Guidelines also suggest that agencies consider, as a regulatory alternative, different requirements for different regions. While the Chamber supports this concept in principle, it does raise

[14] Evidence of this burden can be found in the well-known and well-regarded study conducted by W. Mark Crain and Thomas D. Hopkins for the U.S. Small Business Administration's Office of Advocacy, *The Impact of Regulatory Costs on Small Firms* (July 2001). In the study, Crain and Hopkins find that firms with fewer than 20 employees face a regulatory burden that is almost 60% greater, on a per employee basis, than that faced by firms with more than 500 employees.
[15] The relationship between the analysis required under the Regulatory Flexibility Act and that required by the Draft Guidelines is discussed in greater detail below.

concerns. Problems have arisen due to regional offices creating and enforcing policies or interpretations of regulations and statutes within their region that differ significantly from policies established by Washington, DC headquarters offices.

For example, in August 1999, the U.S. Environmental Protection Agency (EPA) proposed new water discharge permitting regulations as part of the Total Maximum Daily Load (TMDL) regulation. EPA's Region IX office issued guidance in early 2000 to implement the regulation even before the TMDL proposal was finalized and in effect. Further, the Region IX guidance included provisions that were more restrictive than either the existing or proposed TMDL regulations – which in some cases could require long-established facilities to completely eliminate permitted water discharges. In addition, the regional office threatened to revoke a number of permits that had already been state-approved.

The Chamber recognizes that federal agencies need a degree of flexibility to consider regional differences when implementing federal laws. Furthermore, regional offices of federal agencies should be encouraged to develop innovative strategies for assisting the private sector to meet federal requirements. However, the Chamber also believes that regional regulatory offices should not create and implement enforcement, permitting or other policies that are inconsistent or uncoordinated with policies established by headquarters offices, or with federal statutory or regulatory requirements. The Chamber therefore believes that the final guidelines on the conduct of regulatory analysis should be amended to ensure that agencies adopt regional standards only when determined by the agency's national headquarters to be consistent with Agency policy.

3. Performance Standards Rather Than Design Standards

Allowing members of the regulated community the flexibility to determine the manner in which to meet performance standards has resulted in more effective regulation at lower costs, while greatly enhancing market-based opportunities for efficiency improvements

over time. OMB is right to encourage agencies to adopt performance standards rather than to dictate design standards. This provision should remain be emphasized greatly.

C. Analytical Approaches

The Draft Guidelines recognize the value of both benefit-cost analysis (BCA)[16] and cost-effectiveness analysis (CEA)[17]. Because the value of an analysis can be seriously compromised when monetization and/or quantification are not readily capable of being determined, the Chamber believes it is important that agencies conduct, whenever possible, both BCA and CEA.

While not all statutes permit an agency to directly consider the costs of its regulatory proposals, the Chamber is aware of no statute that mandates an agency to select a less efficient regulation where an alternative rule would achieve identical results at lower costs to the regulated community. However, agencies may not be able to determine such possible outcomes without conducting a BCA and/or CEA. Therefore, we encourage OMB to include in its final guidelines an instruction that such analyses are appropriate and necessary even where the governing statute prohibits consideration of costs.

Of course, either type of analysis is only as good as the data or other information that is analyzed. Therefore, we restate the Chamber's position that compliance with the Data Quality Act and its implementing guidelines should be the starting point of, and should remain a fundamental aspect throughout, any BCA or CEA.

D. Identifying and Measuring Benefits and Costs

The identification and measurement of benefits and costs is the most central element of regulatory analysis. As frequently discussed in these comments, the Chamber strongly believes that an agency's starting point when conducting any regulatory analysis must be to ensure that the information used to determine the level, amount, and/or value of costs and

[16] BCA generally consists of a comparison of a rule's or proposed rule's cost and benefits expressed in monetary units.
[17] CEA is an analysis that seeks to determine, with or without monetizing costs, whether resources are being used in the most effective way to achieve an identified regulatory result.

benefits is consistent with the agency's obligations under the Data Quality Act. Beyond this foundational step, the Draft Guidelines present a number of specific issues that merit further discussion.

1. How to Develop a Baseline

As OMB correctly notes, the choice of a baseline indicator of performance or behavior can be determinative of a regulatory analysis's outcome. In fact, to the regulated community, the baseline determination is one of the more critical factors in determining ability to comply and "winners" and "losers" in the marketplace. The Chamber therefore strongly supports OMB's requirement that agencies discuss the reasonableness of the baseline or baselines selected. To the extent practicable, agencies should consider multiple regulatory alternatives against multiple baselines. The act of providing decision-makers with more data in this regard will almost certainly lead to better, more efficient regulations.

The Chamber also approves of OMB's instructions to the agencies to "analyze the benefits and costs of different regulatory provisions separately when a rule includes a number of distinct provisions."[18] Certainly, this requirement leads to more complex, and therefore more expensive, analyses. But the results can be highly revealing and the benefits potentially immense. Individual components of regulatory proposals should be fully vetted. This provision should therefore remain in the final guidelines.

2. How to Develop Benefit and Cost Estimates

a. Some General Considerations

The requirement that agencies prepare probability distributions when uncertainties exist is welcome, but should not be viewed by the agencies or the public as a panacea. The Chamber supports the creation and use of probability distributions, but their use should be tempered with

[18] 68 FR 5492 at 5517.

knowledge of their fallibilities, which OMB should discuss as explicitly as possible. In other words, the OMB guidelines should discuss such shortcomings in much greater detail.

b. Contingent Valuation

The Draft Guidelines discuss the use of contingent valuation (CV) methods – an estimation procedure that derives values solely from responses of survey-takers to hypothetical questions – for estimating indirectly traded benefits (e.g. how much is an acre of wilderness worth to you – a non but potential user of the resource?). This is an area of great concern to the Chamber, as the use of CV can easily lead to misuse or abuse in relation to BCA and CEA analyses; in particular, the valuation of nonuse benefits is an area in which benefits can be considerably increased with little empirical evidence or robust economic support. The Draft Guidelines do contain warnings about the inherent weakness and danger of using CV for nonuse valuations. Nevertheless, the Chamber finds these caveats to be insufficient, as it is our position that contingent valuation should rarely, if ever, be used to monetize nonuse benefits.

OMB is correct to point out in the Draft Guidelines that CV studies must comply with the Data Quality Act and its implementing guidelines, as discussed above. In fact, it seems likely that few CV studies could withstand scrutiny under the data quality "reproducibility" standard, particularly given that it is impossible to externally validate the results of CV studies.[19] For these reasons, the Chamber recommends that OMB more strongly discourage the use of CV as a measurement for nonuse benefits. The better approach, in the Chamber's view, is to inclusively require a narrative description of benefits, along with any quantification or monetization that can be accomplished without resort to CV.

[19] See *Report of the NOAA Panel on Contingent Valuation*, p. 6, www.darp.noaa.gov/pdf/cvblue.pdf (January 11, 1993), in which the authors express many of the same concerns about and limitations of CV as are discussed in the Draft Guidelines.

At a minimum, agencies should make fully transparent the designs, data, and other information concerning any CV survey relied upon to support a regulatory analysis so that an agency's compliance with the regulatory analysis guidelines and the Data Quality Act can be fully scrutinized by the public.

c. Monetizing Health and Safety Benefits and Costs – Premature Mortality Risks

Reasonable people can disagree about the best method of valuing a human life, whether it is a value of statistical life (VSL) or value of statistical life year (VSLY) approach. But it seems highly unreasonable to suggest that an agency limit itself to one approach or the other when conducting regulatory analysis. The Chamber therefore supports the portion of the Draft Guidelines that provides that "[i]n all instances . . . agencies should consider providing estimates of both VSL and VSLY."[20] The Chamber also, as in other contexts, agrees with OMB's mandate that agencies fully disclose their methodologies and that agencies comprehensively explain their choice of any particular methodology.

3. What Discount Rate to Use

The choice of a proper discount rate is one of the most influential decisions an agency must make when conducting a regulatory analysis. Therefore, the Chamber supports OMB's Draft Guidelines requiring agencies to use multiple differing discount rates when measuring the value of future costs and benefits. Regulators will be far better positioned to consider regulatory alternatives when full ranges of rates are considered.

The Chamber believes OMB is also right to recognize that opportunity costs – the costs of investments not made by the public

[20] 68 FR 5492, 5521.

sector because funds were otherwise dedicated to regulatory compliance – should result in the use of an even higher discount rate to match the cost of the lost investment. We also support OMB's requirement that agencies conduct a sensitivity analysis to determine the effect of possible specific changes to a regulatory proposal.

For intergenerational benefits, OMB suggests that agencies adopt even lower discount rates, thereby giving relatively greater value to lives saved far in the future than to lives saved during the present generation. We question both the logic and economic justification behind this suggestion. Nevertheless, the Chamber supports OMB's instruction that agencies, even when applying a lower intergenerational rate, also continue to show calculated net benefits discounted at more standard, higher rates. The Chamber, however, believes OMB should further define the term "intergenerational," particularly as it applies to the use of a lower discount rate. Greater clarity in this area will ensure that agencies do not overstate future benefits or costs that are not truly intergenerational.

4. Treatment of Uncertainty

Uncertainties are the single greatest variable in regulatory analysis. The Chamber therefore applauds OMB for its discussion and approach to dealing with the uncertainties that frequently arise in the regulatory context.[21] Most importantly, we strongly support OMB's requirement that agencies disclose all uncertainties, assumptions, and inferences relating to regulatory analysis.

The Chamber also believes OMB has properly recommended that agencies consider deferring regulatory decisions when uncertainties arise as the result of a lack of data. Insufficient data strongly suggests, in most instances, that there is an insufficient basis on which to promulgate a new rule. With the advent of the Data Quality Act, agencies must seriously consider whether regulatory actions are legal when material data is unavailable or otherwise

[21] 68 FR 5292, 5523-5524.

insufficient. The Chamber therefore recommends that agencies be reminded of this fact in OMB's final guidelines.

The Chamber further supports the call for agencies to conduct quantitative analysis of uncertainty, including the requirement of a formal quantitative analysis for rules that exceed a $1 billion threshold.[22] The Chamber is concerned, however, that the $1 billion threshold may be arbitrary and, in any event, is unnecessarily high.

Under Executive Order 12866, OMB has the authority and responsibility to review "significant regulatory actions," including all those with an annual impact of $100 million or more.[23] Therefore, we question why OMB chose to limit the mandatory portions of its Guidelines to rules having a billion-dollar impact. Because of the indispensable role that regulatory analyses play in most rulemakings, we believe a better approach would be to – at a minimum – apply the mandatory aspects of the guidelines to all "significant regulatory actions," as defined by Executive Order 12866.

5. Other Key Considerations

The Guidelines state that "[e]stimates of costs should be based on credible changes in technology over time."[24] This is a reasonable position, in that technology certainly allows for improved compliance efficiency over time, particularly when agencies adopt performance standards rather than design standards. But this presents an area of potential abuse and agencies should accordingly be provided stricter guidelines concerning how to weigh the effect of future technology on valuation. The Chamber recommends that this aspect of the guidelines be modified to include an instruction that agencies, when determining compliance costs as part of a regulatory analysis, not assume new technology or technological improvements unless such technology or improvements can and are shown to be both physically possible and economically practicable.

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[22] The Chamber's limited concerns regarding probability analyses are discussed in greater detail above.
[23] Executive Order 12866, §6(b).
[24] 68 FR 5492, 5524.

E. Specialized Analytical Requirements

The Guidelines accurately state that the Regulatory Flexibility Act requires agencies to prepare proposed and final regulatory flexibility analyses for rules that are expected to have a significant economic impact on a substantial number of small entities. Pursuant to Executive Order 13272, the Small Business Administration Office of Advocacy recently released a guide entitled "The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies."[25]

The Office of Advocacy's Guide reveals that, although the elements of an analysis under the Regulatory Flexibility Report and an analysis under Executive Order 12866 are quite distinct, some overlap does exist. For instance, both require agencies to consider alternative approaches to regulation. Therefore, the Chamber recommends that OMB, in its final guidelines, more extensively explain the relationship between the differing regulatory analyses, with particular attention to any potential conflicts between them.

The Chamber appreciates the opportunity to submit these comments and thanks the Office of Management and Budget and the Office of Information and Regulatory Affairs for considering the views of the U.S. business community on this important subject.

Sincerely,

William L. Kovacs

[25] http://www.sba.gov/advo/laws/rfaguide.pdf