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Subject: Comments of James Gattuso on draft report

Please find attached my comments on the 2004 draft report on the costs and benefits of regulation.

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Comments to
The Office of Information and Regulatory Affairs
Office of Management and Budget

on the

2004 Draft Report to Congress on the Costs and Benefits of Federal Regulations

May 20, 2004

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In accordance with the notice published in the *Federal Register*, I respectfully submit these comments on OMB's *Draft Report on the Costs and Benefits of Federal Regulations*. The views I express in these comments are my own, and should not be construed as representing any official position of The Heritage Foundation.

In general, the Office of Information and Regulatory Affairs is to be commended for preparation of this comprehensive report. This annual publication is an extremely useful document and a key tool for informing the public and policymakers on the scope and impact of the federal regulatory system. OIRA and its staff are also to be commended for their efforts, described in this draft report, toward strengthening the federal government's regulatory processes over the past several years.

At the same time, a number of improvements should be made to make the report more useful to policymakers and the public, and to ensure that its conclusions are not misunderstood.

One of the primary purposes of this report, as specified in section 624 of the fiscal 2001 Regulatory-Right-To-Know Act is the submission of an "accounting statement" on regulation, estimating the total annual costs and benefits of federal regulation 1) in the aggregate, 2) by agency and program, and 3) by major rule. This is no easy task. Regulatory accounting is still an evolving, and as yet imperfect discipline, making precise and accurate estimates of costs and benefits difficult. Moreover, resource and institutional constraints further limit OIRA's ability to itself analyze and quantify the costs and benefits of regulation.

As a result, the costs and benefits reported by OIRA in this report, as in previous reports, were compilations of estimates previously made by regulatory agencies themselves, with minimal changes. While meeting the requirements of the legislation, the numbers produced are incomplete and potentially inaccurate.

OIRA itself acknowledges these problems in the report. As a first matter, only a small portion of all federal rules are included in the aggregate total. For fiscal 2003, quantified and monetized costs and benefits were available for only six of 12 major rules reviewed by OIRA. Another two major rules did not undergo OIRA review, and did not have quantified benefits, although costs were quantified.

In addition, OIRA reported that there were seven major rules issued in fiscal 2003 by independent agencies not subject to OIRA review. Of these only one had monetized benefits. However, this list – based on data maintained by the General Accounting Office pursuant to the Congressional Review Act – is itself incomplete. This is because rules promulgated under authority of the Telecommunications Act of 1996 are, by statute, excluded from the GAO accounting. As a result, at least two additional major final rules – the Federal Communications Commission's modification of media ownership rules and its revision of local telephone access rules – were excluded. The FCC calculated neither costs nor benefits for either of these rules. Thus, in total, monetized costs and benefits were calculated for only 7 of 23 major rules promulgated in fiscal 2003.

Moreover, the numbers that are available may not be accurate. As the report itself states, because of different methodologies used by agencies, and gaps in the available data, the aggregation of numbers may not be "meaningful." Moreover, many of the specific agency estimates have been challenged by outside studies that suggest cost estimates far higher than that estimated by agencies.[1]

OMB does make it clear that it is not endorsing all the agency conclusions, at one point specifically stating that citation of the data "should not be taken as an OMB endorsement of all the varied methodologies used to derive benefits and cost estimates." Unfortunately, that disclaimer was lost in many of the news reports accompanying the release of this draft report. The Washington Post, for instance, led a story on last year's report with the statement: "A new White House study concludes that environmental regulations are well worth the costs they impose on industry and consumers…"[2]

There are several steps OMB can take to reduce confusion over the meaning and significance of the statistics in the report, as well as to improve their overall accuracy. Among them:

1. **Stress the limited nature of the statistics in the executive summary as well as throughout the report.** While the report does contain adequate disclaimers and

[1] See, Public Interest Comments of Mercatus Center on The Office of Management and Budget's 2004 Draft Report to Congress on the Costs and Benefits of Regulation.
[2] Eric Pianin, "Study Finds Net Gain From Pollution Rules: OMB Overturns Past Findings on Benefits," *Washington Post*, September 27, 2003.

explanations of the numbers, they are often not clear, and sometimes buried in the body of the report. The result is confusion about what the numbers actually are and are not. To avoid such confusion, the report should make absolutely clear that the "headline" numbers on regulation are a restatement of prior agency estimates, and do not include the bulk of federal regulations.

2. **Include information on other credible studies that present alternative estimates of the costs and benefits of individual regulations.** For resource and institutional reasons, it may not be possible for OMB to make new and independent assessments of each regulation for purposes of this report. But, when alternative assessments have been done, and are credible, it would be helpful for them to be referenced as part of this report. This would better inform readers of the possible costs, and other possible ways to quantify them. Such reports could be included if they are deemed credible, without any endorsement of their conclusions by OIRA.

3. **Require stricter adherence to OMB guidance in the preparation of regulatory analyses.** As noted above, the *Draft Report* indicates that despite increased scrutiny by OMB, agency regulatory analyses by agencies still often lack consistency and quality. This problem, which has been highlighted in many comments on previous reports[3], reduces the individual value of analyses, and makes cross-comparisons difficult. OIRA has begun to address this problem with the release last fall of new guidelines for regulatory analysis. The new guidelines should now be enforced strictly, and proposed rules rejected if analyses do not comply with them.

   This scorecard should include information on the number of major and minor rules proposed or promulgated by each agency, how many were supported by analyses, how many had quantified and/or monetized costs and benefits, and to what extent each adhered to OMB guidelines for analyses. This should be provided in table form, with textual analyses critiquing each agencies efforts.

In addition, there are a number of other changes OMB could make to this annual report that would help provide a clearer and more useful picture of the impact of regulation. Among these:

1. **Require each agency to prepare a report on its efforts to minimize regulatory burdens.** In addition to OMB analysis of agency efforts, each agency should be asked to submit to OMB – as part of the preparation of this report – a report on its own regulatory reform efforts. These reports then should be submitted for public comment, along with OMB's government-wide *Draft Report.*

[3] See, e.g., Angela Antonelli, "Comments on the Office of Management and Budget's Draft Report to Congress on the Costs and Benefits of Federal Regulation" (2000), and "Comments of Mercatus Center on Office of Management and Budget's Draft Report to Congress on the Costs and Benefits of Federal Regulations" (2001).

Such a requirement would provide several benefits. First, it would provide OMB, and the public, with detailed information on the agencies' regulatory program and analysis. Second, it would provide the agency with an opportunity to articulate its views and the purposes for its actions. Third, and perhaps most important, it would help focus the agency itself on the need to maintain a coherent and rational regulatory program. Improving regulation should be a goal of each agency – rather than solely the responsibility of OMB. Requiring agencies to report on their own efforts could help reinforce that responsibility.

2. **Present key information in more useful format.** While OMB's draft report provides a wealth of information, much of it is unnecessarily difficult to locate in the report. Improving the way this information is presented would make this report much more useful to policymakers and the public. One possibility would be to include, perhaps an appendix, summary information on each major or significant regulation adopted over the previous ten years (including those by independent agencies), with the date the rule was adopted, a short summary of its purpose, the quantified costs and benefits (if any), a website address for the text of the rule, and a website address for the regulatory impact analysis of the rule. This would increase the transparency of the information and analysis in the report, while making it easier to compare and assess various regulatory actions and trends.

3. **Provide more contextual information.** In addition to the raw numbers, additional efforts to put this information in context would be useful to policymakers. Historical information, for instance tables showing year-to-year incremental changes in the number and cost of major regulations, would be particularly helpful. Other information, comparing the cost of rules to such things as gross domestic product, federal budget levels, tax revenues, and the like (and changes over time in the ratios) would also be helpful in conveying the scope and impact of regulation.

4. **Include other measures of regulation.** Although the Regulatory Right-to-Know Act only requires OMB to provide information on the costs and benefits of regulation, there are also a number of other statistical measures that provide information on regulatory trends. While each of these is imperfect, they can be useful to filling in the regulatory picture. These statistics include total number of final rules and proposed rules by year, total number of major final and proposed rules, the portion of each increasing regulatory burdens, the total number of rules in the Unified Agenda pipeline, economically significant rules in the pipeline, total budgets of regulatory agencies, total staffing and budget of regulatory agencies, and more.

   This information could be readily compiled by OMB, and included in each year's report, along with tables showing year-by-year changes in these figures, in the aggregate and broken down by agency.

The Draft Report also requested recommendations as to regulatory reforms that would reduce costs, increase effectiveness, enhance competitiveness, reduce uncertainty and increase flexibility in the manufacturing sector. I would like to make the following two recommendations:

1. **Revise Family and Medical Leave Act rules.** The Department of Labor should review and modify its Family and Medical Leave Act regulations. The original regulations have proved to be unworkable, disruptive and damaging. They affect employers and employees in all sectors of the economy, including manufacturing.

In particular, DOL should clarify and tighten its definition of a "serious medical condition". Current guidance from DOL suggests that maladies as mild as a common cold can qualify an employee for FMLA leave, even though FMLA was intended to provide leave for severe and lengthy illnesses requiring substantial amounts of care. Most employers' own leave arrangements are more than adequate to take care of milder illnesses.

DOL should also revise the rules regarding intermittent leave and reduced work schedules to prevent abuses. While employees may have legitimate needs to take a part of a day off in order to receive medical care, frequent use of intermittent leave can upset workplace operations, and are difficult for employers to track. At a minimum, employers should be able to offer intermittent leave in half-day increments, to simplify staffing and record keeping arrangements, and provide incentive for employers to minimize their use of intermittent leave.

As of August 2003, sixty-eight cases had been filed in federal courts challenging some provision of the current FMLA regulations. Of those where the courts ruled on the regulations, in nearly half some part of the existing regulations was invalidated. The evidence is continuing to build that the FMLA regulations are overly broad and are contributing to abuse by a small but significant number of workers.

2. Reduce regulation of broadband telecommunications. High-speed, broadband communications technology has the potential to be a key driver of U.S. economic growth in the coming years. The impact could be immense – according to one study, benefits to the U .S. economy could total some $400 billion annually.[4] The growth in economic activity resulting from comprehensive adoption of broadband technology would help all sectors of the economy, including manufacturing. It would also lift manufacturing more directly by expanding markets for Internet and broadband equipment, including switches, lines, home devices and more.

Recognizing this, President Bush called for a "national goal" for universal broadband access by 2007, through a broad range of policies, including reduction of

[4] See, Robert W. Crandall and Charles L. Jackson, "The $500 Billion Opportunity: The Potential Economic Benefit of Widespread Diffusion of Broadband Internet Access," (Criterion Economics, July 2001).

regulatory barriers.[5] A wide range of such barriers exists at the state and local as well as federal level.[6]

A particular area of concern has been Federal Communications Commission rules promulgated under the Telecommunications Act of 1996 that require incumbent telephone companies to lease elements of their networks to competitors at regulated rates. The net effect of these rules has been to discourage investment, and thus slow adoption of broadband. In light of these problems, the FCC last year voted to lift most of these rules as they relate to advanced technologies, though it largely left them in place for traditional "narrowband" telecommunications.

This March, the D.C. Circuit Court of Appeals upheld the FCC's lifting of the broadband rules, but largely struck down the narrowband rules[7]. The Administration is currently considering whether to request review of this decision from the Supreme Court. It should not do so – the regulations should be allowed to fade away.

In addition, the FCC has pending two other proceedings concerning the regulatory treatment of broadband – one to determine whether broadband is a "telecommunications service" or "information service,"[8] another on whether telephone companies providing broadband should be regulated as "dominant" providers[9]. These should be decided expeditiously in a way that reduces or eliminates regulation.

[5] "Promoting Innovation and Competitiveness: President Bush's Technology Agenda," White House fact sheet (www.whitehouse.gov/infocus/technology/economic_policy200404/chap4.html)
[6] For a discussion of options, see Robert W. Crandall, Robert W. Hahn, Robert E. Litan, and Scott Wallsten, "Universal Broadband Access: Implementing President Bush's Vision," AEI-Brookings Joint Center for Regulatory Studies *Regulatory Analysis* 04-01 (May 2004).
[7] U.S. Telecom Association v. FCC, __F.3d __ (D.C. Cir,, 2004).
[8] FCC Notice of Proposed Rulemaking, "Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02-33.
[9] FCC Notice of Proposed Rulemaking, "Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services," CC Docket No. 01-337.