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cc:
Subject: NFIB's Comments on 2004 Draft Report

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Enclosed herein in word format are NFIB's Comments on the 2004 Drafr Report on the Costs and Benefits of Regulation

<<NFIB Comments to OMB 2004 Report.doc>>

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May 20, 2004

Dr. John Graham, Director
Office of Information and Regulatory Affairs
Office of Management and Budget, NEOB, Room 10235
725 17th Street, NW
Washington, D.C. 20503
(Sent Via Electronic Mail)

Re: Comments on OIRA's Draft 2004 Report to Congress on the Costs and Benefits of Regulations

Dear Dr. Graham:

On behalf of the 600,000 small-business owners represented by the National Federation of Independent Business (NFIB), we are pleased to submit these comments on the Office of Information and Regulatory Affairs'(OIRA) **"2004 Report to Congress on the Costs and Benefits of Regulation"** (hereafter referred to as the "Draft Report"). These comments are being submitted jointly by the NFIB, the NFIB Legal Foundation, and NFIB's Research Foundation.

Our comments are divided into 4 sections:

1. Introduction and Overview;
2. Concerns with the Draft Report's Methodologies and Conclusions;
3. Recommendations for Regulatory Review; and
4. Conclusion

Introduction and Overview

NFIB remains appreciative of the efforts of the Office of Management and Budget and OIRA to both assess and reduce the burdens placed on small businesses by the regulatory state. We also appreciate the continued opportunity to offer up our recommendations on regulations that we believe necessitate review or even the recommendation for rescission

by OIRA. We continue to be pleased that OIRA recognizes the disproportionate burden placed on small businesses by the regulatory state.

While the 2004 Draft Report requested recommendations for regulations specifically impacting the manufacturing sector, our joint comments have not been limited to the scope of that request. Because NFIB's members run the gamut of business types, we also focus on regulations that impact other sectors of our membership.

Our recommendations concern the following seven regulations:

1. The Definition of "Waters of the United States" under the Clean Water Act;
2. The "Lead Rule" under the Toxics Release Inventory;
3. Regulations under the Family and Medical Leave Act;
4. The Commercial Fax Ban under the Telecommunications Policy Act;
5. Privacy Regulations under the Health Insurance Portability and Accountability Act;
6. OSHA's new Hazardous Material Communications Guidelines; and
7. Use of the Term "Fresh" for Baked Goods.

We consider these regulations to be particularly burdensome for small business. They are complicated and confusing, counter-intuitive, or otherwise harmful. This leads to our members having to spend inordinate amounts of time figuring out what needs to be done in order to be in compliance with the myriad regulations they face, rather than actually complying with those regulations (and fueling the economy with their businesses).

Concerns With the Draft Report's Methodologies and Conclusions

Understanding that the annual reporting of regulatory costs and benefits of major regulations (those costing the economy $100 million or more) is a tremendous undertaking, especially given the resources available to OIRA, we are concerned that the data being examined, and the methodologies used to examine that data, underestimate the real cost to the economy of the regulatory state.

To start with, OMB estimates the ***total*** cost of those regulations to the economy is $34 billion to $39 billion. This is an incomplete number, and lends itself to be confused with the total cost of regulation. The well-respected and widely-used "Crain-Hopkins" report on the impact of regulation to small business, a report contracted for by the Small Business Administration's Office of Advocacy, states that the total cost of regulation (not limited to the "major rules") to be more than 20 times that amount. Drs. Crain and Hopkins state that amount to be roughly **$843 *billion***.

We believe this $34-39 billion amount is much too low, given one of the reports major flaws, the lack of cost data for half of the "major" regulations discussed. OMB only discusses twelve "major" regulations this year, and six of those twelve have no cost estimates. Understanding that OMB and OIRA are limited by the data given to them by the regulatory agencies at issue, the lack of information compromises OMB's ability to

prepare an accurate report, as required by law. It also calls into question agency compliance with Executive Order 12866, which requires this information for OMB's review of major rules.

That being said, estimating the costs of six, or even twelve major rules, seriously undercuts any attempt to address the totality of the problem as a whole. Last year, there were nearly 350 final rules published in the Federal Register. OMB considered 37 of them to be "major" as defined above, and has stated that 25 of those were "transfer" rules (rules that shift monetary resources from one segment of the economy to another without actually imposing any net benefits or costs to society). Quantifying the costs of only 6 out of the 350 is an examination of just over 1.5%! While "non-major" rules impact the economy far less than so-called "major" rules, these regulations nevertheless do have a cost, especially to small business. This is even more so because the "non-major" rules tend to be narrowly focused on particular industries, and thus are more liable to have a serious impact on specific small business industry sectors.

For example, last year's attempts by the Department of Housing and Urban Development (HUD) to promulgate regulations governing home loans under the Real Estate Settlement Procedures Act was not considered a "major rule" because it would not have an economy-wide impact of more than $100 million. However, the new rules would have been focused on two specific industries, mortgage brokers and land title companies. Small businesses in each of those two industries would have been ***severely*** impacted, and in fact, the land title industry feared that the small businesses within their industry would have been put out of business entirely.

Upon subsequent calls for a re-examination of small business impacts, HUD withdrew the draft final rule.

Also not included in OMB's costs are those associated with regulations put forth by independent agencies. These agencies promulgate regulations that can be similarly costly to small businesses, but those costs are not quantified as those agencies are not covered by Executive Order 12866. We believe OMB ought to consider having that executive order's reach extended to these agencies, so that their impact can be assessed as well.

Finally, it is difficult to independently assess the accuracy of cost estimates (when those estimates *are* provided by the agencies as required), when there are sweeping differences in the methodologies used by the agencies in measuring those costs. OMB itself recognizes that because of inconsistent methodologies, it is difficult to assess the accuracy of agency cost estimates, and chooses not to endorse those methodologies (without identifying which methodologies it found accurate and which it did not).

In the future, we hope that OMB would not only identify which agency methodologies it could not endorse, and why, but also attempt to re-quantify the agency's estimates based upon OMB's own methods. Furthermore, it would certainly help if OMB would mandate that these agencies use roughly similar methods to quantify costs and benefits, so that

true comparisons could be made. If there is no consistent methodology, then OMB ought to consider engaging in a study to create one.

In addition, it would be tremendously helpful if OMB could update the public within the annual Draft Report on the status of regulations previously recommended for review. This would prevent needless re-recommendation of regulations that OMB is taking action on, and allow those with a vested interest in particular regulations to target their comments on the particular actions actually being undertaken. It would also allow organizations to independently track the progress OMB is making in reviewing regulations, and to gauge OMB's success in their efforts.

From a policy standpoint, it would also be of great assistance if OMB would start releasing its draft report at the same time it releases its annual budget. If we are truly interested in getting a "handle" on the annual costs of governing this nation, linking both the on-budget and off-budget costs would be a step in the right direction. Under current practices, releasing the budget, and then releasing the Draft Report some weeks later, creates a disconnect that prevents a casual observer from gaining an accurate picture.

Recommendations for Regulatory Review

Regulation for Nomination: Clean Water Act (CWA) Regulatory Definition of "waters of the United States"

Agency: Department of Defense, Army Corps of Engineers (Corps) and Environmental Protection Agency (EPA)

Regulatory Citation: 33 C.F.R. Part 328 (Corps); 40 C.F.R. Part 230 (EPA)

Statutory Authority: 33 U.S.C. § 1362

Problem: The CWA generally prohibits the discharge of pollutants into "waters of the United States" without a permit issued by EPA, or in the case of dredged or fill material, by the Corps. Regulations issued by the agencies under the CWA generally claim jurisdiction over all "waters of the United States," including intrastate wetlands and waters, the disturbance of which may have the potential to affect interstate commerce.

In 2001, the U.S. Supreme Court ruled in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers* that CWA regulations do not extend to isolated wetlands. Despite this ruling, EPA and the Corps have continued to assert jurisdiction over isolated wetlands, which are only tenuously connected to actual navigable waters through a loosely iterated link. Field regulators continue to assert jurisdiction over wetlands in a manner inconsistent with the Supreme Court's holding in *SWANCC* and in contravention of the Congressional intent to only regulate "navigable waters" by developing theories based on words like "tributary" and "isolated", terms that are not clearly defined in the regulations. Overall, it is increasingly difficult to get a determination from either agency as to whether portions of your property are federally regulated wetlands or not. Clear regulatory definitions are needed so that small business has fair notice of CWA jurisdiction.

Impact: The costs associated with obtaining federal wetlands permits are significant. According to a recent study, on average, it takes 313 days to obtain a nationwide permit at an average cost of $28,915. 42 Nat. Resources J. 59 (Winter 2002). For individual permits, it takes an average of 788 days with costs of over $271,596, more than most small businesses gross in one year. *Id.* Violators also face criminal penalties.

Solution: The Corps and EPA must conduct a rulemaking to provide clear definitions of the specific terms the agencies are using to establish jurisdiction: "isolated", "tributary", "adjacent", "impoundment", and "ordinary high water mark". These terms are either vague or undefined under the existing regulations. In the absence of rulemaking to define these terms, field regulators have unbridled discretion to make up meaning (and thereby jurisdiction) on an ad-hoc, arbitrary and inconsistent basis. Clarity in the regulations would also help ensure that small business is not incurring unnecessary costs for federal permits.

Regulation for Nomination: Toxics Release Inventory (TRI) Lead Rule

Agency: Environmental Protection Agency (EPA)

Regulatory Citation: 40 CFR Part 372

Statutory Authority: 42 U.S.C. §§11001-11050, 11023.

Problem: In a Final Rule issued January 17, 2001, EPA added lead and lead compounds to the list of persistent bioaccumulative toxic (PBT) chemicals and lowered the annual TRI reporting thresholds for lead and lead compounds from 10,000 to 100 pounds. This new rule requires thousands of small businesses to file a form – Form R – if they possess the toxic substance at or above the reportable quantity limit, even if they have zero emissions. EPA reported that of the first year filers, 41% reported zero releases into the environment.

Impact: The current rule has a significant and continuing adverse impact on small businesses, including small manufacturers. As a result of the lower threshold, EPA predicted that 9,800 facilities, including 4,100 small businesses, would have to fill out new paperwork under the rule at a cost of $7,400 for each first-year filer. EPA estimated that it would take first-time filers between 45-70 hours to complete the paperwork. This paperwork burden is tremendous for small firms that do not have compliance officers to complete these forms.

An informal NFIB survey of 6,000 small businesses revealed the following burdens: (1) Annual reporting costs range from $1,000 to over $20,000; (2) Many firms reported that they need a consultant to complete EPA's paperwork; (3) Most firms reported over 80 hours were needed to complete the paperwork; (4) At an estimated $50 per hour, the cost to complete the paperwork is significant; and (5) It takes businesses between 17 and 40 hours just to determine whether the company must comply with EPA's reporting requirements.

Solution:

- Certification for No Significant Change. Allow TRI reporters to file a certification of No Substantial Revision (Form NS) from a baseline Form R filing. This option should be permitted for both PBT and non-PBT reporters who qualify. Additionally, alternate reporting cycles should be incorporated to decrease the burden on those facilities that do not change significantly from year to year.
- Increase the use of Form A. EPA's decision to forbid the use of Form A by reporters of PBT substances, which includes lead, has reduced the number of reports that are eligible for Form A. Form A offers a lower burden form of reporting and should be encouraged as an alternative to the more burdensome Form R.
- Restore De Minimis Exemption. EPA should restore Form A de-minimis exclusion and range reporting for TRI reporting of lead and other PBT substances.

Regulation for Nomination: Family and Medical Leave Act

Agency: Labor

CFR Cite: 29 CFR, Chapter 825, part 110.

Statutory Authority: P.L. 103-3. (1993)

Problem: The regulations under the FMLA have created a burdensome paperwork nightmare for employers, especially through the mandated allowance of small time periods for leave. Furthermore, confusing and improper communications between employers and employees has led to unjustified lawsuits resulting from employee firings following periods of leave.

Impact: Employers are spending inordinate amounts of time and money navigating the confusing regulations and dealing with the paperwork headache that has resuled. This has translated into both increased management and record-keeping costs. The increase in FMLA-based lawsuits has forced employers to carry higher liability insurance policies in the event of such lawsuit.

Proposed solutions:

Many of the solutions suggested here are not new. There have been several "Technical Corrections Act" hearings, with proposed bills in previous Congresses.

1. An ill employee needs better instructions on how and when to notify an employer that he/she is switching to a period of FMLA. The law especially needs to clarify how this is to be done when an employee is already in a hospital. While the law calls for a physician to fill out a form, frequently this occurs *after* the employee believes that he/she is already on leave. Frequently the employer has no prior knowledge of this occurrence, except from secondary sources (e.g. wife, children, or significant other), and has not approved such leave. With the employee believing that he/she is on a period of FMLA, and the employer believing that the employee is on sick leave, the ambiguity often results in a termination. Sometimes the employee is later fired, and then sues the employer for such unjustified action.

2. The law needs to be revised to more accurately specify 1) how leave notification shall occur, particularly within an electronic age, while still protecting privacy, 2) how regular but short absences (such as chemotherapy treatments) can be accommodated with a minimum of paperwork, and 3) that mandatory arbitration is necessary before any lawsuit against an employer for violating the FMLA is allowed to proceed. If and when a lawsuit is allowed to proceed, damages should be capped to a multiple of salary plus expenses.

Regulation for nomination: Commercial Fax Ban
Agency: Federal Communications Commission (FCC)
CFR Cite: 47 CFR Part 64
Statutory Authority: Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991

Problem: The FCC issued regulations on the "do-not-fax" provision, which would require businesses, membership organizations, and non-profits to gain signed written permission from recipients before sending them commercial faxes (the permission form may not be faxed). Businesses would no longer be able to fax material based on the common-sense understanding that the recipient is a customer. If a business or an organization violates the "do-not-fax" provision by sending faxed newsletters and announcements containing advertisements, it could be subject to stiff fines.

Impact: The rule inhibits businesses' ability to communicate with their customers. Compliance will necessitate paperwork and record keeping, resulting in administrative and financial burdens. The rule will only add to the increasing litigation that is taking place over faxing as some lawyers will take advantage of the rule's new requirements. Businesses will be forced to communicate with all of their customers to ensure that continued faxing is acceptable---at a considerable expense and use of time. Businesses use a variety of faxes to communicate with their customers: purchase orders, copies of orders, order confirmation, invoices, copies of invoices, drawings and artwork proofs, sales tax exemptions, among others. It will be difficult for a small business owner to ensure that all faxes sent out are in compliance with the new regulation.

Proposed Solution: We suggest that the rules be amended so that an existing business relationship provides sufficient permission to fax. The consumer must make an affirmative step clearly severing the relationship with the business, or, absent that requirement, some sort of grace period ought to apply to first time complaints from a former customer of a business who believes they have received a communication which is unwarranted. The regulation should be changed to allow the necessary exemption so that businesses, trade associations, and nonprofits are not adversely impacted by the FCC interpretation. Small-business owners, membership organizations, and non-profits should be allowed to fax consumers with whom they have established a business relationship, provided customers are able to request to opt-out of future solicited advertisements.

Regulation for nomination: "Standards for Privacy of Individually Identifiable Health Information." Health Insurance Portability and Accountability Act

Agency: Health and Human Services (HHS)

CFR Cite: 45 CFR Part 160 and Part 164 Subparts A and E

Statutory Authority: The Health Insurance Portability and Accountability Act of 1996 (HIPAA), PL104-191

Problem: The privacy rules, which HHS published pursuant to the Administrative Simplification subtitle of HIPAA, significantly increased costs without increasing privacy. Small businesses need further clarification about the business associate provisions. HHS has not yet published a compliance guide for small entities as required under SBREFA.

Impact: Government-estimated compliance costs (which are likely to be much higher in the real world) will have a disproportionate impact on small physician offices that are already overburdened with paperwork requirements. The vast majority of health care providers and entities covered by the rules are small. Small-business owners faced difficulties while trying to bring themselves into compliance.

Proposed Solution: Further changes are needed to guarantee small-business owners have the tools needed to adopt appropriate contracts. Some clarifications need to be made to the model contract provisions. Language under the title "Obligations and Activities of Business Associates" requires modifications. Read literally, sections (d) and (g) impose requirements on a Business Associate regarding activities that may not be known or communicated by the Covered Entity to the Business Associate. Therefore, we would suggest the following clarifications to these sections: "(d) Business Associate agrees to report to Covered Entity any use or disclosure of the Protected Health Information *that is known to the Business Associate and is* not provided for by this Agreement." "(g) *Pursuant to a request by the Covered Entity,* Business Associate agrees to make any amendment(s) to Protected Health Information in a Designation Record Set that the Covered Entity directs or agrees to pursuant to 45 CFR 164.526 ~~at the request of Covered Entity or an Individual~~, and in the time and manner designated by Covered Entity."

Also, the development of a compliance guide for small businesses must be undertaken as soon as possible. Such a compliance guide should be short, easy-to-understand, and ought to "walk" the readers through what is required of them. If at all possible, model language for privacy policies should be included in such a guide.

Regulation for Nomination: Hazard Communication (HazComm) Standard

Agency: Occupational Safety and Health Administration (OSHA)

Regulatory Citation: 29 CFR 1910.1200

Statutory Citation: OSH Act of 1970 as amended through 2004 (29 U.S.C. § 651 *et al.*)

Problem and Impact: This rule requires that employers label all hazardous chemicals in the workplace and maintain material data safety sheets (MSDSs) for these chemicals. Employers must also provide information and training to employees regarding the hazardous chemicals in their work area at the time of the employees' first work assignment and again whenever a new health or physical hazard is introduced into the work area. In addition, OSHA requires that employers retrain workers when standard-setting groups like the American Conference of Governmental Industrial Hygienists (ACGIH) update chemical information.[1] Consequently, employers must constantly monitor MSDS updates and revise training materials and programs in response to continuous MSDS changes. MSDS changes are particularly problematic for small businesses because, unlike large companies, small businesses rarely employ a certified industrial hygienist who is qualified and trained to monitor the actions of ACGIH.

Failure to comply with the Hazard Communication Standard represents OSHA's most cited program.

Solution: OSHA should remove the link between its standard and the ACGIH updates. The rule should require that OSHA publish each change in an MSDS for notice and comment. This change would alert employers to a potential change in OSHA's standard and would alleviate the need for small businesses to monitor the actions of ACGIH in addition to monitoring actions by OSHA.

[1] When new and significant information becomes available concerning a chemical's hazards or ways to protect against the hazards, chemical manufacturers and distributors must add it to their MSDS for each hazardous chemical used in the workplace.

Regulation for Nomination: Use of the Term "Fresh" for Baked Goods

Agency: U. S. Food and Drug Administration (FDA)

CFR Cite: 21 C.F.R. § 101.95

The Problem: This regulatory action provides the definition for the term "fresh" in connection with food labeling, and seeks to restrict the use of the term "fresh" in food labeling as well. Producers may not claim that a product is "fresh" if it has been frozen, thermally processed (i.e., baked) or preserved, unless said product is "known" by the public (either expressly or through implication) to be processed or preserved, like pasteurized milk. FDA's action is expected to affect small bakeries and bakery suppliers. Not being allowed to call freshly-baked goods "fresh" is counter-intuitive and needlessly confusing.

Impact: If the FDA does not amend the regulation it will result in limiting the bakers' ability to properly label and sell their product. It makes little sense for bakers to be unable to label their freshly-baked bread as "fresh." An amended regulation would lift a significant restriction on the ability of bakers to properly label and sell their product.

Solution: Amend 21 C.F.R. §101.95 to allow the use of the term "fresh" for bakery products. Bakery products should be considered consistent with the FDA's view that expressly permits "fresh" claims for pasteurized milk and other foods that do not mislead consumers. The bakery industry takes a number of steps to assure that its products are fresh (e.g. shelf rotation of product and sell-by dates) and that the consumer knows that bakery products contain preservatives.

Conclusion

We appreciate the opportunity to comment on the regulatory state once again, and to offer up our recommendations for regulatory review. We do believe, however, that OMB has significantly underestimated the costs of regulation, especially as those costs impact small entities. OMB should broaden the scope of its review and standardize cost-estimate methodologies across agencies. This would allow for a better review by independent organizations, and a more accurate assessment of the true cost imposed on our economy.

Please do not hesitate to contact us if you require any additional information, or if you have any questions. We can be reached at (202) 314-2032.

Thank you once again.

Sincerely,

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