

## Center for Regulatory Effectiveness

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Office of Information and Regulatory Affairs  
Office of Management and Budget  
Room 10202  
New Executive Office Building  
725 17<sup>th</sup> Street, NW  
Washington, DC 20503

**Re: The Need for OMB Leadership on International Regulatory Cooperation; Comments on OMB's Draft Report to Congress on the Benefits and Costs of Federal Regulation**

Dear Ms. Gayle:

The Center for Regulatory Effectiveness (CRE) thanks OMB for this opportunity to comment on the Draft Report to Congress on the Benefits and Costs of Federal Regulations. OMB has rightly highlighted in the Draft Report that as “tariffs and other explicit barriers to international trade fall in an increasingly global marketplace, domestic policies are more likely to affect trading partners.” The report also recognizes “that a regulatory regime that offers transparent rules based on technical requirements promotes investment, which in turn leads to economic growth and an increase in consumer well-being.”

The central role of “transparent rules based on technical requirements” in promoting economic growth underscores the need for agencies to “incorporate international trade effects into” economic analyses of regulations. Moreover, OMB stated jointly with the Secretariat General of the European Commission that

*OMB will be reminding agencies of the importance of their taking into appropriate consideration, in preparing their impact analyses for draft regulations, the impact that the intended regulation would have on trade and cross-border investment between the United States and other countries.*<sup>1</sup>

OMB's emphasis on the importance of analyzing the trade and investment impacts of domestic regulations is particularly appropriate in light of the G-20 discussions beginning in Washington on November 15<sup>th</sup>. As the attached letter to Secretary Paulson and Chairman Bernanke explains, it is essential that the G-20 negotiating process not be undermined before it starts. Thus, consistent with Joshua Bolten's “midnight

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<sup>1</sup> Office of Management and Budget and the Secretariat General of the European Commission, “Review of the Application of EU and US Regulatory Impact Assessment Guidelines on the Analysis of Impacts on International Trade and Investment: Final Report and Conclusions” May 2008, pp. 29-30.

regulation” memorandum of May 9, 2008, OMB needs to issue a moratorium on all new regulations, including the Unlawful Internet Gambling Enforcement Act (UIGEA) rule, which would impose cross-border restrictions on capital flows until completion of the G-20 discussions.

As the attached letter details, the UIGEA rule would impose unilateral disruptions on the international payments system in violation of the cooperative nature of G-20 discussions. Specifically, major international financial stakeholders have warned both the Treasury Department and the Federal Reserve about the disruptions that would be triggered by the UIGEA rule and called for discussions on implementation of the Act.

***OMB needs to set an example demonstrating the importance of international regulatory cooperation by placing an immediate moratorium on approval any regulation affecting cross-border capital flows.***

### **Proposed UIGEA Regulations: Harming International Payment Flows and Further Stressing the Banking System**

As discussed below, the UIGEA draft rule should be a test case for OMB guidance on evaluating the international impact of regulations since the proposed rule:

1. Is already resulting in lawful transactions being blocked including loan repayments;
3. Is non-transparent, which increases global financial uncertainty;
2. May “lead to extensive collateral damage on legitimate banking business;”
4. Threatens to result in litigation against U.S. banks operating overseas; and
5. Would impose wasteful new policing duties on banks over above the extensive existing burdens which harms the international competitiveness of US financial institutions.

OMB’s Draft Report states that, “research suggests that a regulatory regime that offers transparent rules based on technical requirements promotes investment, which in turn leads to economic growth and an increase in consumer well-being.” OMB also notes that the OECD “found that differences in services market regulation have a large negative impact on market entry, which also lead to negative impacts on trade flows. Ultimately...consumers will be worse off.” As discussed below, the differences in the regulatory burden imposed on financial services companies is harmful to the global competitiveness of American banks and to the customers they serve.

### **Loan Repayments Are Already Being Blocked**

The British Bankers’ Association (BBA), in their comments on the UIGEA proposed rule, informed the Federal Reserve and Treasury Department that their members “have already seen some evidence of legitimate transactions such as loan repayments being blocked because of a link with the internet gambling industry.”

More disturbingly, BBA expects far worse consequences if the proposed rule is enacted without “an opportunity for further consultation on cross borders issues” during which “all the appropriate legal and practical considerations could be addressed and, if possible, resolved.”

### **UIGEA Rule Is Not Transparent Leading to Amplified Global Financial Uncertainty**

OMB is correct in recognizing that non-transparent regulations harm investment and consumer well-being; transparency is an essential prerequisite for an effective regulatory regime. Unfortunately, the proposed UIGEA regulation is non-transparent.

The BBA informed the Federal Reserve and Treasury Department that the proposed regulation was non-transparent, *i.e.*, their member banks are unable to determine what gambling transactions are lawful and which are unlawful. BBA explained that non-U.S. banks have “real difficulty in understanding the nuances of the interplay between US Federal and State laws and their effects in this area, especially when there appears to be a difference of view between US government agencies for example in relation pari-mutual betting on US horse racing. Particular areas of concern include the status of games of skill as opposed to games of chance, simulation contests, intra-state gambling, gaming connected to Indian reservations, and how the authorities will decide who is ultimately responsible for any breaches in what are often complex financial structures between and within banks.”

The lack of regulatory transparency directly harms trade in financial services. As BBA noted, “there is an overriding concern that, given discretion, US correspondent banks may set extreme parameters or requirements on relationships with foreign banks beyond the requirements of the Regulations in order to mitigate their own uncertainty and risk.” [Emphasis added] Thus, uncertainties created by the UIGEA may be amplified and reverberate throughout the global financial system.

### **“Extensive Collateral Damage”**

The potential for the proposed regulation to inflict substantial damage on the international financial system is made clear by the BBA when they explain that “In view of the complexity of the implied obligations and the uncertainties surrounding the legal position, it is an area where a risk-based approach will inevitably have to be employed to lessen the potential collateral damage on legitimate banking business. A zero-tolerance approach by US regulators is *likely to lead to extensive collateral damage on legitimate banking business.*” [Emphasis added]

The impact on American banks from the regulatory burden already imposed by extensive use of prescriptive regulations, and the success experienced in the UK from changing to a risk-based regulatory paradigm, is discussed in the attached CRE white paper, “Unwarranted Deputization: Increased Delegation of Law Enforcement Duties to Financial Institutions Undermines American Competitiveness.”

### **Litigation Against American Banks**

One of the international economic consequences that needs to be considered in evaluating the proposed UIGEA regulation is the potential for foreign litigation against US banks – the threat of which would

discourage American competition in international markets. BBA points out that “a US bank operating in a non-US country could be sued in that jurisdiction's courts for failing to honour a payment without legal justification under the appropriate national law.”

In providing guidance to agencies on how to assess the potential international impact of regulations, OMB should specify that agencies evaluate the potential for foreign litigation and seek to minimize this potential consistent with the principles detailed in Executive Order 12988, Civil Justice Reform.

### **Burdens on Top of Burdens for American Banks**

The UIGEA would impose substantial new burdens on American banks and their foreign correspondents. For US banks, the burdens would be particularly severe since they would be imposed on top of the already extensive and expensive mandates on banks which have been deputized to police a vast and growing array of domestic and international laws on behalf of the federal government.

The attached Unwarranted Deputization paper details the policing duties already imposed on American banks, how it effects their ability to compete in overseas markets, and what it means for the dollar. There are two key national policy lessons to be drawn from the paper which highlight the need for agencies to evaluate the international impact of regulations:

1. Comparative Regulatory Burdens. Regulatory costs are rising far faster for American banks than for their European and Asian competitors.
2. Reserve Currencies. Decline in the use of the dollar as a reserve currency has coincided with the federally-mandated increase in American financial surveillance and reporting activities; use of the Pound Sterling as a reserve currency has sharply increased as the UK has moved away from detailed, prescriptive rules-based regulations and to a regulatory regime based on broad guiding principles.

### **Recommendations**

1. OMB should issue an immediate moratorium on approval any regulation affecting cross-border capital flows.
2. OMB should issue guidance to agencies on analyzing the impact of draft regulations on international trade and investment.
3. The proposed UIGEA rule should be the initial test case for agencies to evaluate the international impact of regulations.

Sincerely,

/s/

Jim Tozzi

Member, Board of Advisors