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To: Lorraine D. Hunt OIRA BC RPT/OMB/EOP@EOP
cc:
Subject: Comments on 2003 Draft Report to Congress

(Comments also attached in .doc format)

<<Comments to OMB 2003 Report.doc>>

May 5, 2003

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 2003 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) "2003 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, and NFIB's Research Foundation.

Our comments are divided into 5 sections:

1. The Continued Importance of Strong Regulatory Oversight By OIRA;
2. Small Business Considerations in Benefit/Cost Analyses, Peer Review And Risk;
3. Federal agency scorecards and implementing E.O. 13272;
4. Relationships between independent federal agencies and state regulators; and
5. Eliminating Rules that Have Outlived Their Usefulness.

As requested in the February 2003 Draft Report itself, our comments are directed toward the report's first section, "Guidelines for Regulatory Analysis," as well as the second section, "Analysis and Management of Emerging Risks".

The Continued Importance of Strong Regulatory Oversight By OIRA

In past comments submitted by NFIB to OIRA on this issue and other issues, we have discussed the impact of regulation on small businesses, and the need for OIRA to play a strong oversight role with the agencies, in order to minimize the regulatory burden on small businesses. The structure of our government is such that there are two primary mechanisms by which resources

are siphoned away from the marketplace towards solving problems of public policies: taxes (and the subsequent use thereof in spending) and regulation.

The spending of tax revenues is relatively easy to track, subjected to intense scrutiny by members of Congress, their staffs, interested parties, and the public at large. But Americans cannot similarly track the costs of regulation-the scrutiny of those costs is not as intense as the attention paid to taxes-and thus they are a hidden tax.

NFIB appreciates the efforts undertaken by OIRA to address this issue. Like the Crain-Hopkins study done through the SBA's Office Of Advocacy (and referenced by OIRA in its report to Congress last year), this report offers an excellent opportunity to improve regulatory transparency by measuring these costs, increasing awareness of the severity and impact of the hidden taxes imposed by regulation, and by increasing the accountability of regulators to the public at large.

We are pleased that OIRA continues to work closely with the Office of Advocacy on getting a handle on these regulatory costs. The implementation of President Bush's Executive Order 13272 has been essential in this, and we would hope that OIRA would continue to put pressure on federal agencies in seeing the letter and spirit of the order made policy in all branches and levels of the federal government. Rating these agencies with a scorecard can only help both those within government, and those outside of it, keep better tabs on how those agencies are complying, and where improvement might be needed.

Furthermore, we would hope to see some of the agencies not traditionally held accountable for paperwork reduction and regulatory simplification, such as the Internal Revenue Service (IRS) and the Federal Communications Commission (FCC), cooperating in these efforts. IRS has long represented the greatest paperwork "headache" for small businesses, and the FCC's regulatory process is burdensome, confusing, and not small business-friendly. Clearly, for pro-small business reforms to be truly impactive, they must be felt across the entire executive branch.

Small Business Considerations in Benefit/Cost Analyses (B/C), Peer Review, and Risk

In March 2003 before the House Government Reform Committee, Robert W. Hahn and Robert E. Litan of the AEI-Brookings Joint Center on Regulatory Studies, testified that "less than one-half of regulations pass a neutral economists' benefit-cost test." If this is the case, then the authors conclude by arguing that the benefits of federal regulation could increase if more regulations were rejected." We agree completely with these eminent scholars, and offer one additional caveat: small business considerations must play a greater role.

If cost benefit analyses are not quantified, then the Congress and the general public have no way to judge the quality and usefulness of the proposed rule(s). Further, without looking backward at regulations already on the books to study their benefit/ cost ratios, there is no mechanism to improve the quality of future rulemaking, and eliminate burdensome rules to small business owners. This was the intent of E.O.13272, which sets new requirements for Federal agencies to comply with the Regulatory Flexibility Act and it should be carried out in the future.

Many analysts have argued that peer review of regulations should occur outside the agency that promulgates them. We agree. Frequently, because of agency time pressures, little if any peer review occurs. For the more onerous and complex regulations that are frequently not understandable by small business owners, groups comprised of small business stakeholders could make an excellent source of peer review. The Small Business Regulatory

Enforcement Fairness Act panel process already in place for rules promulgated by the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) offer potential blueprints for such reviews.

For the small business community, risk measurement is an issue of similar import. Unfortunately, though, small business voices tend to be left out of the determination process. In the future, small entity representatives should become part of working groups on risk management. Integrating such people into a decision making body (within OIRA, for instance) will help small firm implementation of complex rules. This suggestion is also in keeping with the President's outreach activities to the small business community. Many confusing regulations, particularly in health and safety, have a continually changing standard that makes compliance very difficult.

There is an economic incentive to do this as well. Proper assessment of risks will save small firm owners compliance dollars in the years ahead. In the area of labor law alone, where changing technology and court decisions change the definition of risks in interpreting parts of the ADA, FMLA and similar laws, scientific risk assessment can save a tremendous amount of money for the small business community.

Federal Agency Scorecards and Implementing E.O. 13272

It would be useful for the entities we represent if OIRA were to implement a "Regulatory Flexibility" scorecard on the Internet for federal agencies promulgating regulations. In the case of regulations affecting small firms, Advocacy research has shown that the quality of the analysis has a very large variance. Some agencies prematurely certify a rule as having no effect on small entities; others provide excessive detail where none is really required. The distribution of federal resources spent in preparing Initial Regulatory Flexibility Analyses (IRFAs) would certainly be improved if more high quality models were available on the Internet for agency rule writers to read and absorb prior to taking pen to paper.

It is probably too soon to determine how well E.O.13272 is working, but it must be evaluated to make certain that agencies are in fact discussing regulations with the Office of Advocacy prior to sending them to OIRA for clearance. Advocacy now has the task to make certain that a regulation, while still in the proposal stage, has been peer reviewed, and that it has been analyzed for the validity of the assumptions and quality of the cost benefit analysis, preferably done outside the agency.

Relationships Between Independent Federal Agencies and State Regulators

As is well known, the regulations of independent agencies like the FCC and the FDA are not subject to judicial review under SBREFA and the Regulatory Flexibility Act. What does this mean? It means that extremely complex regulations from FCC lawyers and analysts are frequently not reviewed by anyone outside the federal government. The result is often a myriad of court interpretations when state rules conflict with federal rules. Judicial and "turf" conflicts have led to suggestions from the AEI-Brookings Joint Center on Regulation to create a new agency outside the executive branch to provide interpretive guidance.

As mentioned earlier, NFIB believes that all agencies must cooperate in the regulatory flexibility process. Part and parcel of this will be our efforts to see that SBREFA panel jurisdiction be expanded to include the IRS. It is essential for small business economic health that a serious examination of the paperwork burden associated with taxes be undertaken, and that the IRS be held accountable under the SBREFA process.

In terms of the relationship between federal and state regulatory agencies,

difficulties arise for all firms when federal and state and local regulations conflict. Under the current system, with many differing interpretations of state and federal regulations, it is necessary to include state regulators in the rule-making process. This could be in an advisory capacity to start, with a larger role once the "comfort level" increases between state and federal agencies. NFIB has learned in nationally representative surveys that state regulations can be as burdensome to small business owners as federal rules. A mechanism for bringing the two groups together would be invaluable. It would likely save small firm owners millions of compliance dollars; small business owners would also likely save money on liability insurance policies in the future.

Many state regulators do not know how to interpret federal agency rules, especially when net cost-benefit analyses do not exist. Once again, OIRA would be providing a great service to states by including them in the rule development process from the beginning. Just think of the administration of the Medicare and Medicaid programs as an example. A proper role for the states in this process could help conserve increasingly scarce state budgetary dollars during the next several years.

Eliminating Rules that Have Outlived Their Usefulness

Many studies of regulatory policy and small business have commented that federal agencies infrequently review old regulations. This is unfortunate, because literally thousands of old regulations should be modified, rolled back or simply eliminated. In preparing the regulatory "scorecard" by agency proposed by Hahn and Litan, one of the components should be a checkbox for SBREFA Section 610 reviews. OIRA leadership should put those agencies that have not completed Section 610 reviews on their Web-Site in an attempt to evoke responsive actions from them.

Regulations that have a "compelling social purpose" but non-quantifiable benefits need an additional look (OIRA draft report, page 76). We could not agree more. Simply listing those specific regulations, as OIRA has done in previous reports, has only been partially useful in persuading agencies to "take another look."

Conclusion

The NFIB appreciates the opportunity to participate in this important and essential process. With the cost of regulation being such a high priority for our 600,000 members, we are glad that we could share a number of our regulatory priorities with OIRA, and we are even more glad that OIRA recognizes the tremendous impact the regulatory state has on our members and the small business community. We also want to make it clear that the regulations we have recommended are not the sum total of our concerns, nor are they the entire universe of regulations which ought to be reviewed. We view this as the continuation of a constructive dialogue with OIRA regarding regulations of concern to our members, and the state of regulations overall.

We look forward to working with OIRA on this in the future. Please do not hesitate to contact our office if you have any questions, or require any further information.

Thank you once again.

Sincerely,

//s//

Andrew M. Langer
Manager, Regulatory Policy
National Federation of Independent Business

//s//

Bruce D. Phillips
Senior Fellow in Regulatory Studies
NFIB Research Foundation

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¹ Robert W. Hahn and Robert E. Litan, “Recommendations for Improving Regulatory Accountability and Transparency.” Testimony before the House Government Reform Committee, March, 2003, pg. 3.

² Ibid, page 4. Between 1996 and 1999, of 48 major rules on health, safety, and the environment, net benefits were shown only 29 percent of the time.

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There is an economic incentive to do this as well. Proper assessment of risks will save small firm owners compliance dollars in the years ahead. In the area of labor law alone, where changing technology and court decisions change the definition of risks in

³ See, for example, Randall Luter, "Testimony before the Water Resources and Environment Subcommittee of the House Transportation and Infrastructure Committee, "Hearing on Independent Peer Review of Scientific, Technical, and Economic Products that Support Agency Decision Making." AEI-Brookings Joint Center for Regulatory Studies, March 5, 2003, available at <http://www.house.gov/transportation/water/03-05-03/lutter.html> .

⁴ Bruce D. Phillips, "The Spread of Regulations: From the Federal Government to Private Business: Large, then Small (mimeo, February, 2003, under review by the Journal of Law and Economics.

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⁵ See Consad Research Corporation, “An Evaluation of Compliance with the Regulatory Flexibility Act by Federal Agencies.” (Prepared under contract for the Office of Advocacy of the U.S. Small Business Administration. (Pittsburgh, Pa., 2002).

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⁶ Hahn Litan testimony, *op. cit.*

⁷ William J. Dennis, Jr. ed. National Small Business Poll, “Coping With Regulations.” (I), 5, (NFIB Research Foundation, Washington, D.C., 2001).

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