

TOM DAVIS, VIRGINIA,
CHAIRMAN

DAN BURTON, INDIANA
CHRISTOPHER SHAYS, CONNECTICUT
ILEANA ROS-LEHTINEN, FLORIDA
JOHN M. McHUGH, NEW YORK
JOHN L. MICA, FLORIDA
MARK E. SOUDER, INDIANA
STEVEN C. LATOURETTE, OHIO
DOUG OSE, CALIFORNIA
RON LEWIS, KENTUCKY
JO ANN DAVIS, VIRGINIA
TODD RUSSELL PLATTS, PENNSYLVANIA
CHRIS CANNON, UTAH
ADAM H. PUTNAM, FLORIDA
EDWARD L. SCHROCK, VIRGINIA
JOHN J. DUNCAN, JR., TENNESSEE
NATHAN DEAL, GEORGIA
CANDICE MILLER, MICHIGAN
TIM MURPHY, PENNSYLVANIA
MICHAEL R. TURNER, OHIO
JOHN R. CARTER, TEXAS
MARSHA BLACKBURN, TENNESSEE
PATRICK J. TIBERI, OHIO
KATHERINE HARRIS, FLORIDA

ONE HUNDRED EIGHTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5074
FACSIMILE (202) 225-3974
MINORITY (202) 225-6051
TTY (202) 225-6852

www.house.gov/reform

HENRY A. WAXMAN, CALIFORNIA,
RANKING MINORITY MEMBER

TOM LANTOS, CALIFORNIA
MAJOR R. OWENS, NEW YORK
EDOLPHUS TOWNS, NEW YORK
PAUL E. KANJORSKI, PENNSYLVANIA
CAROLYN B. MALONEY, NEW YORK
ELIJAH E. CUMMINGS, MARYLAND
DENNIS J. KUCINICH, OHIO
DANNY K. DAVIS, ILLINOIS
JOHN F. TIERNEY, MASSACHUSETTS
WM. LACY CLAY, MISSOURI
DIANE E. WATSON, CALIFORNIA
STEPHEN F. LYNCH, MASSACHUSETTS
CHRIS VAN HOLLEN, MARYLAND
LINDA T. BANCHEZ, CALIFORNIA
C.A. DUTCH RUPPERSBERGER,
MARYLAND
ELEANOR HOLMES NORTON,
DISTRICT OF COLUMBIA
JIM COOPER, TENNESSEE

BERNARD SANDERS, VERMONT,
INDEPENDENT

April 22, 2004

BY FACSIMILE

The Honorable Joshua B. Bolten
Director
Office of Management and Budget
Washington, DC 20503

Dear Director Bolten:

I am writing to state my views on the Office of Management and Budget's (OMB's) February 13, 2004 draft seventh regulatory accounting report, the final version of which was required by law to be submitted with the President's fiscal Budget on February 2nd. OMB published a Notice of availability and request for comments on February 20th (34 FR 7987).

As the Government Reform Subcommittee Chairman responsible for oversight over OMB's regulatory functions, this is my seventh letter to OMB on its draft and final regulatory accounting reports. Also, on February 25th, my Subcommittee held a hearing, entitled "How to Improve Regulatory Accounting: Costs, Benefits, and Impacts of Federal Regulation – Part II," on OMB's draft seventh report. I regret to report to you that OMB's draft not only again fails to respond to many of the concerns raised in my previous comment letters but also again fails to meet some of the specific statutory requirements.

I. Statutory Requirements

The law requires OMB to annually submit with the President's fiscal Budget: (a) a regulatory accounting statement, (b) an associated report on impacts of Federal rules and paperwork, and (c) recommendations for regulatory reform. OMB's draft report includes partial regulatory accounting information, an inadequate associated report on impacts, and no specific reform recommendations. I remain concerned about the noncompliance or incomplete compliance with the specific statutory mandates.

For the accounting statement, the law requires OMB to estimate the total annual costs and benefits of all Federal rules and paperwork (1) in the aggregate, (2) by agency, (3) by agency program, and (4) by major rule. OMB's 2004 draft report was still not presented as an

accounting statement and it includes information on only nine agencies (p. 5) and only six agency regulatory programs (p. 7). Moreover, OMB's draft includes only aggregate data on major rules issued in a rolling 10-year period instead of for all Federal rules and paperwork, as required by law. Furthermore, it excludes many categories of rules from its aggregation, e.g., all "transfer" rules that implement Federal budgetary programs. This omission is problematic for many reasons, among which is the fact that many of these rules impose huge costs on State and local governments. Nothing in the statute authorizes OMB to exclude any category of rules.

In her written statement for the Subcommittee's February 25th hearing, the Director of the Regulatory Studies Program at the Mercatus Center, in a section captioned "The estimates cover a small fraction of federal regulation," stated, "The benefits and costs for fiscal year 2003 are based on agency estimates for only six regulations, or one-tenth of one percent of the final rules published in the Federal Register during the year" (p. 2).

In fact, non-OMB estimates of the aggregate costs of all Federal rules and paperwork far exceed OMB's estimates. OMB's draft seventh report estimates that annual costs of the major rules issued in its rolling 10-period range from \$34 billion to \$39 billion. In contrast, in Fall 2001, the Small Business Administration (SBA) estimated that, in 2000, Americans spent \$843 billion to comply with Federal regulations.

In my March 27, 2002 comment letter on OMB's draft fifth report, I stated,

To assist OMB in preparing estimates by agency and by agency program, I recommend that OMB issue annual OMB Bulletins to the agencies like it does for paperwork reduction. In fact, agency proposed estimates of aggregate and new paperwork burden help OMB prepare a government-wide Information Collection Budget to manage paperwork burden on the public. OMB's regulatory accounting Bulletins should require each agency to submit estimates of its aggregate and new regulatory burden for the agency as a whole and for each of the agency's major regulatory programs.

In my January 3, 2003 comment letter on OMB's final fifth - and incomplete - report, I stated, "I now request that OMB promptly issue such a Bulletin." To date, OMB has not done so. Bi-partisan legislation (H.R. 2432, Paperwork and Regulatory Improvements Act), which I introduced on April 3rd, would require OMB to do so in the future. To improve upon its incomplete draft regulatory accounting report, OMB should promptly ask each agency for any available information for the agency as a whole or for one or more of its agency regulatory programs.

II. Historical Progress

I am enclosing a chart that summarizes comments submitted to OMB by the Subcommittee from 1997 to present, i.e., not only from me but also from my predecessor. The chart includes six areas relating to OMB's regulatory accounting reports and OMB's progress in addressing each of

these areas: (1) the statutorily-required annual associated report on impacts of Federal rules and paperwork; (2) the statutorily-required annual estimates of the total annual costs and benefits of all Federal rules and paperwork by agency; (3) the statutorily-required annual estimates of the total annual costs and benefits of all Federal rules and paperwork by agency program; (4) my request for OMB to issue an OMB Bulletin to the agencies calling for all available cost-benefit data to be submitted to OMB; (5) my recommendation for OMB's annual report to be submitted "as part of" the Budget instead of "with" the Budget; and (6) and the need for standardized agency estimation so that OMB is aggregating comparable numbers (i.e., apples and apples instead of apples and oranges).

A. Associated Report on Impacts

The first column includes comments on the required associated report on impacts of Federal rules and paperwork in certain sectors, e.g., on small business and State and local government. You will note that OMB's fourth and sixth reports did not include the required associated report and OMB's other reports inadequately addressed the impacts of Federal rules and paperwork, especially on small business (e.g., its draft seventh report includes only 2 pages on impacts on small business).

On October 24, 2003, Small Business Subcommittee Chairman Edward Schrock submitted comments on resources that OMB could use to include a full impacts report on small business in its future regulatory accounting reports. He stated, "By law, every regulation that is certified to have a significant impact on a substantial number of small entities is required to develop a Regulatory Flexibility Analysis. Within each of the initial and final versions of this agency analysis is a statement of the potential impact of the rule on small business." Unfortunately, OMB did not follow Chairman Schrock's recommendation, i.e., it did not incorporate estimates from available agency Regulatory Flexibility Analyses (RFAs). In his written statement for the Subcommittee's February 25, 2004 hearing, SBA's Chief Counsel for Advocacy stated, "From the Office of Advocacy's perspective, the Draft OMB Report would also benefit from *small business* impact analyses that should be prepared for rules reviewed by OIRA" (p. 4).

In my March 4th post-hearing questions, I asked whether OMB had reviewed the agencies' RFAs. In its March 26th answer, OMB stated that OMB "has not aggregated information on these rules in the 2004 draft report. OMB is open to discussing this type of review with the SBA Office of Advocacy" (p. 6). OMB also pointed to a report issued by SBA. SBA's report does not override a statutory requirement for OMB to submit an annual associated report on impacts. In fact, this mandatory element is extremely important to the regulated community and deserves a more concerted effort by OMB, including OMB's systematically seeking input from the agencies and outside groups.

B. Agency Detail

The second column contains comments on the required agency level detail. You will note that OMB's fifth report was its first to include any agency detail but it did so for only eight agencies. Its draft seventh report includes only partial data for eight departments (Agriculture, Education,

Energy, Health and Human Services (HHS), Homeland Security, Housing and Urban Development, Labor, and Transportation) and one independent agency (Environmental Protection Agency (EPA)). In fact, data are missing for several key regulatory agencies, such as for three key independent regulatory commissions: the Federal Communications Commission, the Federal Trade Commission, and the Securities and Exchange Commission. I encourage OMB to expand its database for its seventh final report and its future reports.

C. Program Detail

The third column contains comments on the statutorily-required annual estimates of the total annual costs and benefits by agency program. You will note that OMB's sixth report was its first to include any program-level detail but it did so for only seven agency programs. OMB's draft seventh report includes only partial data for six agency programs: one in the Energy Department, one in HHS, the Occupational Safety and Health Administration (OSHA) in the Labor Department, one in the Transportation Department, and two in EPA.

For the last two Budgets, OMB used a Program Assessment Rating Tool (PART) to review 40 percent of all agency programs. Many agency programs were categorized as "regulatory based" programs. For example, in the Labor Department, besides OSHA, OMB categorized five other programs as regulatory based: Davis-Bacon Wage Determination Program, Employee Benefits Security Administration (EBSA), Mine Safety and Health Administration (MSHA), Office of Federal Contract Compliance Programs (OFCCP), and Pension and Welfare Benefits Administration (PWBA). OMB's draft report does not include program-level detail for any of these five regulatory programs. I encourage OMB to expand its database for its seventh final report and its future reports.

D. Agency Input

The fourth column arises out of my recommendation that OMB issue an annual Bulletin requesting input from the agencies so that OMB will eventually be able to provide complete agency detail and program detail. In my March 18, 2003 comment letter on OMB's draft sixth report, I stated, "I recognize that, in the first few years, agency submissions will be incomplete; nonetheless, this discipline will result in more complete and better data in time."

I also stated, "Witnesses at my Subcommittee's March 11, 2003 hearing, entitled 'How to Improve Regulatory Accounting: Costs, Benefits and Impacts of Federal Regulations,' expressed support for a pilot test of regulatory budgeting. More complete and better agency data are essential to pursue such an approach." My bi-partisan legislation (H.R. 2432) includes pilot tests of regulatory budgeting. OMB's witness at our March 11, 2003 and February 25, 2004 hearings expressed support for such pilot tests. At the latter, he stated, "You know that I am very optimistic and enthusiastic about the concept of a regulatory budget. You know that I am enthusiastic about the idea of trying to move forward for a pilot project, to try to actually demonstrate and study the potential promise of this type of activity" (transcript, pp. 23-4).

E. Budget Submission

The fifth column contains comments on the statutorily-required submission “with” the President’s fiscal Budget. You will note that OMB’s draft sixth report was the first to be submitted on time. Unfortunately, it was published in the Federal Register instead of with the Budget documents. As a consequence, it was harder for Congress to simultaneously review both the on-budget and off-budget costs associated with each Federal agency and each Federal agency program imposing regulatory or paperwork burdens on the public. Even though OMB’s September 2003 final sixth report stated, “OMB’s objective is to publish the draft 2004 report as part of the President’s FY 2005 budget submission to Congress, which will be released in February 2004” (p. 4), OMB did not do so. Instead, OMB submitted its draft report to Congress 11 days late and published it for public comment 18 days late. This late submission prevented Congressional Subcommittees from preparing fully informed recommendations for this year’s Budget Resolution.

On March 4, 2004, I sent OMB post-hearing questions after the Subcommittee’s February 25th hearing. At the outset, I noted that, “Current law (codified as 31 U.S.C. 1105 Note for ‘Budget contents and submission to Congress,’ USCA pp. 219-237) requires that the Office of Management and Budget (OMB) submit its annual regulatory accounting statement and associated report on impacts ‘with’ the President’s Budget.” I then discussed my bi-partisan bill (H.R. 2432) that would require submission “as part of” (vs. “with”) the President’s Budget and stated, “This provision provides OMB with considerable flexibility regarding in which of the various Budget documents it will present this information.” In its March 26th post-hearing answer, OMB stated, “We are concerned about this proposed change to current law for several reasons. First, this would impose a mandate on the President with respect to what information the President must include in his Budget submission to Congress” (p. 2). In fact, as indicated in my question, there are already nearly 20 pages of detailed specifications in law and, unlike some of the existing detailed specifications, my bill provides considerable flexibility to OMB.

OMB further argued, “Second, under existing law, the draft cost-benefit report that OMB issues in February, with the Budget, is subject to public comment, interagency review, and peer review” (p. 2). The problem is that OMB’s regulatory accounting reports have been issued off-cycle. OMB’s draft report should be issued several months earlier so that its final report can be submitted with the Budget, as the law requires.

Lastly, OMB argued that its report covers only “a series of years.” In fact, the law does not authorize OMB to limit its report to only a series of years. As stated earlier in this letter, OMB’s draft only includes aggregate data for a rolling 10-year period instead of for all Federal rules and paperwork, as required by law.

The Chamber of Commerce witness at the Subcommittee’s February 25th hearing stated his support for including the regulatory accounting report as part of the Budget. He stated, “We would like to see it as part of a submittal, because what the agencies are going to do as part of their budget is certainly going to have an impact on regulation” (transcript, pp. 75-6). The

Mercatus Center witness elaborated by saying, "I would agree, and I think the analogy to the Government Performance and Results Act is helpful there. We have seen that in recent years that [it] has been part of the budget; not alongside the budget, but part of the budget, and I think it is helping improve accountability and performance" (transcript, p. 76). In her written testimony, in a section captioned "The annual reports could be integrated more fully into the fiscal budget process," she stated, "integrating OMB's Regulatory Accounting Report will allow policymakers and appropriators to allocate our nation's resources more efficiently and effectively to achieve greater benefits from our regulatory programs" (pp. 1-2).

F. Standardized Estimation

The last column contains comments about the absence of any mandatory systematic and standardized procedure agencies must use to collect and report data to OMB on the impacts of all existing, revised, and new regulations. The Subcommittee repeatedly commented,

With respect to the absence of standard procedures for collecting and reporting data by the agencies, implementing such procedures are critical to the credibility of future government-wide analyses. Accordingly, we expect OMB to require all executive branch agencies to follow uniform systematic standardized procedures for collecting and reporting data to OMB and to request that the independent regulatory agencies do the same. At a minimum, there must be a standardized procedure for collecting and reporting data on the costs and benefits for all existing rules.

I am pleased that OMB issued a new OMB Circular A-4, Regulatory Analysis, as part of its sixth final report. In my first comment letter on regulatory accounting, I stated, "During OMB's review of individual agency regulatory proposals, the Subcommittee recommends that OMB return to the agencies any regulatory proposal that does not present costs and benefits estimates that fully conform with OMB's standards" (5/4/01). Our February 25, 2004 witnesses agreed. SBA's Chief Counsel for Advocacy stated, "My office recommends that OMB issue return letters on a rule-by-rule basis to enforce agency compliance" (transcript, p. 10). The Mercatus Center witness stated, "OMB should be able to hold agencies accountable for these new guidelines. And, if they do not comport, they should return regulations to agencies" (transcript, p. 55). In addition, OMB's witness stated, "we intend to use all the available authorities we have to make sure that agencies comply with Circular A-4" (transcript, p. 35).

I am heartened by OMB's March 26th post-hearing answer that stated, "It is the Administration's policy that all regulatory impact analyses for economically significant proposed rules **must** comply with Circular A-4 after January 1, 2004, and that all regulatory impact analyses for economically significant final rules **must** comply with Circular A-4 after January 1, 2005. A regulatory impact analysis that is *not-compliant* with Circular A-4 will be **a basis for returning** rules to agencies" (emphases added, p. 5).

My March 4, 2004 post-hearing question asked not only whether OMB will return for revision all agency cost-benefit analyses that are non-compliant with Circular A-4 but also whether OMB will adjust agency cost-benefit estimates in OMB's future annual regulatory accounting reports to ensure more consistent and reliable aggregate information. OMB's post-hearing answer for the latter is not reassuring. OMB stated,

OMB expects that these new disclosure requirements and the new guidelines in general will lead to estimates that are more comparable across agencies. We are aware of this issue, however, and will continue to **monitor** the comparability of estimates across agencies and the effect of the new Circular on comparability. As the Subcommittee points out, a **goal** of our Circular is to **encourage** the standardization of the way that benefits and costs of rules are measured and reported" (emphases added, pp. 5-6).

OMB needs to do more than monitor and encourage; it needs to adjust all inconsistent agency estimates.

III. Other Comments

In OMB's response to other public comments in its September 2003 sixth final report, OMB stated, "Two commenters (307, 327) recommended that the report should include estimates of the benefits and costs of regulations issued prior to 1992. OMB does not believe that the estimates of the costs and benefits of regulations issued over ten years ago are very reliable or very useful for informing current policy decisions" (p. 17). I agree with these commenters. The Subcommittee has repeatedly asked OMB to include all regulations. In my first comment letter on regulatory accounting, I stated,

The Subcommittee believes that OMB's accounting statement and associated report should include all regulations, including those issued prior to 1990. Since there was no executive order in place mandating such analysis prior to 1981, the Subcommittee recognizes the difficulty of estimating these data. Nonetheless, they are essential to appreciate the full impact of Federal regulatory and paperwork requirement on the public (5/4/01).

In my March 4, 2004 post-hearing questions, I quoted the following from OMB's draft report, "Based on information contained in this and previous reports, the total costs and benefits of all Federal rules now in effect (major and non-major, including those adopted more than 10 year ago) could easily be a **factor of ten or more larger** than the sum of the costs and benefits reported" herein (emphasis added, p. 6). Then, I asked OMB, "What steps, if any, has OMB taken to include available data for the still active major rules issued from 1981 (under President Reagan's E.O.) to 1993 (February 17, 1981 to September 30, 1993), and estimates for the still active major rules issued before 1981?" In its March 26th reply, OMB stated that, for the 2005 Report, OMB "has assembled a time series of new Federal regulatory costs for the past 17 years,

from 1987-2003" (p. 8). This is encouraging. Data for a 17-year period is clearly more desirable than data for only a rolling 10-year period.

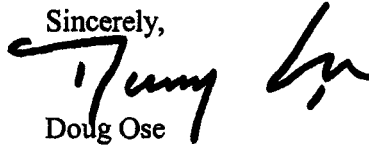
OMB's sixth final report also stated, "One commenter (327) believed that the report should include benefit and cost estimates for non-major rules. OMB believes that major (economically significant) rules account for the vast majority of the total costs of Federal regulation, even though most Federal rules are not considered major" (p. 17). I agree with the commenter and request that OMB, in its future reports, use statistical procedures to include estimates for these benefits and costs. In his written statement for the Subcommittee's February 25, 2004 hearing, the Chamber of Commerce witness stated,

... some methodological approach should be established that can enable OMB to more reliably gauge the impact of all federal rules that are in effect, not just those major rules promulgated over the previous ten years or some other arbitrarily established timeframe that fails to capture the full cost and benefit impacts of regulations on the public (p. 6).

As stated earlier, non-OMB estimates of the aggregate costs of all Federal rules and paperwork far exceed OMB's estimates. OMB's draft seventh report estimates that annual costs of the major rules issued in its rolling 10-period range from \$34 billion to \$39 billion, which pales in comparison to SBA's estimate that, in 2000, Americans spent \$843 billion to comply with Federal regulations, including both major and non-major rules. The cumulative impact of all rules in the aggregate, by agency, and by agency program is critical for informed Congressional and public debate.

Thank you for your attention to my concerns.

Sincerely,



Doug Ose
Chairman
Subcommittee on Energy Policy, Natural
Resources and Regulatory Affairs

Enclosure

cc: The Honorable Tom Davis
The Honorable John Tierney

Summary of Key GRC Subcommittee Comments
on OMB's Draft & Final Regulatory Accounting Reports

Comment & Report	Impacts Report	Agency Detail	Program Detail	OMB Bulletin	With Budget	Standardize Estimation
10/29/97 final 1st	wholly deficient	-	missing	-	-	no
8/28/98 draft 2nd	incomplete compliance	incomplete compliance	incomplete compliance	-	-	no
1/11/00 draft 3rd	wholly inadequate	missing	missing	-	to be late	no
5/4/01 draft 4th	missing	missing	missing	-	no	no
1/24/02 final 4th	missing	missing	missing	-	no	-
3/27/02 draft 5th	only 2 pp. on small bus	8 agencies only	missing	Ose proposed	no	no
1/3/03 final 5th	only 6 pp. in toto	8 agencies only	missing	none	no	no
3/18/03 draft 6th	missing	8 agencies only	7 programs only	none	timely but separate	draft OMB Circular
9/25/03 final 6th	missing	8 agencies only	7 programs only	none	no	final OMB Circular effective 1/1/04 for NPRMs & 1/1/05 for final rules
4/__/04 draft 7th	only 2 pp. on small bus	9 agencies only	6 programs only	none	no	not yet effective