

***Testimony of
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***U.S. House of Representatives
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Subcommittee on Energy Policy, Natural Resources and
Regulatory Affairs***

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On

“What is the Bush Administration’s Record in Regulatory Reform?”

Chairman Ose and Members of the Subcommittee, good morning and thank you for giving me the opportunity to appear before you today. My name is Thomas M. Sullivan and I am the Chief Counsel for Advocacy at the U.S. Small Business Administration (SBA). Congress established the Office of Advocacy to represent the views of small entities before Federal agencies and Congress. The Office of Advocacy is an independent office within the SBA, and therefore the comments expressed in this statement do not necessarily reflect the position of the Administration or the SBA.

The Subcommittee requested Advocacy’s view of the process for identifying reform candidates, and, from the perspective of small business, the progress that has been made over the past four years in implementing those reforms.

In general, Advocacy believes that the public nomination process is beneficial, and that the process can and will be an effective tool for regulatory reform. Advocacy has itself participated in this process by representing the views of small business regarding needed reforms, and by communicating these reforms to the Office of Management and Budget (OMB) in 2002, 2003 and earlier this year. To date, Advocacy estimates that Federal agencies have implemented nearly one fifth of the rule reform nominations identified by OMB and agencies in 2001-2003. Additional important reforms are anticipated to be completed over the next year. Because most of these reforms require agencies to go through rulemaking, we are encouraged by the overall progress that has been achieved so far.

Unfortunately, however, agencies have yet to implement many of the reforms nominated by the Office of Advocacy. In some cases, agencies have apparently been reluctant to seriously consider these reforms. In other cases, the process has progressed slowly and has required sustained efforts by stakeholders to keep agencies focused on reforms. During the past three years, we have learned that stakeholders need to take ownership of the process and understand that their involvement does not end at the time the nomination is made. Federal agencies and OMB should also look at ways to communicate periodically the status of reform nominations to stakeholders. Moreover, Congressional oversight can play an important role in reinforcing the importance of the public nomination process, and in ensuring that agencies give serious consideration to implementing nominated reforms.

Background

The “Regulatory Right-to-Know Act”(1) requires the Office of Management and Budget (OMB) to prepare an annual Report to Congress on the costs and benefits of federal regulations. Since 1997, these Reports to Congress have also included a call for public nominations of regulations that could be updated or otherwise reformed. In its May 2001 draft Report to Congress, for example, OMB called for nominations from the public on “specific regulations that could be rescinded or changed that would increase net benefits to the public by either reducing costs and/or increasing benefits.”(2) In response, OMB received a total of 71 nominations for regulatory reform. Of these 71 nominations, OMB made the determination that 23 should be pursued as “high priority” nominations.(3) *See* Appendix A.

Subsequently, in its March 2002 draft Report to Congress, OMB called for public nominations of rules whose reform would increase overall net benefits to the public, as well as regulations and paperwork requirements that impose disproportionate burdens on small entities without an adequate benefit justification.(4) OMB received 316 nominations from the public, including sixteen nominations from the Office of Advocacy.(5) *See* Appendix B. OMB categorized the 316 nominations received into three groups: (1) rules already subject to recent or current review by Cabinet agencies (and EPA); (2) rules involving independent agencies; and (3) rules that warranted further consideration by Cabinet agencies (and EPA) as reform candidates. The third category consisted of 126 rules and 35 guidance documents, which OMB in turn referred to the agencies in question for evaluation and prioritization. OMB also asked the Office of Advocacy to provide assistance by identifying “rules that offer potential to reduce unjustified regulatory burdens on small business.”(6) Advocacy responded with a list of 30 priority reforms

taken from the larger list sent to the agencies.(7) *See* Appendix C. Based on responses from the Federal agencies and the suggestions from the Office of Advocacy, 45 rules and guidance documents were ultimately identified as “new candidates” for reform.(8) *See* Appendix D.

In the February 2003 Report to Congress, OMB requested public comment on, among other things, ways to ensure that agencies adequately analyze the impacts of their regulations.(9) Advocacy recommended that the annual regulatory analysis submitted by agencies to OMB should include a specific analysis of small business impacts.(10)

Is the Public Rule Reform Nomination Process Working?

Given that more than three years have passed since the 2001 reform nominations were submitted to OMB, it is appropriate to ask whether the process is yielding regulatory reforms. From the perspective of the Office of Advocacy, the public nomination process is working. Of the 68 total regulatory reform nominations prioritized by OMB and the agencies between 2001 and 2003, fourteen can now be considered complete. *See* Appendix E. These reforms are significant, ranging from revisions to the Environmental Protection Agency’s Clean Air Act New Source Review program to the overhaul of the Department of Labor’s Overtime Compensation rules.

We anticipate that several additional reforms will be implemented within the next year. These reforms are expected to include revised rules on highway work safety zones, vehicle roof crush standards, labeling of food allergens, and design standards for buildings where government records are stored.

The majority of the 68 priority rule reforms require the respective agencies to conduct a rulemaking to change existing regulatory requirements. Even where an agency is fully committed to implementing a reform, depending on the complexity of the issue, it typically takes 12-36 months to complete a rulemaking. Keeping this fact in mind, Advocacy is encouraged by the overall progress that the public nominations have achieved so far.

Unfortunately, however, only two of Advocacy's 30 high-priority nominations from OMB's 2002 call for regulatory reform nominations have been implemented by the agencies at this point in time.⁽¹¹⁾ In some cases, agencies appear to be disinterested in implementing these reforms. For example, the predecessor agency to Health and Human Services' Centers for Medicare and Medicaid Services (CMS) issued an interim final rule containing standards for the use of patient restraints in hospitals. The one-hour restraint rule is especially burdensome for small and rural hospitals because it requires treating physicians to make a face-to-face assessment of the patient within one hour of initiating restraint or seclusion. CMS has failed to adequately analyze the impact of its one-hour restraint rule on small entities or to revise the rule to reduce its burdens, despite stating its intention to do so in OMB's 2003 Final Report to Congress.⁽¹²⁾

In other cases, implementing small business reform recommendations have proven to be a time-consuming endeavor. An example is the longstanding effort to reform reporting requirements under the Environmental Protection Agency's (EPA) Toxics Release Inventory (TRI) program. This program requires facilities, including small businesses, to report each year on toxic chemical releases and other waste management activities. Since 2001, OMB has received numerous nominations for TRI

reforms designed to reduce reporting burdens that appear to have little corresponding public benefit. These reforms include EPA accepting simplified reports, setting higher reporting thresholds in some situations, and allowing less frequent reporting where there is no significant year to year change at a facility. Small business stakeholders began pursuing these types of TRI reforms as far back as 1992. With the added impetus of the public reform nomination process, rulemaking action on these reforms is now anticipated to get underway in 2005.

For Small Businesses, Is the Public Nomination Process Worthwhile?

Advocacy believes that the public nomination process is important. This process currently affords small businesses and their representatives a way to initiate meaningful regulatory reform efforts. Small business stakeholders tell Advocacy that they view the public nomination process as a meaningful way to be heard by OMB and the agencies and to pursue reforms in an open and transparent system.

In a larger sense, Advocacy views the public's ability to nominate rules for reform as a major element in OMB's ongoing effort to improve regulatory analysis and the accountability of regulatory agencies. OMB responded to Advocacy's 2003 call for regulatory analyses to include a specific accounting for small business impacts by finalizing OMB Circular A-4.(13) This Circular, which became effective in 2004, requires agencies for the first time to publicly identify the effects of their regulations and programs on small business. Coupled with OMB's public nomination process, small business has a greater ability to identify small business impacts from regulations and to seek reform of those regulations where appropriate. Over time, we believe that Circular

A-4 will encourage agencies to more closely consider small business concerns at every stage of regulatory action.

How Could the Public Reform Nomination Process Be Improved?

The public rule reform nomination process shows great potential, but it can be improved in several ways:

Provide better information about the status of ongoing rule reforms.

Small business stakeholders have told us that they become frustrated when follow-up information about the progress (or lack of progress) on a reform is not provided to the public. Possible mechanisms for providing this information include establishing a Rule Reform Clearinghouse on OMB's website, or ensuring that agencies update the status of specific rule reforms in their Semiannual Regulatory Agenda published twice a year in the *Federal Register*.

Stakeholder involvement is necessary at every stage in the rule reform process.

In order to be successful, stakeholders must be prepared to work with an agency for several years to obtain a rule reform. Their involvement clearly does not end when the reform nomination is made.

Agencies should take consideration of the reform nominations seriously.

Federal agencies should work with OMB and stakeholders in good faith to identify appropriate candidates for reform and implement the reforms. This will improve overall confidence in the reform process and the fairness of individual agencies.

Agencies should work to provide OMB and the public with accurate information about the status of rule reforms.

Congress should stay involved in the process.

Congressional oversight can play an important role in reinforcing the overall importance of the public nomination process, and in ensuring that agencies give fair and full consideration to implementing nominated reforms.

Conclusion

From the perspective of small business, the public rule reform nomination process is working and it is worthwhile. Federal agencies have implemented about one-fifth of the rule reforms identified by OMB and Agency leadership in 2001-2003, and additional reforms are likely to be completed in the coming year. Although the process can be improved, it has the potential to be a major tool for improved regulatory analysis and the accountability of Federal agencies to the public.

Thank you for allowing me to present these views. I would be happy to answer any questions.

Appendix A

OMB's 2001 "High Priority" Rule Reform Nominations(14)

Agency	Regulation
Department of Agriculture/Forest Service	Forest Service Planning Rules
Department of Agriculture/Forest Service	Roadless Area Conservation Regulations
Department of Education	Regulations Related to Financial Aid
Department of Energy	Central Air Conditioner and Heat Pump Energy Conservation Standards
Department of Health and Human Services	Standards for Privacy of Individually Identifiable Health Information
Department of Health and Human Services/Food and Drug Administration	Food Labeling: Trans Fatty Acids in Nutrition Labeling, Nutrient Content and Health Claims
Department of Interior/National Park Service	Amendments to National Park Service's Snowmobile Regulations
Department of Interior/Bureau of Land Management	Regulations Governing Hardrock Mining Operations
Department of Labor/Office of Federal Contract Compliance Programs	Office of Federal Contract Compliance Programs' "60-2" Regulation – The Equal Opportunity Survey
Department of Labor/Employment and Training Administration	Procedures for Certification of Employment Based Immigration and Guest Worker Applications

Department of Labor/Employment and Standards Administration	Proposal Governing "Helpers" on Davis-Bacon Act Projects
Department of Labor/Wage and Hour Division	Overtime Compensation Regulation
Department of Labor/Wage and Hour Division	Record Keeping and Notification Requirements
Department of Transportation/Federal Motor Carrier Safety Administration	Hours of Service of Drivers; Driver Rest and Sleep for Safe Operation
Equal Employment Opportunity Commission	Uniform Guidelines for Employee Selection Procedures
Environmental Protection Agency	Mixture and Derived From Rule
Environmental Protection Agency	Proposed Changes to the Total Maximum Daily Load Program
Environmental Protection Agency	Drinking Water Regulations: Cost-Benefit Analysis
Environmental Protection Agency	Economic Incentive Program Guidance
Environmental Protection Agency	New Source Review
Environmental Protection Agency	Concentrated Animal Feeding Operations (CAFOs) Effluent Guidelines
Environmental Protection Agency	Arsenic in Drinking Water
Environmental Protection Agency	Notice of Substantial Risk – TSCA

Appendix B

Advocacy's 2002 Reform Nominations(15)

US Postal Service	Commercial Mail Receiving Facilities
Labor/OSHA	Sling Standard
Labor/OSHA	Recordkeeping for Work-related Injuries
Dept of Transportation/FAA	General Operating and Flight Rules; Inspections
Environmental Protection Agency	Toxic Release Inventory (TRI) – Lead and Lead Compounds; Lowering Reporting Thresholds
Environmental Protection Agency	TRI; Addition of Chemical and Petroleum Wholesalers to TRI Reporting
Environmental Protection Agency	TRI; Form A
Environmental Protection Agency	Regulation of Hazardous Wastes
Health and Human Services/OCR	Limited English Proficiency (LEP) Guidance
Department of Justice/Drug Enforcement Agency	Hemp Food Products
Health and Human Services/CMS	1-Hour Restraint Rule
Department of Interior/National Park Service	Snowmobile Phaseout in Yellowstone, Rockefeller, Grand Teton National Parks
Health and Human Services/CMS	Medicare Program; Revisions to Payment Policies and 5-year review

Health and Human Services/CMS	Certificates of Medical Necessity
Internal Revenue Service	Monthly versus Semi-monthly Federal Employment Tax Deposits
Internal Revenue Service	Partnership Investments in Small Business Stock

Appendix C

Small Business Priority Reforms Identified in Response to OMB's Request for Office of Advocacy Review(16)

Health and Human Services/CMS	1-Hour Restraint Rule
Health and Human Services/CMS	Medicare Program; Revisions to Payment Programs and 5-year Review
Health and Human Services/CMS	Certificates of Medical Necessity
Department of Justice/Drug Enforcement Agency	Hemp Food Products
Department of Labor	Computer Professional Exemption under Fair Labor Standards Act
Department of Labor	Fair Labor Standards Act Administrative Exception
Department of Labor/OSHA	Lead in Construction
Department of Labor/OSHA	Sling Standard
State Department	Flight Simulators
Department of Transportation	Disadvantaged Business Enterprises
Department of Transportation/RSPA	Emergency Preparedness
Department of Transportation/RSPA	Hazardous Materials Training Requirements
Internal Revenue Service	Flexible Spending Accounts
Internal Revenue Service	Monthly versus Semi-monthly Federal Employment Tax Deposit
Internal Revenue Service	Partnership Investments in Qualified Small Business Stock
Environmental Protection Agency	Toxic Release Inventory Alternative Reporting

	Threshold (Form A)
Environmental Protection Agency	Export Notification Requirements
Environmental Protection Agency	Storage for Reuse Regulations (PCBs)
Environmental Protection Agency	TRI: Lowering Reporting Thresholds for PBT Chemicals
National Archives and Records Administration	Disposition of Federal Records
US Post Office	Commercial Mail Receiving Agencies
Health and Human Services/OCR	Limited English Proficiency (LEP) Guidance
Department of Justice	Guidance on Federal Prison Industries
Department of Labor	Coordination of Family Medical Leave Act with other Leave Policies
Environmental Protection Agency	Toxic Release Inventory Reporting Forms and Instructions
Environmental Protection Agency	TRI Reporting Questions and Answers and other Guidance
Small Business Administration	Guidance on Credit Unions
Federal Communication Commission	Telephone Number Portability
Federal Communication Commission	Broadband Access to Internet over Cable
Federal Communication Commission	Remedying Interference to Public Safety Communications in the 800 MHz Band

Appendix D

Final 2002 “New Candidates” for Regulatory Reform(17)

Department of Agriculture	Salmonella Performance Standards
Department of Agriculture	Phytosanitary Certificates for Seeds
Department of Agriculture	Swine Production Contract Library
Department of Health and Human Services/CMS	75% Rule
Department of Health and Human Services/CMS	One-Hour Restraint Rule
Department of Health and Human Services/FDA	Standard of Chemical Quality – Arsenic
Department of Health and Human Services/FDA	Standard of Chemical Quality – Uranium
Department of Health and Human Services/FDA	Labeling of Carmine
Department of Health and Human Services/FDA	Labeling of Food Allergens
Department of Labor	Medical Certification
Department of Labor	FLSA Administrative Exception
Department of Labor/OSHA	Explosives and Process Safety Management
Department of Labor/OSHA	Sling Standard
Department of Labor/OSHA	Bloodborne Pathogens Standard
Department of Transportation/ Federal Aviation Administration	Flammability Standards for Thermal/ Acoustic Material
Department of Transportation/FHA	Contract Requirements for Minor Transport. Projects
Department of Transportation/Federal Highway Admin.	Historic Preservation Requirements
Department of Transportation/Federal Highway Admin.	Traffic Operations
Department of Transportation/Federal Highway Admin.	Highway Work Zone Safety
Department of Transportation/NHTSA	Roof Crush
Department of Transportation/NHTSA	Door Locks
Department of Transportation/NHTSA	Bumper Strength
Department of Transportation/NHTSA	Side-Impact Protection
Department of Transportation/Coast Guard	Marine Safety Manual
Department of Transportation/RSPA	Hazardous Materials Training
Treasury/IRS	Flexible Spending Accounts

Treasury/IRS	Mortgage Revenue Bond Purchase Price Limits
Environmental Protection Agency	Regulatory Reform for Handling Refrigerants
Environmental Protection Agency	Chemical Plant Safety Standards
Environmental Protection Agency	Protection for Farm Children from Pesticides
Environmental Protection Agency	Definition of Volatile Organic Compound
Environmental Protection Agency	TRI Alternate Reporting Threshold (Form A)
Environmental Protection Agency	Export Notification Requirements
Environmental Protection Agency	Storage for Reuse
Environmental Protection Agency	TRI Form R Reporting
Department of Labor/OSHA	Multi-Employer Citation Policy
Environmental Protection Agency	EPA index of Applicability Decisions
Environmental Protection Agency	“Once In, Always In” Policy
Environmental Protection Agency	TRI Reporting Forms/Instructions
Environmental Protection Agency	TRI Reporting Q & As
Environmental Protection Agency	Waterborne Diseases
Environmental Protection Agency	Integrated Risk Information System
Environmental Protection Agency	Economic Benefit of Noncompliance in Civil Penalty Cases
Environmental Protection Agency	Site-Specific Risk Assessments in Resource Conservation and Recovery Act cases
Environmental Protection Agency	Sub-metering Water Systems

Appendix E

Regulatory Actions Completed by the Agencies

Agency	Regulation	Year of Nomination
Department of Labor/Wage and Hour Division	Overtime Compensation Regulation	2001
Department of Interior/National Park Service	Amendments to National Park Service’s Snowmobile Regulations	2001
Environmental Protection Agency	New Source Review	2001
Environmental Protection Agency	Proposed Changes to the Total Maximum Daily Load Program	2001
Department of Transportation/FMCSA	Hours of Service of Drivers/Driver Rest and Sleep for Safe Operation	2001
Department of Health and Human Services/FDA	Food Labeling: Trans Fatty Acids in Nutrition Labeling, Nutrient Content and Health Claims	2001
Department of Health and Human Services/CMS	75% Rule	2002
Department of Transportation/Coast Guard	Marine Safety Manual	2002
Treasury/IRS	Mortgage Revenue Bond Purchase Price Limits	2002
Environmental Protection Agency	Sub-metering Water Systems	2002
Environmental Protection Agency	Index of Applicability Decisions	2002
Department of Agriculture	Salmonella Performance Standard	2002
Department of Agriculture	Swine Production Contract Library	2002
Department of Health and Human Services/FDA	Standard of Chemical Quality – Uranium	2002

ENDNOTES

- 31 U.S.C. § 1105 note, Pub. L. 106-554, ‘1(a) [Title VI, ‘624], Dec. 21, 2000, 114 Stat. 2763, 2763A-161.
- Draft, *Making Sense of Regulation: Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on States, Local, and Tribal Entities* (May 2001).

3. The other 48 nominations were deemed to be of lower priority or were believed to be ongoing projects by agencies.
4. See 67 Fed. Reg. 15014, 15015 (March 28, 2002).
5. Letter to John Morrall, Office of Information and Regulatory Affairs, Office of Management and Budget, from Thomas M. Sullivan, Chief Counsel for Advocacy (May 28, 2002); available at www.sba.gov/advo/laws/comments/omb02_0528.pdf.
6. Office of Management and Budget, Memorandum for the President's Management Council (December 20, 2002); available at www.whitehouse.gov/omb/inforeg/print/pmc_agency_response_regreform.html.
7. Letter to John Graham, Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, from Thomas M. Sullivan, Chief Counsel for Advocacy (February 6, 2003); available at www.sba.gov/advo/laws/comments.
8. See Table 9, "New Reforms Planned or Underway – Regulations" and Table 10, "New Reforms Planned or Underway – Guidance Documents" in *Informing Regulatory Decisions: 2003 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities* (September 2003) at 26-34; available at www.whitehouse.gov/omb/inforeg/2003_cost_ben_final_rept.pdf.
9. See 68 Fed. Reg. 5492 (February 3, 2002).
10. See Testimony of Thomas M. Sullivan, Chief Counsel for Advocacy, before the House Committee of Government Reform, Subcommittee of Energy Policy, Natural Resources and Regulatory Affairs, "How to Improve Regulatory Accounting: Costs, Benefits, and Impacts of Federal Regulations – Part II" (February 25, 2004); available at www.sba.gov/advo/laws/testimon.html.
11. Department of Labor, Fair Labor Standards Act Administrative Exemption and Computer Professional Exemption. In addition, the Department of Transportation has finalized a rule on hazardous materials training, but the final rule does not address the concerns of the Office of Advocacy and other reform nominators.
12. See Office of Management and Budget, *Informing Regulatory Decisions: 2003 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities* (September 2003) at 26; available at www.whitehouse.gov/omb/inforeg/2003_cost_ben_final_rpt.pdf.
13. Office of Management and Budget, Circular A-4, *Regulatory Analysis*. (September 17, 2003) at 46; available on the OMB webpage at <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>.
14. *Making Sense of Regulation: Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on States, Local, and Tribal Entities* (December 2001), Table 7, "High Priority Regulatory Review Issues" at 63-64.
15. Letter from the Office of Advocacy to OMB (May 28, 2002). This letter is available on Advocacy's webpage, <http://www.sba.gov/advo/laws/comments/#2002>.
16. Letter to John Morrall, Office of Information and Regulatory Affairs, Office of Management and Budget, from Thomas Sullivan (May 28, 2002); available at www.sba.gov/advo/laws/comments/omb02_0528.pdf.
17. See Table 9, "New Reforms Planned or Underway – Regulations" and Table 10, "New Reforms Planned or Underway – Guidance Documents" in *Informing Regulatory Decisions: 2003 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities* (September 2003) at 26-34; available at www.whitehouse.gov/omb/inforeg/2003_cost_ben_final_rpt.pdf. The items in **bold** are Advocacy's high-priority nominations.