Testimony of

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Scholar
Center For Progressive Regulation

Before the
Subcommittee on Regulatory Affairs
Committee on Government Reform
U.S. House of Representatives

Hearing on
"Impact of Regulations on U.S. Manufacturing"

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Thank you for the opportunity to testify before you today. My name is Sidney A. Shapiro. I am the University Distinguished Chair in Law at Wake Forest University, Winston-Salem, N.C. I have also been the John M. Rounds Professor of Law at the University of Kansas, Lawrence, Kansas. I hold a B.S. in Economics from the Wharton School of Finance and Commerce, University of Pennsylvania, and a J.D. from the University of Pennsylvania Law School. My expertise is in administrative law and regulatory policy. My most recent book is *Sophisticated Sabotage: The Intellectual Games Used to Subvert Responsible Regulation*, published by the Environmental Law Institute Press. I am also the co-author of *Risk Regulation at Risk: Restoring a Pragmatic Approach*, published by Stanford University Press, two law school textbooks, on regulatory law and practice and administrative law, as well as a one-volume administrative law treatise. I have published over 40 articles.

I am also a Scholar at the Center for Progressive Regulation (CPR). The Center for Progressive Regulation is a nonprofit research and educational organization of university-affiliated academics with expertise in the legal, economic, and scientific issues related to regulation of health, safety, and the environment. CPR supports regulatory action to protect health, safety, and the environment, and rejects the conservative view that government's only function is to increase the economic efficiency of private markets. Through research and commentary, CPR seeks to inform policy debates, critique anti-regulatory research, enhance public understanding of the issues, and open the regulatory process to public scrutiny.

Recently, the Office of Management and Budget published a report entitled "Regulatory Reform of the U.S. Manufacturing Sector."[1] The report indicates that in

[1] Available at http://www.whitehouse.gov/omb/inforeg/reports/manufacturing_initiative.pdf.

2004 OMB invited nominations of specific regulations that, if reformed, could result in lower costs, greater competitiveness, more regulatory certainty and increased flexibility. Having received 189 reform nominations, OMB, after consultation with the relevant agencies, determined that 76 nominations had potential merit and merited further action.

In the report, OMB maintains that reform of regulation of the manufacturing sector of the United States is necessary because "manufacturing bears a disproportionate share of the overall regulatory costs in the economy." OMB indicates further that since U.S. manufacturers "compete with firms from both developed and developing countries in an increasingly global environment, the Administration believes it is critical that any unnecessary regulatory burdens be removed."

My testimony today reaches the following conclusions:

- **No Regulation-Competition Link**: The scholarly literature provides little or no support for the conclusion that regulation hinders the competitiveness of manufacturing industries or is the cause of the significant job losses in those industries. The primary reason that Federal regulation is not responsible for American manufacturers being less competitive is because ***regulatory costs average less than one percent of the total value of manufactured goods*** in the United States.

- **OMB's Lack of Evidence:** OMB recognizes the previous evidence and admits that it does not establish a competitiveness-regulatory tradeoff. Its response is that manufacturing industries have higher regulatory costs than other industries, but manufacturing industries are also responsible for a larger portion of the environmental and occupational problems in this country.

- **Real Priority Setting**: The government should look back at existing regulations, but this should be part of an overall priority setting process that includes an evaluation of where additional regulation is necessary and appropriate. Instead, OMB's nomination process unbalances how regulatory priorities are set in the federal government in favor of the pet projects of regulated industries.

- **The Small Business Excuse**: While small business is deserving of special consideration from regulators, it already receives such consideration through existing exemptions and protections. Moreover, very few of the OMB final hit-list recommendations appear to address small business concerns.

- **The Reform Masquerade**: While some reform nominations looks for ways to decreasing the cost of meeting existing levels of regulation, many

nominations seek to lower the level of protection of people and the environment. At the same time, the OMB almost entirely disregarded nominations of ways to improve the protection of people and the environment.

I. No Regulation-Competitiveness Link

When OMB claims that regulation harms the competitiveness of United States business, it is merely echoing a long-standing claim of the business community. The scholarly evidence, however, refutes this claim. While the business community may be hampered in competing in global trade, regulation is not at fault. The business community, however, has nothing to gain by publicizing the real reasons for its difficulties, such as lower wages paid in other countries. The idea that regulation causes competitive decline is the product of a public relations campaign, rather than careful scholarly work.

The anti-competitiveness myth is fueled by reference to the hundreds of millions of dollars spent by American industry on regulatory compliance.[2] These citations, however, provide a dubious basis to criticize regulation for three reasons.

Regulations Produce Net Benefits: Citations to the high cost of regulation do not establish that regulation is unwarranted because they completely ignore what we gain from these expenditures. While protecting people and the environment may cost a lot of money, it also produces far larger benefits. As OMB reports to Congress every year, regulation in the United States generates aggregate benefits that greatly exceed the cost of the federal regulations.[3]

Overblown Cost Estimates: Moreover, many claims about regulatory costs are suspicious because they rely on cost estimates that come from industry sources that have an incentive to overstate the costs for regulatory and public relation purposes. According to a recent influential study:

> [E]x ante cost estimates have usually been high, sometimes by orders of magnitude, when compared to actual costs incurred. This conclusion is not at all surprising in light of the strategic environment in which the predictions are generated. In preparing regulatory impact assessments for proposed rules, agencies are heavily dependent upon the regulated entities for information about compliance costs. Knowing that the agencies are less likely to impose regulatory

[2] *See, e.g.*, Jeremy A. Leonard, How Structural Costs Imposed on U.S. Manufacturers Harm Workers and Threaten Competitiveness (Prepared for The Manufacturing Institute of the National Association of Manufacturers) (2003).

[3] OMB, Draft 2005 Report to Congress on the Costs & Benefits of Federal Regulation, at 7 Table 1-1 (aggregate benefits of $12,596-108,483 billion dollars and aggregate costs of $3,840-4,073 billion).

options with high price tags (or to support them during the review process), the regulatees have every incentive to err on the high side. [4]

Small Percentage of Costs: Finally, and most importantly for these purposes, regulation cannot be blamed for a decline in competitiveness or other economic ills because compliance costs are only a very small percentage of total value of the shipments made by manufacturers. On the basis of data from the World Bank, Professor Kevin Gallagher (Boston University) finds the "sum of all marginal pollution abatement costs in the United States is less than one percent of value added production."[5] Department of Commerce data confirm this estimate. This information indicates abatement expenditures are an average of 0.62 percent of the value of shipments of all industries.[6] Industry sectors with high abatement costs pay between 1.27 and 1.51 percent of the value of shipments.[7]

Other regulatory costs – such as loss of productivity, unemployment, price increases, and the loss of consumer welfare – are derivative of direct compliance costs.[8] Since low direct costs generally will produce low indirect costs,[9] regulation overall should have a minor competitive and labor impacts.

The scholarly evidence backs up this claim. Economists have considered the impact of environmental regulations on plant-location-decisions (do pollution-intensive industries build disproportionate number of new factories in countries or areas of the United States where there is weak environmental regulation?) and on trade flows (do exports from developed to developed countries show an increasing percentage of pollution-intensive goods?). Neither type of study supports a regulation-competitiveness link.

The leading summary of the research is by Adam Jaffee (Brandeis University, National Bureau of Economic Research), Steven R. Peterson (Economics Research Group), Paul R. Portney (Resources for the Future) and Robert N. Stavens (Harvard University, Resources for the Future). In their review of plant location and trade flow studies, they found that "studies attempting to measure the effect of environmental regulation on net exports, overall trade flows, and plant-location-decisions have produced estimates that are either small, statistically insignificant, or not a robust to test of model specification."[10] As a result, they concluded, there is "[o]verall … relatively little

[4] Thomas O. McGarity & Ruth Ruttenberg, Counting the Cost of Health, Safety & Environmental Regulation, 80 Tex. L. Rev. 1997 (2002).
[5] Kevin P. Gallagher, Free Trade and the Environment: Mexico, NAFTA, and Beyond 98 (2004).
[6] Adam B. Jaffee, Steven R. Peterson, Paul R. Portney & Robert N. Stavins, *Environmental Regulation and the Competitiveness of U.S. Manufacturing: What Does the Evidence TellUs?*, 33 J. Econ. Lit. 132, 141 (1995) (table 5).
[7] *Id*.
[8] Richard Parker, *Grading the Government*, 70 U. Chi. L. Rev. 1345, 1401 (2003).
[9] *Id*.
[10] Jaffee, *supra* note 1, at 158.

evidence to support the hypothesis that environmental regulations have had a large adverse effect on competitiveness, however that elusive term is defined."[11]

These scholars are not the only ones to reach this conclusion. Kevin Gallagher (Boston University) notes: "The vast majority of studies have found no systematic evidence that the share of developing country exports and production is becoming more pollution-intensive. In addition, no studies have indicated that there is substantial evidence that pollution-intensive industries flee developed countries with relatively high (and costly) environmental standards)."[12] Similarly, Eban Goodstein (Lewis & Clark College) concludes, "[T]he direct evidence on firm-location decisions and the indirect evidence from the trade-flow literature find precious little support for any significant pollution-haven phenomenon."[13]

It is true that there are gaps in our knowledge and that there may be competitive-regulatory tradeoffs that have not yet been identified. This much is clear, however. Those who claim a regulatory-competitiveness tradeoff are a long way from proving their claim.

II. OMB's Lack of Evidence

OMB recognizes the previous evidence and admits that it does not establish the existence of a competitiveness-regulatory tradeoff.[14] To attempt to overcome this admission, OMB makes three arguments.

The New Research: OMB first observes that economists are studying whether there are some types of industries are more disadvantaged than other industries because of regulatory costs. This weak literature hardly justifies OMB's invitation to all industries to seek regulatory relief. Moreover, if OMB wants to cite potential new evidence in the literature, it should also cite new studies that refute a competitiveness-regulation tradeoff, including evidence that investment in Mexican industry has grown at a time when Mexican regulations were becoming much stricter,[15] consistent with the " Porter hypothesis" that regulation may actually stimulate growth and competitiveness[16]; the fact that growth is positively correlated with pollution reduction within the Los Angeles

[11] *Id*.
[12] Kevin P. Gallagher, Free Trade and the Environment: Mexico, NAFTA, and Beyond 26 (2004).
[13] Eban Goodstein, The Trade-Off Myth: Fact and Fiction About Jobs and the Environment 65 (1999).
[14] Office of Management & Budget, Progress in Regulatory Reform: 2004 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local & Tribal Entities 53-56 (2004).
[15] Ebru Alpay et al., Productivity Growth and Environmental Regulation in Mexican and U.S. Food Manufacturing, 84 American J. Agricultural Economics 887 (Nov. 2002).
[16] Michael E. Porter, America's Green Strategy, Scientific American (April, 1991), at 168.

area[17]; the intriguing discovery that restrictions on timber harvesting caused by protection of the spotted owl under the Endangered Species Act may have had net benefits for timber companies, by raising the value of their non-protected timber[18]; and the demonstration that some occupational safety and health regulations increase productivity in manufacturing in Quebec.[19]

No Disproportionate Costs: OMB also observes that regulatory reform is justified because manufacturing is a substantial segment of the U.S. economy and regulatory costs are higher for manufacturing industries than other industries.[20] At the same time, however, the manufacturing industry is the source of most of the air and water pollution in this country and many of the safety and health problems to which workers are exposed. Thus, there is nothing disproportionate about this burden if manufacturing produces a large portion of the environmental and occupational problems in the country.

Inapplicable World Bank Study: Lastly, OMB relies on a World Bank report to conclude that national wealth, productivity, and employment rates are all positively correlated with less regulation.[21] The World Bank study, however, does not even concern itself with most of the types of regulations about which OMB is concerned. The World Bank's conclusions are pretty simple: avoid unnecessary interference with competitive markets, enhance property rights, expand technology, reduce court involvement in business matters, and make reform a continuous process.[22] While these general propositions may be worthy of some consideration, OMB's regulatory agenda, as expressed in the latest list of regulations to be reconsidered, is something very different. The World Bank report does not speak to the type of regulations that OMB would like to undo, and OMB's efforts to tie this effort to the report are entirely unpersuasive.

III. Real Priority Setting

OMB's effort to elicit nominations for regulatory revisions should be part of an overall priority setting process that includes an evaluation of where additional regulation is necessary and appropriate. Instead, the process unbalances how regulatory priorities

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[17] Matthew E. Kahn, Smog Reductions Impact on California County Growth, 40 J. Regional Science 565 (Aug. 2000).
[18] Ted W. Chiles, Jr., and Joy Clark, Environmental Regulation and the Spatial Distribution of Capital and Resources, 29 Review of Regional Studies 51 (Summer 1999).
[19] Charles Dufour et al., Regulation and Productivity, 9 J. Productivity Analysis 233 (May 1998).
[20] *Id*. at 47, 49.
[21] *Id*. at 38-43.
[22] There are numerous other problems with relying on the World Bank report. See Testimony of Robert R.M. Verchick Before the Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs, Committee on Government Reform, U.S. House of Representatives, Hearing on Regulatory Accounting (February 25, 2004), available at http://www.progressiveregulation.org/articles/Verchick_CB.pdf; Letter to Lorraine Hunt, ORIA from Lisa Heinzerling, Georgetown University, and Frank Ackerman, Tufts University (May 20, 2004) (Comments on 2004 OMB Draft Report to Congress), available at http://www.progressiveregulation.org/articles/cost_regs_2004_comments.pdf.

are set in the federal government in favor of the pet projects of regulated industries. Regardless of the merits of such proposals, they must be balanced against the other commitments of regulators, including especially the necessity of protecting people and the environment.

Unbalanced Priority Setting: An appropriate metaphor for regulatory priority setting at any agency is that of a business establishment with a front door, a side window, and a back door.[23] Petitions, information about environmental, safety and health risks in the scientific literature and from health and safety professionals, and information from agency staff all press at the front door, vying for the agency's attention. Meanwhile, OMB is at the agency's back door demanding the agency reconsider some previously enacted rule. At the same time, the courts are pushing some rulemaking initiatives through the side window in response to lawsuits filed against an agency because it is not acted in a timely manner on their requests for a regulation.

What is immediately noticeable about OMB's nomination process is that it is addressed only to the back door. OMB invited nominators to "suggest specific reforms to rules, guidance documents or paperwork requirements that would improve manufacturing regulation by reducing unnecessary costs, increasing effectiveness, enhancing competitiveness, reducing uncertainty and increasing flexibility."[24] There is no similar call to arms about pressing public health and environmental problems. Yet, we know that greenhouse gases, unregulated under federal law, threaten America's future health, productivity, and even national security.[25] We know that asthma, a disease related to urban air pollution, has become the number one childhood illness in the United States.[26] We know that sewage pollution costs Americans billions of dollars annually in medical care, lost productivity, and property damage.[27] Concerning these subjects, OMB has no interest.

Both the nominations and outcome of the process likewise was addressed to the back door of regulatory relief. While 85% of the reform nominations were made by industry, 15% were submitted by public interest groups (Public Citizen and People for the Ethical Treatment of Animals). On the final list approved by OMB, however, 97% of the reforms were industry sponsored and a paltry 3% from the public interest community.

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[23] See Thomas O. McGarity & Sidney A. Shapiro, Workers At Risk: The Failed Promise of the Occupational Safety and Health Administration 188 (1993).

[24] Draft 2004 Report to Congress on the Costs and Benefits of Federal Regulations 1 (February 2004).

[25] *See* Mark Townsend and Paul Harris, Now the Pentagon Tells Bush: Climate Change Will Destroy Us, GUARDIAN (U.K.), Feb. 22, 2004, *available at* http://www.guardian.co.uk/usa/story/0,12271,1153531,00.html.

[26] EnviroHealthAction, Children's Environmental Health, *available at* http://www.envirohealthaction.org/children/asthma/.

[27] Natural Resources Defense Council, Press Release, Aging U.S. Sewer Systems Threaten Public Health, New Report Finds, *available at* http://www.nrdc.org/media/pressreleases/040219a.asp.

A Real Process: Instead of an ad hoc process, OMB should require agencies to consider regulatory reform requests in the context of an agency's annual regulatory plan.[28] This would give an agency the opportunity to consider such back-door requests in the context of what other business is at the front and side-doors. Even if back-door requests to modify existing regulations are valid, this plan gives an agency the opportunity to place such request within the hierarchy of all agency business, some of which is likely to be more pressing than such requests.

Shrinking Agency Budgets: A more organized and efficient priority setting process is not only good management, it is essential at a time when agency's budgets are shrinking, as they have been for years.[29] Agencies simply cannot get to all of the business on their plates. In this context, a decision to emphasize only the back-door, as OMB has done, constitutes a politicization of the priority-setting process, because it elevates the modification of existing regulations over the introduction of new regulations without carefully considering whether the business at the front or side doors is of higher priority.

Politicization of Priority-Setting: Finally, but hardly least of all, OMB's flawed nomination process must be understood in the context in which it is occurring. The Bush administration is engaged in an all-out effort to centralize control over the regulatory process in the White House.[30] The White House has a legitimate interest in management of the federal bureaucracy, but the administration's micro-management of the government creates two undesirable side-effects. First, White House micro-management gives regulated industries substantial and unaccountable influence over the regulatory process. The millions and millions of dollars that industry donated to the President's reelection campaign gives industry lawyers and officials substantial access to the White House to seek regulatory relief. Needless to say, the public lacks similar access to balance out the process. Second, White House micro-management is unlikely to improve decision-making because it elevates the role of political officials and generalists and decreases the role of agency experts and persons more familiar with regulatory problems.[31]

IV. The Small Business Excuse

OMB seeks to justify its nomination process on the need to alleviate the regulatory burden on small business. While small business is deserving of special consideration

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[28] *See* Exec. Order 12,866, §3(c).

[29] The Administration, for example, has proposed a $450 million dollar cut in EPA's budget. Center for American Progress, Making the Wrong Choices: An Analysis of the President's 2006 Budget, at 9, available at http://www.americanprogress.org/atf/cf/{E9245FE4-9A2B-43C7-A521-5D6FF2E06E03}/Wrong%20Choices%20An%20Analysis%20of%20the%202006%20Budget.pdf.

[30] *See* Paul Singer, By the Horns, National Journal, May 26, 2005, at 898.

[31] Sidney A. Shapiro, Political Oversight and the Deterioration of Regulatory Policy, 46 Admin. L. Rev. 1 (1994).

from regulators, it already receives such consideration. Moreover, very few of the OMB final hit-list recommendations appear to address small business concerns.

Solicitude for Small Business: The small business community is a major source of innovation and employment in this country. Like their larger counterparts, however, small businesses are also responsible for social ills addressed by regulations[32] Workers at small firms, for example, are injured by workplace accidents or exposed to toxic chemicals. Additionally, small firms are a not insignificant source of environmental pollution. Thus, there is a valid need to protect the public and the environment from harm caused by small businesses. At the same time, it can be more relatively more expensive for small business to comply with regulations than large companies, which creates a need to find ways to both protect the public and lower the cost of regulation for such businesses.[33]

This, however, has already been done. Small firms receive direct government subsidies such as outright and government guaranteed loans from the Small Business Administration (SBA) as well as indirect preferential treatment through federal procurement requirements and tax provisions.[34] Additionally, small business is treated to many exemptions or special treatment in the area of regulation. For example, employers with less than 15 people are exempt from the Equal Employment Opportunity Act,[35] and OSHA levies lighter penalties for smaller firms, exempts businesses with less than 10 people from recordkeeping requirements, and provides free on-site compliance consultations.[36]

Perhaps more importantly, small business has its very own law, the Small Business Regulatory Enforcement Fairness Act (SBREFA) that requires agencies to give special consideration and voice to small business as part of the rulemaking process as well as expanded judicial review for small businesses wishing to challenge agency decisions.[37] Nonetheless, small business continues to object to any regulation perceived as burdensome even when it has completed the SBREFA screening and input process.

Big-Business Orientation: Even assuming that the nomination process is necessary to ensure proper attention to the concerns of small businesses, very few of the final hit-list recommendations appear to address small business concerns. Of the 71 final reforms, 11 purport to focus all or in part on small business. This tally was made by counting final reforms either recommended by the SBA or whose description mentioned alleviating a

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[32] Richard J. Pierce, Jr., *Small is Not Beautiful: The Case Against Special Regulatory Treatment of Small Firms*, 50 Admin. L. Rev. 537 (1998).
[33] C. Steven Bradford, *The Cost of Regulatory Exemptions*, 72 UCMK L. Rev. 857 (2004).
[34] See Richard J. Pierce, Jr., *Small is Not Beautiful: The Case Against Special Regulatory Treatment of Small Firms*, 50 Admin. L. Rev. 537 (1998).
[35] 42 U.S.C. §2000e(b) 2005.
[36] OSHA Small Business Benefits, http://www.osha.gov/dcsp/smallbusiness/benefits.html.
[37] 5 U.S.C. §601 et seq. 2005.

small business burden. Many of those requests, however, were joined by a number of other petitioners representing large corporations as well.

Consider, for instance, reform #188, a request to rescind the rule controlling listeria in ready to eat lunch meats, was made by SBA as well as the National Association of Manufacturers. Rescinding the rule would affect all manufacturers, not just small ones, leading to the conclusion that big businesses (as well as small businesses) are attempting to dilute an important health control. This is not surprising given industry's influence in weakening the listeria rule from its original proposal.[38] Ironically, OMB lists the listeria rule as having annual benefits of $44-$154 million and costs of only $16 million and touted it as a "regulatory reform accomplishment" as recently as December.[39] Moreover, the rule to which the objection is being made is an interim-final rule and USDA is already considering whether to modify the rule.[40] The nomination appears to be entirely superfluous except as a signal from OMB to weaken the existing rule.

Thus, while regulations affecting small business merit evaluation, this already occurs via the SBREFA process as part of rulemaking. Additionally, regulation of small is business is important as small business is responsible for a disproportionate share of environmental pollution, worker injuries and racial discrimination compared to larger firms.

V. The Reform Masquerade

No one should object to an effort to make it less costly to meet existing levels of regulation, assuming that the changes lead to the same level of regulatory protection. Many of the nominations, however, seek to reduce the level of regulatory protection of people and the environment.

Same Protection, Less Cost: Some of the nominations address this objective. For instance, nomination #34 recommends using common identifiers for all EPA databases and #10 recommends eliminating duplicative energy appliance labeling. These appear to be valid suggestions and true "housekeeping" measures as characterized by the U.S. Chamber of Commerce.[41] Others, following OMB criteria to reduce uncertainty, request agencies to clarify rules or standardize procedures.[42]

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[38] See Consumer Federation of America, *Not Ready to Eat*, Dec. 2004 http://www.consumerfed.org/CFA_Not_Ready_to_Eat.PDF.

[39] OMB, 2004 Report to Congress on the Costs & Benefits of Federal Regulation, at 21 & 111. http://www.whitehouse.gov/omb/inforeg/2004_cb_final.pdf, and see OMB Watch, *White House Adds Rule to Hit List After Calling it 'Accomplishment.'* http://www.ombwatch.org/article/articleview/2770/1/331 (Apr. 4, 2005).

[40] *Id*.

[41] Cindy Skrzycki, *OMB to Reconsider Some Rules*, Washington Post, E01 (Mar. 22, 2005).

[42] *See e.g.* Regulatory Reform, *supra* note 1, at #7 (clarify security requirement overlaps) and #175 (standardize drawback recordkeeping requirements).

Less Protection: Corporations, however, used the nomination process to seek outcomes that would result in less protection of people and the environment. For instance, Deere and Company recommended privatizing all government regulatory activities, and the National Association of Manufacturers suggested that the US Fish and Wildlife Service should "work with Congress to tighten the [Endangered Species Act] so that it must use mainstream science to evaluate species for listing."[43] Similarly, the Copper and Brass Fabricators Council objected to industrial storm-water regulations under the Clean Water Act (CWA) that actually required collection and treatment of storm-water runoff because it cost more than non-technology methods.[44]

Privatizing an entire public function, changing a statutory standard for use of science, and objecting to CWA requirements to ensure less polluted runoff are clearly outside the scope of such a housekeeping exercise, and yet OMB's call for reforms presents the perfect opportunity to lobby for such changes under the guise of regulatory reform. Fortunately, OMB rightly rejected the above referenced nominations, but only after valuable agency resources were spent reviewing such unreasonable and out of place suggestions.

Other nominations that seek to weaken regulatory protections did, however, make the final hit-list. For example, the American Public Power Association recommends that EPA does not need to regulate cooling water intakes structures at electric utility generating plants with capacity of <50 million gallons a day (MGD) for reduction of fish entrainment and impingement under the CWA because such standards are "unlikely to yield net benefits …"[45] Moreover, since this nomination addresses an ongoing rulemaking under CWA §316(b),[46] it is not a look-back nomination at all. In this circumstance, this appears to be another signal from OMB to EPA to adopt a weaker regulation.

Several attacks on EPA's Toxics Release Inventory (TRI) are a second example of the desire to weaken regulatory protections disguised as regulatory reform.[47] TRI is widely supported as a useful and important regulatory program. Environmentalists like TRI because it supports the public's right to know about the toxic substances to which they are exposed. Conservatives like TRI because, as Donald Elliot observes, "disclosure of TRI data to the public has been a powerful incentive to promote 'voluntary' pollution reductions."[48] Nonetheless, complaining about TRI imposed burdens is a favorite

[43] *Id*. at #2 and #132.
[44] *Id*. at #115.
[45] *Id*. at #68.
[46] See http://www.epa.gov/waterscience/316b/basic.htm.
[47] *See e.g.* Regulatory Reform, *supra* note 1, at #43 and #52.
[48] E. Donald Elliott, *Environmental TQM: Anatomy of a Pollution Control Program that Works*! 92 Mich. L. Rev. 1840, 1851 (1994).

pastime of some industry groups,[49] and so it is no surprise that the nominations made the final hit-list.

The first complaint regards the lowering of the TRI reporting threshold for lead to 100 pounds from 10,000 pounds because it affects many small businesses and small lead emitters. However, the rule was promulgated because lead is a persistent bio-accumulative toxic that is dangerous even at low levels and little information is available to local communities regarding lead emissions.[50] Yet, at the behest of industry, OMB has deemed that the recommendation merits further action.

Similarly, a number of petitioners simply want all use of material reporting thresholds increased. Again, these requests go to the substantive basis of the TRI program that was designed by Congress to provide important information to the public on the cumulative amount of toxics used and released. Further, the request appears to be redundant as the procedural component of this complaint regarding reporting forms is already being addressed through EPA's TRI Burden Reduction Rule in which industry has been an active participant.[51]

New Protections Ignored: Finally, responses to the nominations submitted by public interest groups were practically nonexistent and reveal the continued bias of OMB against true reforms that would actually provide benefits to a wide swath of society as opposed to one special interest sector. For instance, as mentioned above, while 15% of the reform nominations were submitted by groups working to improve regulations to protect the public, only 3% of the final action items addressed public interest submissions, with the rest all responses to industry concerns. Moreover, of the two public interest nominations surviving on the final list, only one had a substantive action item.[52] In response to Public Citizen's nomination to establish an occupant vehicle ejection standard, OMB provided a timeline for rulemaking. In contrast, DOT will provide a summary of research in the area of vehicle compatibility standards in response to the one other public interest nomination on the hit-list. Thus, two out of 71 reform nominations address public interest concerns, and only one of those actually pledges any real action.

Meanwhile, there are plentiful environmental and public health and safety issues that remain unaddressed by regulation. For instance, important consumer protections to

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[49] *See e.g.*,Testimony of Todd McCracken, President, National Small Business Association, House Government Reform Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs Nov. 17, 2004), available at http://www.nsba.biz/docs/todd_11-17_testimony.pdf.

[50] See US EPA, *New TRI Reporting Requirements for Lead and Lead Compounds* http://www.epa.gov/tri/lawsandregs/lead/pb_fact_sheet.pdf.

[51] See US EPA, Burden Reduction Stakeholder Meeting http://www.epa.gov/tri/programs/stakeholders/TRIburdenreductionmeetingsummary_oct192004.pdf , and OMB Watch comments http://www.ombwatch.org/article/articleview/2728/1/241?TopicID=3.

[52] Regulatory Reform, *supra* note 1, at #18 and #22.

prevent auto vehicle deaths such as establishment of a rollover crashworthiness standard and coverage of 15-passenger vans by NHTSA safety standards, both proposed by Public Citizen were left off the final list despite the fact that motor vehicle deaths are the leading cause of death for Americans aged 4 to 34. Likewise, other recommendations to protect citizens from mad cow disease, meat fecal contamination and workers from ergonomic injuries and beryllium exposure were likewise rejected despite the need for "reform" in these areas.