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OF THE
UNITED STATES OF AMERICA**

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March 28, 2012

John Cooney
Chairman
Committee on Administration and Management
Administrative Conference of the United States
1120 20th Street NW, Suite 706 South
Washington, DC 20036

**Re: ACUS Committee on Administration and Management's Draft
Recommendation on the Paperwork Reduction Act**

Dear Mr. Cooney:

The U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region, is deeply interested in improving the Paperwork Reduction Act (PRA). In response to the Committee's broad examination of the law and invitation for comments, the Chamber is pleased to provide these recommendations.

When considering the impact of regulation on business, the burden of mounting paperwork is often at the heart of the issue. The PRA was enacted, in large part, to reduce this burden. The purpose section of the PRA begins by explaining that the purpose of the law is to:

[M]inimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, Federal contractors, State, local and tribal governments, and other persons resulting from the collection of information by or for the Federal Government.¹

¹ Paperwork Reduction Act, 44 U.S.C. § 3501 *et. seq.*

The PRA and its goal of reducing the paperwork burden are as important today as they were when the law was enacted in 1980.² Unfortunately, the law has not worked as intended. The Committee, to its credit, has recognized this failure.³ The following recommendations focus on turning what has been a relative failure into a successful means of reducing the paperwork burden on the American public.

I. Government Compliance

First and foremost, agencies need to comply with the PRA for the law to be effective. In a 2005 Government Accountability Office (GAO) study,⁴ agencies certified that the requirements for proposed information collections had been met in 98 percent of that year's 8,211 collections.⁵ When the GAO took a random sample of certifications, 65 percent of those certifications had partial or missing support.⁶

For example, the GAO found that only two of eleven certifications studied had support showing that the collections avoided unnecessary duplication. In fact, seven of the certifications had no support at all.⁷ For the "plain English" requirement, 11 of the 12 certifications (92 percent) had no support at all.⁸

This compliance failure is unacceptable and undermines the legitimacy of government. Businesses and individuals have to comply with legally imposed requirements or else face penalties. Yet, chief information officers in agencies face no repercussions and not surprisingly, there is non-compliance with the reasonable analysis expected under the PRA.

For the PRA to be effective, there must be some means to ensure government compliance with the law (i.e. the law needs some teeth). The Regulatory Flexibility Act (RFA)⁹ had a similar problem with government compliance. In response, Congress passed the Small Business Regulatory Enforcement Fairness Act of 1996.¹⁰

² See e.g. "Paperwork Reduction Act of 1980" web page, U.S. Small Business Administration at <http://www.sba.gov/advocacy/829>

³ "Paperwork Reduction Act, Committee on Administration and Management Draft Recommendation," Administrative Conference of the United States, at 1.

⁴ "Paperwork Reduction Act: New Approach May Be Needed to Reduce Government Burden on Public," United States Government Accountability Office, GAO-05-424, May 2005.

⁵ *Id.* at 16.

⁶ *Id.*

⁷ *Id.* at 17.

⁸ *Id.*

⁹ Regulatory Flexibility Act, 5. U.S.C. § 601 *et. seq.*

¹⁰ Small Business Regulatory Enforcement Fairness Act of 1996, P.L. 104-121.

In its findings, Congress wrote:

[T]he requirements of chapter 6 of title 5, United States Code [Regulatory Flexibility Act], have too often been ignored by government agencies, resulting in greater regulatory burdens on small entities than necessitated by statute.¹¹

According to the Small Business Administration (SBA):

Many agencies have failed to comply with the RFA over the past 16 years, and small businesses found little recourse in the courts due to the absence of any enforcement mechanism. The Small Business Regulatory Enforcement Fairness Act corrects that by permitting judicial review of agencies' compliance with the Regulatory Flexibility Act.¹²

The law created a judicial review process that allows affected parties to ensure that agencies followed the proper process, but does not provide for challenges to the substance of rules.¹³ A similar judicial review process, modeled after the RFA, should be included in the PRA.

The application of penalties also should apply beyond regulated parties. Penalty provisions should be imposed on any government official who knowingly makes false statements or representations, not unlike similar penalty provisions imposed on the public.¹⁴

II. Strengthen the 60-Day Comment Period

There are two distinct comment periods. The first comment period is 60 days and is designed for affected parties to assist agencies in developing information collections. The second comment period, which is 30 days, gives the public an opportunity to submit comments to the Office of Management and Budget (OMB) after agencies have developed their information collection proposals.

The recommendation in the draft Paperwork Reduction Act report to eliminate the 60-day agency comment period was disconcerting. Fortunately, the Committee has recognized the problem with such a move and is instead recommending that

¹¹ *Id.* at §202(5).

¹² "Summary of SBREFA" web page, U.S. Small Business Administration, at <http://www.sba.gov/advocacy/825/12285>

¹³ *Id.* and *See also* P.L. 104-121.

¹⁴ *See e.g.* Clean Water Act, 33 U.S.C. § 1318(c)(4) and Solid Waste Disposal Act, 42 U.S.C. § 6928(d).

“[a]gencies and OMB should take measures to revitalize the sixty-day comment period.”¹⁵

The 60-day agency comment period can be revitalized through:

1) *Conveying Information in a More Accessible Fashion*: Even for organizations that regularly track developments in the Federal Register, understanding and appreciating the nature of proposed information collections can be very difficult. Notices should provide more context and be written in “plain English.”

There also should be a “red flag” system that allows readers to know, at a glance, whether a particular proposed information collection is worthy of attention. Proposed information collections that exceed a certain threshold number of hours per respondent (not in total) should be labeled as “major collections.”

2) *Showing It Makes a Difference*: The best way to revitalize the 60-day comment period is for the public to believe it makes a difference. Unfortunately, as explained in the Committee’s report, the number of burden hours each year is growing at an alarming rate (26 percent for the period from 1997-2010)¹⁶—whether comments have made a difference in slowing down this growth is unclear. There are several specific actions that can be taken to show public comments make a difference:

A) Reduce the Burden

The Paperwork Reduction Act of 1995¹⁷ (PRA of 1995) required target goals of at least 10 percent for fiscal years 1996 and 1997, and five percent reductions for fiscal years 1998, 1999, 2000, and 2001.¹⁸ According to GAO, if the government had been able to reach the goals of the PRA of 1995, the burden hours would have decreased by about 35 percent (as of September 30, 2001). Based on data as of September 30, 2002, not only did the burden hours not decrease by 35 percent, but, based on the burden hour estimate, they went up by 17 percent.¹⁹

¹⁵ *Supra* note 3 at 4.

¹⁶ Stuart Shapiro, *The Paperwork Reduction Act: Research on Current Practices and Recommendations for Reform*, Report to the Administrative Conference of the United States,” at 18.

¹⁷ Paperwork Reduction Act of 1995, P.L. 104-13.

¹⁸ *See* 44 U.S.C. § 3505(a).

¹⁹ “Paperwork Reduction Act: Record Increase in Agencies’ Burden Estimates,” GAO Testimony Before the Subcommittee on Energy, Policy, Natural Resources, and Regulatory Affairs, Committee on Government Reform, House of Representatives (GAO-03-619T), April 11, 2003 (expected testimony date) at 4.

Ideally, there would be mandatory goals, but it is difficult to envision how a required government-wide reduction could be enforced. A voluntary goal though should be set again, especially since the relevant statutory section addressing voluntary goals is outdated. A new target goal of 10 percent for at least the next ten fiscal years should be set under 44 U.S.C. § 3505(a) and progress towards this goal widely communicated.

B) Respond to Comments

Agencies and OMB should respond to comments received and explain why an information collection and/or estimated burden hours have been kept the same or modified. This would provide feedback to commenters and show their time spent submitting comments was justified.

III. A Better Measure of Burden Hours

The Committee's report details the problems for government officials in coming up with accurate estimates of burden hours. Citing OMB, the report states:

While these officials [program analysts] are often experts in their areas of responsibility and are usually familiar with the public's experience with responding to information collections they oversee, in many cases their estimates are not based on objective, rigorous, or internally consistent methodologies.²⁰

It is very difficult to calculate burden hours, especially for complicated collections. The more information and detail provided by agencies to affected parties, the better these parties can estimate and communicate the time impact of collections.

There are some steps that can be taken to better measure the burden hours:

1) Extend the 60-Day Comment Period for Major Collections

For complicated collections, 60 days may not be enough time to work with affected parties to get a sense of the burden hours. On "major collections," the comment period should be extended to 90 days.

²⁰ *Supra* note 16 at 21.

2) Develop Best Practices

The initial estimates developed by agencies should be calculated using sound and consistent methodology. OMB should develop best practices to assist government officials who calculate burden hours.

This would include:

- Comparing the proposed collection to similar collections (benchmarking data).
- Reaching out to appropriate trade groups and other organizations prior to issuing the notice, such as by attending and presenting at relevant conferences.
- Estimating that more time will be needed with new collections than existing collections due to initial investments and learning curves.

3) Publish Anticipated Major Collections

Agencies publish expected regulatory activity in the Unified Agenda. At a minimum, agencies should publish anticipated “major collections” in the Unified Agenda and prominently on their web sites. By doing this, affected parties can have more time to better measure the burden hours and communicate this invaluable information to agencies.

IV. Collections Should Remain at Three Years and Reduced to One Year for New Major Collections

In its draft recommendations, the Committee recommended that OMB have discretion to approve collections for up to five years.²¹ Given the poor burden hour estimates that already exist, such a recommendation would be inappropriate. Collections should be approved for at most three years, as allowed under current law, and approvals should be reduced to one year for *new* major collections.

The best way to determine burden hours is not to estimate but to look at actual experience. By looking back, agencies can gather objective data about the actual experiences of regulated entities. Even after this data has been used to determine burden hours, it is vital to continue reviewing the collections because many things can change, from technological innovations to changes in the legal environment. The

²¹ *Supra* note 3 at 4.

three-year sunset provision requires agencies to engage in the necessary review of collections on a reasonable basis.

The look-back concept is vital not only for adjusting burden hours but also the very need for collections. This concept has been widely used in the regulatory process for many decades.²²

V. Conclusion

The Chamber commends ACUS for considering how to reform this important law. The PRA, with the necessary changes, can play an important role in eliminating the paperwork burden imposed on businesses. We strongly urge the Committee to pass recommendations that give teeth to the law and instill confidence that commenting on information collections can make a real difference.

Sincerely,

A handwritten signature in black ink, appearing to read "William L. Kovacs". The signature is written in a cursive style with a small dot above the "i" in "Kovacs".

William L. Kovacs

²² See e.g. E.O. 12866 and the Regulatory Flexibility Act, 5. U.S.C. §610.