

TUESDAY, MARCH 31, 2009

The Honorable Barack Obama
President of the United States
The White House
Washington, DC 20500

Dear Mr. President:

We very much appreciate your decision to seek public comment before making major changes to President Clinton's *Executive Order No. 12,866, Regulatory Planning and Review*. This letter conveys the common views of the organizations signing below, representing a significant portion of America's industrial base. Some of us, and some of our members, will be filing separate comments as well. In this joint letter we want to stress that, even when our particular interests in regulatory policies may diverge, all of us—indeed all Americans—have a strong interest in having a federal government that is able to look holistically at the public interest, to coordinate the actions of a broad range of federal departments and agencies, to collect the best information that bears on major public policy decisions, and to weigh the pros and cons of administrative actions in a manner that is transparent and accountable.

At the outset, we are pleased to note that your request for comment recognizes that presidential review and coordination is both legitimate and appropriate. It is impossible to envision the federal government successfully tackling any of the major issues of the day—energy and climate policy, infrastructure investment, job growth, financial restructuring, restoring global trade, health care, etc.—without coordinating multiple actions horizontally across the government and, vertically, across levels of government. The management of such a complex enterprise requires systematic procedures to identify and illuminate the critical policy choices that your Administration will face in the coming years. Only the Executive Office of the President can provide coherence to thousands of annual regulatory actions having disparate and sometimes conflicting objectives with such pervasive effects.

President Clinton's Executive Order 12,866 provides a sound foundation for presidential oversight of rule-making. It incorporates principles and procedures for both regulatory process and decision-making that have become a standard emulated throughout the world. We appreciate your interest in updating it to reflect new developments since 1993, and we respond below to the specific questions raised in your January 30, 2009, memorandum (74 Fed. Reg.5975). Our central message is to urge you to retain the basic structure of presidential regulatory review established by President Clinton, and improve it at the margin to make it more efficient, effective, transparent, and open to meaningful public participation.

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I. THE RELATIONSHIP BETWEEN OIRA AND THE AGENCIES

The starting point for ensuring accountability in administrative actions is Article II of the Constitution, which vests all executive powers of the United States Government in the President. Government agencies must recognize that: all regulatory decisions are made subject to your constitutional authority to “take Care that the Laws be faithfully executed.” OIRA is the logical institution for ensuring oversight and coordination of regulatory actions, just as OMB proper does for legislative proposals, executive orders, and budget resources. In addition to providing a “dispassionate and analytical ‘second opinion’ on agency actions” (74 Fed. Reg. 8819) in all these areas, OIRA performs an essential coordination function, ensuring against duplication and inconsistency across the government. E.O. 12,866 appropriately lays out the respective expertise and responsibilities of executive branch agencies, including OMB's role for coordinating review of agency rulemaking as necessary to ensure, among other things, that regulations are consistent with applicable law and the President's priorities. In addition, Section 4 sets forth the respective roles of OIRA and the agencies in setting priorities. This arrangement has worked well since 1993 and continues to be an appropriate mechanism for you to ensure that regulatory actions are consistent with your policies and priorities.

At the same time, the need for presidential oversight has expanded. Some of the most important regulatory issues today, such as those facing the financial sector, are often not subject to presidential regulatory review. Given the importance of reviewing and coordinating these issues and ensuring their consistency with Presidential priorities, we encourage you to consider what expansion of the E.O. may be appropriate to ensure proper Executive branch oversight. OMB would also need to add appropriate resources and expertise to handle this function.

The \$100 million dollar threshold for economically significant regulatory actions remains appropriate and should be retained. The number of draft regulations that exceed this threshold tends to be relatively constant—92 per year under President Clinton and 94 per year under President Bush.

We also note that, in response to requests from state and local governments, the Environmental Protection Agency recently lowered the threshold (to \$25 million from \$100 million) that it uses to trigger intergovernmental consultation under Executive Order 13,132, *Federalism*. Similarly, you might want to consider setting lower thresholds for analyzing rules affecting particularly sensitive sectors of the economy, while retaining \$100 million as the overall measure of economic significance for rules with widespread impacts.

II. DISCLOSURE AND TRANSPARENCY

We favor transparency in the administrative process. The safeguards that OIRA has in place—established by Executive Order 12,866 and enhanced to take advantage of the Internet—make sense and should be continued.

At the same time we recognize that no branch of government, and especially not the Executive branch, could function effectively if those within the government did not have the ability to confer internally, and speak frankly with each other, out of earshot of those interests that seek to influence them, whether those others are business groups, non-governmental organizations, or other non-Executive branch entities.

This basic principle—that external participation in rulemaking should be transparent, while internal deliberations within the Executive branch are disclosed only when appropriate—needs to be supplemented with another basic principle embodied in the Administrative Procedure Act and elsewhere: that the final rules must be supported by a record that explains the legal and factual basis for administrative decisions, including scientific and technical data.

III. ENCOURAGING PUBLIC PARTICIPATION IN AGENCY REGULATORY PROCESSES

Opportunities for public engagement in the regulatory development process have increased substantially in recent years with the advent of the Internet. We support the e-rulemaking initiative and other efforts to use technology that provide greater transparency and improve the robustness and accountability of the regulatory process.

Public participation also could be greatly improved by modifying the presidential regulatory review process such that agencies conduct the analytical components much earlier in the process. Executive Order 12,866 directs agencies to prepare Regulatory Impact Analyses (RIA) for economically significant rules to inform decision-making, but it directs them to submit these analyses for review at the same time that they submit the related draft rule.

This arrangement compels the OIRA staff to review and synthesize a vastly greater amount of information in the same short period of time— an especially difficult challenge when the draft rule is subject to a statutory or judicial deadline. More importantly, this arrangement allows agencies to wait until a regulatory option has been chosen before performing the very analysis that was supposed to inform decision-making. As a result, RIAs increasingly have become

exercises in defending decisions after they have been made, not informing decision-makers of the reasonable options they have available.

Moving the analytic component earlier in the process would ensure that alternatives of interest to the President and his senior advisors are included in RIAs, and it would help avoid the need for OIRA and other EOP offices to ask during the formal review period that agencies analyze alternatives that they had not previously considered. Early public disclosure of RIAs would also enhance the public's ability to help ensure that diverse perspectives are taken into account during the design and data analysis phases of the RIA process.

IV. THE ROLE OF BENEFIT-COST ANALYSIS

Although there is debate about the value of benefit-cost analysis (BCA), no better framework has been developed that allows decision makers to take account of all of foreseeable consequences, whether intended or unintended, of major policy decisions.

At different times BCA has been used to highlight different aspects of regulatory effects. During the late 1970s, for example, it was used to help avoid aggravating inflation. Today, the BCA framework is still appropriate, but there are particular concerns that should be featured prominently in the analyses. These include the effect of regulations on economic growth, on jobs, on the incentives for capital formation, on barriers to trade, research and innovation, and on U.S. competitiveness in international markets.

While all benefits and costs of regulatory actions will not always be readily quantified or valued, that does not diminish the value of the analysis itself, as Executive Order 12,866 explicitly recognizes:

Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider (§ 1(a)).

Cost-effectiveness analysis can be helpful, such as when the effects of a regulation can be measured on a single dimension (e.g., emission reductions). However, cost-effectiveness analysis is not appropriate for regulations that seek to achieve multiple benefits. For even simple regulations that have multi-dimensional effects, cost-effectiveness analysis yields misleading results. The most consistent basis for comparing options remains a more complete benefit-cost analysis. In cases where it is particularly difficult to quantify benefits (e.g., preventing terrorist attacks), break-even analysis may be the best available tool. Still, it should be understood that each of these tools is less robust than benefit-cost analysis, that benefit-cost analysis should never be discarded when it is feasible to perform.

V. THE ROLE OF DISTRIBUTIONAL CONSIDERATIONS, FAIRNESS, AND CONCERN FOR THE INTERESTS OF FUTURE GENERATIONS

Understanding who bears the benefits and costs of regulations can be as valuable to policy makers as the total cost and benefit estimates. Section 1(a) of Executive Order 12,866 recognizes this:

Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; *distributive impacts*; and *equity*), unless a statute requires another regulatory approach. [Emphasis added.]

It is important to recognize that distributional effects and fairness cannot be evaluated with any confidence outside of the benefit-cost analysis framework. Inequities may be found in the way benefits are distributed, in the particularly regressive incidence of regulatory costs, or in the pattern of employment impacts. The examination of distributional effects and fairness can proceed only after a thorough description of the benefits and costs of a rule is completed.

With respect to future generations, the academic literature is clear: any estimate of the impact of decisions today on citizens of the future must take account of economic growth. If we divert resources from one activity to another, we must ask whether the favored investment will produce a sufficient rate of return to make it worthwhile in the future. The standard language is, unfortunately, misleading: when economists “discount” future streams of benefits and costs, this does not disadvantage future generations. On the contrary, if an analysis fails to discount some category of benefits or costs, then it encourages decisions that produce a lower rate of return in the future than alternative investments would have produced. The interests of future generations are best protected when realistic discount rates are applied consistently to all foreseeable benefits and costs.

VI. METHODS OF ENSURING THAT REGULATORY REVIEW DOES NOT PRODUCE UNDUE DELAY

Executive Order 12,866 allows for a 90-day review. Over the past 16 years, OIRA’s average review time has been less than 60 days—well within the prescribed time period. In many cases, the failure of regulatory agencies to meet their own internal deadlines, such as for providing draft rules for interagency review, creates the impression that OIRA is responsible for unreasonable delay. Any proposed solution to the alleged problem of delay should focus on the timeliness with which both agencies and OMB fulfill their responsibilities. Proposed solutions should also not create incentives to truncate interagency review by not providing adequate time for OMB’s review—a problem that has long been manifest in cases where agencies have statutory or judicial deadlines.

Important decisions should be elevated early in the regulatory development process to ensure that different affected agencies with expertise and possibly alternative views have adequate time to understand the issues and work together to address any potential conflicts. This will

reduce the possibility of delays due to controversies that could be left to the last minute.

Statutory and judicial deadlines, especially on difficult and complex regulatory issues, can place enormous strain and pressure on the regulatory review process. Hard and fast deadlines, as well as hard and fast rules on when information can be shared within the government, create undesirable incentives both for effective presidential regulatory review and for effective intra-agency review. Nothing can replace mature and cooperative relationships among agency personnel that are respectful of everyone's role in the process. Establishing hard and fast rules undermines rather than facilitates the cooperation necessary to make interagency review effective.

VII. THE ROLE OF BEHAVIORAL SCIENCES IN FORMULATING REGULATORY POLICY

Developments in behavioral science since the issuance of Executive Order 12,866 in 1993 hold great promise for improving regulatory policy. The award of the 2001 Nobel Prize in economics to Daniel Kahneman and Vernon Smith for the development of behavioral and experimental economics recognized the importance of this field of study. Appreciating how rules and circumstances influence behavior can help in the design of incentives that achieve policy goals more effectively than traditional approaches, which often have unintended results. Designing policy with behavioral responses in mind (setting appropriate defaults, structuring complex choices, providing feedback) can preserve choice while encouraging responsible behavior. Policies should also consider the behavior of the regulated community, the vast majority of which acts responsibly, and works cooperatively with government.

Experimental economics has demonstrated that it has the capacity to “bench-test” policies to see if they will work as intended. Rather than testing important policies out through trial and error in the real world, where the consequences of misjudgments can be irreversible, agencies should be encouraged to test different structural and institutional approaches using these experimental economics methods.

VIII. THE BEST TOOLS FOR ACHIEVING PUBLIC GOALS THROUGH THE REGULATORY PROCESS

As noted above, understanding incentives provided by different regulatory approaches and the likely behavioral responses to them can improve regulatory outcomes. It is important to recognize that federal regulation must operate in the context of a market economy, international frameworks, state and local actions, etc.

The “principles of regulation” enumerated in Section 1(b) of Executive Order 12,866 recognize the importance of identifying the problem to be addressed and examining alternatives in order to devise the best regulatory tools for different circumstances. These principles recommend basing decisions on the “best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.” They also warn agencies to avoid duplicative, incompatible or inconsistent regulations.

A revised order could be more explicit in requiring agencies to understand the consequences of default actions (explicit or implicit), and develop flexible regulatory frameworks that facilitate responsible choices that best meet diverse needs. It could encourage the use of regulatory tools that permit regulators and regulated parties to receive feedback, measure results, and evaluate outcomes, and to modify approaches in response to this information.

IX. REVIEW OF GUIDANCE DOCUMENTS

Based on long experience, the regulated community believes that guidance documents can be very significant. We recognize that guidance generally is beneficial and, indeed, often essential for the smooth and fair operation of regulatory programs by providing direction to agency staff and the public. Interagency review of guidance documents would increase transparency and accountability; improve coordination within and across agencies and with presidential priorities; and help avoid “regulation by guidance.”

The D.C. Circuit in *Appalachian Power* explained the “regulation by guidance” problem:

The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in regulations. One guidance document may yield another and then another and so on.... Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.ⁱ

In recent years, OIRA has learned of many examples of problematic guidance and agency practices as a result of its 2002 request for comments,ⁱⁱ its 2004 request for regulatory reform nominations,ⁱⁱⁱ and the public comments on its proposed Bulletin for Agency Good Guidance Practices.^{iv} To operate effectively, the Executive Branch must have ground rules to clarify the activity of various agencies on important guidance documents as well as the responsibilities of OIRA and the agencies. Moreover, OIRA’s role in presidential regulatory review ultimately necessitates the review of some guidance documents. Absent interagency review, the problem observed by the D.C. Circuit in *Appalachian Power* could take root throughout the federal government.

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- i. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000) (striking down emissions monitoring guidance as a spurious rule requiring notice and comment through legislative rulemaking procedures).
 - ii. http://www.whitehouse.gov/omb/assets/omb/inforeg/summaries_nominations_final.pdf
 - iii. http://www.whitehouse.gov/omb/inforeg/2004_cb/list_2004cb.aspx
 - iv. http://www.whitehouse.gov/omb/inforeg/good_guid/c-default.aspx
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X. CONCLUSION

The American economy is in crisis, and a sensible, accountable approach to regulation is important now more than ever. Responding successfully to the important issues facing America today depends on coordinating multiple actions not only across the Executive branch but across levels of government. You should require and enforce adherence to systematic procedures to identify and inform the critical policy choices that your Administration will make in the coming years. Only the Executive Office of the President can provide coherence to a federal government whose regulatory actions pursue so many disparate objectives and have such a pervasive effect, and OIRA is the best place within EOP to accomplish this task.

Executive Order 12,866 has generally worked well for the past 16 years, and it represents an incremental advance over the review procedures used for the 20 years before that. It provides both the procedural mechanisms and the policy guidelines needed for a robust, transparent, and accountable regulatory system. Its principles and procedures for regulatory action have become a standard emulated throughout the world. Much has been learned since 1993, and it is appropriate to apply those lessons to make targeted changes in the process that improve its efficiency, effectiveness, and transparency that ensure and meaningful opportunities for public participation.

While wholesale revisions to the Order are neither necessary nor appropriate, we appreciate your willingness to evaluate revisions that take advantage of experience and new insights. We hope these comments aid in your evaluation.

XI. SIGNATORIES – MARCH 31ST

ADHESIVE AND SEALANT COUNCIL
ALUMINUM ASSOCIATION
AMERICAN COKE & COAL CHEMICALS INSTITUTE
AMERICAN COMPOSITES MANUFACTURERS
ASSOCIATION
AMERICAN COUNCIL OF ENGINEERING COMPANIES
AMERICAN FARM BUREAU FEDERATION
AMERICAN FOREST & PAPER ASSOCIATION
AMERICAN IRON AND STEEL INSTITUTE
AMERICAN LEGISLATIVE EXCHANGE COUNCIL
AMERICAN LIGHTING ASSOCIATION
AMERICAN PETROLEUM INSTITUTE
AMERICAN PSYCHIATRIC ASSOCIATION
AMERICAN PUBLIC POWER ASSOCIATION
ASSOCIATION OF HOME APPLIANCE
MANUFACTURERS
ASSOCIATION OF MANUFACTURING TECHNOLOGIES
BRICK INDUSTRY ASSOCIATION
COMPOSITE CAN & TUBE INSTITUTE
CONSTRUCTION INDUSTRY ROUND TABLE
COUNCIL OF INDUSTRIAL BOILER OWNERS
DISTILLED SPIRITS COUNCIL OF THE UNITED STATES
EDISON ELECTRIC INSTITUTE
GLASS PACKAGING INSTITUTE
INDUSTRIAL ENERGY CONSUMERS OF AMERICA
INDUSTRIAL MINERALS ASSOCIATION - NORTH
AMERICA
INDUSTRIAL PACKAGING ALLIANCE OF NORTH
AMERICA
INTERNATIONAL DAIRY FOODS ASSOCIATION
INTERNATIONAL SIGN ASSOCIATION

IPC-ASSOCIATION CONNECTING ELECTRONICS
INDUSTRIES
METAL POWER INDUSTRIES FEDERATION
MINORITY BUSINESS ROUNDTABLE
NATIONAL ASSOCIATION OF MANUFACTURERS
NATIONAL ASSOCIATION OF WHOLESALER-
DISTRIBUTORS
NATIONAL COUNCIL FOR ADVANCED
MANUFACTURING
NATIONAL INDUSTRIAL SAND ASSOCIATION
NATIONAL MARINE MANUFACTURERS
ASSOCIATION
NATIONAL MINING ASSOCIATION
NATIONAL OILSEED PROCESSORS ASSOCIATION
NATIONAL PAINT AND COATINGS ASSOCIATION
NATIONAL PETROCHEMICAL & REFINERS
ASSOCIATION
NATIONAL STONE, SAND & GRAVEL ASSOCIATION
NON-FERROUS FOUNDERS' SOCIETY
PERSONAL WATERCRAFT INDUSTRY ASSOCIATION
PRINTING INDUSTRIES OF AMERICA
REGULATORY IMPROVEMENT COUNCIL
SALT INSTITUTE
SULFUR INSTITUTE
TECHAMERICA
UNITED STATES TELECOM ASSOCIATION
US CHAMBER OF COMMERCE
UTILITY AIR REGULATORY GROUP
UTILITY SOLID WASTE ACTIVITIES GROUP
UTILITY WATER ACT GROUP

XII. CONTACT INFORMATION

Wayne H. Valis
Executive Director
The Regulatory Improvement Council (RIC)
1101 17th St., Suite 608
Washington, DC 20036
Ph: 202-393-5055
Fax: 202-393-0120
wvalis@wvalisllc.com

COPY

Peter Orszag
Director
U.S. Office of Management and Budget
Executive Office of the President
The White House
Washington, DC 20500

Kevin F. Neyland
Acting Administrator
Office of Information and Regulatory Affairs
U.S. Office of Management and Budget
The White House
Washington, DC 20500
oira_submission@omb.eop.gov
Fax: 202-395-7245