



Before the  
Office of Management and Budget

Request for Comments  
Federal Regulatory Review

Comments of  
Associated Builders and Contractors, Inc.

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Associated Builders and Contractors, Inc. (ABC) submits the following comments in response to the above-referenced request for comments that was published by the Office of Management and Budget (OMB) in the *Federal Register* of February 26, 2009 (74 Fed. Reg. 8819).

Pursuant to the notice, OMB has solicited public input on “the principles and procedures governing regulatory review,” *id.*, concerning the specific role that OMB’s Office of Information and Regulatory Affairs (OIRA) should play in reviewing federal regulations; the review process that OIRA should use; and how the current process can be improved. The notice has enumerated eight particular issues on which the public’s comments have been solicited.

ABC commends OMB for the opportunity to submit public comment. We recognize that “[e]xecutive orders are not subject to notice and comments procedures, and as a general rule, public comment is not formally sought before they are issued.” *Id.* At the same time, the White House has expressly recognized that the federal rulemaking is a critical component and tool of

government. As the White House Chief of Staff stated in his January 30, 2009 memorandum (White House Memorandum) to the heads of the Executive departments and agencies, “regulations are critical to protecting public health, safety, our shared resources, and our economic opportunities and security.”

ABC agrees with the White House’s assessment of the crucial importance of the regulatory process. For the vast majority of the public, rulemakings provide the only functional opportunity to provide input into and influence government decisions. This is true whether members of the public participate individually, or in concert through a trade association or other organizational entity. Small businesses in particular rely heavily upon industry organizations as the conduit through which to express their opinions and concerns regarding proposed regulatory actions. Small businesses represent the heart and soul of the “Main Street” that the President has publicly stated he wants to protect; therefore, the Administration, and OMB in particular, should ensure that small business input on regulatory proposals continues to be heard and meaningfully considered before final action on a proposed rule is taken.

Success in achieving regulatory goals and objectives is directly tied to the public’s ability to participate fully in the government’s rulemaking activities. The less support and backing that a government program has from the public, the less likely a program will succeed. A key toward ensuring success is for the government to obtain the public’s input and refine proposed rules based on the feedback given. An equally important key to regulatory success is the opportunity for OIRA to provide a “dispassionate and analytical ‘second opinion’” to which the January 30, 2009 White House Memorandum referred. Unlike the agency and departmental staff assigned to steward regulations through their development and finalization, OIRA’s regulatory review process provides the benefit and clear opportunity to evaluate regulatory benefits and consequences from the broad, so-called, “30,000-foot” perspective. OIRA’s continued

involvement in the regulatory process will help to ensure that, in attempting to solve one problem, an agency or department does not merely replace it with another of equal or even greater scope; *i.e.*, by avoiding the “two-steps forward and three-steps—or even one step—backwards.”

The due process and other requirements imposed on government departments and agencies by the Administrative Procedure Act (APA) and the Regulatory Flexibility Act as amended by the Small Business Regulatory Fairness Act (Reg Flex Act), as well as a number of other statutory provisions, were enacted with goals of ensuring not only that the public has the right to participate and submit comments, but also that the public’s comments and supporting or opposing to regulatory actions being proposed receive the full and fair consideration to which they are entitled. OIRA’s oversight has played an essential role in ensuring that the statutory goals of the APA, *et cetera*, have been met and that role should be continued and safeguarded by the President’s pending Executive Order on Federal Regulatory Review (Regulatory EO).

**I. ABOUT ASSOCIATED BUILDERS AND CONTRACTORS, INC.:** Associated Builders and Contractors, Inc. (ABC) is a national construction industry trade association representing 25,000 individual employers in the commercial and industrial construction industry, in 79 chapters across the United States. The majority of ABC’s diverse membership is comprised of “merit shop” companies, who strongly believe in the principal of full and open competition where construction contracts are awarded to the lowest responsible bidder through competitive bidding, without regard to labor affiliation. This philosophy helps to ensure that taxpayers and consumers alike receive the most for their tax and construction dollar.

ABC represents both general contractors and subcontractors throughout the United States. The vast majority of these companies are classified as small businesses by the Small Business Administration. Conservatively, ABC’s members employ more than 2.5 million skilled

construction workers, whose training, skills and experience span all of the twenty-plus skilled trades that comprise the construction industry.

ABC's members depend heavily upon our association to coordinate and communicate their positions, concerns and recommendations to federal departments and agencies on proposed regulations. Consequently, ABC actively engages in the "notice and comment" process when proposed rulemakings affect our members, directly or indirectly. During 2008, for example, ABC filed comments and provided recommendations in response to 18 proposed rulemakings and testified in five regulatory hearings on behalf of our members. So far this year, we have submitted comments in response to three regulatory proposals, and we expect to be involved in a significant number of other rulemaking proceedings before the year ends.

## **II. ABC'S COMMENTS AND RECOMMENDATIONS WITH RESPECT TO THE EIGHT ISSUES**

### **RAISED IN THE NOTICE:**

1. **The relationship between OIRA and the agencies.** The comments submitted to OMB by the Center for Regulatory Effectiveness (CRE) discuss the extensive regulatory activity in which "independent agencies" identified in 44 U.S.C. § 3502(5) routinely engage, and has therefore recommended that the President's pending Regulatory EO apply to "the significant regulations of 'independent' agencies in the regulatory review process." ABC agrees fully with CRE's recommendation to include § 3502(5) independent agencies under the scope of the pending Executive Order on Federal Regulatory Review, and also with CRE's recommendation to make the review applicable to the significant regulations of independent agencies.

OIRA's role in providing a "second opinion" on regulations being propounded by an independent agency can be especially beneficial when it comes to evaluating the economic costs that a proposed rule will impose not only on small businesses, as required by the Regulatory Flexibility Act, but on the economy in general. OIRA's review can help to maintain consistency

within the Administration's priorities. It also ensures that a department or agency gives full and objective consideration to reasonable alternatives recommended by industry to the regulation as proposed. Such alternatives might well achieve particular regulatory goals, without unnecessarily imposing undue cost on the affected industry.

For the same reason, ABC recommends that the Regulatory EO extend OIRA's responsibilities to include review of significant guidances, policy statements and similar interpretative documents issued by departments and agencies. These documents not only have significant, but often unanticipated, economic impacts on the affected regulated community, and the economy as a whole. It is also well known that departments and agencies have, from time to time, issued guidance or similar interpretive documents with the intent of circumventing the rulemaking process, which alone justifies OIRA's oversight. This practice aside, the mere fact that such documents can be issued without being subjected to an objective evaluation of how the guidance might adversely impact the government's achievement of other priorities argues strongly for the need to make at least some of these documents subject to OIRA's second opinion prior to their issuance.

2. **Disclosure and transparency.** The Administration has emphasized, most notably in statements regarding our current economic crisis, the need for transparency as a way to open government and provide enhanced public scrutiny. For example, in remarks made at the White House on January 21, 2009, President Obama referred to the "beginning of a new era of openness in our country." The President has also emphasized his administration's dedication to implementing a new standard of accountability, stating: "Transparency and the rule of law will be the touchstones of this presidency." It follows that the Administration intends to make regulatory transparency a high priority as well going forward.

The tools utilized by OMB and the various departments and agencies intended to provide public access to regulatory information have improved a great deal in recent years. Notably, the launch of the web-based *Federal Register*, and two online databases, Regulations.gov and RegInfo.gov, have made tracking and participating in rulemakings easier than ever; however, there is still much room for improvement.

The comments submitted to OMB by OMB Watch presented five specific transparency measures that we believe should be incorporated into the pending Regulatory EO. These measures call for improving existing information disclosure procedures for internal and external government communication; providing to the public any and all studies, research and other data used to inform regulatory decisions or submitted/cited as support to rulemaking alternatives; and upgrading and enhancing online resources with the objective of making them more user-friendly. ABC strongly supports, and incorporates by reference, the recommendations contained in the “Transparency in Rulemaking” section of OMB Watch’s comments.

In addition, ABC believes that improved access to information and the ability to review materials and resources in a convenient, timely fashion will facilitate greater and more informed public participation in the rulemaking process, without resulting in additional undue delay. The Administration should work at a more seamless interplay between Regulations.gov and RegInfo.gov, integrating these resources into more of a “one stop shop,” where stakeholders can determine a rulemakings status (regardless of the stage in the process) and search and/or review any supporting materials and external/internal government correspondence. The bottom line is that the public should be able to go to one online resource to access this information quickly and easily. Currently this information is located in several places, each with different search capabilities. Improving the manner in which information is provided to regulatory stakeholders,

and the public in general, would not only ensure that it is useful, it would also be a much more efficient use of government resources.

Transparency is also needed with regard to the participation regulatory department and/or agency staff in non-governmental, voluntary standards-making bodies, such as the American National Standards Institute (ANSI). These entities exist to develop consensus standards dealing with a variety of topics of interest to the government, such as safety and health standards. The government's participation in such activities and organizations is clearly appropriate when limited to an advisory role. However, there have been instances in which a government employee has voted on the standard(s) being considered. ABC believes this is highly inappropriate, especially where the resulting standard could later be cited by an agency such as OSHA for purposes of a citation issued under OSHA's General Duty Clause. The pending Regulatory EO should address this issue and clarify that government activity in such organizations should be confined to observer status or, at most, to an advisory role. Regulators should not be permitted to actively assist in the development of non-regulatory standards, even when they claim that their participation is occurring in an unofficial capacity.

3. **Encouraging public participation in agency regulatory processes.** ABC fully supports the Administration's encouragement of public participation in the regulatory process. While it has not occurred as a matter of routine or procedure, past administrations have frequently sought to stimulate greater public participation and obtain direct feedback by conducting outreach hearings around the country on certain proposed regulations. Such hearings give interested members of the public—especially small business owners—the opportunity to present their views, interact with government representatives and provide them with a greater and more comprehensive understanding of how a particular industry or economic sector operates. In addition, the public can obtain details regarding a proposed regulation directly from

the regulating department or agency, without the need to travel to Washington or, in many cases, the need to go through the complex and arduous process of drafting effective written comments.

In addition to outreach hearings, OMB should not overlook the significant role that trade associations, industry groups, and similar organizations play in ensuring that federal departments and agencies receive the highest possible level of public participation in the regulatory process. As we noted in our introductory remarks, the business community relies heavily on trade associations such as ABC to express and disseminate their views on proposed regulations. Significant numbers of non-business individuals similarly rely on membership and professional organizations to convey their respective views to the government in lieu of submitting individual comments. Examples of the latter include the members of American Association of Retired Persons (AARP), labor union members, and professional organizations such as the American Bar Association (ABA) and American Medical Association (AMA)..

When organizations like these submit rulemaking comments, they will routinely provide a narrative description of the organization, including the number of individuals and/or companies on whose behalf the comments are being submitted. This is done with the expectation that an appropriate amount of weight will be given to their comments. It has been ABC's experience, however, that federal departments and agencies often ignore such demographic information and treat it merely as boilerplate. When this occurs, no differentiation is made between comments submitted on behalf of thousands of companies (and in some cases the millions of individuals they employ) and the comments submitted by a single individual. While the occurrence of this is by no means systemic, it nonetheless does occur. OIRA's oversight will help prevent this and ensure not only that departments and agencies are consistently giving the economic cost concerns that a trade (or other) association may raise about a proposed rule's impact on its members fair and impartial consideration to which they are entitled, but also that a proposed



rule's impact on the economy overall will be considered before the final rule is published. This "dispassionate and analytical 'second opinion,'" as it was described in the January 30 White House Memorandum, will help ensure that the stated goals of ensuring consistency with presidential priorities such as economic recovery and the coordination of regulatory policy will indeed be met.

4. **The role of cost-benefit analysis.** Cost-benefit analysis is a critical component of the regulatory review process. There is a clear need for its continuation and for the recognition of its importance in the pending Regulatory EO. It is hard to imagine how the equally important goals articulated in the January 30 White House Memorandum—protecting public health, safety, our shared resources, and our economic opportunities and security—could be achieved without thoughtful consideration of a proposed regulation's costs and benefits. Moreover, the consideration of cost-benefit is important throughout the regulatory process. OIRA's input on projected cost-benefit at both the proposed and final stages of a rulemaking would be especially useful not only to facilitate the coordination of regulatory policy, but also to avoid unnecessary delay in the regulatory process that could be triggered by agency or department actions during the rulemaking. An example would be when OIRA determines that a cost-benefit analysis was conducted using flawed assumptions, or failed to consider the indirect or distributional impacts that the proposed or final rule would have on the economy and on future generations.

As we previously observed, OIRA's regulatory review enables proposed and final regulations to be evaluated from the 30,000-foot perspective. In many cases, having and exercising this ability is the only way to ensure that unnecessary and/or unreasonable costs are not imposed. OIRA review also ensures that more efficient alternatives—potentially as effective

in achieving the proposed regulation's objectives—are not ignored or summarily rejected by the proposing department or agency.

ABC believes the importance of cost-benefit analysis should be emphasized in the pending Regulatory EO. In spite of statutory requirements such as the Regulatory Flexibility Act, agencies and departments have on occasion conducted their analysis as a perfunctory exercise designed to justify the regulatory approach that the department or agency intends to adopt. Cost-benefit analysis is not often treated as an objective, scientific analysis of the application of the proposed regulation by and within the regulated industry, community, or economic sector. A classic example of this is the Department of Transportation's (DOT) Notice of Proposed Rulemaking, Minimum Training Requirements For Entry-Level Commercial Motor Vehicle Operators, 73 Fed. Reg. 73226 (April 9, 2008). In order to quantify the proposed rule's benefits, DOT asserted that the rule's costs would be offset *if* there are at least 19.1 fewer fatal crashes and 507.2 fewer non-fatal crashes. 73 Fed. Reg. at 73239. The use by regulators of such methodologies to calculate costs and benefits negates the need for regulators to put forth any supporting data and the cost of virtually any proposed rule could easily be offset, rendering the cost-benefit analysis essentially meaningless.

Although the foregoing example may be the extreme, in a number of cases, department and agency staff charged with the responsibility of writing regulations have little, if any, firsthand experience or practical understanding of the entities or industries they regulate and, in particular, the complexity of that industry. Consequently, but unnecessarily, proposed regulations with well-intentioned goals—with which the regulated industries or entities might actually agree—end up challenged in court, simply because the department or agency staff lacked sufficient understanding about how the industry operates. This, in turn undermines the government's ability to appreciate the legitimate merits of the cost concerns the regulated

industries or entities raise in their comments. More effective consideration of a proposed rule's costs and benefits, as well as meaningful, timely consideration of alternative approaches, would be highly beneficial. This would help the government avoid needless litigation costs and delays simply due to an insufficient cost-benefit analysis, or the lack of OIRA's one last "dispassionate and analytical 'second opinion.'"

One further point also deserves mentioning on the topic of cost-benefit analysis. The Small Business Administration's Office of Advocacy has played a critically important role in the evaluation of the cost impacts of proposed rules on small businesses. ABC urges the pending Regulatory EO recognize the Office of Advocacy and reaffirm the vital role it continues to play.

5. **The role of distributional considerations, fairness, and concern for the interests of future generations.** ABC believes that the rulemaking process, including its regulatory review by OIRA, should consider the indirect costs that a proposed rule may have on the economy, including its cost implications on future generations. This is where the government's consideration of alternative approaches to that being proposed by the department or agency becomes especially important. It is unfortunate that department or agency staff will often misconstrue comments filed by a stakeholder opposing one or more aspects or provisions of a proposed rule and wrongly interpret that the stakeholder—or the industry as a whole—is opposed to a particular regulatory objective. While it is true that stakeholders do not always agree that the need for a particular regulation has been demonstrated, it is also true that a stakeholder's opposition is often directed at the means by which an agency or department seeks to regulate, rather than the proposed regulation's stated goal(s). Here again is another reason why regulatory staff in general need to have a better understanding about the industries they regulate. All too often, regulators paint employer stakeholders with a broad brush solely because

of the actions of a small number of bad actors. Aside from the unfairness of this, it also makes for bad and costly regulatory decisions.

Another aspect of regulatory “unfairness” that is often overlooked—but should nevertheless be taken into account by the authors of the pending Regulatory EO—arises from two general notions that exist among many federal regulators of business. First is the assumption that if something goes wrong it must be the employer’s fault, never that of the employee. Second, that the prescription for a given problem is more employee training. Not only are both assumptions incorrect, they are a major reason why regulatory obligations are constantly being imposed on employers without regard to whether the requirements imposed by the regulation (or more accurately, an employer’s *compliance* with the regulation) will—or can—eliminate the problem. This is not to argue that employers not be faulted in many cases, or that employee training is never beneficial. However, if President Obama does indeed want the change how things are done in Washington, would it not be better to end the practices of summarily assigning blame to employers and imposing additional regulatory burdens on them? The latter may play well from a political standpoint, but shouldn’t we instead aim at fixing the problem?

Using an earlier example, the driver shortage periodically experienced by the trucking industry may well be due to the shortage of workers in general; however, it may also be attributable to working conditions, or how drivers are treated by some companies. The government’s failure to identify the root cause of the problem, not its manifestation, before initiating regulatory action is a major contributor to this. The government must have more and better data upfront and a better understanding of that data. Regulatory actions should not be based primarily on supposition, anecdote, or the personal bias of the regulators or Congress.

Injuries that occur on construction sites may be the fault of a particular employer, but injuries may also be due to the fact that some employees simply do not always wear or appropriately use their equipment, regardless of the amount of training they received from their employer. Further complicating compliance is the fact that regulations often restrict the ability of employers to achieve greater compliance by imposing limits on ability of employers to discipline non-compliant employees. A good example of this are the personal protective equipment regulations adopted by OSHA in 2008, which limit an employer's ability to discipline employees who continuously lose or damage their equipment, by placing a cap on the dollar amount of the discipline imposed based on the value of the piece of equipment that was lost or damaged.

The only way that our country is going to be able to successfully and efficiently solve problems is to first identify root causes. Regulatory agencies and departments need to do a much better job at identifying root causes than many have been doing up to now. OIRA's involvement and oversight in the regulatory process will be of significant benefit in this regard.

6. **Methods of ensuring that regulatory review does not produce undue delay.** ABC believes that a major cause of delays in the regulatory process is due to many of the issues discussed above, not because of OIRA's involvement in regulatory review. Specifically, delay results from the failure of an agency or department to carry out its regulatory responsibilities fully, competently, and objectively in the first place. The more information an agency or department has before it initiates a rulemaking, the better regulations are in terms of quality and completeness. The greater knowledge and practical understanding that regulators have about how an industry operates (including an understanding that not every company operates the same way, or can afford to operate the same way), the less likely that undue delay

will occur. It is also likely that this would lessen the need for industry to disagree with the provisions of many proposed regulations.

7. **The role of the behavioral sciences in formulating regulatory policy.** ABC believes that the behavioral sciences play a significant role in regulatory compliance and should therefore play a significant role in formulating regulatory policy. Although it seems to be perceived as such by many federal regulators, compliance is not simply a black-and-white issue. In formulating policy, agencies and departments need to take into account that there are simply too few resources available to be able to place a regulatory “cop” at each and every venue it is responsible for regulating. Therefore, compliance success is, to a great degree, dependent on what can best be described as *voluntary compliance*. Although penalties for non-compliance play a role, and can be an important component, it is to everyone’s benefit that regulatory policy include both carrots and sticks. Indeed, in many cases regulatory policies and programs that lean heavily on enforcement to obtain compliance can easily take away any incentive an employer might have to exceed the baseline set by the regulation. If anything, the Administration should be looking at finding ways to encourage employers to take the initiative and go the extra mile.

8. **The best tools for achieving public goals through the regulatory process.** Here again, the behavioral sciences come into play. As it currently stands, the vast majority of rulemakings tend to be adversarial. In order for the regulatory process to be more capable of achieving public goals, regulators need to approach issues through a process aimed at stimulating greater cooperation and dialogue between the regulators and the regulated community. This is not to say, or even suggest, that regulators should routinely invite all of the interest groups to sit down at the same time to discuss the issues. Clearly that will not work in every case, especially at the outset of the process. However, regulators could benefit significantly from sitting down separately with the various interest groups, with the goal of gaining better understanding of how

regulated entities within that interest group operate and their concerns and any recommendations that they may have. Currently, however, many agencies and department perceive that the prohibition against engraining in *ex parte* communications prohibits this from happening. ABC disagrees with that conclusion. The pending Regulatory EO could easily address this but it should also make clear the critical need for regulatory staff to be objective and open minded during such discussions so the regulatory process can more work more effectively and efficiently.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. Hirsch", written in a cursive style.

Robert A. Hirsch  
Director, Legal and Regulatory Affairs  
Associated Builders & Contractors, Inc.  
4250 North Fairfax Drive, 9<sup>th</sup> Floor  
Arlington, VA 22203