



March 16, 2009

(Via Email: oir_submission@omb.eop.gov)

Attn: Mabel Echols
Office of Information and Regulatory Affairs
Records Management Center
Office of Management and Budget
Room 10102, NEOB
725 17th Street, NW
Washington, DC 20503

RE: Federal Regulatory Review

Dear Ms. Echols:

The American Forest & Paper Association is the national trade association of the forest products industry, representing pulp, paper, packaging and wood products manufacturers, and forest landowners. Our companies make products essential for everyday life from renewable and recyclable resources that sustain the environment. The forest products industry accounts for approximately 6 percent of the total U.S. manufacturing GDP, putting it on par with the automotive and plastics industries. Industry companies produce \$200 billion in products annually and employ more than 1 million people earning \$54 billion in annual payroll. The industry is among the top 10 manufacturing sector employers in 48 states.

We appreciate the opportunity to participate in the dialogue to develop a set of recommendations to the President for a new Executive order on federal regulatory review. We join the broad and diverse community that recognizes the importance of our government – and particularly our President – having a broad perspective on how to maximize the well-being of our nation. We submit that presidential review of agency rulemaking has never been more important than today.

Presidential Regulatory Review Using Benefit-Cost Principles

The scope and complexity of regulation and our many national goals have made it a central task of our government to choose wisely among various courses of action to pursue one or more of these sometimes competing goals.¹ To compound the challenge, Congress often legislates general goals and leaves the agencies with the

¹ See Administrative Conference of the United States, Recommendation 88-9, 54 Fed. Reg. 5287 (Feb. 2, 1989).

task of filling in the details of regulatory programs, a process which requires further balancing of competing priorities.² Accordingly, it is imperative that the President have an effective mechanism for interagency review of rules to coordinate regulatory decisions from a broad, societal perspective. While he may rely upon his staff at OIRA and elsewhere³ for assistance, ultimately, that broader perspective is the province of the President, who represents the entire nation.

At a time when our country has ambitious aspirations regarding renewable energy, climate change, environmental quality, health care, education, and many other issues, we are faced with an unprecedented economic crisis. In our case, the forest products industry has lost 15 percent of our workforce – 190,000 jobs – in the past three years. These jobs are critical for the survival of the rural communities where our facilities often are located.

It therefore is essential that the consideration of regulatory policies be guided by thoughtful analysis that can reconcile the tradeoffs, and that regulations be carefully calibrated to achieve their goals in the most efficient and effective manner possible. Benefit-cost analysis can reveal the most promising alternatives to achieve statutory goals. In the Clinton Administration's first Report to Congress on the Costs and Benefits of Federal Regulation, OMB concluded:

[R]egulations (like other instruments of government policy) have enormous potential for both good and harm. Well-chosen and carefully crafted regulations can protect consumers from dangerous products and ensure they have information to make informed choices. Such regulations can limit pollution, increase worker safety, discourage unfair business practices, and contribute in many other ways to a safer, healthier, more productive, and more equitable society. Excessive or poorly designed regulations, by contrast, can cause confusion and delay, give rise to unreasonable compliance costs in the form of capital investments, labor and on-going paperwork, retard innovation, reduce productivity, and accidentally distort private incentives.

The only way we know how to distinguish between the regulations that do good and those that cause harm is through careful assessment and evaluation of their benefits and costs. Such analysis can also often be used to redesign harmful regulations so they produce more good than harm and redesign good regulations so they produce even more net benefits.⁴

² Id.

³ We also support the role played in the regulatory review process by the Small Business Administration's Office of Advocacy (as was recognized in Executive Order 13272), as well as the Department of Commerce Office of Manufacturing and Services.

⁴ OMB, Office of Information and Regulatory Affairs, Report to Congress on the Costs and Benefits of Federal Regulation (Sept. 30, 1997), at 10.

The need for these insights is greater than ever. Thus, we recommend that the President continue the principles of regulation and the procedures embodied in Executive Order 12866.

Review of Guidance Documents

We further recommend that the Administration clearly include significant guidance documents within the scope of OIRA's review authority, as was done under Executive Order 13422, and continue the OMB Bulletin for Agency Good Guidance Practices. Based on long experience, many in the regulated community know 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. Yet, we submit there is a need for interagency review of guidance documents to address the need for:

- transparency and accountability;
- coordination within and across agencies and with presidential priorities; and
- avoidance of "regulation by guidance."

As the D.C. Circuit 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.⁴

In recent years, OMB has been informed of many examples of problematic guidance and agency practices stemming from its 2002 request for comments on problematic guidance,⁵ its 2004 request for regulatory reform nominations,⁶ and the public comments on its proposed Bulletin for Agency Good Guidance Practices.⁷

⁴ Appalachian Power Co. v. EPA, 208 F.3d 1015, 1019 (D.C. Cir. 2000) (striking down emissions monitoring guidance as a spurious rule requiring notice and comment through legislative rulemaking procedures).

⁵ http://www.whitehouse.gov/omb/assets/omb/inforeg/summaries_nominations_final.pdf

⁶ http://www.whitehouse.gov/omb/inforeg/2004_cb/list_2004cb.aspx

⁷ http://www.whitehouse.gov/omb/inforeg/good_guid/c-default.aspx

We believe that it would be useful for the Executive Branch to have ground rules to clarify the activity of various agencies on important guidance documents⁸ as well as the responsibilities of OIRA and the agencies. Moreover, ensuring the benefits of interagency review of regulations ultimately necessitates review of guidance documents. Otherwise, the problem observed by the D.C. Circuit in Appalachian Power could take root in the regulatory review process. A regulation might be followed by important guidance documents explaining or expanding its commands in a way that would have raised concerns in the interagency review process had those details appeared in the regulation from the start.

Review of Independent Agencies

While to date Presidents have, for the most part,⁹ refrained from applying their regulatory oversight executive orders to independent agencies, we submit that presidential review should apply generally to the rules of independent agencies. This position was adopted by the Administrative Conference of the United States in 1989, and it also has been the longstanding policy of the American Bar Association.¹⁰ Just as in the case of executive agencies, presidential review of the rules of independent agencies can improve coordination and resolve conflicts among agency rules, as well as facilitate implementation of national priorities.¹¹

With the exception of certain functions of particular agencies and certain categories of rules, the need for presidential review of rulemaking is just as great for the independent agencies as for executive agencies.¹² Indeed, much of the policymaking of independent agencies is not functionally distinct from the executive agencies.¹³ As our nation faces an extraordinary economic crisis, the President's interest in coordinating the activity of the independent agencies, which have a major impact on our economy, has never been greater.

⁸ Guidance documents include interpretive rules and policy statements. While much attention has properly been paid to "spurious rules" (policy statements that are binding and therefore violate the notice and comment requirements of the Administrative Procedure Act), lawful non-binding policy statements and interpretive rules also merit interagency review and the procedures in the OMB Bulletin for Agency Good Guidance Practices.

⁹ But see Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking" (applying to independent regulatory agencies as well as Cabinet Departments and agencies).

¹⁰ ACUS Rec. 88-9, *supra*, note 1 ("presidential review should apply generally to all federal rulemaking, including that by independent regulatory agencies"); American Bar Association, Section of Administrative Law and Regulatory Practice, Report to the House of Delegates (Aug. 1990) (same).

¹¹ See ACUS Rec. 88-9, *supra*, note 1.

¹² See id.

¹³ Id.

Resources

We recognize that for OIRA to successfully carry out these recommendations, it will need adequate funding. When OIRA was created in fiscal year 1981, it had a full-time equivalent (“FTE”) ceiling of about 90 staff. Since then, OIRA staffing FTEs declined to about 50. At the same time, the staff dedicated to writing, administering and enforcing regulations rose from 146,000 in 1980 to 242,000 in 2006. As OIRA’s budget has been reduced from about \$16.4 million in 1981 to \$6 million in 2006 in real 2000 dollars, the agencies’ budgets have increased from about \$12.9 billion in 1981 to \$38.3 billion in 2006 in real 2000 dollars.¹⁴ At the same time, OIRA’s statutory responsibilities have grown through a wide variety of requirements, including:

- The E-Government Act;
- The Unfunded Mandates Reform Act;
- The Small Business Regulatory Enforcement Fairness Act;
- The Congressional Review Act;
- The Data Quality Act;
- The Regulatory Right-to-Know Act;
- The Small Business Paperwork Relief Act; and
- A variety of appropriations riders.

We urge the Administration to ensure that OIRA receives the funding its needs for excellence in regulatory review and planning. When regulatory priorities and programs are grounded in robust analysis, the benefits can be enormous.

Conclusion

For the reasons stated above, we recommend that the President reaffirm the regulatory principles and procedures of Executive Order 12866, extend OIRA review to significant guidance documents as was done in Executive Order 13422, extend presidential review to the rules of independent agencies, and increase funding for OIRA to meet these challenges at this critical juncture in our nation’s history.

¹⁴ See Comments of the National Association of Manufacturers on Federal Regulatory Review from Rosario Palmieri, Vice President of Infrastructure and Legal & Regulatory Reform (March 16, 2009).

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Thank you for your consideration of these comments. If you have any questions,
please contact me at [REDACTED]

Best regards,

A handwritten signature in cursive script that reads "Paul N. Noe". The signature is fluid and written in black ink.

Paul Noe
Vice President, Public Policy