



Driving Trucking's Success

## American Trucking Associations

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*Via e-mail: [oira\\_submission@omb.eop.gov](mailto:oira_submission@omb.eop.gov)*

Re: Office of Management and Budget – Federal Regulatory Review

The American Trucking Associations, Inc.<sup>1</sup> (“ATA”) is writing in response to the Office of Management and Budget’s (“OMB”) request for comments on recommendations to the President for a new Executive Order on Federal Regulatory Review.<sup>2</sup> As the primary advocate for the trucking industry, ATA is interested in federal regulations that impact the industry and is particularly concerned with potential changes to the regulatory process. While Executive Orders generally are not subject to notice and comment procedures, revisions to the heart of the regulatory coordination process will have a profound impact upon regulated entities and federal agency officials. As such, ATA applauds OMB’s decision to seek public comment on the procedures governing regulatory review.

The trucking industry is one of the most heavily regulated industries in the United States. In addition to regulations imposed by the Department of Transportation (“DOT”), ATA members are affected by regulations issued by the Environmental Protection Agency (“EPA”), the Labor Department, the Department of Homeland Security (“DHS”), the Department of Agriculture, the Federal Trade Commission, the Internal Revenue Service, and other federal regulatory agencies. For this reason, the coordination of regulatory initiatives among the various regulatory agencies is critically important to ATA members. Of particular concern is the consistency of federal regulations that are issued by different agencies – each of which focus upon their particular mission and are not necessarily

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<sup>1</sup> ATA is a united federation of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. Directly and through its affiliated organizations, ATA encompasses over 37,000 companies and every type and class of motor carrier operation.

<sup>2</sup> See 74 *Federal Register* 8819 (February 26, 2009).

aware of the potential overlap with regulations issued by other agencies or the cumulative burden on regulated entities. Harmonizing the regulatory mission of multiple federal regulatory agencies remains a critically important role for OMB.

The remainder of these comments provides suggestions on the specific topics raised in the *Federal Register* notice.

A. The Relationship Between OIRA and the Agencies.

For more than 20 years, the Office of Information and Regulatory Affairs (OIRA) has played a critical role in ensuring that regulations issued by various agencies are coordinated, advance the Administration's priorities, properly consider the impact upon regulated entities, and ensure that a proposed regulation's potential societal benefits outweigh its potential costs. OIRA has accomplished this mission through the regulatory review process outlined in Executive Order 12866.<sup>3</sup>

One of the most important functions of OIRA is to address the overlap and potential conflicts between individual agency missions. OIRA's regulatory review procedures are necessary to overcome the so called "silo" mentality of individual regulatory agencies. Looking toward the future, the nation is about to embark upon the Herculean task of addressing climate change. The EPA, DOT, and the Department of Interior all will have a major role to play and each of them may move to promulgate regulations that consider the impact upon climate. While EPA may focus on direct carbon emissions, DOT upon vehicle fuel economy, and DOI upon the exploration of fossil fuels and energy security, there is a critical need to ensure that each agency's regulatory efforts do not conflict with one another; that the economic burden of each regulatory initiative is evaluated individually and is considered in light of other economic burdens being imposed by other federal and state agencies; and that the Administration's goals are achieved in the most efficient manner possible. OIRA is well positioned to perform these critical tasks. It may be unrealistic to expect these separate agencies to coordinate their initiatives and complete an analysis of issues that go beyond their specific mission(s).

B. Disclosure and Transparency.

To be accepted by the regulated community, legislators, and the general public, the regulatory review process must remain transparent. OIRA has procedures in place to docket the rules it receives for review and to list the interested parties that it meets with in connection with various rulemakings.<sup>4</sup> This transparency must be maintained and expanded, if possible. One suggestion for increasing the transparency of the OIRA

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<sup>3</sup> See 58 *Federal Register* 51735 (October 4, 1993) (hereinafter "Executive Order 12866").

<sup>4</sup> See Executive Order 12866, sec. 6, at 51743.

regulatory review process is to eliminate the informal review process. Requiring agencies to formally transmit regulatory initiatives to OIRA for docketing will ensure that all interested parties are apprised of the regulatory review proceedings. The use of informal reviews of agency rules that are shielded from public scrutiny should be discontinued.<sup>5</sup>

Additionally, OMB should consider increasing the amount of information that is available to the public during the review process. In that regard, relevant information received from the agency, other federal entities, and interested parties that furnish information to OIRA should be summarized and made available to the public.

C. Encouraging Public Participation in Agency Regulatory Processes.

Receiving information from those intended to benefit from a regulation and those expected to be burdened by the regulation is critical to effective rulemaking. Basic public participation in the rulemaking process is generally served by the notice and comment rulemaking procedures required by the Administrative Procedures Act. Executive Order 12866 further ensures that the public can provide meaningful comment to the federal government on regulatory initiatives. OMB should continue to require agencies to follow the principles of regulation set forth in Section 1(b) of Executive Order 12866.

The existing OIRA regulatory review provides an additional opportunity for public participation and should be encouraged. Issues that an agency may consider to be beyond the scope of its statutory mission may be raised by the public in the context of the OIRA review. The belief that OIRA review results in increased public participation, additional perspectives on the benefits and impacts of specific rules, and ultimately improved regulations, leads to the conclusion that OIRA should be reviewing more rules than it currently does. We make recommendations to accomplish this goal in Section F, *infra*.

D. The Role of Cost-Benefit Analysis.

A thorough, accurate cost-benefit analysis is critically important to the efficient allocation of limited economic resources. Cost-benefit analyses provide a systematic way to evaluate the impacts of regulatory initiatives by predicting the anticipated benefits and financial impacts of a particular regulatory initiative and thereby determine whether a regulation will provide a net benefit to society. In the absence of a rigorous cost-benefit analysis society's limited resources will be misallocated. Executive Order 12866 requires agencies to provide an *assessment* of the potential costs and benefits of a regulatory action designated by the agency as significant. For regulatory actions that have an annual effect on the economy of \$100 million or more or adversely affect the economy, a sector

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<sup>5</sup> See also comments at Section F(4), *infra*.

of the economy, productivity, competition, jobs, the environment, public health or safety or State, local, or tribal government or communities, an agency must also provide the *underlying analyses* and quantification of the costs and benefits anticipated from the regulatory action.<sup>6</sup>

The requirement to provide OIRA and the public with detailed cost-benefit analyses enables affected parties to develop meaningful comments on a regulatory action. Many industries, especially those comprised of small businesses, do not have the resources to conduct independent cost-benefit analyses. Providing the underlying analyses to the cost-benefit assessment allows affected parties to provide information on the accuracy of the cost-benefit assessment. Making this information available to affected entities is critical to the development of public comments and OIRA's ability to complete an objective analysis of the regulatory action. Accordingly, we believe that the current \$100 million annual threshold for actions to be deemed "significant" should be reduced to \$50 million.

E. Methods of Ensuring that Regulatory Review does not Produce Undue Delay.

Executive Order 12866 sets forth time limits for OIRA review.<sup>7</sup> The order provides that OIRA must notify the agency of the results of its review within 90 days (or 45 days if OIRA has previously reviewed the submitted information and there has been no material change in the facts upon which the regulatory action is based). The order further provides that the review process may be extended by 30 days upon the written approval of the Director and at the request of the agency head. These time limits are reasonable and ensure that the OIRA regulatory review does not produce an unreasonable delay.

F. The Best Tools for Achieving Public Goals through the Regulatory Process.

The OIRA regulatory review process is an indispensable tool for ensuring consistent regulation across multiple federal agencies, considering the cumulative economic burden of disparate rules that are promulgated by different agencies, verifying the Administration's priorities are implemented in a coordinated manner, and conducting a dispassionate and analytical review of federal regulatory actions, including review of an agency's cost-benefit analysis.

To further these public goals, the following modifications to the OIRA regulatory review process should be considered.

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<sup>6</sup> See Executive Order 12866, sec. 6(a)(3), at 51740-1.

<sup>7</sup> See Executive Order 12866, sec. 6(b)(2), at 51742.

- (1) *Lower the Regulatory Threshold for OIRA Review.* Executive Order 12866 limits OIRA review to actions identified by the agency or OIRA as significant regulatory actions. One of the current definitions of significant regulatory actions limits OIRA reviews to regulatory actions that have an annual effect on the economy of \$100 million or more. Depending upon the number and size of the regulated entities impacted by the regulatory action, the \$100 million threshold may be too high to trigger review of certain regulations that will have a profound impact upon certain regulated entities. ATA recommends that the economic threshold be revised to \$50 million to ensure that additional regulatory actions benefit from OIRA review.

OIRA regulatory review should be triggered by changes to a rule that has a significant economic impact. Even if the specific change does not impose a new impact that exceeds the dollar threshold established for classifying the rule as economically significant, the fact that an economically significant rule is being revised should trigger full OIRA review.<sup>8</sup>

- (2) *Comments from the Small Business Administration.* Congress has recognized that small businesses are particularly vulnerable to cumulative regulatory burdens. For this reason, OIRA and the regulatory agencies should pay special attention to comments submitted by the Small Business Administration (SBA) in response to a regulatory action. Federal agencies should be required to address comments submitted by the SBA and OIRA should ensure that the regulatory agencies provide coherent substantive responses to all comments filed by SBA. SBA should also be able to trigger OIRA review of a rule that does not meet the standard definition of a significant regulatory action.
- (3) *Expand OIRA Review of Significant Guidance Documents.* Executive Order 12866 defines “regulatory action” as any substantive action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notice of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking. This definition does not include guidance documents. Many guidance documents have a significant economic or environmental impact

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<sup>8</sup> A 2007 action establishing fees for the Uniform Carrier Registration Agreement (UCRA), the Federal Motor Carrier Safety Administration (FMCSA) acknowledged that its action was significant for its impact upon states, but simultaneously declared that the rule was “not economically significant” because the rule restructured a previous registration program at the direction of Congress. Although the effect on the economy of the restructured program remained greater than \$100 million annually, it appeared that the OIRA review of this rule was abbreviated due to the restructured program ‘caveat’ provided by FMCSA and the conclusion that the rule did not impose an additional \$100 million economic impact. Once a federal regulatory agency determines a rulemaking to be a significant regulatory action under the published definition, a full OIRA review should proceed accordingly.

and are not currently subject to OIRA review. For this reason, we believe that the definition of regulatory action should be revised to include agency guidance documents.


- (4) *Eliminate Informal OIRA Review.* While Executive Order 12866 sets forth specific procedures for review once an agency has formally transmitted a regulatory action to OIRA, these procedures do not apply to agencies that choose to informally seek review of a regulatory action. This loophole compromises the transparency of the entire review process, as agencies can send rules to OIRA on an informal basis, receive comments, make revisions and not disclose these actions to the public. At some point following the informal review, the agency can then formally send the rule to OIRA and most likely will have the rule approved for publication without change. Again this process shields the modifications that occurred during the informal review period and the rationale for such modifications from public scrutiny.


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For the reasons set forth above, ATA believes that OIRA review should continue to follow the procedures set forth in Executive Order 12866. To improve the rulemaking process, we believe that more rules should be subjected to the benefits of OIRA review. To facilitate an increase in OIRA reviews, we recommend modifying the definition of “significant regulatory action” by lowering the annual economic impact threshold from \$100 million to \$50 million and authorizing the SBA to trigger OIRA review of regulatory actions that have a significant impact on small businesses. We also believe that OIRA reviews should be expanded to significant guidance documents issued by regulatory agencies. To improve the OIRA review process itself, we believe that enhanced transparency would result from the elimination of informal OIRA reviews.

If you have any questions concerning these comments, please contact the undersigned at (703) 838-1910.

Respectfully submitted,

  
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