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OF THE
UNITED STATES OF AMERICA

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

Re: Request for Comments on New Executive Order on "Federal Regulatory Review," Fed. Reg. Vol. 74, No. 37 (Feb. 26, 2009)

The U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses and organizations of every size, sector, and region, is pleased to submit these comments to the Office of Management and Budget (OMB) on a proposed Executive Order on "Federal Regulatory Review."

The Chamber applauds President Obama's decision to seek ways to improve the existing regulatory framework,[1] and thanks OMB for soliciting public comment before recommending wholesale changes to President Clinton's Executive Order 12,866, *Regulatory Planning and Review*. Although it is unusual to seek public comment on a proposed executive order, doing so effectively promotes President Obama's objective of a more transparent government, and properly includes the regulated community in a process that could dramatically affect it and the economy of the nation as a whole.

Introduction

The Chamber would like to recognize, at the outset, that it supports the concept of centralized review of federal regulations, which has been a continuing

[1] Presidential Memorandum of January 30, 2009, titled "Regulatory Review;" Fed. Reg. Vol. 74, No. 21 (Feb. 3, 2009).

theme of every President since Richard Nixon. Given the vast number of draft regulations produced annually by federal agencies, not to mention the number currently in effect, the need for centralized review and coordination could not be clearer. Likewise, it is difficult to imagine the federal government addressing the complex policy issues facing our nation today without Executive oversight of the implementing regulations.

Nevertheless, the Chamber is concerned that this call for public comment suggests President Obama may be considering a significant departure from previous Administration directives, which rely heavily (and correctly) on benefit-cost analysis for assessing the impact of regulations, as well as a diminished role for the Office of Information and Regulatory Affairs (OIRA). If President Obama issues a new executive order addressing federal regulatory review, the Chamber strongly encourages him to continue the fundamental concepts contained in Executive Order 12,866 while simultaneously taking steps to improve some of its provisions. These comments, which respond to some of the topics for discussion set forth in the *Federal Register* Request for Comments, suggest several possible improvements.

Specific Comments: Domestic Implications of Federal Regulatory Review

The Relationship Between OIRA and the Agencies

With the executive powers of the United States Government constitutionally vested in the President, accountability and oversight for the activities of federal agencies – and the regulatory decisions they make – are subject to presidential authority to ensure the laws are "faithfully executed." With the creation of OIRA in the Paperwork Reduction Act of 1980, the President finally had a mechanism to coordinate and oversee the regulatory process. Today, OIRA performs several essential functions to ensure regulations are consistent with presidential priorities.

The Chamber strongly recommends retaining the core functions of OIRA as set forth in the Paperwork Reduction Act and amplified by Executive Order 12,866. These include OIRA's authority to reconcile rules and resolve disputes among the agencies; impartially review proposed agency action; ensure robust cost-benefit analyses; and clear regulations before promulgation. It is important to remember that OIRA provides a critical "gatekeeper" service in independently performing impact analyses of federal agency regulation. An impartial impact analysis helps keep the regulatory process honest and prevents agencies from gaming the system, thereby resulting in a more transparent and accountable government.

The Chamber also strongly recommends against raising the $100 million review threshold for economically significant regulatory actions. Several activist groups have noted that this threshold should be adjusted upward substantially in order to account for inflation – that $100 million in 1993 (when Executive Order 12,866 was issued) is equivalent to about three times that today. Such a change makes little sense, however, given that the number of draft regulations exceeding the $100 million threshold has remained relatively constant since 1993, between 90 and 100 per year. Likewise, adjusting the threshold upward would collaterally impact other laws that currently statutorily reference the $100 million amount (e.g., Congressional Review Act; Unfunded Mandates Reform Act, etc.). If anything, the threshold should be reduced to allow a greater number of regulations to be subject to mandatory analysis. That would be consistent with the Obama Administration's interest in promoting transparency.

Disclosure and Transparency

The Chamber views transparency as the most essential element of the regulatory process. A transparent regulatory process consists of honest, open, efficient, and fair procedures that allow the public to provide input and understand what is being proposed and how the government reached its decision.

To achieve transparency the regulator must make available to the public in a timely fashion all relevant information that is being considered in a regulatory proceeding. Transparency enhances the confidence of interested stakeholders, and strengthens the legitimacy of the regulatory process and outcome. Consequently, agencies should establish a public, electronic docket when they initiate a regulatory proceeding, solicit submission of relevant information to the docket form the public, and keep the docket up to date. In addition, all regulatory rules and policies that are adopted, and the analyses behind those rules and policies, should be a matter of public record.

Transparency reduces the probability that interested stakeholders, especially those who would be adversely affected by a regulatory decision, will believe that their input has been ignored or discounted, or that decisions are biased or discriminatory. When stakeholders are confident that their input has been fairly considered, they are less likely to challenge an agency's decision.

Transparency also makes it possible to hold government officials accountable for their actions by ensuring that their actions are public and reviewable. Transparency increases the acceptance of the regulatory decision by the public, including interest groups, and results in a more accountable government.

Disclosure and transparency could also be dramatically enhanced by ensuring that the actions of Executive branch officials involved in the formulation of the final regulatory decision, or who significantly influence the final decision, are placed on the public record so that the public can understand who made the decision and who influenced that decision.

Currently, Executive Order 12,866 requires OIRA disclose "relevant" written communications with regulatory agencies made during the review process. In this way, the public can see any written input from the Executive branch to the agencies. While recognizing the need for internal deliberations to occur, the Chamber nonetheless recommends expanding Executive Order 12,866 in two ways. First, any substantive written communications between executive branch employees, made with the intent to influence the final regulatory decision, should be disclosed and made part of official record. Second, these disclosures should apply to all executive officials, particularly those unconfirmed officials – the so called "czars" – who otherwise can easily bypass OIRA and communicate directly to the agencies during the rulemaking process. The czars' enormous ability to influence rulemakings without direct accountability to the public is, at best, problematic and should be rectified through any new executive order.

While Executive branch officials will be extremely resistant to the transparency being proposed in these comments, this amount of disclosure is essential if these same officials are to be held accountable for their influence on the decisions made by the government and imposed on the public and the regulated community. The government of the U.S. is the government of the people, by the people and for the people, and as such the people have a right to know what its government does, how decisions are made and who is accountable for those decisions.

Some commentators have suggested that OIRA make greater use of prompt letters to departments and agencies to urge them to act pursuant to their organic statutes. The Chamber wonders whether OIRA retains superior access to the data necessary to make such a regulatory judgment without prior input from the substantive regulator. Nonetheless, if OIRA decides to issue such prompt letters, the Chamber requests that all data and materials submitted to OIRA by third-party

sources urging the imposition of new regulations be made available for comment before the letters are issued.

The Role of Cost-Benefit Analysis

Cost-benefit analysis is an important policymaking tool, utilized by federal agencies to calculate whether the potential benefits of a proposed regulation outweigh the cost of implementing it. Federal agencies are currently mandated by Executive Order 12866 to conduct cost-benefit analyses for proposed "economically significant" rules—those expected to have an economic impact of greater than $100 million—to determine if the costs for a particular regulatory action are worth the benefits to be received.

The Chamber is a strong proponent of ensuring that economic considerations are a part of the regulatory decision-making process. We strongly urge continued use of cost-benefit analysis as the primary tool for assessing the value of regulations. Cost-benefit analysis is particularly important now, given our nation's current economic downturn; arguably, the need to assess regulatory costs to the private and public sectors has never been greater. Therefore, rather than supplanting cost-benefit analysis, the Chamber recommends taking steps to enhance its application, improve its accuracy, and inoculate it from potential abuse by federal agencies.

One solution would be to require federal agencies to work directly with OIRA to develop and agree on key assumptions for cost-benefit analysis. This would ensure consistency and avoid subsequent disputes on its application. Another solution would be to prohibit the promulgation of any regulation where the costs are shown to exceed the benefits, unless the agency otherwise demonstrates that the regulation is necessary (e.g., promulgation is statutorily or judicially required; significant qualitative considerations weigh toward regulating; etc.).

The Chamber also recommends requiring *ex post* studies to determine the actual costs of a regulation on the public, as well as whether the regulation is accomplishing its intended purpose. Currently, federal agencies calculate the costs and benefits of a proposed regulation through the use of *ex ante* studies. *Ex ante* studies are pre-regulation forecasts of what the agency predicts will happen once a rule takes effect. These "educated guesses" are an inadequate form of economic modeling because they do not present the public with a reasonable and true account of the costs of regulatory impacts. Moreover, the U.S. Chamber believes that the use of *ex ante,* or prospective, analysis is subject to frequent abuse by federal agencies because agencies are allowed

to determine for themselves which rules are deemed to be major. This raises the possibility of some agencies "gaming" the system by purposefully understating costs or overstating the benefits of proposed regulations to avoid performing an impact analysis.

Ex ante studies also do not account for rules originally deemed to be minor by an agency but which often end up having major impacts. *Ex ante* studies are by their very nature imprecise estimates of future occurrences. As a result, projected costs and benefits of new regulations are often inaccurate and end up costing businesses and other regulated entities, including federal agencies and state and local governments, significant time and money in regulatory compliance costs.

OMB previously recognized the inherent difficulties with *ex ante* studies[2] and, to its credit, took comments on ways to improve this accounting method. As the Chamber noted in its comments to OMB at that time, an *ex post* analysis of the impact and effectiveness of a regulation could serve to dramatically improve our economic modeling. It could account for the impact of regulations on economic growth, job loss or creation, capital formation, barriers to trade, and U.S. competitiveness in international markets. Knowing that OMB/OIRA have limited resources to conduct such studies, however, the Chamber recommends a public-private partnership wherein industry would provide OIRA with relevant analyses and data on the effects and effectiveness of a rule. After all, it is the regulated community that is in the best position to assess the consequences and real-world impacts of a regulation.

While the Chamber readily acknowledges that cost-benefit analysis should not be the exclusive basis for assessing regulation, it is arguably the most important, and, therefore, should be retained and improved to the extent possible.

Role of Distributional Considerations, Fairness, and Concern for the Interests of Future Generations

When choosing between alternative regulatory approaches, Executive Order 12,866 urges agencies to select those approaches that maximize "net benefits," which it defines as including economic, environmental, public health, safety, distributive impacts, and equity considerations. But evaluating net benefits – and especially

[2] "[A]n *ex ante* estimate is no more than an informed guess and, like other forms of prospective modeling, the estimates may or may not prove to be accurate once real-world experience with the rule is accumulated and analyzed." *Validating Regulatory Analysis: 2005 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities* (2005) pg 41.

distributive impacts and fairness considerations – cannot be done effectively outside the context of the cost-benefit analysis framework. One must assess the costs and benefits of a regulation before one can identify impacts – that is, who actually bears those costs or receives those benefits – and whether those impacts have been equitably distributed.

As for future generations, no one seriously questions that we have a certain responsibility for the welfare of subsequent generations of Americans. Instead, the debate centers on the extent of that responsibility and how to value it. Again, such considerations seem to require the use of cost-benefit analysis; it is the most effective tool for making these decisions.

While determining future benefits can be inherently difficult, and while placing a value on human life might make people uncomfortable, policymakers implicitly do this whenever they consider how much to reduce risk. Critics of cost-benefit analysis instead recommend the use of the precautionary principle, which justifies highly aggressive regulation despite the lack of any scientific consensus on risks, as the best way to protect the interests of future generations. They argue that pure statistical analysis (and specifically the application of a "discount rate" and placing a numerical value on human life) diminishes the future benefits of regulations and provides inadequate protection of our descendents.

Yet this argument fails because regulators need to be aware of costs and benefits in order to decide which precautions to take. Cost-benefit analysis, therefore, remains a critical tool of regulatory assessment. The Chamber believes that the interests of future generations will best be protected when realistic discount rates are applied consistently to all foreseeable benefits and costs. Efforts to improve the discount rates – to ensure that future benefits are accurately valued – would be a better use of critics' time than promoting a flawed precautionary approach to regulation.

Methods of Ensuring That Regulatory Review Does Not Produce Undue Delay

There is a misperception among the public that OIRA causes undue delay in the regulatory process, and it has been the target of activists claiming that it "slow walks" regulations due to an inherent anti-regulatory bent. In fact, OIRA on average generally conducts its reviews within 60 days, which is well within the 90-day review period allowed under Executive Order 12,866. OIRA does not cause undue delay.

Instead, the delay in many instances stems from the failure of an agency to meet its own internal deadlines. To address the issue of timeliness, then, the focus should be on the individual agency's review not on OIRA's review.

To the extent that OIRA might be responsible for delays, it almost certainly results from the fact that both its budget and staff have decreased alarmingly over the years even while the number of regulations it must review has increased.[3] In other words, OIRA's budget is not tied to the number of regulations it must review: in fact, its resources have continued to diminish while the number and cost of regulations have increased. Increasing OIRA's resources – both in terms of budget and staff – would almost certainly ensure that OIRA is able to conduct its myriad functions (including regulatory review) adequately and without undue delay.

Another way to prevent undue delay would be to ensure full OIRA and agency consideration of comments filed by the Small Business Administration's Office of Advocacy (Advocacy). Small businesses often shoulder a disproportionate share of the national regulatory burden. To address this, Congress passed the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act to make certain agencies considered significant economic impacts to small business in their actions. Advocacy works with agencies to ensure compliance with these laws and avoid subsequent administrative and legal challenges to regulations for non-compliance. Therefore, any new executive order should require agencies to respond directly to Advocacy comments on proposed and final rules, particularly with regard to certifications of "no significant economic impact to a substantial number of small entities."

The Role of Behavioral Sciences in Formulating Regulatory Policy

Researchers working in the behavioral sciences have made interesting and important discoveries in recent years as to systematic errors caused by the use of simple heuristics. In light of such advances, your request for comment naturally made clear that OIRA is considering what role, if any, behavioral sciences should have in developing regulatory agendas and policies. The Chamber is very supportive of the government relying on the best science has to offer. However, as many of the studies are of recent vintage and there remains a significant question as to whether regulators may be subject to similar heuristics in their decision-making, the Chamber requests

[3] Mercatus Policy Series, Primer No. 9, "For Whom the Bell Tolls: The Midnight Regulation Phenomenon," by Jerry Brito and Veronique De Rugy, December 2008, page 12.

that, before relying on any particular research in this field, OIRA request comments as to the research's validity and appropriateness in the regulatory sphere.

The Best Tools for Achieving Public Goals Through the Regulatory Process

Another method for achieving public goals through the regulatory process is by the application of OMB Circular A-119, which implements the National Technology Transfer and Advancement Act (NTTAA).[4] These policies, which have been in place and unchanged since 1998, direct federal agencies to utilize voluntary consensus standards in carrying out both regulatory and procurement activities. Circular A-119 recognizes and affirms that the U.S. Standards System is market-driven and private sector led, which enhances the competitiveness of U.S. industries. It assists in achieving public policy goals by promoting successful public-private sector standard development efforts that reduce the cost of regulation and improve the effectiveness of government.

Similarly, Circular A-119 and NTTAA work to facilitate the alignment of regulatory criteria across borders. The most effective mechanism of harmonizing cross-border requirements (technical regulations and standards) is when regulators around the world reference universally accepted private sector standards. If the regulators across the globe reference the same international standards, the global private sector (together with its government partners) is well positioned to quickly harmonize and maintain these standards. Such a practice reduces the cost of regulatory compliance and market access, fosters the public good, ultimately produces a more effective regulation as requirements can be designed to keep up with the latest technology, and can be clearly complied with by industry and other regulated entities.

Executive Order 12,866 also recognizes the importance of advancing public goals by requiring decisions be based on the "best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation."[5] As such, the Chamber strongly recommends that any new executive order explicitly recognize the value of adhering to the strictures of the Information Quality Act (IQA), independent peer-review, risk assessment principles, and good guidance practices. Each of these is discussed briefly below.

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[4] PL 104-113

[5] Executive Order 12,866, Sec 1(b).

It goes without saying that any regulatory decision based on inaccurate or incomplete data is inherently flawed. That is why it is critically important to ensure that all regulatory decisions are based on good quality data. The IQA requires federal agencies to ensure and maximize the quality, objectivity, utility, and integrity of disseminated information. In other words, agencies must do their best to make sure the data they use is substantively accurate, objective, and presented in a clear and unbiased manner. The IQA also establishes a system whereby interested parties can seek correction of erroneous, disseminated information.

The Chamber has been a strong proponent of the IQA because, by utilizing sound data, we can be assured that regulators are focusing our resources on the problems that need to be addressed. While the IQA would be greatly improved by clarifying that agency decisions under the IQA are judicially reviewable, it is still an integral component of sound regulation and should remain so throughout President Obama's Administration. The use of high quality data must continue to be a core principle of any regulatory framework.

A new executive order should also explicitly require access to underlying data and independent, open peer-review of data. Reliable data is the backbone of every rule and regulation. It is axiomatic that the better the data, the better the regulation – and the better the regulation, the more likely it will achieve its intended goal and foster the public good. Therefore, efforts to improve the underlying science or data, including greater public access to underlying data, are ultimately efforts to improve the quality and effectiveness of regulation. Open, independent peer-review frees the federal government from the limits of its small group of internal peer-reviewers, and opens the record to receive the innovative and often brilliant ideas and research being conducted by business and universities.

Equally important to information quality and peer-review are the principles of risk assessment set forth in OMB's "Updated Principles for Risk Analysis" (Sept. 19, 2007). That memorandum reinforces generally-accepted principles for risk analysis related to environmental, health, and safety risks. Use of the memorandum will enhance the scientific quality, objectivity, and utility of agency risk analyses while improving efficiency and consistency among federal agencies. These principles should be incorporated by reference in any new or modified executive order.

Finally, the Chamber recommends continued support and use of OMB's Final Bulletin on Agency Good Guidance Practices, which attempts to curb federal agencies' use of guidance documents to impose requirements sans public comment.

Federal agencies issue thousands of guidance documents each year that provide the regulated community with an agency's interpretation on policy and technical issue compliance. Unfortunately, many agencies include language in their guidance documents that has a regulatory impact – effectively changing the documents from interpretive guidance to binding regulations with the full force and effect of law. In this manner, federal agencies avoid the notice and comment period that attends a formal rulemaking.

The Bulletin addresses this practice, known as "regulation through guidance documents." It is a comprehensive policy for federal agencies concerning the development and use of guidance documents. It established, for the first time, a bright-line test to distinguish between a regulation, which is subject to notice and comment and has the force and effect of law, and a guidance document, which is merely agency interpretation and does *not* have the force and effect of law. It establishes uniform policies and procedures for the development, issuance and use of significant guidance documents.

These tools will help foster public goals while ensuring that the data they are based upon are sound.

Specific Comments: International Implications of Federal Regulatory Review

Increasingly, the challenges U.S. companies' face when doing business globally are regulatory, not tariff in nature. Those challenges are often the result of a regulatory process that does not benefit from transparency, stakeholder input, sound science, and economic and benefit-cost analysis.

As a result, regulatory decisions are made that are trade-distorting and result in a divergence of regulatory approaches to the same issues. Depending upon the degree of divergence, the regulation may adversely impact our ability to export and compete in foreign markets. Large businesses struggle to keep pace with changes and compliance to multiple regulatory frameworks around the globe, but it is near impossible for small and medium enterprises to do the same. The promotion internationally of the U.S. approach to regulation and the promulgation process which is supported by EO 12,866 is critical to U.S. commercial competitiveness.

Finally, the U.S. cannot afford to "regulate in a vacuum." Global supply chains and the interconnected and interdependent nature of markets extend well beyond U.S. borders. Therefore, any revisions to EO 12,866 should explicitly require that federal regulators consider the international implications proposed regulations have on international trade and investment.

Conclusion

The need for a comprehensive and sensible approach to regulation has never been greater. Given the fragile state of our economy, it is imperative that we provide our government with the tools and direction necessary to address the myriad problems facing our nation. This includes the ability to successfully coordinate multiple agencies and multiple regulatory activities with both domestic and international impacts. At this critical time, it would be foolhardy to reduce OIRA's oversight and coordination role, or to diminish the utility or frequency of rigorous of cost-benefit and risk analysis.

The Chamber thanks OMB for soliciting public comments on this matter and we hope these comments assist you in your evaluation.

Sincerely,

William L. Kovacs