Building and Construction Trades Department

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Via e-mail: oira_submission@omb.eop.gov

Kevin F. Neyland
Acting Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, N.W.
Washington, D.C. 20503

Re: Federal Regulatory Review: Response to Request for Comments

Dear Mr. Neyland:

On behalf of the Building and Construction Trades Department, AFL-CIO, I am submitting the attached comments in response to your request for comments on the role of the Office of Information and Regulatory Affairs in Federal regulatory review. I appreciate this opportunity to present the BCTD's views on this important issue.

Sincerely,

Mark H. Ayers
President

Attachment

COMMENTS OF THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, ON OMB's ROLE IN FEDERAL REGULATORY REVIEW

The Building and Construction Trades Department, AFL-CIO ("BCTD"), appreciates the opportunity to comment on the role of the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) in overseeing the Federal Government's regulatory activities. We are extremely pleased by President Obama's interest in reexamining OIRA's role, as expressed in his January 30, 2009 Memorandum for the Heads of Executive Departments and Agencies (published at 74 Fed. Reg. 5977 (Feb. 3, 2009)), and by OIRA's willingness to hear from interested stakeholders in developing its recommendations for a new Executive Order on Federal regulatory review. *See* 74 Fed. Reg. 8819 (Feb. 26, 2009).

As we will explain in greater detail below, it is our view that there are useful roles for OIRA in assisting the agencies in meeting their regulatory priorities, in coordinating the regulatory activities of the various Federal agencies, and in supporting the agencies in developing the most effective and efficient mechanisms for carrying out their responsibilities. It is also our view, however, that the role that OIRA has traditionally played, of providing centralized, final review and control of all significant regulatory action, has hobbled rather than facilitated the Federal agencies in fulfilling their statutory obligations. We applaud the Administration for taking a fresh look at the relationship between OIRA and the agencies.

We offer our comments from a particular perspective. The BCTD, its thirteen affiliated national and international labor organizations and the three million construction employees they represent operate under – and seek protection from – a vast array of

Federal regulations, promulgated and enforced by a variety of Federal agencies. By way of example, the BCTD, its affiliated unions and our represented employees are affected by regulations the Department of Labor promulgates and implements under the Occupational Safety and Health Act, the Labor-Management Reporting and Disclosure Act, the Davis-Bacon and Service Contracts Acts, the Employee Retirement Insurance and Security Act, and the Uniformed Services Employment and Reemployment Rights Act. We also deal with drug testing regulations imposed by the Department of Transportation; safety and health regulations promulgated by the Department of Energy; work hour and access rules implemented by the Nuclear Regulatory Commission; access requirements imposed by the NRC and the Homeland Security Administration; and Federal Election Commission regulations governing campaign contributions – to name just a few.

There is no question that we are often at odds with the agencies over their regulatory decisions, and have on numerous occasions sued regulators for failing properly to implement their statutory mandates. However, our experiences have also convinced us of a few basic principles that inform our comments here: First, Congress defines both the roles of the agencies and the criteria they are to use in carrying out their responsibilities. Second, OIRA can assist the agencies in efficiently and effectively executing their statutory duties. But third, the Administration must respect the agencies' statutory mandates and defer to the agencies' decisions in effectuating them, rather than erecting new administrative hurdles and imposing additional decisional criteria that all agencies must utilize before they can act.

I. The Relationship Between OIRA and the Agencies

OIRA's current relationship with the regulatory agencies has been defined by both the tone and the substance of previous Executive Orders. President Reagan's Executive Order 12291 set a decidedly anti-regulatory tone, stating at the outset that its purpose was to "reduce the burdens of existing and future regulations." President Clinton's Executive Order 12866 continued in the same vein, emphasizing the financial impact of regulations as the central factor in agency decisionmaking, notwithstanding the statutory mission underlying a particular agency's initiatives. Like E.O. 12291, E.O. 12866 conveys a basic hostility to Federal regulation, a hostility that was only heightened during the previous Administration, and one which we do not believe President Obama shares.

In substance, Executive Order 12886 continued the structure established by E.O. 12291, making OIRA the central gatekeeper for all "significant" federal regulation, and placing an entire analytic overlay on top of the statutory mandates directing agency decisionmaking. In our view, this structure fails on two accounts. First, OIRA simply does not have the resources to fully re-examine all federal regulations. Nor should it: In enacting legislation, Congress entrusts the administrative agencies with the authority to regulate, assuming that those agencies will develop the expertise (and hopefully, providing the resources) necessary to do so effectively. More to the point, however, it is Congress that establishes the governing principles the agencies are to apply in deciding whether and how to regulate and, as we explain in greater detail below, we do not believe that it is either productive or appropriate for OIRA to impose an entirely different set of criteria on the agencies.

In short, under previous administrations, OIRA has appeared to function from the perspective that there is too much government regulation, and that the way to cure that problem is to erect an entire additional administrative process, under OIRA's auspices, that agencies must navigate to justify adding to the public's regulatory load. For the most part, we disagree with the premise that underlies this entire system: With some notable exceptions, the problem we face is generally *not* that there is too much regulation. Instead, in many areas – particularly, protection of workers' safety and health – we face seriously insufficient regulation and inadequate enforcement of the rules that do exist. There are, of course, exceptions, most notably in the area of labor organizations' internal affairs, where we have faced activity aimed almost entirely at satisfying a political agenda – not at curing identifiable problems. In our view, however, OIRA's micromanagement of agency decisionmaking would not cure either under- or over-regulation.

We therefore propose that rather than simply tinkering with E.O. 12866, OMB use this as an opportunity to reorient OIRA's relationship with the Federal regulatory agencies. First, it should set a very different tone with respect to regulatory action generally, making clear President Obama's apparent respect for the role of agencies in developing and implementing regulations, and clearly establishing the Administration's expectation that the agencies will act responsibly and efficiently in doing so.

Second, we propose that OIRA make clear that its mission is to assist the agencies in carrying out their statutory mandates in effective and efficient ways that advance the Administration's priorities. Among the functions OIRA could serve in this regard are the following:

a. *Assist regulatory agencies in meeting their regulatory priorities.* The regulatory agenda could be a useful tool for agencies to use in setting their priorities and establishing realistic plans for accomplishing those priorities. Instead, they appear too often to be haphazard "wish lists," which neither guide the agencies' work nor provide the public with any useful information.

An example from the Occupational Safety and Health Administration provides a case in point.[1] OSHA first placed a silica standard for the construction industry on its regulatory agenda in October 1997, designating it as a "long-term action." The Fall 2000 regulatory agenda listed silica at the "proposed rule" stage, with a notice of proposed rulemaking (NPRM) projected for September 2001. Since then, silica has continued to appear on OSHA's agenda, sometimes described as at the "prerule" stage, sometimes at the "proposed rule" stage. With its Fall 2001 agenda, OSHA began to project the initiation of the process required under the Small Business Regulatory Enforcement Fairness Act (SBREFA); that process was actually commenced and completed in December, 2003. In its Spring 2004 regulatory agenda, OSHA for the first time listed its "peer review of risk assessment" as a next step, projecting completion by February, 2005. OSHA's most recent regulatory agenda – Fall 2008 – again listed silica at the "prerule" stage, with the risk assessment peer review projected to be completed in February 2009, a deadline that has now passed. The agenda is currently silent about when we can expect an NPRM.

Assuming that promulgating a standard for silica is, in fact, a priority for the agency, this history suggests that OSHA has continuously placed the silica rule on its

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[1] Throughout these comments, we will use our experiences under the Occupational Safety and Health Act to illustrate our points.

agenda without realistically assessing the time and resources it needs to accomplish each of the steps leading to publication of its NPRM. OIRA could help the agencies develop realistic plans for accomplishing their stated objectives. It could also monitor their agendas, working with agencies that fail to meet their benchmarks to identify and overcome impediments to regulatory action.

b. Assist regulatory agencies in coordinating their regulatory efforts. OIRA is also in a unique position to assist the agencies in coordinating complementary and overlapping efforts. Thus, in areas that cut across agencies, OIRA could help agencies work in concert, fully cognizant of the range of regulatory actions that touch on the same community or on similar issues. It could also facilitate resolution of conflicts that may arise between and among agencies. And OIRA could ensure that when questions arise over which of several agencies has responsibility in a particular area, those questions are resolved rather than being left to languish unanswered.

The manner in which the Environmental Protection Agency (EPA) has handled its obligation to develop training requirements for individuals engaged in lead abatement activities provides an example of what happens when agencies appear unsure of their respective responsibilities. In the Housing and Community Development Act of 1992, Congress assigned roles to both OSHA and EPA for protecting employees exposed to lead-based paint. It gave OSHA eighteen months – until mid-1993 – to promulgate an occupational health standard to protect construction workers from exposure to lead. 42 U.S.C. § 4853. And it gave EPA the same eighteen months to develop regulations to ensure that firms and individuals engaged in activities that potentially disturb lead-based paint in "target housing" and public and commercial buildings and on buildings,

structures and superstructures "are properly trained; that training programs are accredited; and that contractors engaged in such activities are certified." 15 U.S.C. § 2682(a)(1).

OSHA met its deadline, issuing its lead standard in May, 1993. 29 C.F.R. § 1926.62; *see* 58 Fed.Reg. 26590 (May 4, 1993). In 1996, EPA issued regulations that addressed only work performed in target housing and child-occupied facilities, explaining that it was delaying implementation rules dealing with the balance of the work to avoid any possible conflict between its rules and training requirements in OSHA's standards. 61 Fed.Reg. 45,778, 45,780 (Aug. 29, 1996). A year later, EPA requested additional public comments on a number of outstanding issues, including the potential overlap with OSHA regulations. 62 Fed.Reg. 44,621 (Aug. 22, 1997). To date – sixteen years after its statutory deadline – EPA has yet to issue regulations for lead-based paint activities on public and commercial buildings or on bridges, structures and superstructures.

To the extent that EPA's inordinate delay is, in fact, due in any part to outstanding questions about overlap between EPA regulations and OSHA standards, this is the kind of question that OIRA could assist the agencies in working together to resolve.

c. *Evaluate and make recommendations about the utility of the plethora of requirements agencies must satisfy to promulgate a regulation.* Between the Administrative Procedure Act, procedures imposed under the agencies' respective authorizing legislation, SBREFA, the Paperwork Reduction Act, the Regulatory Flexibility Act, the Data Quality Act, Executive Order 12866, and OMB's requirements

for peer reviews of agency risk assessments and economic analyses, agencies must jump through an ever-increasing number of hoops to justify their regulations.

OSHA's on-going procedure to promulgate a safety standard for cranes and derricks in the construction industry is a perfect example of the burdens these layers of analysis impose on the regulatory process and the attendant delays in safeguarding our nation's workers. OSHA's effort to revise its seriously out-dated crane standard began with a series of negotiations conducted under the auspices of the Negotiated Rulemaking Act, 5 U.S.C. § 561. After eleven meetings held over the course of a year, the Cranes and Derricks Negotiated Rulemaking Advisory Committee successfully completed its work and presented OSHA with a negotiated rule in July, 2004 – lightening speed in the regulatory process. OSHA, however, did not publish the proposed rule and begin the public notice-and-comment rulemaking procedure until October 9, 2008, a delay at least in part attributable to the time it took to perform the various economic assessments required under E.O. 12866, meeting with and responding to the concerns of the SBREFA panel, and complying with the requirements of the RFA and the PRA. *See,* 73 Fed. Reg. 59713, 59872-914 (Oct. 9, 2008) (OSHA's proposed crane standard; preamble discussion of procedural determinations reached in analyzing proposed rule).

OSHA has recently completed public hearings on its proposed standard, but we remain years away from a final rule: Once the rulemaking record closes on June 18, 2009, OSHA will still have to consider and make changes in its proposed rule based on the public record, then – assuming some form of E.O. 12866 remains in place – perform its final regulatory assessments and secure OIRA's final review and approval.

It would be very useful if OIRA evaluated the utility of these many requirements, including those imposed by OMB, and made recommendations to Congress and the Administration about which serve valuable public functions and which simply impose unnecessary, time-consuming and costly burdens on the agencies, ultimately hampering their ability to promulgate regulations needed to protect workers.

d. Assist regulatory agencies in developing efficient mechanisms for conducting their rulemaking. Different agencies have devised their own strategies for working their way through this maze of procedural steps. For example, while OSHA gets bogged down in the SBREFA process, other agencies have apparently been able to navigate it more efficiently. In assisting the agencies in meeting their stated priorities, OIRA could evaluate these different approaches and provide guidance on "best practices" to share among the agencies.

e. Help ensure the agencies have the resources to accomplish their statutory objectives. OIRA is in the position to work with the agencies to determine the resources they need to accomplish their objectives and to act as their advocate in securing necessary funding.

II. The Role of Various Substantive Considerations in Agency Rulemaking

The touchstone for any rulemaking proceeding is the statutory mandate under which it is being conducted. It is Congress that entrusts standard setting authority to the particular agency, expecting it to develop the expertise necessary to effectively administer the law. It is Congress that defines the statutory objectives, and Congress that determines the elements the agency is to consider – and the weight which they are to be given – in developing the regulations.

Among the issues OMB is to consider in revisiting the elements of regulatory review are the role of various substantive issues in regulatory decisionmaking, including cost-benefit analysis; distributional considerations, fairness and concern for the interests of future generations; behavioral sciences in formulating regulatory policy; and the best tools for achieving public goals through the regulatory process. 74 Fed.Reg. 8819. Whether it is appropriate an agency to rely on these sorts of considerations depends on the particular statutory scheme under which it is conducting its regulatory proceeding. In our view, it is *not* appropriate for OMB to prescribe these as considerations that must be taken into account in *all* cases. Nor is it even appropriate for OMB to direct that these considerations be taken into account "to the extent permitted by law," since whether these factors add anything meaningful to an agency's deliberations depends entirely on the nature of the agency's undertaking.

Some examples from our experience under the OSH Act illustrate these points.

a. *Cost-benefit analysis.*

In enacting the OSH Act, Congress directed OSHA, "in promulgating standards dealing with toxic materials . . . [to] set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." 29 U.S.C. § 655(b)(5). The statute goes on to define a "standard" as one requiring conditions or practices "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." *Id.* § 652(8). The Supreme Court has read these provisions to set the boundaries for OSHA in setting health standards:

before promulgating a standard, OSHA must make a threshold finding that the standard will address and reduce a "significant risk" of harm; and the standard's requirements must be technologically and economically feasible. *See Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 653-58 (1980) (significant risk finding is a precondition to standard setting); *American Textile Mfrs Inst. v. Donovan,* 452 U.S. 490, 508-09 (1981) (feasibility). Specifically with respect to cost-benefit analysis, the Court wrote that

> Congress itself defined the basic relationship between costs and benefits, by *placing the benefit of worker health above all other considerations save those making attainment of this benefit unachievable.* Any standard based on a balancing of costs and benefits by the Secretary that strikes a different balance than that struck by Congress would be inconsistent with [Congress'] command . . . . Thus, cost-benefit analysis is not required by the statute because feasibility analysis is.

Id. at 509 (emphasis added). OSHA follows the same considerations in promulgating safety standards: *i.e.,* once it identifies a significant risk, it must promulgate a standard designed to eliminate or reduce that risk "to the extent feasible." *See UAW v. OSHA,* 37 F.3d 665 (D.C. Cir. 1994).

Beyond the express terms of the statute, cost-benefit analysis is, moreover, singularly ill-suited as the basis for establishing safety and health standards. The underlying premise of a cost-benefit analysis is that, in a market economy, the relevant determinants of regulatory action can all, or in significant part, be monetized and weighed in a manner that appropriately determines whether to move forward with regulation. The statute, however, begins from a completely different premise: that preserving the safety and health of working people is a value in and of itself, without being measured in dollars, and that because the market economy has failed to respect

that value, the government must step in. Thus, the legislation is *not* based on purely economic considerations, but instead on social and moral judgments that workers' lives are not expendable, even if protecting them costs money.

Even if Congress had not spoken so plainly about the values underlying this statute, there is the very basic question about whether a cost-benefit analysis gives the agency, as the decision maker, any useful information. In attempting to comply with E.O. 12866 and calculate the benefits to be realized from safety and health regulations, OSHA places a value on lives saved and injuries avoided. In the initial regulatory flexibility analysis for its proposed crane standard, OSHA assigned a value of $ 7.5 million for each fatality and $50,000 for each injury avoided, 73 Fed. Reg. at 59884, based on a "willingness-to-pay" approach, *id.* at 59874. Setting aside, for the moment, the problems inherent with a WTP approach, there is not even any pretense that this number -- $ 7.5 million per life – represents the measurable impact on the economy of the loss of a life. Weighing it against an equal value of expenditures by the affected industry in implementing safety measures therefore tells the agency nothing of practical value.

There are myriad other infirmities in the manner in which OSHA has assigned values to costs and benefits.[2] For present purposes, however, we want to return to the

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[2] Simply by way of example, among the benefits (*i.e.,* costs avoided) that OSHA generally fails to consider are pain and suffering averted; hospital, medical and insurance costs avoided; quality of life issues; avoidance of workers compensation and disability benefits; and the costs of replacing a worker in the workplace, the family and the community. On the cost side, OSHA generally relies on industry estimates, which notoriously overestimate the costs. Because, however, Congress intended the OSH Act to be "technology forcing," *American Iron & Steel Inst. v. OSHA,* 577 F.2d 825, 832-35 (3d Cir. 1978), *cert. dismissed,* 448 U.S. 917 (1980), it is fair to assume that the industry will reap benefits from the evolving technology that better safety and health

basic problem of assigning a value to the fundamental "benefit" at stake when OSHA sets standards – the value of human life and health – and the discordant notion that those values can and should be set through a "willingness-to-pay" approach" that "estimates the 'value of a statistical life' (VSL) based on data collected about job risks and the 'risk premium' in wages that is paid to employees in riskier jobs." 73 Fed.Reg. at 59874.

The "willingness-to-pay" construct is completely inappropriate for occupational standards, as it rests on a series of assumptions that at once ignore and belittle the realities of the lives of the people these regulations are intended to protect. How much a theoretical person is "willing to pay" to avoid harm is a function of a number of variables that simply are not factored into the mix: wealth, economic power, access to information, mobility, and perception. Someone accustomed to making millions of dollars a year would view an offer to be paid $100,000 to perform a certain job much differently than someone used to making $24,000. Someone able to move to another locale to take a job may be willing to take fewer risks than someone lacking the resources to support such a move. And one only need look at the low wages paid to immigrants and the extremely high rates of injuries and fatalities they are suffering on construction sites every day to be disabused of the notion that our society pays "premium wages" for hazardous work.

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requirements demand. Indeed, when the chemical industry implemented process changes to comply with OSHA's vinyl chloride standard – changes that captured and recycled the vinyl chloride fumes rather than releasing them into the environment – the industry enjoyed substantial savings in its production costs, something nowhere reflected in the cost estimates generated during the standard setting process.

At base, this construct is fundamentally at odds with the purpose of the OSH Act and, we submit, the philosophy of this Administration: that all lives have equal value that cannot and should not be quantified according to some fictitious "willingness-to-pay." We see no justification for requiring OSHA – or *any* agency dealing with labor standards, for that matter – to use this as a method for decisionmaking, particularly when not directed to do so by Congress.

b. Consideration of behavioral sciences.

Applying behavioral science to OSHA rulemaking illustrates another misfit between one of the proposed elements of decisionmaking and a statutory scheme. OSHA structures its health standards according to a "hierarchy of controls," requiring employers to implement mechanisms for controlling hazards in order of their effectiveness: first, engineering controls and then work practices, and only when those prove inadequate, personal protective equipment. For example, in a commonly structured provision, OSHA's construction standard for hexavalent chromium states that

> the employer shall use engineering and work practice controls to reduce and maintain employee exposure to chromium (VI) to or below the [permissible exposure limit (PEL)] unless the employer can demonstrate that such controls are not feasible. Wherever feasible engineering and work practice controls are not sufficient to reduce employee exposure to or below the PEL, the employer shall use them to reduce employee exposure to the lowest levels achievable, and shall supplement them by the use of respiratory protection that complies with the requirements of [the standard].

29 C.F.R. § 1926.1126(e)(1)(i).

This approach to standard setting "reflects the fundamental principle of industrial hygiene that it is preferable to eliminate hazards at their source rather than rely on protective measures that depend on worker conduct." Rabinowitz, OCCUPATIONAL

SAFETY AND HEALTH LAW 377 (2D ED. 2002). Thus, in approaching the issue of how best to protect employees from health hazards in the workplace – *i.e.*, in deciding how to carry out its statutory mandate – OSHA has relied on the expertise of industrial hygienists, the discipline it views as most relevant. The courts have upheld OSHA in following these principles. *See, e.g., ARARCO, Inc. v. OSHA*, 746 F.2d 483, 496-98 (9th Cir. 1984) (arsenic); *AFL-CIO v. Marshall*, 617 F.2d 636, 652-55 (D.C. Cir. 1979), *aff'd in part and rev'd in part on other grounds*, 452 U.S. 490 (1981) (cotton dust).

If OMB were to impose a blanket requirement that agencies must consider the views of behavioral scientists in developing their regulations, it would usurp OSHA's authority to decide which fields are most useful to its decisionmaking. While nothing in the statute would necessarily preclude the agency from taking behavioral scientific thought into consideration, OIRA should leave to the agency the decision whether this is a productive avenue of inquiry.

c. The use of alternative regulatory tools.

For similar reasons, each agency should be left to decide whether, and to what extent, it would serve its objectives to use alternative "regulatory tools such as warnings, disclosure requirements, public education and economic incentives." 74 Fed.Reg. 5977. OSHA has promulgated standards that incorporate these sorts of "tools." For example, its Hazard Communication Standard, 29 C.F.R. § 1910.1200 (*codified as id.* § 1926.59 for the construction industry), requires employers to maintain and make available to employees detailed information about the hazardous chemicals contained in materials with which they work. Various standards also require employers

to post warnings cautioning employees to avoid hazardous areas of a workplace when they do not have to be there to perform their work.

OSHA, however, has always treated these tools as adjuncts to, not substitutes for, engineering controls, work practices and personal protective equipment. It does so for a number of reasons, including the fact that it would run counter to the industrial hygiene principles just discussed; it would contradict the statute's emphasis on placing reliance on employers to provide safe workplaces; and it would totally disregard the economic realities that face most workers. That is, for workers to make effective use of warnings and other hazard information, they must possess a degree of economic power missing in most workplaces. Just as the use of "willingness-to-pay" analysis disregards the economic realities that face most workers, so, too, would safety and health regulation that depended on workers being able to stand up to their employers and use information about workplace hazards in order to protect themselves.

III. Conclusion

Once again, the BCTD appreciates the Administration's willingness to rethink the role of OIRA in the regulatory scheme. As the examples drawn from our experience with OSHA illustrate, Congress has entrusted each administrative agency with particular missions, defining their purpose, the basic criteria for decisionmaking and the process through which the agency is to promulgate its regulations. OIRA's purpose should be to assist the agencies in developing efficient and effective means of accomplishing their statutory objectives, not to thwart their efforts by erecting additional substantive or procedural barriers to regulation.