[redacted]

From: on behalf of FN-OMB-OIRA-Submission
Subject: FW: NAHB comment letter on Federal Regulatory Review
Attachments: NAHB Comment Letter to OMB - FINAL.pdf; Attachment.pdf; c-nahb.pdf

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From: Mittelholzer, Michael
Sent: Monday, March 16, 2009 8:34 PM
To: FN-OMB-OIRA-Submission
Cc: Asmus, Susan
Subject: NAHB comment letter on Federal Regulatory Review

To Whom It May Concern:

Please find the attached comment letter (NAHB Comment Letter to OMB – FINAL.pdf) and two attachments (Attachment.pdf & c-nahb.pdf) that comprised the National Association of Home Builders (NAHB) comments on OMB's Thursday, February 26, 2009 notice for public comment on the President's Memorandum for the Heads of Executive Departments and Agencies, published in the Federal Register on Tuesday, February 3, 2009. All files have been saved in PDF format.

NAHB respectively submits these comments to OMB for consideration, if anyone at OMB has follow-up questions regarding the points raised by NAHB in this comment letter please either reply to this email or to the contact person listed in NAHB's comment letter.

Thank you for your consideration of NAHB's comments.

Michael Mittelholzer
Assistant Staff Vice President, Environmental Policy, Advocacy Group
National Association of Home Builders

NAHB
NATIONAL ASSOCIATION OF HOME BUILDERS

Monday, March 16, 2009

VIA ELECTRONIC MAIL

The Honorable Peter R. Orszag
Director
Office of Budget and Management
Attn: Mabel Echols, Room 10102
New Executive Office Building
725 17th Street, N.W.
Washington, D.C. 20503

Re: Federal Regulatory Review

Dear Mr. Orszag:

On behalf of the National Association of Home Builders (NAHB) I respectfully submit these comments regarding the President's memorandum entitled Memorandum to the Heads of Executive Department and Agencies published in the Federal Register on Thursday, February 26, 2009. I commend the President for affording the public and NAHB an opportunity to comments on these critically important matters concerning how the federal rulemaking process should work and specifically, what role the Office of Information and Regulatory Review (OIRA) within the Office of Management and Budget (OMB) should play during the federal rulemaking process.

NAHB understands that it is unusual for a President to seek public comment on Executive Orders or Presidential Memoranda. We are therefore especially pleased to have this opportunity to share our views on the vital role OIRA plays in the federal rule making process. In short NAHB strongly supports the oversight role OIRA provides to the various federal agencies to ensure that their regulatory proposals are; fully justified, supported by rigorous cost-benefit and distributional effects analyses, and are conducted in an open and transparent manner. NAHB also strongly recommends that OIRA and federal agencies follow a similarly rigorous approach for "significant" regulatory guidance documents. Because NAHB's members are directly affected by many federal regulatory proposals, and because NAHB's membership is comprised almost entirely of "small entities" as defined by the Small Business Administration (SBA), NAHB members rely on the good work of independent federal agencies, such as OMB and SBA, to ensure all federal agencies comply with various Executive Orders and Congressional

mandates designed to ensure the regulatory impact on small entities is fully understood, documented, and minimized to the extent possible. Therefore, NAHB would like to add its voice to those from academia, public interest organizations, and the business community who all support the crucial oversight role OIRA plays in implementing the requirements of E.O. 12866, and NAHB urges the Obama Administration to apply that approach consistently to both "significant" rules and regulatory guidance documents.

***Background*:**

The above-referenced Federal Register notice summarizes the President's Memorandum and Executive Order (E.O.) 13497 signed on January 30, 2009. Under E.O.13497, President Obama repealed two provisions of the E.O. 12866 entitled "Regulatory Planning and Review," originally adopted by President Clinton in 1993.[1] The first provision required federal agencies that prepare regulatory guidance documents that were likely to result in an annual economic impact of $100 million or greater to submit those guidance documents to OIRA for review and provide the public an opportunity for public comment. The second provision required each federal agency to identify a coordinator who would work directly with OIRA staff during the pre-publication stage of an economically "significant" rule or guidance document.

In addition, under the Presidential Memorandum, the President has instructed the OMB Director to convene a working group of representatives from various federal agencies to develop a series of recommendations within 100 days (i.e., by mid-May) that will form the basis of a new executive order on the federal regulatory review process. Specifically, under the President's directive and the federal register notice federal agencies and the public are asked to consider seven (7) factors:

I. Relationship between OIRA and the other federal regulatory agencies.
II. Importance of disclosure and transparency during the federal rulemaking process.
III. Encouraging public participation during the federal rulemaking process.
IV. The role of "cost-benefit analysis" during the rulemaking process.
V. The role of (economic or social welfare) distributional consideration, fairness, and concern for the interests of future generations.
VI. The role of "behavioral sciences" in formulating regulatory policy.
VII. The best tools for achieving public goals through the federal regulatory process.

With regard to the factors highlighted by the President in his memorandum, NAHB believes the two objectives that must be maintained are transparency during the rulemaking process and maintaining (if not expanding) opportunities for public

[1] Exec. Order No. 12866, 58 Fed. Reg. 51735 (October 4, 1993).

participation *before* a "significant" federal regulatory proposal or guidance document is promulgated by an federal regulatory agency.

Beyond expressing support for transparency and opportunities for public participation, NAHB will address four factors (I, II, IV, and V) raised by President and one matter that was not raised the removal of OMB's review of "significant" guidance documents from E.O. 12866 review. NAHB believes each of these matters is both a core function of OMB and necessary to safeguard the public's right to a level of transparency in federal government that has been too long absent from the federal rulemaking process. NAHB recognizes OMB and the federal agencies need to balance these important objectives with the federal government's overarching need for a timely and responsive federal rulemaking process. NAHB does not believe such an outcome is a "zero sum game," NAHB respectfully offers some suggestions on how to balance these potentially conflicting objectives.

I. Relationship Between OIRA and Other Federal Agencies:

OMB is responsible for assisting the President in the development and execution of his policies and programs, including the development and resolution of all budget, policy, legislative, regulatory, procurement, e-gov, and management issues. In the regulatory arena, OMB, typically through OIRA, plays an important role in overseeing federal rulemaking, guidance, and information requirements. OMB/OIRA oversight is an important part of the rulemaking process – both to ensure consistency in the rulemaking process and to ensure informed and impartial review. Prior to the adoption of E.O. 13497, the scope of the OIRA's role and the agencies' required regulatory analysis was outlined through E.O. 12866 and OMB Circular A-4.[2] Both documents identify guiding principles and/or normative analytical objectives (including requirements for cost-effectiveness analyses (both quantified and non-quantified benefits and costs), scientific risk assessment, performance-based regulatory standards, and public participation) that, as a matter of sound regulatory procedure, have been demonstrated to work and, thus, should be shared by successive Administrations. The repeal of E.O.s 13258 and 13422, along with the announcement of the development of a new E.O. on federal regulatory review, however, causes great concern. NAHB is particularly concerned that OMB/OIRA's role and processes may be changed to diminish their effectiveness and/or allow a less rigorous level of cost/benefit and regulatory analyses.

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[2] Office of Management and Budget, Circular A-4, dated September 13, 2003 (which became effective for economically significant final rules on January 1, 2005).

According to Circular A-4, "Regulatory analysis is a tool regulatory agencies use to anticipate and evaluate the likely consequences of rules. It provides a formal way of organizing the evidence on the key effects - good and bad - of the various alternatives that should be considered in developing regulations. The purpose of the analysis is to (1) learn if the benefits of an action are likely to justify the costs and (2) discover which of various possible alternatives would be the most cost-effective."[3] Because federal agencies are designed to regulate, however, they often overlook a regulations' full costs or unintended consequences, and rarely fully examine alternatives. The federal agencies and their staff are also often vested in particular outcomes, making a fair and impartial review of proposed actions virtually impossible. NAHB believes that the key principles outlined by Arrow et al in 1996 still apply.[4] One of these principles is that the more external review regulatory analyses receive, the better they are likely to be. A robust and primary role for OIRA in the federal rulemaking process is of utmost importance to ensure a dispassionate and impartial review of proposed agency action, and therefore to ensure a reasonable and legitimate rulemaking action in general.

Another principle in Arrow et al that is still relevant is the need for a single entity to establish key economic parameters and a standard format for regulatory impact analyses that all agencies should follow. Although the principle does not require that single entity to be OIRA, OIRA is a logical entity to fill that role, given its history. To date, OIRA has been engaged at both the front end and the back end of most rulemakings. From NAHB's experience, OIRA appears to form a loose partnership with the agency and the Small Business Administration, where appropriate, to ensure that the requisite processes were followed an analyses completed, and that the agency has considered all reasonable options. Because the agencies retain the substantive expertise related to their rulemaking activities and OIRA maintains a role ensuring due process and analyses, the joint approach to rulemaking has proven effective in the past and should be continued. It has been demonstrated countless times that a rigorous OMB/OIRA review processes can help to develop and implement regulatory alternatives that provide equivalent levels of regulatory benefit with significantly less cost and burden to the regulated community – an important objective. Similarly, an impartial review can ensure that regulations are based on sound science and an informed understanding of their direct and indirect impacts. Finally, by playing a strong role, OMB/OIRA can meet the Administration's goal to "offer a dispassionate and analytical "second opinion" on agency actions."[5] NAHB strongly urges the Administration to maintain strong ties between the agencies and OMB

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[3] *Id.*
[4] Arrow, Kenneth J. et. al,, *Benefit-Cost Analysis in Environmental, Health, and Safety Regulation: A Statement of Principles*, American Enterprise Institute and Resources for the Future, Washington , DC, 1996.
[5] 74 *Federal Register* 8819 (February 26, 2009).

and retain the high level of oversight for OMB that was effectuated through the full implementation of, and compliance with, E.O. 12866 and Circular A-4.

II. *Importance of Disclosure and Transparency*:

By their very design, rules define generally applicable conditions and have the constraining power of law. As a result, rulemaking should not be undertaken lightly, without sufficient demonstration of need, an understanding of how the regulatory action will garner the desired results, and a thorough analysis of costs and benefits and other impacts that may result from each rule's implementation. Sufficient disclosure and transparency are critical to meeting these standards, and thus are critical to the rulemaking process in general. This is consistent with another of the key principles outlined in Arrow, et al: that transparency is necessary if a regulatory analysis is to inform the decision making process. Congress recognized the need for sound and clearly transmitted information by adopting federal information quality requirements in Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001.[6] This law was supplemented by OMB's establishment of model Information Quality Guidelines (IQG) and by each agency's implementing guidelines. Under OMB's IQG, "influential information" (i.e., information having or likely to have important public policy or private sector impacts, in other words, data that is relied on to support rulemaking) must include sufficient "transparency" such that the analytic results are "reproducible" by a qualified member of the public. Also, influential information concerning risks to human health, safety, or the environment must meet the new more stringent standard of quality from the Safe Drinking Water Act of 1996 (SDWA),[7] which has been adopted government-wide by OMB (and adapted by each of the agencies).

EPA's IQGs, for example, require the agency to use only the "best available, peer reviewed science" and "best available methods."[8] As a result, EPA must ensure that any technical or scientific studies or information used in developing any new rules meets this data quality standard. Further, the SDWA standard requires that when an agency disseminates information concerning risks to human health, safety or the environment, such agency should also include "in a document made available to the public," information concerning: the population addressed by any estimates of health risk; the expected or estimated health risk; the upper and lower bounds of the risk; significant uncertainties with the risks; and any peer reviewed studies that are relevant to or fail to

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[6] P.L. 106-554.
[7] 42 U.S.C. 300g-1(b)(3)(A) and (B).
[8] *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity, of Information Disseminated by the Environmental Protection Agency*, EPA/260R-02-008, October 2002, p. 22 (October 2002).

support any estimated of risk.[9] Each agency must include this additional information along with any environmental risk information it uses, relies on, or disseminates.

Under OMB's and the agencies' IQGs, information that has been subject to formal peer review is presumed to be of sufficient quality to meet the test of objectivity under the guidelines. This requirement bolsters individual agency's Peer Review Policies that generally require independent peer review of all scientific or technical work products that are used to support a significant rulemaking. EPA strives, under its IQGs, "to ensure that all parts of society - including communities, individuals, businesses, State and local governments, Tribal governments - have access to accurate information sufficient to effectively participate in managing human health and environmental risks."[10] To meet these obligations, the agencies must follow, and OMB must enforce, policies that require the sharing of data that meet the IQG requirements. NAHB thus recommends that the processes and procedures OMB adopts within any new Federal Regulatory Review be designed to embrace and withhold the obligations outlined in the IQG and each agency's individual requirements.

In addition, NAHB strongly supports President Obama's recognition of the need for transparency when he stated, "Each agency should make available to the public the scientific or technical findings or conclusions considered or relied on in policy decisions," except where prohibited by law.[11] He added that each agency should also have procedures to "ensure the integrity of the scientific process" and ensure that decision making is not corrupted. To meet these goals, it is clear that the Administration must retain oversight of the rulemaking process and continue to perform rule-by-rule review. Failing to provide an opportunity to perform a specific and focused review of each and every rulemaking would jeopardize the President's Constitutional duty to – "'take care that the laws be faithfully executed."

III. Benefit-cost analysis as an important, but not necessarily the only, tool that is appropriate for OMB to require that agencies provide, and that OMB should use when analyzing regulatory proposals:

Two of the key principles outlined in Arrow et al, with which NAHB agrees, are 1) a benefit-cost analysis (BCA) is a useful way of analyzing proposed policies, and 2) a BCA

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[9] *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity, of Information Disseminated by the Environmental Protection Agency*, EPA/260R-02-008, October 2002, p. 23.
[10] *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity, of Information Disseminated by the Environmental Protection Agency*, EPA/260R-02-008, October 2002, p. 3.
[11] Barack Obama, Memorandum for the Heads of Executive Departments and Agencies re: Scientific Integrity, March 9, 2009.

should be required for all major regulatory decisions. Fully analyzing costs and impacts on the affected entities and society overall along with the expected benefits, is the only way to truly understand and comprehend the potential scope and impact of any rule.

Another principle in Arrow et al is that economic analysis can be useful in designing regulatory strategies that achieve a desired goal at the lowest possible cost. Thus rulemaking may benefit from conducting both BCA and cost effectiveness analysis (CEA). Where BCA compares the costs of an action to its expected benefits, , CEA compares the costs, and only the costs, of different regulatory options to achieve the same goal. CEA does not weigh benefits, and it is appropriate where the obligation to take an action is undisputed, but an agency has a choice of methods to achieve it. BCA should be used when the agency has some choice over the extent or existence of regulations.

In the end, while NAHB believes that BCA should play a prominent role in federal rulemaking, NAHB also recognizes that BCA has certain limitations. Again, these are outlined in the principles state by Arrow et al. One limitation is that not every impact of a regulatory action can be quantified or expressed in monetary terms. A good BCA should quantify and monetize as many impacts as possible, but should also carefully list the important impacts that cannot be quantified or monetized, in order to better inform regulatory decisions.

Moreover, an agency should not be bound strictly by the results of a BCA. This is consistent with the principles outlined in Arrow et al, and in a paper by Hahn and Sunstein, presumptive nominee for Administrator of OIRA[12] In particular, Hahn and Sunstein, do not contend that an assessment of quantified costs and quantified benefits tells us everything that we need to know or the precise numbers are always possible. But when costs are high and the benefits low or nonexistent, something seems seriously amiss, especially because an absence of significant benefits signals a likely absence of significant savings in terms of health, safety, or the environment." NAHB concurs with this p and many of the observations and conclusions of this paper, including 1) the general value of BCA in the federal rulemaking process, by helping to focus limited public resources toward areas of greatest benefit. 2) the point that, absent some form of BCA, federal agencies and OIRA during the rulemaking process, neither the public nor federal agencies know if their proposed regulatory program is delivering presumed benefits.

[12] Hahn, R., Sunstein, C., (insert date) A New Executive Order for Improving Federal Regulation? The Law School University of Chicago, Working Paper No. 150, 2.

*IV. **Role of Distributional Effects:***

Another principle emphasized in Arrow et al is that, although a benefit-cost analysis should emphasize the comparison of overall benefits to overall costs, a *good* benefit-cost analysis should also include an analysis of important distributional effects. Any regulation, rule, or administrative action is going to make some people better off and some people worse off. In the context of examining a regulatory proposal, it is appropriate to identify job losses in or other effects in particularly industries, on low-income or other types of individuals, or in particular local economies. . . Regulatory actions that do impose a distributional effect can still be economically efficient if the winners receive enough benefit so they could compensate the losers for their losses, and retain some incremental benefit. If compensated, the losers would have no grounds for complaint, since they were made whole; they are no worse off than before. The gainers are better off than before, so the administrative action would be an unambiguous improvement in economic well-being. Because potentially the gainers could compensate the losers and still keep some benefit, the action has positive net benefits, and it is called "Potentially Efficient" or "Kaldor-Hicks Efficient." However, that compensation is never paid in practice. The gainers keep all of their gains, and the losers bear all of their losses. Therefore, it is essential for federal agencies and OIRA to pay close attention to who bears the burden of a regulatory policy and who receives the benefits; this problem is called the "incidence" of the regulation. Previous OMB guidance to federal agencies on how to conduct a regulatory analysis addressed this issue. OMB guidance correctly states (see Section III (D) of Appendix C) such consideration of issues as fairness, are especially important when there is a great disparity in the effects a regulation would have on different groups of people.[13]

In the case of housing policies, NAHB often has a particular interest in marginal first-time home buyers, small homes builders and residential subcontractors, and local economies where housing costs are high. Often NAHB has provided information to OMB and agencies such as, from among many possible examples, 1) how many home buyers will be priced out of the market for a new home by regulatory actions that increase the price of producing a home and delivering it to the buyer 2) how many small builders there are in the U.S. and how they in particular may be adversely impacted by a regulation that requires them to hire additional employees, 3) how particular local housing markets will be impacted by changes in limitations imposed on conforming or government-insured mortgages.

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[13] Draft 2003 Report to Congress on the Costs and Benefits of Federal Regulations, 68 Fed. Reg. 5492, 5513 (February 3, 2003).

NAHB urges OMB to make distributional issues an important part of regulatory analysis in general, and to take into account impacts on marginal first-time home buyers, low- and moderate-income renters, small home builders and subcontractors, and local economies with high housing costs in particular .

V. NAHB opposes removal of "significant" regulatory guidance documents from OIRA oversight:

On January 30, 2009, President Obama signed E.O. 13497 *Revocation of Certain Executive Orders Concerning Regulatory Planning.*[14] E.O. 13497 removes "significant" guidance documents from OIRA's oversight responsibilities under E.O. 12866 *Regulatory Planning and Review* that provides OMB authority to review "significant" federal regulatory proposals that will have a "significant" impact on any sector of the U.S. economy. The term "significant" is defined under E.O. 12866 as "any regulatory action" that is likely to have an annually economic impact of over $100 million.[15] Under E.O. 12866, each federal agency whose "significant" regulatory proposal or guidance document is subject to OMB review under E.O. 12866 must engage OIRA staff and prepare a cost-benefit analysis of the regulatory proposal to ensure, among other things, that the regulatory proposal's benefits, when quantified outweigh the costs.[16] Federal agencies that fail to meet the requirements of E.O. 12866, risk having OMB halt or remand the regulatory action back to the federal agency for reconsideration. Thus, the review conducted under E.O. 12866 provides a vital *check-and-balance* to the federal rulemaking process ensuring each federal agency, including OMB, has been fully assessed their proposal to determine economic costs and societal benefits before being formally proposed to the public.

NAHB supported the prior Administration's decision to include "significant" regulatory guidance documents under E.O. 12866 review. Inclusion of economically "significant" guidance documents under E.O. 12866 was logical given that the definition of "significant regulatory action" under E.O. 12866 includes "any regulatory action."[17] Certainly, regulatory guidance documents as they can impose requirements and mandates that are legally enforceable (see attached table of examples of guidance documents) issued by various federal agencies meets the definition of "significant regulatory action" under E.O. 12866. NAHB also supported OMB's "Good Guidance Practices," directive issued by (then) OIRA Administrator John D. Graham in 2007.[18] NAHB incorporates

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[14] Exec. Order No. 13597, 74 Fed. Reg. 6113 (February 4, 2009).
[15] Exec. Order No. 12866, 58 Fed. Reg. 51737(October 4, 1993).
[16] *Id.* At 51736..
[17] *Id.* At 51738.
[18] Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3431 (January 25, 2007).

the comments we submitted to OMB on that matter into this comment letter and a copy of NAHB's comment letter is attached for your consideration.

Furthermore, NAHB is seeking clarification from the OMB Director under this notice as to whether E.O. 13497 means OMB is no longer requiring federal agencies to follow OIRA's "Good Guidance Practices."[19] We are specifically interested in the requirements under OIRA's guidance that all federal agencies allow the public an opportunity to comment of all economically "significant" guidance documents as well as maintain a "public posting" either on the internet or some other electronically accessible media for all economically "significant" regulatory guidance documents."[20] NAHB strongly encourages the President and OMB Director continue to observe these two mainstays of OMB's "Good Guidance Practices." Failure of federal agencies to follow OMB's Final Bulletin for Agency Good Guidance Practices strikes NAHB as is inconsistent with President Obama's commitment under this Presidential Memorandum for greater transparency on the part of federal agencies and incompatible with the President's directive "encouraging public participation in agency regulatory processes."[21]

To be clear, NAHB is not opposed to federal agencies issuing various forms of regulatory guidance documents. To the contrary, NAHB understands the need for and firmly supports the ability of federal agencies to routinely (and in a timely manner) issue the guidance documents necessary to effectively run their regulatory programs. NAHB itself often seeks written guidance from federal agencies to either clarify existing regulatory requirements, or in a limited number of situations, provide immediate interpretations or "stop gap" compliance information when, for example, a federal court has invalidated a key regulatory requirement or program (see attached example from FWS.) In these situations it is imperative federal agencies can develop and disseminate to the public and regulated entities regulatory guidance documents almost immediately. Recognizing the balance needed to both facilitate the timely issuance of certain guidance documents and provide an opportunity for public comment on those guidance documents deemed significant, NAHB suggests that the Administration continue to operate pursuant to the Good Guidance Practices, and to exempt the following documents from public review.

- Regulatory guidance documents that are needed immediately, for example in responseto a court actions that effectively halts a core regulatory permitting program, and

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[19] 72 Fed, Reg. at 3432.
[20] 72 Fed, Reg. at 3440.
[21] 74 Fed, Reg. at 8819.

- Regulatory guidance documents that only clarify existing regulatory requirements.

NAHB does not believe these two proposed exemptions are inconsistent with either E.O. 12866 or OIRA's Final Bulletin for Agency Good Guidance Practices. For example, neither E.O. 12866 nor OIRA's bulletin required federal agencies to review any regulatory guidance documents that did not meet the definition of "significant" under E.O. 12866. This means that regulatory guidance documents that neither raise "new" or "novel" legal or policy interpretations nor have an annually economic impact of greater than $100 million dollars were never subject to review under E.O. 12866. For guidance documents that are issued on an emergency basis, NAHB suggests that the federal agencies still submit those regulatory guidance documents deemed "significant" to both OMB review and public comment at a later date. In fact, federal agencies routinely claim to follow this approach (see attached example from U.S. FWS) unfortunately, however, they frequently fail to revisit these guidance documents as promised. Therefore, NAHB asks the OMB Director to use his authority under E.O. 12866 to issue "prompt letters" to the head of any federal agency who fails to revisit "significant" regulatory guidance documents under E.O. 12866 within one year.[22]

Conclusion:

NAHB supports the vital oversight role OMB and its' OIRA staff play during the federal rulemaking process. OMB role is to ensure all federal agencies have sufficiently examined and quantified the economic impact and the presumed benefits of any regulatory programs before they are implemented. NAHB believes the requirements under E.O. 12866 strike an important balance by allowing non-significant proposed rules and guidance documents to proceed without OMB or the public's input prior to publication in the Federal Register or posting on an agencies website.

Furthermore, NAHB understands federal agencies themselves may need a limited ability to issue immediate "significant" guidance documents without prior review by OMB or the public. In those limited situations NAHB has highlighted in this letter, NAHB requests both the issuing federal agencies and OMB agree to revisit any "significant" guidance documents for review by OMB and public within a specified period of time (e.g., no more than one year after initial publication.) Given the President's goal is to achieve both transparency and increasing the public's participation

[22] Exec. Order No. 12866, 58 Fed. Reg. 51739 (October 4, 1993).

during the federal remaking process, NAHB views implementation of E.O. 12866 for regulatory proposal and guidance documents are the best way to achieve those goals.

If you have any questions regarding NAHB's comment letter or would like to discuss them with us, please do not hesitate to call Michael Mittelholzer, NAHB's Assistant Staff Vice-President of Environmental Policy [redacted]

Sincerely,

Vice President,
Environmental Policy, Labor Safety and Health/Advocacy Group
National Association of Home Builders

Attachments (2)

Attachment "A" Examples of Recent Federal Guidance Documents

Examples listed below are recent federal guidance documents that impact NAHB's members. The purpose of this list is to provide OMB staff further clarity on when a federal guidance document should be subject to OMB/ORIA review and when a federal guidance document does not merit such OMB/ORIA review, or where such OMB/ORIA review could be performed later date e.g., under an emergency situation.

Should be reviewed

- **Guidance Documents That Provide Detailed Examinations Of Specific Safety and Health Issues.** For example, Ergonomics for the Prevention of Musculoskeletal Disorders - Guidelines for Poultry Processing (OSHA 3213) http://www.osha.gov/ergonomics/guidelines/poultryprocessing/poultryall-in-one.pdf OSHA claims that these guidelines are advisory in nature and informational in content. OSHA also asserts that these documents are not a new standard or regulation and do not create any new OSHA duties. Under the OSH Act, the extent of an employer's obligation to address safety hazards where there is not a specific rule, regulation, or standard, is governed by the general duty clause. OSHA claims that an employer's failure to implement such "guidelines" is not a violation, or evidence of a violation of the general duty clause. However, we believe that OSHA may in fact use such guidelines as evidence of an employer's obligations under the general duty clause and issue citations and fines based on these guidance documents.

- **Policy Directives.** These policy directives provide instruction and guidance to OSHA National, Regional, and Area Offices, industry employer and employee groups, OSHA State programs, and federal agencies concerning OSHA's policy and procedures for implementing intervention and inspection programs that substantially affect the rights of the regulated community. We believe that some of these directives, such as CPL 02-00-124 [CPL 2-0.124] - Multi-Employer Citation Policy. http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=2024 , are actually rules that can only be effectuated by notice and comment rulemaking under the Administrative Procedures Act.

- **Wetlands Jurisdiction Guidance.** EPA and U.S. Army Corps of Engineers (Corps) issued joint guidance in June, 2007 and again in December, 2008 on the limits of federal jurisdiction over so called "isolated wetlands" following the U.S. Supreme Court's 2006 ruling under Rapanos v. Carabell. http://www.epa.gov/owow/wetlands/guidance/CWAwaters.html This EPA/Corps guidance document serves as the primary compliance tool both federal regulators and private landowners use to determine if an "isolated wetland" is subject to federal regulation. In this case both OMB and the public had a chance to review and comment on this guidance document. However, NAHB believes

(and commented as such) both EPA and Corps should enter into formal rulemaking on this topic given that this guidance document is serving in lieu of a federal rulemaking.

- **Guidance on Conforming Loan Limit Calculations**. In 2007 OFHEO released on their Agency website guidance on how the Agency would calculate the conforming loan limit for residential mortgages which the two Government Sponsored Enterprises (GSEs) Fannie Mae and Freddie Mac can provide financing. Residential properties valued greater than OFHEO's limit cannot benefit from favorable financing terms provided by the GSEs. NAHB objected to OFHEO not conducting this review of Conforming Loan Limits Calculations through a public notice and comment process subject to OMB review.

Should **NOT** be reviewed

- **OSHA Standard Interpretation Letters.** OSHA requirements are set by statute, standards and regulations. These interpretation letters explain OSHA's requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. These letters constitute OSHA's interpretation of the regulatory requirements and offer critical information to the regulated community in a timely manner. An example would be this letter from OSHA to NAHB requesting clarification on fall protection requirements for stairwells and mechanical chase openings surrounded by interior stud walls in residential construction: http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=24722

- **OSHA Training Information Contained in Brochures, Booklets, Fact Sheets, Pocket Guides, Posters, and QuickCards.** These documents are a series of training and informational fact sheets, booklets, etc. highlighting OSHA programs, policies or standards. They provides a general overview of a particular topic related to OSHA regulations and standards and do not alter or determine compliance responsibilities. In addition, they typically refer to compliance requirements of OSHA standards in the Code of Federal Regulations. Examples would be the OSHA "Lead in Construction Fact Sheet: http://www.osha.gov/OshDoc/data_Hurricane_Facts/lead_hazards_fs.pdf and Working Safely in Trenches Safety Tips QuickCard (OSHA 3243) http://www.osha.gov/Publications/trench/trench_safety_tips_card.pdf .

Should be **NOT** be reviewed

- **FWS Guidance Memo On The Application Of The "Adverse Modification" Standard.** On August 6, 2004, the Ninth Circuit Court of Appeals ruled, in Gifford Pinchot v. USFWS, that the regulatory definition of "adverse modification" was

contrary to law. On December 9, 2004, the Department of Interior issued a guidance memo to all FWS Regional Directors when making "adverse modification" determinations for biological opinions as an interim measure "to be in place while the Department proceeds with a proposed rulemaking early next year that addresses this ruling." As a result of the court rule, all projects that could potentially destroy or adversely modify critical habitat would come to a halt in the absence of this guidance. Therefore, NAHB does not believe OMB should formally review this guidance document. However, NAHB strongly recommends OMB should require the Department of Interior to follow up with revised guidance or a new rulemaking, that includes public notice and comment, based on a specific timeframe. The guidelines issued over 4 years ago were intended to be used on a temporary basis until a new rulemaking could be made. Lack of rulemaking has left the Service to continue to make inconsistent determinations despite the guidelines.
http://training.fws.gov/bart/Resources/HCP/Guidance_and_Directors_Memo/Director%27s_Adverse_Mod_Guidance_12-9-04.pdf

ADVOCACY GROUP
Federal Regulatory & Housing Policy

January 9, 2006

VIA FACSIMILE AND ELECTRONIC MAIL

The Honorable John D. Graham, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
New Executive Office Building, Rm. 10235
725 17th Street, N.W.
Washington, D.C. 20503

Re: Good Guidance Practices

Dear Dr. Graham,

The National Association of Home Builders (NAHB) would like to thank the Office of Management and Budget (OMB) for proposing a process to bring transparency and consistency to Executive Branch activities that affect the public directly, but do not qualify as rules under the Administrative Procedure Act (APA). Without any regularized procedures for publication, adoption, or even application to specific instances, such as OMB suggests, the mass of agency "guidance" has grown without order or comprehension to a point where–in the aggregate–it impairs substantially the ability of the public to understand or comply with the law. Agency guidance and policy can become tantamount to a rule; it may be unknown to the public or even the employees of the administering agency; and it may be inconsistent within and across agencies. The result is a set of unsystematic requirements that bind the public in an arbitrary manner, yet from which there is no remedy, since agency "guidance" is not generally subject to judicial review.

NAHB is a Washington-based trade association representing more than 220,000 members involved in home building, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. Known as "the voice of the housing industry," NAHB is affiliated with more than 800 state and local home builders associations around the country. NAHB's builder members will construct about 80 percent of the more than 2 million new housing units projected for 2006, making housing one of the largest engines of economic growth in the country.

Home building is one of the most intensely regulated industries in the economy. Not only do home builder face the full slate of regulations stemming from the tax laws,

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Social Security, and equal opportunity legislation, but they also face a special chapter of regulations from the Occupational Safety and Health Administration (OSHA), and the Environmental Protection Agency (EPA) has declared home builders to be a special target for enforcement. No industry faces the restrictions that confront home builders about where they may conduct business, the minutiae of how to conduct that business in terms of the placement of structural components, or the very appearance of the business. Many of those issues are matters of state or local land use or building codes, but they resonate in federal regulations as well. Conservation requirements from the EPA or Interior Department may dictate the placement or design of housing in some areas; the ability to build may hinge on the ability to get a wetlands permit from the Corps of Engineers (Corps). Local building codes can be partly pre-empted by Department of Energy regulations. Perhaps most important for builders, building permits generally require builders to obtain "all necessary permits" before construction can begin.

Permits, agreements, licenses, and the like are issued by agencies, but the crucial point in guidance is that they are issued by individual employees of the agency. A staff member at an agency has to make a decision, and that decision may not flow unambiguously from the statute and regulations–requirements that have been codified and that were written with public scrutiny and input. While trying conscientiously to follow the statutes, regulations, and judicial interpretations that are relevant, the agency staff must consider the preferences of supervisors and the plans of the agency, even if those plans and goals have not been communicated effectively to the staff or the public. In addition, agency staff will have preferences and viewpoints of their own that may influence their decisions–consciously or unconsciously. Therefore, the agency decision–which is the staff member's decision–is subject to many influences besides the facts and the law. The purpose of guidance is to make those decisions uniform by telling the staff and the public exactly what the agency policy is.

These individualized, non-policy, or non-rule decisions are not thought to have legal consequences, because they do not determine any generally applicable principle. However, they have all the constraining power of the law. The builder cannot proceed with construction without, for example, a wetlands permit from the Corps of Engineers, if applicable. Whether the permit will be issued depends on Corps headquarters policy, Corps regional policy, and local office policy, as well as the inclinations of relevant Corps staff. These all affect the question that is crucial for builder: whether the permit will be issued. A denial has same effect on the builder whether the denial is due to clear provisions of the Clean Water Act or due to a staffer's idiosyncrasy.

Thus, guidance and office policies determine the way regulatory power is applied; NAHB would like to see mechanisms put in place to ensure this power is applied in a transparent and fair manner in accordance with the law. NAHB believes the most important principles to govern this process of guidance reform are publication, accountability, and consistency. All of these principles are addressed by the OMB proposal.

Publication is the keystone of guidance reform. This issue is illustrated by the experience of an NAHB member who sought to sell a property participating in low-income housing program. To do so, he had to assign the contract with the Department of Housing and Urban Development (HUD), which has rules and policy in place to govern such transactions. However, he was told he would also have to accept additional requirements to abide by all future HUD directives because of an "unwritten rule" HUD applied to such cases. Leaving aside the question of whether this was a rule in terms of the APA, it was at least an agency procedure that determined a condition for granting applications. He could not plan for compliance with this "rule," because it was unwritten; neither could he comment to the agency about the policy's practicality or legality.

The multiple forms of electronic media mean that many different methods might qualify as publication. OMB suggests that all guidance should be available on the internet, which would be a good thing. Electronic publication facilitates search and transmission of policies, but the most important point is that the guidance be written down in some permanent record, so the guidance itself and any changes can be traced, and there would be no more "unwritten rules." If the guidance is written, then the guidance documents can be listed and catalogued. A descriptive and organized list of existing guidance documents could be of substantial help.

Accountability means that some person in the agency is in a position to change existing guidance and issue new guidance. OMB's proposed Good Guidance Practices[1] would go a long way toward establishing accountability via Section II(1), "Approval Procedures." By the terms of that section, each guidance document would have to be signed by an official authorized to make such decisions. Agency employees are required to follow the guidance. To avoid excessive rigidity, staff can cut some of the red tape by providing justification for not following guidance. However, the staff cannot act alone; they must get supervisory approval. NAHB recommends that OMB make clear that the supervisor should be at the level appropriate for issuing relevant guidance. That clarification would ensure the chief advantage of OMB's recommended approval procedures: they eliminate *ad hoc* decision-making by agency staff, with the additional benefit of assuring that decisions are made in the appropriate office.

Consistency encompasses both the idea that the law should be same for each person and the idea that federal law should be the same in all parts of the country. As a corollary, the law should be the same at all agencies; the public shouldn't be held to violate one agency's policies when it hews to the requirements of another agency. For example, the criteria for whether a species is endangered should be the same, regardless of whether that decision is made by the Fish and Wildlife Service or the National Marine Fisheries Service.

Requiring all guidance to be written, signed by the appropriate official, and published should accomplish giant strides toward the goal of consistency. If guidance can only be issued by authorized persons, and if it is published so that people can know

[1] http://www.whitehouse.gov/omb/inforeg/good_guid/good_guidance_preamble.pdf, page 9.

what guidance is already in place, staff will naturally avoid many inconsistencies that would have arisen out of ignorance or miscommunication. OMB's suggestion to allow for public feedback is another method of calling inconsistencies to the attention of agency staff. However, these communication improvements will not affect the inconsistencies that arise when several agencies have jurisdiction over aspects of an activity, and the agencies have inconsistent ideas of the goals off the regulatory scheme. For example, OSHA, HUD, and EPA all have versions of rules pertaining to exposure to lead based paint, but the agencies have different missions and different views of the role of remodelors, many of whom are NAHB members.

Inconsistencies Between Agency Offices

EPA and the Corps: Isolated Wetlands

Well-defined guidance approval procedures–such as those suggested by OMB–would also help eliminate very real problems of inconsistency amongst the various offices of agencies, such as field offices and headquarters. An egregious example of this inconsistency problem is the Corps' regulation of isolated wetlands as waters of the United States, within the meaning of the Clean Water Act[2]. In 2001, the Supreme Court invalidated the basis the Corps had used to regulate isolated wetlands.[3] Subsequently, the Corps and EPA issued an advance notice for new rules on a different legal basis,[4] but eventually the agencies announced that they would not issue any proposed rules.[5] The agencies had published some guidance along with the advance notice,[6] which has not prevented stark policy differences from one Corps region to another.

The wetlands guidance affords considerable latitude for the judgment of the regional and local offices of the Corps, with the result that some Corps districts–such as the Philadelphia and Seattle offices–treat roadside drainage ditches as "waters of the United Sates," while other Corps districts do not. Except for infill construction in urban areas, most home building will require crossing a drainage ditch, which will require installing a culvert filling a part of the ditch to allow for road access. In the Philadelphia and Seattle Corps districts, all drainage ditches are considered "waters of the United States," and a wetlands permit is required. In the district that contains Texas, no drainage ditch requires a wetlands permit. Whether the builder needs a permit for the culvert is determined by what Corps district encompasses the land. Therefore, the federal law means different things in different parts of the country, for no reason but bureaucratic dysfunction. New authoritative guidance procedures would prevent jurisdictional questions of national policy from being set by regional officials.

Postal Service: Central Box Units

The isolated wetlands matter is a situation where a federal agency needs to issue guidance, and its failure to do so has resulted in non-uniform federal law. A similar issue

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[2] 33 USC Sec. 1344.
[3] *SWANCC vs. Corps of Engineers*, 531 US 159 (2001).
[4] 68 Federal Register 1991, January 15, 2003
[5] EPA Press release, December 16, 2003.
[6] 68 Federal Register 1995, January 15, 2003.

has arisen at the United States Postal Service (USPS). USPS seems to have a policy to favor the usage of Central Box Units (CBUs) for residential mail delivery in new city neighborhoods. Every postal official contacted by NAHB readily admitted that USPS would prefer CBUs because it is so much cheaper to deliver to them than to deliver to a separate mailbox for each detached home. However, that policy cannot be found anywhere on the USPS Web site, nor is it contained in the Code of Federal Regulations. It's not even contained in the Domestic Mail Manual or Postal Operations Manual, which merely instruct postmasters to choose the form of delivery that is cheapest for the Postal Service. Nonetheless, some NAHB members have encountered strong insistence that mail delivery in new city developments must be done using CBUs, though only in some regions. USPS staff have said the decision is in the hands of the local postmaster or district officials.

Without addressing the issue of whether USPS has the right to insist on CBUs as a condition of initiating delivery, it is clear that the decision for CBUs must rest on something less arbitrary than whose district the new homes are in. It should depend on topography, population density, mail volumes, or other facts that are relevant to the problem of delivering mail and that are authorized by statute or regulation. USPS should issue some guidance, at the very least, so the rules will be uniform across the country. The guidance process should be public, so the people can be heard on what kind of service they want, and how much they are willing to pay for it. The resulting guidance should be made public as well, because builders are very confused about what sort of mail delivery their customers can get, and what the builder must do to get the homes ready. Because USPS is conditioning the right to receive mail upon the performance of a requirement, this issue is more properly the subject of a regulation, where the standards of the APA would apply, but even guidance from the appropriate level would be helpful.

Both the isolated wetlands issue and the CBU issue are cases where more guidance is needed, but the agencies have not issued it. The OMB suggestions would be improved by including an explicit means for the public to request or suggest new or additional guidance, as well as providing the comment procedures for proposed or existing guidance. The right to ask for the issuance of guidance is guaranteed by the First Amendment right of petition, but agencies can help protect that right by telling the public how to make those requests at each agency.

Improper *de facto* Rulemakings

In contrast to the isolated wetlands issue, where guidance is needed to clarify existing rules, NAHB has encountered more numerous problems where an agency has issued policies as guidance, when in fact, they are rules. The agency is using the garb of guidance to avoid the APA, possibly in good faith that the policy is not a rule. Some examples follow.

OSHA: The Multi-Employer Citation Policy

OSHA has issued what it calls its "Multi-Employer Citation Policy,[7]" by which OSHA inspectors are instructed to issue hazard citations to employers on the job site even if their own employees are not at risk and even if they did not create the alleged hazard. NAHB has long argued that the OSH Act governs the employer-employee relationship; it does not govern locations The employers' duties have been extended greatly beyond their own employees, yet the rights of the employers get no protection of law; for not only does guidance escape notice and comment, it also escapes judicial review. The multi-employer policy alters the duties of citizens without the opportunity to participate in the process. At the very least, OSHA needs to go through a rule-making to find that the OSH Act implies a duty such on strangers to the employment relationship. The policy is a legislative rule within the meaning of *American Mining Congress v. MSHA*[8], and it should have gone through the notice and comment procedures required by the OSH Act and the APA.

Department of Energy: Residential Appliance Manufacturing Standards

The Department of Energy (DOE) has promulgated energy efficiency standards for residential heat pumps and air conditioners manufactured after January 23, 2006.[9] As part of the initiation of the new standards, DOE posted information on its website[10] that qualifies as guidance under the OMB proposal. The guidance contains the claim that builders may not meet overall energy conservation goals by combining relatively low efficiency appliances with high efficiency structural components, such as windows and doors. This is a serious claim that substantially alters the incentives to use energy-efficient technologies, and it reduces greatly the advantages that would accrue to a builder who made energy-efficient choices. This qualification is a substantive change to the energy efficiency regulations, and it belongs in regulations, not guidance. It is a statement about what can or cannot be done; it is not a statement of opinion or interpretation.

The Mandatory Nature of Guidance is Regulatory.

Though some guidance is issued to instruct or inform the public about agency procedures, much is directed to agency employees. The guidance tells agency employees what to do in various circumstances. Assuming the staff obey their instructions, the public will not be able to get permits, licenses, or whatever they seek from the agency until the staff are convinced the guidance has been satisfied. Though the guidance may seem less like policy and more like administration, consequences will flow to the public just as surely as if the instructions had come through a rule.

Fish and Wildlife Service: Quino Butterfly Survey Protocol

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[7] OSHA Directive Number CPL 2-0.124; December 10, 1999.
[8] 995 F.2d 1106, CADC September 8, 1993.
[9] 10 CFR Part 430, especially Sec. 430.33.
[10] http://www.energycodes.gov/residential_ac_hp.stm

As OMB has noted, guidance can become a back-door method of issuing regulations. For example, the Fish and Wildlife Service (FWS) had advised people living in the range of the endangered Quino Checkerspot Butterfly that they should survey their property for presence of the butterfly before applying for an Incidental Take Permit, and usage of a particular survey protocol was urged. At no time did FWS say that permits were conditioned on performing the specified survey, nor did FWS say it would not issue a permit unless the survey protocol were followed. However, there is no indication that FWS has ever accepted a survey that did not follow the protocol. Clearly, this purported guidance is not advice; it is a fiat. An applicant must follow the prescribed protocol or give up any chance of getting a permit, without which a builder or homeowner cannot undertake construction, because of a possible failure to get "all necessary permits."

Corps: Regulatory Guidance Letters

The Corps sends Regulatory Guidance Letters (RGL) to each state to advise the state about the Corps' wetlands permit program.[11] The Corps claims the letters "are used only to interpret or clarify existing Regulatory Program policy" but it admits the letters are mandatory on the Corps district offices.[12] Further amplifying the role of the guidance as regulation, the Corps stated that it "incorporates most of the guidance provided by RGL's (sic) whenever it revises its permit regulations."[13] Therefore, the "guidance" must have been mandatory all along; incorporating the terms into regulation is merely a name change.

Mitigation Banks

In 1995, the Corps, EPA, FWS and Marine Fisheries issued a joint guidance on mitigation banking, and they took public comment on it.[14] Though this procedure complies with OMB recommendations for economically significant documents, it has not cured the substantive nature of the guidance. It is treated as *de facto* regulation, and NAHB staff are unaware of any subsequent mitigation bank approvals where the applicant did not follow the steps of the guidance.

Therefore, NAHB is concerned about methods of securing agency compliance. Many of the abuses cited here have been published in the *Federal Register*, and the agencies have even accepted comment on some of them. However, they were issued as notices, not regulations. Publication and comment did not cure their abuse or prevent other ways to use guidance to compel actions on the part of the public. Though one may argue that if purported guidance is really a rule, there is a remedy in the APA; that remedy is hollow at best, and often illusory. To file litigation is an expensive and risky process under the best of circumstances; individuals are likely to find it more economically rational to comply than litigate. Worse, when the action in a lawsuit is characterized as guidance, the courts will almost automatically rule that the lawsuit is not

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[11] 33 CFR 320-330
[12] 62 Fed. Reg. 31492; June 9, 1997.
[13] Ibid.
[14] 60 Fed. Reg. 58605; Nov. 28, 1995.

ripe, because guidance is not a final agency action. The court seldom reaches the merits of whether the guidance is really guidance or a disguised rule.

It would be helpful if OMB–or some other office wielding the executive authority of the President–would issue criteria under which agencies must regard interpretations, decisions, guidance, or policy as rules. Executive Branch policy can require agency decisions to be adopted pursuant to the APA, as long as the executive does not try to exempt anything required by Congress or the courts to be adopted under the APA as well. That is to say, the executive can add programs to APA purview, but it cannot subtract from judicial or Congressional requirements. This policy would merely be for the organization and operation of the Executive Branch. It would provide more discipline to the guidance and regulatory processes, and it would provide greater consistency among and across agencies.

The OMB proposal goes a long way toward increasing the transparency, consistency, and accountability of the administrative system. NAHB supports the OMB efforts and offers these comments by way of documentation of the need for reform and illustration of suggested additions to OMB's proposals.

If you have any questions, please feel free to contact the undersigned.

Sincerely,

Andrew Jackson Holliday
Regulatory Counsel
National Association of Home Builders