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March 16, 2009

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

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

Re: Office of Management and Budget – Federal Regulatory Review

Dear Ms. Echols:

The Agricultural Retailers Association¹ (“ARA”) is writing in response to the Office of Management and Budget’s (“OMB”) request for comments on recommendations to the President for a new Executive Order on Federal Regulatory Review.² ARA is interested in federal regulations that impact the agricultural retail industry and is particularly concerned with potential changes to the regulatory process. ARA appreciates the opportunity to comment on the regulatory review process since revisions to the regulatory coordination process will have a significant impact upon regulated entities and federal agency officials.

The agricultural retail industry is heavily regulated by the Department of Transportation (“DOT”), the Environmental Protection Agency (“EPA”), the Labor Department, the Department of Homeland Security (“DHS”), the Department of Agriculture (“USDA”), the Federal Trade Commission, the Internal Revenue Service, and other federal regulatory agencies. For this reason, the coordination of regulatory initiatives among the various regulatory agencies is critically important to ARA members. The regulatory review process is of particular importance to ensure consistency in federal regulations that are issued by different agencies. It is also important to measure the cumulative burden and benefit of compliance with regulations before they are effective.

¹ ARA is a non-profit trade association that represents America’s agricultural retailers and distributors. ARA members provide goods and services to farmers and ranchers which include: seed, crop protection chemicals, fertilizer, crop scouting, soil testing, custom application of pesticides and fertilizers, and development of comprehensive nutrient management plans. Retail and distribution facilities are scattered throughout all 50 states and range in size from family-held businesses or farmer cooperatives to large companies with multiple outlets.

² See 74 *Federal Register* 8819 (February 26, 2009).

The following recommendations pertain to the specific topics raised in the *Federal Register* notice:

A. The Relationship between OIRA and the Agencies.

The Office of Information and Regulatory Affairs (OIRA) carries out the critical role of ensuring that regulations issued by various agencies are coordinated, consistent with the Administration's priorities, and to provide an analytical opinion on the agency's actions.

OIRA is essential for identifying and addressing the potential overlap and conflict of proposed regulations between individual agency missions. Often, a regulatory agency may promulgate a regulation without knowledge of another agency's existing regulation, and the two regulations would result in the frustration of the purpose.

For example, the DHS's Chemical Facility Anti-Terrorism Standards (CFATS) are set to sunset September 30, 2009. The CFATS program covers all chemical facilities, whether water treatment plants, agricultural facility, or a traditional chemical manufacturer. Congress is currently considering reauthorizing the CFATS program, with the addition of several new provisions. The new provisions include mandated inherently safer technology (IST) for the regulated chemicals. The potential conflict of purpose and regulation in this case is that DHS's mission is to ensure secure the country and preserve our freedoms; while EPA's mission is to protect human health and to safeguard the natural environment. The CFATS regulations are aimed at security risks, but there is a potential conflict with the EPA's authority over safety and environmental risks.

OIRA is positioned to coordinate efforts between these two agencies so that security is not undermined by safety regulations, and vice versa. It would be difficult for these two agencies to completely coordinate their initiatives since they are specialized in their individual fields. It would also be unrealistic to expect the agencies to do an unbiased analysis of the proposed regulation.

B. Disclosure and Transparency.

To encourage compliance and faith in the regulatory process, the regulatory review process should maintain disclosure and transparency. Advocacy groups, like ARA, are able to inform their members of regulations that they may need to comply with in the future. This gives business owners an opportunity to view the proposed regulation's effect on their business; helping business owners prepare for compliance or bring logistical compliance hurdles to the attention of OMB. To increase transparency, is increasing the availability of information that has been disclosed during the regulatory review process. OMB should make information on a proposed regulation available to the general public.

Transparency could be made more effective by eliminating the informal review process. The specified procedures for review do not apply to agencies that choose to informally seek review of a regulatory action. This process gives agencies the ability to send rules to OIRA informally, receive comments, make revisions, and the agency can then formally send the rule to OIRA and most likely will have the rule approved for publication without change. Eliminating

the informal review process would provide the opportunity for the public and all interested parties to comment on proposed rules.

C. Encouraging Public Participation in Agency Regulatory Processes.

Effective rulemaking requires information from those intended to benefit or to be burdened by the regulation. Issues concerning a proposed regulation that an agency may consider to be beyond the scope of its mission may be raised by the public in the OIRA review. Public comment provides a method of collecting information on the effectiveness and possible effects of a regulation. Public participation should be encouraged; increased transparency and public disclosure would help accomplish this.

D. The Role of Cost-Benefit Analysis.

Cost-benefit analysis is critically important for identifying and quantifying the effects of a proposed regulation. Cost-benefit analyses make it possible to identify the result of regulatory initiatives by predicting the anticipated benefits and financial impacts; thus, determining whether a regulation will provide a net benefit to society. Another advantage of performing cost-benefit analysis is that it makes limited resources and funding easier and more efficiently allocated. Efficiently and effectively using both government and private sector funds is becoming increasingly important as the U.S. economy is recovering from an economic downturn and financial crisis.

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

Executive Order 12866 sets specific time limits for OIRA review.³ The order instructs OIRA to notify the agency of the results of its review within 90 days or 45 days if OIRA has previously reviewed the submitted information and there has been no material change in the facts upon which the regulatory action is based. The Executive Order also provides that the review process may be extended by 30 days with the written approval of the Director and the request of the agency head. These time limits ensure that the OIRA regulatory review does not produce an unreasonable delay and give OMB enough time to perform a thorough regulatory review.

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

The OIRA regulatory review process is crucial for ensuring consistent regulation across federal agencies, considering the cumulative economic burden of rules, verifying the Administration's priorities supported, and conducting an analytical review of federal regulatory actions. To make the regulatory process stronger, the following modifications to the OIRA regulatory review process should be considered:

- (1) *Review of Significant Guidance Documents.* Executive Order 12866 definition of "regulatory action" does not include guidance documents; however, many guidance documents have a significant economic or environmental impact. Accordingly, the

³ See Executive Order 12866, sec. 6(b)(2), at 51742.

definition of “regulatory action” should be revised to include agency guidance documents.

- (2) *Eliminate Informal OIRA Review.* The informal review process enables an agency to effectively seek review exclusive of public scrutiny. To increase transparency and compliance, informal review should be eliminated.
- (3) *Consider Small Business Administration Comments.* OIRA should pay special attention to comments submitted by the Small Business Administration (SBA) in regards to a regulatory action. Small businesses are particularly vulnerable to cumulative regulatory burdens, and often do not have the staff or resources to perform an analysis on a proposed regulation. Federal agencies should be required to address comments submitted by the SBA, and OIRA should ensure that the regulatory agencies provide relevant and considerate responses to all comments filed by SBA. Furthermore, SBA should also have the ability to trigger OIRA review of a rule that does not meet the definition of a “significant” regulatory action.

For the foregoing reasons, ARA strongly supports the OIRA review process and supports the review procedures prescribed in Executive Order 12866. In order to strengthen the review process, we believe that significant guidance documents should come under OIRA review. ARA also suggests eliminating the informal review process to increase the integrity of the OIRA Review process. Finally, we suggest that OIRA and federal agencies be required to respond to SBA comments, and we propose that the SBA be able to initiate OIRA review of regulations.

If you have any questions concerning these comments, please contact the undersigned at



Sincerely,

A handwritten signature in cursive script that reads "Carmen Haworth".

Carmen Haworth
Public Policy Counsel