March 16, 2009

VIA ELECTRONIC MAIL

Peter Orszag
Director
Office of Management & Budget
Executive Office of the President
1650 Pennsylvania Avenue, NW,
Washington, DC 20503

RE: Office of Management & Budget
74 Fed. Reg. 8819
Request for Comments on Federal Regulatory Review

Dear Director Orszag:

The National Association of Manufacturers (NAM) is pleased to submit these comments on the President's Executive Order for Regulatory Planning & Review. The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. Eighty percent of the NAM's members are small and medium manufacturers with fewer than 500 employees and a full one-third have fewer than 50 employees. Headquartered in Washington, D.C., the NAM has 10 additional offices across the country. We represent the more than 12 million men and women who make and invent things in America.

The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth, and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

In the current recession, American manufacturing has lost more than 1 million jobs. At a time like this, when firms are fighting for their survival and trying to emerge as stronger companies when the economy recovers, unnecessary incremental burdens caused by regulation can destroy jobs. Sloppy analysis or too quick a dismissal of less costly alternatives can not be tolerated, especially during challenging economic circumstances. And the work of prioritizing regulatory initiatives is critical when private sector resources are most scarce. The work conducted under the authority of the President's Executive Order on regulatory planning and review is more important now than at any time in its history.

The Relationship between OIRA and the Agencies

For almost three decades, the Office of Information & Regulatory Affairs (OIRA) in the White House Office of Management & Budget (OMB) has been serving Presidents through regulatory planning and review, information collection review, ensuring consistent application of sound statistical policy, coordinating e-government initiatives, coordinating risk assessment policy, and ensuring information quality. Its function has been recognized by administrations of both parties as a critical tool to advance the President's agenda and to coordinate the diverse interests of dozens of executive branch agencies.

Single mission agencies are frequently effective in accomplishing their objectives. This intense focus on a relatively narrow set of policies can weaken their peripheral vision including their assessment of duplication between agencies, cumulative impacts of similar rules or different rules on the same sector of the economy, or other broader considerations. OIRA is the only agency that brings to bear a government-wide, economy-wide perspective. For that reason, OIRA should continue to conduct centralized review of the agencies' regulatory activities, facilitate interagency review, resolve conflicts and eliminate unnecessary duplication.

NAM strongly supports continued vesting of the responsibilities outlined in the current Executive Order 12,866 in OIRA. It is OIRA's responsibility to enforce the President's Executive Order and return rules that do not comply with those requirements or are submitted with incomplete, inconsistent, or incorrect analysis. This includes whether or not the regulation, consistent with other applicable laws, is congruent with the principles of regulation outlined in E.O. 12,866 and maximizes net benefits to society.

Additionally, the NAM supports the comments of the Coalition for Effective Environmental Information.

Principles of Regulation

The principles of regulation, listed in the current E.O. on regulatory planning and review, provide systematic direction for agencies embarking on a new rulemaking, starting with a call for clearly identifying the problem that exists and the need for the rulemaking. This section of principles could be further strengthened by reaffirming Director Raines' OMB Circular A-119. The Circular encourages the use of voluntary consensus standards as the basis of rulemaking instead of government unique standards, where appropriate and permitted by law. The Circular's definitions are sound and should be maintained. Specifically, the language should not restrict the choice of standards that can be used by government agencies. As recognized in the Circular, voluntary or "open" standards are those developed under procedures that provide for open participation, due process and consensus. The use of voluntary consensus standards provides enormous efficiencies both within the U.S. economy and internationally. They form the core of many regulatory programs today and their importance should be noted among the principles of regulation in a new or amended executive order.

Benefit-Cost Analysis, Distributional Considerations and Fairness
In E.O. 12,866, the statement of regulatory philosophy includes the following:

> In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

The current E.O. sets as its fundamental philosophy "maximizing net benefits" including an analysis of all costs and benefits, both quantitative and qualitative, including distributive impacts and equity. Benefit-cost analysis in this approach is not simply a quantitative bottom-line driven process but instead provides a logical framework to consider all of the positive, negative, and neutral impacts of a chosen regulatory approach and facilitates rational decision making by the administration. The current requirements and philosophy should be continued.

Stronger expectations, however, should be placed on agencies to justify, in writing, their benefit-cost analysis assumptions. In circumstances where benefits do not exceed costs, a presumption not to move forward with the regulation should be a default unless additional considerations justify the decision.

The previous administration used the prompt letter as an additional tool for supporting the President's agenda and maximizing net benefits to society. When OIRA exercises this authority it should do so judiciously and with the same level of rigor and transparency required of agencies to justify their rulemakings.

Encouraging Public Participation
In order to encourage public participation in the regulatory process, proposed rules and final regulations must be written in plain, understandable language, as required by the current E.O. The average citizen or small business will be prevented from accessing the information if it fails to follow the basic tenets set out in President Clinton's plain language guidelines. Instead, the conversation will be limited to technical experts and lawyers only without meeting the broader goal of increased citizen participation.

We also join with previous commenters in support of the ABA's 2008 study and recommendations on the status and future of E-rulemaking[1], as well as previous commenter's urging of the integration of reginfo.gov with regulations.gov. If

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[1] **ACHIEVING THE POTENTIAL The Future of Federal e-Rulemaking (Nov. 2008), accessible at** http://ceri.law.cornell.edu/documents/report-web-version.pdf

regulations.gov is to be the branded home of the U.S. government's regulations, then perhaps reginfo.gov should be folded into the site entirely.

A more fully integrated, online portal will also serve to increase transparency. The disclosure required by the current Executive Order along with the current announcement of meetings held with OIRA and outside parties on rules under review should be continued and integrated into this single online portal.

Impact on Small Entities

Small businesses, in general, and small manufacturers, in particular, disproportionately bear the costs of regulation but not necessarily the benefits. To address this imbalance, Congress passed and President Carter signed the Regulatory Flexibility Act (RFA) in 1980. It requires agencies to account for "significant impacts" of regulation on small entities and to consider alternatives that would be less burdensome to them. Despite the requirements in E.O. 12,866 that require agencies to comply with all applicable laws, including the RFA, agency compliance with the RFA is inconsistent. The SBA's Office of Advocacy was created to monitor and encourage compliance and provide training to agencies but was provided with no enforcement power. To enhance the role of the Office of Advocacy, E.O. 13,272 was issued. As a means of alerting OIRA to potential agency failure to comply with the RFA, the E.O. 13,272 may have been beneficial. However, absent clear directive, agency compliance with the RFA will remain inconsistent and lead to unnecessary litigation. While OIRA can play an enforcement role by returning regulations to agencies that fail to comply with the RFA, even that process remains one of inconsistent, ad hoc decision making. A more forthright approach would be to incorporate into any regulatory executive order provisions similar to those in E.O. 11,991 in which the Council of Environmental Quality was tasked with developing government-wide regulations for compliance with the National Environmental Policy Act (NEPA). The provisions would empower the Office of Advocacy to issue government-wide rules on RFA compliance. Together with oversight from OIRA, this will ensure that agencies comply with their statutory mandates.

Guidance Documents

As clarified by your memo on March 4 to the agencies, OIRA continues to review, "all significant proposed or final agency actions, including significant policy and guidance documents" which was unchanged by the President's E.O. 13,497. All too frequently, agencies have used guidance documents in place of notice and comment rulemaking to make significant determinations or policy changes. Making sure that agencies develop and use guidance documents appropriately will limit costly litigation, and ensure that an open and transparent process is used. The new or amended executive order should continue to reflect that authority.

Undue Delay

One of the concerns addressed in the Federal Register notice is undue delay allegedly produced by OIRA review. While the painstaking process of rulemaking often takes many months and sometimes years, much of that time is spent within the agency gathering information and determining the best course of action. Very little of the total time for rulemaking is spent undergoing OIRA review. Considerable time, however, is spent complying with congressionally mandated administrative due process under the Administrative Procedure Act, Paperwork Reduction Act, RFA, and other applicable statutes. Much of the end-stage review by OIRA staff could be limited if they were engaged earlier in the development of the Regulatory Impact Assessment, the review of significant research and assumptions, the regulatory flexibility analysis, and development and consideration of alternative approaches.

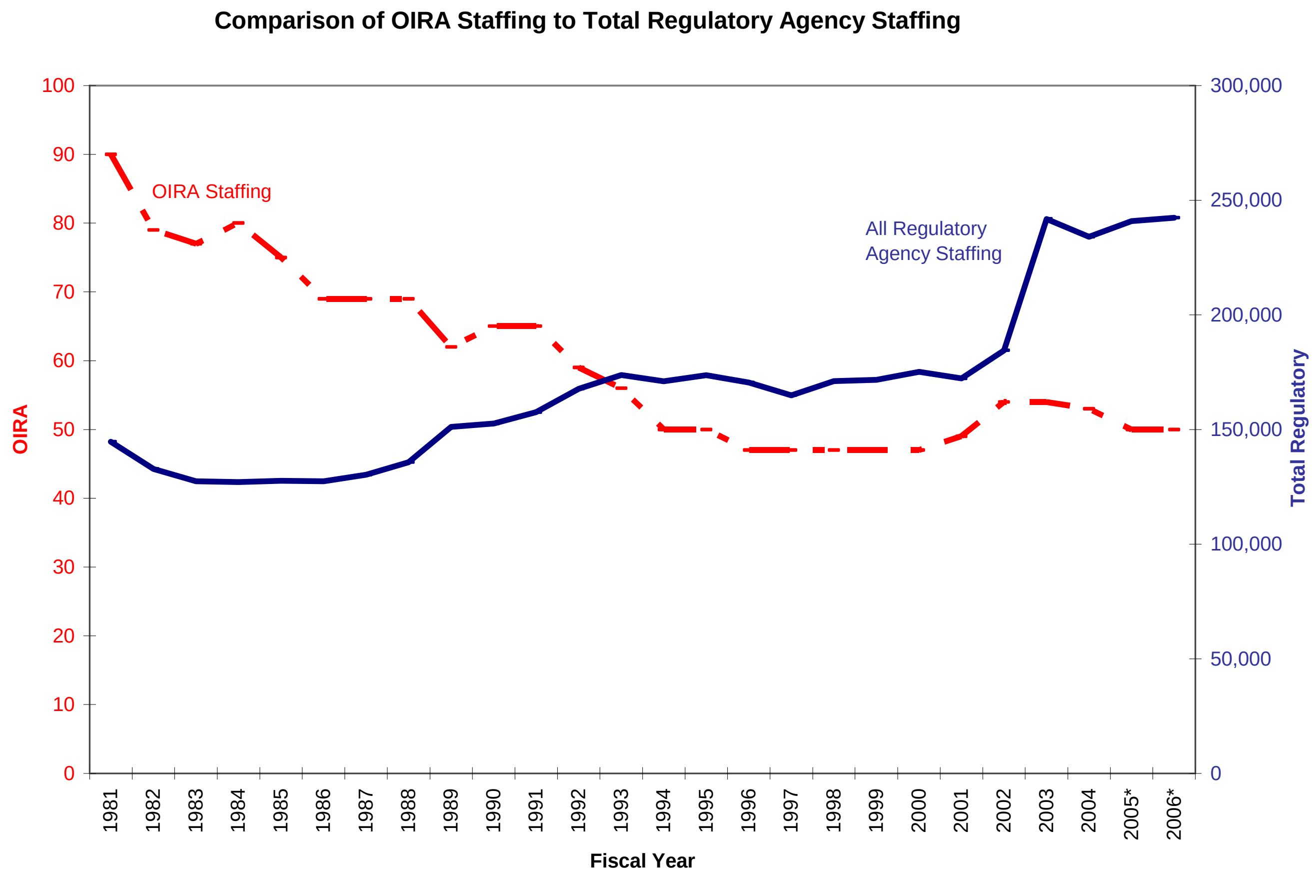
To the extent that OIRA review is a source of delay, the responsible solution is to restore OIRA's staff and budget. As the size and scope of government has increased, OIRA has shrunk. As OIRA's staff was reduced from an FTE ceiling of 90 to 50 employees, the staff dedicated to writing, administering and enforcing regulations has increased from 146,000 in 1980 to 242,000 in 2006 (see Figure 1). And as OIRA's budget has been reduced by more than 50% or $7 million in real 2000 dollars, the agencies' budgets have increased from $12.9 billion to over $36 billion in real 2000 dollars (see Figure 2). Although it is true that OMB spending overall has seen some reductions in real dollars over that timeframe, it is not as significant a reduction as OIRA has taken (see Figure 3).

To ensure that OIRA is able to fulfill its current mission and any additional responsibilities imposed upon it by a new or amended Executive Order, additional staff and resources are necessary. A modest increase of a dozen staff at a cost of under $2 million annually could ensure that lack of personnel does not produce undue delay in regulatory review. This is a clear case where benefits outweigh the costs.

Conclusion

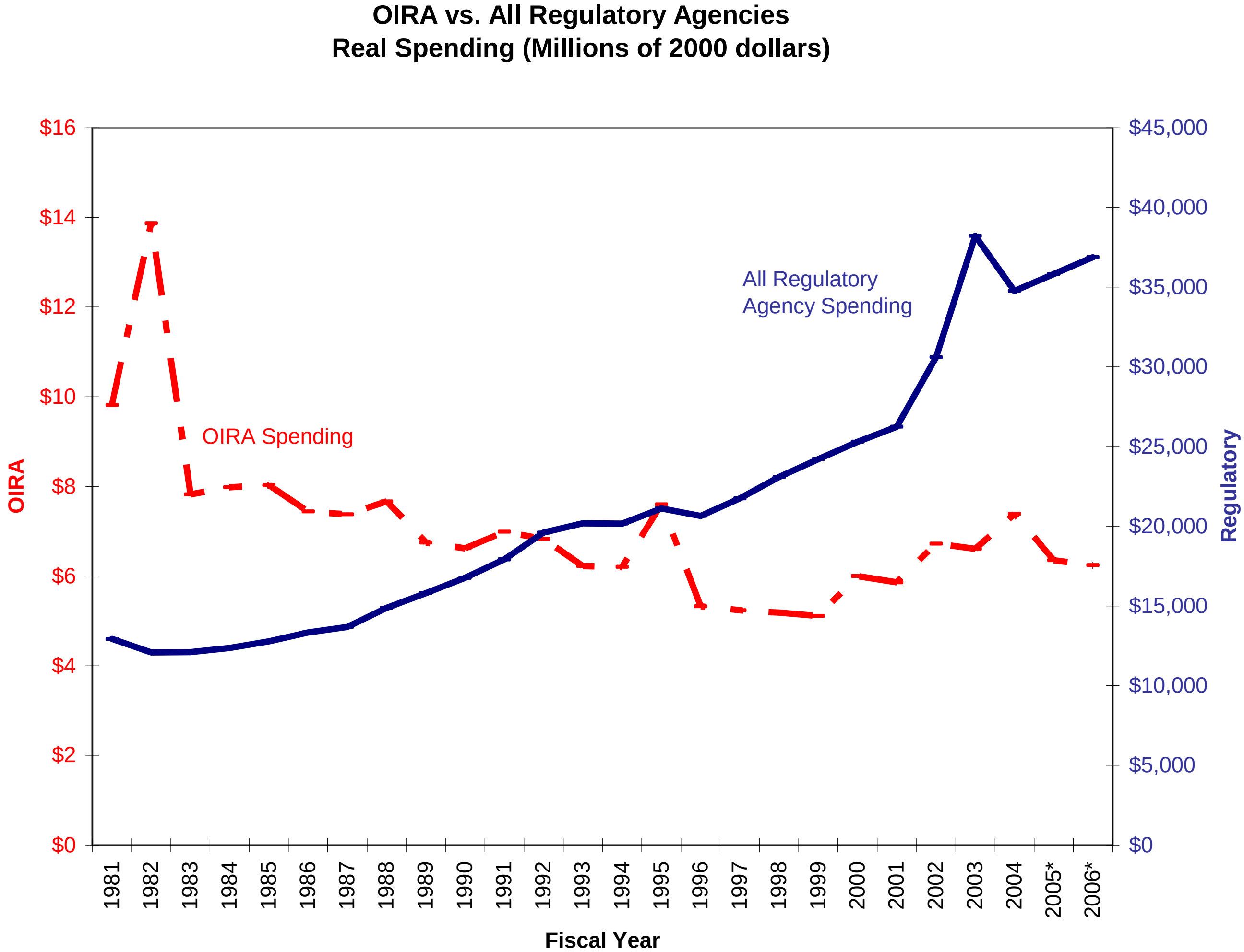
Many more good paying manufacturing jobs have been and will continue to be lost in the current state of the economy. In order to meet the President's goal of adding millions of new jobs to the economy and leading us out of this economic crisis, a coordinated effort from all agencies of government is necessary. Regulatory policy must be a part of that coordinated response to restoring the economy. The only place where all the interests of the American people and the entire economy can be weighed against competing priorities in regulatory decision making is through the President's staff and advisors in the Office of Information & Regulatory Affairs in the White House Office of Management & Budget. The ultimate decisions may not be to the liking of every stakeholder in the process, but if they are made transparently with proper review and analysis and seek to maximize net benefits to the country, then they will be in America's interest and will bring us closer to the end of this recession than the beginning.

Figure 1



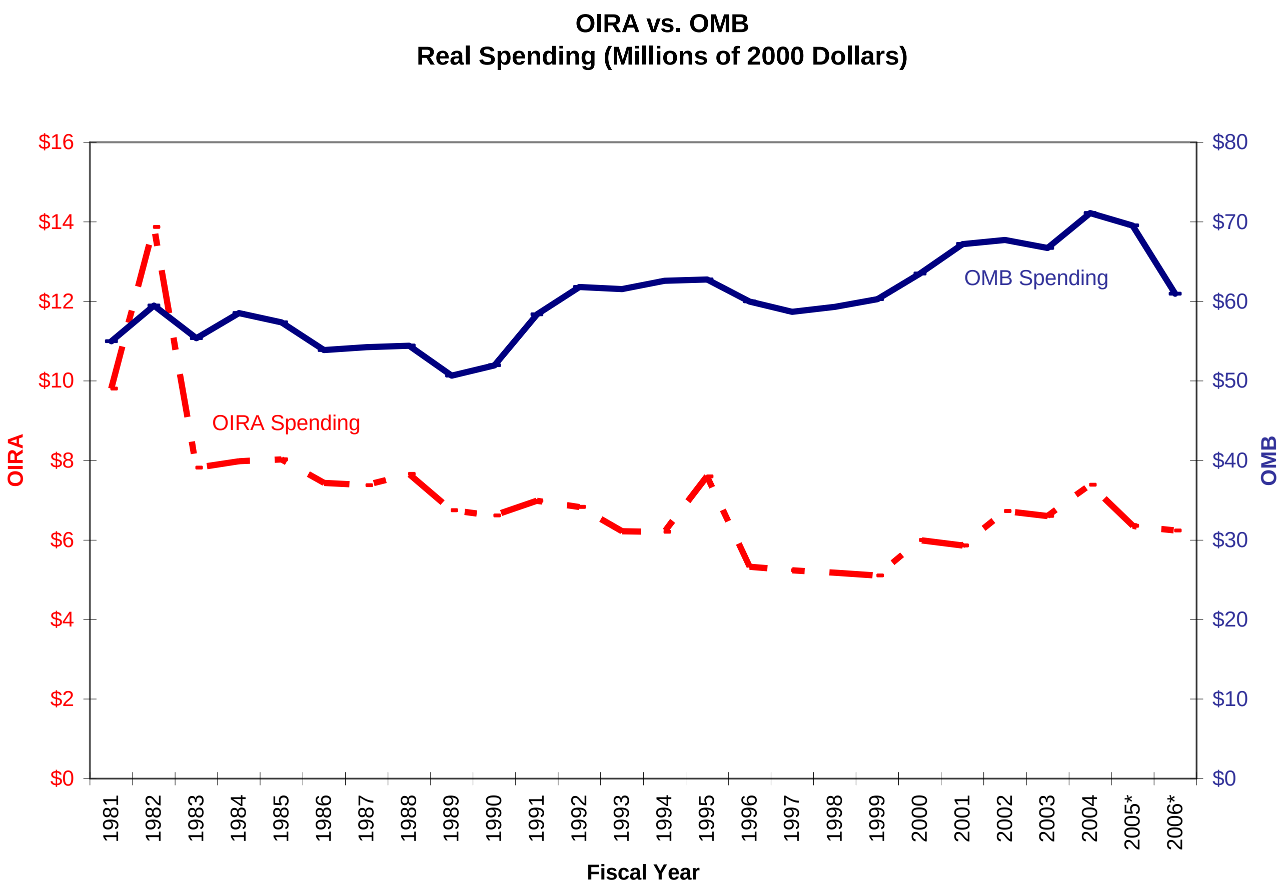
Sources: OIRA:*Office of Management & Budget Directories* 81-01, OMB provided data 02-06; Agencies: *Analysis of the U.S. Budget*, Dudley/Warren, Weidenbaum/Mercatus, various years.

Figure 2



Sources: OIRA: *Budget of the United States,* various years; Agencies: *Analysis of the U.S. Budget*, Dudley/Warren, Weidenbaum/Mercatus, various years.

Figure 3



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