



AIR TRANSPORT ASSOCIATION

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March 16, 2009

Ms. Mabel Echols  
Office of Information and Regulatory Affairs  
Records Management Center  
Office of Management and Budget  
New Executive Office Building  
725 17<sup>th</sup> St., NW  
Washington, DC 20503

**Re: Federal Regulatory Review—February 26<sup>th</sup> Request for Comments**

Dear Ms. Echols:

The Air Transport Association of America submits this letter in response to the February 26<sup>th</sup> request for comments about improving the process and principles governing regulation. 74 Fed. Reg. 8819 (Feb. 26, 2009). ATA is the principal trade and service organization of the U.S. scheduled airline industry.<sup>1</sup> We appreciate the opportunity to comment about the anticipated new executive order concerning federal regulatory review.

The Office of Information and Regulatory Affairs manages the federal regulatory review process. It does so with a number of tools, most notably Executive Order 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993). As the President said in his January 30<sup>th</sup> memorandum that was the impetus for the February 26<sup>th</sup> request for comments, “if properly conducted, centralized review is both legitimate and appropriate as a means of promoting regulatory goals.” 74 Fed. Reg. 5877 (Feb. 3, 2009). Effective, centralized review is essential to fostering a regulatory system that is fair and efficient.

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<sup>1</sup> The members of the association are: ABX Air, Inc.; AirTran Airways; Alaska Airlines, Inc.; American Airlines, Inc.; ASTAR Air Cargo, Inc.; Atlas Air, Inc.; Continental Airlines, Inc.; Delta Air Lines, Inc.; Evergreen International Airlines, Inc.; Federal Express Corporation.; Hawaiian Airlines; JetBlue Airways Corp.; Midwest Airlines; Southwest Airlines Co.; United Airlines, Inc.; UPS Airlines; and US Airways, Inc. Associate members are: Air Canada; Air Jamaica; and Mexicana.

## OVERVIEW

The request for comments states that the purpose of OIRA's reviews of federal regulations has been to "ensure consistency with Presidential priorities, to coordinate regulatory policy, and to offer a dispassionate and analytical 'second opinion' on agency actions." 74 Fed. Reg. 8819. Those goals of consistency, coordination and objectivity should continue undiminished. Achieving them is indispensable to a well-functioning regulatory system.

Regulatory review should assure that proposed and existing regulations exhibit the following characteristics:

- Fairness
- Effectiveness
- Efficiency
- Transparency
- Open participation in development
- Clear and achievable responsibility
- Proportionality between the regulatory objective and resources need to meet that objective
- Adaptability
- Consistency with other policy objectives

These criteria, however, do not shed light on whether and how to regulate. Providing clear guidance about that fundamental issue should be a central element of any document enumerating regulatory review policy.

Executive Order 12866 supplies that necessary guidance. Section 1 of it states that

"Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or well-being of the American people. 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." 58 Fed. Reg. 51735 (Sept. 30, 1993).

That statement establishes a workable analytical framework. The executive order contains 12 principles of regulation that elaborate on it. *Id.* at 51735-36. They express precepts against which OIRA can measure department and agency action.

Among those key principles set forth in Executive Order 12866 are the establishment of regulatory priorities; reliance upon risk assessment; maximizing cost effectiveness; the need for cost-benefit analysis; and the importance of imposing the least burden consistent with achieving regulatory objectives. *Id.* at 51736. Common to each of these principles is the recognition that resources—those of government, of regulated parties and of society, which ultimately absorbs the cost of regulation—are finite. Any new regulatory review executive order should include those among its foremost considerations.

In addition, section 5 of Executive Order 12866 directs each department and agency to review periodically its existing regulations to determine whether they should be modified or eliminated so as to make its regulatory program more effective in achieving regulatory objectives, less burdensome, or in greater alignment with the President's priorities and the principles set forth in the executive order. *Id.* at 51739-40. The ongoing requirement to examine and cull regulations is vital. The regulatory system is not static; the justification for a rule can fade with time. Consequently, any comprehensive regulatory review policy should include periodic evaluations of existing rules and orders.

Finally, although not a subject of the February 26<sup>th</sup> request for comments, OIRA oversees government-wide data quality, information technology, and privacy policies. These policies are important complements to the Federal regulatory program. Their role and significance should be recognized in any new regulatory review executive order.

#### **SPECIFIC ISSUES IDENTIFIED IN THE REQUEST FOR COMMENTS**

##### **Relationship between OIRA and the agencies**

Section 4 of Executive Order 12866 established a detailed regulatory program planning mechanism. We believe that such a mechanism is necessary and that section 4 has provided the needed structure for coordination between OIRA and the agencies. This arrangement not only facilitates coordination, it fosters setting priorities. That makes for more efficient rulemaking. Moreover, the need for this collaboration and oversight has grown with the expansion of the federal government.

##### **Disclosure and transparency**

One basic way to assure disclosure and transparency is to place as much pertinent information as possible in the rulemaking docket. Pertinence can vary according to the interests of a party contemplating preparing comments. That reality argues for broad disclosure of information that was relied upon in developing a proposed rule. That better informs the public. In particular, it creates a superior record to explain the basis for a final rule that emerges from the proceeding.

In addition, we urge that the use of interim final rules be avoided whenever possible. Interim final rules truncate the rulemaking process. They also leave the clear impression that the agency has made up its mind without the benefit of public comment. That undermines the sense of legitimacy of that process.

### **Increasing public participation in agency regulatory processes**

Internet access to rulemaking proceedings has made public participation in them far easier. Continued exploitation of electronic technology will benefit public understanding of regulatory initiatives and agencies' receipt of public comments.

### **The role of cost-benefit analysis**

Cost-benefit analysis is not the only tool for making regulatory decisions but it is an essential one. It has three principal attributes.

First, cost-benefit analysis imposes decisional discipline. It promotes examination of possible consequences of regulatory action. Cost-benefit analysis also inhibits an agency from exercising unwarranted discretion.

Second, cost-benefit analysis improves the analytical quality of the regulatory process. This encourages better and more objective decisions. The result is decisions that are easier to explain to the public and more easily accepted by the public.

Third, the use of cost-benefit analysis encourages more efficient allocation of resources by better identifying which potential regulatory actions are worth pursuing and their value compared to other possible efforts. Efficient allocation of resources is beneficial to society as well as to regulated parties.

Cost-benefit analysis is not at odds with reaching decisions that are in the public interest. Rather, it is a tool to produce better informed decision making, which is an outcome that is plainly in the public interest.

Another tool that produces better informed decision making is quantitative safety analysis, which can include scientific analysis. In aviation rulemaking, for example, an area we deal with almost daily, decisional discipline is enhanced when the regulator supports a proposed rule with hard data in a rational analytic framework. Emphasis on such disciplined justification improves the rulemaking process for government and regulated parties.

**The role of distributional considerations, fairness, and concern for the interests of future generations**

Distributional considerations are matters for Congress, in the first instance, to assess and judge. A regulatory agency should act, or not act, based on the public interest considerations that are in its enabling legislation. Those should guide its decisions. Similarly, Congress is the legitimate source of guidance about how regulatory activity should be fashioned to take account of the interests of future generations.

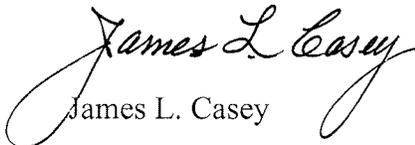
**The best tools for achieving public goals through the regulatory process**

The best tools for achieving public goals in the regulatory process are open and timely access for the public to relevant information, a regulatory plan that reflects clear agency understanding of how proposed rules relate to other rules, the establishment of priorities, and disciplined evaluation of proposed regulatory initiatives.

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We appreciate the opportunity to respond to the February 26<sup>th</sup> request for comments. We would appreciate the opportunity to participate in the development of the anticipated regulatory review executive order.

Sincerely,

  
James L. Casey