A Union of Professionals

American Federation
of Teachers, AFL-CIO

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Re: Comments Regarding Executive Order on OMB Regulatory Review

The American Federation of Teachers (AFT) welcomes the opportunity to offer comments to the Director of the Office of Management and Budget (OMB) as the agency develops a set of recommendations to the President for a new Executive Order on Federal Regulatory Review. We have some suggestions for improvement of the process and principles governing regulation. We base our comments on our experience with the regulatory process in the Occupational Safety and Health Administration (OSHA).

The AFT represents education employees – teachers (pre-K-16), school support staff (education assistants, office workers, custodians, bus drivers, food service workers, school nurses, and security personnel), health professionals and public employees in state and local governments.

The overwhelming majority of AFT members are in the public sector where there is little data on the impact of work-related exposure on rates of work-related injury and illness. The U.S. Department of Labor, Bureau of Labor Statistics (BLS) excludes government employees in their annual estimates of work-related injuries and illnesses. The extent of public employee work-related injury and illness is rarely documented. The AFT continues to pursue avenues to assure that this data are collected so that we can better understand the magnitude of work-related injuries and illnesses in the public sector. Until then, we know from quantitative risk assessments of workers in the private sector in similar job titles that our members are at significant risk of exposure and subsequent injury and illness.

For that reason, the AFT has actively sought protective standards and engaged in the regulatory arena – most notably in the effort to promulgate standards for

blood-borne pathogen exposure, tuberculosis, indoor air quality, ergonomics, communicable diseases and pandemic influenza. Only one of these standards has come to fruition – the occupational exposure to blood-borne pathogens and that one only because of Congressional fiat.

When OIRA was first established several administrations ago, two principles guided its formation. The first principle was that agencies tended to over-regulate and the second was that agencies had a tendency to exaggerate benefits and ignore costs. Therefore according to the first and all subsequent executive orders, some oversight was required to protect public and economic interests. That has not been our experience with OSHA. The agency has been overly scrupulous in addressing costs and feasibility of implementation of its standards as proscribed in the enabling legislation. It has carefully analyzed employer estimates of costs of implementation. And it has promulgated very few standards The agency has been so encumbered that the process can typically take well over a decade before the standard is submitted to the OMB, Office of Information and Regulatory Affairs ((OIRA) for even further review.

We believe that centralized OMB-OIRA review is not required for OSHA. In our view, the current regulatory impact analysis required by judicial and legislative mandates has provided ample time and opportunity for OSHA to review feasibility and cost issues to the point that no further regulatory review on the part of OIRA is necessary.

We present suggestions for consideration in the development of recommendations for the new executive order as follows:

The relationship between OIRA and the agencies

We recommend that OIRA be significantly restructured so that OSHA and other agencies can more efficiently perform their regulatory duties. OIRA, first and foremost, should work with OSHA to assure that it has adequate funding to perform all aspects of the regulatory process including regulatory impact analysis. The lack of funding has led to the obvious outcome of slowing the process to a snail's pace leaving workers without critical protection. OIRA should make a strong case for additional appropriations before Congress.

OIRA should expand the expertise of its staff. The small agency is composed primarily of economists and policy analysts and it is doubtful that it has adequate expertise to assess the highly technical information contained in a typical OSHA standard. If OIRA is to be helpful in prioritizing risks for consideration in the regulatory arena, it needs experts who can bridge those gaps such as health economists trained in assessing the costs of occupational injuries and illnesses. If it cannot expand its staff to include the needed expertise, it should not second guess

specialized agency staff who have spent years reviewing research and technical data in order to develop appropriate standards and other regulations.

With expanded expertise, OIRA could then help the agency create a more rigorous regulatory agenda. This is no easy task and will require "thinking out of the box". Workplace exposures and risks are extensive, often unique and many times unrecognized. There are over 80,000 chemical compounds in commercial use – most without any OSHA or consensus standard. Challenges will mount as new technology introduces novel chemicals such as nano-particles into general commercial use. It is difficult enough to perform quantitative risk assessments for one single chemical, let alone for mixed chemical exposure or novel chemicals. And toxic chemicals are not the only hazard that carries significant risks. For instance, our members in schools and healthcare facilities are at risk of exposure to communicable diseases, violence and ergonomic hazards. These additional risks, separately and together require OSHA's attention. OSHA can no longer regulate on a case-by-case basis without risking trade-offs (one bad chemical replaces another, etc.) and decade long delays in protecting workers

Among other things, OIRA could assist the agency in prioritizing broader program standards with dynamic performance criteria that require the employer to both assess and control exposure to multiple recognized hazards and conduct active surveillance to rapidly identify and control new hazards

Many OSHA standards and permissible exposure levels (PEL) are in serious need of updating. Workers in workplaces with outdated standards will continue to be exposed to hazards that could be economically and feasibly controlled. OIRA could assist OSHA by developing a funding strategy to address or reopen older standards; OSHA could then flag standards to be updated and revised based on new quantitative risk assessment and new control technologies.

Disclosure and transparency

In the past, OIRA has often used a veiled and often a highly politicized process to review regulations. A more open and accessible process is essential to win public confidence. The most fundamental disclosures the agency must make are the assumptions and methods used to perform any analysis. The public should be allowed to comment on these assumptions and methods.

Transparency should go beyond publication of the methodology used in an analysis and include some translation of the methodology. Any "reasonable person" should be able to understand the analytical process and underlying assumptions. Very few workers, occupational health and safety professionals and the general public are familiar with the techniques of cost-benefit analysis. The often arcane elements of cost-benefit analysis such as "willingness to pay";

discount rates and comparative value must be explained to assure a democratic and open process.

Encouraging public participation in agency regulatory processes

For the most part, OSHA has a well-established process for public participation. With the exception of the past administration, OSHA has made opportunities for stakeholders to meet with OSHA staff and administrators and developed several avenues for public participation including consensus committees of stakeholders. Additional venues and opportunities are not needed and will only slow an already glacial process for protecting workers through the creation of new standards.

The role of cost-benefit analysis

Cost-benefit analysis (CBA) should play a small role in the regulatory impact analysis of OSHA standards. Cost-benefit analysis has been the purview of economists and legal scholars - just one of many disciplines that should be involved in the regulatory process. The assumptions used by economists who place a monetized value on human life and behavior are very different than those of public health researchers and workers. It is difficult to see how the CBA approach can be reconciled with the other excellent technical and feasibility analyses that OSHA already employs. Other types of risk assessment (both qualitative and quantitative) and feasibility studies should have as much or perhaps more validity in the standard setting process.

In fact the OSHA law specifically prohibits the use of cost-benefit in determining appropriate standards[1]. Congress mandated that OSHA develop technology-based or feasibility standards. The statute requires the agency to determine economic feasibility of a proposed standard by evaluating the likely costs of implementation.

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[1] Public Law 91-596 84 STAT. 159091st Congress, S.2193 December 29, 1970,sec. 6. (b) (1) "the Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired".

The law however does not require OSHA to attempt to monetize or quantify the benefits of the regulation in order to compare them to costs.

It behooves OIRA to clearly demonstrate why the cost-benefit analysis approach should have primacy in the process. The agency should embark on more studies of CBA and compare the efficacy of this approach with other types of analyses. Perhaps retrospective and updated CBA of OSHA standards should be performed using different sets of assumptions to test this position.

At the same time, OIRA should do more to improve the expertise of the office's policy analysts on alternative analytic tools. In the past, they have not demonstrated a tacit understanding of the highly technical and varied implications of workplace risk assessments, exposures and hazard controls.
There are obvious potential problems in relying on CBA as the final arbiter for the promulgation of an OSHA standard. Most apparent is the predictable overestimation of costs of implementing a regulation by employers. Most employers have resisted regulation on principle and found this method appealing to stall promulgation of OSHA standards.

On the other hand, there is the risk of underestimating the benefits of OSHA standards. The benefits in CBA are usually conferred to workers; however employers and society stand to gain benefits that may not be taken into consideration. Many OSHA standards such as the Occupational Exposure to Blood-borne pathogens have rationalized and improved standard operating procedures and practices to the point of improving industry performance and decreasing nosocomial (hospital-caused) infections. Employers have benefited from this and other standards; the benefits include increased worker productivity, reduced absenteeism and retention of skilled employees. Fewer nurses and other direct-care providers left the industry prematurely because of the risk of exposure to patient blood and bodily fluid with the implementation of the standard.

Another hypothetical example of employer benefit is found in reducing teacher and paraprofessional (educational assistant) noise exposure in the classroom setting. The current OSHA noise standard does not address classroom noise and acoustical conditions. Teachers have a disproportionate rate of significant, often irreversible, voice disorders associated with high noise levels in classrooms that leads to many leaving the profession involuntarily[2]. For the sake of argument, let's assume that the OSHA noise standard reduced the allowed noise exposure to 75 dba TWA (noise levels commonly found in classrooms). With that hypothetical reduction, employers (school districts) would derive the enormous benefit of retaining trained, experienced teachers over the course of a career. In addition, children's

[2] Smith E, Gray SD, Dove H, Kirchner L, Heras H. **Frequency and effects of teachers' voice problems**. Journal of Voice 1997 Mar; 11(1) 81-87.

learning would be enhanced because they would be better able to hear the teacher and their hearing would be better protected. None of these benefits would likely to be included in standard CBA.

Employers have successfully socialized the cost of work-related injury and illness to society as a whole. Therefore any benefit analysis should include the benefits to society as a result of promulgation of a standard. The list of potential benefits is long. One outstanding benefit is reduction in private healthcare insurance and costs for society as a whole. For certain injuries and illnesses, workers turn to their private healthcare insurance to treat work-related illnesses and injuries. For instance special education paraprofessionals (education assistants) who must manually lift and handle children with physical disabilities; food service workers and other workers in our industries have a high rate of work-related musculo-skeletal injuries. These workers routinely use their health insurance to treat these injuries. An ergonomics standard would have mandated programs to reduce the risk of exposure and ultimately reduce injuries and the private health insurance costs of education employers as well as employers in several other industries. Society would also have benefited significantly from lower healthcare and healthcare insurance costs generated by this sweeping standard.

Many of the injured workers mentioned above are pushed out of the education industry because of the severity of their injuries. Those workers are often in no shape to seek any other meaningful employment and must rely on Social Security Disability Insurance (SSDI), Medicare and Medicaid. Reville and Schoeni [3]found that 37% of Social Security Disability Insurance (SSDI) recipients in the 1992 Health and Retirement Study were disabled because of a work-related injury and/or illness. They calculated an annual cost to SSDI and Medicare of $30 billion dollars for these work-related injuries. Any CBA must take into account the benefits derived from not socializing disability costs in any given standard.

Similarly indirect economic and social benefits should be assessed. The benefits of fewer worker compensation claims and the benefit of reduced rehabilitation/return to work programs must be counted as well as benefits derived by the children of workers who will not be denied the active attention and concern of a parent. There are also certain psychological benefits with the reduction of the stress of exposure.

There are other problems with CBA. It suggests that all relevant costs and all benefits can be monetized. They cannot be. And CBA operates under the principle that the standard or regulation being evaluated is merely supposed to take account of some market problem, account for some cost, not included in the normal pricing scheme. OSHA regulations are supposed to protect workers from known hazards

[3] Reville R, Schoeni R. *The Fraction of Disability Caused at Work*. PSC Research Report no. 04-551. Population Studies Center at the Institute for Social Research, University of Michigan. February 2004.

as long as this is feasible, defined by the courts as not putting the industry out of business. Subjecting OSHA standards and regulations to CBA effectively rewrites the law. This is not an appropriate role for OIRA.

The final and perhaps the most crucial problem with CBA is that it violates the demand for equity inherent in the protections provide by OSHA and other protective legislation. The benefits and costs counted do not accrue to the same people. In fact, the costs generally accrue to one set of people (workers) and the benefits to another (management). The reason we have protective legislation is that the people through their representatives in Congress have decided that some risks are not worth taking, regardless of their benefits. Workers should not have their lives and well-being weighed against the employer's bottom line whenever OSHA promulgates a new standard. That is immoral and in violation of the law as passed.

Methods of ensuring that regulatory review does not produce undue delay

As stated above, OIRA should reconsider the need for central regulatory review in the OSHA regulatory process when there is evidence that cost, feasibility and other economic considerations have been addressed by the agency.

The role of behavioral sciences in formulating regulatory review

Employers have successfully socialized the cost of work-related injuries and illnesses and have few incentives to be genuine stakeholders in the regulatory arena to improve worker health and safety. Employers have rarely if ever proposed work-related hazards for regulatory consideration by the agency. Employers with effective programs are often reluctant to bring their programs to the attention of OSHA. This reluctance was especially noticeable during the ergonomics standard process. OIRA should explore cognitive and behavioral methods to persuade employers with effective, evidence-based programs to be more active and less passive in the regulatory process.

OIRA staff education is essential as well. Without a clear understanding of the complexity of worker exposure in various settings, staff may have a tendency to minimize the risks of any one hazard. OIRA should find genuine ways for workers to discuss their perception and experience of risk and to present the rationale for regulations.

The best tools for achieving public goals through the regulatory process

Economists often assert as a free market principle that if workers are given enough information about the hazards of the job, they would be able to make informed decisions on whether or not to take or stay in a job. It is true that information on job hazards is not readily available to workers. And certainly workers should be entitled to all the information that is available about the hazards of the job or

industry. For instance, teachers and staff in pervasively dangerous schools should be informed about the rates of assault on staff and faculty. Perhaps job applications should come with cancer rates associated with exposure to certain solvents and hazard. But laws governing occupational hazards, consumer product safety and wages and hours exist because Congress has decided that the market does not work well enough in these areas, that workers – and sometimes consumers – have inadequate information and inadequate freedom of action.

Moreover even adequate information would not necessarily translate into better, more preventive programs. A new teacher or staff person is inevitably assigned to the least desirable, "bad" school. Should the teacher or staff person forgo having a career in education because she or he cannot get an assignment to a safer school? And will employers genuinely inform workers of the hazards in a job or actively make the job safer to attract workers if information is available?

The best tools for achieving the goal of worker health and safety must include mandating efficient ways for workers to get information and report hazards, injuries and illnesses. These tools are often part of OSHA standards. An example of this process is the Occupational Exposure to Blood-borne Pathogens standard. That standard requires that workers receive information and education from a "living" professional (not a video or on-line course) who can answer questions and demonstrate techniques (i.e. use of gloves, puncture proof containers, safer devices). The regulatory process should guarantee worker involvement in improving health and safety without retaliation. Workers need assurances that they will not be sanctioned for reporting injuries or illnesses

In summary, the President's new executive order offers an opportunity to recast OIRA in a role to improve the regulatory process by: 1) advocating for adequate funding for OSHA and other regulatory agencies to perform the necessary regulatory impact analyses 2) assisting OSHA in developing a more responsive and rigorous regulatory agenda 3) establishing CBA as one of many regulatory analytical tools 4) improving the assumptions and methods of CBA by providing opportunities for public comment 5) identifying incentives for genuine employer (stakeholder) involvement in developing programs to protect worker health and safety; 6) providing waivers to centralized review when other effective tools have been used by OSHA

Thank you again for the opportunity to provide comments to the Director as he makes recommendations to the President for the forthcoming Executive Order.

Sincerely,

Darryl Alexander
Program Director
AFT Health and Safety Program

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Enclosures