

March 16, 2009

Via E-Mail: oira_submission@omb.eop.gov

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

ATTN: Mabel Echols

Re: Federal Regulatory Review

Dear Ms. Echols:

We are writing to submit comments in response to the above-captioned Federal Register Notice, which specifically seeks public comments to assist the Office of Management and Budget ("OMB") develop a new Executive Order on Federal Regulatory Review and how to improve the process and principles governing regulation. See, 74 Fed. Reg. 8819 dated February 16, 2009. The American Association of Exporters and Importers ("AAEI") greatly appreciates the opportunity to submit these comments, and we fully support OMB's effort to engage with the public to improve the federal regulatory process. We hope that our comments below assist OMB in developing recommendations for the President.

Introduction

AAEI has been a national voice for the international trade community in the United States since 1921. Our unique role in representing the trade community is driven by our broad base of members, including manufacturers, importers, exporters, retailers and service providers, many of which are small businesses seeking to export to foreign markets. With promotion of fair and open trade policy and practice at its core, AAEI speaks to international trade, supply chain, product safety, export controls, non-tariff barriers, and customs and border protection issues covering the expanse of legal, technical and policy-driven concerns.

As a representative of private sector participants engaged in and impacted by federal regulations pertaining to international trade, product safety and supply chain security, AAEI represents a large cross-section of the stakeholders in the trade industry, and thus, AAEI is deeply interested in the federal regulatory process. Our comments below relate to the corresponding sections of the notice.

1. Relationship with OIRA and the Agencies

AAEI believes that OIRA plays a critical role in serving as the final regulatory hurdle to be cleared before an agency can issue a proposed rule. We believe that having a "fresh set of eyes" review technical trade regulations serve a very valuable role in questioning agency officials about the purpose, means and necessity of a regulation. We support OMB's continued role in the federal regulatory process.

However, we are deeply concerned about regulations which involve complex cost/benefit analysis whereby the private sector strongly disagrees with the government's assessment of cost impact. We believe that such regulations are difficult for OMB to arbitrate at the end of the federal regulatory process because the mere production of a cost/benefit study consistently creates a presumption at OMB that the agency has satisfied its statutory requirements. We believe that OMB should independently scrutinize study design and results proactively. Otherwise, meetings with OMB can often feel like exercises in "a day late and a dollar short" for industry seeking to stop costly regulations where industry is essentially put to a burden of disproving the agency's analysis. Industry is also hampered in this regard because it often lacks adequate time to develop its own cost/benefit information. AAEI proposes that OMB develop a mechanism whereby it conducts an early review of the cost/benefit analysis of any proposed rule with a significant cost impact. We discuss our concerns about the cost/benefit analysis process in greater detail below.

2. Disclosure and Transparency

It is AAEI's experience that an agency's motivation for proposing a particular regulation is often not transparent despite the policy goals stated in the notice. For example, U.S. Customs and Border Protection recently issued two proposed rules changing longstanding principles in U.S. customs law: a) the ability of U.S. importers to use the "first sale" value of merchandise in a multi-tiered transaction; and b) the use of the NAFTA rules of origin in place of the "substantial transformation" test to determine the country of origin for imported goods. Both of these principles are permitted by U.S. statute and have been recognized by U.S. court cases for nearly 80 years.

Since CBP's transfer to the Department of Homeland Security, the Treasury Department has retained final authority over "customs revenue functions" (e.g., tariff classification, valuation, country of origin and marking) of CBP, including approval of regulations relating to such functions. As a result, it is often difficult for the trade community to identify the true proponents and agency decision makers behind a proposal. Such lack of transparency results in a ping pong match when industry seeks to discuss the policy behind proposal and possible alternatives to the agency's proposal, and allows policymakers to "pass the buck" to other officials. We also believe that agencies should be more transparent in the policy reasons for changing longstanding regulatory principles that the private sector has relied upon for many years, and that such policy changes should not be permitted without an agency demonstrating a compelling national interest.

3. Encouraging Public Participation in Agency Regulatory Process

AAEI supports OMB's continued outreach to encourage the public to participate in the regulatory process. We are particularly concerned that small and medium size enterprises ("SMEs") may be underrepresented in providing comments to agencies about the impact of proposed rules on their business operations. The Small Business Administration often provides some input on SME's behalf, but they often do not have the technical expertise to provide specific comment concerning a proposed rule's impact on companies which do not have inhouse regulatory compliance professionals to implement the rule. AAEI will continue to reach out to SMEs to bring their concerns to the attention of policymakers when formulating regulations.

4. The Role of Cost-Benefit Analysis

AAEI believes that the role of cost-benefit analysis in formulating federal regulation governing how the private sector does business is the most critical aspect of economic

regulation. It is our experience that the cost-benefit analysis undertaken by a federal agency to support a regulation often provides false assumptions upon which the regulation is based. AAEI's experience with CBP's Importer Security Filing regulation has left us with deep concern about two critical issues.

First, we question how federal agencies choose the consultants who conduct the cost/benefit analysis. When CBP proceeded with the ISF rule, it chose Industrial Economics, Incorporated ("IEI") to perform the regulatory assessment¹ including the impact of the rule on the supply chain as well as the projected cost to industry and economic impact. AAEI was one of the first organizations contacted by IEI, and it became apparent rather quickly that the economists and statisticians assigned to the task did not have a background in international trade or the global supply chain. AAEI staff provided such background to IEI in a few lengthy teleconferences. While we have no doubt that IEI Consulting conferred with a wide range of industry stakeholders, we have little confidence in the firm's ability to gain the necessary technical background to conduct a sound risk assessment and cost analysis.

For rules regulating economic activity, the risk assessment including cost/benefit analysis must form a rational basis for the rule – that is, ruling out less costly alternatives as a viable option for meeting the policy goals of the proposed rule. Companies are in the business in selling and shipping products, they are not in the business of regulatory compliance. As a result, we believe that the government must demonstrate that a regulation serves a compelling government policy goal and that the means chosen will have the least economic impact. Therefore, we believe that OIRA should set specific criteria and guidelines for how agencies hire outside consultants to conduct the risk assessment cost/benefit analysis for all economic regulations imposed on the private sector.

5. Role of Distributional Considerations, Fairness and Concerns for the Interest of Future Generations

Based on our experience in the federal regulatory process, AAEI believes that government agencies rarely consider lost opportunity costs to the private sector when regulatory compliance requirements force companies to use scarce resources for non-revenue generating purposes. Government agencies need to recognize that every time an economic regulation is promulgated, the government is essentially telling the private sector how to conduct business. Such regulations are written by government employees, many of whom have never worked in the private sector. As a result, they are ill-equipped to make the judgments necessary so that the regulation balances the policy objective without impeding companies from pursuing business opportunities that would be otherwise lost due to allocating resources to regulatory compliance. Companies are not in business solely to comply with government regulations.

6. Methods of Ensuring that Regulatory does not Produce Undue Delay

Economic regulations, particularly those impacting international trade and the global supply chain, need to take into account the business cycle and the planning process necessary to implement new mandates. Recently, the U.S. Consumer Product Safety Administration needed to delay the implementation of certain mandates under the Consumer Product

¹ The document referenced is "Regulatory Assessment and Initial Regulatory Flexibility Analysis for the Notice of Proposed Rulemaking - Importer Security Filing and Additional Carrier Requirements Cost, Benefit, and Feasibility Study as Required by Section 203(c) of the Safe Port Act 03 December 2007."

Safety Improvement Act, P.L. 110-314 (August 14, 2008), because the trade community needs more lead time to make the changes to its supply chain and inventory practices. See, e.g., CPSC Notice of Stay of Enforcement of Testing and Certification Requirements, 74 Fed. Reg. 6396 (February 9, 2009). Therefore, AAEI recommends that agencies take particular care in developing an implementation schedule for any regulation involving imported or exported products.

7. The Role of Behavioral Sciences in Forming Regulatory Process

AAEI has no comment on the role of behavioral sciences in forming the regulatory process.

8. The Best Tools for Achieving Public Goals Through the Regulatory Process

For regulations impacting international trade and the global supply chain, AAEI believes the best tool is using a holistic approach to risk management to regulate companies and evaluate their compliance with the regulation. Our members continue to support business practices which enhance their internal controls in sourcing, importing, exporting and shipping goods around the globe. As more regulatory agencies shift their focus to regulating products in a global economy, AAEI recommends that all agencies which regulate imported and exported products avoid a "one size fits all" approach to regulation. Although agencies such as CBP purportedly use "risk management" strategies to minimize regulatory burdens, we have found that, in actuality, agencies have used overbroad and deeply intrusive data requirements in the name of "risk management." Data and information collection, validation and submission to the government are enormously expensive because data submissions must be created and managed by the company. Corporate personnel and systems around the globe must be created and adapted to the task, causing up-front and ongoing cost recognition by business. In many cases, there has been a dearth of evidence that the requirements are the best way to truly manage risk. Here, we emphasize that data requirements are applied without regard to the reliability and risk of the parties being regulated. Quite the opposite consistently occurs because the agencies require the same information from all parties, no matter the risk, wasting scarce government and corporate resources, particularly in these difficult economic times.

AAEI has consistently asked agencies to "think outside the box" by creating alternative means of data collection, be they periodic filings of data, pre-filing, statistical sampling, etc. These suggestions have been long ignored as agencies continue to demand data on a transaction-by-transaction basis, the most difficult and costly means to fulfill such requirements. In other words, agencies continue to apply 19th century thinking to import requirements and, therefore, businesses are forced to automate old transaction-based processes. OIRA would serve both government and business interests by working to reinvent and modernize information collection processes.

9. Regulations Must Conform to Statute and Must Be Reasonable

In addition to the items above, AAEI would add another major concern of AAEI members - that detailed analytical comments submitted in response to a notice of proposed rulemaking are given short shrift by agencies. Again, we cite to CBP's ISF proposal. Many of the hundreds of comments made in-depth arguments that were dismissed by CBP with a wave of the regulatory plume (e.g., the agency has already responded to this comment, etc.) without sufficient rationale to show that the regulation is a reasonable means to accomplish the statutory purpose. In many instances, commentators cited specific statutory parameters (e.g., data confidentiality concerns) only to have them summarily dismissed or

ignored altogether. It is imperative that OMB and OIRA ensure that legitimate public comments and concerns are specifically addressed in a satisfactory manner before the regulation is made final.

Conclusion

AAEI supports OMB's Federal Regulatory Review as a way to appropriately allocated scarce government and company resources. We believe that the suggestions above would provide a more effective regulatory process while still achieving the government's policy goals.

We hope that OMB will call upon AAEI as a leader of the import and export community to facilitate ongoing dialog with the government to protect the health and safety of Americans while ensuring the continued flow of legitimate products to American consumers throughout the country. AAEI would be happy to discuss any of the matters raised in these comments or any other matter germane particularly to the importing community.

Thank you for the opportunity to submit these comments on behalf of our members.

Sincerely,



Marianne Rowden
General Counsel

cc: Tim Van Oost, Chair, AAEI
Karl Riedl, Chair-Elect, AAEI
Claib Cook, Co-Chair, AAEI Customs Committee
Aaron Gothelf, Co-Chair, AAEI Customs Committee