



NATIONAL AUTOMOBILE DEALERS ASSOCIATION  
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Legal & Regulatory Group

March 16, 2009

**ELECTRONIC SUBMISSION**

Ms. Mabel Echols  
Office of Information and Regulatory Affairs  
Records Management Center  
Office of Management and Budget  
725 17<sup>th</sup> St., N.W.  
Rm 10102, NEOB  
Washington, DC 20503  
Electronic address: [www.regulations.gov](http://www.regulations.gov) (OMB Docket E9-4080)

**Re: Federal Regulatory Review; FR Doc. E9-4080**

Dear Ms. Echols:

The National Automobile Dealers Association (NADA), founded in 1917, represents 19,000 franchised automobile and truck dealers who sell new and used motor vehicles, and engage in service, repair, and parts sales. Together those dealers employ more than 1,000,000 people nationwide.

**I) Introduction**

The centralized federal regulatory review process that exists today evolved over the past 30 years and enables the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) to review significant regulatory proposals and policies with potential impacts on numerous businesses and individuals throughout the country. Such review by the Executive branch has proven to be valuable and beneficial by ensuring that proposed regulations are consistent with Presidential priorities and as a 'second opinion' on important government actions. NADA is pleased to comment on this very important regulatory control mechanism.

When President Reagan drafted Executive Order 12291 in 1981, our country was in the midst of an economic crisis plagued with high levels of unemployment and low levels of consumer confidence, not unlike what we are faced with today. President Reagan's vision to establish a process for reviewing significant regulatory proposals and mandating the use of cost-benefit analyses provided a sense of focus within the Executive branch and helped our government navigate through those difficult times. Almost thirty years later, we find ourselves in arguably worse economic circumstances. To help chart through the rough waters ahead, any new Presidential Executive Order on Federal Regulatory Review should focus on incremental improvements to the system that exists today and should not abandon those core principals that have served the country well for the past three decades.

Throughout various administrations, the federal regulatory review process has evolved and improved over time, allowing for OIRA to work in concert with the federal agencies and enabling them to prioritize and tackle the most pressing and significant regulatory issues in the most efficient manner. If anything, it is minor details within the regulatory review process that may need amending and not the process itself. During these unstable and uncertain times, new procedures and methodologies for reviewing and promulgating regulations risk impairing the current system by requiring agencies to effectively 'unlearn' the process they have come to know and comply with. Difficult economic times require proven actions that coordinate the federal departments and agencies, not the reinvention of such actions.

NADA commends the new administration for asking for public comments and suggestions on this important matter. We implore the new administration not to use this opportunity to dismantle an established system that works well and replace it with an untested one, however well-intended.

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

OIRA was established by the 1980 Paperwork Reduction Act and "in addition to reviewing collections of information under the Paperwork Reduction Act, OIRA reviews draft regulations under Executive Order 12866 and develops and oversees the implementation of government-wide policies in the areas of information technology, information policy, privacy, and statistical policy."<sup>1</sup> OIRA is also responsible for reviewing agency draft regulations before publication "to ensure agency compliance with Executive Order [12866]."<sup>2</sup> This objective is bestowed upon the Executive Branch through Article II, Section 3 of the United States Constitution which states that as part of his Constitutional duties, the Chief Executive must "take Care that the Laws be faithfully executed..."<sup>3</sup> As such, Presidential review of agency regulations is part of the underlying governing fabric of our country in the 21<sup>st</sup> century.

At any one time, dozens of federal agencies are developing hundreds of new federal rules and policies involving thousands of issues, millions of regulated and impacted entities, and millions

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<sup>1</sup> Executive Office of the President of the United States, Office of Management and Budget, *Office of Information and Regulatory Affairs*, available at [http://www.whitehouse.gov/omb/OIRA\\_QsandAs/](http://www.whitehouse.gov/omb/OIRA_QsandAs/) (last visited March 16, 2009).

<sup>2</sup> *Id.*

<sup>3</sup> U.S. Const. art. II, §3.

of dollars. OIRA is the rational place to serve as a ‘central clearinghouse’ for such regulations. It is important that the White House have available to it the services of centralized experts whose job it is to ensure that new rules and policies comport with procedural mandates, avoid duplicative and inconsistent outcomes, and meet overall executive branch expectations.

In lieu of a revamped review process, NADA suggests a few minor, yet hopefully effective changes to the current model. One such amendment would be to make “independent agencies” subject to OIRA review. As we understand it, with the revocation of Executive Orders 13258 and 13422, Executive Order 12866 remains the principal regulatory directive in place.<sup>4</sup> Executive Order 12866 specifically exempts “independent agencies” from the Regulatory Review process.<sup>5</sup> Such “independent agencies” are defined under 44 U.S.C. 3502(5) and include the Federal Trade Commission and the Federal Reserve Board.<sup>6</sup> These “independent” agencies are some of the most influential and important that exist in the federal government. Many independent agencies regularly promulgate regulations that not only affect numerous businesses and individuals in our society, but also meet the “economically significant” standard as specified for regulated agencies. Since the goal is to produce a more efficient and capable regulatory process within the federal government, the review process should be made more inclusive.

NADA would support an increase of the \$100 million threshold now used to help determine which rules are ‘major’ and thus require a cost-benefit analysis. This monetary ceiling has not been adjusted since it was first implemented some 30 years ago in Executive Order 12291.<sup>7</sup> At the very least, the dollar amount threshold should be set at \$250 million.

### III) Cost-Benefit Analysis

A requirement for the performance of regulatory cost-benefit analyses has been in place for over 30 years. President Nixon was one of the first to institute this process by establishing “Quality of Life” reviews of administrative actions.<sup>8</sup> President Carter also took advantage of this process and incorporated it within his Regulatory Analysis Review Group.<sup>9</sup> However, it was President Reagan

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<sup>4</sup> Executive Office of the President of the United States, *Revocation of Certain Executive Orders Concerning Regulatory Planning and Review*, available at [http://www.whitehouse.gov/the\\_press\\_office/Revocation-Of-Certain-Executive-Orders-Concerning-Regulatory-Planning-And-Review/](http://www.whitehouse.gov/the_press_office/Revocation-Of-Certain-Executive-Orders-Concerning-Regulatory-Planning-And-Review/)

<sup>5</sup> Exec. Order No. 12,866, 58 Fed. Reg. 190 (Oct. 4, 1993).

<sup>6</sup> the term “independent regulatory agency” means the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, the Federal Housing Finance Board, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Rate Commission, the Securities and Exchange Commission, and any other similar agency designated by statute as a Federal independent regulatory agency or commission;

<sup>7</sup> Exec. Order No. 12,291, 46 Fed. Reg. 13193 (Feb. 17, 1981).

<sup>8</sup> Robert W. Hahn, and Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, John M. Olin Law & Economics Working Paper No. 150, April 2002, accessed at [http://www.law.uchicago.edu/Lawecon/WkngPprs\\_126-150/150.CRS.Cost-Benefit.pdf](http://www.law.uchicago.edu/Lawecon/WkngPprs_126-150/150.CRS.Cost-Benefit.pdf), citing Richard R. Nathan, *The Plot That Failed and the Administrative Presidency* 45-49 (1975).

<sup>9</sup> *Id.*, citing Richard H. Pildes & Cass Sunstein, “Reinventing the Regulatory State,” 62 *U. Chi. L. Rev.* 1, 14 (1995).

who solidified this process by incorporating it into his Federal Regulatory Review in his Executive Order 12291.<sup>10</sup>

One of the best tell-tale signs of whether a rule or regulation will benefit the society as a whole is to measure whether its benefits outweigh the costs. It is only through such analyses that we can determine with reasonable certainty whether a regulation will do more harm than good. As advocated by Robert Hahn and Cass Sunstein in their John M. Olin Law and Economics Working Paper No. 150, “cost-benefit analysis is not an effort to reduce all human goods to numbers, but to increase the likelihood that regulation will actually produce human good.”<sup>11</sup>

The Hahn/ Sunstein paper explains that a cost-benefit analysis shouldn’t bind regulators to ‘bottom line’ numbers or consideration, but should allow regulators to explain ...how the benefits exceed the costs, or if they do not, why it is nonetheless worthwhile to go forward. When the benefits do not exceed the costs, it would make sense to adopt a presumption against proceeding- a presumption that might be rebutted by showing, for example, that children would be the principal beneficiaries of the regulation, or that poor people would be disproportionately benefited.”<sup>12</sup>

In essence, the cost-benefit analysis should not be viewed as the sole method of measuring regulatory action, but as one of many tools in making that determination.

As noted above, the cost-benefit analysis has played an integral part of the federal regulatory review since President Reagan’s Executive Order 12291. As with other aspects of the regulatory review, the role of the cost-benefit analysis has changed throughout the administrations. Most recently, President Bush’s Executive Orders 13258, and 13422, expanded the federal regulatory review to include an aggregate cost-benefit analysis. This addition further expanded the role of the analysis in the regulatory process by requiring agencies to provide their “best estimate of the combined aggregate costs and benefits of all its regulations planned for that calendar year to assist with the identification of priorities.”<sup>13</sup>

President Obama appears to have effectively revoked President Bush’s Executive Orders 13258 and 13422, thereby eliminating the requirement for aggregate cost-benefit analyses. This does not appear to make good sense. Oftentimes, analyzing the aggregate impact of multiple regulations by multiple agencies may reveal consequences that were not otherwise visible. NADA urges OMB to expand the application of cost-benefit analyses consistent with Executive Order 13422. As the Hahn/ Sunstein report states, the “cost-benefit analysis has a great deal of promise, and when it has been used, it has often made things better rather than worse.”<sup>14</sup>

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<sup>10</sup> Exec. Order No. 12,291, 46 Fed. Reg. 13193 (Feb. 17, 1981).

<sup>11</sup> Robert W. Hahn, and Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, John M. Olin Law & Economics Working Paper No. 150, April 2002, accessed at [http://www.law.uchicago.edu/Lawecon/WkngPprs\\_126-150/150.CRS.Cost-Benefit.pdf](http://www.law.uchicago.edu/Lawecon/WkngPprs_126-150/150.CRS.Cost-Benefit.pdf).

<sup>12</sup> Id.

<sup>13</sup> Exec. Order No. 13,422, 72 Fed. Reg. 14 (Jan. 23, 2007).

<sup>14</sup> Robert W. Hahn, and Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, John M. Olin Law & Economics Working Paper No. 150, April 2002, accessed at [http://www.law.uchicago.edu/Lawecon/WkngPprs\\_126-150/150.CRS.Cost-Benefit.pdf](http://www.law.uchicago.edu/Lawecon/WkngPprs_126-150/150.CRS.Cost-Benefit.pdf).

#### **IV) The Role of Guidance Documents**

Executive Order 13422 defined “guidance document” as “an agency statement of general applicability and future effect, other than a regulatory action, that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue.”<sup>15</sup> Such documents are typically created to help explain how regulations should be implemented or enforced.

Unquestionably, guidance documents play a significant role in the regulatory process and as such should be subject to some appropriate form of potential review. Without such oversight, guidance documents may wrongly define or expand regulations, may potentially alter the original purpose of regulations, or even may serve to act as de facto regulations themselves. Therefore, guidance documents should be scrutinized in a manner similar to that suggested in Executive Order 13422.

Note that Executive Order 12866 was amended to expand OIRA’s duties to review “significant” guidance documents, as follows:

Each agency shall provide ORIA, at such times and in the manner specified by the Administrator of OIRA, with advance notification of any significant guidance documents. Each agency shall take such steps as are necessary for its Regulatory Policy Officer to ensure the agency’s compliance with the requirements of this section. Upon the Request of the Administrator, for each matter identified as , or determined by the Administrator to be, a significant guidance document, together with a brief explanation of the need for the guidance document and how it will meet that need. The OIRA Administrator shall notify the agency when additional consultation will be required before the issuance of the significant guidance document.

Similar if not identical language should be set out in the new Executive Order on federal regulatory review.

#### **V) Conclusion**

Much like the economic crisis we endured in 1981, we are currently in the midst of another dreadful financial crisis with no definitive end in sight. This situation demands clear and effective centralized oversight of the regulatory process, which in turn requires that OIRA be fully staffed and fully funded and that all federal agency regulatory and policy personnel be educated regarding their regulatory overview responsibilities. In addition to our above comments, NADA generally supports comments submitted by the Regulatory Improvement Council.

On behalf of NADA, I thank the OMB for the opportunity to comment on this matter, and its consideration of our concerns. Please feel free to contact me should you have any questions or require additional information.

Sincerely,

Timothy A. Brown

Associate Director, Franchising and State Law

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<sup>15</sup> Exec. Order No. 13,422, 72 Fed. Reg. 14 (Jan. 23, 2007).