1201 F Street NW, Suite 200, Washington, DC 20004
(202) 554-9000

March 16, 2009

The Honorable Peter Orszag
Director
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Re: Request for Comments on Possible New Executive Order on Regulatory Review (74 Fed. Reg. 8819 [February 26, 2009])

Dear Mr. Orszag:

The National Federation of Independent Business and the NFIB Small Business Legal Center (hereafter, NFIB) are pleased to submit comments to the Office of Management and Budget (OMB) on a possible new executive order regarding regulatory review. This cover letter will present our general comments, while the attached document will provide our comments in greater detail for your reference.

NFIB is the nation's leading small business association, with offices in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of our members to own, operate and grow their businesses. NFIB represents about 350,000 small businesses, the average member has about six employees and 90 percent of NFIB's membership has fewer than 20 employees. NFIB's average member has gross receipts of $350,000-$500,000 per year. NFIB members include all segments of the NAICS codes.

The NFIB Small Business Legal Center is a 501(c)(3) public interest law firm created to protect the rights of America's small business owners by providing advisory material on legal issues and by ensuring that the voice of small business is heard in the nation's courts.

NFIB firmly believes that review by OMB is critical to ensuring that regulations promulgated by executive agencies are reasonably scrutinized for fairness, necessity and ease of compliance. Small businesses have a particular need for this increased scrutiny. According the U.S. Small Business Administration's Office of Advocacy, small firms face an average regulatory cost of $7,647 per employee — 45 percent more than big businesses.

We believe that the new executive order should address the following seven areas:

1. The order should preserve OMB's authority to individually review economically significant rules.
2. The order should expand OMB review to the economically significant rules of independent agencies to ensure that all aspects of a rule are necessary and not overly burdensome.
3. The order should continue to utilize the Office of Information and Regulatory Affairs (OIRA) to negotiate differences between federal agencies that have similar interests in a particular rule, in order to prevent redundant or contradictory rules.
4. The order should strengthen the role of the SBA's Office of Advocacy and place increased responsibility upon agencies to demonstrate how they have addressed Advocacy's concerns and suggestions for making rules fairer to small firms.
5. The order should direct agencies to provide amnesty for small business owners the first time he or she makes an honest, innocent mistake in compliance where no one is physically or financially harmed.
6. The order should require OMB to review guidance documents that essentially have the effect of a rule in economically significant situations.
7. The order should embrace one of the chief goals of this administration and enhance transparency, particularly regarding how executive officials outside of OIRA assert their views into the rulemaking process.

In this current economic climate, small business is more dependent on OMB review than at any time since the process started four decades ago. OMB needs to maintain its authority to review regulations for overly burdensome mandates. These mandates, if unchecked, may impose significant costs on small firms that cannot take on any more red ink. The result could be additional doors closing on Main Street, and thousands of more employees without jobs.

NFIB appreciates the opportunity to comment on the new executive order. If you would like more information or have questions, please do not hesitate to contact Karen Harned, the NFIB Small Business Legal Center's executive director, at 202-314-2061 or via email at karen.harned@nfib.org.

Sincerely,

Dan Danner
President and CEO

1201 F Street NW, Suite 200, Washington, DC 20004
(202) 554-9000

ATTACHMENT

Further Comment on a Possible New Executive Order on Regulatory Review

Point 1: The order should preserve OMB's authority to individually review economically significant rules.

Since the early 1970s, the Office of Management and Budget (OMB) has exercised review over the individual rules proposed by executive agencies. The entire process has evolved over each administration since. The process has developed through bipartisan means and has demonstrated effectiveness in preventing some overly burdensome rulemakings.

NFIB strongly believes that such review should continue. The U.S. Small Business Administration's Office of Advocacy has determined that regulations cost small firms $7,647 per employee annually — 45 percent more than the cost per employee for large firms. Because of this reality, it is critical to the success of small businesses that federal agencies are not given carte blanche to devise and issue rules that may be inconsistent with administration policy or unnecessarily detrimental to the part of the economy that produces one-half of America's gross domestic product.

Several laws require review of proposed rules to ensure they are not overly burdensome on the regulated population. Such laws include the Regulatory Flexibility Act (RFA) and the more recent Small Business Regulatory and Enforcement Fairness Act (SBREFA). This particular law requires agencies to determine if a proposed rule will impose a significant regulatory burden on small entities. To comply, agencies must perform regulatory flexibility analyses to find a less burdensome rule. NFIB believes that OMB review of compliance with the RFA, and other laws like it, is the most effective mechanism within the government to ensure conformity. It is the constitutional responsibility of the administration to make sure the "laws be faithfully executed." OMB review of individual agency rules is necessary to make that happen.

Point 2: The order should expand OMB review to the economically significant rules of independent agencies to ensure that all aspects of a rule are necessary and not overly burdensome.

While OMB review of rulemakings has been instrumental in making sure the majority of rules are necessary, there are several rulemaking bodies that currently lie outside the scope of OMB review. Such rulemakings include proposals by statutorily defined "independent" agencies.

OMB should review economically significant rules from these agencies for two important reasons. First, as mentioned in the last section, the executive has a constitutional responsibility to execute the laws faithfully. Oversight of all rules is therefore a primary responsibility.

Second, the economic climate requires it. America is facing its worst economic crisis since the Great Depression. Now, more than ever, OMB needs to expand its regulatory review to those agencies not subject to review in the past. OMB needs to make sure the rules coming out of these agencies do not unnecessarily disrupt the economy further. For these purposes, OIRA requires a variety of skill sets, including personnel familiar with the burdens of small enterprises.

Point 3: The order should continue to utilize the Office of Information and Regulatory Affairs (OIRA) to negotiate differences between federal agencies that have similar interests in a particular rule, in order to prevent redundant or contradictory rules.

On many occasions multiple federal agencies — either with goals that appear congruous or disparate — have rulemaking interests that overlap or contradict. It has become the role of OIRA to, in effect, negotiate and resolve these situations before a rule becomes final.

NFIB believes that any executive order on regulatory review must continue to allow for such conflict resolution. OIRA is best suited to analyze the interests of the various agencies and reconcile those differences with administration policy and economic impact.

Point 4: The order should strengthen the role of the SBA's Office of Advocacy and place increased responsibility upon agencies to demonstrate how they have addressed Advocacy's concerns and suggestions for making rules fairer to small firms.

Congress created the Office of Advocacy in 1976 within the U.S. Small Business Administration to inform policymakers about small business contributions and effectively represent the nation's small businesses within the federal government's rulemaking processes. As time progressed, both Congress and various administrations expanded Advocacy's role to ensure agency compliance with the RFA and its amending law SBREFA.

While OIRA is often most responsible for ensuring compliance with the RFA, it relies heavily on the role Advocacy plays. Since 2002, OIRA has leaned on Advocacy to provide information as to whether or not an agency has sufficiently addressed its RFA responsibilities. NFIB and the Legal Center believe this relationship should continue.

In addition, the new executive order should strengthen the role of Advocacy. Particularly, it should require agencies to:

- Address in the *Federal Register* — at all points in the rulemaking process — Advocacy's comments on the rule or Advocacy's agreement with the agency's certification that the rule will not substantially impact small entities.
- Submit certifications of no significant or de minimus impact, and proposed and final rules to OIRA 30 days prior to publishing in the *Federal Register* so that Advocacy may comment or challenge the certification. If Advocacy challenges the certification, OIRA should use its negotiating capacity to resolve the dispute.
- Provide information in the *Federal Register*, preferably by providing a URL, on how to view a copy of Advocacy's comments.

Point 5: The order should direct agencies to provide amnesty for small business owners the first time he or she makes an honest, innocent mistake in compliance where no one is physically or financially harmed.

The sheer weight of the federal regulatory burden (over 150 rules annually costing over $100 million each in compliance costs) is cumbersome for any business. It is particularly difficult for small businesses, which lack specialized compliance staff in nearly every instance. The job of compliance officer usually falls to the small business owner, along with the responsibilities of acquiring new customers, keeping track of inventory, hiring new workers, or even taking out the trash at the end of the day. Even the most well-organized small business owner will at some point make a compliance mistake.

In today's economy, the cost of that mistake can likely mean shutting a business's doors and sending its employees to the unemployment lines. Therefore, NFIB believes that the first time a small business owner makes an honest, innocent mistake in compliance where no one is physically or financially harmed, federal agencies should provide amnesty.

According to a 2004 NFIB Research Foundation poll of small business owners, 53 percent of respondents said that the most difficult part of regulatory paperwork compliance was either confusing instructions or sheer volume of the paperwork itself. These types of problems will lead to innocent errors. The new executive order should direct federal agencies to provide amnesty so that well-meaning small businesses can correct their innocent mistakes without having to face the stiff financial penalties that can drive them out of business.

Point 6: The order should require OMB to review guidance documents that essentially have the effect of a rule in economically significant situations.

There are too many situations where an agency issues a new guidance document detailing how the agency will enforce a law where there are no corresponding regulations codifying how the law will be enforced. In such instances, these guidance documents have the effect of a final rule. Yet, OMB does not review these — even in circumstances of significant impact. Regulating by guidance document is, therefore, a way for an agency to sidestep the critical OMB review process.

As an example, in 2007 the U.S. Army Corps of Engineers issued its *Jurisdictional Determination Form Instructional Guidebook*, in response to a court ruling that the Army Corps had been asserting authority over waters outside of its jurisdiction. The guidebook was issued on May 30, 2007 to clarify how the Army Corps would determine its authority. However, no corresponding regulations were proposed or issued.

In effect, this guidebook is the new rule. Yet OMB was not able to review it because it is technically not a "rule." NFIB believes the new order should address situations like this by requiring OMB to review guidance documents that will have the effect of a rule.

OMB should also assert its regulatory reviewing authority to ensure that guidance documents come out with a final rule, as often required by law, instead of months or years after the fact. These documents do help increase compliance.

Point 7: The order should embrace one of the chief goals of this administration and enhance transparency, particularly regarding how executive officials outside of OIRA assert their views into the rulemaking process.

In the weeks since assuming office, this Administration has pledged to increase transparency in the government. NFIB believes that the Administration should demonstrate its commitment to transparency by including the communications about rulemakings between OMB and executive officials in the public record. In particular, NFIB is interested to know how the newly created positions within the White House affect the rulemaking process. Transparency is needed to make sure that rulemakings are performed legitimately, and with the interests of the American people — not politics — in mind.