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OFFICIAL COMMENTS
OF
ASSOCIATED BUILDERS AND CONTRACTORS, DC.

May 5, 2003

RESPECTFULLY SUBMITTED TO

Dr. John Graham
Office of Information and Regulatory Affairs
Office of Management and Budget
NEOB, Room 10202
725 17th Street, NW
Washington, DC 20503

ON

OMB Draft Guidelines for the Conduct of Regulatory Analysis

In Response to
Chapter II of OMB Notice and Request for Comments
Published February 3, 2003 in the *Federal Register*

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Associated Builders and Contractors (ABC) respectfully comments on the Office of Management and Budget's Draft Guidelines for the Conduct of Regulatory Analysis and Format of Accounting Statements published in the Federal Register on February 3, 2003 ("draft guidelines"). ABC is a national trade association representing over 23,000 construction contractors and supplier members in 80 chapters throughout the United States.

The draft guidelines provide an important overview to conducting an economic analysis to federal agencies. Most agencies have been engaged in this exercise for many years and have familiarity with this level of analysis. Unfortunately, many agencies continue to disregard the value of a substantiated and transparent economic analysis. These guidelines are an effective reminder of that duty.

ABC provides the following recommendations for the draft guidelines.

Transparency

OMB should incorporate into the guideline the necessity of transparency of all the analyses. In particular, transparency is mentioned only in the context of contingent valuation in Section IV.B.5. However, agencies continue to propose cost estimates without the benefit of source information to the public.

Under the claim that federally-funded private research is proprietary, agencies often refuse to share studies that are the underpinnings of cost estimates. Without the benefit of knowing the number of entities surveyed, the methodology, the type and size of entities surveyed, etc., the agencies' claims are difficult to scrutinize. This information should be easily accessible for the public's review and analysis, so that any claim from baseline costs, time for performance, or contingent valuation can be substantiated.

Unquantifiable Costs and Benefits

The guidelines should encourage agencies to evaluate the unquantifiable costs to entities involving business closures, unemployment, reduced tax revenues, increased costs to consumers, etc. Agencies are often quick to rely upon the unquantifiable benefits of a rule (e.g., improved quality of life). However, it is not uncommon for an agency to say that harm to business is "too far removed" or "indirect" or "unquantifiable." At minimum a public disclosure of the possibilities should be included in any analysis as appropriate.

Distributional Effects

ABC urges OMB to go beyond the mere aggregate analysis of cost and benefits and require agencies to provide an analysis of the costs to affected entities. The draft guidelines indicate a need for "Evaluating Distributional Effects" in Section III.D. However, a mere paragraph does not address the span of necessary steps. Moreover, the

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instruction makes this step discretionary. "The presentation of distributional effects is especially important when you *have reason to believe* that there will be significant disparities in how your regulatory actions may affect different groups of people." (Emphasis added.) The agency should not use "belief" as a system of analysis. The agency must conduct the distributional effects analysis in order to determine whether and to what extent there are disproportionate harms among affected parties.

By using mere aggregate numbers, agencies have been able to manipulate the cost-benefit analysis and the required Regulatory Flexibility Analysis to dilute the costs to particular industry sectors (by type and/or size). Average costs to a regulated entity can be a low average but be significant for a particular industry sector. Without a requirement for industry-sector analysis, the public cannot understand or scrutinize the more specific harms. Cost analysis for businesses of different sizes, depending on the type of regulation, is important to find the "tipping point" (where the costs outweigh the benefit). These industry sector harms may be unquantifiable or ripe for more in-depth analysis. Importantly, the agency may find that costs are being borne by an industry-sector that is not a primary "bad actor" that is driving the need for regulation.

OMB should include reference to the Regulatory Flexibility Act and Unfunded Mandates Act under this section. The reference to these requirements points to the necessity by law to fully analyze the distributional effects of a rulemaking. In addition, the draft guidelines should refer to the statutory definitions of small business that must be used in analysis. By introducing these definitions to the user, the agency is not put in the position of "retrofitting" its aggregate analysis to the requirements of the Regulatory Flexibility Act. The mere mention of these statutes at the end of the report at Section V as "Specialized Analytical Requirements" marginalizes the laws' importance and implies that the OMB requirements are superior to those of these critical laws. Instead, these laws can work hand-in-hand to increase the value of regulatory analysis.

Development of Cost Analysis

In addition to extensive distributional effects analysis, OMB should discourage a number of common techniques used by agencies to underestimate costs. ABC recommends that the following additional guidance for agencies be adopted:

- Support by market price-elasticity analysis any claims that costs are simply passed through to the consumer with price increases;
- Report how many firms are covered in various industry-sectors and their characteristics (e.g., annual payroll or revenue, number of employees, geographic dispersion, unit production, etc.) as part of the baseline analysis
- Assure small aggregate costs are not concentrated in a particular industry sector where harm could distort the market;
- Avoid minimizing cost estimates for "performance-based" standards by doing case analyses for different performance approaches; and

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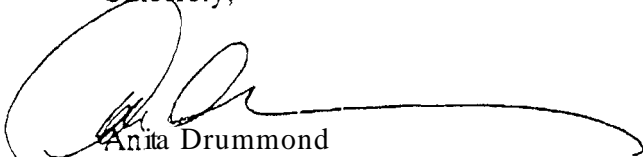
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- Analyze cost of first-year compliance as separate from maintenance compliance to assure market entry is not impeded and market exits are not increased;

Thank you for considering ABC's comments on the draft guidelines. Please contact me if you have any questions about our recommendations.

Sincerely,



Anita Drummond

Director of Legal and Regulatory Affairs

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