



UNITED STATES TRADE REPRESENTATIVE



ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY AFFAIRS


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MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES
AND INDEPENDENT REGULATORY AGENCIES

FROM:

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SUBJECT: Export and Trade Promotion, Public Participation, and Rulemaking

Pursuant to the *Memorandum on Transparency and Open Government* issued by the President on January 21, 2009, and the *Open Government Directive* issued by the Office of Management and Budget (OMB) on December 8, 2009, the Office of the United States Trade Representative (USTR) and the Office of Information and Regulatory Affairs (OIRA) are issuing this Memorandum to promote U.S. exports and trade through increased transparency and openness in the rulemaking process. Reducing unnecessary regulatory barriers to exports and trade will promote economic growth, entrepreneurship, job creation, and innovation.

Existing Obligations

We draw agencies' attention to several existing obligations that can contribute to these economic objectives:

A. Regulatory Analysis

Executive Order 13563 (“Improving Regulation and Regulatory Review”),¹ Executive Order 12866 (“Regulatory Planning and Review”),² and OMB Circular A-4 (“Regulatory Analysis”)³ establish principles governing regulatory analysis. With respect to economically significant rules—those that are likely to have an effect of \$100 million or more in any one year—Executive Orders 13563 and 12866

¹ Available at: http://www.whitehouse.gov/sites/default/files/omb/inforeg/eo12866/eo13563_01182011.pdf

² Available at: http://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf

³ Available at: <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf>

direct agencies to analyze and, to the extent feasible, to quantify the costs and benefits of proposed regulatory actions.⁴

For economically significant rules, agencies should, consistent with these requirements, provide a clear and transparent accounting of both costs and benefits.⁵ In some cases, such costs and benefits can have impacts on productivity, employment, the ability of small and medium sized enterprises (SMEs) to participate in the global economy, and competitiveness. Where any such effects, including significant adverse effects on the ability of American companies to compete in domestic and foreign markets, are reasonably anticipated, agencies should provide a publicly accessible assessment (to the extent feasible and permitted by law and subject to valid privacy, confidentiality, or other restrictions).⁶

Agencies should also note relevant requirements of Circular A-4. Circular A-4 states that “[t]he role of Federal regulation in facilitating U.S. participation in global markets should also be considered” along with public health and other considerations, and that “[c]oncerns that new U.S. rules could act as non-tariff barriers to imported goods should be evaluated carefully.”⁷

B. Trade Agreements Act of 1979

In addition to these analytic requirements, agencies are reminded of their obligations under the Trade Agreements Act of 1979 (Public Law 96-39), as amended by the Uruguay Round Agreements Act (Public Law 103-465) (Trade Agreements Act). The Trade Agreements Act (TAA) prohibits Federal agencies from engaging in “any standards-related activity that creates unnecessary obstacles to the foreign

⁴ Executive Order 13563 provides: “[E]ach agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.” Section 1(c). Executive Order 12866 provides: “Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.” Section 1(b)(6). It is recognized that this requirement applies only to the extent permitted by law.

⁵ Circular A-4 states: “Your analysis should also have an executive summary, including a standardized accounting statement.” (p. 3). OMB recommends that: “Regulatory analysis should be made as transparent as possible by a prominent and accessible executive summary—written in a ‘plain language’ manner designed to be understandable to the public—that outlines the central judgments that support regulations, including the key findings of the analysis (such as central assumptions and uncertainties). . . . If an agency has analyzed the costs and benefits of regulatory alternatives to the planned action (as is required for economically significant regulatory actions), the summary should include such information.” See *2010 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities* (p. 51), available at: http://www.whitehouse.gov/sites/default/files/omb/legislative/reports/2010_Benefit_Cost_Report.pdf

⁶ Executive Order 13563 provides: “To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days. . . . For proposed rules, such access shall include, to the extent feasible and permitted by law, an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings.” Section 2(b). Circular A-4 states: “A good analysis should be transparent and your results must be reproducible. You should clearly set out the basic assumptions, methods, and data underlying the analysis and discuss the uncertainties associated with the estimates. A qualified third party reading the analysis should be able to understand the basic elements of your analysis and the way in which you developed your estimates. To provide greater access to your analysis, you should generally post it, with all the supporting documents, on the internet so the public can review the findings.” (p. 17).

⁷ Additional information on how such analyses can take into account potential international effects of regulation is provided in the chapter on “Analyzing International Effects of Regulation” in OMB’s *2008 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, And Tribal Entities* (available at: http://www.whitehouse.gov/sites/default/files/omb/assets/information_and_regulatory_affairs/2008_cb_final.pdf).

commerce of the United States.”⁸ One way for agencies to avoid creating such unnecessary obstacles is to consider relevant international standards, as directed by the TAA.⁹

C. Openness and Participation in the Rulemaking Process

Executive Order 13563 states, “[E]ach agency . . . shall endeavor to provide the public with an opportunity to participate in the regulatory process. To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days. To the extent feasible and permitted by law, each agency shall also provide, for both proposed and final rules, timely online access to the rulemaking docket on regulations.gov, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded. For proposed rules, such access shall include, to the extent feasible and permitted by law, an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings.”¹⁰

Consistent with Executive Order 13563, Federal agencies should provide the public with timely access to regulatory analyses and supporting documents (to the extent permitted by law and subject to valid privacy, confidentiality, security, or other restrictions), as well as meaningful opportunities for comment. To that end, agencies should provide a description of the methods used in their analysis; should publish information online (in addition to any other planned or mandated publication methods); and, to the extent feasible, should provide the public with the underlying data in downloadable format. Public access via the Internet ensures that rules, analyses, and supporting documents are available to, and allow comment by, both domestic and foreign stakeholders, thus promoting exports and trade.

In addition, the World Trade Organization (WTO) Agreement on Technical Barriers to Trade (TBT Agreement) requires the United States and other WTO Members to notify the WTO of certain draft product standards and related procedures for comment by other WTO Members. To fulfill this requirement, the U.S. TBT Inquiry Point, which is housed in the National Institute of Standards and Technology, undertakes the day-to-day notification functions of the United States.¹¹

D. Encouraging International Collaboration

With the goal of implementing these existing requirements, and helping to ensure that regulatory actions do not create unnecessary barriers to exports and trade, agencies have also adopted, in certain cases, collaborative practices for economically significant rules with potential trade implications. These practices have included and should be considered (to the extent appropriate and consistent with domestic law):

- information exchanges, dialogues, or meetings with other governments;

⁸ 19 U.S.C. 2532.

⁹ See USTR’s 2011 *Report on Technical Barriers to Trade* (available at: <http://www.ustr.gov/sites/default/files/TBT%20Report%20Mar%2025%20Master%20Draft%20Final%20pdf%20-%20Adobe%20Acrobat%20Pro.pdf>).

¹⁰ Section 2(b).

¹¹ See 19 U.S.C. 2544. Questions on the notification process can be directed to U.S. Inquiry Point officials at: ncsci@nist.gov or anne.meininger@nist.gov.

- information exchanges, dialogues, or meetings with interested stakeholders, including SMEs, in other countries;
- coordination of regulatory activities with other governments;
- participation in efforts to share best practices and to harmonize relevant regulatory approaches, standards, and related procedures, as well as consideration of such efforts in the development of regulatory measures; and
- consideration of regulatory schedules that allow for sufficient time to consider regulatory approaches in other countries, as well as relevant developments in international, regional, and other fora.¹²

Where appropriate and feasible, such practices can help reduce regulatory costs, making it easier to do business, and also promote U.S. exports and trade by reducing unnecessary regulatory divergences, which impose costs on U.S. exporters, especially SMEs. Efforts of this kind can promote job creation and support export goals. Collaborative efforts—including, *inter alia*, regulator-to-regulator dialogue, information exchange, mutual recognition arrangements, and similar initiatives—could have many domestic benefits, including increasing the safety and quality of other countries’ exports to the United States and thus helping to protect U.S. consumers.

Practices of this kind can also help to improve the quality of foreign health, safety, and environmental measures—for example, by ensuring that such measures are developed in an open and participatory manner, using principles of good regulatory practice (including, where appropriate, consideration of both costs and benefits), and based on the best available scientific and technical information.

Agencies are encouraged to consult with USTR about these matters as part of their rulemaking processes. In particular, USTR’s WTO & Multilateral Affairs office (202-395-6843) can provide guidance to agencies on compliance with the TBT Agreement and other trade obligations. Both OIRA and USTR look forward to working cooperatively with you and your staff to promote the goals of public participation and open government in the context of international regulatory cooperation.

¹² For a discussion of U.S. participation in various international, regional, and other fora, see USTR’s 2011 *Report on Technical Barriers to Trade* (available at: <http://www.ustr.gov/sites/default/files/TBT%20Report%20Mar%2025%20Master%20Draft%20Final%20pdf%20-%20Adobe%20Acrobat%20Pro.pdf>).