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National Funeral Directors Association

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Via Facsimile and Electronic Mail

John D. Graham, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
New Executive Building, Room 10201
725 17th Street, N.W.
Washington, D.C. 20503

Re: Proposed Bulletin for Good Guidance Practices

Dear Mr. Graham:

The National Funeral Directors Association (NFDA) represents more than 11,000 funeral homes in all 50 states. It is the leading funeral service organization in the United States, providing a national voice for the profession. The average NFDA member is a family owned and operated business with fewer than ten employees.

NFDA members are subject to the regulations of federal agencies such as the Environmental Protection Agency and Occupational Safety and Health Administration, among others. NFDA has a great interest in these regulations and agency "guidance" interpreting regulatory compliance expectations and enforcement issues, particularly with respect to how they impact small business.

NFDA agrees that guidance documents may not, and usually do not, receive the same consideration required for the development and review of regulations. NFDA supports the Office of Management and Budget (OMB) proposal to establish standards to increase the quality and transparency of agency guidance practices and the guidance documents produced through them. Specifically, NFDA supports the practices, procedures and definitions in the Proposed Bulletin for Good Guidance Practices (Bulletin), with the following two exceptions:

Proposed Definition of Significant Guidance Document (Section I)

NFDA believes that the Bulletin should be applicable to all guidance documents, not just "significant" or "economically significant" guidance documents. The disproportionate impact and burden of federal regulatory compliance on small business has been well documented. The 2005 study *The Impact of Regulatory Costs on Small Firms*, performed by W. Mark Crain and

Thomas D. Hopkins and funded by the Small Business Administration Office of Advocacy, is the latest study to document this.

Crain and Hopkins estimate that the overall regulatory burden for all businesses exceeded $1.1 trillion in 2004. The cost per employee was over 40 percent higher in small firms employing less than 20 employees, compared with medium and large firms. For small firms like NFDA members, this means that complying with federal economic, workplace, environmental and tax regulations cost $7,647 per employee, as opposed to $5,411 for medium size firms and $5,282 for large firms. This is a 16 percent increase since 2000.

These costs are "significant" for small businesses and are increasing. They are frequently ignored and compounded by agencies that often certify that a notice of proposed rulemaking will not have a significant impact on a substantial number of small entities. This certification is routinely "supported" by conclusions and assumptions, not the facts and analysis required by the Regulatory Flexibility Act. NFDA urges OMB not to allow this situation to be perpetuated by federal agencies in the development and issuance of guidance documents.

According to Crain and Hopkins, 90 percent of all firms in the United States employ fewer than 20 employees. Increasing the quality and transparency of agency guidance documents will have little positive impact if 90 percent of the regulated community is excluded from its benefits. Instead, the questions of fairness, quality and lack of accountability that concern OMB will not be addressed or resolved at all for this segment of the economy.

Public Access and Feedback (Section III)

OMB advises that one of the primary objectives of the proposed guidance practices is to ensure that agency guidance documents are developed "with appropriate review and public participation, accessible and transparent to the public." To achieve this goal OMB proposes to require agencies to invite and accept comments on "significant guidance documents" in Section III. However, these comments are "for the benefit of the agency, and no formal response to comments by the agency is required."

NFDA supports the requirement that agencies be required to invite and accept comments on significant guidance documents. However, NFDA believes that agencies should be required to respond to these comments in the same way they are required to respond to public comments on "economically significant guidance documents" in Section IV. The Section III exemption from this requirement is inconsistent with the objectives OMB seeks to achieve.

The ability to comment without the obligation to respond and explain how this input was used in a final guidance document does little to enhance transparency or agency accountability. And the "opportunity to participate" in a process that apparently allows an agency to ignore this participation is not likely to reinforce public confidence in the lawfulness, quality and fairness of agency policymaking.

Conclusion

The NFDA supports the OMB Proposed Bulletin for Good Guidance Practices, with the following two exceptions:

- The Bulletin should be applicable to all guidance documents, not just "significant" or "economically significant" guidance documents; and

- Federal agencies should be required to respond to public comments on "significant guidance documents," as well as "economically significant guidance documents."

The NFDA appreciates the opportunity to comment on the proposed Bulletin. Please include these comments in the record of the OMB's proceedings on this matter.

Sincerely,

William A. Isokait

William A. Isokait
Director of Advocacy