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The Honorable Steven D. Aitken
Acting Administrator, Office of Information and Regulatory Affairs
Office of Management and Budget
Eisenhower Executive Office Building, Room 262
17th Street and Pennsylvania Avenue, NW
Washington, DC 20503
Electronic Address: OMB_RAbulletin@omb.eop.gov

Re: Proposed Bulletin on Comparative Risk Assessment

Dear Mr. Aitken:

On behalf of the 600,000 members of the National Federation of Independent Business (NFIB), we are submitting these comments on the Office of Management and Budget's Proposed Bulletin on Comparative Risk Assessment¹ (the Bulletin), published in the Federal Register on January 17, 2006².

NFIB is the nation's largest association representing small businesses. With an average member-size of five employees, our members are the smallest of small businesses. As such, they face unique challenges in the face of an ever-increasing regulatory state, and NFIB serves to inform policymakers of those challenges—especially when it comes to fundamental issues driving public policy decisionmaking, like comparative risk assessment.

¹ http://www.whitehouse.gov/omb/infoereg/proposed_risk_assessment_bulletin_010906.pdf

² *Notice of Proposed Risk Assessment Bulletin*, Office of Management and Budget, 71 Fed. Reg. 2600 (January 17, 2006)

Introductory Comments

In terms of creating a sound and sensible regulatory state, there are few tools more important than comparative risk assessment (CRA). The creation of a unified set of guidelines, to be applied across most (if not all) federal agencies, therefore, is of paramount importance. At its most basic level, CRA allows for prioritization of public policy alternatives: if benefit/cost analysis (BCA) allows us one way of objectively weighing the success or failure of a program, by using CRAs we can put those programs in some order of importance. CRAs help us determine which public policy problems are the most pressing and present us with the greatest risks as compared to other problems.

In terms of enacting public policies, CRAs can be the most important factor in determining the need for them as well as the levels and other types of standards contained in them. Done well, a CRA can help to convince stakeholders (as well as the general public) that the agency's decision is needed and justified. In contrast, a CRA shown to be biased, suspect, or otherwise poorly done, will create the perception that the agency acted arbitrarily and/or capriciously.

If implemented, the Risk Assessment Bulletin would not in itself be an arbiter of policy. Its standards would, however, help to improve the value of the information that policymakers have before them.

Small businesses can only benefit from this. In fact, our members have to do the same thing informally with a wide variety of problems on a near-daily basis. Our members ask themselves these sorts of questions: is it more pressing for me to pay someone to fix that leak in the roof, or should I spend that money on training materials for my employees? Do I make decision A or decision B? It is only fair that agencies have to make the same determinations when it comes to particular policy courses of action—not all public policies are on an equal footing for one another.

Therefore, NFIB is pleased to offer comments on this Bulletin. We are largely satisfied, and our comments will cover those areas we support, and those areas we believe ought to be improved.

Standardization and Differentiation

First and foremost, NFIB applauds OMB's decision to standardize risk assessment across agencies. One of the problems in comparing and prioritizing different federal programs are the metrics used to evaluate risk found in different agencies (between the Environmental Protection Agency [EPA] and Occupational Safety and Health Administration [OSHA], for instance). But in order to make informed choices in articulating public demands to policymakers, interested parties and the general public need to be able to make those comparisons. Standardization will assist them in doing so—by making it clear that the metrics used by OSHA to assess risk are the same as those used by EPA, so that we can compare apples to apples, instead of apples to oranges.

NFIB also appreciates that the bulletin differentiates between risk assessment, risk communication, and risk management. These are three entirely separate areas. The first deals specifically with the pre-implementation evaluation of the problem, while the latter two deal with implementation.

Risk Communication

In terms of communication, we appreciate the following sentiment articulated in the draft, that agencies "shall place the risk in perspective/context with other risks familiar to the target audience." Good regulatory decisionmaking needs to inform the public in the most effective/educational manner. However, much too frequently, public policies that affect health, safety, or the environment are made without a context, or determined in a manner that the public is completely unable to understand.

In many cases, in fact, the presentation of the risks of a particular public policy problem is so confusing that the public completely misunderstands the risks that they face. Placing risks in context is of paramount importance if the public is to be informed and

able to recommend public policy priorities to government. If the public does not properly understand their risks, then they cannot offer accurate feedback or guidance to their elected officials or other policymakers, resulting in misprioritized problems and inaccurately assigned and spent resources.

One of the benefits of earlier work by EPA on the subject of risk was their approach to risk communication in the late 1980s and early 1990s. For example, EPA's 1987 publication *Unfinished Business: A Comparative Assessment of Environmental Problems* was not only a seminal comparison of several dozen potential problems facing the public, but it served as the basis of further research by the academic community into comparing various environmental risks. It served as the basis, for instance, of the comparison of risks from non-occupational, limited exposure to asbestos to eating one char-broiled steak per week (demonstrating that the latter was, indeed, of greater risk).

The public understands such comparisons, and it allows them to give sound feedback to policymakers on what they ought to be doing.

Wider Applicability of Guidelines to Non-Rulemakings

Increasingly, public policies impacting small businesses are being made outside of the rulemaking process. Because of this, we are pleased that OMB is recommending that CRAs do not have to be part of the rulemaking process, but can, instead, apply to a wider variety of public policy decisionmaking processes. Agencies should not be allowed to take a backdoor approach to rulemaking, and should similarly not be tempted to avoid comparing risks, simply because CRAs would not be applied to non-regulatory actions by agencies.

Given the scope articulated, there has nevertheless been concern expressed by other stakeholders that the scope of application could be narrowly construed in certain cases. In the case of regulatory decisions that are made in the guise of individual permitting, for instance (like pesticide applications to the EPA under the Federal Insecticide, Fungicide

and Rodenticide Act of 1996³), there is some fear that such assessments do not apply. They ought to be applied in these cases as well—tailored not widely to *all* instances of permitting, but only to those unique situations where permitting is done in lieu of a general regulation.

Objectivity and Standardization Amongst Regulatory Tools

A concern has been articulated by other stakeholders that multiple standards are being created, inasmuch as policy tools like the Paperwork Reduction Act (PRA) and Data Quality Act (DQA) have different standards of application (in other words, there is some discrepancy between these two laws as to what regulatory actions they apply to). As much as it is practicable, standards of applicability ought to be made as uniform as possible—so that policies that require PRA and DQA analysis ought to also be required to undergo CRA following these guidelines.

Inasmuch as these tools are all designed to assist policymakers in crafting the best, most sensible, cost-effective and successful regulations, they ought to apply to the same regulations across the board. The public is not well-served by a pastiche of regulatory controls that apply to one series of regulations but not another series.

With that in mind, considering that the DQA concerns itself with the scientific integrity of the information that underlies regulatory decisionmaking, we support the idea that CRAs must be scientifically objective, reproducible and have their underlying science transparent. If any of these aspects of a CRA is compromised, the result is simple and clear: the public interest is not served. If the science itself is skewed, non-reproducible or otherwise flawed, then neither the public nor public policymakers can accurately assess risk, let alone compare that risk to other risks.

Alternative Regulatory Risk Comparisons

³ 7 USC 136 et seq. (1996)

The sections of the Bulletin regarding alternative regulatory risk comparisons (IV7b and IV7F) are also important. Not only is it of importance that agencies assess the risks of the problems being addressed (as well as the various solutions), but it is also important to assess the policy considerations and weigh their impacts (in the form of risks) on other regulatory regimes.

For example, many cities were “encouraged” by EPA to improve municipal air quality through programs designed to abate dust generation under National Ambient Air Quality Standards (NAAQS). Cities like Pocatello, Idaho undertook this mandate by requiring many small businesses to pave their parking areas (rural cities like Pocatello frequently have businesses with unpaved dirt parking lots).

But several years later, many of these cities (like Pocatello) were facing mandates from the EPA under the National Pollution Discharge Elimination System (NPDES) Phase II Stormwater Runoff program. These cities then assessed the “impervious areas” within the city to see how much stormwater was being channeled, versus how much was being absorbed by the ground directly.

The end-result was that those businesses forced to pave their parking lots under NAAQS were then penalized under NPDES for doing so.⁴

An equal comparison of those programs would have been beneficial (and it still would be).

Public Participation in the Process

Because this Bulletin at its core is about accurately assessing and communicating risks to the public, public participation throughout the process ought to be encouraged. We therefore appreciate the mandate placed on agencies in section V9A. It is good public policy for agencies to have to consider all substantive comments, and then respond to each of those comments individually in a “response to comments” document.

⁴ Comments from NFIB members in Pocatello, ID were received regarding this situation.

Likewise, agencies ought to update these CRAs from time to time, and the public ought to have the ability to petition agencies for such updates. Therefore we support section VI 3, which lays out such a requirements. Moreover, we believe that the bulletin should require a response from agency, with a justification for whatever decision they ultimately decide to undertake.

Conclusion

The Comparative Risk Assessment process is an essential tool for regulatory decisionmaking. What OMB has decided to do here will tremendously benefit the public generally, and small businesses specifically. The proper assessment and comparison of risk will help us all create public policies that are both sound and able to be prioritized, while weighing them in the face of other public policies that are currently being implemented.

NFIB appreciates the opportunity to comment on this. If you have any questions or comments, please do not hesitate to contact Andrew Langer at (202) 314-2032.

Sincerely,

Andrew M. Langer
Manager, Regulatory Policy