

SUSAN M. COLLINS, MAINE CHAIRMAN

TED STEVENS, ALASKA
 GEORGE V. VGINOVICH, OHIO
 NORM C. CULLEMAN, MINNESOTA
 ARLEN SPECTER, PENNSYLVANIA
 ROBERT F. BENNETT, UTAH
 PETER G. FITZGERALD, ILLINOIS
 JOHN C. CUNLIFF, NEW HAMPSHIRE
 RICHARD C. SHELBY, ALABAMA

JOSEPH I. LIEBERMAN, CONNECTICUT
 CARL LEVIN, MICHIGAN
 DANIEL K. AKAKA, HAWAII
 RICHARD J. DURBIN, ILLINOIS
 THOMAS R. CARPER, DELAWARE
 MARK DAYTON, MINNESOTA
 EMILY F. LITENBERG, NEW JERSEY
 MARK PRYOR, ARKANSAS

United States Senate

COMMITTEE ON
 GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510-6250

259

MICHAEL D. BOFF, STAFF DIRECTOR AND CHIEF COUNSEL
 JOYCE A. RECHTSCHAFFEN, MINORITY STAFF DIRECTOR AND COUNSEL

April 3, 2003

The Honorable John D. Graham
 Office of Information and Regulatory Affairs
 Office of Management and Budget
 NEOB, Room 10202
 725 17th Street, N.W.
 Washington, D.C. 20503

Dear Dr. Graham:

I appreciate the opportunity to comment on the Office of Management and Budget's (OMB) Draft Report to Congress on the Costs and Benefits of Federal Regulation. These guidelines are intended to make continued improvements in the quality of regulatory analyses prepared by agencies. I understand how the country can be better served through good regulatory impact analysis and establishing standardized benefits and costs measures, but the extent that the nation will benefit from these guidelines will depend on how they are implemented.

The proposed guidelines contain striking changes in the details, as well as a general shift from relying on agency discretion and expertise to in-depth and active involvement by OMB, as compared to those established by the previous administration. My first three concerns focus on specific guideline details, while the remaining five address the broad changes to OMB's philosophy and participation in rule making.

1. Cost-effective measures:

In Section III C., The Effectiveness Metric for Public Health and Safety Rulemaking, the guidelines state, "agencies currently use a variety of methods for determining effectiveness, including number of lives saved, number of equivalent lives saved, and number of quality-adjusted life years saved. It is difficult for OMB to draw meaningful cost-effectiveness comparisons between rulemakings that employ different cost-effectiveness measures." However, in your comments to *Resources for the Future* on OMB's perspective of valuing health, you state that, "OMB recognizes that the quality-adjusted life year (QALY) is a widely used measure of effectiveness in the medical literature."

Honorable John D. Graham
April 3, 2003
Page Two

This implies that OMB will rely more heavily on QALY than other measures. In addition, QALY is in the developmental stage and is not accepted by a good portion of economists, medical professionals, and the public health community. Assuming that QALY is a true preference, I am concerned that it is not mentioned in the guidelines, and that this preference is for a cost-effectiveness measure that is controversial and under development.

2. Discount Rates:

Section IV C., What Discount Rate to Use, recommends using a base discount rate of 7 percent to approximate the opportunity cost of capital and the effect of a regulation on the private sector. Discount rates are powerful and commonly used in discounting to determine the economic impact of a regulation. However, specifying a particular discount rate is very controversial. The 7 percent recommended base rate tends to trivialize those items with long-term risks to health and safety, such as global warming and nuclear waste. Moreover, while discounting makes sense in comparing alternative financial investments, it cannot reasonably be used to compare alternative life saving investments. Human health and lives cannot be discounted in the same way as dollars.

3. Distribution Effects:

Section III A., Benefit-Cost Analysis, recommends using benefit-cost analysis, or BCA, because both benefits and costs are expressed in monetary units which allows evaluation of different regulatory options with a variety of attributes using a common measure. However, BCA does not address distribution effects. While the guidelines recommend that agencies illustrate distribution effects, the guidance is brief and ambiguous. This is one area where the previous administration's guidelines are considerably more explicit and detailed than the proposed guidelines.

I am concerned that in your interest in standardization and performance-based measures, OMB will not give distributional effects and other non-quantifiable concerns adequate consideration. The guidelines suggest that agencies consider such effects, but caution that such non-quantifiables are not to be used as "trump cards" to decide for one rule over another. Members of Congress are very interested in how proposed rules disproportionately affect different regions, children, the elderly, and other vulnerable groups.

4. Data-Quality Guidelines:

The data-quality guidelines issued by OMB last fall apply to all agency-released data or data used in rulemaking, including scientific, economic, and statistical data. Will the detailed cost benefit assessment required by OMB meet these recently released data-quality guidelines? Can agencies realistically meet both regulatory analysis guidelines and data-quality guidelines? Is it OMB's intention to use two sets of guidelines in concert to reject rules by citing data-quality requirements that are almost impossible to attain in cost-benefit analysis.

Honorable John D. Graham
April 3, 2003
Page Three

5. Agency ability to perform regulatory analysis:

I am concerned that agencies will not have the resources or time necessary to complete the detailed regulatory analysis required in the guidelines. The guidelines may make agencies reluctant to begin the rule making process due to time and money constraints. This delay would put at risk the American people and their environment. In addition, the cost and time necessary to perform extensive analysis of regulatory alternatives may undermine the value of the proposed regulation.

6. Transparency of rule-making:

I commend your work to make the regulatory oversight process transparent and public. However, while transparency has increased once rules get to the Office of Information and Regulatory Affairs (OIRA), I am concerned that OMB could exert undue pressure on agencies in the early stages of rule formulation. How many rules never get to the public notice stage because of the overwhelming amount of analysis required or a belief that a rule is doomed because of preliminary discussions with OIRA?

The proposed guidelines state that "a good analysis is transparent. It should be possible for anyone reading the report to see clearly how you arrived at your estimate and conclusions." I believe that OMB's guidelines and its actions in these early stages, which are not always documented, may cut off options before rulemaking even begins. I do not believe that OMB's actions in these early stages are transparent.

7. Trade-offs between regulations:

I am concerned that OIRA is operating under the false assumption that there is a clear trade-off between different regulations. For example, even though seat belt laws may have a greater cost-benefit effect in the short term compared to environmental regulations, this does not mean that money saved today by not implementing environmental rules will be used for broader seat belt use. However, in your comments to *Resources for the Future*, you state, "the administration is moving with determination toward performance-based budgeting, and a greater focus on cost-effectiveness and net benefits should be helpful in budgeting." Will OIRA recommend against environmental protection regulations, which have more non-quantifiable benefits and often apply to future lives saved and quality of life issues, and instead recommend safety regulations which are easier to quantify and affect lives saved today? This implies a trade-off between agencies and rules that should not exist.

Honorable John D. Graham
April 3, 2003
Page Four

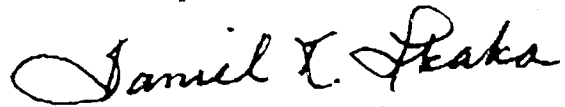
8. Homeland Security:

Finally, I would like to address your specific request for public comment on improving analysis of regulations relating to homeland security. I agree that calculating the costs and benefits of homeland security rules and activities presents challenges because of the rarity of terrorist events. I am curious as to how OIRA will categorize homeland security activities and regulations as compared to those from all hazard emergency preparedness. Natural and man-made disaster mitigation efforts share many of the same characteristics as homeland security preparedness. Both have direct and indirect costs in time, convenience, and economic productivity. Both also have hard-to-quantify and long-term benefits from outreach and public-private partnerships, such as community cohesion and overall improvements to safety and security.

In addition, the draft report asked for public comment on homeland security regulations that may erode privacy rights. Any regulations issued should follow the spirit of the U.S. Constitution and applicable laws to adhere to fundamental civil rights and liberties. It is difficult to put a price on such rights, and any administrative deviation from these well-established rights will dismantle the very foundation this country was built upon.

Thank you for this opportunity to discuss OMB's Draft Report to Congress on the Costs and Benefits of Federal Regulation.

Aloha pumehana,



DANIEL K. AKAKA
Ranking Member, Subcommittee on
Financial Management, the Budget, and
International Security