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June 9, 2005

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BY FACSIMILE & FEDERAL EXPRESS

John D. Graham, Ph.D.
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Eisenhower Executive Office Building
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Re: Peer Review Comments on the Draft 2005 Report to Congress on the
Costs and Benefits of Federal Regulations

Dear Dr. Graham:

I appreciate the opportunity to offer peer review comments on the Draft 2005 Report to Congress on the Costs and Benefits of Federal Regulations (Report). While I offer a few thoughts about the discussion of regulatory matters in the early parts of the Report, most of my comments consider the sections addressing the Information Quality Act (IQA).

As an overall matter, the report does a good job presenting the available data and noting the areas where there is uncertainty and a need for further refinement. I offer my comments, then, as suggestions to enhance what is an excellent contribution to public understanding about the status of federal regulatory and information policy.

1. P. 6

The Report indicates that the costs and benefits of "major rules" capture the primary impacts of all rules subject to OMB review. In support of this conclusion, the Report cites an analysis OMB conducted for the 2004 Report to Congress, which looked at significant, non-major rules in three agencies. OMB also noted that the task of examining the impact of all rules in all agencies is beyond the scope of what can reasonably be accomplished for an annual report of this nature.

It is not clear that a look at the handful of rules that qualify as "major rules" can fully characterize the state of regulatory activity at the federal level. Recognizing that an annual assessment of all rules is probably impractical, OMB could nonetheless improve its annual report

on this topic by spotlighting an individual agency each year for more in-depth analysis. Such an analysis could look at the impacts of non-major rules and perhaps examine the impact of orders issued in non-enforcement adjudicatory actions (e.g., product approvals and denials, facility licenses.) The latter category of agency actions, which can have profound impacts on the private sector, should be given greater visibility as a key component of the overall regulatory impact of federal agencies.

2. P. 29

Citing the work of Ehrenberg and Smith, the Report indicates that the cost of compliance with health standards will fall on employees. At the same time, that discussion also indicates that the cost of compliance with health standards may be absorbed by reductions in profits or increases in prices. It is not clear in this discussion whether OMB views possible changes in profits and prices at a *firm level* to also constitute the imposition of costs on "employees" at a *societal level*. The point can probably be argued from several different perspectives. It would be helpful for OMB to provide a more robust explanation of its views on this issue.

3. P. 30-34

This section of the Report is a discussion of the relationship between regulation and economic growth. Presumably OMB has prepared this portion of the Report to be responsive to Section 624 of the Regulatory Right-to-Know Act, which calls for an analysis of the impact of Federal regulation on, among other topics, "economic growth." This is an inherently difficult topic to analyze, and it may be an unreasonable to try to address this topic on an annual basis.

The analysis provided by OMB in this section provides a summary of research that has taken place over several years on the relationship between regulatory conditions in various countries, mostly economic rather than social regulation, on productivity, economic freedom and per capita GDP. The research presented is certainly interesting. It reinforces the common sense notion that economic progress can be harmed by regulatory systems that intrude into the marketplace in burdensome, inefficient ways.

At the same time, the analysis provided in this section is not grounded in the other aspects of the Report. This section does not consider whether there is a direct correspondence between the U.S. regulatory activity discussed elsewhere in the Report and economic growth. The readers is not clear whether OMB believes that the impact of the regulatory activity described in this Report is acceptable or unacceptable. If OMB has an opinion on that question, or has concluded that the impacts cannot really be analyzed at this time, that perspective should be clarified in this section.

4. P. 48

The flow charts presented in Figure 3-1 and 3-2 provide a useful framework for understanding the status of agency activity on IQA correction requests. It would be more useful, however, to provide that information for all of the correction requests that have been filed. If OMB leaves out the FEMA flood insurance rate map requests and the FMCSA report, the universe of correction requests to be considered for this chart would be quite reasonable.

A characterization of this larger universe of correction requests would be more helpful than a separate consideration of the "influential" requests or the undetermined correction requests. During the development of the IQA Guidelines, there was substantial public debate about the definition of "influential" information. As indicated in the Report, however, the distinction between influential and non-influential data has not appeared to make a large difference in how agencies have addressed correction requests in practice. The "undetermined" category also does not seem to be related to particular policy or procedural issues that warrant special consideration in this description of the experience with correction requests.

5. P. 52

The Report challenges the notion that the IQA has slowed the regulatory process and has created a chilling effect on agency disseminations. The Report's general conclusion in this regard seems sound. In presenting evidence in support of the conclusion, OMB states that only 5 correction requests "were directly related to rulemaking." Some may argue that OMB is defining a class of information related to the regulatory process that is too narrow. For example, a determination concerning the habitat for an endangered species or a record of decision related to a site cleanup could reasonably be seen as related to regulatory action.

OMB may want to present data on the number of correction requests that are linked to a more expansive definition of regulatory actions. It is likely that such an analysis will show that, even under a broad definition of regulatory action, a significant number of correction requests concern matters unrelated to regulations. Presenting such information would help reinforce OMB's more general point.

In addition, it is worth noting in this discussion that the universe of correction requests filed thus far is quite small when considered in the context of the number of other information-related actions (e.g., FOIA requests) or regulatory actions (as documented in the Regulatory Agenda) that the federal government undertakes in any given year. Thus, while an IQA challenge might slow a particular project to some extent, the aggregate impact of the statute on the overall level of regulatory action and information dissemination by the federal government is likely to be minor.

6. P. 53

The Report properly notes that the appeals process has fostered important corrections. In addition to the example cited, the Report might note the Department of Interior's decision to grant the correction request filed by Public Employees for Environmental Responsibility (PEER) concerning models used to predict the habitat of the Florida panther. The decision on this petition is an important development because it is a leading example where a public interest group has used the IQA effectively. It is also significant for this purpose because the granting of the correction request came on Request for Reconsideration (i.e., an appeal) filed with the Director of the Fish and Wildlife Service. Since OMB is making a qualitative point in this section of the Report, it would not seem problematic that the PEER decision was rendered in the current fiscal year.

7. P. 56

The Report recommends that parties interested in information that is currently under public review use traditional modes of public participation (e.g., comment period on a proposed rule), rather than the IQA correction process, to file IQA correction requests on such data. The apparent expectation of the Report is that an agency would then address that request in the course of the other proceeding. If the agency did not meet that obligation, the petitioner could then file an appeal of its correction request, under IQA guidelines.

While this blending of the IQA procedures with other agency procedures may work well in some circumstances, OMB should note that there will be situations where it does not. In the example of a rulemaking, a party may have concerns both about the information in a study and the substantive rule itself. Under many statutes, it is necessary to file any legal challenge to an agency rule within a fixed period of time after the rule's promulgation. Assuming that the information and the rule are disseminated at the same time (i.e., when the rule is promulgated), it may not be practical to await the outcome of an administrative appeal in the IQA context concerning the *information*, which OMB has noted is taking substantial time in some agencies, before pursuing a legal challenge to the *rule*. In a legal challenge on the rule, the parties and the court may well need to consider the consistency of the study with the IQA standards without the benefit of an agency decision on an appeal.

In other contexts, rulemakings can remain in preliminary stages for many years. At the same time, some of the agency analyses disseminated at the proposed rule stage of a rulemaking may have marketplace impacts that begin to occur shortly after the information is disseminated. In those circumstances, the rulemaking process may not be timely enough to serve the purposes and intent of the IQA.

ROPES & GRAY LLP

John D. Graham, Ph.D.

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June 9, 2005

Thank you for the opportunity to offer these comments on the Report.

Sincerely,

A handwritten signature in black ink that reads "Mark A. Greenwood". The signature is written in a cursive style with a large, stylized initial "M".

Mark A. Greenwood

MAG:chh