

Guest Perspectives

Charting a New Course in Federal Regulation: John Graham's First Year as OIRA Administrator

By Jim J. Tozzi

As the federal regulatory regime has grown over the past several decades, the Office of Management and Budget (OMB) — and in particular OMB's Office of Information and Regulatory Affairs (OIRA) — has taken on an increasingly important role in reviewing regulations to ensure that they are based upon sound science and rational policy. With a relatively small staff, OIRA has performed its regulatory duties remarkably well. However, strong leadership on the part of the OIRA Administrator is essential to achieving the office's intended oversight role.

Dr. John Graham was confirmed as OIRA Administrator by the Senate on July 19, 2001, to oversee the nation's extensive regulatory regime, and whether or not you agree with his every decision, few would disagree that Dr. Graham has brought that type of strong leadership during his first year in office. In addition, Dr.

Graham has had a distinguished academic career, so he brings with him to OIRA significant expertise in risk analysis, a subject at the heart of many federal regulatory matters. Prior to joining OMB, Dr. Graham was a tenured professor of policy and decision sciences at the Harvard School of Public Health, and he also founded

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the Harvard Center for Risk Analysis, which he led for over ten years.

With Dr. Graham's first year as Administrator nearly complete, now seems to be an appropriate time to reflect on his accomplishments to date and his impact on OIRA operations. On balance, Dr. Graham's performance has been quite positive, as demonstrated by a number of achievements, including:

(1) OMB Promulgation of Government-wide Guidelines Under the Data Quality Act

As required by the Data Quality Act (Pub. L. No. 106-554, § 515, codified at 44 U.S.C. § 3516 note), Dr. Graham led OMB's efforts to develop government-wide standards for the quality of information that federal agencies disseminate to the public. OMB issued final Data Quality guidelines with broad input from the agencies, interested stakeholders, and the public (See 67 FR 8452, Feb. 22, 2002). Overall, OMB's guidelines are strong, well reasoned, and flexible enough to apply to all federal agencies and a wide variety of government information products. OMB's guidelines lay a strong foundation for higher and more consistent levels of information quality across federal agencies.

In addition, under Dr. Graham's leadership, OIRA is also working closely with federal agencies as they draft their own conforming Data Quality guidelines, which, as required by statute, must include an administrative mechanism through which the interested public may petition agencies for correction of information which does not meet the standards set forth in the Data Quality guidelines.

(2) Applicability of Data Quality Guidelines to Third-Party Submissions to Agencies

Dr. Graham also made another significant contribution to improving government information quality by stating that the Data Quality Act guidelines would apply to third party submissions of data to agencies, to the extent that agencies rely on, use, or endorse that information. Applicability of the Data Quality guidelines to outside information is extremely important for those decisions which receive, or may be perceived to receive, the government's imprimatur. Otherwise, such third-party data could become the weak link in the Data Quality Act's overall efforts to improve the federal government's information quality.

(3) Increase in Prompt Letters and Return Letters

OMB has a number of useful tools at its disposal to assist agencies in developing better and more effective regulations. Among these are so-called prompt letters and return letters. In prompt letters, OMB takes the initiative to suggest to an agency an area for potential regulatory priority. OMB issues return letters in cases where the quality of the agency's analyses are inadequate; the regulatory standards adopted are not justified by the analyses; the rule is not consistent with the regulatory principles stated in Executive Order 12866 or with the President's policies and priorities; or if the rule is not compatible with other Executive Orders or statutes. Return letters do not necessarily imply that OMB is opposed to the draft rule, but they explain why OIRA believes that the rulemaking would benefit from further consideration by the agency.

However, these tools had fallen into disuse in recent years. For example, OIRA issued no return letters to agencies during the final three years of the Clinton Administration. However, under

John Graham's tenure, return letters, prompt letters, and other mechanisms were revived and have come to play an important role in helping agencies improve their regulatory processes.

(4) Revitalization of OIRA

OIRA operates best when it works as an independent and objective partner with agency officials to develop strong, rational, and effective regulations and policy. Trouble may arise when OIRA's relationship with agencies is perceived to be either too confrontational or too accommodating. Many observers felt that under the Clinton Administration, the pendulum had swung too far in favor of agency deference.

However, Dr. Graham appears to have revitalized the Office of Information and Regulatory Affairs, both in terms of staff morale, expertise, and willingness to engage agency officials in important policy debates. Major initiatives such as the Data Quality Act guidelines no doubt contributed to OIRA's renewed sense of mission.

Obviously Dr. Graham has a lot of work on his plate; however, there are two areas which warrant priority consideration by OMB. The first is ongoing OMB oversight to ensure that federal agencies comply with OMB's government-wide Data Quality Act guidelines and that agencies do

not improperly exempt categories of information from the guidelines' coverage. A review of agencies' proposed Data Quality guidelines reveals a number of exemptions concerning the types of information to which the OMB and agency guidelines apply, or the circumstances under which persons may utilize the correction mechanism.

Examples of such exemptions include: (1) Retroactivity Exemptions (indicating that agency guidelines and the OMB guidelines will apply only to information that is disseminated after October 1, 2002); (2) Case-By-Case Exemptions (suggesting that the guidelines are not binding); (3) Rulemaking Exemptions (stating that the guidelines' error correction process will not apply to information in proposed rulemakings, and that any alleged errors will be addressed only through the notice and comment process); (4) Adjudicative Process Exemptions (significantly broadening the exemption contained in OMB's interagency Data Quality guidelines); and (5) Definition of "Affected Person" (defining the term too narrowly, in violation of the Data Quality Act's intent to allow users of government to petition for correction of information which does not meet Data Quality standards).

OMB must remain vigilant in working with the agencies on their Data Quality guidelines and must ensure agency compliance with both the Data Quality Act and OMB's interagency guidelines prior to approving the agencies' guidelines for final promulgation. Only in this way can the goals of the Data Quality Act be realized. Consequently, exemptions such as those outlined above should be removed prior to agencies' issuance of final Data Quality guidelines.

However, OMB's oversight efforts must go beyond ensuring that agencies promulgate final Data Quality guidelines, and ongoing efforts will be needed. OMB itself has stated that implementation of the Data Quality Act will be an iterative process, and that revisions will be required to both OMB's interagency guidelines, as well as individual agency guidelines. Such changes will be required as the agencies gain experience with processes and petitions under the Data Quality Act, as well as due to changing subjects and circumstances of government information dissemination.

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In this regard, OMB should monitor agency performance in terms of its Data Quality Act complaint process and how specific issues are handled thereunder. Independent agencies should be included in this oversight process by OMB, with the Federal Energy Regulatory Commission (FERC) and the Federal Trade Commission (FTC) being excellent candidates for early review.

Second, OMB's Office of Information and Regulatory Affairs should consider bringing independent agency rules within the scope of OMB's regulatory review. In sensitivity to concerns for agency independence, such review can be accomplished without need for any new legislation or Executive Orders. As detailed in a White Paper by the Center for Regulatory Effectiveness (*see* http://www.thecre.com/ombpapers/20020225_cre-blueprint.html), OMB's review could be accomplished using OIRA's existing ana-

lytical structure for Paperwork Reduction Act and Executive Order 12866 review, and OMB could then provide written comments to the agency like any other interested member of the public. In light of the significant role played by independent agencies in both economic and social regulation, additional reasoned input by OMB should be welcomed by the agencies.

In sum, Dr. Graham has demonstrated capable leadership during his first year as head of OMB's Office of Information and Regulatory Affairs. He has re-energized and enlarged OIRA's staff, actively engaged agencies on a variety of rulemaking topics, and coordinated implementation of a new landmark "Good Government" statute – the Data Quality Act. It can only be hoped that OIRA will be able to sustain its present level of energy and achievement for the remainder of Dr. Graham's term and beyond.