



Testimony

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REGULATORY REFORM

Comments on S. 746--  
The Regulatory  
Improvement Act of 1999

Statement for the Record of L. Nye Stevens  
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General Government Division



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# Regulatory Reform: Comments on S. 746— The Regulatory Improvement Act of 1999

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Mr. Chairman and Members of the Committee:

I am pleased to assist in your consideration of S. 746, the “Regulatory Improvement Act of 1999.” As I said in my testimony on its predecessor, S. 981, we believe that the bill thoughtfully addresses many issues in regulatory management that have long been the subject of controversy.<sup>1</sup> We have issued reports on a number of those issues.

My statement today focuses on our past work in four areas of relevance to the bill: (1) the effectiveness of previous regulatory reform initiatives, (2) agencies’ cost-benefit analysis practices and the trigger for the analytical requirements, (3) peer review of agencies’ regulatory analyses, and (4) the transparency of the regulatory development and review process.

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## Unfunded Mandates Reform Act Had Little Effect on Agencies’ Rulemaking Actions

During this Committee’s hearings on S. 981, one of the witnesses indicated that Congress should determine the effectiveness of previously enacted regulatory reforms before enacting additional reforms. Perhaps the most directly relevant of those reforms to S. 746 is title II of the Unfunded Mandates Reform Act of 1995 (UMRA), which requires that agencies take a number of analytical and procedural steps during the rulemaking process.

We examined the implementation of UMRA during its first 2 years of operation and, for several reasons, concluded that it had little effect on agencies’ rulemaking actions.<sup>2</sup> First, the act’s cost-benefit requirement did not apply to many of the rulemaking actions that were considered “economically significant” actions under Executive Order 12866 (78 out of 110 issued in the 2-year period). Second, UMRA gave agencies discretion not to take certain actions if they determined that those actions were duplicative or unfeasible. For example, subsection 202(a)(3) of the act requires agencies to estimate future compliance costs and any disproportionate budgetary effects of the actions “if and to the extent that the agency determines that accurate estimates are reasonably feasible.” Third, UMRA requires agencies to take actions that they were already required to take. For example, the act required agencies to conduct cost-benefit analyses for all covered rules, but Executive Order 12866 required such analyses for more than a year before UMRA was enacted and for a broader set of rules than UMRA covered.

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<sup>1</sup>Regulatory Reform: Comments on S. 981—The Regulatory Improvement Act of 1997 (GAO/T-GGD/RCED-97-250, Sept. 12, 1997); and Regulatory Reform: Comments on S. 981—The Regulatory Improvement Act of 1998 (GAO/T-GGD/RCED-98-95, Feb. 24, 1998).

<sup>2</sup>Unfunded Mandates: Reform Act Has Had Little Effect on Agencies’ Rulemaking Actions (GAO/GGD-98-30, Feb. 4, 1998).

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Like UMRA, S. 746 contains some of the same requirements contained in Executive Order 12866 and in previous legislation. However, the requirements in the bill are also different from existing requirements in many respects. For example, S. 746 would address a number of topics that are not addressed by either UMRA or the executive order, including risk assessments and peer review. These requirements could have the effect of improving the quality of the cost-benefit analyses that agencies are currently required to perform. Also, S. 746 applies to rules issued by independent regulatory agencies that are not covered by Executive Order 12866.

However, as currently written, S. 746's analytical requirements do not appear to apply to some rules that are covered by Executive Order 12866. The executive order's cost-benefit analysis requirements apply to "economically significant" rules issued by the covered agencies, and the order defines economically significant rules as ones that are likely to have

"an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities."

Under the executive order, a rule can have a \$100 million effect on the economy by imposing \$100 million in costs or by providing \$100 million in benefits. S. 746's cost-benefit analysis requirements apply to "major" rules, and the bill defines a major rule in subsection 621(7) as one that

"(A) the agency proposing the rule or the Director (of the Office of Management and Budget) reasonably determines is likely to have an annual effect on the economy of \$100,000,000 or more in reasonably quantifiable costs; or (B) is otherwise designated a major rule by the Director on the ground that the rule is likely to adversely affect, in a material way, the economy, a sector of the economy, including small business, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments, or communities."

Therefore, a rule that is economically significant under Executive Order 12866 because it is likely to have more than \$100 million in benefits (but perhaps only \$90 million in costs) would not be covered by the analytical requirements in S. 746 (unless designated by the Director). Also, the bill does not cover a rule if the agency determines that it imposes \$90 million in costs plus other costs that are not "reasonably quantifiable." If the intent of the bill is not to exclude these kinds of rules covered by the executive order, the definition of a major rule in subsection 621(7)(A) could be amended to eliminate the words "in reasonably quantifiable costs."

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## Agencies Could Improve Cost-Benefit Analyses

The centerpiece of S. 746 is its emphasis on cost-benefit analysis for major rules. The bill establishes detailed procedures for preparing those analyses and using them in the rulemaking process. Therefore, it is important to understand how agencies are currently preparing cost-benefit analyses.

Mr. Chairman, in a 1998 report prepared at your and Senator Glenn's request, we examined 20 cost-benefit analyses at 5 agencies to determine the extent to which those analyses contain the "best practices" elements recommended in the Office of Management and Budget's (OMB) January 1996 guidance for conducting cost-benefit analyses.<sup>3</sup> We concluded that some of these 20 analyses did not incorporate OMB's best practices. For example, the guidance states that the cost-benefit analysis should show that the agency has considered the most important alternative approaches to the problem addressed by the proposed regulatory action. However, 5 of the 20 analyses that we examined did not discuss any alternatives to the proposed action, and some of the studies that discussed alternatives did so in a limited fashion. For example, the Food and Drug Administration's (FDA) regulation on adolescents' use of tobacco examined six regulatory alternatives but contained only a few paragraphs on the five that were ultimately rejected. A more thorough discussion of the alternatives that FDA considered would have better enabled the public to understand why the agency chose the proposed action.

Six of the cost-benefit studies did not assign dollar values to benefits, and only six analyses specifically identified net benefits (benefits remaining after costs have been accounted for)—a key element in OMB's guidance. Executive Order 12866, on which OMB's guidance is based, emphasizes that agencies should select approaches that maximize net benefits unless a statute requires another regulatory approach.

The OMB guidance stresses the importance of explicitly presenting the assumptions, limitations, and uncertainties in cost-benefit analyses. However, the analyses that we examined often were not explicit or "transparent" on these matters. For example, five of the analyses did not explain why the agencies did not use a discount rate to determine the present value of future benefits and costs. Also, five of the analyses did not explain why they did not discuss the uncertainty associated with the estimated benefits and costs. Similarly, in a 1997 report examining 23 cost-benefit analyses supporting the Environmental Protection Agency's (EPA) air quality regulations, we concluded that certain key economic

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<sup>3</sup>Regulatory Reform: Agencies Could Improve Development, Documentation, and Clarity of Regulatory Economic Analyses (GAO/RCED-98-142, May 26, 1998).

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assumptions were not identified or were not explained in 8 of the analyses.<sup>4</sup> For example, one analysis assumed a value of life that ranged from \$1.6 million to \$8.5 million while another analysis that was prepared in the same year assumed a value of life that ranged from \$3 million to \$12 million. In neither case did the analysis clearly explain why the values were chosen.

Eight of the 20 cost-benefit analyses that we examined in our 1998 report did not include an executive summary that could help Congress, decisionmakers, the public, and other users quickly identify key information addressed in the analyses. In our 1997 report, 10 of the 23 analyses supporting air quality regulations did not have executive summaries. We have previously recommended that agencies' cost-benefit analyses contain such summaries whenever possible, identifying (1) all benefits and costs, (2) the range of uncertainties associated with the benefits and costs, and (3) a comparison of all feasible alternatives.<sup>5</sup>

S. 746 addresses many of these areas of concern. For example, when an agency publishes a notice of proposed rulemaking (NPRM) for a major rule, section 623 of the bill would require agencies to prepare and place in the rulemaking file an initial regulatory analysis containing an analysis of the benefits and costs of the proposed rule and an evaluation of the benefits and costs of a reasonable number of alternatives. Section 623 also requires an evaluation of the relationship of the benefits of the proposed rule to its costs, including whether the rule is likely to substantially achieve the rulemaking objective in a more cost-effective manner or with greater net benefits than other reasonable alternatives. Finally, it requires agencies to include an executive summary in the regulatory analysis that describes, among other things, the key assumptions and scientific or economic information upon which the agency relied.

Enactment of the analytical, transparency, and executive summary requirements in S. 746 would extend and underscore Congress' previous statutory requirements that agencies identify how regulatory decisions are made. We believe that Congress and the public have a right to know what alternatives the agencies considered and what assumptions they made in deciding how to regulate. Although those assumptions may legitimately

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<sup>4</sup>Air Pollution: Information Contained in EPA's Regulatory Impact Analyses Can Be Made Clearer (GAO/RCED-97-38, Apr. 14, 1997).

<sup>5</sup>Cost-Benefit Analysis Can Be Useful in Assessing Environmental Regulations, Despite Limitations (GAO/RCED-84-62, Apr. 6, 1984).

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vary from one analysis to another, the agencies should explain those variations.

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## All Major Rules Do Not Have NPRMs

If enacted, Congress may want to review the implementation of this part of S. 746 to ensure that the initial regulatory analysis requirements apply to all of the rules that it anticipated. As I previously noted, the bill's analytical requirements apply to all major rules at the time they are published as an NPRM. The Administrative Procedure Act of 1946 (APA) permits agencies to issue final rules without NPRMs when they find, for "good cause," that the procedures are impracticable, unnecessary, or contrary to the public interest.<sup>6</sup> When agencies use this exception, the APA requires the agencies to explicitly say so and provide an explanation for the exception's use when the rule is published in the Federal Register.

In a report we issued last April, we pointed out that 23 of the 122 final rules that were considered "major" under the Small Business Regulatory Enforcement Fairness Act and published between March 29, 1996, and March 29, 1998, were issued without a previous NPRM.<sup>7</sup> If the same proportion holds true for the major rules covered by S. 746, the initial analytical requirements in the bill would not apply to nearly one-fifth of all final major rules.

We also examined the issuance of final rules without NPRMs in another report that we issued last year.<sup>8</sup> In some of the actions that we reviewed, agencies' stated rationales for using the good cause exception were not clear or understandable. For example, in one such action, the agencies said in the preamble to the final rule that a 1993 executive order that imposed a 1994 deadline for implementation and incorporation of its policies into regulations prevented the agencies from obtaining public comments before issuing a final rule in 1995. In other actions, the agencies made only broad assertions in the preambles to the rules that an NPRM would delay the issuance of rules that were, in some general sense, in the public interest.

We believe that agencies need the flexibility to publish final rules without NPRMs in order to respond quickly to emergencies and in other

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<sup>6</sup>An NPRM is also not required for interpretative rules; general statements of policy; or rules of agency organization, procedures, or practice.

<sup>7</sup>Regulatory Reform: Major Rules Submitted for Congressional Review During the First 2 Years (GAO/GGD-98-102R, Apr. 24, 1998).

<sup>8</sup>Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules (GAO/GGD-98-126, Aug. 31, 1998).

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appropriate situations. Similarly, we believe that using the issuance of NPRMs as the trigger for analytical requirements may be entirely appropriate. However, as a result, some major rules will probably not be subject to these requirements.

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## Peer Review Can Improve Regulatory Decisionmaking

S. 746 also requires agencies to provide for an independent peer review of any required risk assessments and cost-benefit analyses of major rules that the agencies or the OMB Director reasonably anticipate are likely to have a \$500 million effect on the economy. Peer review is the critical evaluation of scientific and technical work products by independent experts. The bill states that the peer reviews should be conducted through panels that are “broadly representative” and involve participants with relevant expertise who are “independent of the agency.”

We believe that important economic analyses should be peer reviewed. Given the uncertainties associated with predicting the future economic impacts of various regulatory alternatives, the rigorous, independent review of economic analyses should help enhance the quality, credibility, and acceptability of agencies’ decisionmaking.

In our 1998 study of agencies’ cost-benefit analysis methods that I mentioned previously, only 1 of the 20 analyses that we examined received an independent peer review.<sup>9</sup> Of the five agencies whose analyses we examined, only EPA had a formal peer review policy in place. Although OMB does not require peer reviews, the Administrator of OMB’s Office of Information and Regulatory Affairs (OIRA) testified in September 1997 that the administration supports peer review. However, she also said that the administration realizes that peer review is not cost-free in terms of agencies’ resources or time.

The peer review requirements in S. 746 provide agencies with substantial flexibility. If an agency head certifies that adequate peer review has already been conducted, and the OMB Director concurs, the bill requires no further peer review. However, agencies will need to carefully plan for such reviews given the bill’s requirement that they be done for all risk assessments and each cost-benefit analysis for which the associated rule is expected to have a \$500 million effect on the economy. Agencies will also need to ensure that a broad range of affected parties are represented on the panels and (as S. 746 requires) that panel reports reflect the diversity of opinions that exist.

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<sup>9</sup> GAO/RCED-98-142.



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## Transparency of Regulatory Actions Can Be Improved

Mr. Chairman, last year we issued a report which you and Senator Glenn requested, assessing the implementation of the regulatory review transparency requirements in Executive Order 12866.<sup>10</sup> Those requirements are similar to the public disclosure requirements in S. 746 in that they require agencies to identify for the public the substantive changes made during the period that the rules are being reviewed by OIRA, as well as changes made at the suggestion or recommendation of OIRA. We reviewed four major rulemaking agencies' public dockets and concluded that it was usually very difficult to locate the documentation that the executive order required. In many cases, the dockets contained some evidence of changes made during or because of OIRA's review, but we could not be sure that all such changes had been documented. In other cases, the files contained no evidence of OIRA changes, and we could not tell if that meant that there had been no such changes to the rules or whether the changes were just not documented. Also, the information in the dockets for some of the rules was quite voluminous, and many did not have indexes to help the public find the required documents. Therefore, we recommended that the OIRA Administrator issue guidance on how to implement the executive order's transparency requirements.

The OIRA Administrator's comments in reaction to our recommendation appeared at odds with the requirements and intent of the executive order. Her comments may also signal a need for ongoing congressional oversight and, in some cases, greater specificity as Congress codifies agencies' public disclosure responsibilities and OIRA's role in the regulatory review process. For example, in response to our recommendation that OIRA issue guidance to agencies on how to improve the accessibility of rulemaking dockets, the Administrator said "it is not the role of OMB to advise other agencies on general matters of administrative practice." The OIRA Administrator also indicated that she believed the executive order did not require agencies to document changes made at OIRA's suggestion before a rule is formally submitted to OIRA for formal review. However, the Administrator also said that OIRA can become deeply involved in important agency rules well before they are submitted to OIRA. Therefore, adherence to her interpretation of the order would result in agencies' failing to document OIRA's early role in the rulemaking process. Those transparency requirements were put in place because of earlier congressional concerns regarding how rules were changed during the regulatory review process.

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<sup>10</sup>Regulatory Reform: Changes Made to Agencies' Rules Are Not Always Clearly Documented (GAO/GGD-98-31, Jan. 8, 1998).

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Finally, the OIRA Administrator said that an “interested individual” could identify changes made to a draft rule by comparing drafts of the rule. This position seems to change the focus of responsibility in Executive Order 12866. The order requires agencies to identify for the public changes made to draft rules. It does not place the responsibility on the public to identify changes made to agency rules. Also, comparison of a draft rule submitted for review with the draft on which OIRA concluded review would not indicate which of the changes were made at OIRA’s suggestion—a specific requirement of the order.

We believe that enactment of the public disclosure requirements in S. 746 would provide a statutory foundation to help ensure the public’s access to regulatory review information. In particular, the bill’s requirement that these rule changes be described in a single document would make it easier for the public to understand how rules change during the review process. We are also pleased to see that S. 746 requires agencies to document when no changes were made to the rules.

Additional refinements to the bill may help clarify agencies’ responsibilities in light of the OIRA Administrator’s comments responding to our report. For example, S. 746 could state more specifically that agencies must document the changes made to rules at the suggestion or recommendation of OIRA whenever they occur, not just the changes made during the period of OIRA’s formal review. Similarly, if Congress wants OIRA to issue guidance on how agencies can structure rulemaking dockets to facilitate public access, S. 746 may need to specifically instruct the agencies to do so.

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## Conclusions

S. 746 contains a number of provisions designed to improve regulatory management. These provisions strive to make the regulatory process more intelligible and accessible to the public, more effective, and better managed. Passage of S. 746 would provide a statutory foundation for such principles as openness, accountability, and sound science in rulemaking.

This Committee has been diligent in its oversight of the federal regulatory process. However, our reviews of current regulatory requirements suggest that, even if S. 746 is enacted into law, congressional oversight will continue to be important to ensure that the principles embodied in the bill are faithfully implemented.

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