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To: Mabel E. Echols OMB_Peer_Review/OMB/EOP@EOP
cc:
Subject: Comments on Draft Peer Review Bulletin

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Re: Comments on OMB Peer Review Bulletin

Dear Dr. Schwab:

Please find attached our comments on OMB's draft bulletin on peer review published in the September 15, 2003 Federal Register.

Regards,

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(See attached file: GAMA Comments on OMB Peer Review.pdf)

- GAMA Comments on OMB Peer Review.pdf



GAMA-An Association of Appliance & Equipment Manufacturers

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Product Divisions and Groups

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Heater
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Food Service
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Fuel Cell
Furnace
Gas Air
Conditioning
Gas Appliance
Connector
Gas Detector
Gas Equipment
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December 11, 2003

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Re: Comments on OMB Peer Review Bulletin

Dear Dr. Schwab:

The Gas Appliance Manufacturers Association (GAMA) is pleased to comment on OMB's draft bulletin on peer review published in the September 15, 2003 *Federal Register*.

Founded in 1935, GAMA's members manufacture more than 90 percent of all space heating and service water heating equipment sold in the United States. GAMA staff participates vigorously in regulatory proceedings affecting our members and their products. In recent years, the Department of Energy (DOE) has been the most active agency in this area, issuing a "major" rule regulating the energy efficiency of residential water heaters. DOE is currently in the analysis phase of another major rulemaking that addresses the energy efficiency of residential warm air furnaces and boilers. Over 13 million residential water heaters, furnaces, and boilers are sold in the United States each year, and the DOE regulations have a major economic effect on both the manufacturers of those products and the consumers who purchase them.

It is from this perspective that we strongly support OMB's proposal to require that agencies subject their studies to peer review prior to promulgating a major rule. Although there is no shortage of analysis in any DOE rulemaking, we have been critical of the quality of the analytical approaches and basic assumptions that DOE and its Laboratories have depended upon.

As a proxy for peer review, DOE relies on public comment to evaluate the quality of its technical analysis. This is not an ideal approach for several reasons:

- Few members of the public have the expertise to penetrate DOE's complex and often esoteric analysis.
- At the stage when DOE publishes the analysis for public comment, DOE's path has already been largely determined, and it is very difficult to convince DOE to

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adopt a change in its analysis if that change will upset the study's conclusions.

- Public commenters are typically stakeholders in the rulemaking, and DOE places limited weight on stakeholder comments, regardless of their technical merit.

These concerns echo those expressed by OMB in the preface to the draft Bulletin.

To address these problems we have already urged the DOE to 1) seek peer review prior to issuance of the analysis for public comment, and 2) open analytical support contracts to competitive bidding. We welcome OMB support for the first of those two essential elements.

OMB has proposed appropriate waiver allowances to protect national and societal interests in the rare cases where the Agency judges that peer review would do more harm than good. Still, critics will charge that peer review will serve only to further slow or stop already bogged down rulemakings. In case of energy efficiency regulations, peer review, if it occurs prior to the Notice of Proposed Rulemaking (NOPR), may actually accelerate the rulemaking by reducing the controversy and reanalysis that is normally required after the NOPR is issued due to analytical errors or misjudgments. Even if the peer review process does, because of the added management burden, delay in the issuance of the rule, the benefits to society in terms of more economically efficient regulations will far outweigh the costs of a few months of foregone regulation.

To address the specific questions OMB poses:

Should the overall scope of the OMB Bulletin be reduced or enlarged, or should fewer exceptions be made?

The scope of the OMB Bulletin is appropriate.

Should some provisions be strengthened, modified, or removed?

The provisions are well-balanced and we see no need to strengthen or eliminate any of them. Some recommended modifications are explained below.

Would any provisions of the proposal unnecessarily burden participating scientists or discourage qualified scientists from participating in agency peer reviews?

Yes. This part of the OMB proposal concerns us. By their very nature, major rulemakings are broad in scope and significant in impact. Many experts owe their expertise to research funded by these Agencies and their notoriety to events that the Agency has sponsored in the past. Any nationally recognized expert in the field covered by the rulemaking would probably fail all four of OMB's criteria, limiting the pool to candidates with a less than desirable level of national standing and recognized expertise.

In other words, show us a candidate who, in some way, is not financially interested in the outcome of the rulemaking, has not recently advocated an opinion in particular material issue, has not been funded by the Agency, and has not served that Agency multiple times, and we would expect that candidate to be sorely under-qualified.

We urge OMB not to force the Agencies to apply any particular set of criteria while selecting its peer reviewers. The public disclosure of peer reviewers' credentials and stated conflicts of interest will suffice in most cases to guarantee a balanced and qualified panel. If the peer review panel is to serve its intended purpose, technical qualifications, rather than perceived biases, should be paramount.

Instead of applying stated restrictions, we would suggest simply that OMB require that Agencies demonstrate that they:

- consider potential bias and conflict of interest when selecting reviewers,
- select reviewers qualified to address technical concerns raised previously by the public, if any, and
- make peer reviewers' credentials and conflict of interest statements available to the public.

Should peer reviewers' disclosure requirements be limited to a specific number of years?

Yes. Five years is more than adequate. If an individual has not been active in a particular technical realm within five years, we would question the extent to which that person's expertise is current. Moreover, potential conflicts that existed before that time, but not since, are likely to have little residual influence on the individual's actions.

How can agencies encourage peer-review participation by qualified scientists?

Scientists typically participate in peer review to stay current in their technical field and to contribute to the vibrancy of the peer review system, which allows them to raise their own level of prestige through publication of peer-reviewed papers.

Participating in an agency review is not likely to provide either of these benefits to the scientist. Agency analysis is not likely to be cutting-edge and rulemakings lie outside of the scientific journal system.

Since the study of a major rulemaking will be high profile and commonly cited, however, the panelist will benefit simply by having his name associated with the peer review panel.

It may be necessary to provide a more direct benefit, however, and we would also allow the Agency to provide a modest stipend to encourage participation. Although this may expose the Agency to charges that it used its financial arrangement to influence the panelist's opinion, we believe that if the arrangements are uniform, modest, and fully disclosed, that such charges would be minimized.

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Should agencies be permitted to select their own peer reviewers for regulatory information?

Yes. The composition of the peer review committee will inevitably be a new source of controversy in any rulemaking, regardless of who appoints them. We would prefer that the Administration demonstrate confidence in its own Agency by allowing the Agency to select its own experts with as little interference as possible from the White House. Knowing that OMB will review public comments, which will include comments on the composition of the review panel, the Agency will likely attempt to be responsible in its choices.

Sincerely,

Mark A. Kendall
Vice President, Technical Affairs