

Calendar No. 511

104TH CONGRESS }
2d Session }

SENATE

{ REPORT
104-331 }

LOCAL EMPOWERMENT AND FLEXIBILITY ACT OF 1996

R E P O R T

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

TOGETHER WITH

ADDITIONAL AND MINORITY VIEWS

TO ACCOMPANY

S. 88

TO INCREASE THE OVERALL ECONOMY AND EFFICIENCY OF GOVERNMENT OPERATIONS AND ENABLE MORE EFFICIENT USE OF FEDERAL FUNDING, BY ENABLING LOCAL GOVERNMENTS AND PRIVATE, NONPROFIT ORGANIZATIONS TO USE AMOUNTS AVAILABLE UNDER CERTAIN FEDERAL ASSISTANCE PROGRAMS IN ACCORDANCE WITH APPROVED LOCAL FLEXIBILITY PLANS



JULY 23, 1996.—Ordered to be printed

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JULY 23, 1996.—Ordered to be printed

Mr. STEVENS, from the Committee on Governmental Affairs,
submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 88]

The Committee on Governmental Affairs, to which was referred the bill (S. 88) to improve the system of grant administration, reports favorably thereon and recommends that the bill do pass.

I. PURPOSE AND SUMMARY OF THE LEGISLATION

The current system of intergovernmental Federal grants can be characterized as a piecemeal approach to addressing the needs of our nation's communities. Each of the various grant programs tends to treat the need it aims to address as if most communities had the precisely identical problem calling for a single, common solution. The standardized set of regulations surrounding each program do little to encourage creativity in seeking solutions, with their emphasis on following defined process, over achieving meaningful results. In reality, though, not only do the specific needs of New Haven, Connecticut, differ greatly from the needs of Walla Walla, Washington, and Kenai, Alaska, but the best approaches to addressing similar needs may vary significantly. To date, our Federal grant system has not recognized these differences.

The Local Empowerment and Flexibility Act (S. 88) is designed to reflect these differences, by creating a mechanism that fosters intergovernmental communication, recognizes the efforts of the private sector, facilitates the efficient expenditure of taxpayer dollars,

and increases the flexibility and integration of Federal categorical grants. In doing so, it will allow Federal categorical grants to complement local efforts more effectively. Rather than forcing communities to attack problems singly, S. 88 recognizes that effective solutions often require a comprehensive approach using a blend of tools from several programs—something presently discouraged by many grant-specific regulations.

The legislation expands upon successful intergovernmental partnerships and promotes accountable flexibility in the implementation of Federal grants. The General Accounting Office, in “Community Development: Comprehensive Approaches Address Multiple Needs but Are Challenging to Implement,” stated that:

The proliferation of federal programs imposes a burden on local organizations that attempt to piece together programs to serve their communities * * * neighborhood organizations we studied found it burdensome to manage multiple programs with individual funding streams, application requirements, and reporting expectations.

The sole purpose of S. 88 is to ease this burden without sacrificing accountability for achieving Federal objectives. It aims to do this in several ways:

1. The legislation encourages local innovation. S. 88 allows state, local or tribal governments or private, non-profit organizations and consortiums to examine the sources of financial assistance they receive, develop a plan of grant integration to avoid duplicative and inconsistent requirements, and apply for the waiver of the statutory or regulatory requirements that lead to this duplication, inconsistency, and inefficiency.

Although state, local, and tribal waivers may be requested concurrently, S. 88 does not preempt non-Federal waiver processes. The bill provides for technical assistance in the development and execution of plans and gives special consideration to smaller governments.

2. The legislation permits variation in how grantees achieve national objectives. The Federal government has a legitimate role to play by establishing broad national objectives that bind our nation together. The bill encourages more efficient ways to achieve these purposes. S. 88 is not intended to permit flexibility for the purpose of deviating from national objectives.

3. The legislation requires the review of current regulations and performance standards associated with Federal financial assistance programs. S. 88 directs the Executive Branch to review regulations for elimination, revision or better coordination. It also provides for the examination of ways to establish a uniform application for multiple Federal financial assistance programs.

4. The legislation promotes greater interagency communication at the Federal level. S. 88 establishes a forum for Federal agencies to discuss how multiple programs originating from separate agencies are integrated or otherwise coordinated at the State and local levels.

Known as the Community Empowerment Board (Board), this forum already exists, through Presidential directive, to oversee

the Empowerment Zones/Enterprise Communities program. The Board would also review plans submitted under S. 88 for approval, but any statutory or regulatory waiver requests would have to be finally approved by the appropriate Federal agency.

5. The legislation promotes greater public and private communication. S. 88 requires all plans to be submitted for review to all levels of State and local government and the general public before being submitted to the Board.

6. The legislation provides postal equity to Alaska and Hawaii, States which are not part of the contiguous forty-eight. S. 88 changes the date of receipt of a grant application from the date received in Washington to the date postmarked, so as not to disadvantage remote communities in those States.

II. BACKGROUND AND NEED FOR THE LEGISLATION

A. Overview

A June 1995 report published by the Advisory Commission on Intergovernmental Relations (ACIR) cites 618 Federal categorical grants funded in FY95—the largest number of such grants in history. ACIR reports that the 634 total Federal grants to state and local governments represent \$228 billion in FY95 outlays.

In his December 5, 1995, testimony before the Committee, Senator Mark Hatfield, Chairman of the Committee on Appropriations, stated that non-defense discretionary spending (the source of most of these grants) represents 18% of the total Federal budget. He predicted that by the year 2002, this same category will represent only 13% of the Federal budget.

Two conclusions can be drawn from these figures: (1) State and local grant recipients continue to be faced with the task of managing multiple funding streams, each with its own unique requirements; and (2) the amount of money available to address the needs for which these grants are targeted is shrinking.

As a result, communities are, more than ever, seeking efficient and effective means to qualify for, receive, and implement Federal and other financial assistance programs. As they seek to integrate multiple funding streams, conflicting requirements can obstruct potentially productive outcomes. In its September 7, 1993 report, "From Red Tape to Results; Creating a Government that Works Better and Costs Less," the National Performance Review states:

Considered individually, many categorical grant programs make sense. But together, they often work against the very purposes for which they were established * * * Thousands of public employees—at all levels of government—spend millions of hours writing regulations, writing and reviewing grant applications, filling out forms, checking on each other, and avoiding oversight. In this way, professionals and bureaucrats siphon money from the program's intended customers: students, the poor urban residents and others. And states, and local governments find their money fragmented into hundreds of tiny pots, each with different, often contradictory rules, procedures, and program requirements. (p. 35).

The overly-fragmented nature of the Federal categorical grant system may not be in the best interests of the individuals it purports to assist.

In testimony before this Committee, the National Academy of Public Administration (NAPA) discussed a comprehensive plan of one community to move welfare recipients to self-sufficiency. Part of this plan relied indirectly on funding authorized by the Job Training Partnership Act (JTPA). The JTPA administration owned computers in a local community college, and the plan involved training welfare recipients (who were not JTPA-eligible) on those computers during the evening, when they would otherwise not be in use. However, JTPA regulation restricts all use of JTPA resources to JTPA-eligible individuals. This is but one example among far too many of a piecemeal approach to a complex problem being derailed by inflexible restrictions.

As with categorical grants, the characteristics of block grants can make it more difficult to attain national policy goals. Block grants, for instance, can also be too restrictive. They sometimes have too narrow a focus and too many prescriptive requirements. An analyst for the Center for Budget and Policy Priorities, quoted in a recent issue of the periodical "MBIA Public Policy Issues," writes that, "[f]lexibility and block grants are not synonyms. You can have an entitlement in which a state has enormous flexibility, and a block grant program in which a state has very little flexibility."

A stark example of the potential inflexibility of block grants can be seen in the administration of the Community Development Block Grant (CDBG). According to the 1995 Catalog of Federal Domestic Assistance, the objective of CDBG is to "develop viable urban communities, by providing decent housing and a suitable living environment * * *." Although it enjoys a fairly broad purpose, the program has a statutory limit on what proportion of funds may be spent on public services—no more than 15%. A grantee in Albany, Georgia, presented a waiver request to the Community Empowerment Board hoping to use 20% of its CDBG funds for public services. Albany's request could not be honored because the 15% cap is a statutory requirement.

Tacoma, Washington, requested permission to use CDBG moneys to build new housing because existing housing stock was beyond rehabilitation. Again, this request was denied because of a statutory restriction banning new home construction.

The Local Empowerment and Flexibility Act would overcome obstacles like these by combining the flexibility of more expansive block grants with the accountability of categorical grants. In the case of the requests in Georgia and Washington for waivers of CDBG restrictions, for example, this legislation would enable the Community Empowerment Board to approve a plan for these waivers and the Secretary of Housing and Urban Development to grant them under appropriate conditions.

The question is, of course, on whose perspective should be relied on in adapting Federal financial assistance to the needs of our citizens. The Committee believes that the best perspective is that of the individuals who are most directly affected by the success or failure of programs supported by federal grants: the providers and recipients of local services. The specific ideas that derive from first-

hand knowledge and experience at the community level are most likely superior to even the best generalized strategies that are abstractly conceived at the national level.

B. Evolution of Intergovernmental Grant Administration

Testimony before this Committee submitted by the Advisory Commission on Intergovernmental Relations (ACIR) described two earlier reform efforts which shed light on the purpose of S. 88. The first is the Integrated Grant Administration program of 1972, and the second is the Joint Funding Simplification Act of 1974. Both were attempting to address what, at the time, was seen as a grave failure in the Federal aid system. However, long before the 1970's, the categorical grant system was the subject of much debate.

Nearly 20 years ago, the ACIR issued a report entitled "Improving Federal Grants Management; The Intergovernmental Grant System: An Assessment and Proposed Policies" (February 1977). This was one of several reports which have been released calling for improvement in our nation's grant system—including a 1949 Hoover Commission report with a section on Federal-State relations. While the Local Empowerment and Flexibility Act addresses a current issue, the issue has been actively considered for decades. Congress has attempted to address grant flexibility before, but without success. Legislation in the late 1960's and early 70's was intended to bring relief to the headache of grant fragmentation.

In 1968, the Intergovernmental Cooperation Act (P.L. 90-577) was enacted. It made several improvements to the grant administration process including improved Federal-State communication and standardization. Other reforms not included in the Intergovernmental Cooperation Act were incorporated by the Office of Management and Budget into the Integrated Grant Administration Program in 1972. Modernizing the grant administration process, encouraging greater State involvement and cutting stifling requirements were at the center of the program. The Joint Funding Simplification Act of 1974 established in law many of the provisions included in the Integrated Grant Administration Program. Three years after passage of even this landmark legislation, in "Improving Federal Grants Management," ACIR reported that grant administration faced the same obstacles:

Very little has changed over the years. Even the extensive reforms initiated in the past decade have not altered greatly the nature of the complaints. Many of the fundamental difficulties continue. * * *

Most of the administrative problems associated with categorical aid arise from the large number of narrow, distinct programs of assistance—what critics often call the "fragmentation" of Federal aid. Aid programs, of whatever worth singly, become objectionable as they proliferate. There are a variety of complaints: "red tape," "inflexibility," and others. "Poor coordination" is probably the most common charge.

According to ACIR testimony at the Committee's December 5, 1995 hearing, the Integrated Grant Administration program was created by the Office of Management and Budget to simplify the

grant process for grantees of more than one Federal assistance program, so as to coordinate the administration of several programs as a single project. The ACIR witness stated that when assessed by OMB and the General Services Administration (GSA), it was determined that, "(P)roblems of 'turf,' as well as statutory barriers to program consolidation were seen as stumbling blocks to agency cooperation."

However, there was enough success for the House Subcommittee on Intergovernmental Relations to hold hearings discussing grant flexibility and specifically, H.R. 11236, the Joint Funding Simplification Act. Enacted into law in 1974, it was reauthorized twice before finally being repealed in 1982. ACIR testified that the act, "* * * never really got off the ground." A lack of Federal commitment is given as the primary reason. The Joint Funding Simplification Act authorized Federal agencies to identify programs suitable for consolidation, modify requirements and create "joint management funds" for multipurpose projects.

The Intergovernmental Cooperation Act of 1968, Integrated Grant Administration program of 1972 and the Joint Funding Simplification Act of 1974 share one thing in common: reliance on the creativity, resourcefulness and commitment of the Federal agencies.

Proponents of the Local Empowerment and Flexibility Act maintain that the role of determining how to consolidate funding streams most effectively is not best left to the wisdom of the Federal agencies, the President, or OMB, but to the State and local grantees. Empowerment at the State and local level, coupled with a renewed intergovernmental commitment at the Federal level, is a key ingredient absent in similar reform measures of the past.

One advance in grant simplification and local flexibility was actually a management circular (GSA Circular FMC 74-7, formerly OMB Circular A-102). As reported in ACIR's 1976 report, this circular "standardized and simplified 15 areas of grant administration requirements, and placed restraints on Federal grantor agencies' imposition of 'excessive' requirements." (p. 138) Emphasizing performance over process was one of its major objectives.

An important lesson is to be learned from the experience various groups had with this and other related circulars. Its lessons, as stated in the 1976 ACIR report, can be applied today:

* * * a paramount point that must be understood when judging experience under the circulars: parties representing different interests in the grants process have different kinds of complaints. The public interest groups stress enforcement failures, whereas Federal grantor agencies chafe at efforts to standardize or complain about 'unrealistic' interpretations of circular provisions. This suggests that in the development of improvements in grant management, the nature of the grantor-grantee relationship is such that it will never be possible to completely satisfy both ends of the grant process. (p. 259)

While the Committee understands that differing experiences shape perspectives toward S. 88, 20 additional years of dissatisfaction with the Federal grant process led to a unity of purpose be-

tween the grantor agency and the grantee which was previously missing. For the most part, grantor agencies would like the ability to target funds to specialized groups. Grantees would like it recognized that the way services are targeted and implemented in one part of the country may differ from another part of the country.

A series of hearings on Federal grants management reform before this Committee in 1979 led to unanimous Senate approval of S. 878, the Federal Assistance Reform Act on December 2, 1980. Grant consolidation was the paramount goal of S. 878. Like its predecessors, although never enacted into law, S. 878 incorporated consolidation suggestions at the Federal agency level in order to reform the fragmented system of categorical grants.

The budget reconciliation in 1993 (P.L. 103-66) created 9 empowerment zones and 95 enterprise communities. In exchange for a strategic revitalization plan, these distressed communities could receive tax credits, block grants, and the removal of some barriers to efficient implementation of Federal assistance. Waiver requests and strategic plans are reviewed by the Community Empowerment Board, chaired by the Vice President and consisting of cabinet and sub-cabinet agencies.

However, some have argued that the program should have greater waiver authority to afford greater flexibility for communities. For example, in a letter of December 6, 1995, to Louisville mayor Jerry Abramson, Assistant HUD Secretary Andrew Cuomo wrote:

* * * the City of Louisville has asked for 11 waivers and broad policy changes that the CEB [Community Empowerment Board] does not have the authority to act upon because they require statutory changes—meaning Congress would have to change laws * * * Moreover, the Administration supports the local Empowerment and Flexibility Act of 1995. This pending legislation would permit the CEB to modify statutory requirements which impede creative solutions to local problems.

C. Flexibility experience and examples

The Clinton Administration has entered into an agreement that allows Oregon to be exempted from certain regulatory requirements in exchange for Oregon's commitment to focus its public resources on a series of planned goals entitled, "Oregon Benchmarks." This agreement has been titled the "Oregon Option." By focusing on specific objectives such as reducing teen pregnancies or improving immunization rates, Oregon has begun to highlight regulatory barriers to efficient intergovernmental service delivery.

Through the establishment of "The Oregon Option," the State of Oregon has achieved some flexibility with regard to categorical financial assistance. For example, at one point, the state was receiving eight different funding streams, each of which was for enhancing access to immunizations. Each stream had its own reporting requirements. Some required reporting twice a year, others specified how the money should be spent, others specified doses. Oregon estimated that it could save \$600,000 in a two-year period if the reporting requirements could be relaxed. Oregon set a goal to move from a then current 52% child immunization rate to a rate of at

least 90% by 1996. Oregon did see immunization rates improve over 20% as a result of the added flexibility.

Issues that Oregon would like to address in the future through the Oregon Option include removing various requirements that impede comprehensive plans for public assistance. When Headstart children and non-Headstart are included in the same program, for example, there is a requirement that food for each group be stored in separate locations. This is a needlessly expensive regulation. Also, Oregon recently developed a one-page form to be filled out by everyone receiving Ryan White AIDS funds. The Federal government requires a two-page form with a 17-page set of instructions. Oregon would like to see if the Oregon Option could provide enough flexibility to defer to the state form.

The Portland, Oregon, Bureau of Housing and Community Development expressed interest in applying Community Development Block Grant dollars to new construction. HUD's HOME program does allow for new development, but does not begin to meet the city's need for affordable housing. The city states that if it were able to integrate HOME and a portion of CDBG money, a greater number of low and moderate income households benefitting from these Federal monies would increase. An Empowerment Zone in Kansas City, Missouri pursued a similar CDBG waiver but the waiver was denied—because the restriction is statutory.

The National Conference of State Legislatures has identified three areas in which it would like to see S. 88 used to increase flexibility:

1. Pooling of portions of the Drug-Free Schools education grant (DoED), the Alcohol and Drug Abuse Block Grant (HHS), and the Office of Juvenile Justice and Delinquency Prevention grants (DoJ) to create a targeted anti-drug education program in the public schools.
2. Pooling various administrative funds for income support, employment and other social service programs to create one-stop shops or centralized administrative functions to streamline overhead.
3. States joining with counties in rural areas to use portions of the state part of the Community Development Block Grant program together with DoL job training/trade adjustment assistance and agriculture retraining programs to revitalize poor rural communities.

III. COMMITTEE HEARING

At the Committee's hearing on December 5, 1995, Senator Mark O. Hatfield testified to the need for Federal requirements to take into account differences found at the State and local levels:

First as a former governor of Oregon, I experienced the frustration expressed by many State and local authorities when Federal policies do not make sense for their particular communities. Blanket standards from the Federal government are incapable of taking into consideration the diversities of each locality.

In expressing concern about the budget deficit, Senator Hatfield said that fiscal responsibility is contingent upon both spending cuts

and maximizing efficiency. He stated that, in light of an anticipated reduction in discretionary spending, the Local Empowerment and Flexibility Act would be an important tool to optimize the expenditure of federal resources.

Judy A. England-Joseph of the General Accounting Office (GAO) based her testimony primarily upon the February 1995 GAO report, "Community Development: Comprehensive Approaches Address Multiple Needs but Are Challenging to Implement." The report highlights coordinated efforts to address community problems: efforts that include citizen participation, technical support, non-profit involvement and several sources of private, local, State and Federal financial assistance.

Ms. England-Joseph testified that many experts have endorsed comprehensive approaches to community needs, but the GAO report found that many factors hampered success. Community involvement can be difficult to evoke, and funding streams can be difficult to manage. Regarding four projects the GAO examined, she stated:

Overall, the organizations relied on public funding—for 30–60 percent of their budgets. After obtaining funds, the organizations faced the challenge of concurrently managing multiple programs, each with several separate funding sources; application requirements; and reporting expectations.

She testified to a traditional lack of coordination among Federal departments with regard to administering Federal financial assistance programs. A lack of coordination at the Federal level has led to increasing burdens on local grantees, she said.

Ms. England-Joseph's concerns with the legislation include the need to process waiver requests in a timely manner, monitor requests that cut across federal agencies, build strong accountability into the programs included in a flexibility plan, and determine the resources available to implement S. 88.

John A. Koskinen, Deputy Director for Management, Office of Management and Budget, testified regarding the Clinton Administration's support of flexibility in federal funding, particularly through the efforts of its National Performance Review. Mr. Koskinen stated that:

While the Administration's efforts to promote flexibility have proven to be a strong beginning to devolving power to the local level, they are not complete answers to the problem. For Federal grant programs to work, we believe strongly that the Executive Branch agencies must have the flexibility to waive statutes and remove barriers that interfere with communities trying to improve their economic and social conditions.

He added, however, that the Administration could not support the bill without changes that include extending review periods, allowing States to submit plans, excluding certain statutes, utilizing the Community Empowerment Board, and ensuring all waiver authority is kept within Federal agencies.

Subsequent to the hearing, Mr. Koskinen asked the President's Council on Integrity and Efficiency to review the Administration's redline draft of amendments to S. 88 as originally introduced. This critique is included in this report at the request of Senator Glenn. While it is not a critique of the reported legislation, which is significantly different from the redline amendments and the original S. 88, it does address concerns regarding financial management issues involve in local flexibility.

Susan A. Cameron of the Tillamook County Health Department testified about her county's and Oregon's recent experiments with results-driven programs. She stated that in Oregon:

We talk about results: literacy—not dollars spent for schools or student-teacher ratios; reduced crime—not prison beds; reduced teen pregnancy rates—not contraceptives delivered. We talk about accountability for results and the key idea here is that by being accountable for results we should not have to face the red tape and micro-management often imposed by government when results are vague or completely invisible.

She offered a recent example that was inspired by a State program called Oregon Benchmarks. The county had a teen pregnancy rate of 24 per thousand and wanted to achieve the Oregon Benchmark of 9 per thousand. To do so, the health department brought together churches, schools, health clinics and other interest groups to develop a comprehensive approach. She testified that such collaboration is also needed among the variety of federal programs in which the county participates.

Scott Fosler, President of the National Academy of Public Administration, testified that “[t]he federal categorical grants system has grown topsy.” He cited the 1995 Advisory Commission on Intergovernmental Relations report which counted 618 categorical programs available to state and local governments, including 110 education program, over 100 health care grant programs, 82 social service grant programs and close to 30 grant programs dealing with community and regional development. He acknowledged the need for flexibility in the grant system, saying:

To achieve the highest level of performance, we should create systems that are capable of continuous learning and adjustment. Prescriptive systems place too much emphasis on outmoded “command-and-control” models and too little emphasis on flexibility with accountability for meeting ambitious performance goals and cross-cutting needs.

Charles Griffiths, Director of Intergovernmental Liaison for the Advisory Commission on Intergovernmental Relations, testified on the history of flexibility programs. He enumerated four ingredients to successful federal aid reforms: holistic rather than partial solutions, sufficient commitment of time to allow reform to succeed, flexibility, and avoiding excessive complexity. He said the Local Empowerment and Flexibility Act was an opportunity to build on past mistakes.

Among other recommendations, he suggested that S. 88 be changed to allow for the integration of State and federal funding

streams, include regional governments as eligible applicants, and allow a flexibility plan to suffice for individual program applications.

IV. LEGISLATIVE HISTORY

103d Congress

On August 4, 1993, Congressman John Conyers (D-MI) introduced the Local Flexibility Act of 1993, contain provisions similar to S. 88. Funding in the areas of health, nutrition, education, housing, job training and social services would have been eligible to receive waivers from Federal statutory and regulatory requirements applicable to these particular grants. A hearing was held on October 13, 1993, by the Human Resources and Intergovernmental Affairs Subcommittee of the House Committee on Government Operations. No further action occurred on the bill.

On March 16, 1993, the Senate included as part of the S. 4, the "National Competitiveness Act of 1993", and amendment offered by Senator Hatfield that was similar to Congressman Conyers's bill. It would have given certain local governments the opportunity to submit plans requesting flexibility for the purpose of integrating Federal funds. The amendment passed by a vote of 100-0, but the underlying legislation was not reported out of conference.

Congress did allow a great deal of flexibility in the use of Federal education funds by enacting "Ed-Flex", legislation sponsored by Senator Hatfield. Reauthorization of the Elementary and Secondary Education Act (P.L. 103-227) permits a limited number of States, school districts and schools to seek and obtain the waiver of statutory and regulatory requirements of certain Federal educational programs, if the waiver is expected to help improve school effectiveness and academic achievement. This legislation passed 97-0.

104th Congress

On January 4, 1995, "The Local Empowerment and Flexibility Act of 1995" (S. 88) was introduced by Senator Hatfield, and co-sponsored by Senator Inhofe. It was referred to the Committee on Governmental Affairs.

On December 5, 1995, the Committee held a hearing on the bill. The witnesses at the hearing were:

The Honorable Mark O. Hatfield, U.S. Senate;

Ms. Judy A. England-Joseph, Director, Housing and Community Development, General Accounting Office;

The Honorable John A. Koskinen, Deputy Director for Management, Office of Management and Budget;

Ms. Susan A. Cameron, Administrator, Tillamook County Health Department, Tillamook, Oregon;

The Honorable Gail Phillips, Speaker, Alaska House of Representatives;

Mr. Scott Fosler, President, National Academy of Public Administration; and

Mr. Charles Griffiths, Director, Intergovernmental Liaison, Advisory Commission on Intergovernmental Relations.

On May 16, 1996, the Committee marked up S. 88. Chairman Stevens offered an amendment in the nature of a substitute, on behalf of Senator Hatfield, which was adopted by voice vote. The Committee also adopted by voice vote an amendment by Senator Akaka, providing that applications for Federal grants and contracts shall be deemed filed as of the date of postmark. An Amendment by Senator Levin prohibiting the waiver of statutory requirements that protect public health, safety and the environment was tabled by a vote of 5–4, upon a motion by Chairman Stevens. An amendment by Senator Levin limiting the commingling of funds among categorical grant programs was also tabled, by a vote of 6–5, upon a motion by Chairman Stevens. The Committee then voted to report S. 88 as amended by a vote of 8–1, with Senators Stevens, Roth, Thompson, Smith, Brown, Levin, Lieberman, and Akaka voting “aye”, and Senator Glenn voting “no”.

V. SECTION-BY-SECTION ANALYSIS

Section 1. Short title

This section provides that the Act be cited as the “Local Empowerment and Flexibility Act of 1996.”

Section 2. Findings

The current Federal Categorical grant system is focused on providing financial assistance for targeted needs with numerous restrictions on how such assistance may be used. These restrictions ignore the different needs of different communities and often impede innovative programs for addressing these needs at the local level. It is ever more critical, however, that Federal funds promote cooperation, flexibility, and innovation among all levels of government as well as among private and public organizations in order to optimize the attainment of national policy goals.

Section 3. Purposes

The purposes of the Act include (1) enabling the more efficient and effective use of government resources, (2) de-emphasizing compliance with federal procedural requirements and instead emphasizing the successful achievement of policy goals, (3) enabling State and local governments to adapt Federal programs to their particular needs, and (4) facilitating cooperation between government entities and private, non-profit organizations.

Section 4. Definitions

This section defines terms used throughout the bill.

Subsection (1) defines an “approved flexibility plan” as a plan or part thereof that has been approved by the Community Empowerment Board under Section 8.

Subsection (2) defines “Board” as the Community Empowerment Board established under Section 5.

Subsection (3) defines “Director” as the Director of the Office of Management and Budget.

Subsection (4) defines an “eligible applicant” as a State, local or tribal government, qualified organization, or qualified consortium eligible to receive financial assistance under at least one eligible

Federal financial assistance program (as defined under subsection (5)).

Subsection (5) defines an “eligible Federal financial assistance program” as a domestic assistance program defined under section 6101(4) of title 31 U.S.C. under which financial assistance is available either directly or indirectly to an eligible applicant.

This does not include Federal programs of direct financial assistance to an individual or to a State in order to provide financial assistance directly to an individual, as in entitlement spending.

Subsection (6) defines an “Empowerment Zone-Eligible Area” as any area nominated for designation in 1994 under the Empowerment Zones and Enterprise Communities Act ruled as meeting the technical eligibility standards established for that Federal policy.

Subsection (7) defines a “flexibility plan” as a comprehensive plan or part thereof for the integration and administration by an eligible applicant of financial assistance under two or more eligible Federal financial assistance programs.

Subsection (8) defines “local government” as a political subdivision of a State that is a unit of general local government as defined under section 6501 of title 31, U.S.C., or any combination of such political subdivisions. This term includes local education agencies.

Subsection (9) defines a “qualified consortium” as a group comprising two or more qualified organizations or State, local or tribal agencies that receive Federally appropriated funds.

Subsection (10) defines a “qualified organization” as a private, nonprofit organization described in Section 501(c)(3) of the Internal Revenue Code of 1986 that is exempt from taxation under section 501(a) of the Internal Revenue Code of 1986.

Subsection (11) defines “small government” as any small governmental jurisdiction defined in section 601(5) of Title 5, U.S.C., and tribal governments.

Subsection (12) defines “State” as any of the 50 states or the District of Columbia, Puerto Rico, American Samoa, Guam or the Virgin Islands.

Subsection (13) defines a “State legislative official” as the majority or minority leader of a chamber of a State legislature.

Subsection (14) defines “tribal government” as the governing entity of an Indian tribe as defined in the Federally Recognized Tribe List Act of 1994.

Section 5. Establishment of Community Empowerment Board

The Community Empowerment Board is a council of Cabinet secretaries and agency heads with a Chair chosen by the President from among its members. The Board is a forum for receiving, reviewing, evaluating, and approving flexibility plans.

Subsection 5(c) describes the functions of the Board. It is responsible for receiving, reviewing and approving or disapproving flexibility plans. The Board is the point of contact for flexibility plan applicants and may direct agencies to provide, when necessary, technical assistance to applicants. Along with the Director of OMB, the Board shall monitor the progress of flexibility plans. This section also provides for certain regulations to be reviewed and, if needed, revised.

The Board shall evaluate the performance standards and evaluation criteria of Federal financial assistance programs in order to establish specific performance and outcome measures to compare and evaluate the success of the programs and the success of flexibility plans.

Section 5(d) directs the Director of OMB, working with the Board, to assist Federal agencies in simplifying the grant application progress.

Section 6. Application for approval of flexibility plan

Section 6(a) states that an eligible applicant that crafted a flexibility plan may submit the plan to the Board for review.

In Section 6(b), the contents of an application for approval of a flexibility plan are described. It must include written certification from the chief executive of the applicant that the applicant has the ability, authority, and resources to implement the proposed flexibility plan. The Board may request any additional assurances, beyond written certification, that the applicant possesses such ability, authority and resources. Written certification is required to help ensure that an entity does not use S. 88 to supersede another entity's jurisdiction over eligible Federal financial assistance programs.

The Governor, affected State agencies, State legislature and other chief executives of affected local or tribal governments shall have been given opportunities to comment on the plan and these comments are to be included for the Board to review. If the applicant responds to these comments, the responses shall be included in the application.

Written documentation of significant public input must be included in the plan. Public input shall include comments by those directly affected by the plan, such as its intended beneficiaries.

The Board may require any other information necessary.

Section 6(c) describes the contents of the flexibility plan. Whom the plan will serve, for how long and where must all be included in the plan. Since the goal a S. 88 is to improve service delivery, the applicant must lay out the goals and criteria it will use to measure the flexibility plan's ultimate performance. If the State has already documented a set of goals, these must be included in the plan as well as how the plan can achieve the State goals. Methods to measure performance and collect and maintain data are to be included.

The plan must explain who is eligible for benefits and what, exactly, those benefits are. The Board may require any other descriptive information it needs to approve a plan. The plan shall also describe the statutory goals and purposes of each Federal financial assistance program included in the plan.

If, in order to implement a plan, a statutory or regulatory requirement must be waived, the applicant must list what waivers are necessary and why. S. 88 provides no authority for the waiver of State or local requirements. However, if a State or local waiver is needed to implement a plan, that waiver shall be included along with a commitment to grant the waiver from the appropriate State or local entity.

Fiscal control and accountability provisions must be included to the satisfaction of the Board along with a description of all non-fed-

eral funds needed to carry out the eligible Federal financial assistance programs included in the plan.

Section 6(d) spells out the application procedures. The application (which includes the plan) must be sent to each State and local government directly affected by the plan at least 60 days before submitting the plan to the Board. After the Governor, affected State agency head, State legislature and local chief executive have a chance to review the plan, they may within 60 days of receipt, prepare comments, grant or make commitments to grant State or local waiver requests, and submit these comments and commitments back to the applicant. The applicant may then submit the plan to the Board with any changes it deems necessary based on this response.

Section 6(e) ensures maintenance of the current tribal-Federal relationship.

Section 6(f) ensures that disapproval of a plan by the Board does not affect the eligibility of an applicant to receive federal grants.

Section 6(g) explains that S. 88 may not, in any way, preempt or supersede State or local law. Current programs established to administer Federal financial assistance at the State or local level may not be altered using S. 88 unless authorized by the entity with jurisdiction over those programs. If a local school district applies for approval of a flexibility plan to alter that district's fiscal relationship with the State education agency, that plan cannot be approved unless the State education agency approves. If a Governor submits a flexibility plan which alters the manner in which a city implements Federal financial assistance of which the city is a grantee, that plan is not eligible for approval unless the city agrees.

Section 7. Review and approval of flexibility plans and waiver requests

Section 7(a) states that regardless of how many plans the Board receives each year, it is required to review only the first fifty. This allows the possibility that at least one plan from each State may be reviewed.

Priority is given to Empowerment zone eligible areas because they have some experience in addressing complex community needs with comprehensive assistance. The Board shall also give priority consideration to plans that exhibit significant State and local support, as indicated by State or local waivers already included in the plan. The Board may establish any additional criteria to use to review applications.

Section 7(b) ensures that an applicant be notified, in writing, of the Board's receipt of an application for approval. The Board then has 120 days to approve and disapprove of a plan unless either the Board requires more information or the applicant requests additional time to modify its application. The Board must notify an applicant in writing of its decision within 15 days of approving or disapproving an application and must include any reasons for disapproving the application therein.

Section 7(c) describes the conditions for approval of a flexibility plan. The Board may approve an application if the plan improves
 “* * * the effectiveness and efficiency of providing benefits under

eligible Federal financial assistance programs included in the plan * * * This provision requires that the benefits a Federal financial assistance plan provides prior to a flexibility plan continue to be provided.

Similarly, the Board shall approve a plan if it determines that the services provided by the eligible Federal financial assistance programs of the plan, prior to the plan's approval, would be improved by implementation of the flexibility plan. Before approval, the applicant shall have considered the effect implementation of the plan will have on programs not included in the plan.

To secure Board approval, eligible applicants also must have developed or be developing data bases, planning, and evaluation processes for determining whether the implementation of the plan has been successful. If a plan does not describe how performance is to be measured, the plan will not be approved. The goals and purposes of each Federal financial assistance program included in the plan must be retained as a condition of plan approval.

The Board may not approve plans that increase spending or provide assistance to a qualified organization without its express consent. The Board shall determine how long a plan is effective, but in no case can such a determination be for a period exceeding five years.

Finally, if the Board has received at least a commitment to grant all necessary State or local waivers, and if grant funds are not used to supplant non-Federal funds or to meet maintenance-of-effort requirements, a plan may be approved.

Section 7(d) describes the Memoranda of Understanding that must be reached before final approval of a plan. The applicant and Board must reach agreement as to the contents of the plan, the waivers being granted (if any) by the agency head, the State, local or tribal requirements (if any) being waived, the total amount of funds provided in the grants the plan includes, and the criteria upon which the plan will be evaluated.

Section 7(e) discusses the limits on confidentiality requirements required by the plan. The Board may not impede the exchange of information needed for the design of or provision of benefits provided under the plan.

Section 7(f) explains the waiver requirement process. For purposes of this Act, only statutes that establish Federal financial assistance programs may be considered for waivers. Non-grant, or cross-cutting statutes that, by their very nature affect every Federal financial assistance program, are exempt from being waived under this Act. The scope of S. 88 is limited to allow only for the waiver of Federal statutory and regulatory requirements that are solely part of Federal financial assistance programs.

If the waiver is necessary for implementation of the plan and the Board has not disapproved the waiver, the waiver may be granted by the Federal agency head with jurisdiction over the program. The duration of the waiver may be established by the affected agency head.

Waivers may never be granted for requirements that enforce any Constitutionally, or certain statutorily, secured rights.

Section 8. Implementation of approved flexibility plans

Section 8(a) states that benefits provided by eligible financial assistance programs in approved plans must be implemented in accordance with the plan.

Section 8(b) allows the head of Federal agencies to provide special assistance to support the implementation of a flexibility plan.

Section 8(c) requires that applicants submit reports and cooperate in audits of the approved flexibility plan. Approved applicants must periodically evaluate the plan and its effects on individuals who receive benefits under the plan, communities in which those individuals live, and the costs of administering the Federal financial assistance programs included in the plan. A report is required shortly after the end of the plan's first effective year to evaluate the plan and compare its implementation with criteria included in the contents of the plan.

The Board shall terminate the plan if its goals are not or likely will not be met, the approved applicant cannot meet the necessary commitments, or fraud and/or abuse has been detected. Similarly, waivers may be revoked if the necessary waiver criteria are not met or the plan is terminated. In either case, written notice of revocation must occur.

Section 8(d) requires that a final report be prepared by the approved applicant to evaluate the successes and shortcomings of the plan and describe its effect on the individuals who received benefits under the plan.

Section 8(e) ties the waiver of provisions of grant agreements to the availability of funds.

Section 9. Technical and other assistance

Section 9(a) authorizes the Board to provide or direct the provision of technical assistance for the development, design or implementation of a flexibility plan. Applicants must describe the flexibility plan being developed and make several additional assurances to the Board.

Section 9(b) allows special assistance to be provided to small governments which may lack the resources of larger communities to create a flexibility plan.

Section 9 (c) and (d) allow Federal agencies to detail or assign staff to the Board as well as utilize interagency financing for the purposes of this Act.

Section 10. Reports by Board; Director

Section 10(a) requires the Board to submit to the President and Congress a list of all statutory and regulatory requirements which are most frequently waived.

Section 10(b) requires that after repeal of this act, the Director report on the progress of the responsibilities it was given in section 5(d) regarding reporting simplification.

Section 10(c) directs the Board, in consultation with the Director and Federal agencies to report on the effectiveness of flexibility plans.

Section 11. Repeal

Section 11(a) repeals this bill on September 30, 2001.

Section 11(b) states that after this Act is repealed, its provisions shall still apply to any plan in effect at that time.

Section 12. Delivery date of Federal contract, grant, and assistance applications

Section 12 provides that the Director of OMB shall direct all Federal agencies to develop policies that deem the postmark date of applications for Federal contracts, grants, and other assistance to be the date of application.

VI. REGULATORY IMPACT OF LEGISLATION

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of S. 88. The legislation is designed to reduce the effect of certain types of Federal regulations on State and local governments and will have no adverse impact on the public:

- (1) Regulatory Impact—The legislation will impose no regulations on individuals or businesses;
- (2) Economic Impact—The legislation will have no economic impact on individuals or businesses;
- (3) Privacy Impact—The legislation will have no privacy impact on individuals; and
- (4) Paperwork Impact—The legislation does not require the creation of any additional paperwork from regulations promulgated pursuant to its provisions.

VII. COST ESTIMATE OF LEGISLATION

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 30, 1996.

Hon. TED STEVENS,
Chairman, Committee on Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 88, the Local Empowerment and Flexibility Act of 1996, as ordered reported by the Senate Committee on Governmental Affairs on May 16, 1996. We estimate the enacting S. 88 would increase the cost to the federal government to review state and local plans for integrating federal and nonfederal programs and funding. Depending on the number and complexity of these plans, the additional cost could be significant; however, we are unable to estimate the extent of the increase. Any increase in federal spending would be subject to the availability of appropriated funds. Because the bill would not affect direct spending or receipts, pay-as-you-go procedures would not apply.

Bill purpose. S. 88 would statutorily establish the Community Empowerment Board; it would be comprised of the heads of 19 departments and agencies. (The Board has already been created by the President; S. 88 would require its existence by statute, and would broaden its role.) The Board would approve or disapprove state and local plans to integrate and administer federal and non-federal programs for a period of up to five years. S. 88 would prohibit the Board from approving any plan that would result in an

increase in federal spending. The bill and its provisions would terminate on September 30, 2001.

As part of its plan, a state or locality could request that an agency waive the requirements of a federal statute or regulation, thus potentially reducing a regulatory burden while enhancing its flexibility in administering the consolidated programs. Agencies would have the authority under S. 88 to waive any requirement that does not serve to enforce a constitutional or civil right.

Federal budgetary impact. The President established the Community Empowerment Board to assist with the implementation of the Empowerment Zone and Enterprise Communities program included in the 1993 Omnibus Budget Reconciliation Act (OBRA). S. 88 would broaden the Board's role and authority to include proposals to integrate programs in areas other than community development and allow for the waiver of certain statutory requirements.

Because the Board could not approve a plan that would increase federal spending, S. 88 would not affect direct spending. However, by significantly expanding both the Board's authority and the number of potential petitioners—the Office of Management and Budget estimates that about 19,000 local communities would be eligible—the bill would increase the costs to the federal government of reviewing plans submitted by state and local governments. In the budget submitted for fiscal year 1997, the President requested \$1 million for the Board; that amount would provide the funding for a staff of eight full-time employees.

Because CBO cannot predict the number of additional plans that would be submitted for review, or the amount of additional time needed to review requests for waivers from existing statutes, we are unable to estimate the extent that costs would increase under S. 88. Based on the prior experience of the Community Empowerment Board, we expect that for some agencies, such as the Departments of Housing and Urban Development and Health and Human Services, the additional costs could be significant.

S. 88 also could result in some savings in administrative costs to the federal government. Enacting the bill encourage communities to consolidate their efforts related to multiple federal programs. As a result, having the state or local government primarily responsible for monitoring and administering the consolidated program could reduce the need for some federal administrative activities. But because we do not know the type or number of plans that would be approved under S. 88, we cannot estimate the extent of such potential savings.

Finally, S. 88 also would require that agencies accept applications for federal contracts, grants, and other assistance that are postmarked by the application deadline. Currently, some agencies refuse to accept applications received beyond this date. Because the provision would only affect the procedure by which some agencies allocate these funds and not the amount spent, CBO estimates that it would result in no significant cost to the federal government.

In sum, we expect that costs would increase under S. 88, but at this time, CBO cannot estimate the likely level of the net increase. Funds for any increase would be subject to the availability of appropriations.

Mandates statement. S. 88 contains no intergovernmental or private-sector mandates as defined in Public Law 104–4, and would impose no direct costs on state, local, or tribal governments. The bill would provide these governments with additional flexibility in using and consolidating federal financial assistance. Such flexibility could lead to significant savings in the administration of some federal grant programs.

Previous CBO estimate. On May 17, 1996, CBO prepared a cost estimate for H.R. 2086, the Local Empowerment and Flexibility Act of 1996, as ordered reported by the House Committee on Government Reform and Oversight on April 24, 1996. The bills are very similar, and this estimate is nearly identical to the estimate provided for H.R. 2086.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are John R. Richter, for the federal costs, and Theresa Gullo, for the state and local costs.

Sincerely,

JUNE E. O'NEILL, *Director*.

VIII. ADDITIONAL VIEWS OF SENATOR CARL LEVIN ON S. 88

The purpose of S. 88 is a sound one—to make the hundreds of federal categorical grant programs which we now have more responsive to the needs and unique characteristics of the communities they are intended to serve. We know that from Washington, we cannot address or anticipate all the peculiarities found in the various regions of this great country or even the differences between towns just 15 miles apart. We create federal programs to meet real needs, but we know those needs are not the same across-the-board. Lansing, Michigan, may have a problem with teens in junior high school; Grand Rapids, Michigan, may be having a more serious problem with high school students. A federal program for at-risk youth may be structured in a way to prevent either city from targeting their grant funds in the way that makes the most sense. The restrictions we set in our federal programs can defeat the very purpose of the programs when faced with the unique features of a local community.

This bill is intended to get around some of those problems without destroying the important controls we've placed on the use of federal taxpayer monies. As trustees of the federal taxpayer dollar, we simply can't give away federal funds without controls. So we establish programs that have specific purposes, strict limits on how federal funds can be used, federal standards that must be met, and auditing and oversight requirements to avoid waste or fraud. The restrictions are not imposed to make the work of local communities harder, though they may have that effect; they're required because we are trying to be responsible with the taxpayer money we are spending.

Although the motive for these requirements is a good one, the outcome can often be frustrating and self-defeating. This is particularly true, now that there are over 600 categorical grant programs and any one local community may be administering several such programs, with similar goals but different requirements. That's where this bill comes in. It is an attempt to allow local communities participating in several federal categorical grant programs to make the best use of federal taxpayer dollars by consolidating administration and coordinating service delivery where appropriate.

S. 88, if appropriately amended, would not turn categorical grant programs into block grants or strip away important restrictions in categorical grant programs in a wholesale manner. Rather it is an attempt to allow communities to develop a plan for the more effective administration of the relevant categorical grant programs they want to coordinate, identify the specific problems they have with specific categorical grant programs in implementing that plan, and then seek from the appropriate federal agencies waivers of specific regulatory or statutory provisions that would obstruct the implementation of the plan.

Because I support the goal of this legislation, and because as reported by the committee, the waiver authority is limited to the statutory and regulatory requirements of just the categorical grant programs themselves, I voted to report S. 88 to the full Senate. However, I also stated at the time that I could not support its passage in the Senate if several issues were not addressed. I offered amendments on two of these issues in Committee but those amendments were tabled.

There are eight outstanding issues that the bill as reported fails to address and which I believe are essential before I can support the bill's passage on the floor. I hope the sponsors of this bill will incorporate these amendments before the bill is presented to the full Senate. They are as follows:

1. *Clarification that environmental, labor, public health or safety standards within a categorical grant program are not subject to waiver.*—While the scope of the statutory waiver in the bill as reported is limited to just the provisions of the categorical grant programs themselves, many of the categorical grant statutes also have important environmental, labor and public health or safety protections in them that shouldn't be waived. For example, there are numerous categorical grant programs embodied in the Clean Air Act, and under the bill as reported, any provision of the Clean Air Act could possibly be waived. We need to be clear that the standards applicable to grant programs, either because they are in the grant statute or incorporated by reference, are not waivable.

2. *Clarification of the role of the Board and the agency heads.*—Statutory and regulatory waivers should be approvable only by the head of the agency with jurisdiction over the relevant categorical grant program. Similarly, the relevant agency head should be able to revoke any waivers and should be the party to enter into the Memorandum of Understanding with the plan participants. These responsibilities should not lie with the Community Empowerment Board.

3. *No judicial review of any action by the Board.*—The Community Empowerment Board is an interagency body that serves largely in a coordinating capacity. It would be inappropriate to have the work of the Board subject to judicial review. Any judicial review provisions under the categorical grant programs, themselves, should remain unaffected.

4. *No plan approval if it would result in the use of funds of a categorical grant program in a manner inconsistent with the goals or purposes of that program.*—This is a very important requirement. Limited use of funds between or among categorical grant programs with similar goals and purposes should be permitted, but the bill should clearly prohibit the use of funds for a purpose not in accordance with the purposes of the categorical grant program. For example, grant money for an immunization program should not be able to be used for job training. Local flexibility should not be an excuse for ignoring or defecting the federal purpose of these categorical grant programs. In addition, the bill as reported suggests that the commingling of funds between or among categorical grant programs is a precondition or requirement for plan approval. Not every plan

may require such a combination of funds, and it shouldn't, therefore, be suggested that it is a necessary element of a flexibility plan.

5. *Improving the process for the approval of plans and resolving the number of plans subject to approval.*—The bill as reported would require a minimum of 50 plans to be reviewed by the Board each of the 5 years of the statute. A plan could be approved in the 5th year and allowed to continue for an additional 5 years although the statute itself, including the provisions for evaluation of the plans, would have expired. A better approach would be to use the first two years of the five year life of the statute for the purpose of preparing, reviewing and approving and unlimited number of flexibility plans, and having a deadline by which the approved plans are put in effect for three to five years and then evaluated at the end of that period.

6. *Identify current beneficiaries of categorical grant programs included in the flexibility plan and the future beneficiaries if the plan were implemented.*—Each plan should be required to identify the current beneficiaries of the categorical grant programs included in the plan, how they will be affected by the plan, and any new beneficiaries anticipated because of the plan.

7. *A requirement that the plan meet the goals and purposes of the categorical grant programs contained in the plan.*—Similar to the concern in number 5, above, an applicant for a flexibility plan should be required to show that the plan will continue to meet the goals and purposes of the categorical grant programs addressed in the plan in a more efficient and effective way.

8. *Some guarantee that the state and local entities currently involved in each of the categorical grant program in the plan will continue to serve in the same capacity under the plan, unless each such entity agrees to the change proposed in the plan.*—States should not be able to use a plan to usurp a previous funding source for local community, and a local community should not be able to change the role of the State, unless the parties agree to that.

The goal of flexibility in the administration of federal categorical grant programs is a worthy one. S. 88 is on the right track to create a demonstration program that could make that goal a reality. With a number of important changes, I could support this legislation on the floor of the Senate.

CARL LEVIN.

IX. MINORITY VIEWS OF SENATOR GLENN ON STEVENS SUBSTITUTE TO S. 88

I cannot support the legislation in its current form. While the bill incorporates a number of changes that have been negotiated in a bi-partisan fashion prior to markup, its scope remains too broad and its ultimate impact largely unknown. Furthermore, it contradicts the notion of legislative accountability in our system of government by delegating authority to the Executive Branch to waive many of our laws without Congressional approval. This broad shift of authority to the Executive disrupts the delicate balance of power intended by our Founding Fathers between the three branches of government. There are other problems with the legislation, but this one is the most serious.

I would like to support a bill providing greater State and local flexibility in the administration of intergovernmental grant programs. We clearly have too many categorical grant programs carrying too much redtape. This redtape combined with the “stovepipe” approach by which many of these programs operate makes it difficult to coordinate the delivery of services at all levels of government. An accountable, well-implemented waiver process could improve the administration of many grant programs as well as encourage innovation in the delivery of essential public services. However, the waiver process envisioned by this legislation should be tested first before being implemented on a more widespread basis.

This is sweeping legislation. It covers hundreds of grant programs; dozens of laws; and billions of taxpayer dollars. In an effort to reduce “one-size-fits-all” Federal program and grant requirements, it establishes a generic, “one-size-fits-all” Federal waiver process for all these different programs and laws without adequate understanding of how they will be affected by such a process. It is not surprising that we have such a limited understanding of the bill; we had only one hearing and we did not hear from a broad range of views at that hearing. Given its broad scope, I don’t think we have truly explored what the impact of the bill might be, even with the changes that we have negotiated and incorporated in the substitute.

My preference would be to enact this legislation on a pilot basis. We have over 600 different Federal grant programs to State and local governments, many of which have similar purposes but also contain conflicting and overlapping requirements that make program implementation in an integrated or coordinated way difficult. So the bill’s goal of providing flexibility in order to improve performance in the delivery of services at the State and local level is a salutary one. However, rather than tackle the entire intergovernmental grant system at once, we should focus the scope of the bill on specific programmatic areas where grant flexibility is most needed. For example, housing and job training are two areas most

frequently cited by State and local officials as being too numerous in number of grant programs and overly riddled with redtape. Bipartisan proposals to consolidate and streamline grant programs in these areas have made significant progress toward enactment in this Congress. The Clinton Administration has also pushed for greater grant flexibility and consolidation, approving over 500 regulatory waivers in its Empowerment Zone/Empowerment Community program and proposing to consolidate 271 grant programs into 27 performance partnerships. Therefore, it seems logical that we focus the bill on these programmatic areas where there is strong consensus in the Administration, the Congress, and at the State and local level for greater flexibility, rather than trying to bite the whole apple all at once. We might also explore ways to make this bill more of a pilot by narrowing the window of opportunity during which plans may be submitted and sunseting both the plans and the legislation by 2002. Currently, this bill operates on a 10 year horizon since 5 year plans can still be approved in the 5th year of the bill.

Section 7(f)(3) is the only section in the bill that attempts to limit the scope of the bill. It does this by prohibiting Federal agencies from approving flexibility plans that would waive civil rights or disabled rights laws. However, the bill does not exempt laws protecting the environment, public health and safety, and labor standards as has been proposed by the Administration, Senator Levin and myself. Advocates of the Hatfield bill have suggested that these laws are cross-cutting in nature and therefore not affected by the bill since the bill only applies to grant requirements. But I'm not confident that this is the case, especially since an amendment to make those exemptions explicit was rejected by the Majority in Committee markup in a 5 to 4 vote. Such exemptions are needed and important. For example, in environmental programs we provide grants to States and localities for wastewater treatment, for solid waste disposal, and for underground storage tank cleanup. It is my understanding that there are certain minimum public health and environmental standards that the grant recipients are required to follow in order to receive funding. Those standards could potentially be waived under flexibility plans authorized by this bill. In the area of public safety, we have certain requirements for States and localities to implement seat belt laws or drunk driving laws as a condition of receiving Federal highway dollars. While greater flexibility for State and local use of Federal transportation funds may be desirable in order to better meet local transportation needs, do we want to set up a process, for example, whereby structural safety requirements for bridge or airport construction can be waived? I think not.

Furthermore, the bill is unclear as to whether it would allow agencies to approve the use of vouchers in existing grant programs when approving any flexibility plan that requested such a conversion. Clearly, the purposes of the bill emphasize flexibility in the administration of Federal grant programs, but that flexibility is so broadly construed as to provide substantial leeway to Federal agencies and the Board in reconfiguring those programs. For example, it is conceivable, under the authorities of this legislation, that the Department of Education could approve a flexibility plan that uti-

lizes Federal education monies for private school vouchers, even though Federal law currently prohibits such use. This is an issue of considerable debate and controversy and should be kept separate from this legislation.

I do not think that Senator Hatfield intends for the kind of waivers I just described to go through, nor do I think that most state and local governments would propose these kind of waivers. Still, when we write legislation, we always have to look out for the law of unintended consequences and to examine how to preclude worst-case scenarios from occurring. That brings me to my other area of major concern: accountability.

In our system of government, the Congress is responsible for enacting our laws and the Executive Branch is responsible for implementing them. Those decisions are accountable, either indirectly through public election of the officials responsible for making them, or more directly through oversight by the judiciary. Accountability is shared by each of the three branches of government through a system of checks and balances. Under this bill, accountability is transferred from the Congress to the Executive Branch through a substantial shift in the delegation of power. The Executive Branch would be granted the authority to waive numerous Federal laws without any opportunity for Congress to review those decisions. I had proposed that any statutory waivers approved by the Executive Branch must be ratified by the Congress through a "fast-track" legislative process. Unfortunately, this proposal was rejected, although I maintain that it is still relevant, particularly if the bill retains its broad scope.

The bill is silent on the issue of accountability through judicial review and the bill advocates have yet to address this matter in any form at this point in the debate. In general, judicial review is used to ensure that Federal agencies faithfully implement our laws. However, judicial review must be carefully written and balanced when proposed in legislation. Otherwise, one may end up with costly and excessive litigation. It seems to me that an appropriate course of action might be to prohibit judicial review of the actions of the Community Empowerment Board (CEB) while allowing judicial review of the agencies' actions as provided or under existing law. In that way, we can avoid potentially entangling an entity in the Executive Office of the President in needless litigation while ensuring that agency decisions are judicially reviewable, but only as permitted under existing law so as not to open up any new causes of action to take agencies to court.

In this bill, accountability issues not only need to be addressed through ensuring the proper roles of Congress and the judiciary, but also must be encompassed in the submittal, review, approval, and evaluation process that flexibility plans must go through. The legislation does place an emphasis on performance measurement in the flexibility plan process. Applicants must demonstrate through specific goals and performance measures how greater flexibility will allow them to improve the existing performance of the eligible Federal financial assistance programs proposed under the flexibility plan. These provisions are among the strong points of the bill and have been strengthened at the suggestion of my staff, although

some of these provisions still need further refinement (See later comments).

Allowing greater public input and comment into the plan development process is another way to increase accountability under this legislation. Section 6(b)(4) stipulates that applicants must include in their applications written documentation showing that there was significant public input into the development of the plan, including input from those who are beneficiaries under the plan as well as from those directly affected by its implementation. This provision was inserted at the suggestion of my staff and ensures that plans go through a thorough public vetting at the State and local level before coming to the Federal government for review. However, I also believe that plans should be judged by the Board and agencies on the level of public input into and consensus behind a plan. Therefore, similar language should be adopted under Section 7; otherwise, the Section 6(b)(4) requirement is meaningless. Furthermore, the plan development and approval process must also be a public process at the Federal level as well. Federal agencies should place an announcement in the Federal Register once a plan has been received for review, and then make that plan available to any member of the public at their written request. Unfortunately, this suggestion was not included in the substitute.

Competition is a third means to ensure accountability. My staff proposed that applications be submitted to the CEB between January 1 and March 31 of the calendar year, with the CEB making final decisions on plan approval by no later than July 31. The logic behind this concept is that plans would be reviewed at around the same time, making it easier for the CEB and agencies to evaluate, compare, and rank similar proposals against each other and then approve those proposals that are the best within the pool of applications. Currently, the bill establishes a "rolling" process whereby proposals are submitted at any time during the calendar year, with the SEB and agencies then having 120 days to make a decision on plan approval or denial. This process is more ad hoc than a process that works on a calendar basis; thus, proposals are less likely to be evaluated in a competitive fashion.

The final issue concerning accountability deals with how Federal funds are best protected from possible waste, fraud, and abuse in the implementation of flexibility plans. Unfortunately, even with enhanced safeguards and measures we have initiated through actions of this Committee in the past, the potential always exists for the mismanagement of taxpayer dollars. This is true not only on the federal level—and the Committee held numerous hearings under my Chairmanship exposing such problems—but at the State and local level as well.

At the one Committee hearing on this bill, I referred to an investigation that has just been completed in my own home State of Ohio. In that case, officials of a local community action agency spent federal anti-poverty funds to lease and purchase new vehicles, among them a Corvette, for primarily their own personal use. Another recent audit found that a local entity was receiving federal money for programs which existed only on paper. Although both of these schemes were ultimately detected, it took several years. There was a breakdown at all levels of government. Audits and in-

spections that were supposed to be made on a periodic basis were not. And when they were, they were insufficient to prevent or detect the ongoing waste and mismanagement.

It has been my concern that increased flexibility could potentially result in less accountability. I doubt any of us want this legislation to fail because of inadequate protections to guard the public purse. In order to succeed, a truly intergovernmental framework of cooperation in financial management and accountability must be realized. This would entail proper internal fiscal and accounting controls and objective performance measurements and evaluations. Compliance with the Single Audit Act and other grant management requirements is essential. While I do not want to impose unnecessarily rigid or duplicative requirements on States and localities—indeed, I would support alternatives that meet current standards but without the administrative burdens—neither do I want to totally dispense with them in the name of flexibility.

At my suggestion, the Deputy Director for Management of the Office of Management and Budget (OMB) asked the President's Council on Integrity and Efficiency (PCIE) to review the Administration's "redlined" version of S. 88. This was a revised draft of Senator Hatfield's original legislation, reflecting comments and input from other federal agencies, which OMB presented to the Committee for our consideration as we moved towards mark-up. The PCIE was tasked specifically to identify concerns regarding financial management and accountability issues affecting the use of federal funds and the achievement of national and local program goals. This review, which I found most helpful, along with OMB's response, are attached. It is a good general "primer" for anyone concerned with how to best preserve sound financial management controls as we proceed to offer State and local interests more flexibility in administering federal grants.

The bill we have reported out is a different version of S. 88 than the PCIE was asked to examine, and I am glad that it does incorporate some of the concerns they raised to the earlier "redlined" draft. Nonetheless, the legislation still falls short of all the protections I feel are necessary to ensure we will have sufficient financial management and accountability safeguards. We will need to do more work in this area. Indeed, I am pleased to note that OMB has pledged its commitment to address these remaining concerns, both in terms of supporting specific amendments to strengthen the bill or through subsequent implementing guidance or instructions.

While scope and accountability are the two major concerns with this bill, there are other significant issues that are not resolved or only partly resolved.

At the suggestion of my staff, a number of protections for State and local governments have been added to the legislation. The Board is now prohibited from pre-empting or waiving any State, local, or tribal law or regulation in the approval of any flexibility plan. In addition, the Board can not override any existing State or local administrative plan for the distribution of Federal funds, although this language still needs further clarification. Finally, the prescriptive Community Advisory Committee mandate has been removed, leaving State and local governments the flexibility to design their own mechanisms for receiving public input in the develop-

ment of flexibility plans. However, the bill still contains overly burdensome reporting requirements for State and local governments and other applicants. They must submit a report annually to the Board for each of the 5 years a plan is in effect. My preference would be to scale this requirement back to submittal of just an interim report and a final report.

In addition to the concerns that I have raised, both the Clinton Administration and others have commented about other problems in the bill that should be corrected. They included the following:

- Strengthen language that ensures Federal funds can not be made fungible across unrelated grant programs.

- Establish agency primacy, rather than the Board, over entering in MOUs as well as over the revocation of waivers. Further clarify agency authority over the granting of waivers.

- Provide the President flexibility to appoint other Executive Branch officials to the CEB.

- In the Definitions section, clarify that the legislation covers only discretionary grant programs and does not apply to taxation or loan guarantees.

- Reconcile the roles of the CEB and OMB in streamlining grant application paperwork and reporting requirements.

- Clarify that cross-cutting requirements incorporated by reference in grant programs cannot be waived.

- Require applicants to stipulate who may lose benefits or services under a flexibility plan.

- Allow regional or metropolitan planning organizations to submit plans.

- Establish a funding mechanism and/or specific authorization for the CEB.

- Give preference for agency and Board review of plans submitted under the EZ/EC program.

- Prohibit the waiver of matching fund requirements.

- Ensure that flexibility plans include performance measures that are tied to Federal goals as well as State, local, and tribal goals.

- Provide for the development of baseline data so performance can be properly tracked as plans are being implemented.

- Make plan performance measures consistent with performance measures established under the Government Performance Results Act.

- Reconcile whether a flexibility plan (or part) can still go forward even if a waiver request is denied.

- Decide whether or not a Federal waiver can be granted even if State and local waivers are pending or have been denied.

- Set up a process whereby approved flexibility plans can be amended in the out years as circumstances dictate (reforms in existing Federal grant programs, reduction or elimination of funds in those programs, etc.).

- Clarify Board and agency roles in the evaluation process of approved plans.

- Alter the maintenance of effort provisions so as not discourage applicants from including related State and local funds as part of any plan.

This long list along with my earlier comments shows that the bill was marked up prematurely and without adequate hearings involving affected parties.

The Administration, in a 5/16/96 letter from OMB Deputy Director for Management John Koskinen to Chairman Stevens (see attached), asked that the legislation be considered by the Committee at a later date so that the Administration would have time to review the substitute for changes it suggested as part of its "redline." The letter was particularly critical of the House counterpart to S. 88 for making Federal civil rights, labor, health, safety, environmental, and educational protections subject to waiver.

As I stated earlier, I believe that many of these problems could have been worked out had we had more hearings and greater time to deliberate within the Committee. While I cannot support the bill in its current form, it is my intent to work with Senator Hatfield, the Administration, and others to correct many of these problems so we can develop bi-partisan legislation that can overwhelmingly pass the Senate.

JOHN GLENN.

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, DC, May 16, 1996.

Hon. TED STEVENS
Chairman, Committee on Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: As you know, the Administration supports efforts to encourage innovation and entrepreneurship at the State and local levels. In a time of declining Federal resources, the granting of waivers and the providing of flexible funding streams are two ways to increase the impact of Federal programs. "Local Flexibility" legislation could become a useful tool to promote greater efficiency and innovation in intergovernmental service delivery programs.

In Alice Rivlin's April 17, 1996 letter to Chairman Shays and you, she identified our major concerns with H.R. 2086, the version of local flexibility approved by the House Subcommittee on Human Resources and Intergovernmental Relations. The Administration was deeply troubled by the shift of focus in the House bill from affording flexibility in Federal assistance programs to making fundamental statutes, including important health, safety, labor, educational, financial, environmental, and civil rights protections subject to waiver.

The amendment in the nature of a substitute, we understand will be offered by Senator Hatfield at the markup this morning, is a substantial improvement over the House bill. Unfortunately, since we only received the draft yesterday afternoon, neither the Federal agencies responsible for administering the over six hundred domestic assistance programs, nor affected States and communities, have had a chance to review the amendment. Therefore, we cannot support the substantially revised bill until these parties

have an opportunity to assess whether the legislation as redrafted will work as intended.

Some of the particular issues the agencies need to review are the impact of:

The newly defined waiver authority, and in particular, whether it is sufficiently bounded to prohibit waiving fundamental cross-cutting statutes;

The elimination of the list of "exemptions," and whether the bill opens-up to waiver important standards specified in any of the numerous grant program statutes;

The new authorities and reporting requirements for the Director of OMB;

The revised sequence and timing of events (application, review, approval of plans, development of the memorandum of understanding, approval of waivers, etc);

The execution of the MOU by the CEB rather than the agencies responsible for the grant programs; and

Deletion of the authorization for a revolving fund to enable agencies to underwrite the cost of the CEB's coordination, outreach, review of plans, and technical assistance.

While we appreciate the substantial progress made within the last several days, we are concerned, that, without more thoughtful consideration by the responsible agencies and those affected by their programs, we will act in such haste that we may create problems that are not intended, but are nonetheless real. Therefore, we urge the Committee to delay markup to give those affected by the bill an opportunity to advise whether this statute will work effectively.

We look forward to working with you to address these concerns and to develop a bipartisan bill that we can all support.

Sincerely,

JOHN A. KOSKINEN.

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, DC, April 8, 1996.

Hon. JUNE GIBBS BROWN,
Vice Chair, President's Council on Integrity and Efficiency, Office of
the Inspector General, Department of Health and Human Services,
Washington, DC.

DEAR JUNE: Thank you for the very timely and helpful report on S. 88, "The Local Empowerment and Flexibility Act of 1995." The report responds to my request that the President's Council on Integrity and Efficiency (PCIE) review the bill to identify any concerns regarding financial management and other accountability issues affecting the use of Federal funds and the achievement of national and local program goals.

As you know, the Administration believes that such "Local Flex" legislation could help promote greater efficiency and innovation in intergovernmental service delivery programs. "Local Flex" would provide an opportunity for State and local governments to propose plans to improve coordination of Federal, State, local, and non-prof-

it funds and services, and to request waivers from Federal laws and regulations that hinder the implementation of those plans.

To assist the Congressional Committees considering this legislation, OMB and the agencies developed a “redlined” redraft of the bill, indicating the changes necessary to accommodate our concerns with the bill as drafted. Your report concludes that our proposed “redline” revisions do indeed address many concerns that the PCIE had with S. 88 and recommends that we consider a number of further actions to clarify the importance of financial management and accountability. We agree with your suggestions and will address them as follows:

1. Grants management common rule. Rules implementing the legislation will require grantees to adhere to the uniform administrative requirement for grants and cooperative agreements, known as the grants management “common rule.”

2. Tribal governments. In recognition of the wide program consolidation authority already available to tribes and possible conflicts with the Indian Self-Determination Act, we will not propose extending S. 88 to tribes.

3. Local flexibility plan goals. We will propose that the goals in local flexibility plans should be “specific” rather than “general.”

4. Ceasing or reducing services or benefits. We will suggest that the legislation be modified to require applicants to “explain” the rationale for ceasing or reducing services or benefits.

5. Role of State governments. We will support changes in the legislation to clarify that States will have the opportunity to review, as appropriate, all plans proposed by local governments.

6. Monitoring and evaluation responsibilities. Implementing procedures will explore using a “cognizant Federal agency” concept to monitor and evaluate local flexibility plans.

7. Termination of a local flexibility plan. We will urge that the legislation provide for terminating a plan for fraud or abuse.

In conclusion, I want to express my appreciation for the fine work done on this project by Jack Ferris and Tom Robertson. Their discussions with OMB staff, along with the observations and suggestions in the PCIE report, will be very useful when we develop implementing procedures and instructions.

This has been another in a series of excellent PCIE projects and we look forward to continuing to work with the PCIE on similar matters in the future.

Best wishes.

Sincerely,

JOHN A. KOSKINEN.

[From the President's Council on Integrity & Efficiency]

Memorandum for the Honorable John A. Koskinen, Deputy Director for Management, Office of Management and Budget.
 Subject: President's Council on Integrity and Efficiency—Review of Office of Management and Budget's Draft Amendments to S. 88 "The Local Empowerment and Flexibility Act of 1995."

This report is in response to your request that the President's Council on Integrity and Efficiency (PCIE) review the Office of Management and Budget's (OMB) draft amendments (hereafter referred to as the redline draft) to S. 88 "The Local Empowerment and Flexibility Act of 1995." The objective of the PCIE review of the redline draft dated February 12, 1996, was to identify any concerns that the PCIE had regarding financial management and other accountability issues affecting the use of Federal funds and the achievement of national and local program goals.

The redline draft to S. 88 included several proposed amendments to the bill. Some of the most significant amendments:

Revise the review and approval processes. The redline draft establishes the Community Empowerment Board (CEB) to approve and monitor local flexibility plans¹ submitted by State, local and tribal governments. It also authorizes the CEB to develop criteria to select proposed plans for detailed review, and extends the time frames for review to 60 days for State Governors and 120 days for the CEB.

Increase the role of Federal agencies. The redline draft requires that all requests for waivers of Federal requirements be approved by the Federal agencies responsible for administering the Federal programs included in a local flexibility plan. It also requires, as a condition of CEB approval, that each State, local or tribal government and each qualified organization that would receive financial assistance under a plan enter into a memorandum of understanding with the Federal agencies.

Strengthen audit requirements. The redline draft requires State, local and tribal governments to submit audits required under the Single Audit Act of 1984 to the CEB, a requirement not subject to waiver.

While the redline draft of S. 88 addresses numerous concerns that the PCIE had with the bill, we have identified additional revisions that would further ensure accountability over the use of Federal funds and the achievement of national and local goals. As summarized below, the PCIE has concerns about financial management and accountability issues dealing with the need to: (1) require applicant governments to meet uniform financial management and accountability standards such as those found in the grants management common rule; (2) clarify procedures relative to the application, review and approval of proposed local flexibility plans; and (3) clarify procedures for the monitoring and evaluation of operating local flexibility plans.

¹A local flexibility plan combines funds from Federal, State, local or tribal governments or private sources to address the service needs of a community.

The applicant governments should be required to meet uniform financial management and accountability standards such as those found in the grants management common rule

The “Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments,” generally referred to as the grants management common rule, provides sound financial management and accountability standards for State, local and tribal governments. Compliance with the common rule, which sets minimum standards without being overly prescriptive, should be specifically required of applicant governments either in the redline draft or in implementing instructions. (Page 6)

Procedures should be clarified for the application, review and approval of proposed local flexibility plans

Tribal governments already have wide program consolidation authority under the “Indian Self Determination and Education Assistance Act.” If OMB intends to propose including tribal governments under S. 88, the redline draft should: provide instructions as to how tribal governments are to apply for an approved local flexibility plan; clarify that S. 88 applies only to Federal programs not already covered by the Act; and exempt this Act from waiver in S. 88. (Page 7)

The goals included in proposed local flexibility plans should be “specific” rather than “general,” and the CEB should be required to determine the reasonableness of the goals during the application review process. (Page 7)

State, local and tribal governments proposing to cease or reduce services or benefits to groups of individuals under a local flexibility plan should explain the rationale for this action, similar to the explanation required in the redline draft for waivers of Federal requirements. (Page 8)

The role of State governments in the application review process should be clarified to ensure they have the opportunity to review, as appropriate, all local flexibility plans proposed by local governments. (Page 9)

Procedures should be clarified for the monitoring and evaluation of operating local flexibility plans

The monitoring and evaluation responsibilities of Federal agencies and State governments should be clarified. Use of the “cognizant Federal agency” concept may be particularly applicable in this situation. (Page 9)

The conditions under which an approved local flexibility plan can be terminated by the CEB should be expanded to include fraud and abuse related issues. (Page 10)

OIG recommendations and OMB response

In a draft report to OMB dated March 8, 1996, we made recommendations (page 11) that addressed the PCIE concerns with the redline draft. The recommendations were for OMB’s consideration prior to submission of the redline draft to Congress. We also discussed another issue—the scope of S. 88—which was also a concern of the PCIE (See Other Matters section of this report on page 12). While the broad scope of the bill may not be directly related

to financial management and accountability issues, it may have an impact on the implementation of the bill and is, therefore, relevant to this review.

On March 14, 1996, representatives of the Department of Health and Human Services' Office of Inspector General (HHS/OIG) and OMB discussed the draft report. The OMB representative generally agreed with the recommendations, stating that the issues raised in the draft report point to a need to clarify the language in the red-line draft or in the implementing instructions which are to be issued after enactment of S. 88.

BACKGROUND

The "Local Empowerment and Flexibility Act of 1995" was introduced on January 4, 1995 by Senator Mark Hatfield as Senate Bill S. 88. An identical companion bill, H.R. 2086, was introduced on July 21, 1995 by Congressman Christopher Shays. The preamble of S. 88 states that it was intended "to increase the overall economy and efficiency of government operations and enable more efficient use of Federal funding, by enabling local governments and private, nonprofit organizations to use amounts available under certain Federal assistance programs in accordance with approved local flexibility plans."

The S. 88 is substantially similar to a bill introduced in the 103rd Congress by Congressman John Conyers, H.R. 2856, "Local Flexibility Act of 1993." The bill was then reintroduced as the "Local Empowerment and Flexibility Act of 1994," and passed the Senate as "Title XI of H.R. 820, National Competitiveness Act of 1994." The 1994 legislation, ultimately eliminated in conference, contained most of the features of the 1993 and 1995 bills, but was a demonstration program limited to no more than 30 local governments from no more than 6 States.

The S. 88 and its earlier versions are consistent with the Administration's goal of increasing State and local flexibility in administering federally-funded programs. According to the September 1994 report of the Vice President's National Performance Review, this goal includes two efforts: the "top-down effort" to "consolidate a slew of separate Federal programs so they can provide funds for States and localities in broader categories," and the "bottom-up effort" to "increase State and local authority to spend Federal funds in the most effective way."

The current Administration has also made increasing use of statutory waivers that are available to the States. Under Aid to Families with Dependent Children (AFDC) and Medicaid, States may apply to the Secretary of HHS for waivers of statutory and regulatory requirements to implement approved "demonstration projects." At present, 37 States are operating their AFDC programs under statutory waivers and 10 States are operating their Medicaid programs under statewide waivers. Moreover, the Administration has substantially shortened the time frame for considering waiver applications, by completing its review within 90 days after receipt.

The S. 88 would greatly expand the use of waivers by allowing localities to design individually tailored "local flexibility plans" to consolidate Federal, State, local and private, nonprofit grant funds, and to waive statutory requirements that would impede implemen-

tation of such plans. In formulating the plans, no restriction is placed upon the particular funding source or program area that was initially intended for the funds. No restriction is placed upon the number of localities that may participate. Plans must be approved by a Federal Governmentwide "Flexibility Council" and implementation would be assisted locally by a "Community Advisory Committee." The bill appears designed to exempt Medicaid, AFDC, and other "entitlement" programs. The Act is repealed on the date that is 5 years after enactment.

Legislation similar in concept to S. 88, but more limited in scope, include the "Goals 2000: Educate America Act," Public Law 103-227 (March 31, 1994), and the Empowerment Zone/Enterprise Community (EZ/EC) program, enacted as Subchapter C of Title XIII of the "Omnibus Budget Reconciliation Act (OBRA) of 1993," Public Law 103-66 (August 10, 1993).

Section 311(e) of Goals 2000, creating "educational flexibility demonstration programs," authorized the Secretary of Education to select six States for the purpose of delegating to the States themselves authority to grant waivers of both State and Federal education statutes and requirements. States are selected on the basis of applications that must demonstrate the quality and scope of "educational flexibility plans," designed to foster comprehensive educational reform in the State.

The EZ/EC program authorizes the Secretaries of Housing and Urban Development (HUD) and Agriculture to designate 95 "enterprise communities" and 9 "empowerment zones," each of which must satisfy rules regarding size and population and be characterized by "pervasive poverty, unemployment, and general distress." The law extends significant tax advantages to the designated areas and provides funding from HHS.

You testified in support of S. 88, with reservations about certain aspects of the legislation, on December 5, 1995. In accordance with OMB Circular A-19, OMB has sought and received Executive agency comments on the bill, and has incorporated many of the comments in its redline draft to S. 88 dated February 12, 1996.

OBJECTIVES OF PCIE REVIEW

This report responds to your request that the PCIE review accountability issues raised by S. 88 and its implementation. The objective of the PCIE review of the OMB redline draft of S. 88 was to identify any concerns that the PCIE has regarding financial management and other accountability issues affecting the use of Federal funds and the achievement of national and local program goals.

The HHS/OIG was designated as lead agency for this PCIE assignment. By memorandum dated February 13, 1996, OMB provided the HHS/OIG with a copy of its redline draft dated February 12, 1996. The HHS/OIG provided copies to OIGs from the following Departments: Agriculture, Commerce, Education, HUD, and Transportation. A copy was also provided the OIG of the Environmental Protection Agency. The OIGs were asked to comment on S. 88 and the redline draft.

Comments received from the OIGs were incorporated into a draft report, which was then provided to the OIGs who had submitted

comments. The information contained in this report represents a general consensus on the major concerns expressed by the OIGs.

RESULT OF PCIE REVIEW

The PCIE believes that the redline draft addresses many of the PCIE concerns with S. 88. We have identified, however, additional actions that can be taken to further ensure accountability over the use of Federal funds and the achievement of national and local goals. The recommended actions deal with the need to: (1) require applicant governments to meet uniform financial management and accountability standards included in the grants management common rule; (2) clarify procedures for the application, review and approval of proposed local flexibility plans; and (3) clarify procedures for the monitoring and evaluation of operating local flexibility plans.

UNIFORM FINANCIAL MANAGEMENT AND ACCOUNTABILITY STANDARDS

The applicant governments should be required to meet uniform financial management and accountability standards included in the “Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments,” which is generally referred to as the grants management common rule. The common rule imposes an acceptable degree of accountability on governments applying for the plans without being overly prescriptive.

The grants management common rule was originally issued in March 1988, and subsequently codified in regulations by Federal agencies. For example, in HHS the common rule is found in 45 CFR Part 92, while in the Department of Defense, it is found in 32 CFR Part 33. The common rule provides uniform fiscal and administrative requirements applicable to all types of grants and cooperative agreements to State, local, and tribal governments. Uniform minimum requirements for financial management systems cover financial reporting, accounting records, internal controls, allowable costs, matching or cost sharing, source documentation and cash management. The grants management common rule also incorporates applicable cost principles (OMB Circular A-87 for State, local, and tribal governments, and OMB Circular A-122 for private nonprofit organizations), and includes reports, record retention and enforcement requirements.

The redline draft (Section 7(c)(8) page 15 line 2) requires the applicant governments to include in a proposed local flexibility plan the fiscal control and related accountability procedures applicable under the plan. However, there is no mention of any minimum standards for these fiscal controls and accountability procedures. In discussing this issue, OMB representatives stated that they have every intention of having applicant governments comply with the grants management common rule, and that the rule is covered under Title II, Section 503(b)(2)(c) of the Chief Financial Officers Act of 1990. The section cited deals with functions of the Deputy Director for Management (OMB) relating to grant, cooperative agreement, and assistance management. It does not refer directly to the grants management common rule.

The PCIE believes that a requirement for applicant governments to comply with the grants management common rule needs to be

further emphasized. This could be accomplished by either adding language in the redline draft (Section 7(c)(8) appears to be a suitable location for such language) or by emphasizing compliance in the implementing instructions to be issued after enactment of S. 88.

THE APPLICATION, REVIEW AND APPROVAL OF PROPOSED LOCAL FLEXIBILITY PLANS

The redline draft revises provisions in S. 88 relative to the application, review and approval of local flexibility plans proposed by State, local and tribal governments. The PCIE has identified additional revisions that would further clarify the procedures dealing with: (1) tribal governments; (2) goals included in a local flexibility plan; (3) ceasing or reducing of services and benefits; and (4) the role of State governments in the application review process.

Tribal governments

Tribal governments already have wide program consolidation authority under the “Indian Self Determination and Education Assistance Act” (hereafter referred to as the Act). If OMB intends to propose including tribal governments under S. 88, the redline draft needs to be revised.

Although the S. 88 does not include tribal governments, the redline draft extends eligibility to them. If OMB believes that tribal governments should be covered under S. 88, the redline draft should be revised to: (1) provide instructions as to how tribal governments are to apply for an approval local flexibility plan as instructions in the redline draft (Section 7(d) page 15 line 15) apply only to proposed local flexibility plans developed by one or more local governments; (2) clarify that S. 88 applies only to Federal programs not already covered by the Act; and (3) exempt the Act from waiver in S. 88.

Local flexibility plan goals

The goals included in local flexibility plans should be “specific” rather than “general,” and the CEB should be required to determine the reasonableness of the goals during the application review process.

The S. 88 requires that the contents of a proposed local flexibility plan include “specific” goals, measurable performance criteria, and a description of how the plan is expected to attain the goals. The redline draft makes some language changes to the bill’s provisions regarding goals. One change is that the plan would no longer be required to contain “specific” goals but only “general” goals (Section 7(c)(4)(A) page 13 line 17).

The PCIE believes that OMB needs to revisit this issue. It appears as if this proposed change may not reflect an OMB intent to eliminate the need for “specific” goals in a local flexibility plan since the redline draft refers to “specific” goals in another section (Section 8 (c)(1)(C) page 19 line 21). In any event, it is our opinion that eliminating the requirement that applicants include “specific” goals in their local flexibility plans is a mistake. The less specific the goals are, the harder it will be to meaningfully evaluate the success of the plans.

As part of the plan approval process, the redline draft (Section 8(c) page 18 line 20) requires the CEB to determine that the applicant government has or is developing data bases for measuring performance. The CEB must also determine that the plan will more effectively achieve the general goals of each Federal program included in it. There is no specific requirement that the CEB determine the reasonableness of the goals or performance criteria in the plan. The redline draft requires such a determination only when the CEB is considering terminating a local flexibility plan (Section 9(c)(3)(A) page 32 lines 15 and 19).

The reasonableness or soundness of goals and performance criteria should be an important factor in determining whether a proposed local flexibility plan should be approved, and this determination should be made part of the approval process. For the CEB to make a determination of reasonableness, however, local governments would have to provide some type of baseline data so that the CEB could compare past achievements under the Federal programs to anticipated achievements under the local flexibility plan.

Ceasing or reducing services or benefits

State, local and tribal governments proposing to cease or reduce services or benefits to groups of individuals under a local flexibility plan should explain the rationale for this action, similar to the explanation required in the redline draft for waivers of Federal requirements.

The S. 88 includes a provision which requires, as a condition of approval of a plan, a determination that the plan adequately ensures that individuals and families who receive benefits under covered Federal financial assistance programs included in the plan shall continue to receive benefits that meet the needs intended to be met under the program.

The redline draft deletes this provision of S. 88 (Section 8(c)(1)(G) page 20 line 13), and adds a new provision (Section 7(c)(3)(B) page 13 line 12) which requires that the local flexibility plan shall identify the group of individuals, by service needs, economic circumstance, or other defining factors, who would cease to receive services or benefits under the plan, or receive fewer services or benefits.

The PCIE recognizes that Federal financial assistance programs that provide benefits directly to a beneficiary or to a State as a direct payment to an individual are not eligible for inclusion in a local flexibility plan. It nevertheless appears that OMB envisions instances where State, local or tribal governments can make a conscious decision to cease or reduce services or benefits to groups of individuals. If this is OMB's intent, it should consider having applicant governments explain the rationale behind their decision. We noted that the redline draft adds a requirements (Section 7(c)(6) page 14 line 20). We believe something similar should be required when services or benefits are to be halted or reduced.

Role of State governments

The role of State governments in the application review process should be clarified to ensure they have the opportunity to review, as appropriate, all plans proposed by local governments.

The S. 88 makes it very clear that local governments are required to submit proposed local flexibility plans to the State Governor for review. The Governor has 30 days to prepare comments on the plan, describe any State laws which must be waived, and forward the application for Federal review. If the Governor chooses not to comment, the local government can send the application directly to the Flexibility Council (replaced in the redline draft by the CEB). The redline draft is not quite so clear.

The redline draft states that “proposed local flexibility plans developed by one or more local government shall be submitted to directly affected state *or* local governments for approval or disapproval at least 60 days prior to submission to the Board” (Section 7(d)(1) page 15 line 19). Using the word “or” could lead some to interpret that local governments could opt to bypass the Governor’s Office.

The language in the redline draft should be clarified to: (1) indicate that local governments will, in every case, send proposed local flexibility plans to their State government or (2) describe the circumstances under which local governments are not required to submit proposed plans to their State government. The redline draft retains the S. 88 provision allowing local governments to send the applications directly to the CEB should the Governor fail to comment within a specified time frame. With this protection, the PCIE envisions that virtually all proposed plans from local governments should be first submitted to the State government for review and comment.

MONITORING AND EVALUATION OF OPERATING LOCAL FLEXIBILITY PLANS

The monitoring and evaluation responsibilities of the Federal agencies and State governments should be clarified to ensure that governments at all levels realize that operating local flexibility plans are subject to review by Federal agencies and State governments that have programs in the plans. Also, the redline draft should be revised to permit the CEB to terminate local flexibility plans on the basis of fraud and abuse related issues.

Monitoring and evaluation responsibilities

The monitoring and evaluation responsibilities of Federal agencies and State governments should be clarified. Use of the “cognizant Federal agency” concept may be particularly applicable in this situation.

The redline draft assigns monitoring responsibility to the CEB and requires State, local and tribal governments to adhere to the audit requirements of the Single Audit Act of 1984. The single audit requirement included in the redline draft, although a major addition to S. 88, is not a substitute for management oversight and program reviews by Federal agencies. Since the bill primarily focuses on approved performance goals as a measure of program effectiveness, there is a need for a review of the local government’s system to account for performance measures and program achievement.

The redline draft does not directly address the monitoring and evaluation roles of the Federal agencies and State governments.

We note, however, that one section of the redline draft (Section 9(c)(3)(B) page 33, line 8) states that Federal agencies and State governments shall have a reasonable period of time to resume administration of Federal programs included in a local flexibility plan which is terminated by the CEB. The use of the word resume could be interpreted by some as meaning that Federal agencies and State governments relinquish administration of programs while the local flexibility plan is in effect.

In discussing this issue with an OMB representative, we were assured that Federal agencies and State governments will retain their monitoring and evaluation responsibilities. We believe this needs to be further emphasized. As is the case with the grants management common rule, this emphasis can be accomplished by either adding language in the redline draft (the section dealing with memoranda of understanding seems a suitable location for such language) or by emphasizing the roles of the Federal agencies and State governments in implementing instructions.

Included in the implementing instructions should be details on how monitoring and evaluation will be conducted at the Federal level. Several options are available. Since local flexibility plans may involve several Federal agencies, and may also move outside of the programmatic safeguards of each agency, the CEB could assume full responsibility for the monitoring and evaluation function. Another option would be to have the CEB request the Federal agency responsible for a particular program included in the plan to conduct the required review.

A third option would be for the CEB to adopt the "cognizant Federal agency approach" similar to the one now being used by the Federal Government at colleges, universities and State and local governments throughout the country. Under this approach, the CEB would designate a cognizant Federal agency based on the predominant amount of Federal funds in a local flexibility plan. That cognizant agency would assume the Federal role in monitoring and evaluating operating local flexibility plans in coordination with the CEB.

This option seems ideal for S. 88 since many Federal programs could be included in a single local flexibility plan. Adoption of a cognizant agency concept could preclude duplicative reviews being made by numerous Federal agencies, and would facilitate the settlement of audits conducted under the Single Audit Act of 1984. The cognizant agency could ensure that the government audited has implemented the recommendations in the audit, and has corrected reported deficiencies.

Termination of a local flexibility plan

The conditions under which an approved local flexibility plan can be terminated by the CEB should be expanded to include fraud and abuse related issues.

The redline draft permits the CEB to terminate an approved local flexibility plan if, after consulting with the Federal agencies, the CEB determines that: (1) the goals and performance criteria included in the plan have not been met; (2) the goals and performance criteria are not sound and that the program also would not meet goals and criteria that are sound; and (3) the State, local or

tribal government is unable to meet its commitments. These conditions under which termination is possible are specific, but not all inclusive. We believe that the CEB should be specifically authorized to terminate a local flexibility plan because of fraud or abuse related issues. This is consistent with a provision in the March 13, 1996 amendments to H.R. 2086 "Local Empowerment and Flexibility Act of 1995." The H.R. 2086 was the identical companion bill to S. 88.

CONCLUSIONS AND RECOMMENDATIONS

The OMB redline draft addresses many of the concerns that the PCIE has with provisions in S. 88 over accountability for the use of Federal funds and the achievement of national and local goals. We continue to have concerns about financial management and accountability issues regarding: compliance with uniform financial management and accountability standards; certain procedures dealing with the application, review and approval of local flexibility plans; and the role of Federal agencies and State governments in the monitoring and evaluation of operating local flexibility plans.

We, therefore, recommend that OMB consider the following actions:

1. Further emphasize the requirement that applicant governments must comply with the grants management common rule. This can be accomplished either in the redline draft or in the implementing instructions.
2. If OMB intends to propose the inclusion of tribal governments, the redline draft should be revised to: provide instructions on how tribal governments are to apply for a local flexibility plan; clarify that S. 88 applies only to those programs not covered by the "Indian Self Determination and Education Assistance Act"; and exempt this Act from waiver.
3. Clarify the language in the redline draft to show that local flexibility plans must include "specific" goals, and propose that the CEB specifically review the reasonableness of the goals included in a plan prior to approving the plan.
4. Revise the redline draft to require that an applicant government explain in the local flexibility plan the rationale for ceasing or reducing services or benefits to groups of individuals.
5. Clarify the language in the redline draft to: (1) indicate that local governments will, in every case, send proposed local flexibility plans to their State government; or (2) describe the circumstances under which local governments are not required to submit proposed plans to their State government.
6. Emphasize that Federal agencies and State governments retain their monitoring and evaluation responsibilities for programs included in an operating local flexibility plan. This can be accomplished either in the redline draft or in the implementing instructions.
7. Revise the redline draft to permit the CEB to terminate a local flexibility plan on the basis of fraud and abuse related issues.

OMB response to recommendations

On March 14, 1996, representatives of the HHS/OIG and OMB discussed the draft report. The OMB representative generally agreed with the recommendations, stating that the issues raised in the draft report point to a need to clarify the language in the red-line draft or in the implementing instructions which are to be issued after enactment of S. 88.

OTHER MATTERS

During our review of S. 88 and the redline draft, we became aware of an issue that, although not directly related to financial management or accountability, could impact on the implementation of the bill. The issue relates to the scope of S. 88, which is very broad, encompassing as it does thousands of local governments and hundreds of Federal programs with different goals and objectives. A single local flexibility plan consist of any number of Federal programs involving any number of Federal agencies, and there appears to be no limit on the number of local flexibility plans that can be submitted to the Flexibility Council (similar in purposes to the CEB established in the redline draft) for review and approval.

The PCIE believes that effective reviews, particularly at the Federal level, of proposed local flexibility plans are essential since the intermingling of Federal funds within a plan poses an inherent risk that funds could be spent for purposes other than those intended by individual Federal program statutes. The PCIE noted, however, that the Flexibility Council responsible for the reviews at the Federal level was not funded under S. 88, and was dependent on Federal agencies for staff to carry out its functions. We were concerned that the flow of paperwork generated by local governments could potentially overburden the Federal and State review process, and could ultimately impact on the success of the bill's implementation.

We noted that the redline draft made several revisions which affect the implementation of S. 88. On one hand, the redline draft broadens the bill's scope by extending eligibility to State and tribal governments (S. 88 applies only to local governments), and by redefining the term "local government" to include any combination of political subdivisions and local education agencies. On the other hand, the redline draft attempts to facilitate the implementation of the bill by not only extending the time frames for the completion of the Federal and State reviews but, more importantly, by allowing the CEB to be selective in what it reviews. According to the redline draft (Section 8.(a) page 18 line 1) the CEB shall to the extent practicable accept for review no fewer than 50 local flexibility plans each year, and shall develop criteria to govern the factors it will consider in determining which plans it reviews. The redline draft also provides \$1 million of funding for the CEB in Fiscal Year 1997 and allows for additional funds to be obtained from Federal agencies for the remaining years of the bill.

The PCIE believes the redline draft strengthens the implementation provisions of S. 88. We still have two concerns, however. One concern deals with the effect that the selection for review process could have on governments that submit proposed local flexibility plans only to find that their plans were not subject to a detailed

review by the CEB. The other concern deals with the unlimited number of Federal programs that could be included in a single local flexibility plan. We believe that limiting Federal programs in a plan to those with a common purpose would facilitate the development of the plan, as the governments could focus on some of the 1,390 Federal assistance programs included in OMB's "Catalog of Federal Domestic Assistance." It would also facilitate the evaluation of the plan. Without a central concept based on the similarity or program purposes, local governments could combine programs of very general scope, intermixing highway funds and safe drinking water programs, for example, thereby making it extremely difficult to determine whether Federal funds were used for the purposes intended.

We discussed this matter with an OMB representative and raised the possibility of initially implementing S. 88 on a demonstration basis, restricting implementation to a limited number of governments and Federal programs with a similar purpose. We pointed out that the Senate took a somewhat similar approach in 1994 when it passed H.R. 820, "National Competitiveness Act of 1994." Title XI of this Act (ultimately eliminated in conference) was a demonstration program limited to no more than 30 local governments from no more than 6 States.

The OMB representative believed that the redline draft, in effect, established a demonstration program in that: (1) the intent is to have the CEB review approximately 50 proposed local flexibility plans annually (OMB anticipates far fewer being received in the early years of the bill's implementation); (2) the bill would expire after 5 years; and (3) S. 88 requires the U.S. General Accounting Office to evaluate the bill's implementation. The OMB representative also indicated that implementing instructions would further narrow the focus of the bill, and the general objectives of the local flexibility plans approved under it.

In our opinion, the instructions to be issued after enactment of S. 88 will be a key factor in the successful implementation of the bill. Not only should the instructions further focus the bill and the objectives of the plans, they should also make it very clear that the intent is to review 50 proposed local flexibility plans annually. Once aware of this, applicant governments can further coordinate with the CEB and decide whether they want to spend resources to develop a proposed local flexibility plan.

Any questions or comments on this final report are welcome. Please call me or have your staff contact Mr. Thomas D. Roslewicz, Deputy Inspector General for Audit Services, Department of Health and Human Services.

JUNE GIBBS BROWN, *Vice Chair.*

