The **Mercatus Center** at George Mason University is an education, research, and outreach organization that works with scholars, policy experts, and government officials to bridge academic theory and real-world practice. The center's Regulatory Studies Program works within the university setting to improve the state of knowledge and debate about regulations and their impact on society. More information about the center can be found on the Web at www.mercatus.org. For the latest federal regulatory developments, visit www.regradar.org.

KEVIN TUMA (2)

The Precautionary Principle

STATUS: Use is under examination

The White House has established a new Interagency Work Group on Risk Management that will examine current risk management practices "with an emphasis on the role of precaution in risk policy and regulation."

When faced with uncertainty about the likelihood or magnitude of potential harm associated with human action, some advocate that government policymakers use as their guiding tenet the "Precautionary Principle." While there is no widely endorsed definition of this principle, it has been advocated in a variety of international settings.

One definition that is often referred to is the "Wingspread Statement on the Precautionary Principle," which emerged from a January 1998 meeting of environmentalists:

> When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause-and-effect relationships are not fully established scientifically.

Expressing concern that the "burden of scientific proof has posed a monumental barrier in the campaign to protect health and the environment," proponents turn to the Precautionary Principle to avoid having to justify decisions based on available evidence, but instead based on a "better safe than sorry" approach.

Precaution, while not an expressed principle of the United States, is ubiquitous in U.S. policy. It is embedded in current risk assessment procedures, particularly those directed at human health risk assessments. It is also evident in policies ranging from maintaining forests to approving new drugs and therapeutic devices.

While "better safe than sorry" may sound like common sense, such precaution may harm, rather than protect, public health. Risk assessments based on animal studies, in particular, present policymakers with only the high end of the range of possible risk outcomes. That is a problem because when agencies focus their efforts on regulating insignificant risks, they may forsake more significant risks or inadvertently create new risks.

A further problem with a precautionary approach as advocated by its proponents is that it does not recognize that inaction, as well as action, bears risks. It focuses simplistically on potential dangers associated with new technologies or activities and ignores the very real risks that could be mitigated by those technologies. As Cass Sunstein pointed out in his Winter 2002-2003 *Regulation* article "The Paralyzing Principle," the Precautionary Principle, taken literally, would forbid all courses of action, including inaction.

A more reliable approach to making policy was codified in a 1983 National Academy of Sciences report that directed regulators to separate the risk analysis process into two parts: risk assessment and risk management. Risk assessment is a purely scientific process that measures the risk of an activity. Risk management takes scientific risk assessment information and combines it with other information, such as the cost and feasibility of reducing risks, to determine what action to take.

Unlike the ambiguous Precautionary Principle, this approach relies on most-likely estimates of risk based on available scientific evidence, and explicitly considers tradeoffs of different actions. Unfortunately, in current

regulatory policy, the results of the risk assessment phase tend to be systematically biased to overstate risk, which confounds the risk assessment/risk management division. Because of that systematic bias, uncertain risks are likely to be weighed more heavily than more certain risks of harm.

At a minimum, the White House Work Group should reconfirm the separation between risk assessment and risk management and recognize that, at best, precaution is a risk-management technique; there is no place for it in risk assessments. The Group should also recognize explicitly that because inaction, as well as action, poses risks, "better safe than sorry" is not a useful construct for making difficult tradeoffs.

Airline Computer Reservation Systems

STATUS: Comment period closed June 9, 2003

It has been nearly 20 years since the Civil Aeronautics Board imposed a series of regulations on the then-airline-owned Computer Reservation Systems (CRS). The Board, and subsequently the Department of Transportation, believed that airline ownership of the CRS could confer an unfair competitive advantage to the owner airlines, so it instituted detailed rules to constrain that possibility.

Since their adoption, however, two major changes have obviated whatever rationale may have existed for the rules, and have forced the DOT to consider whether the existing CRS rules are still pertinent. First, airlines have substantially divested them-selves of CRS ownership, and second, Internet-based travel sites have blossomed as alternatives to traditional CRS-based bookings conducted mainly through travel agencies. In response to those changes in the competitive environment, the DOT has proposed a rule that would loosen some of the regulatory requirements on those systems.

From a procedural perspective, it is interesting to note that the DOT considered a full deregulatory option only after the Office of Information and Regulatory Affairs — the regulatory ombudsman for the White House — insisted that the DOT include a deregulatory alternative in the proposed rule in addition to proposals that simply modified the existing rules. This forced-inclusion of a deregulation option may help to explain the patchwork approach taken by the Department in the proposed rule.

For example, the DOT has suggested it would like to retain its old rule prohibiting biasing of CRS screen displays in favor of one air carrier over another, despite offering no evidence that a biased display was harmful to consumers. (Indeed, for biasing to carry force, it must be able to persist against the wishes of travelers and travel agents, and travelers and their agents must have no recourse to correct or work around such biasing.)

On the other hand, the DOT has suggested that it sees no reason to impose CRS-type rules on Internet travel sites or to continue its mandatory-participation rule in which airlines are required to participate equally in all CRSs if they participate in any of them.

Unfortunately, the bulk of the Department's proposed CRS rule changes do not focus on deregulation, but rather seek to stipulate a variety of new or modified contract practices between CRSs and airlines and between CRSs and travel agencies. As Mercatus suggested in recent comments to the DOT on the proposed CRS regulations, such micromanaging of contract terms is at best likely to prove ineffective (as industry participants innovate along non-regulated margins), and at worst is likely to prove counterproductive (as costs are increased and air travel is made less attractive, thereby inducing consumers to pursue less-safe travel alternatives).

It should prove easier and far less socially costly, therefore, if the Department simply allowed the present CRS rules to sunset. Any rationale the rules may have once enjoyed has long since evaporated as the marketplace has moved well beyond the regulator's effective reach. R