

APPENDIX III

Additional Procedures Concerning OIRA Reviews Under Executive Order Nos. 12291 and 12498 [Revised]

June 13, 1986

MEMORANDUM FOR THE HEADS OF DEPARTMENTS AND AGENCIES SUBJECT TO EXECUTIVE ORDER NOS. 12291 AND 12498

From the time the President signed Executive Order No. 12291 on February 17, 1981, OMB has worked with the Departments and Agencies to develop and implement various procedures concerning the review of draft rules by the Office of Information and Regulatory Affairs (OIRA). We have also developed trial procedures and supported legislative proposals concerning our reviews as we have gained experience with these Executive Orders. For example last year, we implemented on a pilot basis with the Environmental Protection Agency additional procedures concerning OIRA's communications with persons outside the Federal Government.

We have also supported an American Bar Association Resolution that endorsed the President's regulatory review efforts and recommended that more information concerning our reviews be made available to Congress and the public.

The purpose of this memorandum is to advise you of additional procedures that we have determined, as a matter of administrative discretion, to implement concerning our review of draft rules under Executive Order No. 12291 and to set forth our policy on disclosure of agency regulatory program drafts under Executive Order No. 12498.

Current Procedures

These new procedures supplement our current procedures. As you are aware, Executive Order No. 12291 establishes certain procedures; the Administrative Procedure Act sets forth procedural and substantive requirements that govern agency action; other statutes establish procedures; and OIRA has adopted its own internal rules concerning its review of draft rules under Executive Order No. 12291. Furthermore, Departments and Agencies usually have established rules or practices to implement their rulemaking activities.

Attached to this memorandum are copies of some of the relevant materials concerning our reviews and procedures. Several of the most important features of these current procedures are:

Reviews Under Executive Order No. 12291

- Rules must meet statutory requirements. Executive Order No. 12291 reviews cannot result in rules not authorized by law or rules that do not carry out statutory requirements.
- Rulemaking decisions are made by agency heads. Executive Order No. 12291 makes it clear that the rulemaking authority of the agency head is not displaced by the Order.
- Rules must be based on the agency record. Executive Order No. 12291 cannot cause rulemaking decisions that are not supported by the agency rulemaking record. The law requires that all agency decisions must be rationally based on information in the agency record.
- Requirements of Executive Order No. 12291 apply only to the extent permitted by law. If there is a conflict between the Executive Order or the President's regulatory principles in Executive Order No. 12291 and the law, the law governs.

Current OIRA Procedures

- Only the Administrator and Deputy Administrator within OIRA (or someone specifically designated by them) may communicate with someone who is not employed by the Federal Government on regulations submitted to OIRA for review under Executive Order No. 12291.
- Written materials received from anyone not employed by the Federal Government are made available in OIRA's public reading room for review by the public.
- OMB has advised persons who wish to send us information about regulatory proposals to *send information to the rulemaking agency*, with a copy to us, so that the material may be made a part of the agency record.
- In general, OIRA provides *written reasons* to the agency when OIRA returns a regulation to an agency for further review because it is not consistent with the President's regulatory principles.

- OIRA issues *full reports* annually on the disposition of all rules reviewed under Executive Order No. 12291, including a list of all returned rules.

New Procedures

1. OIRA will make available, upon written request made to OIRA after publication of an ANPRM or NPRM in the *Federal Register*, copies of any draft of the ANPRM or NPRM submitted for OIRA's review under Executive Order No. 12291;
2. Similarly, OIRA will make available, upon written request made to OIRA after publication of the final rule in the *Federal Register*, copies of any draft of the final rule submitted for OIRA's review under Executive Order No. 12291;
3. OIRA will make available, upon written request made to OIRA after the ANPRM, NPRM or the final rule is published in the *Federal Register*, all written correspondence concerning the draft submitted for OIRA's review under Executive Order No. 12291 that is exchanged between OIRA and the agency head. "Correspondence" means any documents exchanged between OIRA and the head of an agency.

These procedures are derived from provisions in S. 2433, as reported from the Senate Government Affairs Committee, with Administration support, in 1984. The Report on S. 2433 (No. 98-576, 98th Congress, 2d. Sess.) contains explanatory material as to how these provisions would have been interpreted had S. 2433 been enacted. We will be guided by that material in implementing these first three provisions.

4. OIRA will send EPA copies of all written material concerning EPA rules that OIRA receives from persons who are not employees of the Federal Government;
5. OIRA will advise EPA of all oral communications concerning EPA's rules, e.g., meetings, telephone calls, that OIRA (i.e., the Administrator and Deputy Administrator) has with persons who are not employees of the Federal Government; and
6. OIRA will invite EPA to all scheduled meetings with such persons concerning EPA's rules.

In May 1985, we instituted with EPA on a trial basis other procedures to better conform our Executive Order No. 12291 review procedures to EPA's somewhat unique internal procedures and statutory provisions concerning rulemaking. (See attached letter dated May 30, 1985, Attachment D.) These procedures are practical, and EPA believes that they are useful. This Memorandum revises those procedures with EPA and makes them a part of OIRA's current procedures.

(Note: These procedures do not apply to information collection requests under the Paperwork Reduction Act of 1980, even if such requests are a part of a proposed agency rule. Other procedures apply to such matters, see 5 CFR Part 1320.)

7. OIRA will apply these procedures (#4 through #6) to any other Department or Agency that is subject to Executive Order No. 12291 if that agency elects to institute these procedures, or any part of them.

Procedures #4 through #6 presently apply only to EPA. Although patterned upon EPA's statutory and internal procedures nonetheless, OIRA is prepared to extend these procedures to other agencies if the head of the agency so requests. A current list of agencies that have requested coverage will be maintained in the public reading room.

In addition,

8. OIRA will make available upon written request to OIRA made after the Regulatory Program is published, any agency draft submission sent to OIRA under Executive Order No. 12498. A copy will be available in the public reading room;
9. OIRA will continue to publish a complete annual accounting of Executive Order No. 12291 activities;
10. OIRA will make available upon written request to OIRA made after the end of a calendar month, a list of all draft ANPRMs, NPRMs and draft final rules for which OIRA has completed review under Executive Order No. 12291 during the preceding month (and the length of our review for each); and
11. OIRA will place in its public reading room: all written material received from persons outside the Federal Government concerning agency rules; a list of all meetings with persons outside the Federal Government pertaining to rules of an agency if that agency elects to participate in procedure #6; and a list of all other communications with persons outside the Federal Government pertaining to rules of any agency if that agency elects to participate in procedure #5.

Effective Date of New Procedures

The effective date of these new procedures is June 13, 1986, as explained below.

For purposes of new procedures #1 through #3, OIRA will make available in accordance with the conditions of those procedures, all drafts of the rule (and written correspondence referred to in procedure #3) if the review under Executive Order No. 12291 began on or after June 13, 1986, or was under review on that date. OIRA reviews of draft ANPRMs, NPRMs and final rules will be separate actions for purposes of disclosure. For example, copies of a draft NPRM under procedure #1 will be available in accordance with the conditions of procedure #1 after publication of the NPRM, if it was pending on or submitted after June 13, 1986, for review under Executive Order No. 12291. Disclosure of the draft NPRM would not be delayed until publication of a final rule. The reviews are distinct events for disclosure purposes. Similarly, if a review under Executive Order No. 12291 of a draft NPRM was completed prior to June 13, 1986, it

would not be covered by these new procedures. Drafts of the final rule would be subject to procedure #2 if the final rule was pending on or submitted after June 13, 1986.

For purposes of Procedures #4 through #6, the effective date will be the date of receipt of the request by the head of an agency to have these procedures apply. They apply as of June 13, 1986, for EPA. (Trial procedures with EPA have been effective since May 30, 1985.)

Procedure #8 will apply to drafts of the agency submissions for the *1986 Regulatory Program* and thereafter. The annual accounting referenced in procedure #9 is an appendix to the annual *Regulatory Program*. The lists referred to in procedures #10 and #11 will be available in OIRA's public reading room and upon written request on the 10th day of the month following the month for which the list is made. The first list will be available August 10, 1986. All written material pertaining to rules subject to Executive Order No. 12291 review received from persons not employed by

the Federal Government as described in procedure #11 will be available within 3 to 5 days after receipt by OIRA.

These new procedures and OIRA's existing procedures are intended only to improve the internal management of the Federal Government, and are not intended to create any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its agencies, its officers or any person.

WENDY L. GRAMM
Administrator
Office of Information
and Regulatory Affairs

Attachments

- A - Department of Justice/OLC Opinion dtd 2/13/81
- B - Executive Order No. 12291 (see Appendix II)
- C - Executive Order No. 12498 (see Appendix I)
- D - OIRA Procedures #3

Attachment A

February 13, 1981

MEMORANDUM

Re: Proposed Executive Order entitled "Federal Regulation"

The attached proposed Executive Order was prepared by the Office of Management and Budget in consultation with this Office, and has been forwarded for the consideration of this Department as to form and legality by the Office of Management and Budget with the approval of the Director. The proposed Order is designed to reduce regulatory burdens, to provide for presidential oversight of the administrative process, and to ensure well-reasoned regulations. The Order sets forth a number of requirements that Executive Branch agencies must adhere to in exercising their statutory rulemaking authority. We conclude that the Order is acceptable as to form and legality.

The Order has the following major provisions. Agencies must take action only if the potential benefits outweigh the social costs; attempt to maximize social benefits; choose the least costly alternative in selecting among regulatory objectives; and set priorities with the aim of maximizing net benefits. All of these requirements must be followed "to the extent permitted by law." The Order would require agencies to prepare for each "major rule" a Regulatory Impact Analysis (RIA) setting forth a description of the potential costs and benefits of the proposed rule, a determination of its potential net benefits, and a description of alternative approaches that might substantially achieve regulatory goals at a lower cost. Agencies would be required to determine that any proposed regulation is within statutory authority and that the factual conclusions upon which the rule is based are substantially supported by the record viewed as a whole. The Director of the Office of Management and Budget and the Presidential Task Force on Regulatory Relief would be given authority, *inter alia*, to designate proposed or existing rules as major rules, to prepare uniform standards for measuring costs and benefits, to consult with the agencies concerning preparation of RIA's, to state approval or disapproval of RIA's and rules on the administrative record, to require agencies to respond to these views (and to defer rulemaking while so consulting), and to establish schedules for review and possible revision of existing

¹In *Buckley v. Valeo*, 424 U.S. 1, 140-41 (1976), the Supreme Court held that any "significant governmental duty exercised pursuant to a public law" must be performed by an "Officer of the United States," appointed by the President or the Head of a Department pursuant to Art. II, § 2, cl. 2. We believe that this holding recognizes the importance of preserving the President's supervisory powers

major rules. The Order would require agencies to defer rules that are pending on the date of its issuance, including rules that have been issued as final rules but are not yet legally effective, and to reconsider them under the Order. By its terms, the Order would create no substantive or procedural rights enforceable by a party against the United States or its representatives, although the RIA would become part of the administrative record for judicial review of final rules.

I. LEGAL AUTHORITY: IN GENERAL

The President's authority to issue the proposed Executive Order derives from his constitutional power to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3. It is well established that this provision authorizes the President, as head of the Executive Branch, to "supervise and guide" Executive officers in "their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone." *Myers v. United States*, 272 U.S. 52, 135 (1926).¹

The supervisory authority recognized in *Myers* is based on the distinctive constitutional role of the President. The "take Care" clause charges the President with the function of coordinating the execution of many statutes simultaneously: "Unlike an administrative commission confined to the enforcement of the statute under which it was created . . . the President is a constitutional officer charged with taking care that a 'mass of legislation' be executed," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 702 (1952) (Vinson, C.J., dissenting). Moreover, because the President is the only elected official who has a national constituency, he is uniquely situated to design and execute a uniform method for undertaking regulatory initiatives that responds to the will of the public as a whole.² In fulfillment of the President's constitutional responsibility, the proposed Order promotes a coordinated system of legislation, ensuring a measure of uniformity in the interpretation and execution of a

over those exercising statutory duties, subject of course to the power of Congress to confine presidential supervision by appropriate legislation. See also n. 7, *infra*.

²See Bruff, *Presidential Power and Administrative Rulemaking*, 88 Yale L.J. 451, 461-62 (1978).

number of diverse statutes. If no such guidance were permitted, confusion and inconsistency could result as agencies interpret open-ended statutes in differing ways.

Nevertheless, it is clear that the President's exercise of supervisory powers must conform to legislation enacted by Congress.³ In issuing directives to govern the Executive Branch, the President may not, as a general proposition, require or permit agencies to transgress boundaries set by Congress. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). It is with these basic precepts in mind that the proposed Order must be approached.

We believe that an inquiry into congressional intent in enacting statutes delegating rulemaking authority will usually support the legality of Presidential supervision of rulemaking by Executive Branch agencies. When Congress delegates legislative power to Executive agencies, it is aware that those agencies perform their functions subject to Presidential supervision on matters of both substance and procedure. This is not to say that Congress never intends in a specific case to restrict Presidential supervision of an Executive agency; but it should not be presumed to have done so whenever it delegates rulemaking power directly to a subordinate Executive official rather than the President. Indeed, after *Myers* it is unclear to what extent Congress may insulate Executive agencies from Presidential supervision. Congress is also aware of the comparative insulation given to the independent regulatory agencies, and it has delegated rulemaking authority to such agencies when it has sought to minimize Presidential interference. By contrast, the heads of non-independent agencies hold their positions at the pleasure of the President, who may remove them from office for any reason. It would be anomalous to attribute to Congress an intention to immunize from Presidential supervision those who are, by force of Art. II, subject to removal when their performance in exercising their statutory duties displeases the President.

Of course, the fact that the President has both constitutional and implied statutory authority to supervise decisionmaking by Executive Branch agencies does not delimit the extent of permissible supervision. It does suggest, however, that supervision is more readily justified when it does not purport wholly to displace, but only to guide and limit, discretion which Congress has allocated to a particular subordinate official. A wholesale displacement might be held inconsistent with the statute vesting authority in the relevant official. *See Myers v. United States, supra*, at 135:

³In certain circumstances, statutes could invade or intrude impermissibly upon the President's "inherent" powers, but that issue does not arise here.

⁴*Cf.* H. Friendly, *The Federal Administrative Agencies* (1962) (discussing concept of "agency expertise" as reason for delegation of power to particular agencies). The *Myers* Court reaffirmed, however, that even such officers may be dismissed at the pleasure of the President. 272 U.S. at 135.

"Of course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance." This suggestion is based on the view that Congress may constitutionally conclude that some statutory responsibilities should be carried out by particular officers without the President's revision, because such officers head agencies having the technical expertise and institutional competence that Congress intended the ultimate decisionmaker to possess.⁴ Under this analysis, of course, lesser incursions on administrative discretion are easier to support than greater ones. This Office has often taken the position that the President may consult with those having statutory decision-making responsibilities, and may require them to consider statutorily relevant matters that he deems appropriate, as long as the President does not divest the officer of ultimate statutory authority.⁵ Of course, the President has the authority to inform an appointee that he will be discharged if he fails to base his decisions on policies the President seeks to implement.⁶

A. The Order would impose requirements that are both procedural and substantive in nature. Procedurally, it would direct agencies to prepare an RIA assessing the costs and benefits of major rules. We discern no plausible legal objection to this requirement, which like most procedural requisites is at most an indirect constraint on the exercise of statutory discretion. At least as a general rule, the President's authority of "supervis[ion] in his administrative control," *Myers v. United States, supra*, at 135, permits him to require the agencies to follow procedures that are designed both to promote "unitary and uniform execution of the laws" and to aid the President in carrying out his constitutional duty to propose legislation. *See* U.S. Const., Art. II, § 3. We believe that a requirement that the agencies perform cost-benefit analysis meets these criteria. Further, the President's constitutional right to consult with officials in the Executive Branch permits him to require them to inform him of the costs and benefits of proposed action.⁷ In our view, a requirement that rulemaking authorities prepare an RIA is the least that *Myers* must mean with respect to the President's authority to "supervise and guide" Executive officials.

B. Substantively, the Order would require agencies to exercise their discretion, within statutory limits, in accordance with the principles of cost-benefit analysis. More complex legal questions are raised by this requirement. Some statutes may prohibit agencies from basing a regulatory decision on an assessment of

⁵*See generally*, 1 Ops. Office of Legal Counsel Nos. 77-21, 77-56 (1977).

⁶*See* note 4 *supra*.

⁷*See* U.S. Const., Art. II, § 2 (President may "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices").

the costs and benefits of the proposed action. *See, e.g., EPA v. National Crushed Stone Ass'n*, 101 S. Ct. 295 (1980). The Order, however, expressly recognizes this possibility by requiring agency adherence to principles of cost-benefit analysis only "to the extent permitted by law." The issue is thus whether, when cost-benefit analysis is a statutorily authorized basis for decision, the President may require Executive agencies to be guided by principles of cost-benefit analysis even when an agency, acting without presidential guidance, might choose not to do so. We believe that such a requirement is permissible. First, there can be little doubt that, when a statute does not expressly or implicitly preclude it, an agency may take into account the costs and benefits of proposed action. Such a calculus would simply represent a logical method of assessing whether regulatory action authorized by statute would be desirable and, if so, what form that action should take. In our view, federal courts reviewing such actions would be unlikely to conclude that an assessment of costs and benefits was an impermissible basis for regulatory decisions.

Second, the requirement would not exceed the President's powers of "supervision." It leaves a considerable amount of decisionmaking discretion to the agency. Under the proposed Order, the agency head, and not the President, would be required to calculate potential costs and benefits and to determine whether the benefits justify the costs. The agency would thus retain considerable latitude in determining whether regulatory action is justified and what form such action should take. The limited requirements of the proposed Order should not be regarded as inconsistent with a legislative decision to place the basic authority to implement a statute in a particular agency. Any other conclusion would create a possible collision with constitutional principles, recognized in *Myers*, with respect to the President's authority as head of the Executive Branch.

C. We believe that the President would not exceed any limitations on his authority by authorizing the Task Force and the Director to supervise agency rulemaking as the Order would provide. The Order does not empower the Director or the Task Force to displace the relevant agencies in discharging their statutory functions or in assessing and weighing the costs and benefits of proposed actions.⁸ The function of the Task Force and the Director would be supervisory in nature. It would include such tasks as the supplementation of factual data, the development and implementation of uniform systems of methodology, the identification of incorrect statements of fact, and the placement in the administrative record of a statement disapproving agency conclusions that do not appear to conform to the principles expressed in the

President's Order. Procedurally, the Director and the Task Force would be authorized to require an agency to defer rulemaking while it responded to their views concerning proposed agency action. This power of consultation would not, however, include authority to reject an agency's ultimate judgment, delegated to it by law, that potential benefits outweigh costs, that priorities under the statute compel a particular course of action, or that adequate information is available to justify regulation. As to these matters, the role of the Director and the Task Force is advisory and consultative. The limited power of supervision embodied in the proposed Order is, therefore, consistent with the President's recognized powers to supervise the Executive Branch without displacing functions placed by law in particular agencies.

II. SUSPENSION OF PROPOSED AND FINAL REGULATIONS

The Order requires Executive Branch agencies (1) to suspend the effective date of rules that have been issued as final rules, but have not become legally effective; and (2) to reconsider rules that are proposed but have not yet been made final. After suspension of final rules, agencies must reconsider all such rules in accordance with the Order. These requirements are imposed only "to the extent permitted by law" and are thus inapplicable when a judicial or statutory deadline requires prompt action. Moreover, agencies must, in complying with these directives, adhere to the requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*, and all other laws.

For rules that have not yet been made final, the APA imposes no special procedural requirements. Agencies need not follow the notice and comment procedures of 5 U.S.C. § 553, for nothing in that provision requires an agency to allow a period for comment on a decision to delay final adoption of a proposed rule. The agency's decision may, however, be subject to judicial review, and the agency may have to furnish a reasoned explanation for that decision. *See ASG Indust. v. CPSC*, 593 F.2d 1323, 1335 (D.C. Cir. 1979); *Action for Children's Television v. FCC*, 564 F.2d 458, 478-79 (D.C. Cir. 1977). The explanation here—that the agency needs time to prepare an RIA required by Executive Order—is, we believe, sufficient.

The second category of regulations covered by the Executive Order raises somewhat different legal issues. Under 5 U.S.C. § 553(b), notice and comment procedures must be followed for "rulemaking" unless "the agency for good cause finds (and incorporates the findings and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary

⁸The Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812, provides some implied statutory support for the Order by giving OMB a direct role in coordinating agency regulations that impose paperwork burdens on the public. With respect to non-independent agencies the Act gives the Director authority to disap-

prove "unreasonable" agency collection of information requests. § 3504(h)(5)(C). The Act does not authorize him, however, to disapprove the accompanying rule itself insofar as the two are separable. *See* § 3518(e); S. Rep. No. 930, 96th Cong., 2d Sess. 56 (1980).

to the public interest." Under 5 U.S.C. § 551(5), the term "rulemaking" is defined as "agency process for formulating, amending, or repealing a rule." The initial question, then, is whether an agency's decision to "suspend" a final but not effective rule is "rulemaking" which triggers the procedural safeguards of § 553.

In a recent memorandum, this Office concluded that a 60-day suspension of the effective date of a final rule should not, in general, be regarded as rulemaking within the meaning of the APA.⁹ We based our conclusion on "the clear congressional intent to give agencies discretion to extend the effective date provision beyond 30 days" and the absence of statutory language or history suggesting "that a delay in effective date is the sort of agency action that Congress intended to include within the procedural requirements of § 553(b)." Nevertheless, we believe that a short-term suspension of the effectiveness of a final rule is not the equivalent of an indefinite suspension coupled with a process designed to review the basis for the rule, with a view to establishing a new rule. Although the former seems fairly characterized as a mere extension of an effective date under § 553(d), the latter should probably be characterized as "agency process for formulating, amending, or repealing a rule" for purposes of § 553(b).

The difference between these two measures for purposes of § 553 becomes clear upon examination of the sequence of events that is expected to take place under each of them. Under the President's Memorandum of January 29, 1981, agencies are to defer the effective dates of final rules for sixty days in order to review them. The completion of that review will point to either of two dispositions. The rule might be allowed to take effect as published in final form, or it might be withdrawn for some proposed change. The first disposition would require no new procedures. The second disposition would surely contemplate an amendment or repeal of the earlier rule subject to § 553's public procedures, but the earlier deferral of the rule's effective date would remain just that.¹⁰

Under the proposed Order, the situation is analogous to the second possible disposition under the President's Memorandum. The Order, by requiring careful cost-benefit analysis of rules through the RIA process, would contemplate notices of proposed rulemaking on the preliminary RIA and a reexamination of the rule at the appropriate time. The issue to be decided at the time the rule is suspended indefinitely for the Order's process to take place is whether the rule, which has already been promulgated in final form, should be allowed to have interim effect while it is under review by the agency. We believe that this

decision is one of "formulating, amending, or repealing a rule" that requires either notice and comment procedures or good cause for dispensing with them under § 553(b). Admittedly, the difference between a short deferral of the effectiveness of a rule and an indefinite suspension for reexamination is in part one of degree. But there is also a difference in kind: once a decision to begin the process of amending a rule is made, there is no longer a plausible argument that a rule that was to take effect is merely to be delayed for a brief period.

Notice and comment procedures on the issue of the interim effectiveness of a rule that is due to undergo reexamination under the Order should take the following form. The agency should defer the rule's effective date for a period sufficient to allow a short time for notice and comment, an opportunity for the agency to consider the comments and decide the issue of interim effectiveness, and an interval before the rule takes effect sufficient to meet the purposes of § 553(d).

In deciding on the interim effectiveness of final rules subject to the Order's procedures, the final question is whether and under what circumstances agencies will have good cause to dispense with notice and comment procedures. Public procedures on interim effectiveness might be "unnecessary, impracticable, or contrary to the public interest," where the question whether there should be any rule at all was fully ventilated in the rule's comment process, or where it is clear that interim effect could impose substantial but short-term compliance costs. On the other hand, notice and comment might be needed where the rule's proponents had advanced substantial arguments for its early effectiveness, and where compliance costs are not likely to be wasted.

Such arguments must, of course, be assessed on a case-by-case basis. If the available record indicates that the costs of the rule at issue are not substantial and that the failure to allow the rule to become effective may itself be controversial, the likelihood that a court will require notice and public comment increases. The procedural requirements of the APA will, therefore, vary with the size and immediacy of the burdens imposed by the rule and the need for public comment on a decision to withdraw a final but not effective rule.

III. REGULATORY REVIEW BY AGENCY HEADS

Section 4 of the proposed Order would require agency heads to make express determinations that regulations they issue are authorized by law and are supported by the materials in the rulemaking record.

460 F. Supp. 458, 467 (S.D. Fla. 1978). This purpose, however, does not suggest that agencies may make corrections, let alone withdraw rules, during the period between a rule's publication and its effective date without offering public procedures or showing good cause for dispensing with them. Proposed corrections—or even repeals—would of course be amendments for purposes of § 553(b).

⁹Memorandum of January 28, 1981, for Honorable David Stockman, Director, Office of Management and Budget, from Larry L. Simms, Acting Assistant Attorney General, Office of Legal Counsel.

¹⁰Admittedly, one of the purposes of the 30-day effective date provision is to allow agencies to correct errors or oversights in final regulations. See Final Report, Attorney General's Committee on Administrative Procedure 114-15 (1941); *Sannon v. United States*,

These requirements are meant to assure agency compliance with existing legal principles that rules must be authorized by law, and that they should be adequately supported by a factual basis. Accordingly, we find no legal difficulty with them. In particular, they do not purport to change generally applicable statutory standards for judicial review of agency action, see 5 U.S.C. § 706, and could not have such an effect. They also do not purport to alter any specially applicable standards, such as those concerning the evidentiary standard that must be met to uphold a given rule, appearing in statutes governing a particular agency.

On the other hand, the section would add the significantly new procedural requirements that agency heads expressly determine that the legal and factual requisites for a rule have been met. The first requirement reflects the principle, central to administrative law, that agency action must be guided by the "supremacy of law." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J.). This principle protects against excess of power and abusive exercise of power by administrators. See *Report of the U.S. Attorney General's Comm. on Administrative Procedure, Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. 76 (1941). The requirement that agency heads determine that a rule has "substantial support" in the materials before the agency means that a rule's necessary factual basis must be found to exist. This second requirement should not be confused with a "substantial evidence" standard of judicial review, which could be imposed only by statute. It embodies Recommendation 74-4 (subpart 3) of the Administrative Conference of the United States, 1 CFR § 305.74.4, which urges that for a rule to be considered rational, it should be adequately grounded in a factual basis. This requirement is consistent with the approach of courts that have carefully reviewed agency action under the "arbitrary and capricious" standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). See, e.g., *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir.) (en banc), cert. denied, 426 U.S. 941 (1976).

IV. JUDICIAL REVIEW

The Order states that it is not intended to create any rights or benefits enforceable by a party to litigation against the United States, its agencies, or any other

person. At the same time, it provides that determinations of costs and benefits, and the RIA itself, are meant to form part of the agency record for purposes of judicial review. The effect of this provision is to preclude direct judicial review of an agency's compliance with the Order. The provision makes clear the President's intention not to create private rights, an intention that should be controlling here. See *Independent Meat Packers Ass'n v. Butz*, 526 F.2d 228 (8th Cir. 1975), cert. denied, 424 U.S. 966 (1976) (no judicial enforcement of Executive Order requiring consideration of inflationary impact of regulations, in part because such Order had not been issued pursuant to delegation from Congress); *Legal Aid Soc. of Alameda County v. Brennan*, 608 F.2d 1319 (9th Cir. 1979) (judicial review available of compliance with an Executive Order that had been ratified by Congress). Even without the provision, compliance with the Order would probably be immunized from review because the Order has not been promulgated pursuant to a specific grant of authority from Congress to the President and thus lacks the "force and effect of law" concerning private parties. See *Independent Meat Packers Ass'n v. Butz*, supra; *National Renderers Ass'n v. EPA*, 541 F.2d 1281, 1291-1292 (8th Cir. 1976); *Hiatt Grain Feed, Inc. v. Bergland*, 446 F. Supp. 457, 501-502 (D. Kan. 1978). The bar on judicial review of agency compliance with the Order does not, of course, prohibit a court from hearing a constitutional or statutory attack on the legality of the Order itself or of agency action taken pursuant to its requirements.

Because the regulatory impact analysis that will be required by the Order will become part of the agency record for judicial review, courts may consider the RIA in determining whether an agency's action under review is consistent with the governing statutes. This, of course, is true of all matters appearing in the rulemaking record.

V. CONCLUSION

The proposed Executive Order is acceptable as to form and legality.

LARRY L. SIMMS
Acting Assistant Attorney General
Office of Legal Counsel

Attachment D

May 30, 1985

MEMORANDUM FOR OIRA STAFF

Subject: OIRA Procedures #3

The purpose of this memorandum is to remind you of the policies of the Office of Information and Regulatory Affairs under the Paperwork Reduction Act of 1980, Executive Order No. 12291, and Executive Order No. 12498, with respect to:

- records maintenance;
- public access to records; and
- meetings with the public.

These policies are intended to ensure that our responsibilities are discharged as efficiently and openly as practicable, consistent with both the law and the need for confidential communications between the President and his executive officers. Because OIRA's role in implementing the Paperwork Reduction Act is very different from its role in implementing Executive Order No. 12291 and Executive Order No. 12498, different procedures are necessary for our actions under each of these three programs. The differences derive primarily from the different authorities involved. The rules for Executive Order No. 12291 reviews will be applied to the Executive Order No. 12498 process to the extent they are relevant in that context.

BACKGROUND

OIRA's Role Under the Paperwork Reduction Act. In summary, the Paperwork Reduction Act requires OMB to review and approve or disapprove agency requests for information from the public. In this regard, the Paperwork Reduction Act essentially recodified the clearance authority that was originally assigned to OMB (actually the old Bureau of the Budget) by the Federal Reports Act of 1942.

OMB is responsible for determining whether agency information collection requirements meet the standards of the Act. Reviews under the Act determine whether the proposed information collection request is necessary for the proper performance of agency functions, including whether the information has "practical utility," whether it is too burdensome on respondents, and whether there is a need for the information. As a result, our actions may have legal, judicially reviewable consequences and must be based upon a complete record. The Act and our implementing rule specify the procedures that OIRA must follow. The bottom line is that we are responsible for ensuring that the record is complete and constitutes a justifiable basis for our decision, and that we adhere to the required procedures in developing the record and making our decision.

OIRA's Role Under E.O. 12291 and E.O. 12498. In contrast, our review under Executive Orders No. 12291 and No. 12498 derives from the President's constitutional authority over, and responsibility for actions taken by, his executive officers in carrying out the law. He has delegated his authority to review regulations to the Director of OMB. Thus, we conduct our reviews on behalf of the Director and the President.

In conducting an Executive Order review, OMB does not make final regulatory decisions—those are assigned by law to the heads of the respective agencies and must in all cases remain the regulatory agency's responsibility. The decision is made by the regulatory agency and the agency is accountable for both the adequacy of the record of its rulemaking and for justifying the substantive validity of the decision under the applicable statutes. We review the draft regulations of departments and agencies and advise whether the draft rules and their analysis meet the President's regulatory principles, as set forth in Executive Orders No. 12291 (Section 2) and No. 12498 (Section 1). As the Executive Orders note, our review is not intended to provide any third party with any procedural or substantive right concerning the regulations.

Since some regulations contain collections of information from the public, they are subject to our review and approval under the Paperwork Reduction Act as well as under Executive Order No. 12291.

THE DECISIONMAKING RECORD

The law generally requires that agencies must compile a record of materials that justify their rulemaking actions and that will serve as a basis for judicial review. The regulatory agency is also required under the Administrative Procedure Act to provide a concise general explanation for any regulations adopted by informal rulemaking and to explain, for example, significant substantive differences between an NPRM and a final rule, including new facts or data that the agency has relied upon.

For most rulemakings the law requires only that public comments on a proposed rule and certain underlying scientific and empirical data be included with a text of the notice of proposed rulemaking and a final rule in the rulemaking record. The agency may, and usually does, include in a preamble to a rule other material in the record that is significant and relevant to the rulemaking. But the rule must be based upon and justified by the whole rulemaking record. Factual

material that is not in the rulemaking record may not be used as a basis for supporting a rule.

For paperwork reviews, OIRA is the decisionmaking agency; *we* open and maintain that record. Our decision to approve or disapprove is based upon this record and must be justified by it. The record we compile is the material that may be reviewed as the law provides by the courts.

For reviews of regulations under Executive Orders No. 12291 and No. 12498, the agency is the decisionmaker; for judicial review, its rulemaking file, not factual material available to us, is the relevant material. In accordance with the Director's Memorandum of June 11, 1981 (attached), we make available materials we receive from the public to the regulatory agency so it may consider such material and include it in its records if it chooses to do so.

When we conduct reviews and give advice under the Executive Orders, we and the agencies treat our discussions in the same way we handle such consultation on other subjects—they are not generally disclosed. We will, however, make available upon request to the public all written information that we receive from any member of the public that we consider in our review, our final recommendation letter (if any) to the agency under E.O. 12291, and, of course, any material we submit for inclusion in an agency rulemaking record.

The following additional policies should be used as guidance in implementing our responsibilities under the Paperwork Reduction Act of 1980 and Executive Orders No. 12291 and No. 12498.

RECORDS MAINTENANCE

Each OIRA supervisor is responsible for ensuring that the relevant documents are placed in the proper files on matters under their supervision.

Any supervisor (including the Administrator and Deputy Administrator) who receives written comments directly from a member of the public will promptly send a copy of the comments to the appropriate Desk Officer.

Any comments that would otherwise be included in the public record but for which the commentor proposes to limit public access should not be accepted without the approval of the Deputy Administrator. Jim MacRae is responsible for periodic review and disposition of all files for the purpose of retention, storage, or destruction, in accordance with the policies set forth below. Except in unusual circumstances, all documents that are not required by law to be retained should be disposed of when the documents that are required to be retained are transferred to the Federal Records Center.

• *Paperwork Reduction Act of 1980*

- Because the written materials in our dockets are the documentary basis for our paperwork decisions and also constitute a basis for the public to review and comment to us on the proposed agency action, paperwork clearance

dockets must be kept accurate, timely, and complete. To that end, Desk Officers should place in the docket, promptly after its receipt at OMB, any material that should be in the record.

- The record should include the following material:
 - Agency proposal and any revisions;
 - OMB worksheet;
 - All written comments from the public and other government agencies;
 - Evidence of final OMB action.
- After final action (approval or disapproval), the record should be retained in the reading room for at least 6 months. At least twice a year the Reports Management staff will review the files and send to the Federal Records Center all records for which final action has been completed for at least six months. The records will be classified as “temporary” for the Federal Records Center.

• *Executive Order No. 12291*

- Because the head of the regulatory agency, not OMB, is the decisionmaker on all rulemaking issues that come to us under E.O. 12291, we will routinely make available to the appropriate regulatory agency copies of all written materials that we receive from members of the public during the rulemaking proceeding and that are relevant to a particular informal rulemaking.
- The Desk Officer should also send to the public reading file within three days after receipt a copy of any such comments received from members of the public.
- The Desk Officer should send a copy of the final OMB written recommendation to the agency (if any) to the public reading file within three days after transmittal to the agency.
- The following material will *not* be made public, but, in addition to the final written OMB recommendations/views to the agency (if any), will be retained as part of the regulatory files:
 - draft and proposed agency materials;
 - OMB worksheets; and
 - internal OMB and interagency documents as described by 5 U.S.C. 552(b)(5).
- After completion of the OIRA review, the regulatory files should be retained for at least six months. At least twice a year, the Reports Management staff, assisted by the other Branches, will review the files and segregate all files for which the reviews have been completed for at least six months. All files of rules that were

“consistent, with no change” will be sent to the Federal Records Center. All other files will be retained within the NEOB for one year, then sent to the Federal Records Center. All files sent to the Federal Records Center will be classified as “temporary.”

PUBLIC ACCESS TO OUR DOCKETS AND RECORDS

FOIA requests should be handled in accordance with OMB FOIA procedures. In addition, we have customarily made our paperwork dockets and written information from the public available for inspection.

Notwithstanding the increased Secret Service security precautions in the New Executive Office Building, we must continue to make access to our public records as simple as possible. All clearances should be arranged through Jim MacRae’s office, ext. 6880.

To avoid confusion and misunderstanding, visitors should be told at the time clearance is sought that their clearance is limited to the public reading room. If the individual who has been cleared does not arrive at the reading room shortly after their scheduled clearance time, Jim MacRae should be notified. Jim will alert the Secret Service, which will take appropriate action. We cannot permit individuals who are cleared into the building for the reading room to roam through the building.

• *Paperwork Reduction Act of 1980*

- Current and recent records of paperwork clearance actions will be maintained in such a way as to be readily accessible to members of the public (with exceptions as provided in 5 CFR 1320.18). These files, which are the complete and official record for clearance purposes, will be kept in NEOB 3201, the reading room. They will be accessible to the public during normal business hours—9:00 am–5:30 pm.

• *Executive Order No. 12291 and No. 12498*

- We will maintain two types of documents in our public files relating to regulatory reviews—all comments received from any member of the public, and all our final recommendation letters to agencies under Executive Order No. 12291. These files will also be accessible to the public in the reading room during normal business hours.

MEETINGS WITH MEMBERS OF THE PUBLIC (including telephone contacts)

• *Paperwork Reduction Act of 1980*

- Any Desk Officer or supervisor may meet with members of the public to discuss and receive data and facts that are relevant to a paperwork clearance decision.

- Consistent with the policies of this memorandum and available time, OIRA staff must be equally accessible to all members of the public.
- In making our paperwork decision, we will consider only information that we receive *in writing*. The OIRA staff should make this policy clear during any conversation with members of the public, and should advise them to submit their comments in writing to *both* OMB and the agency concerned.
- OIRA staff may provide the public with information regarding the status of our paperwork decisionmaking process and the material and factual basis of our review, but should refrain from discussing their views of the issues or speculating on the outcome of the review.
- If an information collection requirement is contained in a proposed rule, any discussion with members of the public must be limited exclusively to the information collection request.
- Other procedures concerning paperwork reviews are set forth in 5 CFR 1320 and the Act itself.
- *Executive Orders No. 12291 and No. 12498*
 - Inquiries from persons outside of the executive branch about regulatory matters under Executive Orders No. 12291 and No. 12498 shall be referred to the Deputy Administrator’s Office or the appropriate agency.
 - Consistent with the policies of this memorandum and available time the Administrator and Deputy Administrator will be accessible to all members of the public.
 - No one within OIRA except the Administrator or Deputy Administrator will meet or talk with members of the public on Executive Orders No. 12291 and No. 12498 matters, unless specifically authorized by the Administrator or Deputy Administrator.
 - Members of the public should be advised to submit their comments in writing to the appropriate agency if they wish to submit them to OMB, as provided in the Director’s letter of June 11, 1981. They should also be advised that any materials submitted to us will be made part of the public file and made available to the appropriate agency.

ROBERT P. BEDELL
Deputy Administrator
Office of Information
and Regulatory Affairs

Attachment

June 11, 1981

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

Subject: Certain Communications Pursuant to Executive Order 12291, "Federal Regulation"

Regulatory relief is one of the cornerstones of President Reagan's program of economic recovery. As an important step in achieving regulatory relief, on February 17, 1981, the President issued Executive Order 12291, "Federal Regulation." This memorandum explains how the Presidential Task Force on Regulatory Relief and the Office of Management and Budget (OMB) will communicate with the public and the agencies regarding proposed regulations covered by E.O. 12291. It also describes certain obligations of the public and agencies in this regard.

A major purpose of the Executive Order is to ensure that, to the extent permitted by law, regulatory decisions are based upon sound analysis of the potential consequences. Toward this end, a comprehensive factual basis is essential to assist agencies and other interested parties in assessing the economic and other ramifications of proposed regulations.

Under the Executive Order, both the Task Force and OMB will be reviewing factual materials related to regulatory proposals. Both the public and the agencies should understand that the primary forum for receiving factual communications regarding proposed rules is the agency issuing the proposal, not the Task Force or OMB. Factual materials that are sent to the Task Force or OMB regarding proposed regulations should indicate that they have also been sent to the relevant agency. Pursuant to this policy, the Task Force and OMB will regularly advise those members of the public with whom they communicate that relevant factual materials submitted to them should also

be sent to the agency for inclusion in the rulemaking record. Accordingly, agencies receiving such materials from the public should take care to see that they are placed in the record.

On occasion, the Task Force staff and OMB will receive or develop factual material which they believe should be considered by an agency during a particular informal rulemaking. In accordance with advice provided by the Department of Justice, such material, when submitted to an agency for its consideration, will be identified as material appropriate for the whole record of the agency rulemaking.

Two additional matters should be noted. First, our procedures will be consistent with the holding of and policies discussed in *Sierra Club v. Costle*, No. 79-1565, slip op. at 212-20 (D.C. Cir. April 29, 1981). Second, these procedures apply only to informal rulemaking proceedings and are not in any sense intended to affect the more stringent ex parte rules applicable to agency adjudications and formal rulemakings. (Such proceedings are expressly intended by Congress to be more in the nature of formal judicial proceedings and involve bars against various forms of ex parte communication.)

DAVID STOCKMAN
Director
Office of Management
and Budget

May 30, 1985

Mr. A. JAMES BARNES
Deputy Administrator
Environmental Protection Agency

In recent discussions, you have asked us to review our present practices to ensure that factual information pertaining to EPA's rulemaking activities that is made available to us by members of the public is also made available to EPA in a timely manner.

We have reviewed our procedures and we believe that our general policies and practices under Executive Order No. 12291 are sound. However, in response to your request, we would propose certain additional procedures, beyond our existing policies and practices, which, if they are acceptable to you, we would be willing to undertake on an experimental basis.

Background

Our existing procedures implement guidance provided to us by the Attorney General in an opinion of April 24, 1981, entitled "Contacts between OMB and Executive Branch Agencies Pursuant to Executive Order 12291." It complements an earlier analysis by the Attorney General of the legal basis of the Executive Order (Memorandum re: Proposed Executive Order entitled "Federal Regulation," dated February 13, 1981). Both opinions of the Attorney General are enclosed (Tabs A and B).

The earliest of these two opinions of the Attorney General concluded that Executive Order No. 12291, which established the regulatory review process administered by the Office of Information and Regulatory Affairs was a lawful exercise of the President's Constitutional authority—

"to 'supervise and guide' Executive Officers in 'their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone' *Myers v. United States*, 272 U.S. 52, 135 (1926)."

The second opinion of the Attorney General of April 24, 1981, concluded, in part that:

- The Office of Information and Regulatory Affairs, to which the authority of the Director of OMB under Executive Order No. 12291 has been delegated, "may freely contact agencies regarding the substance of proposed regulations, and may do so by way of telephone calls, meetings, or other forms of communication unavailable to members of the public."
- "[D]isclosure obligations, if any, lie with the rulemaking agency and not with [OIRA]."
- "[OIRA] is therefore under no legal disability with respect to contact with rulemaking agen-

cies. At most, [OIRA] could adopt procedures as a matter of policy to assist the agencies in complying with our recommendation or with rules fashioned by the agencies themselves..." (p. 4).

This opinion, written before the seminal decision of the United States Court of Appeals for the District of Columbia Circuit in *Sierra Club v. Costle*, 657 F.2d 298 (1981), concluded that the judicial decisions issued until that time were "confused" as to whether an agency must include in its rulemaking record for judicial review factual information received by the agency from officials of the Executive Office of the President (EOP). The Attorney General therefore recommended that agencies include such factual information in their records in order to avoid the possibility of judicial reversal. The Attorney General did not, however, require or recommend inclusion of communications under the Executive Order that form part of the agency's deliberative process, i.e., legal and policy arguments, analyses of the facts, and factual data that cannot reasonably be segregated from deliberative material.

To implement the recommendations of the Attorney General, OMB Director David A. Stockman issued a Memorandum for the Heads of Executive Departments and Agencies on June 11, 1981, entitled "Certain Communications Pursuant to Executive Order No. 12291, 'Federal Regulation'" (Tab C). That Memorandum emphasized "that the primary forum for receiving factual communications regarding proposed rules is the agency issuing the proposal, not the Task Force or OMB."

This emphasis on the agency as the forum for receiving factual communications merely reflects, of course, the fact that the Executive Order does not divest an agency head of authority provided by law or the legal requirement that agency rules must be based upon the rulemaking record.

Since these procedures were implemented, the court's decision in *Sierra Club* has clearly established the propriety of contacts between EOP officials and agencies concerning rulemaking—indeed, it has demonstrated their importance for proper policy guidance of this critical aspect of government activity—and demonstrated that the procedures recommended by the Attorney General and implemented by the Director's Memorandum go well beyond what is required by law.

Written Materials from Persons Outside the Executive Branch

The Director's Memorandum provided that:

- Factual materials that are sent to the Presidential Task Force on Regulatory Relief or OIRA

regarding proposed regulations should indicate that they have also been sent to the relevant agency. Pursuant to this policy, the Memorandum noted that the Task Force and OIRA would regularly advise those members of the public with whom they communicated that relevant factual materials submitted to them should also be sent to the agency for inclusion in the rulemaking record.

- Accordingly, agencies receiving such materials from the public should take care to see that they are placed in the record.
- On occasion, the Task Force staff and OIRA would receive or develop factual material that they believed should be considered by an agency during a particular informal rulemaking. The Memorandum provided that, in accordance with advice provided by the Department of Justice, such material, when submitted to an agency for its consideration, would be identified as material appropriate for inclusion in the record of the agency rulemaking.

To further implement the recommendations of the Attorney General, OIRA established additional procedures, as a matter of policy, beyond the requirements of law and the recommendations of the Attorney General. Thus, we have uniformly and consistently made available to Members of Congress, the agencies, and the public copies of documents concerning an agency rulemaking that we have received from persons who are not officials or employees of the executive branch. We also strive to maintain copies of all such documents in our materials that are available for public review.

In addition to such materials being lodged in our public files and copies being made available upon request, you have asked whether copies of such documents that pertain to EPA rules could be routinely sent to EPA to help ensure that such materials are included, if appropriate, in EPA rulemaking dockets. In order to accommodate you, we will send to the General Counsel of EPA copies of all such documents that we receive from persons outside the executive branch. We will seek to provide these copies within five working days of their receipt in OIRA.

Non-written Communications with Persons Outside the Executive Branch

As you know, our practice with regard to non-written communications with persons outside the Federal Government, e.g., telephone calls and meetings, is to constrain communications that pertain to proposed

agency rules. Only the Administrator and I (or OIRA employees specifically authorized by us in unusual circumstances) are authorized to communicate with persons outside the Federal Government on the substance (as opposed to the status) of rules that are subject to review under Executive Order No. 12291. These restrictions also apply to our review of rulemaking activities pursuant to Executive Order No. 12498. These restrictions do not apply to the other functions and activities of OIRA, such as our review of information collection requests under the Paperwork Reduction Act of 1980, even if an information collection request is contained in a proposed rule. In this latter circumstance, different procedures apply. See 5 CFR Part 1320 (Tab D) and OIRA Procedures Memorandum #3 (Tab E). The limitations noted above do, however, apply to the parts of a rule that do not contain an information collection request.

Obviously, senior officials in OIRA must be able to communicate freely with members of the public and persons within the Federal Government, just as the senior officials in EPA do.¹ We have, however, limited such communications essentially to the Administrator and Deputy Administrator. Furthermore, even Doug and I usually do not communicate with persons outside the Federal Government on proposed agency rules while they are under review pursuant to Executive Order No. 12291.

Notwithstanding these procedures applicable to all rules subject to the Order, you have asked whether specific additional procedures could be fashioned to apprise EPA of factual information that becomes available to us as a result of non-written communications with persons outside the Federal Government and that pertain to proposed EPA rules. Before describing what we believe is appropriate, it is useful first to deal with an approach we have rejected and the reasons why.

“Logging”

Although you have not suggested it, we believe that a general “logging” program or some variant thereof, particularly between and within executive agencies and entities, would not be an acceptable solution and would, as a general matter, be bad policy. The Attorney General’s opinion of April 24, 1981, confirms this at pages 7–9 (Tab A). This view is also reflected in *Sierra Club v. Costle*, 657 F.2d 298, 404–408 (1981); prior congressional consideration of the issue (see pp. 3–4, Tab A); and, EPA’s own stated position on the matter (Tab F).

In a nutshell, here is why we think a general “logging” system is a bad idea.

with a regulated industry, other affected groups, and the public cannot be underestimated. Informal contacts may enable the agency to win needed support for its program, reduce future enforcement requirements by helping those regulated to anticipate and shape their plans for the future, and spur the provision of information which the agency needs.” 657 F.2d 298, 400–1 (1981).

¹As the court stated in *Sierra Club v. Costle*, “Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their commands must fall. . . . Furthermore, the importance to effective regulation of continuing contact

- It is unnecessary. There would be no adverse legal consequence even if we were to have information that is not in the agency record. An agency rule must be based on material in the record. Since EPA cannot rely on information it does not have to support a rule, see 657 F.2d 401, factual information that might be available to us from persons outside the Federal Government, that is not also made available to EPA, is not pertinent. Furthermore, an agency has no use for who-talked-to-whom entries.
- Imposition of a logging requirement would improperly interfere with the communication of policy views within the executive branch and the deliberative process itself. The court in *Sierra Club* rejected this approach. This was also a basis for Congress' rejection of the proposal to apply "ex parte" requirements to informal rulemaking. See pages 3 and 4 of Tab A, particularly footnotes 5-8.
- It is contrary to the "legislative model" of informal rulemaking² adopted by the Congress.
- It would divert attention from whether the agency's decision is a good one—the substantive issue—to how the agency made the decision.
- It would establish a paperwork blizzard if all participants in all discussions were required to "log" all communications on the thousands of rules considered every year. This would be nothing short of a bureaucratic nightmare to administer.
- A "logging requirement" would be impossible to "define." When would it begin? Who would it cover? When would it end? What would it consist of? There are neither practical nor principled answers to these questions.
- Such a procedure would logically require the agency to log all of its internal deliberative discussions also—a practical impossibility.

Additional Procedures

Nonetheless, in order to increase the amount of factual information that is available to EPA for its rulemaking decisions, and to respond to your request, we propose the following procedure which, if acceptable to you, we would try for a period of time and then reassess with you.

Whenever the Administrator or I have a meeting or a telephone call with a person outside of the executive branch concerning a proposed EPA rule subject to Executive Order No. 12291, and that meeting or telephone call provides factual information that we are not confident has also been provided to EPA, either the Administrator or I will call the General Counsel of EPA and advise him of the communication and of the relevant factual information. EPA can then do whatever it deems appropriate with regard to the information reported to the General Counsel. Furthermore, with respect to scheduled meetings, if any, we will try for a period of time and for a few rulemakings to provide an opportunity for senior officials of EPA to attend and participate, if they choose to do so. After some experience, we will reassess this procedure, as well.

Please let me know if you believe that we should initiate these procedures.

ROBERT P. BEDELL
Deputy Administrator
Office of Information and
Regulatory Affairs

Enclosures

²Where agency action resembles judicial action, where it involves formal rulemaking, adjudication, or quasi-adjudication among "conflicting private claims to a valuable privilege," the insulation of the decisionmaker from *ex parte* contacts is justified by basic

notions of due process. But where agency action involves informal rulemaking of a policymaking sort, the concept of *ex parte* contacts is of more questionable utility.

APPENDIX IV

Executive Order No. 12291 Annual Report for 1986

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I. INTRODUCTION

This report provides information on the implementation of President Reagan's Executive Order No. 12291 for the year ending December 31, 1986. It also describes trends in regulatory activity during the past decade.

Executive Order No. 12291, signed on February 17, 1981, established within the Executive branch a mechanism for improving Federal regulatory activities. The purposes of the Executive Order are to control the growth of Federal regulation and to ensure that individual regulations are well reasoned, economically sound, and coordinated with the policies of other agencies. In particular, the Order requires that all new regulations, to the extent permitted by law, adhere to the following principles:

- Agencies must base regulations upon adequate information concerning the need for and the consequences of the proposed action.
- Agencies must not issue regulations unless the potential benefits to society outweigh the potential costs to society.
- Of the alternative approaches to a given regulatory objective, an agency must select the alternative involving the least net cost to society.

To ensure compliance with these principles, the President ordered executive agencies to submit all proposed and final regulations to the Office of Management and Budget (OMB) for review before publication.

These review policies and procedures are conducted within statutory authorities. The Executive Order guides Federal regulatory officials in exercising

the discretion given them by statute. This statutory discretion is often very broad, and may be ambiguous or contradictory, but may be exercised only to the extent permitted by law. Where statutes clearly exclude economic considerations, by their terms, any Executive Order policies to the contrary are overridden. The Order applies to general policymaking, such as "informal rulemaking" under the Administrative Procedure Act. It does not apply to adjudicatory proceedings.

This is the sixth annual report on the Order's implementation. Section II describes the requirements and procedures of the Order. Section III presents detailed information on the types of rules reviewed and the types of actions taken by OMB in 1986. Comparisons are then made between 1986 data and that of 1981 through 1985. Section IV examines the nature and extent of regulatory activity since 1977 by analyzing certain statistics of *Federal Register* activity.

II. IMPLEMENTATION OF THE EXECUTIVE ORDER

The Office of Information and Regulatory Affairs (OIRA) in OMB oversees agency compliance with Executive Order No. 12291. OIRA seeks to ensure, on a day-to-day basis, that agency regulatory activity reflects the President's regulatory policies described in the Order.

OIRA reviews "major" regulations with special attention. Regulations so designated have economic costs of over \$100 million annually, or are projected to have significant effects on employment, inflation, or industry viability. A regulatory impact analysis (RIA) must accompany major regulations at both proposed and final rulemaking stages. An RIA assesses the costs and benefits of the action and its alternatives. OMB may waive the RIA requirements in special cases, for example, in order to expedite publication of an emergency regulation. Agencies must submit to OMB major proposed rules at least 60 days before publication, and major final rules at least 30 days before publication.

Executive agencies must transmit nonmajor regulations to OMB at least 10 days prior to planned publication. Executive Order No. 12291 does not require agencies to prepare RIAs for nonmajor actions, but it does require agencies to assure that their rules are consistent with the Executive Order's principles to the extent permitted by law. Many agencies perform an initial analysis of the economic impact of nonmajor rules if they believe the rule will have a significant effect, or if it will be useful in assessing the impact.

III. REVIEW OF REGULATIONS

A. Types of Rules Reviewed in 1986

OMB reviewed 2,005 agency rules in 1986 under Executive Order No. 12291. Nine agencies accounted for

80 percent of the rules reviewed (see Exhibit 1). These agencies were: the Department of Agriculture (418 rules), the Department of Health and Human Services (281 rules), the Environmental Protection Agency (197 rules), the Department of Transportation (196 rules), the Department of the Interior (144 rules), the Department of Commerce (129 rules), the Department of Education (99 rules), the Office of Personnel Management (72 rules), and the Department of Housing and Urban Development (68 rules).

Exhibit 2 shows the number of rules reviewed during 1986 by each agency. Rules are classified as either proposed or final, and either major or nonmajor. Of the rules OMB reviewed in 1986, 40.3 percent were proposed and 59.7 percent were final. Major rules constituted 3.5 percent of all rules. Nonmajor final rules were the predominant type of rule reviewed, comprising 57.4 percent of the total of all rules reviewed. The Department of Health and Human Services had the largest number of major proposed rules (6), followed by the Environmental Protection Agency (5), and the Departments of Agriculture and Transportation (3 each). The Department of Agriculture had the largest number of major final rules (19), followed by the Department of Health and Human Services (9). Exhibit 3 lists by name all major proposed and final regulations reviewed in 1986.

Exhibit 4 displays changes over the last 6 years in the types of rules reviewed. The total number of rules OMB reviewed in 1986 declined 9.3 percent from 1985 and dropped 28.5 percent from 1981. The number of proposed rules in 1986 declined 24.7 percent from 1985 and 18.8 percent from 1981. The number of final rules reviewed in 1986 rose 5.2 percent from 1985 and declined 32.5 percent from 1981. The number of major rules in 1986 increased 22.0 percent from 1985 and rose 16 percent from 1981. The percentage-change comparisons with 1981 activity understate somewhat the decline in rulemaking actions, since the Executive Order review process operated for less than a full year in 1981.

Exhibit 5 shows, by agency, the number of rules reviewed during each of the last 6 years. Comparing 1986 with 1981, the greatest percentage decline in the total number of rules occurred at the Environmental Protection Agency (-73.2 percent), the Department of the Treasury (-38.2 percent), and the Department of Agriculture (-36.4 percent). The Small Business Administration experienced the largest percentage increase since 1981 (200.0 percent), followed by the Department of Health and Human Services (140.2 percent), the Department of Defense (125.0 percent), and the Office of Personnel Management (89.5 percent). The large percentage increases for the Department of Defense and the Small Business Administration may be deceptive, however, since they represent very small absolute increases.

EXHIBIT 1.

EXECUTIVE ORDER 12291 TOTAL REVIEWS - BY AGENCY 1986

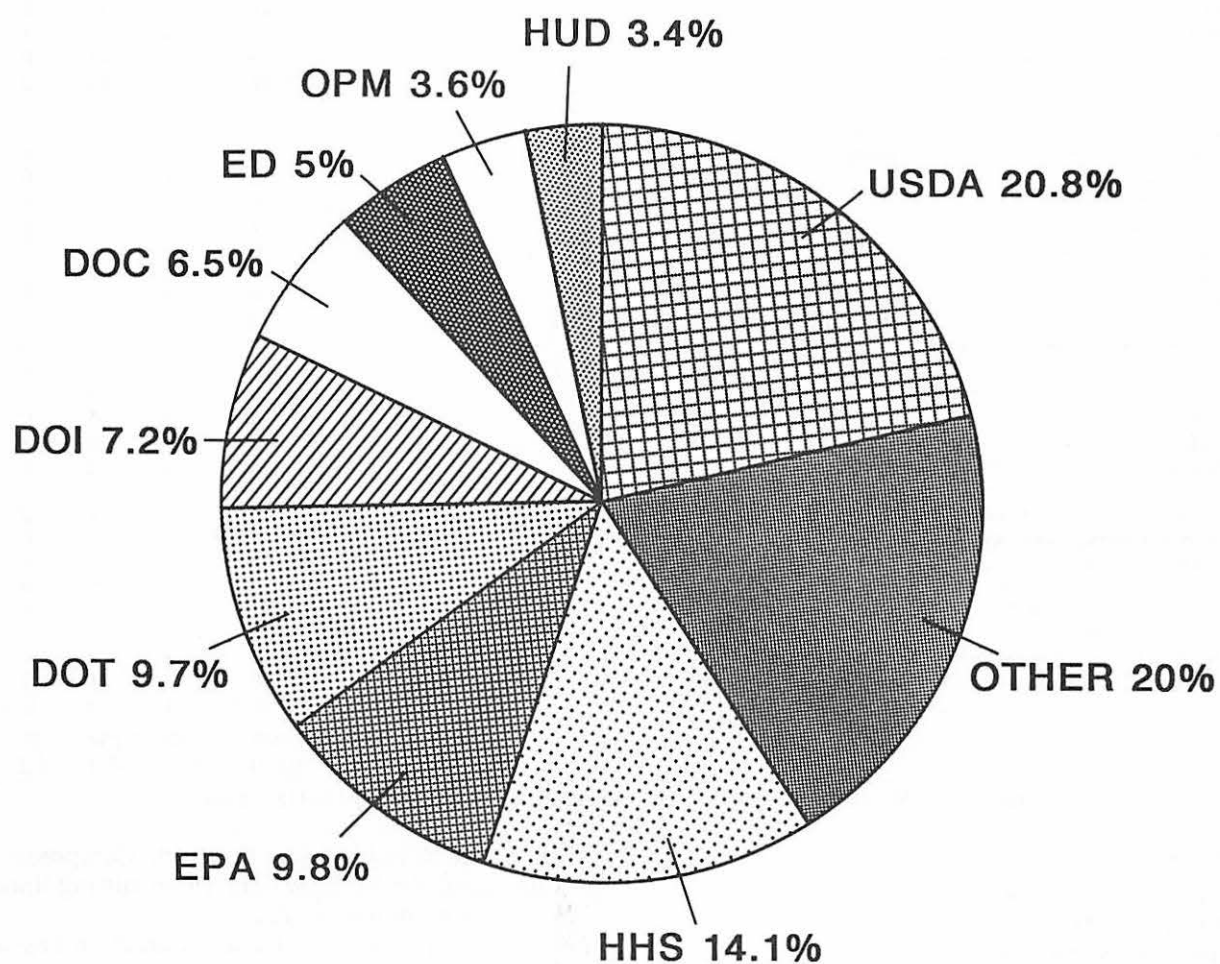


EXHIBIT 2. TYPES OF RULES REVIEWED DURING 1986 BY AGENCY

Agency	Total rules	Nonmajor		Major	
		NPRM	Final	NPRM	Final
Agriculture	418	143	253	3	19
Health and Human Services	281	107	159	6	9
Environmental Protection Agency	197	87	103	5	2
Transportation	196	88	101	3	4
Interior	144	60	79	1	4
Commerce	129	48	80	1	0
Education	99	43	56	0	0
Office of Personnel Management	72	28	44	0	0
Housing and Urban Development	68	22	43	2	1
Veterans Administration	62	28	34	0	0
Labor	56	28	25	1	2
Justice	46	22	24	0	0
General Services Administration	41	8	33	0	0
Small Business Administration	30	4	21	1	4
Federal Emergency Management Agency	24	13	11	0	0
Treasury	21	7	14	0	0
Energy	16	9	5	2	0
National Aeronautics and Space Administration	15	2	13	0	0
National Archives and Records Administration	13	5	8	0	0
Department of Defense	9	1	7	0	1
Railroad Retirement Board	8	2	6	0	0
Pension Benefit Guaranty Corporation	7	5	2	0	0
Other Temporary Commissions	6	0	6	0	0
Panama Canal Commission	6	2	4	0	0
U.S. Information Agency	6	5	1	0	0
Committee for Purchase from the Blind and Other Severely Handicapped	4	1	3	0	0
National Endowment for the Humanities	4	2	2	0	0
State	4	3	1	0	0
Equal Employment Opportunity Commission	3	1	2	0	0
Institute of Museum Services	3	2	1	0	0
Navajo Hopi Indian Relocation Commission	3	0	3	0	0
U.S. International Development Cooperation Agency	3	1	2	0	0
Tennessee Valley Authority	2	2	0	0	0
Advisory Council on Historic Preservation	1	0	1	0	0
Council on Environmental Quality	1	0	1	0	0
Commission on Civil Rights	1	1	0	0	0
Executive Office of the President	1	1	0	0	0
Merit Systems Protection Board	1	1	0	0	0
National Science Foundation	1	0	1	0	0
Office of Science and Technology Policy	1	0	0	0	1
Pennsylvania Avenue Development Corporation	1	0	1	0	0
Peace Corps	1	1	0	0	0
Total	2,005	783	1,150	25	47
Percentage of total	100.0	39.1	57.4	1.2	2.3

EXHIBIT 3. MAJOR PROPOSED AND FINAL RULES REVIEWED DURING 1986

<i>Major Proposed Rules</i>	
Department of Agriculture	End-Stage Renal Disease Program: Composite Rates and Methodology for Determining Rates
1987 Wheat Program	Medicare Economic Index
1987 Feed Grain Program	Medicare Reasonable Charge Limitation Payment for Anesthetic Services
1987 Upland Cotton Program Proposed Determinations	Reasonable Charge Limitations for Cataract Procedure
Department of Commerce	Lowest Charge Level
Deep-Seabed Mining—Commercial Recovery	
Department of Energy	Department of Housing and Urban Development
Basis for Defense Waste Fees	Lead-Based Paint Hazard Elimination in Certain FHA Single- and Multifamily Housing Programs
Fees for Defense High-Level Waste Disposal by the Office of Civilian Radioactive Waste Management	Lead-Based Paint Hazard Elimination in CDBG, UDAG
Department of Health and Human Services	Department of the Interior
Payment for Indirect Costs of Medical Education	Proposed 1986–87 Migratory Game Bird Hunting Regulations (Preliminary)

- Department of Labor
Application of Fair Labor Standards Act to State and Local Governments
- Department of Transportation
Passenger Automobile Average Fuel Economy Standards, Model Years 1987–88
Light Truck Average Fuel Economy Standards, Model Years 1988–89
Passenger Automobile Average Fuel Economy Standards, Model Years 1987–88 (Supplemental NPRM)
- Environmental Protection Agency
Hazardous Waste Management System: Toxicity Characteristic
Proposed Codification Rule
California List Land Disposal Restrictions and Treatment Standards for Some Wastes
NSPS for Industrial-Commercial-Institutional Steam Generators
Asbestos: Mining and Import Restrictions
- Small Business Administration
Breakout Procurement Center Representative Program
- Major Final Rules*
- Department of Agriculture
Joint Policy Statement on Regulation of Biotechnology
Dairy Termination Program
Conservation Reserve Program
Conservation and Environmental Programs
1986–87 Milk Price Support Program
1987 Rice Program Proposed Determinations
1986 Wheat, Feed Grain, Upland Cotton and Rice Affirmation
Rice and Upland Cotton Programs
1986 Crop Sugar Beets and Sugarcane Price Support Loan Rates
Rice and Upland Cotton Programs
1986–87 Milk Price Support Program—Price Support Level and Commodity Credit Corporation Purchase Prices
Disaster Payment Program for 1986 Crops
Tobacco (Guaranteed Production Plan) Crop Insurance
Resource Limits and Sales Taxes on Food Stamp Purchases
Thrifty Food Plan and Deductions
“Clear Title” Provision of the Food Security Act
Disaster Payment Program for 1986 Crops
Highly Erodible Land and Wetland Conservation
1986 Through 1990 Crops Sugar Beets and Sugarcane Price Support Loan Program
- Department of Defense
Administrative Rulemaking
- Department of Health and Human Services
Joint Policy Statement on Regulation of Biotechnology
Joint Policy Statement on Regulation of Biotechnology (Resubmission)
Payment for the Costs of Malpractice Insurance Liability for Certain Noncovered Services
Medicare FY1986 Changes to the Inpatient Hospital Prospective Payment System
Medicare Elimination of Periodic Interim Payments and Methodology
End-Stage Renal Disease Program: Composite Rates and Methodology
20 CFR 404, Subparts C, D, and G
Medicare Program, Reasonable Charge Payment Limits for Anesthesia Services
- Department of Housing and Urban Development
Lead-Based Paint Hazard Elimination in Public and Indian Housing
- Department of the Interior
Open Season Dates for Hunting Migratory Game Birds in Alaska, Puerto Rico, and the Virgin Islands 1986–87 Season
Late Season Migratory Bird Hunting Regulations
Nontoxic Shot Zones for 1987–88 and Subsequent Waterfowl Hunting Seasons
Nontoxic Shot Approval Procedures
- Department of Labor
Application of Fair Labor Standards Act to Employees of State and Local Governments
Joint Policy Statement on Regulation of Biotechnology
- Department of Transportation
Nondiscrimination on the Basis of Handicap in DOT Financial Assistance Programs
Light Truck Average Fuel Economy Standards, Model Year 1988
Passenger Automobile Average Fuel Economy Standards, Model Years 1987–88
Intervals for Drydocking and Tailshaft Examination on Inspected Vessels
- Environmental Protection Agency
Solvents and Dioxins Land Disposal Restrictions
Joint Policy Statement on Regulation of Biotechnology
- Office of Science and Technology Policy
Joint Policy Statement on Regulation of Biotechnology
- Small Business Administration
Small Business Size Standards: Wholesale Trade
Small Business Size Standards: Definition of Small Business
Minority Small Business and Capital Ownership
Definition of Small Business for Dredging

EXHIBIT 4. COMPARISON OF RULES REVIEWED DURING 1981-86 BY TYPE

Type of rule	Number						Percentage change					
	1981	1982	1983	1984	1985	1986	1981-82	1982-83	1983-84	1984-85	1985-86	1981-86
Nonmajor:												
Proposed	971	1,024	1,044	945	1,053	783	5.5	2.0	-9.5	11.4	-25.6	-19.4
Final	1,735	1,528	1,377	1,101	1,100	1,150	-11.9	-9.9	-20.0	-0.1	4.5	-33.7
Total	2,706	2,552	2,421	2,046	2,153	1,933	-5.7	-5.1	-15.5	5.2	-10.2	-28.6
Major:												
Proposed	24	29	22	33	20	25	20.8	-24.1	50.0	-39.4	25.0	4.2
Final	38	51	39	25	38	47	34.2	-23.5	-35.9	52.0	23.7	23.7
Total	62	80	61	58	59	72	29.0	-23.8	-4.9	1.7	22.0	16.1
All:												
E.O. Not Applicable . . .	35	1	0	0	0	0	-97.1	-100.0	NA	NA	NA	-100.0
Proposed	995	1,053	1,066	978	1,073	808	5.8	1.2	-8.3	9.7	-24.7	-18.8
Final	1,773	1,579	1,416	1,126	1,138	1,197	-10.9	-10.3	-20.5	1.1	5.2	-32.5
Total	2,803	2,633	2,482	2,104	2,211	2,005	-6.1	-5.7	-15.2	5.1	-9.3	-28.5

EXHIBIT 5. TWENTY MOST ACTIVE RULE-PRODUCING AGENCIES, COMPARISON OF RULES REVIEWED 1981-86

Agency	Number						Percentage change					
	1981	1982	1983	1984	1985	1986	1981-82	1982-83	1983-84	1984-85	1985-86	1981-86
USDA	657	692	551	480	406	418	5.3	-20.4	-12.9	-15.4	3.0	-36.4
HHS	117	272	294	198	212	281	132.5	8.1	-32.7	7.1	32.5	140.2
EPA	734	340	268	302	302	197	-53.7	-21.2	12.7	0.0	-34.8	-73.2
DOT	285	225	225	217	253	196	-21.1	0.0	-3.6	16.6	-22.5	-31.2
DOI	147	248	240	132	161	144	68.7	-3.2	-45.0	22.0	-10.6	-2.0
DOC	162	147	121	107	113	129	-9.3	-17.7	-11.6	5.6	14.2	-20.4
ED	77	52	50	104	109	99	-32.5	-3.8	108.0	4.8	-9.2	28.6
OPM	38	49	65	45	69	72	28.9	32.7	-30.8	53.3	4.3	89.5
HUD	74	130	111	108	90	68	75.7	-14.6	-2.7	-16.7	-24.4	-8.1
VA	69	70	69	70	65	62	1.4	-1.4	1.4	-7.1	-4.6	-10.1
DOL	83	49	49	35	38	56	-41.0	0.0	-28.6	8.6	47.4	-32.5
DOJ	53	51	72	46	78	46	-3.8	41.2	-36.1	69.6	-41.0	-13.2
GSA	56	62	85	62	85	41	10.7	37.1	-27.1	37.1	-51.8	-26.8
SBA	10	16	20	31	19	30	60.0	25.0	55.0	-38.7	57.9	200.0
FEMA	16	6	29	16	26	24	-62.5	383.3	-44.8	62.5	-7.7	50.0
TREAS	34	33	53	44	26	21	-2.9	60.6	-17.0	-40.9	-19.2	-38.2
DOE	53	49	34	25	19	16	-7.5	-30.6	-26.5	-24.0	-15.8	-69.8
NASA	10	11	13	11	25	15	10.0	18.2	-15.4	127.3	-40.0	50.0
NARA	NA	NA	NA	NA	9	13	NA	NA	NA	NA	44.4	NA
DOD	4	9	13	7	17	9	125.0	44.4	-46.2	142.9	-47.1	125.0

B. Types of Actions Taken on Rules

Exhibits 6 through 9 summarize the actions taken on agency rules under Executive Order No. 12291 during 1986. Exhibit 10 compares OMB's action during 1986 with actions in previous years.

Of the 2,005 rules revised during 1986, OMB found that 68.3 percent were consistent with the principles of the Executive Order as submitted; 22.9 percent were consistent with the Order after the agency adopted changes during the review period; 1.4 percent were found inconsistent with the Order and returned to the agency for reconsideration; and agencies withdrew another 2.8 percent. Emergency rules and rules subject to statutory or judicial deadlines constituted 4.3 percent of all 1986 rules, and 0.2 percent were sent improperly or were exempt.

Exhibit 6 shows the number of rules in these categories that OMB reviewed during 1986 by each agency.

Exhibit 7 shows the percentage of rules in each category for the 20 most active rulemaking agencies.

Exhibit 8 lists by name each of the 29 rules returned for reconsideration in 1986. Exhibit 9 lists by name each of the 54 rules withdrawn by agencies during OMB review in 1986. OMB may return regulations for reconsideration if it finds them to be inconsistent with the principles of the Executive Order. Agencies may withdraw rules during review because they have concluded that the rules are inconsistent with the Executive Order or for other reasons. An agency may, for example, wish to incorporate newly acquired information into a rule.

Exhibit 10 compares OMB actions on agency rules during the past 6 years. The percentage of rules OMB found consistent with the Executive Order declined rather steadily from 87.3 percent in 1981, to 68.3 percent in 1986. At the same time, the percentage of rules OMB found consistent after change increased from

4.9 percent in 1981 to 23.1 percent in 1985, and dropped slightly to 22.9 percent in 1986. The percentage of rules that agencies withdrew through 1985 increased to 3.1 percent from 1.8 percent in 1981, declining to 2.8 percent in 1986. The percentage of rules that OMB returned for agency reconsideration has fluctuated over the years but was 1.4 percent in 1986 compared to 1.6 percent in 1981. Through 1985, the percentage of rules issued by agencies under emergency, statutory, or judicial deadlines did not appreciably change from the 1.4 percent recorded in 1981, but it increased significantly in 1986 to 4.3 percent.

Exhibit 11 shows OMB's average regulatory review time by agency from 1981 to 1986 for all major and nonmajor rules. Generally, review time for major rules is longer than for nonmajor rules because of their greater complexity and importance. In 1981, OMB's average review time for all major rules was 13 days; in 1986, it was 29 days. OMB's average review time in 1981 for nonmajor rules was 9 days, as compared to an average of 24 days in 1986. The 1986 average review time for all rules was 24 days—slightly lower than 1985's average of 27 days.

C. Exemptions

Executive Order No. 12291 authorizes the Director of OMB to exempt classes of regulations from any or all of the requirements of the Order. The exemptions granted by OMB fall into four broad categories: (1) rules that are essentially nonregulatory; (2) rules that delegate regulatory authority to States; (3) rules that largely or entirely affect individual entities and that do not involve broader policy issues; and (4) rules for which a delay of even a few days could impose substantial costs and that are unlikely to involve significant policy issues.

At the end of 1986, OMB had granted a total of 29 exemptions (some covering more than one of the categories above) to 8 agencies. Exhibit 12 lists these exemptions. Most of the exemptions were established during the initial years of the operation of the Executive Order. In each case, OMB determined that the exempted regulations, as a class, were consistent with the goals and requirements of the Executive Order.

OMB continues to review all "major" rules as defined by the Executive Order regardless of class exemptions. OMB may request that agencies submit specific rules within an exempt class and may revoke exemptions at any time.

IV. TRENDS IN REGULATORY ACTIVITY

Because there are no precise or agreed-upon measures of regulatory activity, we cannot measure the precise effect Executive Order No. 12291 has had on regulatory activity. It is useful, however, to compare the number of pages and the number of total rule documents (proposed rule documents plus final rule documents) published in the *Federal Register* during different time periods.

Exhibit 13 shows the number of pages published in the *Federal Register* from its inception in 1936 through 1986. There was little year-to-year change until the 1970s, when the size of the *Federal Register* increased dramatically. But in 1981, the year Executive Order No. 12291 went into effect, the growth in the *Federal Register* ended.

For example, Exhibit 14 shows the number of pages published in the *Federal Register* each month since 1977, and illustrates the effects of Executive Order No. 12291 on the size of the *Federal Register*. In fact the exhibit shows that since 1981, with but one exception, the size of the *Federal Register* has declined precipitously. In 1981 through 1984, the number of pages published in the *Federal Register* decreased—there were 41.4 percent fewer pages in the *Federal Register* in 1984 than in 1980. In 1985, the number of pages rose modestly by 4.87 percent over 1984 levels. But in 1986, the number of *Federal Register* pages declined 11.3 percent to its lowest level since 1974.

Exhibit 15 depicts the total number of proposed and final rule documents published since 1977. This chart parallels the exhibit for pages published. It also indicates that since Executive Order No. 12291 was issued, Federal regulatory activity as represented by documents issued has decreased.

Exhibits 16, 17, and 18 provide various measures of regulatory activity since 1980.

EXHIBIT 6. TYPES OF ACTIONS TAKEN ON AGENCY RULES DURING 1986

Agency	Total reviews	Consistent without change	Consistent with change	Withdrawn by agency	Returned for reconsideration	Returned Sent improperly	Emergency	Statutory or judicial deadline
Agriculture	418	294	71	15	4	1	16	17
Health and Human Services	281	162	104	8	5	1	0	1
Environmental Protection Agency	197	131	49	7	5	2	0	3
Transportation	196	127	66	1	2	0	0	0
Interior	144	111	29	3	0	0	1	0
Commerce	129	80	7	2	1	0	22	17
Education	99	69	28	1	1	0	0	0
Office of Personnel Management	72	69	2	0	0	0	1	0
Housing and Urban Development	68	39	20	4	4	0	0	1
Veterans Administration	62	49	9	2	2	0	0	0
Labor	56	17	37	2	0	0	0	0
Justice	46	44	1	0	0	1	0	0
General Services Administration	41	35	6	0	0	0	0	0
Small Business Administration	30	18	2	6	0	0	1	3
Federal Emergency Management Agency	24	21	2	1	0	0	0	0
Treasury	21	17	2	1	0	0	1	0
Energy	16	9	3	2	2	0	0	0
National Aeronautics and Space Administration	15	13	2	0	0	0	0	0
National Archives and Records Administration	13	13	0	0	0	0	0	0
Defense	9	7	2	0	0	0	0	0
Railroad Retirement Board	8	6	1	0	1	0	0	0
Pension Benefit Guaranty Corporation	7	4	2	0	0	0	1	0
Other Temporary Commissions	6	5	1	0	0	0	0	0
Panama Canal Commission	6	5	1	0	0	0	0	0
U.S. Information Agency	6	4	2	0	0	0	0	0
Committee for Purchase from the Blind and Other Severely Handicapped	4	3	1	0	0	0	0	0
National Endowment for the Humanities	4	3	1	0	0	0	0	0
State	4	4	0	0	0	0	0	0
Equal Employment Opportunity Commission	3	0	3	0	0	0	0	0
Institute of Museum Services	3	1	1	0	0	0	1	0
Navajo Hopi Indian Relocation Commission	3	0	2	1	0	0	0	0
U.S. International Development Cooperation Agency	3	3	0	0	0	0	0	0
Tennessee Valley Authority Advisory Council for Historic Preservation	1	1	0	0	0	0	0	0
Council on Environmental Quality	1	0	1	0	0	0	0	0
Commission on Civil Rights	1	1	0	0	0	0	0	0
Executive Office of the President	1	1	0	0	0	0	0	0
Merit Systems Protection Board	1	0	0	0	1	0	0	0
National Science Foundation	1	1	0	0	0	0	0	0
Office of Science and Technology Policy	1	0	1	0	0	0	0	0
Pennsylvania Avenue Development Corporation	1	1	0	0	0	0	0	0
Peace Corps	1	1	0	0	0	0	0	0
Total	2,005	1,370	459	56	29	5	44	42
Percentage of total	100.0	68.3	22.9	2.8	1.4	0.2	2.2	2.1

EXHIBIT 7. TYPES OF ACTIONS TAKEN ON AGENCY RULES DURING 1986 BY PERCENTAGE

Agency	Total reviews	Percentage						Statutory or judicial deadline
		Consistent without change	Consistent with change	Withdrawn by agency	Returned for reconsideration	Returned sent improperly	Emergency	
Agriculture	418	70.3	17.0	3.6	1.0	0.2	3.8	4.1
Health and Human Services	281	57.7	37.0	2.8	1.8	0.4	0.0	0.4
Environmental Protection Agency	197	66.5	24.9	3.6	2.5	1.0	0.0	1.5
Transportation	196	64.8	33.7	0.5	1.0	0.0	0.0	0.0
Interior	144	77.1	20.1	2.1	0.0	0.0	0.7	0.0
Commerce	129	62.0	5.4	1.6	0.8	0.0	17.1	13.2
Education	99	69.7	28.3	1.0	1.0	0.0	0.0	0.0
Office of Personnel Management	72	95.8	2.8	0.0	0.0	0.0	1.4	0.0
Housing and Urban Development	68	57.4	29.4	5.9	5.9	0.0	0.0	1.5
Veterans Administration	62	79.0	14.5	3.2	3.2	0.0	0.0	0.0
Labor	56	30.4	66.1	3.6	0.0	0.0	0.0	0.0
Justice	46	95.7	2.2	0.0	0.0	2.2	0.0	0.0
General Services Administration	41	85.4	14.6	0.0	0.0	0.0	0.0	0.0
Small Business Administration	30	60.0	6.7	20.0	0.0	0.0	3.3	10.0
Federal Emergency Management Agency	24	87.5	8.3	4.2	0.0	0.0	0.0	0.0
Treasury	21	81.0	9.5	4.8	0.0	0.0	4.8	0.0
Energy	16	56.3	18.8	12.5	12.5	0.0	0.0	0.0
National Aeronautics and Space Administration	15	86.7	13.3	0.0	0.0	0.0	0.0	0.0
National Archives and Records Administration	13	100.0	0.0	0.0	0.0	0.0	0.0	0.0
Defense	9	77.8	22.2	0.0	0.0	0.0	0.0	0.0
All Other	68	8.8	1.5	0.0	1.5	0.0	0.0	0.0
Total	2,005	68.3	22.9	2.8	1.4	0.2	2.2	2.1

EXHIBIT 8. REGULATIONS RETURNED TO AGENCIES FOR RECONSIDERATION DURING 1986

Agency/Title of regulation	Type	Received	Reviewed
Department of Agriculture:			
Rural telephone bank loan rate	NPRM	11/03/86	12/04/86
Environmental Program	NPRM	05/01/86	06/24/86
Definition and standards of identity for miscellaneous pork and beef products	Final	10/05/84	02/14/86
Food Stamp Program: simplified application and standardized benefit project	Final	06/10/86	12/04/86
Department of Commerce:			
Trademark automated search system fees	Final	08/04/86	09/03/86
Department of Education:			
OMB control numbers	Final	06/04/86	06/12/86
Department of Energy:			
Proposed basis for defense waste fees	NPRM	12/06/85	01/04/86
DOE financial assistance rules	NPRM	10/22/86	12/23/86
Department of Health and Human Services:			
Aspartame as an inactive ingredient in human drug products	Final	06/21/85	09/03/86
Exclusion of new alcohol/drug hospitals and units from the prospective payment system	Final	11/19/85	02/19/86
Standards for consultative examinations and existing medical evidence	NPRM	04/17/86	08/29/86
Reopening and revising determinations and decisions when there is clear error or new and material evidence—finality of adjudicative nonaction	NPRM	04/29/86	08/29/86
Federal Old-Age, Survivors, and Disability overpayments, underpayments, waivers of adjustment, or recovery of overpayments	NPRM	08/27/86	10/01/86
Department of Housing and Urban Development:			
Manufactured home procedural and enforcement—state administrative agencies reporting requirement	NPRM	11/21/85	01/07/86
Removal of refinancing limitations on certain multifamily projects	Final	12/18/85	06/24/86
Insurance of adjustable-rate mortgages	Final	07/14/86	09/08/86
Energy management demonstration in public housing and solicitation of interest in participation	NPRM	12/06/85	01/31/86
Department of Transportation:			
Operating a vessel while intoxicated	NPRM	12/26/85	02/14/86

EXHIBIT 8. REGULATIONS RETURNED TO AGENCIES FOR RECONSIDERATION DURING 1986—Continued

Agency/Title of regulation	Type	Received	Reviewed
Inspection, repair, and maintenance	NPRM	07/15/86	08/22/86
Environmental Protection Agency:			
Addition of Appendix F—quality assurance procedure	Final	11/20/85	06/30/86
NSPS for SOCOMI air oxidation unit processes	Final	01/29/86	11/25/86
NSPS for SOCOMI distillation unit operations	Final	01/29/86	11/25/86
NSPS for SOCOMI reactor processes	NPRM	02/11/86	11/25/86
Oklahoma visibility protection SIP	NPRM	02/14/86	03/24/86
Merit Systems Protection Board:			
Proposed rules and amendments of rules	NPRM	12/05/85	03/11/86
Railroad Retirement Board:			
Reopening of decisions regarding railroad retirement annuities	Final	01/28/86	06/15/86
Tennessee Valley Authority:			
Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970 . .	NPRM	05/13/85	04/16/86
Veterans Administration:			
Acquisition regulations implementing the Competition in Contracting Act	Final	07/21/85	02/07/86
Evaluation of hearing loss	NPRM	09/16/86	12/03/86

EXHIBIT 9. REGULATIONS WITHDRAWN BY AGENCIES DURING 1986

Agency/Title of regulation	Rule type	Date received	Date returned
Department of Agriculture:			
Competition in the Awarding of Discretionary Grants and Cooperative Agreements . .	Final	11/05/85	01/10/86
Peanut Warehouse Storage Loans and Handler Operations—1986–90 Crops	Final	07/23/86	07/24/86
General Administrative Regulations—Reinsurance Agreement	Final	11/04/85	02/21/86
General Administrative Regulations—Standards for Approval, Reinsurance Agreement	Final	11/04/85	02/21/86
General Amendment Crop Insurance Regulations, Various Annual Premium, Interest Rate Charge	NPRM	03/03/86	07/09/86
General Administrative Regulations—Suspension and Debarment	NPRM	08/12/86	08/19/86
FMHA Instruction, Fire and Rescue Loans	NPRM	01/02/86	02/13/86
Guaranteed Loan Programs	NPRM	02/12/86	03/20/86
Swine Health Protection	Final	10/24/86	11/14/86
Unpaid Furlough for FSIS Employees—FY86, Revision of Basic Workweek	Final	01/31/86	03/24/86
Level of Donated-Food Assistance for Nutrition Program for the Elderly—FY85	Final	03/10/86	03/20/86
Verification Monitoring and AIMS Reporting	Final	08/05/86	09/25/86
Food Stamp Program: Shelter Cost Deductions and the Treatment of Low-Income Home Energy Assistance Payments	Final	08/18/86	09/04/86
Enhance Consistency for the Food Stamp Program, AFDC, and the Adult Assistance Programs	NPRM	09/26/86	11/20/86
Proposed Fee Policy for Linear Rights-of-Way	NPRM	07/09/85	06/09/86
Department of Commerce:			
Availability of FY87 Funds for Programs in Titles I, II, III, IV, IX	Final	12/12/86	12/24/86
Atlantic Swordfish Fishery—Preliminary Annual Adjustments to Variable Season Closures	NPRM	07/28/86	09/02/86
Department of Education:			
Assistance to States for Education of Handicapped Children	Final	11/03/86	11/19/86
Department of Energy:			
Fees for Defense High-Level Waste Disposal by the Office of Civilian Radioactive Waste Management	NPRM	08/22/86	09/30/86
DOE Financial Assistance Rules	NPRM	09/19/86	10/02/86
Department of Health and Human Services:			
Irradiation in the Production, Processing, and Handling of Food	Final	12/12/85	04/07/86
Additions and Revisions to the Current List of Covered Surgical Procedures for Ambulatory Surgical Centers	Final	11/25/85	03/11/86
Redesignation of Reasonable Cost Regulations	Final	09/17/86	09/17/86
Medicare and Medicaid—Program Integrity Amendments	Final	09/17/86	09/22/86
Establishing Dependency of Surviving Divorced Wife	NPRM	05/08/85	07/27/86
Availability of Information and Records to the Public	Final	05/13/86	08/01/86
Department of Housing and Urban Development:			
Shared Housing in the Section 8 and Public Housing Programs	Final	08/19/85	02/10/86
Discretionary Grant and Cooperative Agreement Policies and Procedures	NPRM	10/07/86	11/06/86
Prohibition of Use of HUD Funds for PHA Expenses for Suits Against HUD	Final	07/01/86	07/23/86
Mortgage Insurance Qualification Requirements for Veterans	Final	02/24/86	09/02/86
Department of the Interior:			
Migratory Bird Hunting: Nontoxic Shot Approval Procedures	Final	02/04/86	02/10/86
Annuity and Other Per Capita Payments	NPRM	09/04/86	09/11/86
Priority of Claims in Indian Probate Proceedings	NPRM	04/25/86	05/05/86
Department of Labor:			
Amendments to the Trade Adjustment Assistance Program	Final	07/17/85	03/07/86

EXHIBIT 9. REGULATIONS WITHDRAWN BY AGENCIES DURING 1986—Continued

Agency/Title of regulation	Rule type	Date received	Date returned
Amendments to the Trade Act of 1974	Final	08/06/85	03/07/86
Department of Transportation:			
Air Quality Procedures for Use in Federal-Aid Highway and Federally Funded Transit Programs	NPRM	08/23/85	01/30/86
Department of the Treasury:			
Payments Between the Federal Government and Recipient Organizations	NPRM	06/02/86	06/09/86
Environmental Protection Agency:			
404 Program Definitions and Permit Exemptions	Final	02/19/86	03/01/86
National Emission Standards for Coke Oven Emissions From Wet-Coaled-Charged Byproduct Coke Oven Batteries	NPRM	01/15/86	04/22/86
Federal Radiation Protection Guidance for Occupational Exposures	Final	02/10/86	02/20/86
Disapproval of I/M Portion of Ohio's Part D Ozone SIP	Final	03/26/86	04/04/86
Light Truck CAFE Adjustments	Final	04/28/86	05/15/86
Imposition of Fees for FIFRA Activities	NPRM	01/21/86	01/25/86
Significant New Use Rules—Acrylate/Methacrylate Esters	NPRM	07/23/86	08/02/86
Federal Emergency Management Agency:			
Superfund Cost Share Eligibility Criteria for Permanent and Temporary Relocation	Final	10/16/86	10/24/86
Navajo Hopi Indian Relocation Commission:			
Interim Land Use Regulations for Resettlement Lands	Final	10/01/85	01/14/86
Small Business Administration:			
Loans to State and Local Development Companies	Final	04/01/86	04/11/86
Small Business Development Center Program	NPRM	04/03/86	04/11/86
Surety Bond Guarantee	Final	04/04/86	04/11/86
Accounting Standards and Financial Reporting Requirements for Small Business Investment Companies	Final	04/09/86	04/11/86
Small Business Development Center Program	NPRM	05/05/86	10/14/86
Small Business Size Standards	Final	09/12/86	10/21/86
Veterans Administration:			
Medical Benefits	NPRM	01/30/85	06/12/86
Use of Community Nursing Homes	Final	04/16/86	04/26/86

EXHIBIT 10. TYPES OF ACTIONS TAKEN ON AGENCY RULES—PERCENTAGE COMPARISON 1981–86¹

Action taken	Percentage in						Percentage change					
	1981	1982	1983	1984	1985	1986	81–82	82–83	83–84	84–85	85–86	81–86
Consistent without change	87.3	84.1	82.3	78.0	70.7	68.3	-3.2	-1.8	-4.3	-7.3	-2.4	-19.0
Consistent with change	4.9	10.3	12.7	15.1	23.1	22.9	5.4	2.4	2.4	8.0	-0.2	18.0
Withdrawn by agency	1.8	1.2	1.6	2.4	3.1	2.8	-0.6	0.4	0.8	0.7	-0.3	1.0
Returned for reconsideration	1.6	2.1	1.3	2.7	1.5	1.4	0.5	-0.8	1.4	-1.2	-0.1	-0.2
Sent improperly or exempt	3.1	0.9	0.0	0.0	0.3	0.2	-2.2	-0.9	0.0	0.3	-0.1	-2.9
Emergency, statutory, or judicial deadline	1.4	1.4	2.0	1.7	1.2	4.3	0.0	0.6	-0.3	-0.5	3.1	2.9

¹Percentages may not add to 100.0 percent due to rounding.

EXHIBIT 11. AVERAGE REVIEW TIME OF RULES UNDER EXECUTIVE ORDER NO. 12291
(in days)

	1981			1982			1983			1984		
	Major	Nonmajor	All	Major	Nonmajor	All	Major	Nonmajor	All	Major	Nonmajor	All
USDA	22	8	8	17	10	10	15	13	13	11	19	19
DOC	8	6	8	22	9	10	5	11	11	316	14	17
DOD	NA	9	9	NA	6	6	NA	16	16	NA	30	30
ED	NA	8	8	32	12	13	NA	11	11	39	18	19
DOE	7	7	7	26	6	7	45	7	9	77	9	12
HHS	8	7	7	21	10	11	35	18	19	3	33	33
HUD	NA	14	14	NA	11	11	12	15	15	10	18	17
DOI	6	8	8	13	10	10	12	17	17	7	17	17
DOJ	NA	6	6	NA	7	7	NA	14	14	NA	10	10
DOL	26	6	9	37	10	12	121	18	29	NA	43	43
State	NA	9	9	NA	7	7	28	10	16	NA	5	5
DOT	8	8	8	37	12	12	24	15	15	42	20	21
TREAS	1	8	8	60	13	14	NA	12	12	17	18	18
EPA	12	9	9	88	17	19	14	22	22	58	30	31
Other agencies	5	10	10	40	13	14	35	14	14	26	20	20
All government	13	9	9	28	11	12	28	15	16	31	22	22

	1985			1986			1981-86					
	Major	Nonmajor	All	Major	Nonmajor	All	Major	Nonmajor	All			
USDA				15	19	19	13	18	18	15	14	14
DOC				NA	12	12	127	15	15	41	11	12
DOD				NA	30	30	30	28	28	30	21	22
ED				NA	16	16	14	13	13	30	14	14
DOE				30	7	8	34	15	17	31	8	9
HHS				74	46	47	19	37	36	32	26	26
HUD				NA	27	27	44	32	33	20	18	18
DOI				5	19	19	7	11	11	9	14	14
DOJ				NA	9	9	NA	8	8	NA	9	9
DOL				173	55	61	76	47	49	68	28	31
State				NA	16	16	NA	5	5	28	9	9
DOT				80	34	36	32	19	19	39	18	18
TREAS				16	13	13	NA	7	7	24	12	12
EPA				78	33	35	41	41	41	57	21	22
Other agencies				105	23	25	74	24	25	46	17	18
All government				64	26	27	29	24	24	31	17	17

EXHIBIT 12. AGENCY RULES EXEMPTED FROM REVIEW PROCEDURES

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service—Special Nutrition program notices that revise reimbursement rates and eligibility criteria for the School Lunch, Child Care Food, and other nutrition programs.

Food and Nutrition Service—Food Stamp program notices that set eligibility criteria and deduction policies.

Agricultural Marketing Service—Regulations that establish voluntary standards for grading the quality of food.

Animal and Plant Health Inspection Service—Rules and notices concerning quarantine actions and related measures to prevent the spread of animal and plant pests and diseases.

Animal and Plant Health Inspection Service—Rules affirming actions taken on an emergency basis if no adverse comments were received.

Rural Electrification Administration—Rules concerning standards and specifications for construction and materials.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration—Certain time-sensitive pre-season and in-season Fishery Management Plan regulatory actions that set restrictions on fishing seasons, catch size, and fishing gear.

DEPARTMENT OF ENERGY

Power Marketing Administrations—Regulations issued by various power administrations relating to the sale of electrical power that they produce or market.

DEPARTMENT OF THE INTERIOR

Office of Surface Mining—Actions to approve, or conditionally approve, State regulatory mining actions or amendments to such actions.

Office of Surface Mining—Approval of State mining reclamation plans or amendments.

Office of Surface Mining—Cooperative agreements between OSM and States.

United States Fish and Wildlife Service—Certain parts of the annual migratory bird hunting regulations.

DEPARTMENT OF TRANSPORTATION

All Offices of DOT—Amendments that postpone the compliance dates of regulations already in effect.

Coast Guard—Regatta regulations, safety zone regulations, and security zone regulations.

Coast Guard—Anchorage, drawbridge operations, and inland waterways navigation regulations.

Coast Guard—Regulations specifying amount of separation required between cargoes containing incompatible chemicals.

Federal Aviation Administration—Standard instrument approach procedure regulations, en route altitude regulations, routine air space actions, and airworthiness directives.

National Highway Traffic Safety Administration—Federal Motor Vehicle Safety Standard 109 table of tire sizes.

DEPARTMENT OF THE TREASURY

Internal Revenue Service, Bureau of Alcohol, Tobacco and Firearms, and Customs Service—Revenue rulings and procedures, Customs decisions, legal determinations, and other similar ruling documents. Major legislative regulations are covered fully.

ENVIRONMENTAL PROTECTION AGENCY

Office of Pesticides and Toxic Substances—Actions regarding pesticide tolerances, temporary tolerances, tolerance exemptions and food additives regulations, except those that make an existing tolerance more stringent.

Office of Pesticides and Toxic Substances—Unconditional approvals of TSCA Section 5 test marketing exemptions, and of experimental use permits under FIFRA.

Office of Pesticides and Toxic Substances—Decision documents defining and establishing registration standards; decision documents and termination decisions for the RPAR process; and data call-in requests made under Section 3(c)(2)(B) of FIFRA.

Office of Air, Noise, and Radiation—Rules that unconditionally approve revisions to State Implementation Plans.

Office of Air, Noise, and Radiation—Unconditional approvals of equivalent methods for ambient air quality monitoring, and of NSPS, NESHAPS, and PSD delegations to States; approvals of carbon monoxide and nitrogen oxide waivers; area designations of air quality planning purposes; and deletions from the NSPS source categories list.

Office of Water—Unconditional approvals of State Water Standards.

Office of Water—Unconditional approval of State underground injection control programs; delegations of NPDES authority to States; deletions from the 307(a) list of toxic pollutants; and suspensions of Toxic Testing Requirements under NPDES.

Office of Solid Waste and Emergency Response—Unconditional approvals of State authorization under RCRA, of State solid waste management plans, and of hazardous waste delisting petitions under RCRA.

PENSION BENEFIT GUARANTY CORPORATION

Interest Rates—Changes in interest rates on late premium payments and delinquent employer liability payments under Sections 6601 and 6621 of the Internal Revenue Code as amended by the Tax Equity and Fiscal Responsibility Act of 1982.

GOVERNMENTWIDE

Office of Federal Procurement Policy—All regulations, except those concerning acquisition of automatic data processing and telecommunications equipment; those implementing and supplementing Federal Acquisition Regulation Subparts 15.6 (Source Selec-

tion) and 32.5 (Progress Payments Based on Costs); and those implementing and supplementing the Competition in Contracting Act of 1984 (Public Law 98-3691), the Defense Procurement Reform Act of 1984 (Title XII, Public Law 98-525), and the Small Business and Federal Procurement Competition Enforcement Act of 1984 (Public Law 98-577).

EXHIBIT 13.

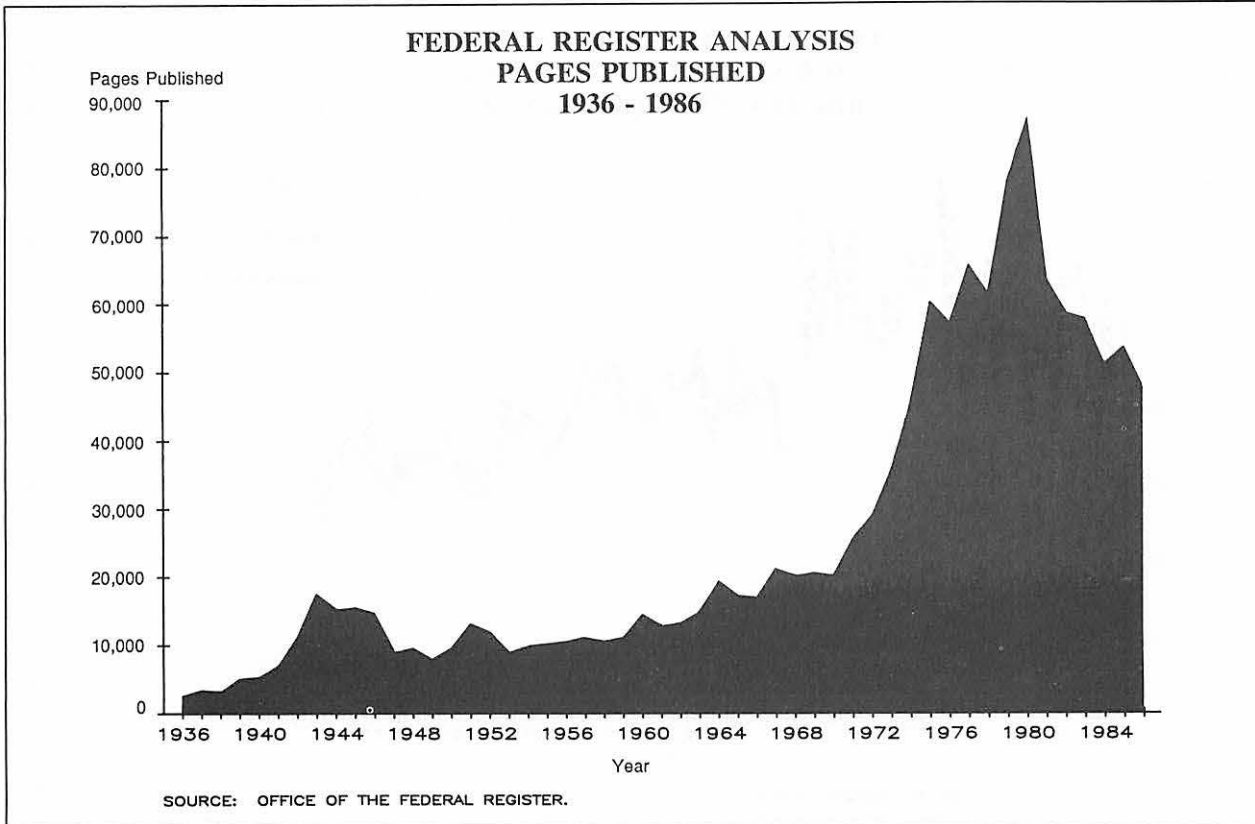


EXHIBIT 14.

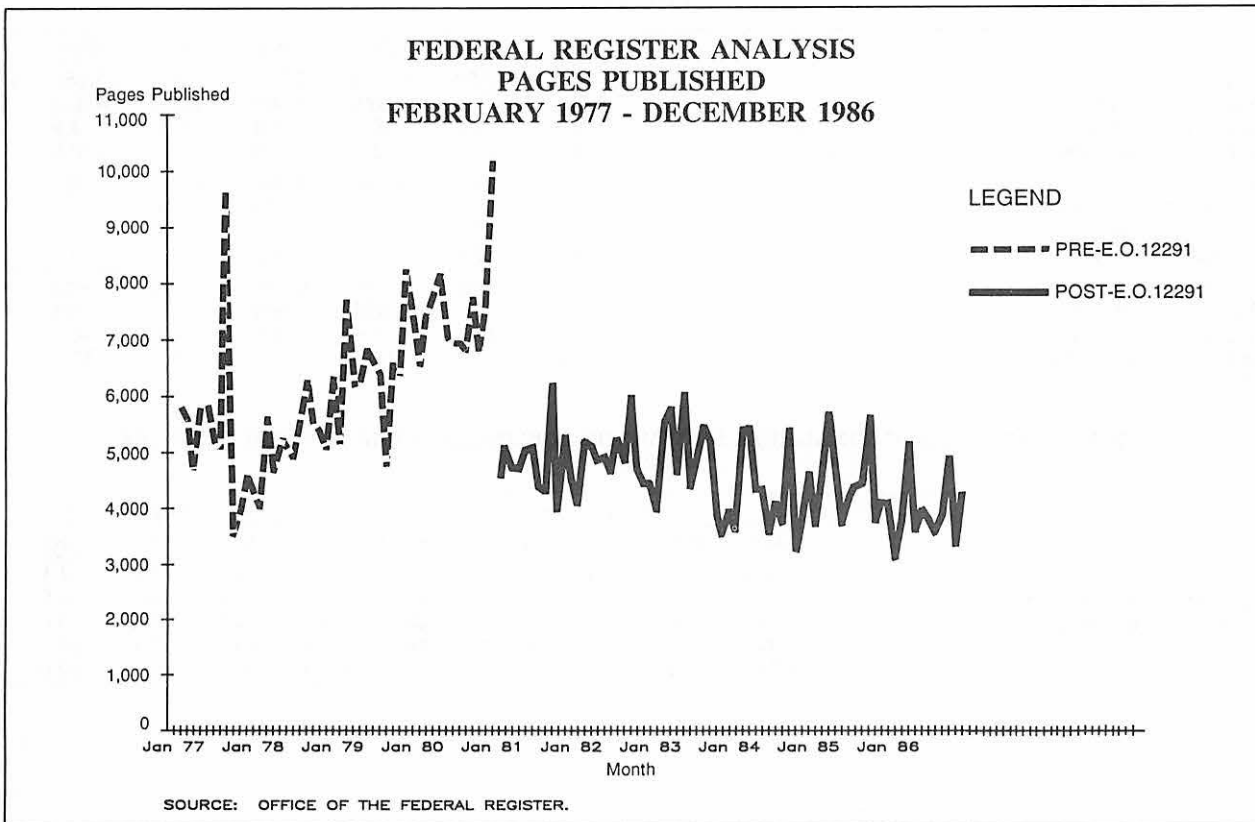


EXHIBIT 15.

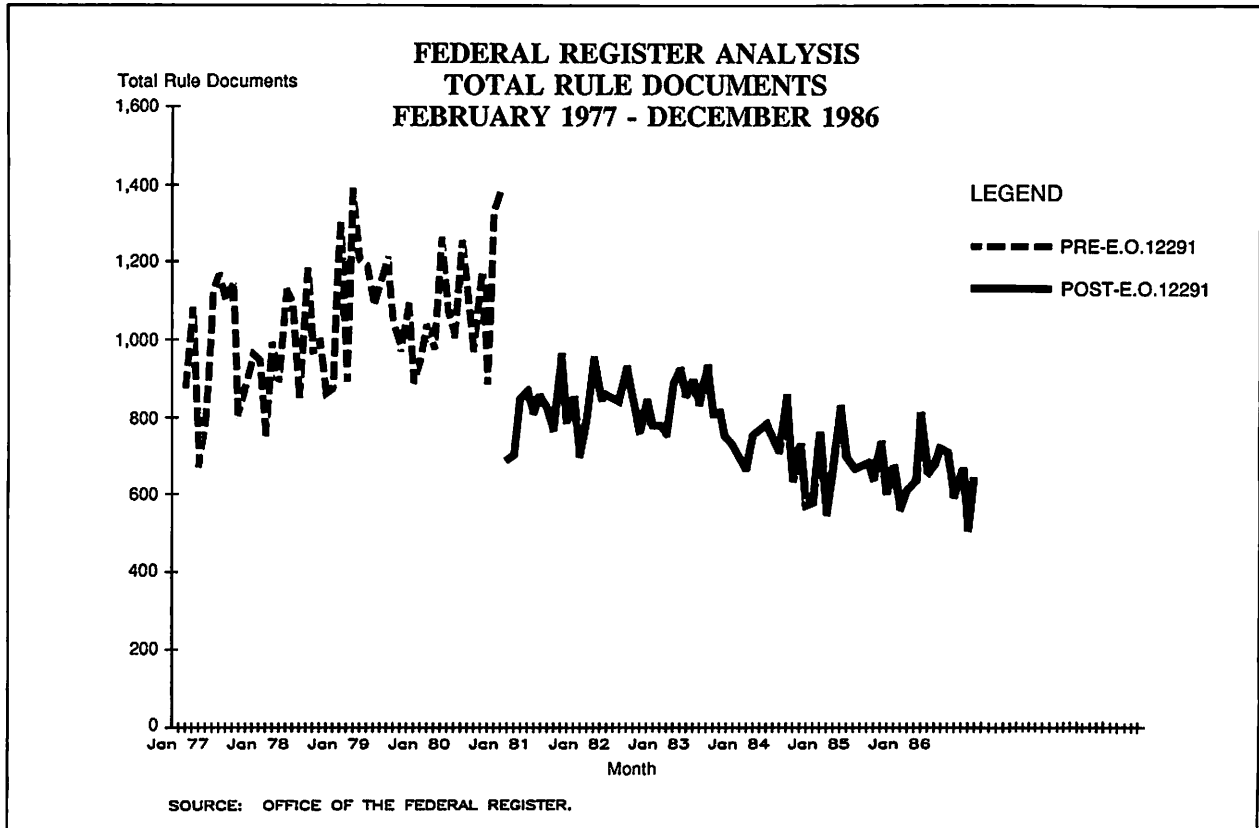


EXHIBIT 16. COMPARISON OF PAGES AND DOCUMENTS PUBLISHED IN THE FEDERAL REGISTER 1980-86

	1980	1981	1982	1983	1984	1985	1986
Total pages published	87,012	63,554	58,494	57,704	50,998	53,480	47,418
Average pages per month	7,251	5,296	4,875	4,809	4,250	4,457	3,952
Percentage change year to year	NA	-27.0	-8.0	-1.4	-11.6	4.9	-11.3
Percentage change from 1980	NA	-27.0	-32.8	-33.7	-41.4	-38.5	-45.5
Proposed rule documents	5,347	3,862	3,729	3,906	3,350	3,381	3,185
Average documents per month	446	322	311	326	279	282	265
Percentage change year to year	NA	-27.8	-3.4	4.7	-14.2	0.9	-5.8
Percentage change from 1980	NA	-27.8	-30.3	-26.9	-37.3	-36.8	-40.4
Final rule documents	7,745	6,401	6,288	6,049	5,155	4,843	4,589
Average documents per month	645	533	524	504	430	404	382
Percentage change year to year	NA	-17.4	-1.8	-3.8	-14.8	-6.1	-5.2
Percentage change from 1980	NA	-17.4	-18.8	-21.9	-33.4	-37.5	-40.7

EXHIBIT 17. ANALYSIS OF FINAL RULE DOCUMENTS PUBLISHED IN THE FEDERAL REGISTER 1982-86

	Final Rules					Percentage of Total				
	1986	1985	1984	1983	1982	1986	1985	1984	1983	1982
New requirements	366	358	260	248	294	7.6	7.4	5.0	4.1	4.7
Revisions to existing requirements	1,267	1,255	1,350	1,430	1,530	24.2	25.9	26.2	23.6	24.3
Elimination of existing requirements	142	177	162	217	299	3.3	3.7	3.1	3.6	4.8
All other	2,814	3,053	3,383	4,154	4,165	64.9	63.0	65.6	68.7	66.2
Total	4,589	4,843	5,155	6,049	6,288	100.0	100.0	100.0	100.0	100.0

**EXHIBIT 18. FINAL RULE DOCUMENTS BY AGENCY PUBLISHED IN THE FEDERAL REGISTER
1982-86**

Agency	Number of documents					Percentage of documents				
	1986	1985	1984	1983	1982	1986	1985	1984	1983	1982
Agriculture	554	611	684	638	674	11.1	11.8	12.9	10.5	10.6
Commerce	292	254	202	213	205	5.9	4.9	3.8	3.5	3.2
Defense	198	113	102	109	111	4.0	2.2	1.9	1.8	1.8
Education	51	40	35	25	36	1.0	0.8	0.7	0.4	0.6
Energy	21	14	27	37	52	0.4	0.3	0.5	0.6	0.8
Health and Human Services	405	450	422	573	561	8.1	8.7	8.0	9.5	8.9
Housing and Urban Development	95	96	141	128	124	1.9	1.9	2.7	2.1	2.0
Interior	240	258	320	461	477	4.8	5.0	6.0	7.6	7.5
Justice	116	108	113	159	102	2.3	2.1	2.1	2.6	1.6
Labor	55	68	56	63	63	1.1	1.3	1.1	1.0	1.0
State	12	7	7	8	15	0.2	0.1	0.1	0.1	0.2
Transportation	923	903	748	865	908	18.5	17.4	14.1	14.3	14.3
Treasury	236	219	247	244	180	4.7	4.2	4.7	4.0	2.8
Environmental Protection Agency	487	518	624	605	805	9.8	10.0	11.8	10.0	12.7
Equal Employment Opportunity Commission	8	13	14	16	7	0.2	0.3	0.3	0.3	0.1
Federal Emergency Management Agency	71	84	91	261	398	1.4	1.6	1.7	4.3	6.3
Government Services Administration National Aeronautics and Space Administration	74	107	74	95	80	1.5	2.1	1.4	1.6	1.3
Office of Management and Budget	0	0	1	2	1	0.0	0.0	0.0	0.0	0.0
Office of Personnel Management	44	39	38	43	25	0.9	0.8	0.7	0.7	0.4
Small Business Administration	34	26	39	26	26	0.7	0.5	0.7	0.4	0.4
Veterans Administration	51	49	54	53	54	1.0	0.9	1.0	0.9	0.9
Other	275	241	261	335	337	5.5	4.7	4.9	5.5	5.3
Commodity Futures Trading Commission	19	32	38	51	19	0.4	0.6	0.7	0.8	0.3
Consumer Product Safety Commission	9	17	30	22	25	0.2	0.3	0.6	0.4	0.4
Federal Communications Commission	306	400	405	359	393	6.1	7.7	7.7	5.9	6.2
Federal Deposit Insurance Corporation	16	14	20	24	17	0.3	0.3	0.4	0.4	0.3
Federal Energy Regulatory Commission	82	127	139	156	120	1.6	2.5	2.6	2.6	1.9
Federal Home Loan Bank Board	29	39	32	41	53	0.6	0.8	0.6	0.7	0.8
Federal Maritime Commission	6	9	43	19	26	0.1	0.2	0.8	0.3	0.4
Federal Reserve System	28	40	37	66	75	0.6	0.8	0.7	1.1	1.2
Federal Trade Commission	77	84	82	116	80	1.5	1.6	1.6	1.9	1.3
Interstate Commerce Commission	51	59	53	103	127	1.0	1.1	1.0	1.7	2.0
Nuclear Regulatory Commission	36	49	42	55	51	0.7	0.9	0.8	0.9	0.8
Securities and Exchange Commission Total ¹	54	66	54	65	84	1.1	1.3	1.0	1.1	1.3
	4,991	5,182	5,290	6,056	6,329	100.0	100.0	100.0	100.0	100.0

¹Totals may include final rules issued jointly by two or more agencies.