EXECUTIVE OFFICE OF
THE PRESIDENT

OFFICE OF MANAGEMENT
AND BUDGET

REGULATORY PROGRAM OF THE UNITED STATES GOVERNMENT

April 1, 1987 - March 31, 1988

TABLE OF CONTENTS

THE REGULATORY MESSAGE OF THE PRESIDENT

TO THE CONGRESS OF THE UNITED STATES:

The 1987 *Regulatory Program of the United States Government* sets forth the current regulatory policies and priorities of my Administration. This is the third such annual report, and it has become a useful tool for assessing our government's regulatory activities more carefully and systematically and for managing them more effectively.

It has been, and remains, a basic tenet of my Administration that there is too much regulation of American life and that true regulatory reform must involve regulatory reduction. Thousands of regulations, implemented by more than a hundred Federal agencies, can have an enormous impact—for good or ill—on virtually every aspect of our national life. They govern what we can and cannot buy, what is and is not safe, how products can be manufactured and marketed, how much those products will cost, how they will be transported, used, and even discarded.

In the 50 years during which government regulation grew to be a major factor in our national economy, "red tape" became so dense it threatened finally to strangle our free enterprise system. In the past 6 years, we have cut through much of this red tape, and we have substantially reduced the volume of new regulation.

By Executive order I have required that agencies demonstrate that the likely benefits of any new regulation they may propose outweigh its likely costs. And we have vigorously enforced the Paperwork Reduction Act of 1980, which requires an agency to demonstrate that its need for information outweighs the burden on respondents and the costs involved in compliance.

These review procedures, as reinforced by the regulatory planning process also established by my Executive order, provide the framework for making Federal regulation and paperwork requirements as fair, effective, and unobtrusive as possible.

Regulatory reform is not a one-time enterprise but a continuing effort that must engage the active, constant attention of every government manager. Regulations should not be imposed upon the public without adequate justification. Inconsistencies among the agencies in the regulations they do adopt should be avoided. Government managers should regularly seek valid, objective information from the public on the nature of new problems to be solved and how best to solve them.

As we continue this work in 1987, I have set as a special priority the review of regulations that affect America's ability to compete in international trade. In carrying out the 1987 Regulatory Program, government managers will also concentrate on revising—and reducing where possible—those regulations that make intergovernmental relations so needlessly cumbersome.

I look forward to working with the Congress in pursuit of these goals.

RONALD REAGAN

THE WHITE HOUSE
June 1987

THE REGULATORY PROGRAM IN BRIEF

THE REGULATORY PROGRAM IN BRIEF

This is the third annual publication of the *Regulatory Program of the United States Government*. The Regulatory Program planning process was created by Executive Order No. 12498, signed by President Reagan on January 4, 1985. Its purpose is to promote sound, rational government policy by improving Executive branch regulatory decisionmaking and coordination within the direction and discretion provided under law. It also provides Congress and the public with an advance view of the most important regulatory decisions for the forthcoming year.

In addition to the "Regulatory Message of the President," this year's Program comprises the "Regulatory Program in Brief" and the "Regulatory Program by Agency." Within the former, Chapter I presents a general discussion of the need for regulatory improvement and better regulatory management. It is followed by four additional chapters on: the role of regulatory impact analysis; competitiveness and its relation to regulatory oversight; Federalism in regulatory actions; and a history of Executive oversight of Federal regulation and regulatory paperwork. In the "Regulatory Program by Agency," an overview of each agency's regulatory activities is provided, followed by descriptions of their significant regulatory actions.

I. REGULATORY IMPROVEMENT

THE REGULATORY ENVIRONMENT

Regulation is a basic part of day-to-day life in America, and has become a primary means by which our government seeks to attain the social and economic goals of the Nation. Empowered either by general legislative grants of authority from Congress or by specific statutory directives to regulate, Federal agencies have created a web of regulations that establish rights and responsibilities, set limits, and control at least some of the behavior of nearly every American institution and individual.

Federal rules delimit banking practices, health care entitlements, student loan eligibility, and crop supports. Rules also establish standards for matchbooks, refuse bins, and swimming pool slides. The Code of Federal Regulations, now well over 100,000 pages long, contains the rules of agencies ranging from high-volume regulators like the Departments of Agriculture, Health and Human Services, and Transportation to the more narrowly focused Panama Canal Commission, Institute of Museum Services, and Pennsylvania Avenue Redevelopment Corporation. The larger regulators may issue 300 or 400 proposed and final rules a year; the smaller regulators only 1 or 2.

Regulations vary in every conceivable way. Some are minor by almost anybody's measure, and may simply update or modify existing procedures, incorporate certain material by reference, or make other minor adjustments to existing standards. Coast Guard rules, for example, establish times for the opening and closing of drawbridges. Such rules are likely to be uncontroversial and involve virtually no costs; they may take only a few months to implement.

Other rules establish major new programs and often generate widespread controversy. Some, such as the rules implementing new hazardous waste disposal laws, result directly from specific legislation. Other major rules result from initiatives taken by agencies under broad statutory authority. For example, the Department of Housing and Urban Development undertook to establish energy-related construction standards for the mobile home industry based on general legislative authority.

Major rules can cost society millions or even billions of dollars annually and often take years to implement. Reaching acceptable administrative resolution of complex regulatory issues requires extensive data collection, thorough analysis, and difficult legal, economic, and political decisions. Sometimes the rulemaking is blocked or redirected by court challenges. Just establishing major rules can absorb extensive resources of the agency, of the court system, and of the proponents and opponents of the proposed action.

All regulations are based ultimately on statutory authority. Given the complexity and uncertainty associated with many regulatory problems, the authority provided by Congress is often broad, establishing the outlines of a program or indicating the general boundaries of a Federal concern. The agency head, then, overseen by the President, uses the necessary flexibility to execute the law and carry out the program by addressing the perceived problem more specifically, developing a regulatory solution, and deciding the details of the standards of conduct themselves—those contentious lines that distinguish acceptable practice from noncompliance and legal penalties.

Regulatory development inevitably turns out to be a daunting task. The United States is a large and heterogeneous society, which has fostered and respected differences in values and behavior among its citizens, its businesses, its industries, and its other institutions. Furthermore, the society is vital and energetic,

driven by curiosity and experiment, and change is both encouraged and expected. As a result, the problems that statutes and regulations are established to allay are continually changing. The clarity that may seem initially to define a perceived problem blurs as its details are investigated and as time passes. The initial problem itself may shift or even disappear as new issues emerge due to changes in technology, economics, or world conditions.

The oil crises in the 1970s, for example, made fuel economy standards for the automakers seem a reasonable way of forcing oil conservation. With an oil glut in the 1980s, however, the standards now inhibit manufacturers from making larger cars desired by consumers and, in addition, have contributed to a competitive disadvantage domestic producers suffer relative to foreign imports.

Moreover, even if a problem can be grasped and clearly identified, solving it raises its own challenges. Alternative solutions can (and should) always be devised and considered. Each possible solution affects different groups and solves different aspects of the problem; each provides benefits for different advocates and imposes costs on different groups. For example, highway safety advocates have argued for years over whether the greatest safety payoff results from regulating the vehicle, the highway, the driver, or some combination.

Other difficult decisions arise. Enforcement schemes may prove more or less practical. Conflicts arise between new statutes and rules (designed to solve new problems) and old prescriptions (for old problems), as do conflicts among Federal, State, and local responsibilities. Furthermore, one agency solving one set of problems may establish rules that conflict with or duplicate rules of another agency bent on addressing a different set of issues. In short, the American economic and social system—big, dynamic, varied, and hard to pin down—makes the regulator's task of defining, bounding, and otherwise limiting human behavior enormously complex and difficult.

LESSONS FROM TWO DECADES OF REGULATION

In the mid-1960s, the United States extended the role of the Federal government into new areas. Congress created programs to protect the health and safety of Americans, and in the decade that followed, agencies wrote regulations establishing these programs, then modifying and adjusting them. These young regulatory programs came primarily out of the Departments of Transportation, Health and Human Services, Housing and Urban Development, and Labor and the Environmental Protection Agency, and grew quickly as Congress increased their responsibilities. This, in turn, required increases in the size of the bureaucracies needed to establish, administer, and enforce the new regulations, thereby creating the expectation that even more could be done.

These programs became well-established tools of social policy and added to the older regulatory programs, such as those of the Departments of Commerce and Treasury and the Interstate Commerce Commission, which focused primarily on economic regulation. In general, these new health and welfare programs were more far-reaching in their effect, extending across industries and applying to whole categories of business. They established new entitlements, created licensing or permitting requirements, required specific technologies, or restricted business practices to protect workers or reduce the emission of pollutants into the environment. The Clean Air Act, for example, established a program requiring the Environmental Protection Agency (EPA), with the States, to reduce pollutant emissions below certain thresholds. State and Federal standards resulting from this program affected virtually every industry in every major city and State, from steel mills to local drycleaning shops.

The goals of these regulatory programs, e.g., to reduce harmful effects of industrial production, were generally accepted by Americans as appropriate Federal policy. By the mid-1970s, however, government officials, academicians, business leaders, and individual citizens perceived the need to focus on the costs and the emerging unintended side effects of these programs. Although rules were always intended to have benefits, experience with rulemaking in the 1970s demonstrated that predicted benefits were often far less than expected, while costs were often greater than anticipated.

First, it became apparent that regulations were expensive. Investigators began to document the high and often hidden societal costs of regulation. The Council on Environmental Quality, for example, estimated the total annual cost of Federal environmental legislation and regulation to be almost $27 billion in 1978. Even relatively minor rules could cost society tens of millions of dollars per year. No one is really sure what the total cost of Federal regulation is, but studies have estimated the costs for the Nation as a whole at between $50 and $150 billion per year.

Second, researchers and government officials began to discover unintended and sometimes perverse effects of regulations and government control in general. Some programs, for example, simply did not work, or could not be enforced, producing few if any benefits. In 1973, the National Highway Traffic Safety Administration tried to increase seatbelt use by mandating an interlock system (an automobile could not be started unless the seatbelt was fastened). People hated it. The systems often failed, leaving properly belted drivers unable to start their cars. Loud public outcry led Congress to prohibit such a system through legislation. In short, in many regulatory programs technology did not work or people did not behave as expected.

In other cases, researchers found new evidence of what some had argued from the start—that programs of price and entry control raised rather than lowered

prices, and that regulation restricted rather than promoted competition and innovation. In yet other cases, though benefits in theory extended to society in general, in fact they accrued to small special interests. Thus, a business might actively promote a worker safety rule (perhaps its own business practice) to protect it from liability suits. Or, in the same vein, a large business might advocate Federal regulation as a means of increasing business costs for its smaller competitors or of restricting the competitive playing field to an area where it had a comparative advantage.

The Federal government learned valuable lessons from its experience in the 1960s and 1970s. Our society is complex, and regulating it is a difficult task prone to unintended consequences. The Federal government is not always the best problem solver—often State or local governments are more responsive. Effective government entails more selective application of regulatory standards and compliance methods, more care in their establishment, and better regulatory oversight. And, in general, some unifying principles are needed to help sort out and order the work of over 100 Federal agencies acting with different goals in order to enable the American government, as a whole, to carry out its activities in a coherent, fair, and efficient manner.

GOOD GOVERNMENT AND REGULATORY MANAGEMENT

The final chapter of the "Regulatory Program in Brief" explains in detail the development of Federal efforts, including those of President Reagan's three immediate predecessors, to better manage the government's regulatory affairs. This Administration, in particular, has made improved regulatory management one of its primary goals. Building on the lessons of the 1960s and 1970s, President Reagan has sought to make rulemaking better reasoned and to apply to regulation a unifying set of rational principles.

These regulatory principles further efforts to ensure that within the discretion conferred by law, the government only intrudes into the free market to solve real problems that will not otherwise be addressed, and to ensure that Federal regulations produce benefits that outweigh their costs. The principles also further efforts to contain or remove regulatory obstacles to free choice.

For example, the Administration has recently proposed a rule that will make experimental drugs more readily available to patients with immediately life-threatening illnesses for which there are no alternative therapies. Under this proposal, patients, their physicians, and the scientists who develop and test the drugs would have increased responsibility for making decisions regarding their use.

The application of rational principles to rulemaking and the establishment of a central oversight process have also helped the Administration better manage the regulatory component of other policy concerns. At a time when our domestic economy is increasingly tied to a complex global economy, competition is not only a domestic concern, but an international one. Domestic policies, including regulation, have to be considered in the much larger context of our ability to compete in an international economy. In addition, this Administration has reexamined the Nation's division of government authority into Federal, State, and local levels. In a variety of ways, authority and responsibility have been returned to the States, where decisions better reflect local needs and the views of the local electorate. (These particular concerns are discussed further in Chapters III and IV.)

The principles relied upon by this Administration to manage and unify Federal regulations come from two sources. Executive Order No. 12291 requires agencies to use the discretion afforded them by law to ensure that regulatory action is based on adequate information, that alternatives are considered, and that the benefits of a possible regulation outweigh the costs. (An annual summary of rules reviewed under Executive Order No. 12291 is included as an appendix to this issue of the *Regulatory Program*.) The Paperwork Reduction Act of 1980 requires that all Federal information collection, frequently directed or authorized by rules, is the least burdensome possible, is not duplicative of other information, and is actually used.

While Executive Order No. 12291 and the Paperwork Reduction Act articulate principles for regulatory development and require reviews of individual rules, Executive Order No. 12498 and the Regulatory Program are the centerpiece of this Administration's effort at good government in regulatory affairs. The Regulatory Program requires the Executive branch to balance regulatory priorities and to publish a detailed description of the Administration's regulatory goals for the next year.

The Regulatory Program was created because experience with Executive Order No. 12291 and the Paperwork Reduction Act showed that neither, by itself, provided a comprehensive overview of regulatory activities across the Federal government. The Regulatory Program requires that the most significant regulatory issues be considered by agency heads and balanced against priorities within and between agencies. This gives the public and the Congress an early understanding of the Administration's regulatory intentions. It also contributes to the fundamental objective of good government in a variety of ways, including: ensuring coordination among agencies; identifying regulatory actions to improve the government's management of expenditures; helping to meet paperwork reduction goals; and improving individual regulations.

Coordination Across Agencies To Meet Federal Policy Goals

Interagency coordination makes Federal regulation more efficient. Effective coordination can range from simply informing other interested agencies of pending

regulatory actions to defining regulatory priorities across agencies and adopting consistent approaches in setting regulatory requirements.

The regulation of biotechnology products exemplifies timely and effective coordination of regulatory action. Biotechnology refers to the use of living things or their byproducts as the basis for a product. The most immediate uses for this new technology are in agriculture and medicine—for example, the production of insulin needed by diabetics. In 1984, the Administration convened a working group to review and coordinate Federal regulation of biotechnology. In addition, the Biotechnology Science Coordinating Committee—comprising top officials from the key regulatory and science agencies—was created to ensure scientific consistency across Federal agencies. As a result of these efforts, the Federal government will avoid a patchwork of conflicting regulations; instead, it will ensure both protection of the public from unreasonable risks and flexibility for this fledgling industry.

The implementation of the Superfund Amendments and Reauthorization Act of 1986 (SARA) further illustrates improved interagency coordination under the Regulatory Program. SARA requires rulemaking by EPA that will result in some 350,000 businesses reporting to local communities information on many chemicals that they use or store. Ancillary rulemaking by the Occupational Safety and Health Administration (OSHA) could substantially increase the number of businesses that must report. Coordination between EPA and OSHA will ensure that local communities can effectively use the information provided under SARA.

Managing Government Expenditures

Coordination of Federal regulatory activity also enhances the management of Federal funds and resources. Through regulations, agencies oversee and improve the efficiency of government operations, manage the administration of Federal expenditures and revenue collections, establish eligibility standards for Federal assistance, and direct the use of public resources. This year's Regulatory Program contains a number of rulemakings that will help to ensure that individual agencies deliver services efficiently and develop policy consistent with the overall budgetary objectives of the Federal government.

The General Services Administration, for example, will conduct a review of the Federal Information Resources Management Regulations in an effort to improve the Federal government's acquisition and use of computer and communications technology and place information technology acquisition on a sound business footing.

A final rule being developed by the Health Care Financing Administration (HCFA) would modify the way in which State Medicaid agencies are reimbursed by the Federal government for prescription drugs. HCFA's final rule, if promulgated, will encourage the dispensing of less costly, but medically equivalent, generic drugs. The new approach should reduce annual costs to the Federal government while maintaining dependable, quality health care for Medicaid recipients.

The Farmers Home Administration, which finances housing in rural areas, has issued regulations that establish a priority system favoring very low-income tenants, while including a family asset test in determining eligibility for housing loans. By targeting recipients with the greatest need and examining applicants' financial risks, these regulations will provide more effective use and protection of the government's loan portfolio.

The Federal Emergency Management Agency (FEMA) is improving its administration of the National Flood Insurance Program. These changes are designed to reduce future flood losses through local floodplain management efforts and to transfer the costs of residual flood losses from the general taxpayer to the floodplain occupant through the use of insurance rates reflecting the actual risk. A major goal, which FEMA outlines in the Regulatory Program, is to make the program self-supporting by fiscal year 1988, thereby reducing the need for Federal subsidies.

Meeting Paperwork Reduction Goals

The administration of Federal programs and regulations invariably requires the collection of information. As a result of the significant paperwork burdens imposed by the Federal government, the Paperwork Reduction Act of 1980 required an initial 25 percent reduction in Federal paperwork requirements, and the 1986 amendments to the Act require additional annual reductions of 5 percent over the next 4 years. The Regulatory Program has helped to identify and implement important opportunities to reduce this Federal paperwork burden.

This past year, for example, OSHA converted several recordkeeping requirements into a self-certification process and removed other unnecessary recordkeeping requirements through rulemaking. This regulatory action achieved a 7.5-million-hour reduction in paperwork burden. Similarly, the Department of Transportation (DOT) recently completed a comprehensive review of Federal requirements for financial reporting by the airlines. DOT published final rules that cut those requirements by 30 percent, and has plans for more regulatory reductions in paperwork burden. Proposals to make the remaining reports consistent with generally accepted accounting principles would enable the airlines to use data compiled in the normal course of business rather than generate special information, at greater cost, to meet DOT's regulatory needs.

Improved Federal Regulation

One of the key objectives of both Executive Order Nos. 12291 and 12498 is to ensure that regulatory decisions are based on sound analysis. Policymakers are only able to make decisions that maximize social welfare if they have enough information and analysis to assess fully the real benefits and costs of regulatory proposals.

The relationship between a regulatory action and the desired outcome can be a complicated one—often involving uncertainty about the magnitude, and even the direction, of the likely effects. As a result, agencies need to undertake extensive study of the likely effects of alternative regulatory approaches and options. One function of the Regulatory Program is to ensure that, early in the development of regulations, adequate information is sought and a full range of alternatives is considered.

Through careful analysis of a range of options, agencies are able to select regulatory alternatives that provide the greatest net social benefits. For example, in developing its regulations governing the storage of petroleum products in underground tanks, EPA studied various alternatives designed to reduce health risks. The Agency discovered that only a very small number of tanks are likely to pose significant risks, because the potential for exposure and risk from tank leaks depends greatly on the location of the tank (e.g., soil characteristics, proximity to drinking water, etc.). Therefore, rather than require all tank owners (who are mostly small businessmen who own gas stations) to install the most expensive, double-vault tanks, EPA developed comprehensive but less expensive requirements designed to protect human health and the environment. These requirements will cost about $20,000 less per gas station than the double-vault tank alternative. The Agency is encouraging the States, which will be responsible for this program, to establish more stringent standards as are necessary in higher risk locations.

As was noted last year in the 1986 *Regulatory Program*, there is a pressing need to improve Federal risk assessment and risk management activities used to assess potential health and safety regulatory actions. Often these risk assessments so overstate risks that the chance that they approximate actual risks is remote. This overstatement—and the uncertainty as to the degree of overstatement—are likely to cause policymakers to overestimate the benefits of regulatory action. As a result, they often select what are, in fact, the wrong targets for reducing risks to society and apply stringent and costly regulatory measures that may actually have little or no risk-reducing benefits, but that may impose significant costs.

This Nation can ill afford to commit limited resources to the wrong targets and to excessively stringent and costly regulatory measures. Spending these scarce resources inefficiently will preclude us from pursuing better opportunities to reduce risks and to improve the Nation's standard of living.

II. THE ROLE OF REGULATORY IMPACT ANALYSIS

Federal regulations play a powerful and complex role in our economy. They can significantly enhance the Nation's welfare in a number of ways, such as reducing health risks or improving the use of natural resources held by the Federal government. At the same time, however, resources spent as a result of any given regulatory initiative reflect a judgment not to expend these resources in other ways. Thus, we can only improve the Nation's welfare through Federal regulatory action if the net benefits (benefits minus costs) of these actions are greater than those of alternative actions.

Major regulatory initiatives, such as a crash standard for automobile bumpers or a standard limiting the amount of lead in gasoline, can impose costs and yield benefits substantially in excess of $100 million per year. Regulatory actions like these often involve complex issues and require careful analysis of their likely benefits and costs. For example, in evaluating the effect of phasing down the amount of lead permitted in gasoline, the Environmental Protection Agency (EPA) identified and evaluated a variety of important benefits (in addition to the direct health benefits of reducing the amount of lead in the environment). These included a reduction in the costs of operating an automobile and the environmental benefits of a reduction in the destruction of catalytic converters due to the misfueling of cars with leaded gasoline. EPA's analysis showed that the cumulative value of the benefits of the rule exceeded the estimated cost by more than $1 billion per year.

Because of the importance of understanding the effects of major regulations, President Reagan issued Executive Order No. 12291. This Order requires Federal agencies to analyze "the need for and consequences of proposed government action" in order to design regulatory measures that, to the extent permitted by law, "maximize net benefits to society." Among other things, Executive Order No. 12291 requires Executive branch agencies to prepare for review by the Office of Management and Budget (OMB) a regulatory impact analysis (RIA) for each major rule.[1] The basic objective of the RIA requirement is to ensure that regulatory policymakers have the best information available on the likely benefits and costs of regulatory alternatives so they can make better decisions, and to provide the public, Congress, and the courts with a

[1]Generally, a major rule is a regulation that is likely to result in (1) an annual effect on the economy of $100 million or more, (2) a major increase in costs or prices, or (3) significant adverse effects on competition, employment, investment, productivity, or innovation.

better understanding of the basis for agency decisionmaking.

The RIA requirement under Executive Order No. 12291 differs from analyses required by earlier Executive Orders.[2] The major difference is that the RIA must evaluate the benefits, as well as costs, of regulatory actions.[3] Specifically, Executive Order No. 12291 requires that RIAs contain:

1. A description of the potential benefits of the rule, including any benefits that cannot be quantified in monetary terms, and the identification of those likely to receive the benefits;
2. A description of the potential costs of the rule, including any adverse effects that cannot be quantified in monetary terms, and an identification of those likely to bear the costs;
3. A description of alternative approaches that could substantially achieve the same regulatory goal at lower cost, together with an analysis of the potential net benefit; and
4. A brief explanation of the legal reasons why the rule cannot be based on the regulatory alternative maximizing net benefits, if some other regulatory option is selected as the basis for the rule.

This chapter examines the key elements of an RIA and some of the questions that arise in developing an RIA. We use specific examples from nine actual RIAs covering a broad spectrum of regulatory actions. They are:

1. Department of Commerce—final rule prohibiting offshore hydrocarbon operations (oil and gas drilling) in the Channel Islands and Point Reyes/Farallon Islands National Marine Sanctuary areas;
2. Department of Interior—final rule setting migratory bird (duck) hunting season lengths and bag limits for the four American flyways;
3. Department of Transportation (DOT)—final rule requiring center high-mounted stoplamps in automobiles;
4. DOT—final rule relaxing the minimum crashworthiness of auto bumpers from 5 miles per hour (mph) to 2.5 mph;
5. (EPA)—proposed rule that would set New Source Performance Standards limiting sulphur dioxide (SO_2) emissions from industrial boilers;
6. EPA—1983 Lead Phasedown rule—rule limiting the lead content of gasoline to 0.1 grams per gallon;
7. Occupational Safety and Health Administration (OSHA)—final rule lowering the permissible level of exposure to ethylene oxide in the workplace;
8. OSHA—proposed rule to reduce the risk of falls for construction workers; and
9. OSHA—final rule lowering the permissible level of exposure to asbestos in the workplace.

KEY ELEMENTS OF REGULATORY ANALYSIS

There are two fundamental questions that must be answered if an RIA is to be useful in helping to guide a rulemaking decision: (1) is there a need for Federal regulatory action; and, if so, (2) under what conditions can the benefits of the action be expected to exceed its costs? To answer the first question, the agency must determine whether the Federal government can accomplish the regulatory objective more efficiently than the market or some alternative to Federal regulation. To answer the second question, the agency must identify several potential Federal regulatory actions and evaluate the benefits and costs of each action while accounting for uncertainty and discounting (differences in the timing) of those benefits and costs. Using examples from the nine RIAs cited above, the following discussion identifies the analytic principles that should be used in answering these questions. (Table I presents a summary of these RIAs.)

The Need for Federal Regulatory Action

Market Failure

In order to establish the potential need for a Federal regulatory initiative, the RIA should first determine whether the proposed regulatory action addresses a genuine problem generated by market failure. By definition, a market failure occurs when, in cases of externality,[4] inadequate information,[5] or natural monopoly,[6] the free market fails to maximize social welfare.

[2]See Chapter V for a discussion of this history of Executive branch oversight of Federal regulation.

[3]See Hopkins, Lenard, Morrall, and Pinkston, "A Review of the Regulatory Interventions of the Council on Wage and Price Stability, 1974–1980," pp. 26–27. Earlier analyses focused on cost analysis and such attendant economic effects as price increases, employment effects, trade effects, and plant closings. These analyses rarely presented anything more than a qualitative statement of the likely benefits of regulation.

[4]An externality occurs when production (or consumption) activities result in uncompensated costs or benefits to third parties not part of the market transaction. For instance, environmental problems, such as air emissions from a manufacturing plant, may impose soiling costs or health problems (without compensation) on neighbors.

[5]One type of "public good"—the provision of adequate information for buyers and sellers to make informed decisions in the marketplace—may also be a source of market failure. There are costs, though, as well as benefits in collecting and providing information. As a result, a market failure occurs only in cases where the benefits substantially exceed the cost of providing additional information to the market. Where market failure due to inadequate information is the rationale for government action, a regulatory action to improve the availability of information, thereby allowing individuals to make informed decisions in their own best interest, will ordinarily be the preferred alternative. Food and Drug Administration ingredient labeling requirements and EPA's hazard labeling for pesticides exemplify this type of regulation.

[6]Natural monopoly exists where a market can be served at lowest cost only if production is limited to a single producer, as in the case of local telephone, gas, and electricity services. Unfortunately, an unregulated monopolist will usually charge a higher price and produce and sell a smaller quantity than the price and quantity that would emerge in a competitive industry.

TABLE I. SUMMARY OF RIAs

Regulation	Discussion of market failure	Evaluation of suitable alternatives to selected option	Treatment of uncertainty	Baseline identification	Discounting
DOC—National Marine Sanctuaries	Federal regulation required	Discusses 5 options but evaluates only 2 options	Presents only a range; ignores best estimate	Unclear	Discounts at 10%; does sensitivity analysis
DOI—Migratory Bird Hunting	Statute requires Federal regulation	Identifies several options; evaluates only 2	Ignores uncertainty	Uses existing regulations in each flyway	Rule covers one season
DOT—Center High-Mounted Stoplamps	Statute requires Federal regulation	Evaluates a number of options	Uses best estimates; does sensitivity analysis	Uses existing stoplamp configuration	Discounts at 10%
DOT—Bumper Standard	Statute requires Federal regulation	Evaluates 6 options	Uses best estimates; does sensitivity analysis	Uses existing regulation	Discounts at 10%; does sensitivity analysis
EPA—Industrial Boiler, SO_2	Discusses briefly; statute requires Federal regulation	Evaluates 2 reg. options, but fails to evaluate a performance standard	Fuel price scenarios were much higher than actual price	Uses existing regulation	Discounts at 10%; but no explicit discussion in the RIA
EPA—Lead Phasedown	Statute requires Federal regulation	Evaluates 2 options	Uses best estimates; presents ranges of estimates	Uses existing lead levels	Discounts at 3%
OSHA—Fall Protection	Comprehensive discussion; reviews conditions necessary to eliminate market failure	Evaluates only selected option and current (baseline) requirements	Uses best estimates; does sensitivity analysis for benefits	Uses existing rule with less-than-full compliance	Discounts at 10%
OSHA—Asbestos	Rich and informed discussion	Fails to consider alternative standards; use of respirators	Uses best estimates but ignores uncertainty; no sensitivity analysis	Uses existing practice	Discounts costs at 10%; does not discount benefits
OSHA—Ethylene Oxide	General, basic discussion; but not specific to ethylene oxide	Fails to consider alternative standards; use of respirators	Ignores uncertainty and uses upper bound benefits estimates	Uses existing practice	Discounts costs at 10%; does not discount benefits

This point is crucial because there can be no net benefits (in fact there must be a net loss) resulting from a regulatory action unless there is a market failure. Of course, not all market failures can be remedied effectively through government regulation. In these instances, the market solution, though imperfect, is better than the regulatory alternatives.

While an analysis of market failure should help determine the need for rulemaking, at least some form of Federal regulation is required by statute in many cases. In those instances where legislation requires regulatory action even though there is no market failure, RIAs should focus on the least burdensome means of achieving the statute's goals.

Most RIAs provide only a perfunctory discussion of market failure, citing instead statutory requirements of Federal regulation. There are some exceptions, of course. For instance, OSHA's RIA for its proposed Fall Protection rule provides an excellent discussion of a market failure in the labor market.[7] (See Table I.)

Alternatives to Federal Regulation

If the agency identifies a market failure in any of its three forms, it must then decide whether Federal regulatory action is the best way to resolve the problem. There may be no need for Federal regulatory action if other approaches are more likely to resolve the market failure. Such alternatives include: the judicial system (for example, liability cases to discipline health and safety protection), antitrust enforcement, workers' compensation systems, and regulation at the State or local level.

In general, because demands among localities for different governmental services differ, and because competition among governmental units for taxpayers and citizens encourages efficient regulation, the agency should look to the lowest level of government

[7]In general, workers who are well informed of the risks of a job can decide for themselves whether the wage is high enough to compensate for occupational risks. However, workers' compensation systems introduce a market failure in the form of an externality. They cause some of the costs of an injury to be borne by third parties (other than the employer and worker) because workers' compensation insurance premiums do not always accurately reflect workplace injury risks. As a result of this, as well as other factors identified by OSHA's RIA that are peculiar to the construction industry, workers and employers do not face the correct incentives to provide the optimal amount of fall protection.

(Federal, State, or local) capable of correcting the market failure.[8] In some cases, the nature of the market failure itself may suggest the most appropriate governmental level of regulation. For example, pollution that spills across State lines is probably best controlled by Federal regulation, whereas localized pollution is probably more efficiently handled by local government regulation. In other instances, only a quantitative benefit/cost analysis can resolve the question, and the agency should include in its RIA an analysis of whether State or local government could more effectively achieve the regulatory goals.

Benefit/Cost Analysis

If the agency determines that Federal regulatory action is necessary, then it must also prepare a benefit/cost analysis of the selected regulatory option and other suitable alternatives.[9] There are certain elements that play a crucial role in developing an effective benefit/cost analysis for policymaking purposes.

Evaluation of Regulatory Options

Ordinarily, the RIA should identify several regulatory options. One option, the status quo, normally serves as the base from which increments in benefits and costs are calculated for the other alternatives.[10] Other options the RIA should consider include varying degrees of stringency or varying dates of compliance.

A failure to identify appropriate options may substantially weaken the use of the RIA for decisionmaking, or may bias the analysis in a way that will only serve to justify a predetermined outcome. This is a frequent shortcoming of RIAs prepared by agencies. In fact, four of the RIAs reviewed in this chapter evaluate only two options—the selected option and a "baseline." (See Table I.)

DOT's careful analysis of alternative bumper standards illustrates the usefulness of evaluating suitable regulatory options. The RIA for the bumper standard considered six alternatives, including various front/rear combinations of 5 mph, 2.5 mph, and unregulated bumpers, as well as the existing 5 mph front and rear standard.[11] On the basis of its analysis, the 2.5 mph standard for both front and rear bumpers dominated the other alternatives under most assumptions.

DOT estimated the average net benefits of unregulated bumpers to be $4 per car *less* than the current 5 mph standard. Thus, if only those two alternatives were considered, DOT would have chosen to retain the 5 mph standard. However, DOT's analysis showed that 2.5 mph bumpers would yield average net benefits of $42 per car *more* than the current 5 mph standard and $46 per car over unregulated bumpers. Thus, if the RIA had evaluated only the two options of "no regulation" and the existing 5 mph front and rear standard, the information provided to decisionmakers would have been inadequate, and an unnecessarily costly policy choice would have resulted.

In cases where an agency focuses on a specific "design" standard (a standard that mandates a specific technology), it should also evaluate a comparable regulatory option that achieves the same "performance" level without prescribing the method of compliance.[12] As the 1985 Regulatory Program pointed out, "... a regulation should focus on the goals to be achieved rather than on the specific technology or means used to achieve these goals. Setting performance standards in regulations is more efficient than specifying technological solutions (i.e., design standards) because they provide industry with the incentive to be innovative in finding the most cost-effective solutions...."[13]

DOT's analysis for its bumper standard focuses on a performance standard, i.e., a standard based on the speed of a crash that a bumper should be able to withstand. Although DOT had to make some assumptions about bumper technology in order to estimate costs, the rule does not specify any design requirements. This allows manufacturers to build cars with bumpers that meet the performance standard with varying designs that respond not only to consumer preferences but also to the latest technological advances. The result is a regulation that accomplishes its goal at the lowest possible cost.

Benefit Estimates

The RIA should describe the beneficial effects of the proposed regulatory change and of its principal alternatives. In each case, the agency should explain the way in which the proposed action is expected to yield the anticipated benefits. All potential benefits should be monetized—quantified in monetary terms (using constant dollars)—to the maximum extent possible.[14] Any expected incremental benefits that cannot be monetized should be explained.

[8]In response to these basic principles, the Administration has attempted to encourage "Federalism" where appropriate. Chapter III discusses the Administration's efforts in this area.

[9]Occasionally, the agency may be prohibited by statute from considering benefit/cost analysis in its decision to regulate. Even in this case, however, the Executive Order requires a benefit/cost analysis in order to inform the Congress, the courts, and the public of the rule's effect.

[10]If the status quo is an existing regulation, then the RIA should consider "no regulation" as an alternative. DOT's bumper RIA illustrates the importance of this point.

[11]The phrase "5 mph bumper" refers to a bumper that will withstand a 5 mph crash.

[12]This point follows directly from Guideline #5 in the August 11, 1983 Report of the Presidential Task Force on Regulatory Relief, "Reagan Administration Regulatory Achievements" and reaffirmed by E.O. 12498.

[13]*Regulatory Program of the United States Government: April 1, 1985–March 31, 1986*, p. xv.

[14]The RIA should include a schedule of monetized benefits that would show the type of benefit and when it would accrue; the numbers in this table should be expressed in constant, undiscounted dollars. Moreover, the RIA should identify and explain in detail the data or studies on which benefit estimates are based. Where benefit

In developing benefits estimates, the agency should: (1) clearly outline a causal link between the regulatory action and the expected benefits and (2) support its major assumptions and use sensitivity analysis (i.e., show a range of estimates) where appropriate. The identification of a causal link between the regulatory action and identified benefits is a key element of an RIA. Unfortunately, the causal links to a regulatory action frequently involve a complex sequence of steps. In some cases, there is considerable uncertainty about the magnitude (and even the direction) of the effect of a regulatory action—particularly if the agency considers all the likely indirect effects as well.

One potential pitfall in estimating benefits arises because the regulation itself may alter the behavior of the regulated community. As a result, historical data may not be a good guide to future behavior (and the likely benefits of the rule). For example, if pollution control requirements for new manufacturing buildings or equipment substantially increase the cost of a new facility, a stringent standard for new facilities may delay the replacement of existing facilities, and the actual emission reductions that could be achieved by the rule may be lower than projected. Thus, while a stringent standard may achieve substantial emission reductions in the long run, emissions may actually be higher in the interim than they would have been under a less stringent regulatory alternative.[15]

Principles for Valuing Benefits—Ordinarily, goods and services should be valued at their market prices. In some instances, however, the market price of a good or service may not reflect its true value to society. If a regulatory action affects such a good or service, its monetary value for purposes of benefit/cost analysis should be derived using an estimate of its true value to society—often called its "shadow price."

For example, EPA's RIA on the *Costs and Benefits of Reducing Lead in Gasoline* includes as one of the identified benefits a reduction in crop damage due to reduced ambient ozone levels.[16] In this case, EPA estimates agricultural benefits of $160 million per year using the market value of the additional yields of such crops as wheat, corn, and cotton. The price of these crops, however, is held above its free-market value by government price-support programs. As a result, EPA's use of market prices for these crops overstates the value of the benefit of controlling ozone. EPA should have calculated the social value of this increase in crop yield using shadow prices for those crops subject to price supports.[17]

The estimated shadow price should reflect the value to society of marginal (least valuable) uses of the crop (e.g., the world price if the marginal use is for exports). If the marginal use is to add to very large surplus stockpiles, the shadow price represents the value of the last units released from storage, minus storage costs. Therefore, where stockpiles are large and growing, the shadow price is likely to be low and could well be negative. While in EPA's Lead Phasedown RIA the agricultural benefits represented a relatively small part of total estimated benefits, this issue could be of major importance in evaluating regulatory actions where effects on agricultural yields are a dominant factor (e.g., regulations governing the use of pesticides).

Valuation of Benefits Not Traded in the Market—In some important instances, a benefit does not correspond to a good or service traded in the marketplace. Important examples include reductions in health and safety risks, savings in time, and environmental amenities such as scenic vistas. To estimate the monetary value of a benefit that is not traded directly in the marketplace, the willingness-to-pay valuation methodology is useful, because the amount that people are willing to pay for a good or service is the best measure of its value to them.

Reductions in health and safety risks constitute one of the most important categories of nonmarket benefit. Both explicit and implicit methods can be used to incorporate these risks into the framework of benefit/cost analysis.[18] Reductions in fatality risks are best monetized in an explicit way by using a best estimate for the value of reductions in fatality risk—based on willingness-to-pay estimates—and alternative estimates using other plausible values.[19]

An implicit valuation approach could be developed using calculations of the cost per unit of reduction in fatality risk (cost per "statistical life saved"), with costs defined as costs minus other monetized benefits. Alternatives should be arrayed in order of their total

estimates are derived from a statistical study, the RIA should provide sufficient information so that an independent observer can determine the representativeness of the sample and whether the results were used properly in developing aggregate estimates.

[15]Gruenspecht, H.K., "Differentiated Regulation: The Case of Auto Emission Standards," *American Economic Review* (May 1982), vol. 72, no. 2, p. 328.

[16]EPA, *Costs and Benefits of Reducing Lead in Gasoline*, pp. IV. 29 and 30. EPA based its estimates of agricultural benefits on the following mechanism: the lead phasedown rule would reduce the "poisoning" of the pollution control equipment that reduces automobile and truck hydrocarbon emissions. This reductions in hydrocarbon emissions would, in turn, reduce the formation of ozone.

[17]McGartland, A.M., "The Implications of Ambient Ozone Standards for U.S. Agriculture: A Comment and Some Further Evidence," *Journal of Environmental Management*, vol. 24 (1987), pp. 139–146.

[18]Of course, estimates of the value of fatality risks refer only to changes in an uncertain (statistical) risk of death. They have no application to the certain prevention of the death of an identifiable individual.

[19]While there is extensive literature yielding estimates on the value of small reductions in fatality risk, the available literature on willingness-to-pay estimates for small reductions in the risk of nonfatal illness or injury is far more limited. As a result, the analysis should reflect the best judgment on whether a willingness-to-pay study or a direct-cost valuation (e.g., medical costs and the value of lost production) provides a better estimate of the value of reducing the risk of nonfatal illness or injury.

reduction in expected fatalities with the incremental cost per life saved calculated between each adjacent pair of alternatives. In contrast to explicit valuation approaches, this approach avoids the necessity of specifiying in advance a value for reductions in fatality risks. However, the final selection of an alternative implies a valuation for risk reduction. This valuation should be consistent with estimated values of reductions in fatality risks calculated according to the willingness-to-pay methodology.

To illustrate this, Table II presents estimates of the implicit risk/cost tradeoffs for six selected regulatory actions from last year's Regulatory Program (including OSHA's ethylene oxide rule) along with estimates from the OSHA Fall Protection and Asbestos RIAs. This information shows the implicit value of reductions in health and safety risks associated with these eight different regulatory actions. Four of these rules involve risk reduction costs that are well within the range of current estimates—$500,000 to $2 million per statistical life saved—of an individual's willingness to pay for a small reduction in the statistical risk of death.[20]

TABLE II. RISK-COST TRADEOFFS FOR SELECTED REGULATIONS

Regulation	Agency	Year issued	Cost per statistical life saved ($ millions)
Unvented space heaters	CPSC	1980	$ 0.07
Servicing wheel rims	OSHA	1984	0.25
Fuel system integrity	NHTSA	1975	0.29
Fall protection	OSHA	1985	1.40
Uranium mill tailings (active)	EPA	1983	53.00
Ethylene oxide	OSHA	1984	60.00
Asbestos	OSHA	1986	89.00
DES ban in cattlefeed	FDA	1979	132.00

Sources: *Regulatory Program of the United States Government, April 1, 1986–March 31, 1987*, p. xxi; Morrall, J.F., A Review of the Record, *Regulation*, November–December 1986.

Note: In 1984 dollars, discounted at 10 percent. Each nonfatal accident requiring hospitalization is treated as equivalent to one-fiftieth of a fatality. This relationship was selected as representative of the willingness-to-pay values for fatality risks relative to injury risks found by research studies. Cancer is counted as a fatality. Cancer latency periods were assumed to be 15 years for lung cancer associated with uranium mill tailings, 30 years for mesothelioma and lung cancer associated with lung cancer exposure, and 10 years for the leukemia and breast cancer associated with ethylene oxide and DES, respectively.

Discounting benefits and costs at 4 percent instead of 10 percent does not affect the conclusion that there are extremely wide variations in cost per statistical life saved between these regulations nor does it affect the cost-effectiveness rankings. Discounted at 4 percent, banning DES in cattlefeed still costs 1,500 times more per statistical life than regulating unvented space heaters.

The large differences in risk reduction costs across these rules suggest that regulating a different mix of risk-related activities might have provided greater risk reduction at the same or lower costs.[21] Consequently, failure to monetize health and safety benefits or to provide at least an implicit valuation of them can lead to the selection of an undesirable option. This does not mean that these risks would necessarily remain unregulated; rather, a modified, less stringent form of control could reduce risks at substantially lower costs. For example, a different approach (e.g., allowing greater flexibility in the use of respirators) to meeting the exposure limits for ethylene oxide could reduce costs by at least 60 percent without reducing benefits at all.

Cost Estimates

The important economic concept of opportunity costs is as relevant to benefit-cost analyses of regulations as it is to other types of economic analyses. The opportunity cost of an alternative is the value of the benefits foregone as a consequence of choosing that alternative. For example, the opportunity cost of banning a product (e.g., a drug, food additive, or hazardous chemical) is the foregone net benefit of that product.

All costs calculated should be incremental, i.e., they should represent changes in costs that would occur if the regulatory alternative is chosen compared to costs incurred under a less stringent alternative. Future costs that would be incurred even if the regulation is not promulgated, as well as costs that have already been incurred (sunk costs), are not part of incremental (or marginal) costs.

The RIA should also include a schedule of monetized costs that shows the nature of cost and when it would occur. The numbers in this table should be expressed in constant, undiscounted dollars. Costs include private-sector compliance costs, government administrative and enforcement costs, and costs of reallocating workers displaced as a result of the regulation. Costs that are not monetary outlays—e.g., discomfort or inconvenience costs—must be included and should be assigned a monetary value wherever possible.

The RIA should explain any expected incremental costs that cannot be monetized. An important type of cost that often cannot be quantified is a slowing in the rate of innovation or of adoption of new technology. For example, regulations requiring a costly and time-consuming approval process for new products or new facilities may have such costs, as may regulations setting much more stringent standards for new facilities than for existing ones.

An important, but sometimes difficult, problem in cost estimation is to distinguish between real costs and transfer payments. Transfer payments are not genuine costs, but instead payments that redistribute funds between groups for which there is no corresponding exchange of real goods or services. Several

[20] See W. Kip Viscusi, *Risk By Choice: Regulating Health and Safety in the Workplace* (Cambridge: Harvard University Press, 1983), p. 106.

[21] *Regulatory Program of the United States Government, April 1, 1986–March 31, 1987*, p. xxii.

examples of transfer payments include monopoly profits (payments from consumers to company stockholders), the portion of insurance premiums paid out as claims, and government subsidies (payments from the general taxpayer to specific groups receiving the subsidies). Treating these transfer payments as costs will most likely yield misleading information.

Treatment of Risk and Uncertainty

Where benefit or cost estimates are heavily dependent on underlying assumptions, the RIA should make these assumptions explicit so that information on all elements of the analysis is fully apparent to users of the analysis (e.g., the policymakers, Congress, and the public). Because the particular estimation approach adopted may involve a complicated model, it is important for the agency to make hidden assumptions explicit and present sensitivity analyses (i.e., show the effects of alternate assumptions on costs and benefits) based on plausible alternative assumptions. (See Table I.)

EPA's industrial boiler draft RIA examines two alternative energy price scenarios—clearly a critical element in its analysis. Unfortunately, because of EPA's failure to anticipate the sharp drop in oil prices over the last 18 months, these two scenarios are much higher than current projections of future energy prices. In preparing a final RIA, EPA's recent examination of a lower energy price scenario suggests that for those boilers choosing to use coal or oil, the incremental control costs to meet the stringent 90-percent reduction standard are more than double the cost projected using a higher fuel price scenario.

Wherever benefit or cost estimates are uncertain, an agency should present "most likely" or "best" estimates (in statistical terms, unbiased estimates or expected values). Where possible, an agency should also present information about the likelihood that the true value is different from the estimate, or at least lower bound and upper bound estimates.

Often benefit/cost analyses rely on a number of different studies that yield a range of different estimates. In these cases, the midpoint of the range of extreme values provided by the studies does not represent the most likely estimate because the most extreme estimates may be the least reliable. Such an approach ignores the results of the other studies. The correct approach would use all available information and derive a most likely estimate as a weighted average of the estimates of the individual studies, with the weight of each estimate based on the reliability of the study that produced it.

Furthermore, estimates of the risk reduction benefits to be anticipated from a proposed standard addressing health and safety risks should be best estimates, rather than hypothetical "worst-case estimates." OSHA's RIA for its Ethylene Oxide (EtO) rule provides a good illustration of the adverse effects of using "worst-case estimates." OSHA adopts an upper bound estimate of the cancer risks associated with exposure to EtO. In addition, the EtO RIA appears to overstate occupational exposure to EtO. While the RIA reports that very few hospital employees (zero to 1.2 percent) are exposed to EtO at levels as high as 20 parts per million, the RIA risk estimates are based on the assumption that 20 percent of hospital workers are exposed to EtO at this level.[22] Further, the RIA risk estimates are based on the assumption that workers are exposed continuously 8 hours a day, 5 days a week. In fact, many workers receive only intermittent exposures. Early drafts of the EtO RIA adjusted for intermittent exposure and obtained a risk estimate that is roughly one-third the estimate developed in OSHA's final EtO RIA.[23]

The combined effect of these "worst-case" assumptions yields an estimate of risk reduction that is 5 to 10 times greater than the most likely (or best) estimate.[24] This example clearly illustrates the problem with adjusting estimates in the direction of a worst-case outcome at each stage of the analysis. The estimates presented in the EtO RIA suggest a risk reduction on the order of 9 to 18 statistical cancers per year; but, this is an upper bound estimate. The most likely estimate of the expected reduction would be on the order of two statistical cancers per year.

If the agency believes that a "margin of safety" (i.e., additional protection of public health and safety beyond what it believes is necessary) should be provided, it should make this determination in the final stage of the decisionmaking process as an explicit part of the risk management decision, instead of adjusting the risk or benefits estimates in a worst-case direction at the information-gathering or analytical stages of the process. In addition, to the extent possible, the agency should present separately the likelihood (or probability) of various possible results, so as to allow for an explicit margin of safety. Worst-case estimates may be presented as alternatives to best estimates for sensitivity analysis, but should not be a substitute for them.

Discounting

Discounting takes account of the fact that resources (goods or services) in a given year are worth more than identical resources in a later year, since resources can be invested today so as to return more

[22]OSHA, Regulatory Impact and Regulatory Flexibility Analysis of the Final Standard for Ethylene Oxide, June 11, 1984, Ch. IV, pp. 14–16.

[23]OSHA, Preliminary Quantitative Risk Assessment for Ethylene Oxide, p. 26.

[24]*Regulatory Program of the United States Government: April 1, 1986–March 31, 1987*, p. xxvi. See also Nichols, A.L., and R.J. Zeckhauser, "The Perils of Prudence," *Regulation* November/December 1986, for a discussion of the advantages of "best" estimates as compared with "worst-case" estimates.

resources later. Because of this productivity of investment, the timing of benefits and costs must be taken into account. For example, a dollar invested today at 10 percent per year will return $2.59 in 10 years. Thus, the opportunity cost of a dollar foregone today is $2.59 in 10 years. By the same argument, a regulatory benefit occurring today and worth $1.00 is equivalent to a benefit of $2.59 10 years from now. The appropriate way to account for such differences in the timing of benefits and costs is by discounting.

If costs and benefits occur in different years, the RIA should evaluate the benefit and cost streams (in constant dollars) over a comparable timeframe. Generally, the RIA would make this adjustment by discounting the benefit and cost streams to their present values, but there are alternative approaches that are equally valid, such as annualizing the benefit and cost streams over the appropriate timeframe. Most of the RIAs examined used some form of discounting as a way of addressing the problem of adjusting benefit and cost streams so that they could be considered in a comparable timeframe. (See Table I.)

The effect of discounting can be illustrated by the EtO RIA. This RIA discounts the costs over a 50-year period to yield a present-value estimate of costs of $418 million; but it does not discount the benefits. A comparison of benefits and costs using the RIA estimates indicates a risk reduction cost of roughly $500,000 to $1 million per statistical cancer avoided. If, however, a comparison is made using the RIA benefit estimate (which was not discounted) and undiscounted costs, the risk reduction cost would be roughly $2.5 million to $5 million per cancer avoided. Finally, if both benefits and costs are discounted and appropriate consideration is given to the latency period associated with cancer, the risk reduction cost would be more than an order of magnitude higher—roughly $6 million to $12 million per cancer avoided.[25]

The combined effect of the use of upper bound estimates for risk assessment and the discounting assumptions can have a profound effect on the implicit estimate of risk reduction costs. The EtO RIA estimates suggest a risk reduction cost of roughly $500,000 to $1 million per statistical cancer avoided. If best estimates and a consistent treatment is adopted in the discounting of both benefits and costs, the risk reduction costs would range from $30 million to over $100 million per statistical cancer avoided.

This is an important difference in the estimated costs of risk reduction. The RIA estimates fall within the range of current estimates of the "willingness to pay" for a small reduction in statistical risk; however, the best estimate of risk reduction costs substantially exceeds current willingness-to-pay estimates. Similarly, in Table I, the risk reduction costs suggested by the RIA would fall at the lower end of the range for the eight regulatory actions. However, such comparisons are only meaningful with a consistent use of best estimates and discounting conventions across these regulatory actions. On this basis, the cost of risk reduction for the EtO rule would be $60 million per statistical cancer avoided—a cost at the upper end of the range.

[25]This difference in discounting coupled with the use of best estimates (as discussed below) accounts for the difference between the $60 million per statistical cancer estimate cited in last year's *Regulatory Program* and the $500,000 to $1 million per statistical cancer avoided suggested by the estimates in the EtO RIA.

SUMMARY

The analytical elements outlined above constitute the foundation of an effective and useful RIA. By evaluating both the benefits and costs of suitable regulatory alternatives, an RIA not only helps agency policymakers arrive at sound regulatory decisions, but also helps the public, Congress, and the courts understand those decisions. Although the demands of preparing an RIA may require tradeoffs with competing demands on an agency's staff and resources, carefully completed analyses will result in well-designed regulations and potentially large net benefits to society as a whole. Most of the RIAs considered in this chapter represent a substantial improvement—particularly in developing benefit estimates—over the economic analyses prepared under the procedures established by previous Presidents. Although this chapter provides only a general discussion of what constitutes a useful RIA, OMB is in the process of drafting more specific guidance to help the agencies further improve their analyses.

While there are opportunity costs to the agencies in performing RIAs, we believe that adherence to the key elements outlined in this chapter will yield improvements in the information provided by these analyses. Improved analyses will strengthen the regulatory development process, resulting in better design regulations and potentially large net benefits to society as a whole. This chapter provides only a general discussion of what constitutes a useful RIA. OMB is in the process of drafting more specific guidance to help the agencies improve their analyses.

III. THE COMPETITIVE IMPACT OF REGULATION

As the use of Federal regulations to implement government policy has spread over the last several decades, the impact of Federal regulations on American business has grown commensurately, shaping both the structure of industries and the ability of individual firms to compete successfully for markets here

and abroad. While Federal regulations are often necessary to support societal goals, such as the health of workers or the safety of consumer products, they also directly influence business decisions, such as the production process a company can use, the wages that it can pay to employees, or the markets in which its goods can be sold. By governing the manner in which business can be conducted, regulation alters the cost structure for producing goods. The impact of regulation varies substantially from firm to firm and from industry to industry, but in some cases may significantly affect the price of American products as compared with similar foreign products. In this age of increased competition for world trade, therefore, it is critical that regulations be as rational and least burdensome as possible in meeting their intended goals.

This chapter discusses the ways in which Federal regulation affects the competitiveness of the American economy and provides some examples of how efforts to improve our regulatory structure also aid the competitive position of the United States. Since the best guarantor of competitiveness remains a free and efficient economy, this Administration's efforts to maximize the net benefits of regulation and to encourage marketplace solutions, where practicable, have contributed significantly to the health of the American economy. Following in the footsteps of its predecessors, the Administration has upheld what has been until now the bipartisan tradition of protecting free trade and guarding against protectionism, which in its true guise represents nothing but the reregulation of the American economy.

BACKGROUND

The rising U.S. trade deficit over the last decade has sparked concern among some observers that American business can no longer compete effectively with other countries in the global economy. But the problem of American competitiveness is more complex than critics suggest. A number of the solutions offered by those wishing to enhance competitiveness would have just the opposite effect, harming the growth potential of those industries that will provide future jobs. It is important, therefore, to distinguish which problems are of real concern, and what role the Federal government should play in solving them.

The strategy for achieving the goal of greater competitiveness and a rising standard of living for Americans remains the same as it always has: to promote the development of a true free-market system. Only the marketplace can provide the signals to most efficiently channel available resources towards those economic activities in which we can most effectively compete. A cornerstone of U.S. economic policy has been to extend the advantages of a competitive, free-market economy to the rest of the world in the knowledge that increased trade would generate greater wealth for all, including Americans. To a large extent, this goal has been achieved and Americans have reaped the benefits of greater productivity gains, increased consumer choice, and lower prices.

Increased world trade has brought with it two important developments. First, a more closely knit global economy has emerged in which the operation of the domestic economy is increasingly dependent on developments in other countries. Second, foreign firms have been vying successfully with American businesses in both domestic and foreign markets. These developments are not something to fear but rather are the natural and healthy result of a dynamic international economy.

The current competitiveness debate needs to be placed in perspective. The complex nature of "competitiveness," which embraces all aspects of a nation's economy, from the natural resources it possesses to the skill of its work force and the quality of its technology, should caution all against quick-fix solutions.

Furthermore, there is no one measure that can be used to gauge competitiveness. It would be wrong to assess the "competitiveness" of the American economy solely through the yearly number on our trade accounts with other countries. The United States trades because it seeks the economic advantage of buying goods from another country that has a comparative advantage in producing those goods, while allowing the market to lead us to our comparative advantage. Consequently, it should not be forgotten that it is impossible for us to have a comparative advantage in all industries at all times, that the industries in which we have a comparative advantage will change over time, and that we receive many advantages from trade, including lower prices.

Finally, an important, though paradoxical, cause of the current trade deficit is the success of our economic recovery. The brisk expansion of the economy following enactment of the Economic Recovery Act of 1981 generated a surge in demand for both domestic and foreign goods at a time when the sluggish economies of our trading partners had dampened demand for American goods. Moreover, a large influx of foreign investment in the United States reflected in part a confidence in the health of the American economy as compared with other economies. Unfortunately, these positive developments interacted with other macroeconomic factors to cause the large trade deficit.

The current trade deficit results from a complex mix of economic events, not all of which are unhealthy. The trade deficit can be traced to macroeconomic developments, particularly the gap between domestic savings and expenditures resulting from a burgeoning Federal deficit. This gap led to higher interest rates and a large net inflow of foreign capital that substantially increased the value of the dollar, leaving our exports less price competitive and imports more competitive. Other important factors include the relatively slow economic growth in the economies of our trading partners and the international

debt crisis. By bringing lower prices to consumers, trade has helped keep inflation in check and enhanced the attractiveness of investing in our economy. Increased trade, however, has also meant the loss of jobs in industries where there is strong foreign competition. These losses have been offset by employment growth in other sectors of the economy.

ROLE OF GOVERNMENT

The first task in crafting an effective competitiveness program should be to delineate what government should and should not do—what the boundaries of its activities should be. Given the fundamental soundness of the international trading system and the complex nature of the trade deficit, government should not interfere with the rules of the marketplace itself but rather make sure that the underpinnings of American economic success, such as a well-educated work force and a technological edge, remain strong.

The protectionist approaches advocated by those seeking to balance the trade deficit may relieve short-term adjustment pains, but only at the expense of the long-term health of the economy. By substituting government-inspired incentives for those provided by the marketplace, protectionist measures funnel scarce resources toward areas of the economy where we do not necessarily possess a comparative advantage. Instead of saving jobs, they ultimately retard job formation. Protectionist measures also remove the incentives for productivity gains, adversely affect consumers' choices, raise the prices of goods consumers purchase, and may place the country on the road towards recession. Despite the soothing words of its advocates, then, protectionism really represents the triumph of special interests over the general interest, with the benefits accruing to a few and the costs being borne by all.

The proper role of the Federal government is to use the resources at its disposal to encourage greater economic competition and to ensure that all Americans are able to fully participate in our free-enterprise system. In submitting to Congress the Trade, Employment, and Productivity Act of 1987, President Reagan launched a six-part program that would mobilize Federal government resources to help accomplish these goals. Under the President's competitiveness program, the Federal government will help those workers who are displaced by changes in the economic environment beyond their control. The President's competitiveness package provides funds to help support and retrain those workers affected by foreign competition and technological change, and to teach new entrants to the work force basic skills critical to their future success.

The Federal government must also take steps to change macroeconomic factors contributing to prolonged trade deficits. Economists have consistently cited the large Federal budget deficit as a primary cause of our current trade imbalance. By forcing government to borrow money, substantial deficits crowd out savings that should go towards private investment, raise interest rates, and attract foreign capital. This Administration has repeatedly demonstrated its intention to cut the Federal deficit and proposes in this bill to implement budget-process reforms, such as the line-item veto, to supply much-needed spending discipline.

Finally, the Federal government must take all available steps to remove those obstacles to fair and free economic competition, both at home and abroad. This Administration has pushed for reduction of nontariff barriers, protection of rights of intellectual property, and the elimination of special preferences for some countries in the international trading order. The President's competitiveness package also proposes a number of initiatives to improve the international economic environment by pressing for realistic exchange rates, faster growth abroad, and a tough policy against unfair foreign trade practices.

Further domestic regulatory and legal reform is needed to make the domestic economy more competitive. Legislation deregulating the trucking and natural gas industries to realize the benefits of greater competition has been proposed, and the Cabinet has been asked to review the export control program to weed out unnecessary controls and expedite the export-licensing process. The Product Liability Reform Act of 1987 seeks to reduce the costly product liability insurance spiral, and the Antitrust Amendments of 1987 aim to enhance the competitive vigor of American firms while continuing to protect consumers and firms from monopoly, cartels, and price fixing.

Not surprisingly, many different proposals have been advanced to remedy the trade deficit and stimulate America's ability to sell the goods and services it produces. In Congress, over 425 bills have been submitted thus far in 1987, ranging from comprehensive proposals such as H.R. 3 and S. 490 that seek to address all aspects of the competitiveness problem to more specific proposals, such as one offering protection for the cantaloupe industry. Some proposed bills aim to further the principles of free trade, such as the Administration's own Trade, Employment, and Productivity Act of 1987 and the Gramm-Kemp bill, while others stipulate rigid negotiation and retaliation procedures that dangerously restrict this country's leadership or mandate protection of particular industries to the detriment of the economy as a whole.

REGULATION AND COMPETITIVENESS

While the Administration's legislative efforts will help fashion a more competitive economy, one of the most important tasks is the ongoing effort to coordinate and ensure the cost-effectiveness of Federal regulatory efforts. Federal regulation has a pervasive impact on economic activity in this country. Because trade constitutes an ever-increasing share of the gross national product, regulation has become more important to the ability of American firms to compete with foreign enterprises.

A certain amount of regulation that imposes costs on American business is necessary to protect the health and safety of our citizens where the market does not adequately protect such societal goals. But, such interference in the marketplace is justified only so long as a clear and persistent problem exists and Americans are willing to pay the costs associated with such regulation. What must be insisted on is that those regulations deemed necessary are imposed in the least burdensome manner and that where opportunities exist to take advantage of market efficiency, this happens.

When promulgating regulations, the Federal government must be sensitive to the impact they will have on various segments of the American economy. Most jobs in this country, for example, have traditionally been generated by small businesses. Because of the scale of their business, small firms may be more burdened by regulation than larger firms. Particular attention, therefore, must be paid to the impact that regulation has on smaller firms to ensure that regulatory burdens do not strangle the ability of small businesses to function and generate employment.

Another regulatory trend that has sometimes been overlooked is the tendency to regulate new industries simply because little is known about the production process or the nature of the good itself. Since much of America's comparative advantage during the post-World War II period has been based on its ability to innovate, regulation should not be based on fear of the unknown but on good information that a problem exists. Otherwise, we may unnecessarily hinder those activities, such as the development of biotechnology, that represent the future of our economic success.

COMPETITIVENESS AND THE REGULATORY PROCESS

Following are some of the ways in which Federal regulations influence competitiveness and some examples of how the Federal regulatory structure has been altered to promote competitiveness.

Imposition of Costs

Regulation can impose direct costs on firms by requiring them to take measures to protect societal goals, such as the safety of employees in the workplace and the labeling of a product's contents, or requiring firms to expend resources providing information to the government for use in monitoring and overseeing economic activity. Whatever costs a firm incurs complying with such requirements add to production costs and, thus, raise the price of a good. If regulations govern the production process for a good widely used as an input in other industries, such as coal or oil, the economic impact of such regulations can be much greater than it originally appears on the surface.

The goals behind such regulation may be necessary or desirable, but frequently the chosen means of implementing these goals are unnecessarily costly. For example, the Energy Policy and Conservation Act of 1975 requires automakers to meet corporate average fuel economy (CAFE) standards or face penalties. A 27.5-mile-per-gallon standard was set for 1985 cars and the following model years. The CAFE program, however, placed U.S. automobile companies at a competitive disadvantage by forcing them to meet artificial fuel economy standards to the neglect of actual consumer demand. The practical problem created by the Act was that CAFE levels were calculated separately for each manufacturer's domestic and imported cars. Full-line manufacturers and those who specialize in larger vehicles were penalized, while small-car manufacturers (particularly Japanese importers) could move into the lucrative mid- and large-size car field without concern about exceeding CAFE limits.

While demand for large cars has leveled off, carmakers predict that much of the future growth potential is in the large-car area. Since influence that manufacturers can exert on consumer demand is extremely limited, domestic manufacturers were forced to make uneconomic decisions in fleet mix (i.e., restricting production of larger cars) to avoid CAFE penalties. In this case, outmoded government regulation unnecessarily intruded on manufacturer decisions, encouraged U.S. manufacturers to build products abroad, and put our carmakers at a disadvantage to foreign importers.

Another example involves the removal of oil drilling platforms at sea. The Department of the Interior is examining the possibility of permitting oil companies operating drilling rigs on the Outer Continental Shelf to leave the platforms once they have ceased operations. Removal of these drilling platforms is expensive and contributes to the cost of domestic oil production. With oil prices on the rise again and most experts' forecasting a continuation of this trend, such regulation would decrease the cost of domestic production, thereby encouraging earlier utilization of our domestic reserves and increasing production and jobs in an important and hard-hit industry.

Information-collection requirements can also significantly add to the cost of doing business. Just recently, this Administration reauthorized the Bureau of Economic Analysis' (BEA) Benchmark Survey of Selected Services Transactions—1986 (BE–20). This is a major effort to collect data on services, such as banking, advertising, insurance, transportation, accounting, and data processing, either supplied to or purchased from foreign companies. When the survey was first proposed, it was criticized for being too lengthy and burdensome. The survey, as originally constructed, asked for data that were costly to produce in the form requested and that it was possible to obtain the necessary data in a simpler, less costly fashion. With the help of a working group made up of government (BEA) and industry representatives (organized by the Business Council on Reduction of

Paperwork), the survey was successfully redrafted to improve its focus and reduce its burden.

Barriers to Free Competition

Regulations may shape or structure a particular industry or economic activity, crimping the operation of the market. Such regulation may be warranted. However, there are areas of the economy that remain regulated that could benefit from fuller competition. For example, the deregulation of the airline industry has resulted in huge savings to passengers, productivity gains through more efficient use of company airplanes and reservation systems, and a greater ability to compete with foreign airlines over the same routes. Congress has also removed regulatory impediments in the railroad industry, benefiting shippers by allowing the marketplace to introduce more flexible pricing and other efficiencies in service.

Where legislation is a practical avenue for deregulating an industry, this Administration has supported such an approach. The Federal Energy Regulatory Commission (FERC), for example, has handled oil pipeline regulation with a light hand, but a recent Court of Appeals decision ordered FERC to develop a methodology for imposing strict rate-of-return regulation on oil pipelines. Based on a Justice Department study of the antitrust implications, the Departments of Energy and Justice and the Office of Management and Budget (OMB) have drafted legislation that would remove strict rate regulation on oil pipelines except in those few instances where monopoly or monopsony power justifies such regulation. Deregulation will encourage new investment to upgrade existing pipelines or to build new ones and should lower the price of a valuable input to the production of many goods competing with foreign products.

Regulations also may be aimed specifically at restricting the flow of exports. They usually limit where and in what manner American goods can be sold abroad in order to protect national security or further foreign policy goals. An example would be regulations promulgated under the Export Administration Act restricting the shipment of high-technology goods with military applications to countries that do not adequately safeguard them from countries that threaten our security. While such regulations serve an essential purpose in protecting our security, concerns have been raised that some of these regulations have continued to restrict export of American goods even though those goods have become available in world markets from other industrialized countries. A review of the regulations was undertaken to ensure that our export regulations were not unnecessarily penalizing American companies involved in exporting their products.

The Administration has sent to Congress a series of proposals aimed at streamlining the government's export control procedures for high-technology items. The Administration's program of legislation, regulatory reform, and administrative action will substantially reduce the number of items controlled and the time required for processing licenses while still guarding vital national security interests. The Department of Commerce has proposed regulation that would eliminate the need for exporters to obtain a validated license for shipments of certain low-technology items to most free world destinations. These changes should reduce the total number of export license applications currently submitted by almost 30 percent. Furthermore, a top priority of the Department of Commerce is to complete a comprehensive simplification and consolidation of the Export Administration Act's regulations to make them more understandable and easier for exporters to use, and to eliminate burdensome documentation and reporting requirements.

Finally, regulations are sometimes the vehicle for privatizing activities that were formerly the province of government. Commercialization of former government activities allows the private sector to more efficiently provide these services and eliminates the Federal government's financial commitment, easing pressure on the Federal deficit. Since the ground rules that regulations lay down often involve restrictions on commercial activities to protect societal interests, they must be crafted to ensure that they encourage competition to the maximum extent possible.

An example of this is the proposed regulations to privatize the gathering and processing of data from remote-sensing satellites, information previously collected by government-owned satellites and distributed by the Federal government. Both the image data and infrared data are useful to farmers and the news media, as well as to others. There are concerns, however, that the licensing process necessary to protect national security will discourage the necessary large investments in this potentially valuable industry. The Department of Commerce is developing regulations to ensure that this industry will develop and compete effectively with foreign firms while protecting any national security concerns that might arise.

Uncoordinated or Confusing Regulatory Structure

Federal regulatory activities may be duplicative, work at cross-purposes, or impose cumulative costs that businesses find hard to bear. Such a regulatory environment creates uncertainty, hinders proper business planning, and often acts as a brake on investment. There is a need, then, for strong regulatory coordination to guarantee that regulation is carried out in a practicable, efficient manner. With the help of the review process established under Executive Order No. 12498, Federal agencies and OMB have been successful in addressing potential coordination problems and resolving thorny jurisdictional questions.

As previously mentioned, the Cabinet Council on Natural Resources formed a working group on biotechnology in April of 1984 to guide its safe commercial development with a minimum of regulatory cost and confusion. Biotechnology has potentially important commercial applications in agriculture and medicine, and the United States currently leads the world in such research. Now that commercial development is accelerating and more formal regulatory oversight is required, the Environmental Protection Agency, the Food and Drug Administration (FDA), and the Department of Agriculture are cooperating not only with each other but also with the Organization for Economic Cooperation and Development to ensure consistency in international regulatory approaches.

Another example of a regulatory innovation to lessen unnecessary regulatory burdens is the Department of Labor's use of flexible, performance-oriented criteria to take local workplace conditions into account. The Department of Labor's Occupational Safety and Health Administration issued a performance-oriented rule, effective May 1986, requiring that workers be informed of the health hazards they are exposed to on the job and trained in methods of mitigating those hazards. Performance-oriented regulations save corporations time and money by letting industry have the flexibility to meet regulatory goals in the most effective way based on local conditions, rather than requiring the company to adjust to rigid categories or guidelines concocted in Washington. Furthermore, the United States Trade Representative is continuing to encourage the European Economic Community to adopt performance-oriented hazard communication regulations that are consistent with our own efforts.

Positive Regulatory Developments

Efforts to reduce nontariff barriers and thereby encourage greater world trade often require regulatory adjustments to succeed. The FDA, for instance, is currently studying what regulations are necessary for efficient implementation of the Drug Export Amendment Act of 1986. The amendment would allow U.S. companies to export new drugs and biological products not yet approved for sale by FDA to countries where regulatory action has been taken to permit their lawful sale. The expected regulations will allow U.S. drug manufacturers to compete in foreign drug markets at an earlier stage and/or in instances where they may not have been able to compete under prior law. Without new legislation and improved regulation in this area, we would have continued to face a self-imposed burden on American export of drugs.

In addition to domestic regulatory activities, there is a growing body of regulatory proposals developed by various international organizations (e.g., the United Nations and the Organization for Economic Cooperation and Development) that are being examined for their impact on international trade. During the development of U.S. regulatory procedures, attention is being paid to the need for achieving consistency in national regulation and international harmonization to the maximum extent possible. The Department of Transportation is proposing to adopt the packaging requirements of the United Nations' system into its hazardous material regulations.

Another area where regulatory and statutory changes promise to shape constructively and fairly the conduct of international trade, and thus boost the competitiveness of U.S. firms, involves the protection of intellectual property rights. On April 10, 1987, the President signed an Executive Order on Facilitating Access to Science and Technology as part of his 43-point Competitiveness Initiative. One aspect of this Executive Order directs Federal agencies, when negotiating or entering into cooperative research and development agreements with a foreign company or government, to consider whether the country protects American intellectual property rights.

Finally, regulations will be issued by the Department of Commerce enabling private firms to take commercial advantage of research and development carried out by the Federal government. With these regulations, firms should be able to better execute the important task of marshalling research to commercial purposes, aiding American competitiveness, and enhancing the value of government's investment in such activities.

CONCLUSION

Maintaining American economic competitiveness into the next century requires that the Federal government vigorously pursue efforts to encourage competition both in this country and in the world economy. Federal regulation, while often necessary to support societal goals, directly influences the ability of American firms to conduct business in a productive, efficient way. The ongoing efforts of the Administration to bring greater competition to the marketplace and to ensure that regulation is cost-effective contribute greatly to these goals. This Administration's diverse regulatory activities, then, are a crucial part of efforts to ensure America's competitiveness into the next century.

IV. FEDERALISM IN REGULATORY ACTIONS

While "good government" may mean different things to different people, Federalism must be a key component of any definition. Our system of government works best only when all levels of that government work together, each from its own position of strength and expertise. The Domestic Policy Council's Working Group on Federalism espoused this theme in its November 1986 report, "The Status of Federalism in America," which characterized Federalism as:

> . . . a constitutionally based, structural theory of government designed to ensure political freedom and to ensure responsive, democratic government in a large and diverse society. It rests on political philosophy, experience, and an astute understanding of human nature. In a democracy as large as the United States, the government is responsive only to the extent that citizens can influence the formulation of public policy through the ballot box. This is only possible when the citizens have a working knowledge of the policymaking process and a close relationship to that process. The more distant the government, the less likely is the electorate to be adequately informed of the policies being debated, and the less likely is the government to be fully informed of the electorate's sentiments. Federalism is critical to good government because it strengthens the tie between policy formulation and constituent desires.

Simply put, the Administration is attempting to strengthen its adherence to the principles of Federalism in order to make government at all levels more effective. Placing government closer to the people not only encourages the public to participate more actively in policy and program decisions, but also enables government to serve better the needs and wishes of its constituents. By providing States and localities with suitable flexibility to tailor federally assisted programs to the needs of their constituents, government can help ensure that programs are serving people in the most efficient and helpful way. And, by providing States and localities with the ability to experiment with program administration, government can try new and innovative ways to provide those services more effectively. Along this line, the Administration has recommended to Congress that, rather than adopting a specific welfare reform proposal, current law be amended to provide States with the authority to experiment with a wide array of reform initiatives in order to assess which of these initiatives work best.

The Administration's emphasis on Federalism has been made evident in many recent Federal regulatory activities as well. These efforts have been described in each of the previous two editions of the *Regulatory Program of the United States Government*. This chapter highlights the significant progress made during the past year to further Federalism principles in Federal rulemaking.

FEDERALISM AND REGULATION

The Administration has long recognized the problems created when too much power is centralized in the national government. Many decisions once made by local governments are made now at the Federal level, where the ramifications are not always fully understood. Federal policies made "inside the beltway" of Washington can be too remote from day-to-day issues and concerns to be effective. Federal programs may sometimes be inefficient because of their unwieldy size, which prevents them from being tailored to meet local needs. Similar concerns have also been raised about Federal regulatory efforts—namely, that sometimes they do not adequately consider local needs or circumstances or are an inefficient means of addressing a problem.

These issues arise because the Federal government and the State and local governments are often responding to different problems. There is a natural tension between these partners based on the need of the Federal government to manage responsibly the expenditure of Federal funds and achieve legislative objectives on the one hand, and the authority and responsibilities of State and local governments to decide how best to provide services to their citizens on the other. For Federalism to work, the Federal government's approach must be tailored to both situations.

Sometimes the solution is for the Federal government to take a "back seat" and allow State and local governments to make the administrative and financing decisions. For example, the Administration has proposed to devolve much of the administration and financing of the Unemployment Insurance program to the States. As described in this *Regulatory Program*, the Administration recently submitted to Congress a legislative proposal to implement this concept. Regulations would need to be issued to fully accomplish the transfer.

Sometimes the Federal government can best foster the Federal-State relationship by eliminating unnecessary regulatory burdens or conditions. A key principle of Federalism is to provide States and localities with enough flexibility to administer federally assisted programs in the most effective and efficient manner.

A recent action by the Department of Health and Human Services (HHS) illustrates this point well. Until now, recipients of funds under an Office of Community Services' program were restricted from expending more than 10 percent of grant funds on administrative costs. This restriction was based upon the belief that such a limitation would maximize the amount of funds for the provision of services to needy individuals. HHS has been made aware that, in some situations, grantees may have legitimate reasons for

expending sums in excess of 10 percent for administrative purposes, and that, in fact, potential grantees may be able to make compelling arguments that increases in administrative costs would result in more efficient delivery of program services.

Consequently, in a recent grant announcement for this program, HHS lifted the 10-percent restriction, and, at the same time, added a rating criterion requiring that grant applicants demonstrate that administrative costs are appropriate relative to proposed services. This action should serve as a model for other HHS programs—and, in fact, for all Federal programs—so as to permit State and local governments to make their best cases for administering grant programs, unencumbered by nonstatutory impediments to efficient administration.

In other cases, the Federal government needs to give States more flexibility in administering programs. For example, HHS will modify its regulations governing Federal financial participating payments for prescription drugs under the Medicaid program. Under existing regulations, States desiring to develop their own programs receive matching funds but cannot exceed federally set, national cost ceilings for each drug. The Federal limits do not fully allow for variances from State to State in multiple-source drug prices and availability. These restrictions can impede the ability of the States to administer their programs in the most cost-effective way, despite the fact the States pay about half the program costs.

HHS is currently revising these rules and is proposing to take steps to remove some of these unnecessary, and sometimes counterproductive, requirements. Under new rules to be effective in fiscal year 1988, the Federal government would provide payments to States up to the aggregate limit established by a formula, but prescriptive Federal limits on a drug-by-drug basis would be eliminated. States would be free to set payment rates at the level they think appropriate, as long as the total of such payments does not exceed the aggregate limit.

In still other instances, the Federal government needs to be more flexible and understanding of special local circumstances. One of the most important regulatory issues for State and local governments last year was the implementation of the 1985 amendments to the Fair Labor Standards Act (FLSA). These amendments were enacted in response to the Supreme Court's decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, which held that the FLSA minimum wage and overtime provisions apply to State and local government employees. The 1985 FLSA amendments and their implementing regulations were intended to help alleviate the new administrative and cost problems for States and localities created by the *Garcia* decision. The Department of Labor (DOL) received hundreds of comments on its proposed rule to implement these amendments, many of which came from State and local governments.

DOL carefully considered the suggestions of these and other commenters and, as a result, made substantial changes to the final rule. Most of the changes concern how the FLSA applies to the State and local government use of volunteers (e.g., firefighters) in the performance of traditional governmental activities. The comments enabled DOL to revise the final rule to accommodate common practices in the use of volunteers, such as providing retirement plans for and paying special "per call" fees to volunteer firefighters. These and other revisions should produce a more balanced and effective implementation of the statutory changes.

Finally, the Federal government can promote Federalism by encouraging State and local governments to try new approaches to address old problems. Federal agencies and States frequently enter into agreements where new and innovative policy initiatives are tested on a small scale before they are widely implemented. Such arrangements can be as beneficial for the States as for the Federal government. For example, the U.S. Department of Agriculture (USDA) recently issued a proposed rule amending existing regulations governing the certification of eligible households for the Food Stamp Program. The proposed rule establishes requirements for the Simplified Application and Standardized Benefit Project. USDA's Food and Nutrition Service will choose no more than five States and five units of local government (e.g., counties) to participate in the project.

Under the project, households, in which all or part of the household members participate in Aid to Families With Dependent Children (AFDC), supplemental security income (SSI), and/or Medicaid, will be allowed to fill out a simplified food stamp application. The simplified form will not include the detailed financial information usually requested. Instead, the necessary income information will be obtained from the AFDC/SSI/Medicaid forms the potential recipient already submitted. Under such a program, food stamp benefits could be standardized by category of assistance and household size rather than be individually determined, thereby providing significant administrative relief to State agencies. Under the project, however, the average food stamp allotment participating households would normally receive cannot be reduced.

While most of these examples would not make front-page headlines, taken together, they illustrate two important points. Both points require commitment by all levels of government for effective and productive Federal-State-local government relations to be more than just a lesson in history.

First, applying Federalism principles means working at the level where government and its constituents meet face to face. It means providing those levels of government that administer federally assisted programs with the authority and flexibility to address day-to-day issues and concerns fully and effectively.

Thus, it is extremely important for Federal departments and agencies to follow the 10th principle in the Regulatory Policy Guidelines established by the Presidential Task Force on Regulatory Relief in 1983: "Regulations establishing terms or conditions of Federal grants, contracts, or financial assistance should be limited to the minimum necessary to achieving the purposes for which the funds were authorized and appropriated."

Second, applying the principles of Federalism is very much an interactive process, requiring not only sensitivity of the Federal government to the proper role of State and local governments in policy development and implementation, but also an awareness and willingness of the States and localities to participate actively in those efforts. It is only through open communication between the Federal, State, and local partners during the policymaking process, and mutual cooperation and action by these partners during the implementation of those policies, that Federalism can be successful.

Last year's *Regulatory Program* included the Statement of Federalism Principles that the President transmitted to the Cabinet on May 19, 1986. The purposes of the 10 principles are to clarify the relationship between the Federal government and States and localities and to provide guidance to Federal agencies in the promulgation of new and revision of existing policies and regulations.

While the Federal government should be guided by these principles in its regulatory efforts, sometimes agency rules are inconsistent with them. Even with the best of intentions, Federal departments and agencies cannot always fully understand the particular needs or circumstances of States and localities. Washington, D.C., is a long way from Columbia, Missouri, or Boulder, Colorado, or College Station, Texas, both in distance and in proximity to the day-to-day concerns of their citizens.

Thus, it is crucial for State and local governments to speak out on Federal regulatory proposals that affect them or their constituents. State and local governments are strongly urged to comment on proposed rules of interest to them during the comment period by writing the promulgating department or agency. These comments will help the department or agency to ensure that the rules ultimately issued are the most effective and least burdensome regulatory approaches and provide the maximum administrative flexibility for States and localities.

FEDERALISM IN GRANTS MANAGEMENT POLICY

Perhaps the most visible aspect of Federalism at work is the grants process. Every year, States and localities apply for and receive millions of Federal dollars for projects ranging from highway construction to law enforcement. Years of experience have demonstrated that, if given the flexibility, State and local governments can administer grant projects in a highly effective manner. In an effort to improve this system further, the Administration is reexamining Office of Management and Budget (OMB) Circular A–102, "Uniform Requirements for Assistance to State and Local Governments." Issued in 1971, Circular A–102 establishes standards for consistency and uniformity among Federal agencies in the administration of grants and other types of financial assistance to State, local, and federally recognized Indian tribal governments. It also limits the imposition of "excessive" Federal requirements on grantees.

On March 12, 1987, the President directed OMB to revise the circular and the grantmaking agencies to adopt subsequently a common, governmentwide, grants management regulation. As the President observed, at the time it was issued, "Circular A–102 was a significant step toward the simplification of grants management." He went on to say, however, that "after 16 years, some of the provisions are out of date, there are gaps where the standards do not cover important areas, and agencies have interpreted the Circular in numerous different ways in their regulations. It is now time for the Circular to be revised to reflect developments consistent with our Federalism policies and State and local regulatory relief objectives and the President's Management Improvement Program."

The President not only directed OMB to revise Circular A–102, he further instructed all affected executive departments and agencies, within 90 days, to simultaneously propose common regulations that adopt governmentwide grants management terms and conditions, except where there are inconsistent statutory requirements. Final rules are to be issued in March 1988.

In keeping with his belief that Federalism is a participatory process among partners, the President asked OMB to consult periodically with State and local governments and other affected organizations and interest groups to consider improvements in grants management.

The proposed revised Circular A–102 and the agencies' proposed regulation will be issued on June 9, 1987. These proposals will help achieve several objectives:

- Simplification and standardization of the Federal grants process;
- Elimination of fraud and waste in the grants process through more uniform, businesslike management;
- Elimination of redundant and inconsistent administrative requirements within and among the agencies in regulations and in manuals, handbooks, and other noncodified issuances; and
- Reliance on standard grant forms and language to reduce the Federal government's costs of awarding assistance and the recipients' costs of performing assisted activities.

Most important, and consistent with the President's Federalism principles, the common rule will propose

that States expend and account for grant funds according to the financial management, property, and procurement laws and procedures applicable to their *own* funds—not detailed Federal requirements.

State and local governments are encouraged to comment on the revised circular and the proposed common regulation when they are issued. These comments will help to ensure that the final circular and final rule provide sufficient flexibility for effective grants administration.

STATE FEDERALISM INITIATIVES

As described above, Federalism requires commitment and active participation by all levels of government. That the non-Federal partners are fulfilling this responsibility is evidenced by recent Federalism efforts that they have initiated. In October 1986, for example, Governor John Sununu, Chairman of the National Governors' Association's (NGA's) Federal Assistance Review Project, wrote to the President and presented an extensive set of State recommendations for improving the administration of Federal assistance programs. The list included over 80 proposals affecting 19 Federal departments and agencies. Included in the NGA package was a set of 28 proposals from former Oregon Governor Victor Atiyeh, which the Administration already had under review.

Last fall, Governor Sununu met with the President, who expressed strong interest in the NGA effort and promised that consideration of the proposals would be a high priority. The White House Office of Intergovernmental Affairs and OMB, with the cooperation of Federal departments and agencies, have been working to ensure that the President's commitment to this effort is carried out. The initial review of the Governors' suggestions has been completed, and the agencies have already taken steps to implement many of the proposals.

The NGA recommendations fall into three general categories: regulatory, administrative, and statutory, with the majority of recommendations falling into the latter two categories. While the Administration has all the proposals under consideration, below are a few examples of regulatory actions that the Administration will undertake as a result of specific State recommendations provided by the NGA.

Issues Under the Clean Water Act

The Clean Water Act permits States to share with the Federal government administration of Section 404 of the Act, which governs the discharge of dredged and fill material into certain waters. According to the State of Oregon, however, extensive Federal requirements for shared Federal review of applications cause numerous delays for applicants and increased paperwork for States. The State suggested the implementation of a "blanket" program review, whereby Federal agencies only review and approve the process and policies to be used by the States in approving applications for discharging dredged and fill material. States would review and approve the applications under this arrangement. Oregon also suggested that waiver requirements be simplified so that States can permit waivers for small fills. The Environmental Protection Agency (EPA) has already issued a proposed rule to revise its regulations governing the delegation of the Section 404 permitting program to the States and will issue a final rule in mid-1987 that should satisfy Oregon's concerns.

Hazardous Waste Regulations

Oregon also expressed concerns about the complexity of hazardous waste regulations under the Resource Conservation and Recovery Act (RCRA). The State recommended that EPA rewrite the current RCRA rules to make them clear and easy to implement. As indicated in the EPA "Overview" of the *Regulatory Program*, the Agency appreciates Oregon's concern. Over the coming months, EPA will begin promulgating individual regulations to implement the Hazardous and Solid Waste Act. These regulations will employ a simpler, risk-based approach and will amend existing RCRA rules, resulting in a set of less complex regulations.

Grants Management

Another NGA issue concerns OMB Circular A–87, "Cost Principles for State and Local Governments." At the present time, the Circular does not allow reimbursement for interest costs incurred by the States in the acquisition of capital items such as computer mainframes. This rule, according to the State of Oregon, forces States to use procurement methods other than "lease-purchase" for computer acquisitions and could, therefore, increase overall costs for both State and Federal governments. Oregon recommended that OMB revise Circular A–87 to permit reimbursement for interest costs for capital items other than publicly owned buildings. OMB is in the process of reviewing its grants management circulars and has agreed to address this issue when it reviews Circular A–87.

Reduction of Reporting and Monitoring Requirements

Pennsylvania and the National Association of State Budget Officers raised a regulatory issue concerning a USDA program. They recommended that USDA forgo proposed regulatory changes for recordkeeping, monitoring, and reporting in the Temporary Emergency Food Assistance Program (TEFAP); these changes, they claimed, would be extremely costly to States and would duplicate existing State and county review processes. Based on these and other comments, some modifications to the regulatory proposal have already been made. For example, in lieu of the proposed requirement for monthly reporting of program participation by individuals, final rules that have already been issued require only quarterly reporting of household participation data, thereby greatly reducing burdens on States. Moreover, new rules to be published

for TEFAP will further reduce burdens on States by granting greater flexibility in program documentation and administration requirements.

Elimination of Ineffective Requirements

The Association of State and Territorial Health Officials recommended that USDA eliminate the requirement that States conduct hearings on all State plans for the Women, Infants, and Children (WIC) program, since such hearings are poorly attended and, thus, serve little purpose. USDA recently published a rule abolishing the requirement for mandatory hearings and granting States wide latitude in establishing methods to obtain public comment on their WIC plans.

These are just a few of the specific actions taken in response to the NGA's recommendations for regulatory change. The NGA will receive a comprehensive report on the remaining regulatory changes, and all of the administrative and statutory changes the Federal government can or will propose to adopt.

THE FUTURE OF FEDERALISM

Through the active participation of States and localities in the regulatory process and increased Federal sensitivity to their concerns, Federal regulations are becoming more of a help and less of a hindrance to the administration of federally assisted programs. And, through State- and locally initiated Federalism efforts such as those described earlier, we can expect many further improvements in State-Federal relationships.

V. EXECUTIVE OVERSIGHT OF FEDERAL REGULATION AND REGULATORY PAPERWORK

For more than 10 years, Congress and the Executive have acted to streamline and simplify the Federal regulatory system to make it effective, efficient, and fair. Through increased executive regulatory oversight, President Reagan and his three predecessors have sought to ensure better government policy, less burdensome regulatory paperwork,[1] and more rational and effective rulemaking actions less prone to favor special interest groups at the expense of the general public.

Executive Order No. 12291, issued on February 17, 1981, and the Paperwork Reduction Act of 1980, which took effect on April 1, 1981, provide the framework for this Administration to improve executive oversight and coordination of Federal regulation and regulatory paperwork. With these initiatives, reinforced by the institution in 1985 of an annual regulatory planning process under Executive Order No. 12498, executive regulatory oversight has become more formal, more systematic, and more responsive to public concerns.

Increased executive regulatory oversight is the natural outgrowth of the cumulative effects of the increase in Federal administrative rulemaking and regulatory paperwork upon the American economy and society over the years. The following overview details the reasons for increased executive regulatory oversight and how four Presidents have implemented it. The discussion is broken into six segments: (1) the basis for executive regulatory oversight; (2) the problems of administrative rulemaking; (3) congressional calls for stronger executive oversight of Federal regulation and regulatory paperwork; (4) executive response to the public and congressional calls for more effective oversight of Federal regulation and regulatory paperwork; (5) the Office of Management and Budget's (OMB's) procedures for implementing Executive Order No. 12291 and the Paperwork Reduction Act; and (6) an assessment of executive regulatory and paperwork oversight.

THE BASIS FOR EXECUTIVE REGULATORY OVERSIGHT

By virtue of his role as Chief Executive, the President has the authority—indeed, the responsibility—to oversee the development of regulations by his appointees.[2] A President's oversight and coordination of his political appointees as required by the Constitution go back to the days of the first Congress, in 1789. Executive branch officers have long sought and received prior White House advice on important executive actions.

The roots of executive regulatory oversight are embedded in the Constitution.[3] The President, as Chief Executive, is to manage the Executive branch; take care that the laws are faithfully executed; supervise and guide his appointees in the exercise of their executive functions; and require their written opinions on matters within the scope of their responsibilities.

In practice, executive regulatory oversight reflects three political realities. First, as a practical and constitutionally implicit matter, the President does not

[1]Federal information collection is closely tied to and supportive of Federal regulation. Without large amounts of data flowing to the Federal government from the public, it would be extremely difficult for an agency either to structure an efficient and rational Federal regulatory program or to enforce compliance with it.

[2]This principle was discussed at length in the Hearings on Role of OMB in Regulation before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, Serial No. 97–70, June 18, 1981.

[3]"The executive power under our Constitution . . . is not shared—it rests exclusively with the President." *Sierra Club* v. *Costle*, 657 F. 2d 298, 405 (D.C. Cir. 1981).

execute Federal regulatory law; his appointees do.[4] Congress, by statute, typically provides decisionmaking authority directly to agency heads. Second, Presidential appointees are part of the Executive branch; that is, they work for the President, and generally can be removed by him for any reason, or for no reason at all.[5] As the size of the government has grown, Presidents of both parties have structured working relationships in the Executive branch (usually by Executive orders) so that they may continue effectively to supervise and guide subordinate officials in the performance of their duties. Third, the President is accountable to the public—the voter—for how his appointees execute the law, and is obligated to oversee and manage what these appointees do.

Presidential supervisory processes encompass all types of executive activity. The President is the only official in the Executive branch mentioned in the Constitution and the only elected official (besides the Vice President) to be elected by all of the people, and, therefore, accountable to them for the implementation of the totality of Federal law, including the Nation's regulatory policy. As a result, the President is obligated, within the discretion and authority provided by existing law, to allocate resources, set priorities, and coordinate the activities of the different Federal agencies—all in order to ensure that the Federal government operates in a coherent and efficient way.

In recent years these responsibilities have included greater emphasis on one form of agency action—rulemaking.[6] In the last 6 years, Presidential appointees and their staffs have implemented laws in part by issuing an average of over 2,350 proposed and final rules a year[7]—many more than the President could review personally. As a result, the President has asked staff in his Executive Office to assist in these efforts.

Under the authority of Executive Order Nos. 12291 and 12498,[8] the Director of OMB oversees this regulatory review process. The Office of Information and Regulatory Affairs (OIRA), within OMB, reviews regulatory actions of Executive agencies in order to determine consistency with the President's regulatory principles.[9] OIRA also has lead responsibility for preparing the *Regulatory Program of the United States Government*, the coordinating and planning mechanism for executive regulatory oversight. This document serves as a planning tool for agencies and the Administration and informs the public of the Administration's current regulatory plans.

The constitutional and legal support for this executive regulatory oversight program is clear.[10] On February 10, 1986, the House of Delegates of the American Bar Association endorsed Executive Order Nos. 12291 and 12498 as "appropriate exercises of presidential power"; urged that they be extended to the so-

[4]For example, on September 11, 1789, President George Washington commissioned Alexander Hamilton to be his Secretary of the Treasury. He stated:

> I have nominated, and by and with the advice and consent of the Senate, do appoint him Secretary of the Treasury for the said United States, and do authorize and empower him to execute and fulfil [sic] the Duties of that Office according to Law, and to have and to hold the said Office, with all the Powers, Privileges, and Emoluments, to the same of Right appertaining, during the pleasure of the President of the United States for the time being.

On September 26, 1789, President Washington commissioned Thomas Jefferson to be Secretary of State, likewise "during the pleasure of the President of the United States for the time being." In contrast, on September 6, 1789, President Washington commissioned John Jay to be Chief Justice of the Supreme Court, "during his good Behaviour."

[5]John Quincy Adams, prior to his Presidency, stated his own principles on his role as an upcoming member of the Cabinet. He wrote in a letter to his mother, Abigail:

> . . . For myself I shall enter upon the function of my office with a deep sense of the necessity of union with my colleagues, and with a suitable impression that my place is *subordinate*. That my duty will be to *support*, and not counteract or oppose, the President's administration, and that if from any cause I should find my efforts to that end ineffectual, it will be my duty seasonably to withdraw from the public service. (*Writings of John Quincy Adams* (Worthington Chauncey Ford, ed., 7 vols., New York: MacMillan Co., 1913–17), VI, 182 (May 16, 1817)).

[6]For example, the Code of Federal Regulations contained 9,745 pages in 1950; 22,877 in 1960; 54,834 in 1970; and 102,195 in 1980. The *Federal Register* published only 2,599 pages in 1936, 5,307 in 1940, and 15,508 in 1945; compared with 60,221 pages in 1975, 87,012 in 1980, and 47,418 in 1986.

[7]This is the number of actions, mostly proposed and final rules, that the Office of Information and Regulatory Affairs (OIRA) within OMB has reviewed under Executive Order No. 12291. OIRA's Executive Order No. 12291 review does not extend to the so-called independent regulatory commissions nor to certain categories of rules exempted from review by either the Order or OIRA.

[8]See also 31 U.S.C. 1111.

[9]OMB, however, is not the only agency involved with overseeing regulatory matters. First, other organizations in the White House and the Executive Office of the President assist the President in overseeing the development of agency regulations. As with legislative and budgetary matters, other entities consult or express views on agency rulemakings while they are being developed: the Cabinet, along with its various councils and working groups; White House staff; the Office of the Vice President; and almost every other component of the Executive Office of the President (the Council of Economic Advisors, the Council on Environmental Quality, the Office of Policy Development, the National Security Council, National Critical Materials Council, the Office of Science and Technology Policy, and the Office of the United States Trade Representative). Their reviews may not be as formally structured as those called for by Executive Order Nos. 12291 and 12498; however, the substance and importance of their reviews is significant and influential.

Second, regulations are not the only executive activity of agencies that is subject to Executive oversight. The President, directly and through his White House and Executive Office staff, also oversees such widely varying matters as agency budgets and personnel allocations (e.g., 31 U.S.C. Chapter 11), legislative activities (e.g., OMB Circular A–19), grant administration (e.g., OMB Circulars A–102 and A–110), financial management (e.g., OMB Circulars A–70, A–127, and A–129), the issuance of agency questionnaires (the Paperwork Reduction Act of 1980, 44 U.S.C. Chapter 35) and the implementation of the Privacy Act (Public Law 93–579 (December 31, 1974)).

[10]Every recent President, with the active support or acquiescence of Congress, has supervised the regulatory activities of his appointees, as he has supervised and guided their activities in many nonregulatory areas.

called independent regulatory commissions; and argued that the President was not only authorized to carry out these functions, but was required to carry them out. In January 1987, a panel of the National Academy of Public Administration (NAPA) took the similar view "that a regulatory management process, properly constructed, is an appropriate constitutional exercise of presidential power."[11]

In carrying out regulatory oversight, OIRA's comprehensive responsibilities cover all facets of agency development of regulations. The development and implementation of regulatory programs are a complex process, one that involves many activities: the collection of data from the public to evaluate the need for a regulatory standard and to monitor compliance with it; the internal management of information resources to facilitate the use of the data obtained; and, depending on the nature of the program, the use of appropriate statistical techniques to improve the quality and scope of data obtained. OIRA's oversight responsibilities involve agency paperwork collection, information resources management, and statistical policy, all of which interact with its specific regulatory oversight and build upon each other. OIRA's goal is to maximize the overall efficiency of regulatory programs.[12]

Paperwork Reduction

Under the Paperwork Reduction Act of 1980,[13] OIRA reviews and approves or disapproves all proposed information collections of the Executive branch agencies, including the so-called independent regulatory agencies. OMB has been approving or disapproving proposed agency information collections for over 44 years, initially under the Federal Reports Act of 1942.[14]

Furthermore, because most regulatory paperwork is imposed through agency rulemaking, OIRA coordinates both its Paperwork Reduction Act and Executive Order No. 12291 reviews as much as possible in its efforts to improve the quality of information collected and to reduce the unjustified burden and costs of Federal information collection.[15] Those paperwork requirements most affected by Executive Order No. 12291 include: reducing the unjustifiable burdens of regulation-driven reporting and recordkeeping; ensuring rights of individual privacy; and overseeing acquisition and use of automatic data processing

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Each of the executive regulatory oversight programs of this and prior Presidents (of both political parties) has been reviewed and determined to be legally valid by the Attorney General (Memorandum of the Office of Legal Counsel, February 13, 1981, concluding that the "Proposed Executive Order Entitled 'Federal Regulation'" is "acceptable as to form and legality."; Memorandum of the Office of Legal Counsel, December 21, 1984, concluding that the "Proposed Executive Order Entitled 'Regulatory Planning Process'" is "acceptable as to form and legality").

The decision in *Sierra Club* v. *Costle*, 657 F. 2d 298, 405–06 (D.C. Cir. 1981), which was issued after Executive Order No. 12291 was signed, supports this executive oversight authority:

> The court recognizes the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy. He and his White House advisors surely must be briefed fully and frequently about rules in the making, and their contributions to policymaking considered. . . . The authority of the President to control and supervise executive policymaking is derived from the Constitution; the desirability of such control is demonstrable from the practical realities of administrative rulemaking.

See also, Strauss, "The Place of Agencies in Government: Separation of Powers and the Fourth Branch of Government," 84 Colum. L. Rev. 573 (1984), and Pierce, "The Role of Constitutional and Political Theory in Administrative Law," 64 Tex. L. Rev. 469 (1985). Cf. Shapiro, "APA: Past, Present, Future," 72 Va. L. Rev. 447 (1986).

[11]"Presidential Management of Rulemaking in Regulatory Agencies," January 1987, p. 20. The NAPA Panel went on to suggest that, "[i]f the regulatory management process can bring benefits when applied to executive branch agencies, logic suggests that the benefits would be even greater if it were extended to the independent regulatory agencies as well" (p. 23).

[12]These other OIRA functions are discussed in detail in *Managing Federal Information Resources*, OMB's Fifth Annual Report Under the Paperwork Reduction Act of 1980 (April 1987).

[13]Public Law 96–511 (December 11, 1980), as amended by Public Laws 99–500 (October 18, 1986) and 99–591 (October 30, 1986), Section 101(m).

[14]Public Law 77–831 (December 24, 1942). "[T]he Director [of the Bureau of the Budget] is authorized within his discretion to make a determination as to whether or not the collection of any information by any Federal agency is necessary for the proper performance of the functions of such agency or for any other proper purpose. . . . To the extent, if any, that the Director determines that the collection of such information by such agency is unnecessary, either because it is not needed for the proper performance of the functions of such agency or because it can be obtained from another Federal agency or for any other reason, such agency shall not thereafter engage in the collection of such information" Sec. 2(d).

[15]Regardless of policy focus, regulatory and paperwork reviews are inextricably linked. Most regulations include matters required to be approved or disapproved by OMB under the Paperwork Reduction Act. At present, for example, OIRA estimates that 95 percent or more of the Department of Agriculture's and the Environmental Protection Agency's reporting and recordkeeping are required by statutes and regulations.

OIRA cannot carry out its paperwork reduction responsibilities without reviewing agency regulations. At least 93 percent of the Federal paperwork burden is imposed for regulatory or compliance purposes—67 percent of the total is mandatory, 26 percent is required to obtain or retain a benefit.

Moreover, OIRA is obligated to examine more than the underlying regulation in which a paperwork requirement is embedded. OIRA examines the extent to which related statutory, budgetary, and broad policy mandates may be driving such paperwork requirements. In short, proper review of paperwork burdens, as required by the Paperwork Reduction Act, cannot be confined to the end product—the paperwork requirement—but must of necessity include a careful understanding of the underlying source from which the paperwork requirement springs—be it a statute, regulation, or other form of policy guidance.

In some cases, however, burdensome requirements are mandated by statute. For example, the Tax Reform Act of 1986 will result in a net increase in paperwork burden in excess of 105 million hours. The Immigration Reform Act of 1986 will impose an annual paperwork burden on business of 4 to 7 million hours annually. The Superfund amendments of 1986 will impose a paperwork burden of 10 million hours over the next several years. (See, generally, the *Information Collection Budget of the United States Government* for fiscal year 1987, pp. 33–36.)

(ADP) and telecommunications equipment.[16] Trimming unnecessary paperwork and inefficient regulations are two sides of the same coin. The basic goal is the same—to make government action more efficient, less wasteful of national resources, and less burdensome on the public.

Information Resources Management

OIRA establishes governmentwide policies for management of information systems and technology and has been doing so under various authorities since before 1960.[17] These policies affect information technology policy (computers and telecommunications; acquisition and management), records management, information access (including privacy), and dissemination. OIRA is discharging new responsibilities to provide to the agencies a uniform schedule of Freedom of Information Act[18] fees and guidance on its implementation, and undertaking new initiatives in protection of privacy, and in the electronic collection and dissemination of information. OIRA is also seeking to make improvements in the government's major information systems, the acquisition and financing of computer systems, and the management of Federal information technology.

Beginning in 1983, and annually since, with the assistance of the General Services Administration and the Department of Commerce, OMB has issued 5-year plans for the automatic data processing and telecommunications activities of Federal agencies.[19] The Administration took the first step in improving its major computer technology and related service systems in 1985 by designating eight systems that, because of their size, complexity, sensitivity, or precedent setting nature warranted continuing top management and OMB attention. This review has been expanded to 17 Presidential Priority Systems.[20] The Administration is committed to achieving excellence in these systems, bringing them up to private industry standards by the end of 1988.

OMB has issued a circular that combines and revises several OMB circulars into a single, updated policy document for information resources management.[21] OMB has also established an Information Technology Advisory Committee to help identify opportunities for the modernization of government information systems, and to find and remove policy, regulatory, and legislative impediments to the most efficient use of information technology.

Statistical Policy

OIRA oversees, coordinates, and provides policy guidance for Federal statistical activities under the Paperwork Reduction Act.[22] OMB has carried out governmentwide statistical policy functions since before 1940.

As part of its statistical policy responsibility, OIRA reviews agency plans for statistical surveys and studies to ensure that they produce reliable data for policy analysis and decisionmaking, including regulatory analyses and decisions. OIRA is currently preparing new governmentwide statistical standards, to ensure careful planning of statistical surveys, prompt and complete publication of the results of federally sponsored surveys and studies, full documentation of statistical methods and models, and even-handed treatment of respondents. OIRA recently established a new requirement that agencies publishing principal Federal economic indicators evaluate the accuracy and reliability of these statistics on a regular basis. In response to the 1986 amendments to the Paperwork Reduction Act, OIRA is increasing its efforts to develop long-range plans for improving Federal statistical programs, and to review agency budget proposals to ensure their consistency with such long-range plans.

THE PROBLEMS OF ADMINISTRATIVE RULEMAKING

Executive efforts to evaluate and oversee regulatory activities arose in reaction to the explosive growth of new regulatory programs and the creation of new regulatory agencies in the 1960s and 1970s. As a result of having to develop and implement quickly many new regulations, both new and old regulatory agencies began to implement regulatory law through highly decentralized and uncoordinated rulemakings. Until then, regulatory activity had largely consisted of trial-type, formal rulemaking proceedings or had been concentrated in a few specific agencies that issued individual decisions affecting only a few industries. By the early 1970s, over 100 Federal agencies were issuing regulations, with more money spent on the issuance and enforcement of regulations than ever before.

Many of these new regulatory agencies issued health, safety, and environmental regulations that differed fundamentally from the older types of regulation. In contrast to the traditional common carrier

[16]For example, OIRA's ability to review all Federal Acquisition Regulations and the Federal Information Resources Management Regulations under Executive Order No. 12291 has significantly enhanced OIRA's ability to oversee Federal ADP procurement.

[17]See, e.g., 44 U.S.C. 3504(e) and (g), 44 U.S.C. 3513, the Brooks Act (Public Law 89–306 (October 30, 1965), 40 U.S.C. 759), and Executive Order No. 12046, March 27, 1978 (43 F.R. 13349).

[18]5 U.S.C. 552.

[19]In fiscal year 1988, OIRA estimates that agencies will spend more than $17 billion for general-purpose computers and telecommunications activities, and operate more than 18,000 medium- and large-scale computers.

[20]See "Management of the United States Government, FY 1988," pp. 49–57.

[21]OMB Circular A–130 entitled, "Management of Federal Information Resources," issued on December 12, 1985 (50 F.R. 52730, December 24, 1985).

[22]44 U.S.C. 3504(d). See also 31 U.S.C. 1104(d); Executive Order No. 10253, June 11, 1951 (16 F.R. 5605), as amended; 22 U.S.C. 286f; and Executive Order No. 10033, February 8, 1949 (14 F.R. 561), as amended.

and other "economic" regulatory programs, the new regulatory programs cut across many sectors of the economy (rather than individual industries), and affected industrial processes, product designs, and by-products such as pollution (rather than focusing solely on entry, investment, and pricing decisions). The response from the vast array of entities subject to the new forms of regulation created an urgent demand for greater coordination, rationality, and executive accountability in the regulatory process.

Furthermore, the growth of regulatory activity was fueled by the increasing tendency of agencies to impose standards and conditions on private markets as a matter of general policy, rather than as an adjunct to individual dispute resolution. The older regulatory programs had operated primarily through case-by-case adjudication of rate and service proposals initiated by regulated firms, and also responded to specific complaints filed by competitors or consumers. The newer programs, however, operated primarily through informal rulemaking, in which broad rules were initiated by the agencies themselves and issued after receipt of public comments, but usually without formal adjudicatory hearings. The techniques of informal rulemaking soon spread back to the older regulatory agencies, so that the Federal Trade Commission, the Federal Communications Commission (FCC), and the Interstate Commerce Commission (ICC) increasingly issued broad policy judgments and legal interpretations on their own initiative, rather than through the resolution of individual disputes.

Finally, largely in response to the new regulatory activity, there was much economic research on regulations, regulatory structures, regulatory institutions, and the impact of regulations. Such research demonstrated that regulations often had disappointing results; they were frequently costly, but often not effective. One problem was that regulatory programs imposed a "hidden tax," burdens that were shifted from the entity required to comply (e.g., businesses, hospitals, colleges, State and local governments) to the consumer who paid higher prices or costs. To the extent that such regulations imposed costs on commonly used items, such as automobiles or various other consumer goods, the "hidden tax" tended to be regressive. Moreover, because regulated entities could adjust their behavior to accommodate rules, the net effect of regulations and the changes they made was often quite different from what the regulatory agency intended.

These regulatory studies focused first on the traditional programs of "economic" regulation, such as those of the ICC, FCC, and Civil Aeronautics Board, and later on the new programs of "social" regulation, such as those of the Environmental Protection Agency, the Occupational Safety and Health Administration, the Consumer Product Safety Commission, and the Food and Drug Administration. Analysts frequently found that the effects of these programs were economically perverse and did not support their statutory purposes. For example, numerous empirical studies demonstrated that programs of price and entry control had raised, rather than lowered, prices; and that they restricted, instead of promoted, competition and innovation in the American transportation and telecommunication industries.

For health, safety, and environmental regulation, analysts pointed out that, given the limits on social and economic resources, and as a matter of practical program administration and enforcement, it was impossible for regulatory agencies to reduce to zero the risk of all potential harms. This left the agencies with the difficulties of defining what was to be regulated; how best to regulate it and to what end; where to begin and where to stop; who should reduce the harm of which risks and by how much; and how to balance regulatory priorities in order to maximize the benefits to all. Moreover, given the need to support legally any regulatory standard involving such complex and delicate issues in considerable detail, agencies found that they lacked information adequate to justify what advocates viewed as self-evident regulatory action. Administrative solutions to these conundrums led to the development of complicated risk assessment and risk management analyses based on estimates of exposure and actuarial tradeoffs, comparisons of relative risk, and the equalization of marginal benefits and costs. While logically and analytically sound, such decisionmaking was neither widely understood nor popular with the special interests that saw their benefits reduced.

Analysts also found that the problems with regulatory programs were compounded by the complicated dynamics of regulatory policymaking. For instance, analysts noted the tendency of regulatory decisionmaking to be dominated by well-organized special-interest groups, who reaped narrow advantages from regulation at the expense of the general public. Moreover, large government agencies tended to be overly cautious in setting regulatory standards for products or production activities, or in banning some products or activities altogether. This problem arose from the institutional incentives of the regulators themselves, who receive little credit for approving products or activities that have large social benefits, but most of the blame for approving those that turn out to be excessively dangerous or risky.[23] Finally, government agencies tended to overestimate the effectiveness of

[23]As summarized by two former Administrators for Information and Regulatory Affairs in the Office of Management and Budget:

> First, regulation tends to be excessively cautious (forcing investments in risk reduction far in excess of the value that individuals place in avoiding the risks involved). Second, regulation tends to favor narrow, well-organized groups at the expense of the general public. . . .
>
> We all know that a government agency charged with the responsibility of defending the nation or constructing highways or promoting trade will invariably wish to spend "too much" on its goals. An agency succeeds by accomplishing the goals Congress set for it as thoroughly as possible—not by balancing its goals against other, equally worthy goals. . . . This tendency is reinforced by the "public" participation in the rulemaking

rules in controlling private behavior. Regulatory agencies usually affected only a few selected aspects of the problems they were charged with ameliorating—and "uncontrollable" aspects beyond their reach often responded in ways that compromised or even eliminated the expected benefits of their rules.

CONGRESSIONAL CALLS FOR STRONGER EXECUTIVE OVERSIGHT OF FEDERAL REGULATION AND REGULATORY PAPERWORK

Congressional Analysis of the Problems With Administrative Rulemaking

The cumulative burden of Federal regulations, combined with documentation of the perverse economic effects of some regulatory programs, caused the public to complain ever more loudly. Those politically accountable to the public—Congressmen and the President—heard these complaints and responded.[24]

During the period from 1975 to 1979, members of the Senate Governmental Affairs Committee and the Senate Judiciary Committee concluded that a major cause for regulatory disarray was that regulatory agencies were not effectively accountable to some overseer for what they were doing. The Federal establishment, they said, had become "less accountable to the public";[25] there was "nobody directly accountable for the regulations";[26] the "regulatory process in this country [had] become unwieldy, costly, abusive, ineffective, unaccountable, and anticompetitive";[27] and there was a need to make "the regulators, themselves, more accountable to the American people."[28]

Members also argued that better management and more coordinated oversight of agency regulatory activities would solve many of these problems. In 1975, House Subcommittee Chairman Walter Flowers observed: "our system is fraught with a weak Executive. Maybe what we need to do is to build up the strength of the Presidency so that he can function properly in this complex world we live in."[29] A 1976 report issued by House Subcommittee Chairman John E. Moss pointed out that "the effectiveness of regulation can be increased significantly by . . . reducing and eliminating duplicative, anticompetitive, and ineffective programs."[30] In 1979, Senator William Roth suggested that the regulatory system "is desperately in need of a mechanism for balancing the demands of competing and conflicting regulatory agencies and programs,"[31] and Senator Lloyd Bentsen argued that:

> to say the executive department cannot help in the coordination of these [regulatory] programs doesn't make any sense to me. We see conflicts in those regulations—different agencies trying to accomplish different objectives without any consideration of coordination of very complex programs. As a result we have continuing conflicts among some of them, we have duplication, we have regulations which are wasteful and costly.[32]

Congressional Support for Executive Oversight of Agency Information Collection

Although the Congress did not enact far-reaching regulatory reform legislation during the period from 1975 to 1979, Congress acted to strengthen executive oversight of regulatory and other agency paperwork. In October 1977, the Commission on Federal Paperwork, chaired by Congressman Frank Horton and cochaired by Senator Thomas J. McIntyre,[33] had concluded that Federal paperwork cost about $500 a year for each person in this country—$25 to $32 billion for private industry; $5 to $9 billion for State and local government; $8.7 billion for individuals; $350

process, which as a practical matter is limited to those organized groups with the largest and most immediate stakes in the results. Although presidents and legislatures are themselves vulnerable to pressure from politically influential groups, the rulemaking process—operating in relative obscurity from public view but lavishly attended by interest groups—is even more vulnerable. A substantial number of agency rules could not survive public scrutiny and gain two legislative majorities and the signature of the president.

Christopher C. DeMuth and Douglas H. Ginsburg, "White House Review of Agency Rulemaking," 99 Harv. L. R. 1075, 1080–81 (1986) (footnotes deleted).

[24]In the 1970s, Congress and the Executive also acted to eliminate, or reduce the rigidity of, the existing statutory structures applicable to the regulation of railways, airlines, natural gas, trucking, the financial markets, cable television, and buses.

[25]Senator Edward Kennedy, Hearings on Administrative Procedure Act Amendments of 1976 before the Subcommittee on Administrative Practice and Procedure of the U.S. Senate Committee on the Judiciary, April 28, 1976, p. 2.

[26]Senator Paul Laxalt, presiding at Hearings on Administrative Procedure Act Amendments of 1978 before the Subcommittee on Administrative Practice and Procedure of the U.S. Senate Committee on the Judiciary, September 12, 1978, p. 1.

[27]Senator Carl Levin, appearing before Hearings on Regulatory Reform Legislation before the U.S. Senate Committee on Governmental Affairs, March 20, 1979, p. 11.

[28]Senator Thomas Eagleton, ibid., p. 159.

[29]Hearings on Congressional Review of Administrative Rulemaking before the Subcommittee on Antitrust Law and Governmental Relations of the House Committee on the Judiciary, Serial No. 30, October 29, 1975, p. 380.

[30]Federal Regulatory and Regulatory Reform, Report by the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, October 1976, p. 539.

[31]Hearings on Regulatory Reform Legislation before the U.S. Senate Committee on Governmental Affairs, March 20, 1979, p. 10.

[32]Hearings on Executive Branch Review of Environmental Regulations before the Subcommittee on Environmental Pollution, Senate Committee on Environment and Public Works, Serial No. 96–H4, February 27, 1979, p. 234.

[33]The Commission was established in accord with Public Law 93–556 (December 27, 1974). Members of the Commission included Senator Mark Hatfield and Congressman Tom Steed. The purpose for creating the Commission was a finding that "Federal information reporting requirements have placed an unprecedented paperwork burden upon private citizens, recipients of Federal assistance, businesses, governmental contractors, and State and local governments" (Section 1(a)). For the source of these cost figures, see the October 3, 1977, Final Summary Report of the Commission on Federal Paperwork, page 5.

million for farmers.[34] In a program-by-program review, the Commission found that Federal paperwork was a mess.[35] The recommendations of the Commission led to the overall revision of the Federal Reports Act of 1942[36] that became the Paperwork Reduction Act of 1980.[37]

Congressional Support for Executive Oversight of Regulatory Paperwork

In addition to updating and strengthening OMB's information resource management, statistical policy, and paperwork reduction responsibilities, the Paperwork Reduction Act brought Federal regulatory paperwork explicitly within the purview of a new Office of Information and Regulatory Affairs in OMB. This formal coordination of the regulatory and paperwork review processes emerged in response to calls for greater efficiency in executive oversight activities.[38]

Amendment No. 1777 to the Act explicitly authorized executive oversight of regulatory paperwork. In this amendment, Senator Edward Kennedy, on behalf of the Judiciary Committee, proposed to coordinate Executive reviews of "collection of information requirements" in agency rules with agency rulemaking procedures under the Administrative Procedure Act, and with regulatory oversight by the Executive Office of the President.[39] As amended, then, the Senate's final paperwork bill carefully balanced the Executive's statutory authority to approve or disapprove paperwork with the existing executive oversight of

[34]These estimates were in 1977 dollars. Converted to 1986 dollars, the Commission would have concluded that Federal paperwork cost roughly $1,046 a year for each person in this country—$52.3 to $67.0 billion for private industry; $10.5 to $18.8 billion for State and local government; $18.2 billion for individuals; $732.4 million for farmers.

The 1987 Information Collection Budget estimates that about 1.7 billion hours of the public's time in fiscal year 1987 will be spent in complying with Federal information collections (p. 25). Sixty-one percent of the reporting and recordkeeping burden is imposed on business and other institutions, 27 percent on individuals or households, 10 percent on State and local governments, and 2 percent on farms (p. 20). Depending on how one values the time of these respondents, the reporting burden for the reporting and recordkeeping requirements carried in OIRA's inventory could be imposing a burden of $17 billion to $34 billion or even more on the American economy.

[35]For example:

Although consumer credit protection statutes were intended to benefit consumers, "they have resulted in costly, complex and confusing paperwork" (p. 30 of the Final Summary Report).

"[T]he Federal Government did not know who was collecting what, from whom, or for what purpose in education" (p. 31).

The "diffusion and fragmentation" of employment and training programs "has led to, and is perpetuated by, substantial amounts of unnecessary and duplicable paperwork, while pressing and legitimate information needs are not met" (p. 32).

"Cost burden associated with the preparation of [energy] forms is absorbed by consumers through higher utility bills and gasoline prices" (p. 33).

"Overlapping and sometimes conflicting Federal, State and local review requirements" and "[r]epetitious submittal of similar or identical material to an agency" as part of the "time-consuming and costly process involved in the development of EIS's [Environmental Impact Statements]" (p. 34).

"Compliance with EEO [Equal Employment Opportunity] regulations and laws is complicated by multiple, diverse and sometimes conflicting agency requirements and forms" (p. 35).

"[N]ot all current paperwork is necessary for sound program planning and control" of Federal health programs. "Much of it is attributable to private associations and State governments. However, much of it stems from inconsistent congressional action, administrative anomalies within the executive branch, and a disinclination to share data between programs" (p. 37).

As to the programs of the Department of Housing and Urban Development, the Veterans Administration and the Farmers Home Administration, "[o]verlap is evident," "[r]eporting requirements are often excessive, causing costly processing delays and producing duplicative information," and "[p]aperwork often substitutes for effective consumer protection" (p. 38).

As to the Occupational Safety and Health Administration (OSHA), "[r]ecordkeeping requirements are not clear, consistent or relevant in some instances," and "States are overburdened with requests for information from OSHA and with failure to recognize State concerns" (p. 39).

For public works, "[p]rocedures can be used to reduce paperwork while assuring implementation of Federal policies" (p. 43).

"The policies and procedures of the SBA [Small Business Administration] loan process have grown to thousands of pages of confusing rules, regulations and instructions" (p. 45).

"The current social service planning process, needs assessment system, and annual requirement and amendment processes are inadequate. . . . Complex reporting requirements are difficult to comply with, frequently duplicative, and have resulted in expensive data management systems by provider agencies" (p. 46).

Many tax "schedules and instructions are unnecessarily detailed and complex, and often are written at a reading comprehension level much higher than that of the average taxpayer" (p. 48).

Simplification of the welfare assistance program "should encompass the development of a basic set of common terms and procedures that will treat the needs of public assistance applicants and recipients uniformly and equitably. These common terms and procedures should be utilized by all Federal agencies, and State/local governments in the administration of current welfare programs or their successors" (p. 49).

[36]Public Law 77-831 (December 24, 1942).

[37]44 U.S.C. Chapter 35.

[38]Executive review of agency reporting and recordkeeping activities is closely linked to regulatory oversight. More than two-thirds of all Federal reporting burden (or about 1.1 billion hours of filling out Federal forms or submitting or storing information; about 550,000 productive man-years) is required by information collections contained in agency regulations or otherwise mandated by law. (*Information Collection Budget of the United States Government, Fiscal Year 1987*, p. 18.) At least 93 percent of the Federal paperwork burden is imposed for regulatory or compliance purposes. In other words, in today's government, paperwork business is regulatory business, and vice versa.

[39]In essence, the "Kennedy" amendment (44 U.S.C. 3504(h)) required an agency to notify OMB as soon as practicable—but not later than a notice of proposed rulemaking—of a reporting or recordkeeping requirement in a proposed rule. OMB would then have 60 days to comment. When the agency adopted its final rule, it had to respond to these OMB comments by modifying the rule or by explaining why it rejected OMB's comments. After that, if OMB found the agency's response "unreasonable," OMB had "final power" to overturn it (Senator Edward Kennedy, 126 Cong. Rec. S14689 (November 19, 1980)). For OMB's implementation of the "Kennedy" amendment, see 5 CFR 1320.13.

proposed rules involving reporting or recordkeeping requirements.

Congressional Support for Executive Regulatory Oversight

In response to the public and academic outcry against regulatory burdens, and in support of various Presidential initiatives to improve Federal regulatory activities, Congress acted in various ways to strengthen executive regulatory oversight.

First, in an August 1975 amendment to the Council on Wage and Price Stability Act, Congress explicitly empowered a group within the Executive Office of the President, the Council on Wage and Price Stability (COWPS), to:

> intervene and otherwise participate on its own behalf in rulemaking, ratemaking, licensing and other proceedings before any of the departments and agencies of the United States, in order to present its views as to the inflationary impact that might result from the possible outcomes of such proceedings. . . .[40]

In 1975 and 1976, COWPS issued 106 reports (filings, letters, and testimony) commenting on Federal regulatory programs and individual regulations.[41]

Second, in a 1980 Concurrent Resolution, Congress called on the President to strengthen these efforts to eliminate wasteful and costly regulations.[42] In it, both Houses of Congress agreed it was the "sense of the Congress" that "the President should implement a 'Zero Net Inflation Impact' policy for the regulations promulgated in the remainder of fiscal year 1981."[43] As Senator Lawton Chiles summarized, in seeking Senate agreement to this provision:

> "Zero net inflation impact" over the course of a year means that the agencies will have to reexamine their existing regulations, and either streamline them or eliminate some provisions, in order to achieve cost reductions that offset any increases from new regulations. In effect, this creates a "balanced budget for regulations."
>
> Mr. President, right now we have the kind of situation for regulations which we had for spending before the new budget act came into place. We look at each regulation and weigh its costs and benefits. But we have no way of knowing the total cost of regulations issued during the year. That is just like passing spending bills one at a time without ever adding to see what the total figure is going to be.[44]

In accepting this proposal, Senator Ernest F. Hollings reasoned:

> Perhaps we can get it this far down to actually have a comprehensive look at all of the regulations. I remember one time they got up to 60,000 pages in the Federal Register. It must be nearer 80,000 pages at this particular time.[45] You need to look at all of the regulations. You would not just take the new ones, but you would have to start reviewing the old ones too, because the new ones would all have some inflationary impact. So if I had to administer the program, I would be trying to look at the old ones to see which ones I could offset to keep inflation under control. It is going to be quite a job.[46]

Third, during the period from 1981 to 1983, Congress came close to enacting more broadly applicable executive regulatory oversight procedures and other regulatory reforms.[47] The Laxalt-Leahy regulatory

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[40]Public Law 94–78 (August 9, 1975). Congress created COWPS on August 24, 1974 (Public Law 93–387). Congress then empowered COWPS, in general terms, to:

> review and appraise the various programs, policies, and activities of the departments and agencies of the United States for the purpose of determining the extent to which those programs and activities are contributing to inflation.

After 1975, Congress amended COWPS' legislative authority two more times (Public Law 95–121 (October 5, 1977) and Public Law 96–10 (May 10, 1979)).

COWPS' legislative authority terminated on September 30, 1980. COWPS staff engaged in regulatory review were transferred to OMB to assist what became the Office of Information and Regulatory Affairs to conduct regulatory oversight.

[41]Hopkins, Lenard, Morrall, and Pinkston, *A Review of the Regulatory Interventions of the Council on Wage and Price Stability, 1974–1980*, January 1981, Table I, p. 2.

[42]H. Con. Res. 448, 94 Stat. 3680 (November 20, 1980).

[43]Section 8 of H. Con. Res. 448 states, in part:

> It is the sense of the Congress that due to the extreme rate of inflation in the United States economy, the possible inflationary effects of Federal regulations and legislation shall be carefully monitored as part of a program of fiscal restraint. Inflationary effects should therefore be a prime consideration in developing both regulations and legislation. In order to coordinate the aggregate economic impact of regulations with Federal fiscal policy, it is the sense of Congress that the President should implement a "Zero Net Inflation Impact" policy for the regulations promulgated in the remainder of fiscal year 1981. This policy will require the President to keep an accounting for fiscal year 1981 of all new regulations which have a significant, measurable cost to the economy. Cost-saving modifications need not affect the same area of economic activity as the cost-inducing regulations. The President should institute an exemption procedure to assure the promulgation of regulations necessary to avert any imminent threat to health and safety.

[44]126 Cong. Rec. 31053 (November 19, 1980).

[45]The *Federal Register* published, for the first time, 60,221 pages in 1975. It published 87,012 pages in 1980. The Code of Federal Regulations reached 60,362 pages in 1972; 102,195 pages in 1980.

[46]126 F.R. 31054 (November 19, 1980).

Senator Chiles first persuaded the Senate to pass this provision on May 7, 1980, by a recorded vote of 53 to 34. At that time, he summarized its thrust as follows: "If we need new regulations, let us get some of the old ones off the books. It is a sense of the Congress, and we are telling the President that should be the public policy" (126 Cong. Rec. 10332).

[47]Reflecting a similar concern with excessive regulatory burden, States became very active during this period in establishing executive regulatory oversight mechanisms. By 1983, at least 18 States employed some form of Executive review to oversee their regulatory agencies.

These States are Arizona, California, Colorado, Delaware, Georgia, Hawaii, Indiana, Illinois, Iowa, Maryland, Mississippi, Nebraska, North Carolina, New York, Pennsylvania, Utah, Vermont, and Wyoming (Jody K. Falk, "State Regulatory Development and Reform: An Overview," 1985 Ariz. St. L. J. 298). Two other States—Minnesota and Florida—have elaborate regulatory oversight mechanisms, based at least partly on an administrative judiciary in the State Executive Branch.

The concept of a central agency responsible for regulatory review, under the control of the State governor, has been developed in the California Office of Administrative Law, which reviews all proposed rules for their effectiveness and can also review existing

reform bill, S. 1080, was favorably reported from both the Senate Judiciary and the Senate Governmental Affairs Committees. S. 1080 passed the Senate, with strong Administration support, by a vote of 94 to 0.[48]

As passed, the bill applied not only to Cabinet and other regulatory agencies, but also to the so-called "independent regulatory commissions." It authorized the President "to establish procedures for agency compliance" with the regulatory reform initiatives, and authorized the President "to monitor, review, and ensure agency implementation of such procedures."[49] The companion legislation, H.R. 746, was reported favorably by the House Judiciary Committee,[50] but this matter did not go to the House floor for a vote.

Finally, after a number of hearings and congressional reports,[51] Congress, in October 1986, reauthorized appropriations for OIRA for an additional 3 years.[52] Congress also amended and strengthened various aspects of the original Paperwork Reduction Act.

EXECUTIVE RESPONSE TO THE PUBLIC AND CONGRESSIONAL CALLS FOR MORE EFFECTIVE OVERSIGHT OF FEDERAL REGULATION AND REGULATORY PAPERWORK

Strengthening Executive Regulatory Oversight: 1971–1980

As Congress and the Executive branch began consideration of legislation to address the more generic problems underlying Federal regulation—often proposals to amend the Administrative Procedure Act of 1946[53]—Presidents Nixon, Ford, and Carter each took actions as Chief Executive to address the problem administratively.

rules. (See "Executive Control of Rulemaking: The Office of Administrative Law in California," by Monroe E. Price, April 1981 report of the Administrative Conference of the United States.) If this California office rejects a proposed rule, the rule cannot become effective unless the State regulatory agency persuades the Governor to reverse the Office of Administrative Law. In three other States, rules cannot become effective until the Governor approves them. Over 40 States provide for advance clearance of proposed rules by the State Attorney General. Under the 1981 revision of the Model State Administrative Procedure Act and in some States, rules become effective when adopted by the State regulatory agency, but can be vetoed by the Governor (Professor L. Harold Levinson, "Congressional Oversight of Agency Rulemaking: Options Available After Chadha," Twenty-Seventh Plenary Session of the Administrative Conference of the United States, Discussion of December 15, 1983, Appendix B at p. 24).

As to the need for central State executive regulatory oversight, see Bruce Babbitt, Governor of Arizona, "State Regulatory Reform—A Gubernatorial Perspective," 1985 Ariz. St. L. J. 253.

[48]128 Cong. Rec. S2713, March 24, 1982. OMB also worked with the Senate Governmental Affairs Committee to resolve critical issues concerning statutory executive oversight provided by the bill. The Administration worked with Senators Levin and Rudman and others on an amendment to provide information about the role of the Executive Office of the President in reviewing regulations; this amendment passed the Senate by a vote of 92 to 0 (128 Cong. Rec. S2707, March 24, 1982). For text, see note 99.

[49]Section 624(a).

[50]Regulatory Procedure Act of 1982, Report 97–435 of the House Committee on the Judiciary, February 25, 1982.

[51]Hearings on Regulatory Procedures Act of 1981 before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, Serial No. 27, March 24 to September 10, 1981.

Hearings on Role of OMB in Regulation before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, Serial No. 97–70, June 18, 1981.

Hearings on Congressional Review of Agency Rulemaking before the Subcommittee on Rules of the House of the House Committee on Rules, October 7 to November 19, 1981.

Hearings on Regulatory Reform Act before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, June 8 to July 28, 1983.

Hearings on the Supreme Court Decision in *INS* v. *Chadha* and Its Implications for Congressional Oversight and Agency Rulemaking before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, Serial No. 18, July 18–21, 1983.

Hearings on the Regulatory Reform Act before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, Serial No. J–98–65, Parts 1 and 2, September 21, 1983 and January 19, 1984.

OMB Interference with OSHA Rulemaking, Report by the House Committee on Government Operations, December 1, 1983.

Hearing on Congressional Review of Agency Rules before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, Serial No. J–98–93, February 8, 1984.

Hearings on Legislative Veto After Chadha before the House Committee on Rules, November 9, 1983 to May 10, 1984.

Hearing on EPA's Asbestos Regulations before the Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce, Serial No. 99–2, April 16, 1985.

HHS' Failure to Enforce the Food, Drug, and Cosmetic Act: the Case of Cancer-causing Color Additives, Report by the House Committee on Government Operations, June 3, 1985.

EPA's Asbestos Regulations, Report on a Case Study on OMB Interference in Agency Rulemaking, by the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, October 1985.

Oversight of the Office of Management and Budget Regulatory Review and Planning Process, by the Subcommittee on Intergovernmental Relations of the Senate Committee on Governmental Affairs, January 28, 1986.

Office of Management and Budget: Evolving Roles and Future Issues, Report prepared for the Senate Committee on Governmental Affairs by the Congressional Research Service, Library of Congress, February 1986.

[52]An authorization for appropriations for OIRA was provided in the Paperwork Reduction Act of 1980 for fiscal years 1981 through 1983. Between 1983 and 1986, appropriations were requested by the President and provided by Congress without specific authorization for such appropriations to carry out OIRA's authorities and responsibilities. The Paperwork Reduction Reauthorization Act of 1986 provides an authorization for appropriations for OIRA for fiscal years 1987 through 1989 (Public Laws 99–500 (October 18, 1986) and 99–591 (October 30, 1986), Section 101(m)).

[53]E.g., 5 U.S.C. 553.

In 1971, President Nixon established in the Executive Office of the President a "Quality of Life" review of certain regulations. As a result, the OMB Memorandum implementing this review process required agencies that promulgated rules in the environmental, health, and safety regulatory areas to coordinate their regulatory activities with other Federal agencies. This coordination consisted of submitting copies of their rules to other agencies for review and comment prior to publication in the *Federal Register*. In addition, agencies were required to submit their proposed rules, and the comments from other agencies, to OMB for review.[54]

In 1974, President Ford issued Executive Order No. 11821 to require agencies to prepare, and OMB to review, inflation impact statements—the precursors of "regulatory impact analyses"—for "major" agency rules.[55]

In 1978, President Carter took various actions to strengthen executive regulatory oversight.[56] First, President Carter issued Executive Order No. 12044 requiring detailed regulatory analyses of proposed agency rules and review by the Executive Office of the President.[57] As he pointed out in issuing this Order:

> Regulation has a large and increasing impact on the economy. Uncertainty about upcoming rules can reduce investment and productivity. Compliance with regulations absorbs large amounts of the capital investments of some industries, further restricting productivity. Inflexible rules and massive paperwork generate extra costs that are especially burdensome for small businesses, state and local governments, and non-profit groups. Regulations that impose needless costs add to inflation.
>
> Our society's resources are vast, but they are not infinite. Americans are willing to spend a fair share of those resources to achieve social goals through regulation. Their support falls away, however, when they see needless rules, excessive costs, and duplicative paperwork. If we are to continue our progress, we must ensure that regulation give Americans their money's worth.[58]

To further this effort, in November 1978, OMB issued guidance to the Departments and agencies on how to develop a regulatory analysis.[59]

Second, in January 1978, President Carter created the Regulatory Analysis Review Group (RARG), which comprised representatives from the principal Federal economic and regulatory agencies. RARG's purpose was to examine in detail a limited number of

[54]See October 5, 1971 Memorandum for the Heads of Departments and Agencies entitled, "Agency regulations, standards, and guidelines pertaining to environmental quality, consumer protection, and occupational and public health and safety," from OMB Director George P. Shultz.

Specifically, agencies were instructed to provide OMB a summary description indicating: the principal objectives of the regulations, standards, guidelines, etc.; alternatives to the proposed actions that have been considered; a comparison of the expected benefits or accomplishments and the costs (Federal and non-Federal) associated with the alternatives selected; and the reasons for selecting the alternative that is proposed.

OMB would then convene interagency meetings to resolve differences. To the extent differences could not be resolved at staff levels, they were eventually raised to Cabinet officers, and, on occasion, to the President. The Quality of Life review continued during the Ford Administration.

[55]39 F.R. 41501 (November 29, 1974), extended by Executive Order No. 11949, 42 F.R. 1017 (January 5, 1977). OMB Circular No. A-107 (January 28, 1975), entitled "Evaluation of the Inflationary Impact of Major Proposals for Legislation and the Promulgation of Regulations or Rules," instructed agencies to include in the evaluation they gave OMB:

> an analysis of the principal costs or other inflationary effects of the action...
>
> a comparison of the benefits to be derived from the proposed action with the estimated costs and inflationary impacts,... and
>
> a review of alternatives to the proposed action that were considered....

[56]During this period, both the Senate Governmental Affairs Committee (Hearings on Regulatory Reform Legislation before the Senate Committee on Governmental Affairs, March 20, 1979) and the Senate Judiciary Committee (Hearings on Regulatory Reform before the Senate Committee on the Judiciary, Serial No. 96-28, June 13, 1979) were holding hearings on the problems of the Federal regulations identified on Carter Administration proposals for regulatory reform and in the seminal six-volume *Study on Federal Regulation* (Study on Federal Regulation, Report by the U.S. Senate Committee on Government Operations, Vol. I. "The Regulatory Appointments Process," January 1977; Vol. II. "Congressional Oversight of Regulatory Agencies," February 1977; Vol. III. "Public Participation in Regulatory Agency Proceedings," July 1977; Vol. IV. "Delay in the Regulatory Process," July 1977; Vol. V. "Regulatory Organization," December 1977; and Vol. VI. "Framework for Regulation," December 1978).

The Carter bill had five key goals: making new rules more cost-effective; assuring periodic review of old rules; improving agency planning and regulatory management; cutting needless delay; and enhancing public participation. The Carter bill was reported favorably from both committees (Reform of Federal Regulation, Joint Report 96-1018 of the Senate Committee on Governmental Affairs and the Senate Committee on the Judiciary, October 30, 1980). Instead of passing that bill, however, the Congress codified a requirement for a regulatory flexibility agenda—a biannual publication and brief description of regulations that an agency expects to propose or promulgate in final form within the next 12 months, together with an approximate schedule for completing the action (Public Law 96-354 (September 19, 1980); 5 U.S.C. Chapter 6).

[57]43 F.R. 12661 (March 24, 1978). For "major" regulations, agencies were to develop a regulatory analysis that contained:

> a succinct statement of the problem; a description of the major alternative ways of dealing with the problem that were considered by the agency; an analysis of the economic consequences of each of these alternatives and a detailed explanation of the reasons for choosing one alternative over the others.

He also ordered that regulations be as simple and clear as possible, and that they not impose unnecessary burdens. To give the public adequate notice of upcoming agency actions, he ordered that agencies publish a semiannual agenda of significant regulations under development or review that would be approved by the head of the agency prior to publication.

[58]President Carter's Regulatory Reform Message to the Congress, March 26, 1979, p. 3.

[59]November 21, 1978, Memorandum to the Heads of Departments and Agencies, entitled "Regulatory Analysis," from Wayne G. Granquist, Associate OMB Director for Management and Regulatory Policy.

regulatory analyses with substantial economic impact. This group was headed by a four-member Executive Committee, chaired by the Council of Economic Advisors (CEA). OMB and CEA were permanent members; the other two memberships rotated every 6 months among the Cabinet Departments (except State and Defense) and the Environmental Protection Agency. The RARG was given staff support by the CEA and the Council on Wage and Price Stability (COWPS).

The RARG reviewed and issued reports analyzing only the most important six or so proposed regulations each year. In the RARG review process, reports were drafted by CEA and COWPS staff, commented on and agreed to by the permanent RARG members, and issued in final for agency consideration.[60]

From 1977 to 1980, in support of RARG's efforts, COWPS filed 18 reports with 8 Federal departments and agencies. In addition, during the same period, COWPS issued 180 other reports (filings, letters, and testimony) commenting on Federal regulatory programs and individual regulations.[61]

Third, in October 1978, President Carter created the Regulatory Council, a group consisting of the heads of Federal regulatory agencies.[62] The Council's principal function was to develop and publish semiannually the *Calendar of Federal Regulations*, which provided analytical synopses of 120–180 major regulations under development that were likely to have substantial economic or public impact, and assisted the regulators in developing cost-effective and consistent regulations. The Council then used the *Calendar* to help identify relationships among upcoming rules, and to develop coordinated plans for dealing with any significant crosscutting regulatory issues.[63] The Council also undertook numerous studies and projects designed to improve the regulatory process.

Strengthening Executive Regulatory Oversight: 1981

When President Reagan came into office in 1981, he initiated the Economic Recovery Program. One of its four key elements was a commitment to relieve the economy of the excessive, cumulative regulatory burdens that had been imposed by Federal Departments and agencies.

President Reagan placed responsibility for regulatory relief at the highest levels of government by creating the Presidential Task Force on Regulatory Relief, chaired by Vice President Bush. On February 17, 1981, President Reagan issued Executive Order No. 12291, "Federal Regulation," in order to institutionalize Executive oversight of Federal regulatory action.[64] The basic regulatory principles embodied in Executive Order No. 12291 are straightforward:

> To the extent permitted by law, the Federal Government should not regulate unless there is adequate information concerning the need for and the consequences of proposed regulatory action.
>
> The Federal Government should be sure that the benefits of a given regulatory action exceed the costs.
>
> The Federal Government should choose the regulatory option that maximizes net benefits to society.
>
> Where it is impossible to quantify benefits, the Federal Government should be sure that it has chosen the most cost-effective solution (including the solution that chooses the best and most responsive unit of Government to implement the regulation).

The heads of Departments and agencies were instructed to apply these principles to the extent they could, consistent with applicable law. To ensure the consistency of agency regulatory activities with these principles, the President instructed that all proposed and final regulations be submitted for OMB review before publication.[65] Major rules ($100 million or more likely economic effect) were to be supported by formal regulatory impact analyses.[66]

Strengthening Executive Regulatory Oversight: 1985

In the course of implementing Executive Order No. 12291, it became obvious to the Administration that much more could and should be done to improve executive regulatory oversight. Despite Executive Order No. 12291, Federal regulations continued to be managed far less systematically than direct government spending, exacting large expenditures from many and giving benefits to few.[67]

[60]As indicated in the Hopkins et al. report (see note 41):

> One element strongly correlated with improvement in a rule is White House followup during the postcomment period, after the Council report has been filed (p. 39).

[61]Hopkins et al., Table I, page 2.

[62]Memorandum for the Heads of Executive Departments and Agencies, entitled "Strengthening Regulatory Management," dated October 31, 1978.

[63]See testimony of OMB Director James T. McIntyre, Jr., CEA Chairman Charles L. Schultze, and EPA Administrator Douglas Costle in Regulation Reform Act of 1979, Hearings before the Subcommittee on Administrative Law and Governmental Relations, House Judiciary Committee, Serial No. 41, November 7, 1979, pp. 3–271.

[64]46 F.R. 13193 (February 19, 1981).

[65]The OMB Director has delegated the regulatory review authority granted him by Executive Order No. 12291 to the Administrator of the Office of Information and Regulatory Affairs.

[66]A regulatory impact analysis is to include a description of:

> the potential benefits of the rule, . . . the potential costs of the rule, . . . the potential net benefits of the rule, . . . alternative approaches that could substantially achieve the same regulatory goal at a lower cost, . . . and any legal reasons why the rule cannot be based on the requirements set forth in Section 2 of this Order [Executive Order No. 12291].

[67]Several of the findings of earlier studies by the Senate Governmental Affairs Committee are unfortunately all too accurate a description of some of today's regulatory programs. For example, the Senate Governmental Affairs Committee found that regulatory agencies, individually and collectively, did not appreciate the impact—the burden—of what they were doing. This is the implicit

The problems with regulatory review stemmed in part from a lack of advance planning. Executive Order No. 12291 reviews often came late in the regulatory process, after huge investments of agency time and resources, and often after agency staff commitments to constituents had made it extremely difficult to consider any legally acceptable, but previously ignored, regulatory alternative.[68] As a result, the bureaucracy often presented agency heads with *faits accompli*—regulations that were essentially finished with little or no input from those legally and politically in charge. In many cases, agency heads learned about the proposals only just before they were submitted for Executive Order No. 12291 review. These random, occasionally undesirable rulemakings did not always constitute or reflect Administration priorities, nor did they necessarily reflect the regulatory options authorized by law. Most notably, this phenomenon occurred with costly regulations that, germinating and percolating through several Administrations, became creatures seemingly immune to political or policy influence, gaining and retaining a life of their own.[69]

Moreover, the public and Congress needed earlier notice of upcoming regulatory actions in order to hold the Executive branch more readily "accountable" for regulatory strategies—an issue to which Congress had spoken over the years. For instance, in 1981, Senator Roth stated:

> One of the problems we have in government today is no one can make clear, effective decisions. The regulatory process must indeed be improved so that costs are reduced but it also must be redesigned so that agency officials are accountable to the people for their decisions and so that effective decision-making can take place.[70]

Similarly, in 1983, Senator Carl Levin elaborated on the need for "accountability" of public officials:

> I want to hold the White House responsible for the actions of the executive branch. And I want to hold the Congress responsible, too. I think we are elected officials, the President and us, and that we ought to be held accountable. And the people ought to have a right to come to elected officials and say, "Listen, this agency is doing this in my life." . . . I don't mind the [regulatory] coordination [by OMB]. I don't mind the exercise of power. In fact, I want it, so we know who to hold accountable, whether it is me as an elected official or the President.[71]

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premise of many of the detailed conclusions contained in the Study on Federal Regulation, issued by the Senate Governmental Affairs Committee under the chairmanship of Senator Abraham Ribicoff in 1977–78.

> Regulatory decisions, particularly on the implementation of new schemes and the continuation of existing schemes, all too often are based on insufficient analysis and consideration of alternatives. The clearest indication of the truth of this assertion is the fact that even the approximate total costs of Federal regulatory programs are not known, and as such are not subject to regular, periodic review and appraisal. The same is true of the benefits of regulatory activities (Study on Federal Regulation, Report by the Senate Committee on Government Operations, Vol. VI, "Framework for Regulation," December 1978, p. 269).

In the Study on Federal Regulation, the Senate Governmental Affairs Committee found that regulatory agencies were authorized by congressional directives to do so much that agencies had to pick and choose what they would regulate, and in what ways. "Few agencies can be productively active in every area subject to their potential regulatory authority. The agency must therefore establish priorities" (vol. IV, "Delay in the Regulatory Process," July 1977, p. 153). This Study recommended that agencies issue statements "of agency goals and priorities for the next few years, setting out items such as. . .

> [s]pecific objectives for agency action in each of these areas, and projected dates for their accomplishment, along with proposed resource allocations for these areas, sufficient to accomplish each objective by the specified date,

and a

> [d]iscussion of the criteria by which these areas were selected and these objectives and dates were specified (vol. IV, p. 171).

This recommendation is very similar to the program that President Reagan instituted in early 1985 by issuing Executive Order No. 12498.

[68]The scope of this practice is widely acknowledged:

> In the practice of administrative law as it has developed over the years, there have been virtually no restrictions on communications with agency officials at the early stages of their consideration of a particular problem. Written information is routinely supplied, meetings are held at which the presentations are made by the regulated industry one day, and those on the other side the next, and the agency has felt free to discuss its tentative views about where a proposal is going and what the agency is considering with any interested group. (Alan B. Morrison, "OMB Interference with Agency Rulemaking: the Wrong Way to Write a Regulation," 99 Harv. L. R. 1059, 1068 (1986)).

The administrative problems that can arise from such early, informal contacts—often by interested persons with lower and intermediate agency staff, not with those legally in charge or politically accountable—have been summarized by two Administrators of the Office of Information and Regulatory Affairs in the Office of Management and Budget:

> Scarce government resources must be allocated according to some set of priorities; the question is whether those priorities will be set unilaterally by each agency or by the president's administration as a whole through a process that reflects conflicting agency demands and the president's policies. Naturally, interest groups that stand to benefit from allocation of resources to "their" issue would prefer that planning authority rest exclusively in "their" program agency. There, such groups have a greater opportunity to shape the outcome of the regulatory process to their liking through years of pre-rulemaking orchestration with agency staff, congressional staff, and the trade press. The purpose of regulatory planning is precisely to give the president and his political appointees greater influence over rulemaking at the expense of the "permanent establishment" by bringing their views to bear early enough that their options are not narrowed to a stark "yes" or "no" on a decision memo (Christopher C. DeMuth and Douglas H. Ginsburg, "White House Review of Agency Rulemaking," 99 Harv. L. R. 1075, 1087 (1986)).

[69]Congressman Dan Glickman pointed out this problem in 1981:

> If bureaucrats are out of control, it is because we, through inaction, have allowed this to occur. We can and should tighten the reins, but we should do so in advance so the ill-conceived regulations aren't proposed, not merely after the fact (Hearings on Congressional Review of Agency Rulemaking before the Subcommittee on Rules of the House, House Committee on Rules, October 28, 1981, p. 238).

[70]Hearings on Regulatory Reform Legislation of 1981 before the U.S. Senate Committee on Governmental Affairs, May 12, 1981, p. 1.

[71]Hearings on H.R. 2327, Regulatory Reform Act, before the House Subcommittee on Administrative Law and Governmental Relations,

In response to the widely perceived need for advanced planning and greater public accountability, President Reagan, on January 4, 1985, issued Executive Order No. 12498, "Regulatory Planning Process,"[72] "[i]n order to see that the laws are faithfully executed, and that the policies of this Administration are reflected in the regulations issued under those laws."[73] This Order directs agency heads to develop every year a plan for managing their most significant regulatory actions. Under the Order, OMB reviews the agency plans for consistency with the Administration's regulatory priorities, and publishes the coordinated plans in a governmentwide document. This *Regulatory Program*, covering more than 20 regulatory agencies, is published each year to inform the public and Congress of the Administration's regulatory plans.[74]

President Reagan released the first annual *Regulatory Program of the United States* on August 8, 1985. He stated that this Program "presents, for the first time, a comprehensive program of regulatory policy to be carried out over the coming year." He further stated that "all of this cannot be accomplished simply by publishing a book. This *Regulatory Program* is the end product of a long process of agencies planning their regulatory activities: gathering and reviewing information, evaluating past progress and program effectiveness, and setting goals and priorities."[75]

The *Regulatory Program*, then, provides a formal mechanism by which to involve agency heads, policy officials, and the public earlier in the rulemaking process. With this coordinated action, agency heads can better determine whether a particular regulatory action is worth starting before committing agency resources to it, and that the regulatory activity is consistent with Administration policy.[76] Moreover, as President Reagan stated on issuing Executive Order No. 12498, each agency head would be held "accountable for the management of the regulatory process, to

House Judiciary Committee, Serial No. 25, July 28, 1983, pp. 892–93.

[72]50 F.R. 1036 (January 8, 1985).

[73]The Regulatory Message of the President, published in the *Regulatory Program of the United States Government, April 1, 1985–March 31, 1986*, p. vii.

[74]More specifically, the President decided, in January 1985, that all the significant regulatory actions that the agencies have under way—the regulatory development projects—should first be submitted to the agency head before going any further. Those that the agency head thinks are warranted then go to OMB and the White House for Administration review prior to summary description in the published *Regulatory Program*. Whether an agency plans to issue a significant rule 8 years from now, 2 years from now, or 2 months from now, the Executive needs to review it early as possible, do so carefully, and not have the review take place under the pressures of last-minute, up-or-down ratification.

OMB performs this Executive regulatory oversight in a manner similar to the President's budget process. Each major regulatory agency drafts—at the beginning of each year—a summary of its regulatory policies, and specific regulatory development projects under way. OMB then reviews each agency's draft regulatory program on behalf of the President. OMB reviews each one for consistency with the Administration's regulatory policies and priorities, and the draft regulatory programs of other agencies. OMB will also identify further regulatory or deregulatory actions that are necessary to achieve consistency with Administration policy. If OMB and the agency cannot resolve a policy dispute, it is referred to an appropriate forum in the White House and, if necessary, to the President himself. Following this Executive review, the Administration publishes its decisions in the *Regulatory Program*.

Once the *Regulatory Program* is published, President Reagan authorizes OMB to return for reconsideration any significant rule received under Executive Order No. 12291, if it is not, but should have been included in, or is inconsistent with, the published Program. Special provisions are made for emergency rules or those required by judicial or statutory deadlines.

[75]The Regulatory Message of the President, published in the *Regulatory Program of the United States Government, April 1, 1985–March 31, 1986*, p. vii.)

[76]Section 1(d) of Executive Order No. 12498 states:

> To assure consistency with the goals of the Administration, the head of each agency subject to this Order shall adhere to the regulatory principles stated in Section 2 of Executive Order No. 12291, including those elaborated by the regulatory policy guidelines set forth in the August 11, 1983, Report of the Presidential Task Force on Regulatory Relief, "Reagan Administration Regulatory Achievements."

Executive Order No. 12291 provides in Section 2 that:

> In promulgating new regulations, reviewing existing regulations, and developing legislative proposals concerning regulations, all agencies, to the extent permitted by law, shall adhere to the following requirements:
> (a) Administrative decisions shall be based on adequate information concerning the need for and consequences of proposed government regulation;
> (b) Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society;
> (c) Regulatory objectives shall be chosen to maximize the net benefits to society;
> (d) Among alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen; and
> (e) Agencies shall set regulatory priorities with the aim of maximizing the aggregate net benefits to society, taking into account the condition of the particular industries affected by regulations, the condition of the national economy, and other regulatory actions contemplated for the future.

The August 11, 1983, report of the Presidential Task Force on Regulatory Relief set forth the following Regulatory Policy Guidelines:

1. Regulations should be issued only on evidence that their potential benefits exceed their potential costs. Regulatory objectives, and the methods for achieving these objectives, should be chosen to maximize the net benefits to society.
2. Regulation of prices and production in competitive markets should be avoided. Entry into private markets should be regulated only where necessary to protect health or safety or to manage public resources efficiently.
3. Federal regulations should not prescribe uniform quality standards for private goods or services, except where these products are needlessly unsafe or product variations are wasteful, and voluntary private standards have failed to correct the problem.
4. Regulations that seek to reduce health or safety risks should be based upon scientific risk-assessment procedures, and should address risks that are real and significant rather than hypothetical or remote.
5. Health, safety, and environmental regulations should address ends rather than means.

ensure that policy options are not narrowed prematurely and that each significant regulatory proposal will be considered in relation to others."[77] All in all, this review program permits the Administration—the Chief Executive, his agency heads, and his Executive Office—to set regulatory priorities and to better manage the regulatory process.[78]

Strengthening Executive Oversight of Regulatory and Other Federal Paperwork

In 1977, President Carter, as well as the Congress, took heed of the problems with regulatory and other paperwork that were documented by the 1977 Reports of the Commission on Federal Paperwork.[79] To help agencies solve these problems, and to reduce unnecessary or unjustified burden on the public, the Executive moved to strengthen existing oversight of paperwork.

In 1977, the Executive faced three basic difficulties with paperwork oversight. First, the then-current system of attempting to reduce unneeded paperwork burden only through individual review of each reporting requirement appeared insufficient; the existing executive review process needed to be reinforced by a more broadly based review of overall agency information collection efforts. Second, some agencies did not agree that the Federal Reports Act of 1942 required them to seek OMB approval before they implemented regulatory paperwork, despite existing executive regulatory oversight and the mutual interdependence of Federal regulation and regulatory paperwork. Third, there was a need to strengthen the public's opportunity to express its views concerning draft agency submissions under review.

In the course of the next 10 years, both President Carter and President Reagan, with the active support of Congress, took a number of measures to strengthen executive oversight of regulatory and other paperwork.

First, President Carter established a new procedure to permit more systematic executive review of regulatory and other paperwork requirements imposed by agencies. On November 30, 1979, he issued Executive Order No. 12174,[80] requiring each agency to establish an annual information collection budget. As he explained in his Message to Congress:

> Each agency will submit an annual estimate of the numbers of hours required to fill out all its forms. The Office of Management and Budget will then hold agencies to that total or order it cut. The process will be similar to the spending budget; it will give agencies incentives to set priorities and to eliminate or streamline burdensome forms.[81]

Following up on this Executive Order, OMB issued a notice of proposed rulemaking,[82] guiding agencies on how to implement Executive Order No. 12174 (and

6. Licensing and permitting decisions and reviews of new products should be made swiftly and should be based on standards that are clearly defined in advance.
7. Qualifications for receiving government licenses should be the minimum necessary. Where there are more qualified applicants than available licenses, the licenses should be allocated by auction or random lottery rather than by administrative procedures.
8. Where regulations create private rights or obligations, unrestricted exchange of these rights or obligations should be encouraged.
9. Federal regulations should not preempt State laws or regulations, except to guarantee rights of national citizenship or to avoid significant burdens on interstate commerce.
10. Regulations establishing terms or conditions of Federal grants, contracts, or financial assistance should be limited to the minimum necessary to achieving the purposes for which the funds were authorized and appropriated.

[77]Memorandum for the Heads of Executive Departments and Agencies, entitled "Development of Administration's Regulatory Program," dated January 4, 1985.

[78]Agencies and the Executive are only able to manage, coordinate, and set regulatory priorities to the extent permitted by law. Many regulatory and paperwork problems stem directly from the detailed structure of underlying legislation. Because of such statutory mandates, there may be little that agencies and the Executive can do, as a matter of administrative discretion, to correct the problem. To this end, President Reagan, on December 15, 1986, asked that the Presidential Task Force on Regulatory Relief be reestablished. As he wrote to the agencies:

> In 1981, I identified regulatory relief as one of the four key elements for the recovery of our economy. I established the Presidential Task Force on Regulatory Relief, chaired by Vice President George Bush. Under Task Force auspices, we initiated substantial changes to over 100 existing burdensome rules, saving businesses and consumers billions of dollars each year. The Task Force also saw to the successful implementation of Executive Order No. 12291, the most successful program ever initiated to ensure that agency regulations are no more burdensome than necessary while accomplishing the goals mandated by law. In 1985, I signed Executive Order No. 12498 to set forth annually the Administration's regulatory priorities, and we published these *Regulatory Programs of the United States Government* in 1985 and 1986. In addition, since 1980, we reduced the burden of Federal paperwork imposed on the public by over 600 million hours annually.
>
> It is clear, however, that existing regulatory law, patched together over more than 50 years, creates a diverse and often discordant network of legal authorities, statutory obligations, and private responsibilities and liabilities. The time has come to look at the underlying legislation itself, as one means of ensuring that we in government have done all we can to improve America's productivity and international competitiveness.
>
> Accordingly, I am reestablishing the Presidential Task Force on Regulatory Relief under the chairmanship of the Vice President, and I am directing it to review existing Federal regulatory programs and to develop legislative or other proposals to further eliminate or reduce unnecessary regulatory and paperwork burdens upon the American public and improve American productivity and competitiveness (Memorandum for the Heads of Executive Departments and Agencies entitled, "Comprehensive Review of Federal Regulatory Programs," dated December 15, 1986).

[79]See notes 33–35.

[80]44 F.R. 69609, December 4, 1979.

[81]The information collection budget was then developed, and continues to be used, as a tool for eliminating needless reporting requirements, cutting duplication, streamlining forms, and facilitating comprehensive executive review of agency information collection efforts.

[82]45 F.R. 2586, January 11, 1980.

providing additional detail on how to prepare the annual information collection budget).[83]

OMB also sought, consistent with Executive Order No. 12174, to clarify the applicability of the Federal Reports Act of 1942 to agency rulemaking.[84] The proposed rule specifically provided "that provisions of regulations that involve information collections may not be issued as final or otherwise implemented" until they obtain OMB approval.[85] Eleven months later, before this rulemaking became final, Congress specifically directed the Executive to review the regulatory paperwork of agencies.[86]

President Reagan supported the prompt and full implementation of the Paperwork Reduction Act of 1980, which took effect on April 1, 1981. This Act expanded the scope of executive review in a number of ways. For example, it made the regulatory paperwork of the so-called independent regulatory commissions subject to executive review.

OMB then withdrew its previously proposed rule of January 1980,[87] and, in its place, gave notice of another, more broadly applicable rulemaking, designed to implement the Paperwork Reduction Act.[88] Like the previously proposed rule, this proposal called for an annual Information Collection Budget.[89] In addition, though, it sought to have executive oversight of paperwork "cover the entirety of the federal paperwork burden, regardless of the particular form or mechanism by which it is imposed."[90]

These OMB rules—codified at 5 CFR 1320—took effect on May 2, 1983.[91] The regulation set forth the comprehensive scope of executive review authority provided by the Paperwork Reduction Act, explicitly providing for executive review of regulatory paperwork, labeling and disclosure requirements, agency audit guides, and requests for proposal or other procurement requirements. It also stressed the statutory obligation of agencies to demonstrate to OMB that each collection of information is "the least burdensome necessary for the proper performance of the agency's functions to comply with legal requirements and achieve program objectives."[92] In other words, under the Act, an agency must balance its need for the proposed data collection or other paperwork, and the practical utility of the information it may receive, against the burden imposed on respondents and the costs involved.

The Paperwork Reduction Act not only establishes an important role for Federal agencies, but also provides opportunity for the public to make known its views concerning any Federal data collection. The Act requires that agencies justify each proposed regulatory or other paperwork in writing, and have their justification available for all to see. To facilitate this review process, the Act also requires that agencies give notice in the *Federal Register* when they submit a clearance request to OMB. In 1986, Congress, with the full support of this Administration, amended the

[83]On January 13, 1981, OMB published the first Information Collection Budget of the United States Government.

[84]The close linkage between Federal regulations and the paperwork burdens they may impose was explicitly and publicly recognized from early in the Carter Administration. This executive recognition of the close linkage between regulatory and paperwork burdens set the stage for Senator Edward Kennedy's efforts to coordinate executive reviews of regulatory paperwork with agency rulemaking procedures in what became Section 3504(h) of the Paperwork Reduction Act of 1980.

On November 18, 1977 (42 F.R. 59740), OMB published, for public comment, a proposed Executive Order that included the following statement of Presidential policy: "Regulations should be developed through a process which ensures that... compliance costs, paperwork and other burdens on the public are minimized." That policy statement remained in Executive Order No. 12044 (43 F.R. 12661, March 24, 1978) and was strengthened by the Presidential directive that the agency head should, prior to agreeing to issue a proposed regulation for public comment, ensure that "an estimate has been made of the new reporting burden or recordkeeping requirements necessary for compliance with the regulation" (Section 2(d)(6)).

Three months later, in June 1978, OMB published a Report to the President and the Congress, "Paperwork and Red Tape: New Perspectives, New Directions." This report stressed that "[m]uch of the Federal paperwork is generated by regulations. It is becoming increasingly hard to divorce public complaints about too much regulation from those about unreasonable reporting burden" (p. 22). OMB's September 1979 report to the President and the Congress of the same title pointed out that paperwork burden reduction would be more difficult, in part "because a number of new, extensive reporting requirements will be generated by new regulations scheduled for issuance in the next two years" (p. 17).

On November 30, 1979 (44 F.R. 69609, December 4, 1979), President Carter issued Executive Order No. 12174, "Paperwork." The Order stated that:

> Each agency shall designate an existing official to be responsible for minimizing both the agency's use of forms and the paperwork burden resulting from proposed legislation and regulations (Section 1–102; cf. 44 U.S.C. 3506(b), a similar provision that was enacted as part of the Paperwork Reduction Act a year later).

As Congressman Frank Horton said, at the signing ceremony:

> [T]he people... feel there's what I call strangulation by regulation. And the manifestation of that strangulation is paperwork. And if we can do away with some of that paperwork, then they're going to be aware of the fact that something is being done to eliminate that regulation (Public Papers of the Presidents, Jimmy Carter, 1979, pp. 2178–79).

[85]Proposed Section 1320.22(a), 45 F.R. 2590.

[86]See note 39.

[87]47 F.R. 39516, September 8, 1982. When President Reagan issued Executive Order No. 12291, he revoked Executive Order No. 12174.

[88]47 F.R. 39515, September 8, 1982.

[89]This Administration has had agencies develop and annually submit a draft information collection budget for OMB review and approval, and has published the Information Collection Budget of the United States Government each year, e.g., on December 29, 1981, for fiscal year 1982; on January 5, 1983, for fiscal year 1983; on January 5, 1984, for fiscal year 1984; on April 12, 1985, for fiscal year 1985; on January 6, 1986, for fiscal year 1986; and on January 7, 1987, for fiscal year 1987.

[90]47 F.R. 39519.

[91]48 F.R. 13666, March 31, 1983. OMB delegated paperwork review and approval authority to the Board of Governors of the Federal Reserve System on May 16, 1984 (49 F.R. 20792).

[92]5 CFR 1320.4(b)(1).

Paperwork Reduction Act of 1980[93] in order to facilitate public efforts to participate meaningfully in the Federal paperwork review process.[94]

OMB'S PROCEDURES FOR IMPLEMENTING EXECUTIVE ORDER NO. 12291 AND THE PAPERWORK REDUCTION ACT

Executive Order No. 12291

Under Executive Order No. 12291, the role of the OMB Director and the Presidential Task Force on Regulatory Relief is both consultative and supervisory in nature. The Department of Justice described this role as follows:

> The function of the [Presidential] Task Force [on Regulatory Relief] 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.[95]

Although the Order directs OMB to carry out the review of agency rules and regulations, the Order does not displace the rulemaking authority of agency heads,[96] nor does it displace the opportunity for public comment on proposed regulations provided by the Administrative Procedure Act.

The legal authority of those within the Executive Office of the President—including the OMB Director and his staff—to communicate freely with agency heads and their staff has been fully supported by the courts and the Department of Justice. The decision in *Sierra Club* v. *Costle* is the clearest expression of this authority. Even prior to *Costle*, however, the Department of Justice issued the following opinion to the OMB Director on April 24, 1981:

> You and your staff 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. . . . [R]ulemaking agencies should disclose in the administrative file and the record for judicial review substantive communications from your Office to the extent that they are (1) purely factual as opposed to deliberative in nature, or (2) received by your Office from a source outside of Executive or independent agencies. . . . Notwithstanding these general recommendations, we believe that the rulemaking agency need not disclose substantive communications from your Office which form part of the agency's deliberative process.[97]

In order to ensure that the public and the Congress are fully aware of the Administration's regulatory and information collection policies, OIRA has adopted procedures to:

> maintain two type[s] of documents in our public files relating to regulatory review—all comments received from any member of the public, and all our final recommendation letters to agencies under Executive Order No. 12291. These

[93]The Paperwork Reduction Reauthorization Act of 1986, Public Laws 99-500 (October 18, 1986) and 99-591 (October 30, 1986), Section 101(m).

[94]Congress also clarified the applicability of the Paperwork Reduction Act to regulatory paperwork in proposed and current regulations, ensuring that the "public protection" provision in the Act (44 U.S.C. 3512) would apply fully to regulatory paperwork.

[95]Memorandum of the Office of Legal Counsel, February 13, 1981, concluding that the "Proposed Executive Order Entitled 'Federal Regulation'" is "acceptable as to form and legality," p. 7.

[96]The President's authority to (1) supervise his appointees as to how they exercise discretionary authority vested in them by law; (2) require that these appointees submit regulatory proposals to him; and (3) require OMB to review these proposals and advise the appointee whether they comport with the President's regulatory principles—the basic tenets of Executive Order No. 12291—is derived from the President's authority over the Executive branch provided by the Constitution of the United States and, implicitly, from the laws of the United States that vest authority in the Presidential appointees. No rulemaking-decision authority is transferred to the Director of OMB by Executive Order No. 12291. Executive Order No. 12291 specifically provides that it does not displace the authority of an agency head that is assigned to him or her by law (Sections 2 and 3(f)(3)).

Since the regulatory decision—by statute and by Executive Order No. 12291—is that of the agency head, and the decision must be based on the agency "record," the agency cannot rely on factual information that is not in the agency record to support its decision. Once an agency develops a regulatory proposal, the agency gives public notice, receives comments, and compiles a "record" that provides a rational basis for the final rulemaking decisions.

[97]Memorandum of the Office of Legal Counsel, April 24, 1981, "Contacts between OMB and Executive Branch Agencies Pursuant to Executive Order 12291," pp. 4, 5, and 7.

Rules must be based on the agency record. OMB has advised those who want to submit factual information regarding agency rules to send that information to the rulemaking agency, so that the material may be made a part of the agency record. OMB Director Stockman's memorandum of June 11, 1981, "Certain Communications Pursuant to Executive Order No. 12291, 'Federal Regulations,'" states:

> Under the Executive Order [No. 12291], both the [Presidential] Task Force [on Regulatory Relief] and OMB will be reviewing factual materials relating 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.

files will also be accessible to the public in the reading room during normal business hours.[98]

Furthermore, in accordance with disclosure procedures adopted by OIRA on June 13, 1986, OIRA will disclose and publicly release upon request material provided to it by the agencies for Executive Order No. 12291 review, including the draft rules themselves.[99] As stated:

1. OIRA will make available, upon written request made to OIRA after publication of an ANPRM [advance notice of proposed rulemaking] or NPRM [notice of proposed rulemaking] 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 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.

* * *

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).[100]

The Administration has also required all agencies to prepare detailed semiannual agendas by providing short reference to all regulatory actions under development, and has required agencies to publish these agendas in a single governmentwide document, the *Unified Agenda of Federal Regulations*,[101] that facilitates continuous Executive branch, congressional, and public awareness of current regulatory proceedings.[102] Since 1981, OMB has also published annual reports listing every agency rule that was returned or withdrawn as a result of Executive Order No. 12291 reviews.[103] OMB has published additional reports

[98]May 30, 1985, memorandum, entitled "OIRA Procedures #3," from the Deputy Administrator to OIRA Staff, p. 5. See Memorandum for the Heads of Departments and Agencies Subject to Executive Order Nos. 12291 and 12498, entitled "Additional procedures concerning OIRA reviews under Executive Order Nos. 12291 and 12498 [Revised]," from Wendy L. Gramm, Administrator, OIRA, dated June 13, 1986, procedure #11 (hereinafter, referred to as "OIRA Disclosure Procedures #11").

[99]OIRA Disclosure Procedures #1 to #3, and #10. This Disclosure Memorandum implements administratively a legislative proposal supported by Senators Levin and Rudman. During the Second Session of the 98th Congress, S. 2433, the "Paperwork Reduction Act Amendments of 1984," was reported unanimously from Senate Governmental Affairs, but was not considered by the Senate. S. 2433, as reported by the Senate Governmental Affairs Committee, included a modified "Levin-Rudman" amendment. This provision would have modeled OMB practices in reviewing rules under Executive Order No. 12291 to those required in reviewing paperwork requests in rules under the Paperwork Reduction Act.

The modified "Levin-Rudman" amendment stated:

(1) The Administrator shall make promptly available to the public upon a request made after the date on which a proposed or final rule reviewed by the Office of Information and Regulatory Affairs is published in the Federal Register—

(A) a copy of any draft of any proposed or final rule submitted for review to the Office by the agency proposing or promulgating such rule;

(B) any written material concerning such draft submitted to the Office by the rulemaking agency with or after a submission of a draft rule under paragraph (A); and

(C) any written material concerning such draft submitted by the Office to the rulemaking agency after the submission of a draft rule under paragraph (A).

(2) The Administrator shall make the copies and materials described in paragraph (1) available to the public whether or not the review of a rule described in such paragraph is conducted pursuant to this chapter [of Title 44].

(3) Compliance by the Director or Administrator with the requirements of this section shall not be subject to judicial review.

See pp. 21–23 of Paperwork Reduction Act Amendments of 1984, Report 98–576 of the Senate Committee on Governmental Affairs, August 6, 1984.

[100]OMB has generally not made similar materials publicly available that are developed by the agencies or OMB in other executive review processes because they are deliberative documents and predecisional in nature and not required by the Freedom of Information Act to be released. As a general matter, such disclosure would chill the full and frank interchange of views between the President and his appointees that is critical to the effectiveness of the policy formulation process. OMB's ability to withhold Executive Order No. 12291 review material under the Freedom of Information Act has been upheld (Memorandum Opinion in *National Tank Truck Carriers* v. *OMB*, C.A. No. 82–93 (D.C.D.C. May 28, 1982)).

OIRA has also—as a matter of policy—restricted its discussions, meetings, and other contacts with persons outside the Executive branch on rules under Executive Order No. 12291 reviews. Only the Administrator and the Deputy Administrator of OIRA may meet or discuss a rule under Executive Order No. 12291 review, unless they specifically authorize some other individual in OIRA to do so. The May 30, 1985, memorandum, entitled, "OIRA Procedures #3," from the Deputy Administrator to OIRA staff, p. 6, provides:

> 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.

This memorandum, entitled "OIRA Procedures #3," was attached to the OIRA Disclosure Procedures Memorandum of June 13, 1986 (see note 98).

[101]The *Unified Agenda*, unlike the *Regulatory Program*, is a summary compilation, prepared by each agency, of possible rulemaking activities. It is not a policy statement of the Administration.

[102]The Carter Administration also attempted to provide the public with more detailed information about major regulations under development than provided in the *Agenda*. The information in the *Calendar of Federal Regulations* (see note 63), however, was not reviewed for consistency with the Administration's regulatory principles. As a result, publication of the *Calendar* was discontinued by the Reagan Administration; instead, it was modified and replaced by the *Regulatory Program*, a statement of the Administration's regulatory priorities for all significant regulatory actions under development by the major regulatory agencies.

[103]See OIRA Disclosure Procedure #9:

> OIRA will continue to publish a complete annual accounting of Executive Order No. 12291 activities.

describing its efforts to improve information management within the Federal government, and separate, annual Information Collection Budgets, outlining agency success at reducing paperwork burden and agency plans to further reduce burdens in the future. From early 1981 through the fall of 1983, the Presidential Task Force on Regulatory Relief published several documents announcing the existing regulations that had been selected for priority agency review for possible revision and rescission. The publication of the 1985 *Regulatory Program* marked the first time an Administration disclosed its regulatory policies so early in the process of agency development of regulations.[104]

In addition, OIRA has agreed with several agencies—the Departments of Housing and Urban Development, Labor, Transportation, and the Treasury, and the Environmental Protection Agency—to additional disclosure procedures. Under these procedures, whenever the Administrator or Deputy Administrator of OIRA acquires factual information regarding an ongoing rulemaking as a result of a telephone call or a meeting, they will communicate that information to the agency's General Counsel and advise him of the source of the communication. In addition, on the rare occasions when a meeting is scheduled to discuss a rule with persons who do not work for the Federal government, agency officials will be invited to attend. Furthermore, OIRA will send the agency copies of all written information pertaining to these rules that it receives from persons outside the Federal government.[105]

The Paperwork Reduction Act

OIRA's authority under the paperwork clearance provisions of the Paperwork Reduction Act is based upon statute. [106] The Paperwork Reduction Act specifically provides that "[b]efore making a determination [on whether or not to approve a proposed information collection request] the Director may give the agency and other interested persons an opportunity to be heard or to submit statements in writing."[107] OMB's rule implementing the Paperwork Reduction Act[108] provides for public notice and comment on proposed agency information collections, and for the maintenance of a public file on each proposal.[109] OIRA "desk officers" are authorized to answer public inquiries with regard to such agency proposals and to meet with or discuss the elements of such proposals with interested parties. Indeed, they are encouraged to do so in order to understand better the need for the information and the burden it could impose upon respondents. For over 40 years, this has been OMB's practice in reviewing agency information collections.

Moreover, OMB announced in recent congressional testimony that it is considering whether to have agencies provide, in the *Federal Register* notice indicating submission of its paperwork clearance package to OMB and on individual forms, an estimate of the average burden hours per response being imposed on each respondent. OMB is also considering whether to have agencies publish, as part of the *Federal Register* notice, copies of the collections of information for which OMB approval is being sought, when the agencies request expedited OMB approval.[110]

AN ASSESSMENT OF EXECUTIVE REGULATORY AND PAPERWORK OVERSIGHT

Over the last 5 years, the Administration—the Departments and agencies and the Executive Office of the President, working together—has substantially reduced the burden and intrusiveness of Federal regulatory programs while improving the quality, public responsiveness, and effectiveness of the requirements they impose. Moreover, the publication of the *Regulatory Program* has helped make regulatory development far more open to public scrutiny than ever before.

[104]See OIRA Disclosure Procedure #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.

[105]See OIRA Disclosure Procedures #4 to #7, and #11.

[106]For an agency rule to request or require an information collection, there are two statutory decisions that must be made before the information may be collected: (1) a decision by the head of an agency to include an information collection in a rule and (2) a decision by OIRA under the Paperwork Reduction Act as to whether the information that would be collected is necessary for the proper performance of the functions of the agency.

Specifically, under the Act, OIRA is required to determine whether the information that the agency proposes to collect "is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility" (44 U.S.C. 3508). (See also 44 U.S.C. 3504(c)(2).) If OIRA determines that the proposed collection is unnecessary, for any reason, the proposed collection must be denied and the Act prohibits the agency from engaging in the collection of information. In other words, the authority to approve or disapprove a proposed information collection is vested in OIRA, not in the proposing agency; OIRA is responsible for its actions in approving or disapproving the proposal, not the proposing agency; and the decision to approve or disapprove a proposed information collection must be based upon information available to OMB, not on information available only to the proposing agency.

Under the Paperwork Reduction Act, OIRA creates a public "record" of agency and other submissions upon which to base its decision whether to approve or disapprove a proposed collection. (See 44 U.S.C. 3507(h).) OIRA's decision is based upon that record. OIRA's actions have legal consequences, and they are supported by findings and facts (*Shell Oil Co.* v. *Dept. of Energy*, 477 F. Supp. 413, 428–430 (D. Del. 1979), *aff'd* 631 F. 2d 231 (3rd Cir. 1980), cert. denied 450 U.S. 1024 (1981)).

[107]44 U.S.C. 3508.

[108]5 CFR 1320.

[109]5 CFR 1320.12(a); 1320.13(a); 1320.14(b); and 1320.18.

[110]Testimony of OIRA Administrator Wendy Lee Gramm before the Subcommittee on Federal Spending, Budget, and Accounting of the Senate Governmental Affairs Committee, March 6, 1987, p. 6.

The policies and procedures of Executive Order Nos. 12291 and 12498 and the Paperwork Reduction Act have imposed long-needed discipline on rulemaking and regulatory paperwork. The Administration has eliminated many needless rules, revised ill-conceived ones, and tried to maximize the net social gain of new rules. Since 1980, the number of pages published in the *Federal Register* has dropped 45 percent.[111]

Regulatory Oversight

OIRA has, as of December 31, 1986, reviewed under Executive Order No. 12291 over 5,900 proposed agency rules and over 8,200 final agency rules—a total of over 14,200 rulemaking actions. This averages about 85 proposed rules and 120 final rules per month.

These rules come from a diverse set of agencies with widely varying regulatory responsibilities. They include, among others, the Departments of Agriculture, Transportation, and Health and Human Services and the Environmental Protection Agency, which together submitted 1,092 rulemaking actions last year, as well as the Selective Service System, the Pennsylvania Avenue Development Corporation, and the Panama Canal Commission, which collectively submit only a handful of rules each year.

In 1986, roughly 68.3 percent of the draft rules submitted by the agencies for review under Executive Order No. 12291 were found, after review, to be consistent with the President's regulatory principles without change, about 22.9 percent were consistent with these principles after change by the agency, about 2.8 percent were withdrawn by the agency, 1.4 percent were returned for agency reconsideration because they were inconsistent with those principles, and 4.5 percent were identified as emergency regulations, subject to a statutory or judicial deadline, sent improperly, or exempt from review.

Under Executive Order No. 12498, the publication of the annual *Regulatory Program* by the Executive permits Congress and the American people to understand more fully the Executive's regulatory choices and priorities. With the publication of this document, the public gains a better understanding of what the agency head has identified as the regulatory problems to be solved and the most significant measures the agency will take in seeking to solve them. The public also knows sooner where the Administration is planning to go—considerably before the publication of a proposed rule. Hence, the *Regulatory Program* has resulted in making regulatory development far more open to public scrutiny than ever before.

The Administration has published *Regulatory Programs* for 1985, 1986, and 1987. The 1985 publication contained overview statements from 17 Departments and agencies, and descriptions of 544 significant regulatory actions (SRAs). For 1986, the *Regulatory Program* contained overview statements from 22 agencies and 523 SRAs. This year's *Regulatory Program* contains overview statements from 26 agencies and 556 SRAs.[112]

Paperwork Oversight

Business has also been brisk under the Paperwork Reduction Act. From 1981 to December 31, 1986, OIRA reviewed over 22,200 proposed information collections, many of which are reporting or recordkeeping requirements contained in or mandated by agency regulations. OMB has approved over 20,600 of them, and disapproved over 1,550. This averages about 285 approvals and 22 disapprovals each month. OIRA approves about 93 percent of the information collections sent for review, and disapproves about 7 percent. Since 1981, OIRA's average review time for paperwork reviews—including the time for public comment—has been 38 days.

Since 1981, Departments and agencies, with oversight by OIRA, have reduced the paperwork burden

[111] From 87,012 pages in 1980 to 47,418 pages in 1986.

[112] The distribution of SRAs is as follows:

Agency	Number of SRAs 1985	1986	1987
Agriculture	34	31	43
Commerce	15	12	18
Defense	—	2	1
Education	15	10	12
Energy	5	2	2
Health and Human Services	88	89	88
Housing and Urban Development	42	29	30
Interior	46	48	42
Justice	—	1	13
Labor	100	102	98
State	3	3	2
Transportation	71	61	55
Treasury	14	11	10
Advisory Council on Historic Preservation	—	1	—
Council on Environmental Quality	—	—	—
Environmental Protection Agency	78	91	100
Equal Employment Opportunity Commission	5	6	4
Federal Emergency Management Agency	—	—	6
General Services Administration	4	4	6
National Aeronautics and Space Administration	—	—	—
National Archives and Records Administration	—	—	—
Office of Personnel Management	10	9	7
Pension Benefit Guaranty Corporation	—	—	8
Railroad Retirement Board	—	—	1
Small Business Administration	2	2	4
Veterans Administration	5	6	3
Interagency SRAs	7	3	3

The SRAs included in the Regulatory Programs are in various stages of development.

Type of Activity	1985 Number of SRAs	1986 Number of SRAs	1987 Number of SRAs
Prerule stage	125 (23%)	85 (16%)	83 (15%)
Proposed rule stage	271 (50%)	265 (51%)	274 (49%)
Final rule stage	148 (27%)	173 (33%)	199 (36%)

imposed on the public by over 600 million hours annually. From 1980 to 1983, OIRA reduced the burden known to exist in 1980 by almost 33 percent. In fiscal year 1984, paperwork burden was reduced by an additional 3.3 percent; in fiscal year 1985, by another 4.3 percent, and in fiscal year 1986, by another 3.4 percent.[113]

* * * * *

Americans live in a world of limited resources. To use public and private resources most effectively, the President—any President—needs to coordinate agency activities and to set regulatory priorities. Towards that end, this Administration's executive regulatory oversight program provides management guidance to agencies in their rulemaking and regulatory paperwork, and thereby ensures greater accountability of public officials and more effective response to legitimate public concerns.

President Reagan succinctly summarized the value of Executive Order Nos. 12291 and 12498:

> To set goals and priorities for different programs, government officials must choose the right regulatory tools and identify legitimate needs for regulation as opposed to those that merely benefit special interests. Because some complex regulations take years to develop, involving studies, surveys, and the identification and selection of regulatory options, it is important that senior Federal officials be able to review regulatory options early in the rulemaking process and plan regulatory actions over a longer time horizon. It is also important that they examine and reexamine the nearly 200 volumes of existing regulations to see what regulations need to be modified or have outlived their usefulness.[114]

[113]Specific examples of major paperwork reductions that OIRA has helped agencies achieve are:

- Eliminating detailed lending policies and accounting procedures imposed by the National Credit Union Administration on predominantly small local credit unions (a reduction of 67 million burden hours a year);
- Replacing the Federal Communications Commission's burdensome Program Log requirements for noncommercial radio broadcasters with a much less burdensome requirement that stations maintain a quarterly issues/program list (a reduction of 4.8 million burden hours a year);
- Developing a Uniform Medical Claims and Billing form for the Department of Health and Human Services (HHS), which replaced separate and varying Medicare, Medicaid, and private third-party payor forms (a reduction of about 15 million burden hours a year);
- Eliminating detailed regulations in the Department of Agriculture's school lunch and breakfast programs to simplify computations of reimbursement payments and to eliminate the Annual Report of Revenue and Cost (a reduction of 21 million burden hours a year); and
- Eliminating the Comprehensive Annual Services Plan in HHS' social services program; this action was one of a series of actions implementing the block grant concept, which sought to give States maximum flexibility to administer Federal grants (a reduction of 5 million burden hours a year).

[114]The Regulatory Message of the President, published in the *Regulatory Program of the United States Government, April 1, 1985–March 31, 1986*, p. vii.

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 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

[1] In *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 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*.

[2] *See* 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: "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 decisionmaking 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

[3]In 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.

[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

[8]The 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 disapprove "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.

[9]Memorandum 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.

[10]Admittedly, 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*, 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).

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 agencies. 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.

[1] As 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 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).

- 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 rulemaking[2] 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

[2]Where 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

TABLE OF CONTENTS

Exhibits

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

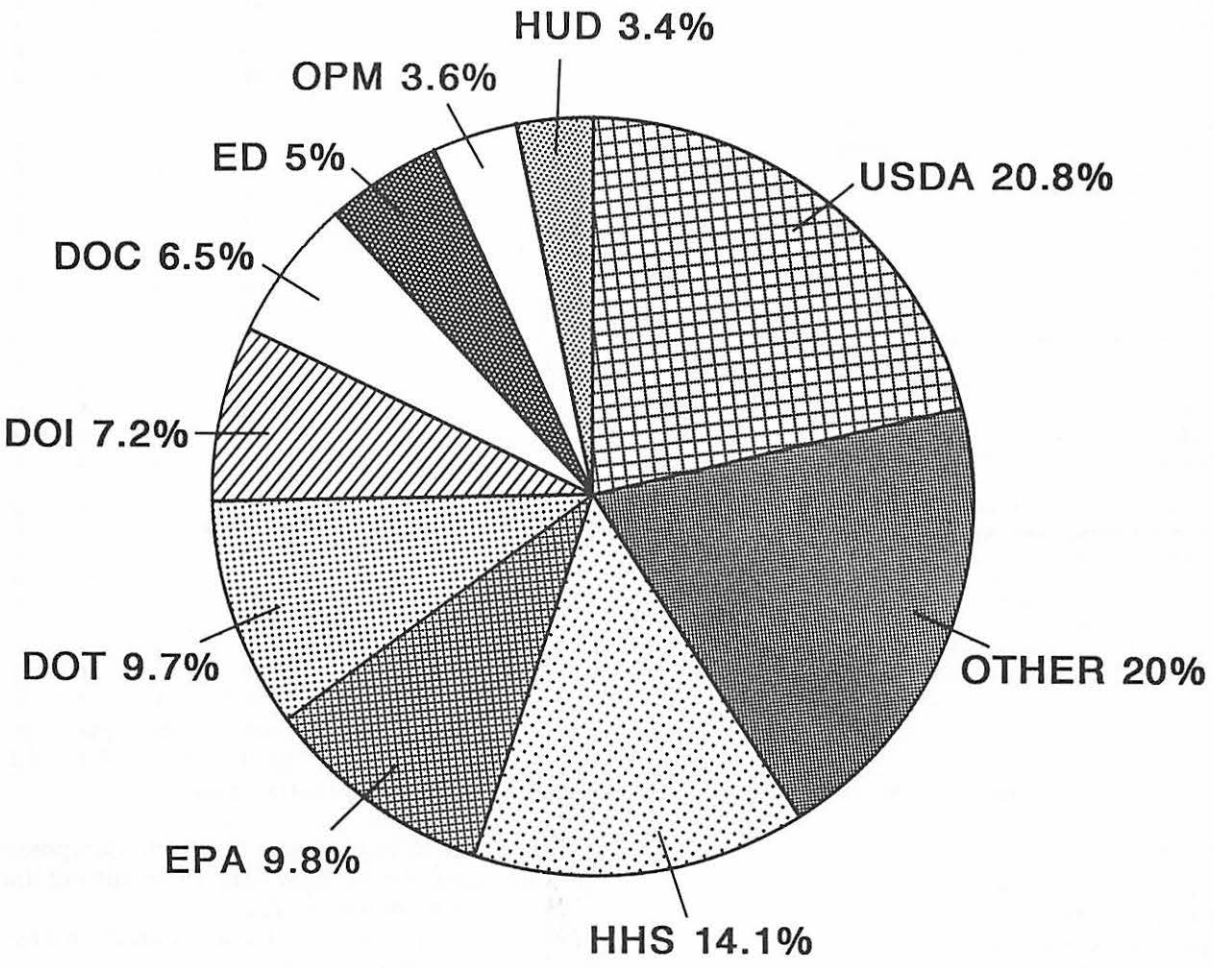

EXHIBIT 2. TYPES OF RULES REVIEWED DURING 1986 BY AGENCY

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

Major Proposed Rules

Department of Agriculture
- 1987 Wheat Program
- 1987 Feed Grain Program
- 1987 Upland Cotton Program Proposed Determinations

Department of Commerce
- Deep-Seabed Mining—Commercial Recovery

Department of Energy
- Basis for Defense Waste Fees
- Fees for Defense High-Level Waste Disposal by the Office of Civilian Radioactive Waste Management

Department of Health and Human Services
- Payment for Indirect Costs of Medical Education
- End-Stage Renal Disease Program: Composite Rates and Methodology for Determining Rates
- Medicare Economic Index
- Medicare Reasonable Charge Limitation Payment for Anesthetic Services
- Reasonable Charge Limitations for Cataract Procedure
- Lowest Charge Level

Department of Housing and Urban Development
- Lead-Based Paint Hazard Elimination in Certain FHA Single- and Multifamily Housing Programs
- Lead-Based Paint Hazard Elimination in CDBG, UDAG

Department of the Interior
- 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 Progams
- 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	2	1	0	0	1	0	0	0
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						
		Consistent without change	Consistent with change	Withdrawn by agency	Returned for reconsideration	Returned sent improperly	Emergency	Statutory or judicial deadline
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 SOCMI air oxidation unit processes	Final	01/29/86	11/25/86
NSPS for SOCMI distillation unit operations	Final	01/29/86	11/25/86
NSPS for SOCMI 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 1981–86[1]

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

[1]Percentages 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 preseason 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 Selection) 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.

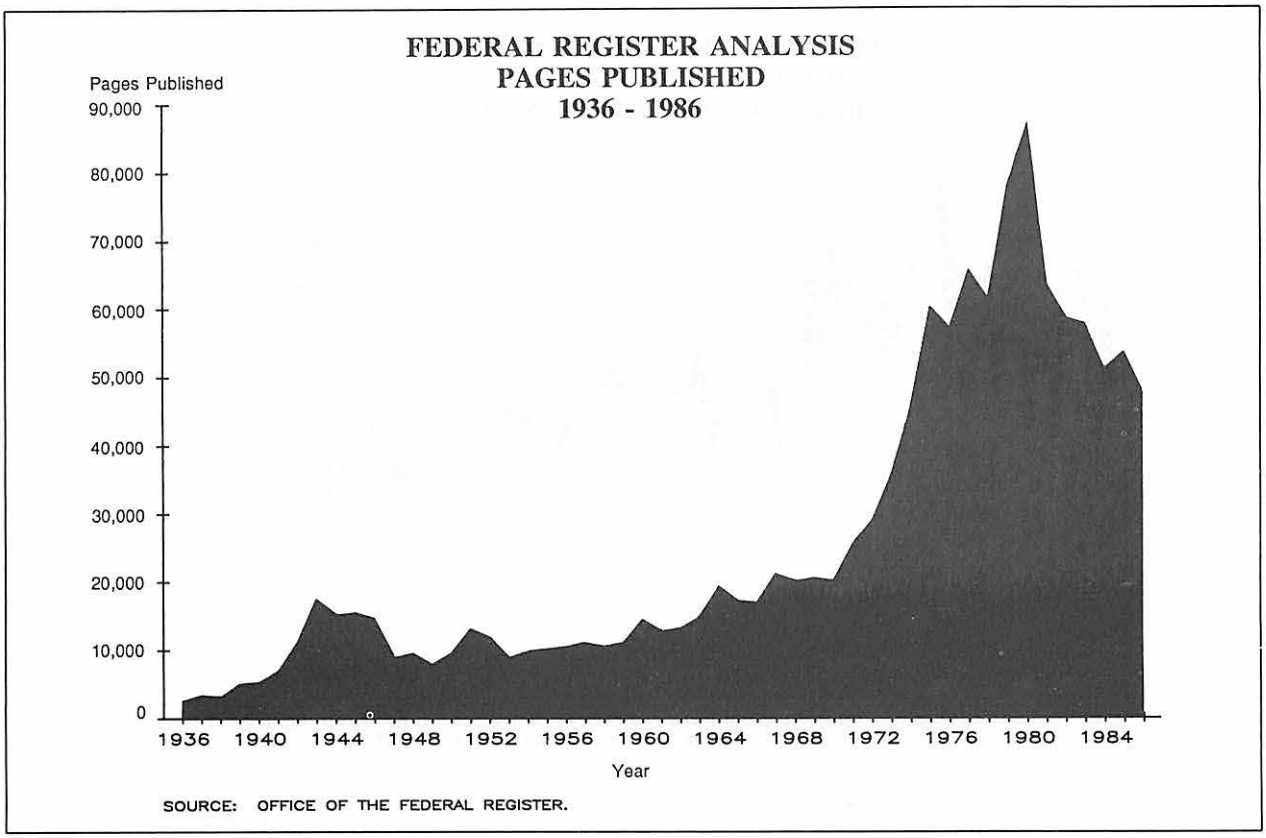

EXHIBIT 14.

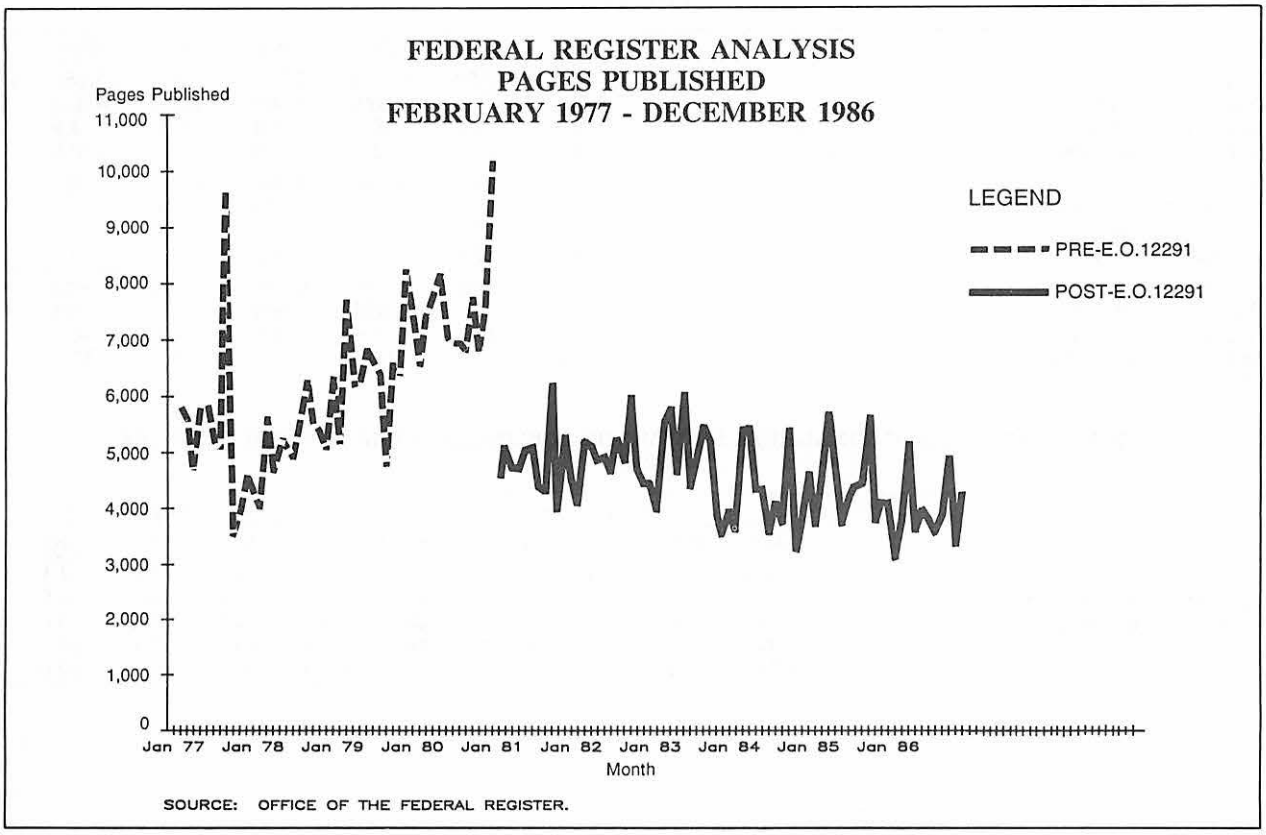

EXHIBIT 15.

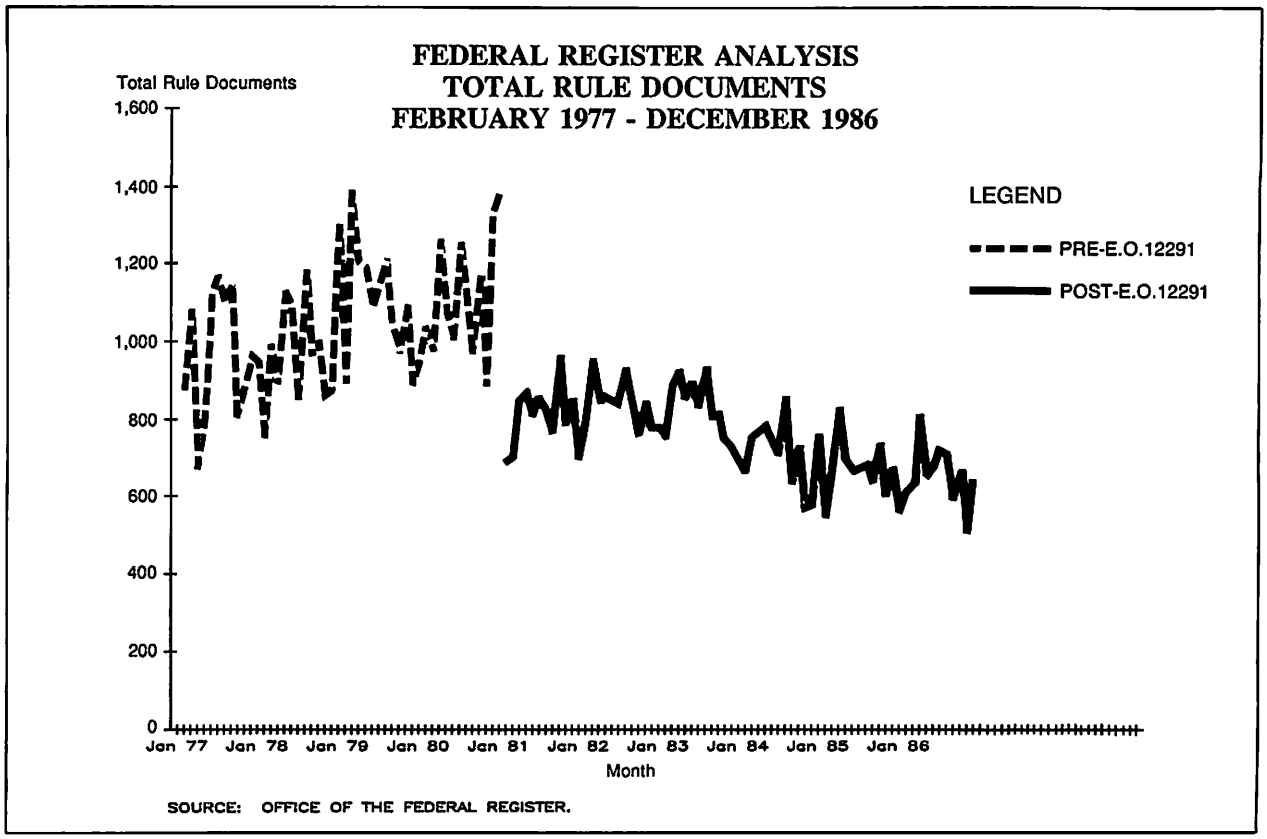

EXHIBIT 16. COMPARISON OF PAGES AND DOCUMENTS PUBLISHED IN THE *FEDERAL REGISTER* 1980–86

	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	74	107	74	95	80	1.5	2.1	1.4	1.6	1.3
National Aeronautics and Space Administration	36	28	15	20	18	0.7	0.5	0.3	0.3	0.3
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	54	66	54	65	84	1.1	1.3	1.0	1.1	1.3
Total[1]	4,991	5182	5290	6056	6329	100.0	100.0	100.0	100.0	100.0

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