~~23518~~

119862

BY THE COMPTROLLER GENERAL

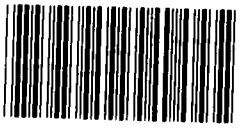
Report To The Chairman, Committee On Governmental Affairs United States Senate OF THE UNITED STATES

Improved Quality, Adequate Resources, And Consistent Oversight Needed If Regulatory Analysis Is To Help Control Costs Of Regulations

Regulatory analysis is the centerpiece of administrative requirements and legislative proposals to control the costs of regulation. Regulatory analyses are required by Executive Order 12291 and will be mandated by law if Senate Bill 1080 is enacted. The analyses are intended to improve the cost-effectiveness of major Federal regulations by requiring agencies to consider fully the consequences of alternative strategies.

GAO found that regulatory analysis has not yet achieved its potential for improving regulatory decisionmaking. OMB's oversight of regulatory analyses has not consistently supported the integration of economic analysis into regulatory decisionmaking. Many of the regulatory analyses GAO reviewed, including several approved by OMB, do not provide adequate support for their conclusions.

GAO recommends that OMB comments on agencies' analyses be publicly filed and that its oversight be carried out more consistently. GAO has also identified several matters for consideration by the Congress, including that it give greater attention to analytical resources, compatibility of substantive legislation, and Presidential oversight.



119862

GAO/PAD-83-6

NOVEMBER 2, 1982

023853

Request for copies of GAO reports should be sent to:

U.S. General Accounting Office
Document Handling and Information
Services Facility
P.O. Box 6015
Gaithersburg, Md. 20760

Telephone (202) 275-6241

The first five copies of individual reports are free of charge. Additional copies of bound audit reports are $3.25 each. Additional copies of unbound report (i.e., letter reports) and most other publications are $1.00 each. There will be a 25% discount on all orders for 100 or more copies mailed to a single address. Sales orders must be prepaid on a cash, check, or money order basis. Check should be made out to the "Superintendent of Documents".

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-207230

The Honorable William V. Roth, Jr.
Chairman, Committee on Governmental
Affairs
United States Senate

Dear Mr. Chairman:

The pervasive impact and substantial cost of Federal regulations makes them a subject of continuing concern in improving the efficacy of Government. Many studies have discovered cases where simple "command-and-control" approaches to regulation have achieved regulatory objectives at an unnecessarily high cost. Agencies have sometimes used the discretion granted to them by statute to issue regulations whose costs far exceeded any reasonable estimate of their benefits. There has been growing interest for several years in subjecting these regulations to careful analyses to ensure that the best regulatory approach available has been chosen. The analyses of regulations are intended to determine whether a proposed regulation is desirable by systematically laying out its advantages and disadvantages (benefits and costs) in comparison with alternative regulatory approaches. By revealing what the alternative regulatory approaches would cost and what benefits they would provide, regulatory analysis 1/ can guide and assist decisionmakers in improving the cost-effectiveness of Federal regulations.

The preparation of regulatory analyses (RAs) for major regulations was first required under Executive Order (E.O.) 11821 (November 27, 1974) and later by E.O. 12044 (March 23, 1978). E.O. 12291 currently requires that "major" regulations be analyzed to assess their costs and benefits. This requirement may be augmented by proposed regulatory reform legislation, S. 1080. S. 1080 would require a description and comparison of the costs and benefits of all major proposed and existing regulations and of reasonable alternatives to them. Both E.O. 12291 and S. 1080 require that, unless otherwise required by law, the most cost-effective alternative be chosen.

1/We use the term "regulatory analysis" to refer to all forms of analyses used to judge the desirability of a regulation. When referring exclusively to the analyses performed under E.O. 12291, we use "regulatory impact analyses" (RIAs)--the term cited in that Executive order.

You have asked us to analyze the potential effects of S. 1080 and to examine the effects of regulatory oversight by the Office of Management and Budget (OMB) under Executive Order 12291. To carry out this task, you asked that we address six questions:

1. How good are the regulatory analyses done by the agencies?

2. What are the potential costs of regulatory analysis of new and existing regulations as required by Executive order or pending legislation such as S. 1080? To what extent could the costs of these analyses distract agencies from their primary responsibilities?

3. How has the regulatory analysis requirement of E.O. 12291 affected deregulatory initiatives? To what extent will the proposed bill, S. 1080, interfere with President Reagan's program to deregulate the economy?

4. What has been the effect of centralizing regulatory oversight at OMB?

5. To what extent do the provisions of Executive Order 12291 and S. 1080 conflict with or pre-empt existing regulatory legislation?

6. What effect will Presidential oversight of regulatory analysis have on independent regulatory agencies?

To address these questions, we interviewed officials at 11 different regulatory agencies and at OMB. We gathered data from the agency officials on the costs of preparing their analyses, discussed how regulatory analyses were used in the decisionmaking process, and discussed what role OMB oversight was having on the regulatory process. We examined the quality of a sample of 57 regulatory analyses, including 38 done under Executive Order 12044 and 19 done under Executive Order 12291 in 1981. We evaluated these analyses on the basis of the standards for quality embodied in Executive Order 12291 and the Interim Regulatory Impact Analysis Guidance issued by OMB. On the basis of the information gathered about how regulatory decisionmaking currently works, we analyzed what the likely effect of S. 1080 would be on that process. A complete discussion of the scope and methodology used in this analysis is contained in appendix I.

We would like to emphasize that our answers to the questions should not be taken as a "cost-benefit analysis" of regulatory analysis. We have not in general addressed the benefits of regulatory analysis, though we think these benefits can be substantial. We hope that our findings will be useful to the Congress in framing legislation that will secure those benefits while minimizing costs.

Detailed answers to the six questions posed above are presented in appendix II. Following are highlights of our responses:

1. Quality: A number of the analyses we reviewed provide less than adequate support for their conclusions on the basis of the criteria for decisionmaking spelled out in the Executive orders under which the analyses were performed. For instance, many of the analyses failed to consider relevant alternatives to the proposed regulations, failed to identify the various benefits and costs, or failed to compare the costs and benefits of different alternatives. While regulatory analyses provide only part of the required information for decisionmaking, we believe they can make an important and useful contribution in bringing about more efficient and effective regulation. S. 1080 has some provisions that may improve the quality of analyses, including provisions that margins of error be calculated for all uncertain data and that data from outside parties be accompanied by sufficient documentation that their validity can be verified.

2. Cost: The potential costs of regulatory analysis, under either E.O. 12291 or S. 1080, are high. Analyses of new regulations cost an average of $212,000 each, and costs of analyses of existing regulations could be as high. S. 1080 can be expected to increase the total costs of regulatory analyses, both because it will require more regutory analyses to be done, and, because more elaborate analyses are likely to result, it will probably cause the average cost of each analysis to rise. S. 1080 would also impose additional costs in connection with its legislative veto, judicial review, and hybrid rulemaking provisions. While we have not gathered data on total agency resource needs or on the availability of agency resources for analytical work, we are concerned that the high costs of analysis and the shrinking budgets of several regulatory agencies will leave them with inadequate resources. If the agencies lack adequate resources, the quality of the analyses may fail to improve, and the regulatory analysis requirement may fail in its objective of improving agency rulemaking.

3. Deregulation: The regulatory impact analysis requirement of E.O. 12291 has not significantly slowed down deregulation, in large part because many deregulatory proposals have been exempted from the analysis requirement. S. 1080 would require more analysis of deregulatory initiatives and provides no discretionary authority to waive the RA requirement for deregulatory initiatives or to provide selective "relief" not supported by analysis. Where the Administration's deregulatory initiatives are not based on regulatory analyses, S. 1080 might require changes in the President's program.

4. Centralized oversight: The problems identified with analyses performed under E.O. 12044 occurred with roughly the same frequency in the analyses performed under E.O. 12291, which were subject to OMB oversight. OMB reviews most executive branch rules and RIAs, but it has not as yet provided other forms of support for the regulatory analysis function, such as monitoring agency rulemaking procedures and resources devoted to analysis. OMB appears to make only a modest effort to encourage the use of other regulatory techniques as an alternative to simply establishing less restrictive standards. It has also done little to identify conflicts in regulations and in analytical methodologies between different agencies. OMB appears to review so many rules that it cannot have a substantial impact on most of them. For those few rules in which OMB takes a more active interest, however, it appears to affect the substance and the timing of the rule significantly.

OMB waived the regulatory impact analysis requirement for 21 of the 43 major rules it reviewed in 1982. The rationale for these waivers was often unclear, with the agency giving one reason and OMB a different reason, or no reason at all. Even where a reason was given (such as sufficient analysis already having been completed), no support was given for this reason (such as a discussion of, or even a citation to, this analysis). We are concerned that so many major rules were allowed to be issued without benefit of a regulatory impact analysis. We do not believe that agencies are likely to take the value of regulatory impact analyses seriously if the analysis requirement is frequently waived.

OMB generally avoids putting its comments on pending rules in writing. It is therefore generally impossible to determine what role OMB plays in any given rulemaking. While the agency remains formally accountable for the regulatory decision, it is impossible to determine to what extent the rulemaking decision is made in the agency, as provided by the agency's statute, or in OMB. It is equally difficult to determine whether OMB input is concentrating on improving the quality of the economics and the objectivity of the tool. The lack of documentation makes it impossible for others, whether interested parties or those with an interest only in cost-effective rulemaking, to comment on OMB's oversight performance. It also complicates the Congress' task in trying to oversee the implementation of regulatory statutes. OMB also lacks procedures for monitoring the use of data from ex parte sources in rulemaking. S. 1080 incorporates some provisions that would provide the public with more information on OMB's role. OMB's comments on pending rules would have to be inserted in the rulemaking record, but

only to the extent that they were in writing and only if they were received after the record "opens" with the notice of proposed rulemaking (NPRM). Pre-NPRM comments and all oral comments would not have to be disclosed. S. 1080 also increases the potential for displacing agency rulemaking discretion by formally authorizing Presidential oversight.

5. Conflicts: Both E.O. 12291 and S. 1080 contain exemption clauses to render them inapplicable when they conflict with existing regulatory legislation. Nevertheless, we believe that there is sufficient ambiguity in existing legislation about the applicability of cost-benefit standards that conflicts with congressional intent could arise.

6. Independents: While S. 1080 is ambiguous as to whether Presidential oversight of independent regulatory agencies is to be substantive or procedural, the oversight provided for is likely to have some substantive content and to reduce the independence of those agencies.

In light of these findings, we have a number of recommendations to the Director of the Office of Management and Budget and matters for consideration by the Congress.

RECOMMENDATIONS TO THE DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

Oversight of RIAs should be broader

We recommend that OMB play a broader role in overseeing the regulatory analysis process. Its centralized position provides a number of opportunities for it to play a more supportive role in promoting the integration of regulatory analysis into agency decisionmaking. For example, OMB should monitor the procedures used by the agencies in integrating regulatory analysis into the regulatory decisionmaking process and should monitor the resources available to the agencies to fulfill their analytical responsibilities. OMB should also broaden its effort in promoting the adoption of innovative techniques as an approach to reducing costs, rather than simply establishing less restrictive standards. OMB should play a more active role in reducing conflicts and overlaps and promoting greater consistency in regulatory policies. It should also promote the development of consistent methodologies for measuring regulatory impacts.

Guidelines to standardize and reduce use of waivers should be developed and rationale should be public

We recommend that OMB develop written guidelines for waiving the analysis requirement to replace the implicit guidelines that are now in effect. OMB should apply the regulatory analysis requirement more consistently, and a full public explanation

should be provided when waivers are granted. While an emergency situation, lack of discretion, or an abundance of existing analysis might justify waiving a regulatory analysis, agencies should be required to demonstrate, both to OMB and to the public, that such conditions exist. Deregulation or intended reduction of regulatory costs should not be a basis for waiving the requirement. Actions that reduce regulatory burdens but that nevertheless might generate significant adverse consequences or substantial cost increases to segments of the population should still be thoroughly analyzed. Only where a substantial body of evidence shows a likelihood of a net gain without serious adverse consequences should a waiver be considered. However, even then a waiver should not be automatic since, where existing analysis is plentiful, it should not be difficult for the agency to pull that analysis together and issue it as a regulatory analysis.

OMB comments on RIAs should generally be written and publicly available

We recommend that OMB oversight be conducted in the open, with public filings of OMB's comments on agency analyses. We believe that OMB would demand a higher standard of agency rulemakings and be more likely to focus on the quality of the analyses if it were required to publish its evaluations of agency rules. Public filings would allow interested parties to comment not only on the agency's proposal but also on OMB's oversight performance. Documentation of OMB's input is also needed to permit the Congress to oversee the implementation of regulatory statutes and to ensure the fairness of the rulemaking process.

Measures should be taken to improve the quality and identify the sources of data

We recommend that OMB require all those who contribute factual information from outside the agency to provide sufficient documentation to enable the agency to assess the validity of the information. OMB should use ex parte facts or analyses as a basis for commenting on an agency's proposed rule or regulatory impact analysis only when the source of those ex parte materials is identified publicly and accompanied by sufficient documentation to assess their validity. Procedures should be established to ensure that those materials, including the documentation, are forwarded to the agency for inclusion in the rulemaking record.

MATTERS FOR CONSIDERATION BY THE CONGRESS

Attention to resources needed if objectives of regulatory analysis requirement are to be achieved

The regulatory analysis requirement is unlikely to achieve its objectives if agencies are not provided the necessary resources. We have found that the costs of preparing regulatory analyses are substantial and believe they are likely to grow if S. 1080 is enacted. The Congress might require OMB and/or the agencies to

provide information on what resources the agencies have for preparing regulatory analyses and on whether there is a disparity between the resources available and required for meeting the substantive requirements of statutes. More attention might also be directed at establishing criteria for allocating analytical resources to those regulations that will benefit most from them.

Review of regulatory legislation can help remove barriers to more cost-effective regulation and reduce potential of RA requirement to displace congressional intent

To help remove statutory barriers to cost-effective regulation and reduce the likelihood of an RA requirement conflicting with congressional intent, the Congress should consider reviewing the provisions of existing regulatory legislation. Since most regulatory legislation was enacted in the absence of an administrative or statutory regulatory analysis requirement, the effect of such a requirement was generally not considered when the legislation was written. As a result, the implementation of that legislation, after becoming subject to a regulatory analysis requirement, may be different from what the Congress intended, especially if the original legislation granted the agency broad discretion. Congressional committees with responsibility for substantive regulatory legislation should consider amending existing legislation to take into account the fact that, absent any statutory directions to the contrary, a cost-benefit standard may now be applied.

The Congress may in some cases wish to remove language that prevents agencies from considering costs or to clarify goals in terms of performance so that agencies are permitted to seek out the most cost-effective means of achieving those goals. In regulatory legislation involving areas where costs and benefits are often intangible and difficult to measure, the Congress may wish to provide agencies with additional guidance on how intangible costs and benefits should be evaluated for purposes of including them in a regulatory analysis. In cases where the Congress develops or retains legislation that precludes agency discretion to balance objectives, the importance of the Congress considering costs and uncertainty is heightened. The Congress may therefore wish to review the implementation of Senate Rule 26.11(b) that requires these economic impacts of regulatory legislation to be assessed.

Role of the President in overseeing the regulatory analysis process and controlling the costs of regulation could be clarified

Finally, we are concerned with the ambiguity in S. 1080 concerning the appropriate role for the President in overseeing the rulemaking process. On the one hand, section 11 of S. 1080 emphasizes that the bill does not change the delegation of rulemaking responsibilities to the heads of agencies. But on the other hand,

section 624 of S. 1080 appears to grant strong powers to the President to intervene in agency rulemaking. Thus, it is not clear whether S. 1080 intends that the President exercise more systematically and comprehensively the strong implicit powers given to him by the Constitution, or whether the intent of the bill is that the President shall exercise the restraint in the use of his implicit powers that has generally characterized past Presidential intervention in rulemaking. We believe that the Congress could clarify Presidential oversight authority in S. 1080, especially as it relates to rulemaking by independent regulatory agencies. The Congress may wish to consider the relevant provisions of the Paperwork Reduction Act of 1980 as an approach to defining a procedure by which independent regulatory agencies can overrule rulemaking directions of the President. In any case, we believe that if S. 1080 is enacted strong congressional oversight will be necessary to ensure that the process of Presidential oversight is consistent with congressional intent in diverse regulatory statutes.

OTHER OBSERVATIONS

We have several additional observations regarding the potential of regulatory analysis to improve the economic soundness of Federal regulation. First we note that although regulatory analyses have been required by Executive order for nearly 8 years, economic analysis has been integrated only modestly into regulatory decisionmaking. Of 2,679 regulations reviewed by OMB in 1981, only 22 had regulatory impact analyses prepared. While many regulations exempted from the regulatory impact analysis requirement had some form of analysis prepared voluntarily by the agency, there is a long way to go before economic analysis is an integral part of rulemaking--not just for a handful of "major" regulations each year, but for the large number of regulations that have a significant but not "major" effect.

In addition, we note that while regulatory analysis has the potential for bringing objective data, facts, and analysis into regulatory decisionmaking, it is a fragile tool readily subject to misuse. If regulatory analyses are pushed beyond the limits of data and methodology, they are unlikely to serve the objectives of more rational and substantiated regulation. The purposes of regulatory analysis will be undermined if used to rationalize pre-selected actions. Regulatory analysis should not be used as an avenue for providing relief not authorized by the Congress, nor should it be relied upon by the Congress as a major source of suggestions for legislative change. Regulatory analysis will have the greatest constructive effect on improving regulation if it is directed at providing sound analysis of the impacts of alternative regulatory approaches so as to achieve the goals established in regulatory statutes in the fairest and most efficient way possible.

Finally, given the limited implementation of the tool to date and its fragility, care should be taken so that it is given a reasonable opportunity to work. We are concerned that, while there is wide agreement on the need for regulatory analysis in the rulemaking process, there is much less agreement on the respective roles of the Congress, the executive branch, and the courts in providing oversight of that analytical process. Under S. 1080, all three branches will do more overseeing--the "Bumpers Amendment" will expand judicial review, the legislative veto will expand congressional review, and the Presidential oversight provisions will expand White House review. We are concerned that this simultaneous expansion of oversight activity in all three directions could make the rulemaking process so cumbersome that agencies may not be able to get needed and analytically justified rules issued expeditiously. Moreover, the analysis process may be overshadowed by the effects of the expanded judicial and legislative review and the new and more highly formalized procedures. We believe that congressional enactment of a regulatory analysis requirement is an important initiative that holds promise for improving the rationality and effectiveness of Federal regulation. However, judgment should be withheld on the need for a legislative veto, expanded judicial oversight, or increased formality of agency procedures until the regulatory analysis requirement has been fully implemented. Then its effect can be assessed.

* * * * *

We requested comments by the Office of Management and Budget. OMB did not respond within the time allowed by statute, so we are issuing the report without their comments. When their comments are received, and if they raise major issues, we will issue them and our response in a supplemental report.

As arranged with your office, we are sending copies of this report to the Director of the Office of Management and Budget and heads of regulatory agencies. We understand that your office will distribute copies of the report to Senate and House Committees with jurisdiction over regulatory agencies. Copies will also be sent to other interested parties and will be available to those who request them.

Sincerely yours,

Milton J. Socolar

Acting Comptroller General
of the United States

Enclosure

ABBREVIATIONS

APA	Administrative Procedure Act
CBO	Congressional Budget Office
CPSC	Consumer Product Safety Commission
CWPS	Council on Wage and Price Stability
DOC	Department of Commerce
DOE	Department of Energy
DOI	Department of the Interior
DOL	Department of Labor
DOT	Department of Transportation
E.O.	Executive Order
EPA	Environmental Protection Agency
FDA	Food and Drug Administration (HHS)
GAO	General Accounting Office
HUD	Department of Housing and Urban Development
OIRA	Office of Information and Regulatory Affairs
OMB	Office of Management and Budget
OSHA	Occupational Safety and Health Administration
RA	Regulatory Analysis
RARG	Regulatory Analysis Review Group
RIA	Regulatory Impact Analysis
S.	Senate Bill

C O N T E N T S

OBJECTIVES, SCOPE, AND METHODOLOGY

This report is in response to an April 1981 request by Senator Roth, Chairman of the Senate Governmental Affairs Committee. He inquired into the role and performance of regulatory analysis in controlling the costs of regulation. The request was structured to address some of the fundamental outstanding issues confronting the Congress in determining whether and how to legislate a regulatory analysis requirement. In particular, Senator Roth requested that we answer the following questions:

1. How do agencies develop regulatory analyses?

2. What are the potential costs of regulatory analysis in delay and additional expense?

3. What are the potential costs of the proposed mandate for a 10-year regulatory review?

4. What is the potential effect of the costs--i.e., to what extent might the costs distract agencies from their primary statutory responsibilities?

5. To what extent might the absence of an exemption for deregulation in S. 1080 interfere with President Reagan's program to deregulate the economy?

6. How well did independent regulatory agencies comply with the regulatory analysis requirement of E.O. 12044 issued by President Carter?

In June 1981, we presented limited and preliminary results to the Senate Governmental Affairs Committee. The scope and methodology of the project at that time was to focus on the experience of selected agencies with the most experience in performing regulatory analyses (RAs). To identify agencies that had the most RAs for possible inclusion in our sample, we examined two sources: a November 1980 report by OMB listing the number of analyses prepared by various agencies *1/ and the three most recent editions of the Calendar of Federal Regulations, 2/ which reported the major projected regulatory actions. We were concerned primarily with the process of "notice-and-comment" or "informal" rulemaking for which the regulatory analysis applies. We sought to ensure that the sample would be large enough to represent accurately the wide variety of regulatory actions (e.g., health, safety, environmental, and economic regulation). With these factors in mind, we selected the following 11 regulatory agencies and executive departments.

---

*All footnotes can be found at the end of the appendix.

1. U.S. Department of Agriculture (Agricultural Marketing Service, Agriculture Stabilization and Conservation Service, and Food Safety and Quality Service),

2. U.S. Department of Commerce (National Marine Fisheries Service),

3. U.S. Department of Energy (Economic Regulatory Administration and Office of Conservation and Renewable Energy),

4. U.S. Department of Health and Human Services (Food and Drug Administration),

5. U.S. Department of the Interior (Office of Surface Mining),

6. U.S. Department of Labor (Occupational Safety and Health Administration),

7. U.S. Department of Transportation (U.S. Coast Guard and National Highway Traffic Safety Administration),

8. U.S. Environmental Protection Agency,

9. Consumer Product Safety Commission,

10. Federal Communications Commission, and

11. Interstate Commerce Commission.

We asked each agency to provide us with their three most recent regulatory analyses. We felt that more recent regulatory analyses would give us a better idea of the current state of the regulatory analysis process. Not all agencies had done at least three recent analyses, so in those cases we used the available ones. While we think our sample is reasonably representative of the regulatory analyses prepared during this period, it is not a scientifically constructed random sample because the universe from which the sample would be drawn is ill-defined.

We interviewed officials identified by the agency's GAO liaison within each of the 11 agencies. Generally we were referred to the director of analysis units within agencies. Sometimes the unit had more general responsibility for rulemaking (for example, within a General Counsel's Office). In some cases, we had separate meetings with officials in several different subagencies or offices. Most of the agency officials were analysts, responsible for either preparing or managing analyses. At times, reviewers of analyses also participated.

We requested cost data on all RAs performed in 1979 and 1980. The data agencies provided us were incomplete and inconsistent. For example, few agencies had data on the costs of all

APPENDIX I

their analyses. Many agencies failed to distinguish between the costs of major and non-major rules, and the costs were not accounted for uniformly. In some cases, agencies only provided us with estimates of staff years, in which case we applied the estimated average cost of a typical GAO staff year for 1981 to convert the estimate to a dollar estimate that incorporates overhead costs.

In developing an estimate of the average costs of RAs, we found a number of limitations in the data provided. In those cases where the cost data were primarily or entirely for non-major rules, we excluded the data from our estimate of average costs. We also separated out the cost data provided by one independent agency--the Consumer Product Safety Commission (CPSC). Its analyses were done under a statutory directive whose scope relative to E.O. 12044 or E.O. 12291 was unclear.

We calculate an average cost figure for 38 RAs at six agencies. But this estimate should be used with considerable caution. We observed significant variation in the average costs of RAs done at the different agencies and thus believe an average itself might be misleading. Moreover, there were a number of significant factors that led us to believe that the observed average cost figure should be viewed as the lower bound of the expected costs of RIAs under E.O. 12291 (see pp. 19-21).

We also requested data on the number and costs of regulatory "sunset" reviews prepared. We received data on the costs of only five regulatory reviews. While we present the average cost, we have no confidence in the reliability of the figure, given the extremely small and unrepresentative sample.

We emphasize that we have not audited or otherwise verified the cost data supplied to us by the agencies.

In our interviews with officials of the 11 agencies in our sample, we focused on the following issues designed to assist us in answering the basic questions posed by Senator Roth:

- problems encountered in conducting RAs and regulatory reviews,
- the extent to which RAs were done and how alternatives were identified and evaluated,
- how cost data were generally obtained and whether agencies had any policy to be explicit about the sources of data,
- how agencies were organized to conduct RAs, and
- the time it took to conduct RAs and whether RAs had noticeably delayed rulemaking.

We also discussed the significance of the expected changes in the scope of analyses based on the policies and standards of E.O. 12291. In addition, we inquired about the agencies' expectations of S. 1080's effect on the costs of RAs. In particular, we asked agencies how many regulatory reviews would have to be conducted to comply with the mandated 10-year sunset review and what they expect the costs of those reviews to be.

We analyzed and synthesized the information gathered in the interviews and drew on a wide range of available information such as S. 1080 and its legislative history, other related congressional hearings and reports, economic and legal literature, select court rulings, and a wide range of published GAO reports. We also assessed the quality of the 38 regulatory analyses provided to us by the agencies, most of which had been done under E.O. 12044.

In January 1982, we briefed the committee on our progress. At that time, the committee staff expressed concern that our work, which had drawn almost entirely on the experience of regulatory analyses under E.O. 12044, did not address the most salient issues before the Congress regarding regulatory analysis, namely, the role and effect of executive oversight under E.O. 12291, which had superseded E.O. 12044 in February 1981. In subsequent discussion with the committee staff, the core questions to be addressed were amended and reformulated as follows:

1. How good are the regulatory analyses done by agencies?

2. What are the potential costs of regulatory analysis of new and existing regulations as required by Executive order or pending legislation such as S. 1080? To what extent could the costs of these analyses distract agencies from their primary responsibilities?

3. How has the regulatory analysis requirement of E.O. 12291 affected deregulatory initiatives? To what extent will the proposed bill, S. 1080, interfere with President Reagan's program to deregulate the economy?

4. What has been the effect of centralizing regulatory oversight at OMB?

5. To what extent do the provisions of Executive Order 12291 and S. 1080 conflict with or pre-empt existing regulatory legislation?

6. What effect will Presidential oversight of regulatory analysis have on independent agencies?

As a result of the additional and reformulated questions, we undertook several additional tasks. The first task, to enable us to address the role and effect of centralized oversight, was to gather and examine basic documents on the Administration's regu-

APPENDIX I

latory relief program. In particular, we studied Executive Order 12291, the Interim Regulatory Impact Analysis Guidance, press releases and other documents released by the President's Task Force on Regulatory Relief, and the annual report on the implementation of E.O. 12291.

To assess the quality of RAs, we added to our sample of 38 analyses prepared under E.O. 12044 by securing copies of all 19 regulatory impact analyses reported by OMB in its "Year-end Summary" as having been done in 1981 after E.O. 12291 was issued. (OMB subsequently revised this number to 22 in its April 1982 annual report.) We reviewed these analyses and analyzed their quality with regard to the following basic components of RAs:

- o the problem statement,
- o identification of alternatives,
- o benefits,
- o cost, and
- o rationale for recommended alternative.

Assessment of quality is a subjective process. Because of this, differences of opinion are bound to exist about whether, for example, a problem statement that is deficient in some respects is fair or poor in overall quality. For this reason, we decided not to rate the overall quality of the regulatory analyses we reviewed and also chose not to tabulate the results of our assessment of the quality of the RIAs. Our discussion of quality takes two tacks. We give examples of the good and poor features of the various analysis, and we discuss the number of cases where an essential ingredient of a good regulatory analysis was clearly absent.

Review of the analyses performed under E.O. 12291 allowed us to draw some observations about how consistently OMB oversees the standards of E.O. 12291, in terms of the analyses approved. In addition, we examined the Federal Register notices for all the major rules listed in OMB's annual report that were published in 1981. We reviewed the basis for the determination that rules were major and the rationale for granting waivers. In cases where the needed information was not in the Federal Register notices, we followed up with phone calls to the designated agency contact.

A considerable portion of our information on OMB's policies and procedures was gathered from structured interviews with senior OMB officials. We met with the Administrator of the Office of Information and Regulatory Affairs (OIRA), who also serves as Executive Director of the President's Task Force on Regulatory Relief. We requested interviews with his two deputies

and met with the Deputy Administrator for Regulatory and Statistical Policy. We were referred by the Deputy Administrator for Information and Regulatory Management to the Assistant Chief of the Reports Management Branch.

In the interviews, we inquired about and requested documentation of several facets of OMB's procedures and policies for reviewing RIAs under E.O. 12291: time for reviews and for resubmissions; nature and documentation of OMB input; occurrence and monitoring of ex parte contacts; role of OMB in identifying and resolving conflicts; efforts to promote use of market-based techniques; adequacy and composition of resources of OIRA and agencies; and process, progress, and plans in identifying needed legislative changes.

Our review was performed in accordance with generally accepted government audit standards.

LIMITATIONS OF STUDY

In a number of cases, our response serves to provide a structure or framework for how the question might be addressed, rather than a definitive response. Regulatory analyses are but one input to the rulemaking process. Therefore, assessments of their quality cannot be used to draw conclusions about the ultimate quality of regulations that result from the entire process. In this regard, we believe a more complete but time-consuming response would involve examining how RAs are used or misused and how their contribution to more objective, rational, and informed decisionmaking can be enhanced. With regard to the costs of RAs, our data are incomplete. In particular, we have no information on the quality or quantity of resources available to agencies or what gap might exist in the resources needed to execute S. 1080. Our effort to address the influence of OMB on regulatory decisionmaking faced significant obstacles. The absence of documentation represented a major impediment. Little information was provided by agencies on delay, and further work could be done in this area by tracing particular rulemakings and related analyses. With regard to our comments on OMB's role in identifying and reducing overlap, we can only note the absence of procedures to deal with the problem.

In those cases in which we believe that the limited scope of our audit work, and in particular the limited time available to address the restructured set of questions, affects our response significantly, we discuss this directly in the body of our report.

APPENDIX I

FOOTNOTES

1/Office of Management and Budget, Improving Government Regulations--Current Status and Future Directions, November 1980.

2/U.S. Regulatory Council, Calendar of Federal Regulations. This was published every 6 months. The ones we examined were Federal Register 44, No. 230, November 28, 1979; 45, No. 106, May 30, 1980; 45, No. 228, November 24, 1980.

QUESTION 1

HOW GOOD ARE THE REGULATORY ANALYSES DONE BY AGENCIES?

All regulatory analyses are intended to determine the desirability of a proposed regulation by systematically laying out its advantages and disadvantages in comparison with alternative regulatory approaches, including the alternative of having no regulation at all. That the advantages and disadvantages are referred to as "costs" and "benefits" suggests that primarily economic factors are to be taken into account; however, a good analysis will include all legitimate reasons for favoring or opposing a regulation.

The value of preparing a regulatory analysis varies with the effect of the regulation. For example, those regulations setting forth requirements or procedures affecting few people and having minimal economic consequences do not warrant any formal analysis. Other regulations are significant enough to justify a formal analysis but are not significant enough to justify an expensive, time-consuming effort to measure every cost and benefit. Still other regulations are of such great significance that they justify the most careful analysis of which the Government is capable. The Executive orders (12044, March 23, 1978, and 12291, February 17, 1981--see appendixes III and IV) and regulatory reform bills (S. 1080--see appendix V--and H.R. 746) have recognized this variation in the value of doing the analysis by only requiring analyses of "major" regulations--those that have more than a $100 million annual "effect" on the economy or that meet other criteria of a more concentrated effect (e.g., E.O. 12291, §1(b)).

While regulations vary widely in significance and in the type of "costs" and "benefits" produced, any analysis that can contribute to improved regulatory decisionmaking must include, at least implicitly, several key elements. To be complete, a regulatory analysis must

- o state the problem to be addressed by the regulation,
- o identify feasible alternatives,
- o identify and measure relevant benefits and costs, and
- o explain why one alternative was chosen over the others.

Executive Order 12291, S. 1080, and H.R. 746 all specify the identification, evaluation, and comparison of the costs and benefits of different regulatory alternatives, except when legally prohibited, as elements of a regulatory analysis. *1/ In several

---

*Footnotes in this appendix can be found at the end of each question.

cases, they are specific about what kinds of alternatives should be considered. 2/

We reviewed a sample of regulatory analyses prepared under both E.O. 12044 and E.O. 12291 to determine the extent to which these four critical elements of a good regulatory analysis were included. We examined 38 regulatory analyses done under E.O. 12044 between 1978 and 1980 at 7 different regulatory agencies. 3/ We examined 19 regulatory analyses done at 6 agencies under E.O. 12291 during 1981. 4/

We describe in appendix VI the features (based on criteria embodied in E.O. 12291) that we looked for in reviewing the various elements of analysis. In the next section, we discuss our observations based on our review of the analyses for each of the four basic elements of a regulatory analysis.

ELEMENTS OF A REGULATORY ANALYSIS

Problem statement

The analysis must convey the problem that leads to a perceived need for a regulation. A specific problem statement often suggests regulatory approaches that the agency might not have thought of otherwise and usually clearly states the regulation's potential benefits. The problem statement should delineate what issues are addressed and why such issues pose a problem worth tackling. The salient features of the problem should be identified, and through this identification one should better understand the problem's causes and effects. Failure to understand a problem usually results in making the wrong diagnosis and, hence, administering the wrong "medicine." A good problem statement will help to avoid this. A good problem statement should also give some sense of the economic, institutional, and legal context that may constrain potential solutions.

For example, total oil pollution over the years 1971-77 and the sources of this pollution, in terms of different types of maritime operations, were described in the problem statement of proposed regulations governing tank barges. In explaining the causes of a problem, a good statement can reveal important alternatives. For example, in the analysis of regulations to protect workers' hearing, the fact that companies in the past have not had to bear the costs of hearing impairment was discussed. This suggested one possible way to correct the problem--namely, focusing on ways to make companies accountable for those costs. In addition, the analysis discussed the role of imperfect information, suggesting that one alternative might be to provide workers with better information on hearing hazards. The idea behind this second alternative was that workers "armed" with such information would freely choose which hazards either to accept or to reject by leaving. In this context, the analysis also discussed the issue of labor immobility.

Several problem statements lacked some of these essential elements. They had no stated rationale for government intervention, such as market failure. For example, one problem statement simply asserted that a farmer-owned wheat reserve was needed to achieve broad policy goals, but gave no reasons why government intervention would be an improvement over the existing situation. In another case, a problem statement spoke of how profit margins of middlemen were being squeezed, but it did not indicate why this was a problem worthy of government attention. Examples of other shortcomings discovered in problem statements were the lack of information on adverse health effects from exposure to a hazardous chemical under a base case or status quo situation and failure to show how a proposed regulation on chemical labeling would protect against hazards already addressed by other regulations "on the books."

Alternatives

The analysis must consider the best alternative approaches to solving the regulatory problem. This alternative could be "no regulation" (always an implicit alternative) or it could be to have the Congress amend the law if the costs seem prohibitive (as it did when the Food and Drug Administration prohibited the sale of saccharin). 5/ Decorating the analysis with weak "straw men" alternatives should be avoided since they only serve to make the proposed alternative look good. Considering an adequate range of alternatives is a critical feature of the analysis. It does not matter how good the cost and benefit estimates are if the best alternative is excluded from the analysis in the first place.

A good analysis will go beyond merely considering different levels of stringency and will include "performance standard" and "market-based incentives" approaches. Of the 57 analyses examined, 16 considered alternatives involving the use of performance standards or economic incentives. One such example concerned natural gas curtailment priorities. The agency developed both a highly efficient economic incentives approach and a more conventional approach involving an innovative, cost-reducing combination of stringency levels.

A good analysis will consider the best alternative regulations and non-regulatory alternatives, such as changes in the tax code and the "no-action" alternative. For example, in a case involving oil and gas leasing, a wide range of alternatives was considered, including an examination of the effects of varying the tract size for leasing, the leasing term, and the types of bidding systems. Similarly, in an analysis of proposed regulations of migratory bird hunting, five different combinations of daily catch limits and season lengths were considered. Finally, the complexity of some regulations was highlighted by a case involving surface mining. Each of 37 individual regulatory issues had its own listing of alternatives ranging from 2 to 13.

We also found examples of analyses that did poorly in their examination of alternatives. One analysis that did poorly in considering alternatives dealt with the use of passive restraints, such as automatic seat belts and air bags, in protecting automobile passengers. 6/ The analysis did not seriously consider other choices involving only the use of air bags or only spool release belts not requiring detachable belt buckles. In other cases, a wider range of alternatives was considered but evidence suggests that some of these choices were not seriously analyzed. For example, one analysis dealing with the allocation of airport landing and takeoff slots considered two basic alternatives, government quotas on the number of slots allotted per airline and landing fees. However, the analysis did not fully assess the rationing function of landing fees, especially at severely congested airports. Instead, the analysis recommended quotas, noting that the government will have to "bear the relatively minor cost of assigning air carrier slots."

Benefits and costs

The analysis must identify and, if possible, measure all the advantages and disadvantages (or costs and benefits) of the proposed regulation and of all the alternative regulations considered. The identification of these costs and benefits is more critical than measuring them perfectly. A marginal error in measurement is usually less significant than omitting a cost or benefit category completely.

There are times, however, when it is difficult to find adequate data on costs and benefits, and this can cause problems when trying to identify and measure these advantages and disadvantages. Particularly for indirect effects--like the effect on technological change, international trade, competition, employment, investment, productivity, and innovation--our understanding of the economic process is often inadequate to predict with any precision how a particular regulation will affect those processes. 7/ Although a number of analyses identify potentially important indirect effects in their proposals, some did not, and fewer tried to measure these effects. In some cases, it may be so difficult to measure these indirect effects that the best that can be expected is only an indication of the direction of the effect (i.e., whether the effect is a cost or a benefit).

The task of quantifying costs and benefits can also be complicated by a number of well-known problems. Many of the costs and benefits of regulatory proposals are not ordinarily bought and sold, so no obvious dollar value applies to them. In other cases, critical biological relationships, such as the dose-response curve of a carcinogen, may be poorly understood. Most agencies do not attempt to assign value to human life because the methodology is problemmatical. 8/

While there is little that can be done immediately to solve these problems, they can be recognized when agencies present quantitative estimates of costs and benefits. Indeed, some analyses did make allowance for the possible errors in their data and estimates, either by stating confidence intervals for their estimates or by conducting a sensitivity analysis to show the effect of varying assumptions about the value of key parameters. 9/

There are categories of benefits and costs, however, that can be identified and measured, but these were sometimes omitted from these analyses. For instance, in two regulations involving labor practices, missing benefits were a problem. The analysis omitted the positive effects on employment resulting from the proposals. A number of analyses failed to include important cost categories. For example, in one analysis of rules proposed to control chemical hazards through better identification, the costs of labeling pipes carrying substances were ignored. As a result, costs of the proposal may have been underestimated by as much as a factor of three. 10/

In some cases, there were no quantitative or dollar estimates, only a qualitative assessment of whether a proposed rule would meet some broad policy goal. Of the 57 analyses reviewed, 23 analyses had no dollar estimates of benefits. Generally, cost estimates were more common; only 8 analyses contained no dollar estimates of costs. To some extent, the inadequacy of benefit and cost estimates is tied to the lack of vital information. 11/ For example, in an analysis of Residential Conservation Service regulations, the absence of data on the unregulated "retrofit rate" (the rate at which existing buildings would be renovated to improve their energy efficiency) makes it impossible to predict reliably what the benefits of a regulation concerning retrofits would be.

Beyond the failure to identify and measure benefits and costs, questionable assumptions about expected benefits and costs also plagued some of these analyses. Examples of questionable assumptions about the benefits of regulations ranged from the supposition that a particular regulation would reduce 5 percent of cancers (when other evidence suggested less than half that amount) to the assumption that energy conservation would result only from government regulations and not from rising energy costs. Unrealistic assumptions about expected costs are also made. For example, in an analysis of affirmative action rules, the costs of changes in those rules were assumed negligible, without any supporting evidence.

Rationale for recommended alternatives

The alternatives identified must be compared by using the costs and benefits identified. Obviously this step is dependent on the right alternatives having been identified and the advan-

APPENDIX II

tages and disadvantages having been accurately identified and evaluated.

This final step of regulatory analysis, providing a rationale for the recommended alternative, was inadequate in a number of analyses that we reviewed. In many cases, there simply were no comparisons of alternatives on the basis of relative benefits and costs. In some cases, analyses were compared on the basis only of relative costs or relative benefits. In few cases were the costs and benefits of considered alternatives presented in a way that would facilitate decisionmaking. Tables ranking alternatives by net benefit levels, or at least presenting the incremental costs and benefits of different choices, were largely absent.

CONCLUSIONS

In summary, while many analyses were well done, many others we reviewed provided less than adequate support for their conclusions on the basis of the criteria for regulatory decisionmaking spelled out in the Executive orders under which they were performed. Based on these criteria, many regulatory analyses reviewed provided only part of the required information for such decisionmaking. 12/

In some cases, these analytical shortcomings were accounted for by unavoidable problems such as lack of data or inadequate underlying knowledge of the key physical or biological process affected by the regulation. In some cases, the analytical shortcomings can be understood by the presence of a regulatory statute that grants the agency so little discretion that there is no immediate gain from a careful regulatory analysis, or by the fact that E.O. 12044, under which many of these analyses were prepared, did not explicitly require estimation of benefits. The higher quality of analyses at some agencies may be explained by the fact that their statutes explicitly require the consideration and balancing of costs and benefits.

But whatever the reasons for the shortcomings, the selective nature of the information provided in these analyses limits their usefulness for regulatory decisionmaking. Those who use these analyses must recognize their limitations and recognize that important regulatory issues often cannot be resolved on the basis of these analyses. A substantial portion of regulatory decisionmaking thus remains discretionary and non-analytical.

Despite the shortcomings of many of these analyses, we believe that regulatory analysis can make an important, useful contribution in bringing about more efficient and effective regulation. Even a less than perfect analysis, which fails to consider some relevant alternatives and has errors in its benefit and cost estimates, can improve the knowlege base upon which the agency makes a decision.

LIMITATIONS OF OUR FINDINGS

We caution the reader in interpreting our evaluation of the quality of RAs. Our evaluation is but a very rough proxy for the quality of analysis within agencies or the quality of the resulting regulations. For example, the printed RAs that we reviewed may be used differently by different agencies and may not incorporate all or the best of the analysis preceding publication of a proposal or transmittal to OMB for review. In particular, the fact that many of the analyses appear to stop short of discussing the rationale for a selected approach does not preclude the possibility that the rationale is dealt with in other analyses. It is possible that extensive, detailed decision memos are prepared subsequent to printing the actual RA, and such memoranda could be interpreted as an integral part of the agency's analysis.

Similarly, our discussion of the features of the analyses reviewed does not reveal very much about how analyses may be used or misused. We are able to identify several blatant instances of incomplete rationales for a selected approach. However, it is not appropriate for us to impute any general observation about how analyses are used by decisionmakers from the information available to us. We believe one of the most critical issues in the potential of regulatory analyses to improve the rationality and increase the cost-effectiveness of regulation is how those analyses are used by decisionmakers. To assess the extent to which regulatory analyses are used to improve decisions rather than to rationalize them would require a much more detailed review of decisionmaking within agencies and was clearly beyond the scope of the report.

FOOTNOTES

1/E.O. 12291, Sec. 3; S. 1080, proposed §622(c)(2); and H.R. 746, proposed §622(b).

2/S. 1080, proposed §622(c)(2)(C); and H.R. 746, proposed §622(c)(8).

3/As of November 1980, 176 such analyses had been finished in draft or final form. We chose our sample of agencies primarily on the basis of the number of regulatory analyses they had done, seeking those with the most experience with this type of analysis. From each of the most active regulatory units in each of these agencies, we sought the three most recent analyses completed. The regulatory analyses in our sample were prepared by the following agencies: EPA (10), Dept. of Labor (3), Dept. of Transportation (2), Dept. of Agriculture (9), Dept. of Energy (10), Dept. of the Interior (1), and Dept. of Health and Human Services (3). Numbers in parentheses indicate the number of analyses reviewed at each agency.

4/The agencies that did those analyses are: Dept. of Labor (6), Dept. of Transportation (4), Dept. of Agriculture (3), Dept. of the Interior (3), Postal Service (1), and Dept. of Commerce (2).

5/Pub. L. 95-203, §3, 91 Stat. 1452, Nov. 23, 1977, as amended. See 21 USCA §348, note.

6/State Farm Mutual Insurance Company v. Department of Transportation, 680 F.2d 206 (1982).

7/See also Arthur Anderson & Co., "Cost of Government Regulation Study" 1979, p. ii. "In addition to incremental costs, there are many less visible secondary effects that cause substantial incremental costs to the companies and to society generally. Examples of these effects of regulations include losses in productivity . . ., [and] delays in construction . . . Many companies observed that the costs of secondary effects were substantially higher [than the costs of direct effects] . . . However, those costs are very difficult to measure."

8/See U.S. General Accounting Office, "Approaches Toward Valuation of Human Life By Certain Federal Agencies" (PAD-82-21), November 9, 1981.

9/S. 1080 incorporates a useful provision (proposed §622(e)) that would require margins of error to be stated for all quantitative estimates. Data submitted by outside parties would have to be accompanied by sufficient documentation to allow the agency to assess their validity.

10/In a subsequent analysis under E.O. 12291, this cost was included.

11/See R. Crandall and L. Lave, eds., The Scientific Basis of Health and Safety Regulation (Washington, D.C.: Brookings, 1981); GAO, "16 Air and Water Pollution Issues Facing the Nation" (CED-78-148B), October 11, 1978, pp. 92-93; GAO, "Improving the Scientific and Technical Information Available to the Environmental Protection Agency in its Decisionmaking Process" (CED-79-115), September 21, 1979; OMB, "Improving Government Regulations--Current Status and Future Directions," November 1980.

12/These findings are consistent with the results of earlier studies. OMB, in its November 1980 report on implementation of E.O. 12044, reported four common analytical shortcomings that CWPS had identified in regulatory analyses: failure to identify the cause for government action, failure to project the base case, failure to consider all effects of proposed regulations, and failure to proceed cautiously in the face of uncertainty. The Regulatory Council had noted that problem statements appeared to receive inadequate attention and, as a result, agencies often proceeded with a rulemaking "with only a vague understanding of the underlying problem." Similarly, GAO has drawn attention to the importance of "knowing the actual state of the environment before imposing regulatory measures." See OMB, "Improving Government Regulations," November 1980; U.S. Regulatory Council, "A Survey of Ten Agencies' Experience with Regulatory Analyses," June 1981 working paper, p. 13; and Henry Eschwege, Director, Community and Economic Development Division, GAO, "The Costs and Benefits of Government Regulation: An Environmental Dilemma," address before the Ohio EPA and Ohio Municipal League, August 1980, p. 11.

QUESTION 2

WHAT ARE THE POTENTIAL COSTS OF REGULATORY ANALYSIS OF NEW AND EXISTING REGULATIONS AS REQUIRED BY EXECUTIVE ORDER OR PENDING LEGISLATION SUCH AS S. 1080? TO WHAT EXTENT COULD THE COSTS OF THESE ANALYSES DISTRACT AGENCIES FROM THEIR PRIMARY RESPONSIBILITIES?

Executive Order 12291 and S. 1080 require that agencies perform regulatory analyses on all "major" regulations to accompany both proposed and final rules. To assess the potential magnitude and significance of the costs of performing regulatory analysis, we examine the following issues:

1. What are the potential costs of regulatory analysis of new and existing major regulations in delay and additional expense under E.O. 12291?

2. How might passage of S. 1080 affect the costs of regulatory analyses?

3. To what extent could the costs of regulatory analyses of new and existing regulations prevent agencies from complying with the regulatory analysis requirement or distract agencies from their primary responsibilities?

4. How can scarce analytical resources be used most effectively?

POTENTIAL COSTS OF REGULATORY ANALYSIS OF NEW AND EXISTING REGULATIONS UNDER E.O. 12291

In large part, the cost data we have gathered relate to regulatory analyses done under E.O. 12044. Any conclusions about the costs of regulatory impact analysis under E.O. 12291 must therefore be only about what those costs might be. To estimate the potential monetary costs of regulatory analysis, as required by E.O. 12291, we examine the costs of

- executive branch analyses of new regulations,
- executive branch review of existing regulations, and
- oversight programs within agencies and OMB.

We then consider the potential costs of delay and uncertainty.

Potential monetary costs of E.O. 12291

The potential costs of a regulatory analysis requirement depend upon the average costs of preparing each analysis, the number of analysis that must be prepared, and the "overhead" cost of reviewing and overseeing these prepared analyses.

We have been able to gather some data on the average costs of preparing regulatory analyses for both new and existing regulations. We have some information on the "overhead" cost of review and oversight at OMB. We have very little information on the number of upcoming major regulations that will require regulatory impact analyses or on the number of existing regulations that might be reviewed. The validity of any projected costs of either E.O. 12291 or S. 1080 critically depends on the number of major regulations anticipated.

In principle, a projection of the number of future regulations would be based on an understanding of the defined coverage of E.O. 12291, an examination of regulatory legislation covered by the Executive order, 1/ and an estimate of the number of major regulations necessary to execute that legislation. Between February 17, 1981, and December 31, 1981, 43 major rules were issued. However, we do not believe this number necessarily reflects the number of major regulations that may be necessary to put into effect all the covered regulatory statutes. We have not made such an estimate and believe that preparation of such an estimate would require a time-consuming examination of both the mass of regulatory legislation and the status of agency implementation of that legislation. Even if such an estimate were made, it would still be inadequate, since the number of regulations required to carry out a given piece of legislation often depends on changing circumstances, such as scientific findings about new carcinogens, new technologies, etc. Moreover, agencies have substantial discretion under most regulatory legislation about how many regulations to issue. Finally, new regulatory legislation is continually being passed, and the effect of these new laws is unforeseeable until they are passed.

In practice, estimates of the number of future major regulations are simply extrapolations from past years. For example, in 1980, OMB estimated the total number of major rules to be about 165 each year. 2/ The actual number of major rules in any year was not counted before 1981, and the estimates made may not be valid because agencies used inconsistent definitions of "major." Even if we had a good estimate, there would be no basis for assuming that this number would hold constant, rise, or fall in the future. 3/ Even in the case of reviews of existing regulations, where the regulations are already codified in the Code of Federal Regulations, any estimate of the number of major regulations on the books that would have to be reviewed is, of necessity, based on an arbitrary grouping of sections in the Code. Since, under E.O. 12291, existing rules are reviewed at the discretion of the agency and the Director of OMB, any number of rules might be reviewed.

Another problem in estimating the cost of E.O. 12291 is that it is not clear how much analysis agencies would do if the Executive order did not exist. Regulatory analyses have been required by Executive order for nearly 8 years, and agencies may believe the analysis to be of sufficient value that they might continue

to prepare them even if they were no longer required. Moreover, agencies' statutes often require that certain factors be considered in issuing a regulation. Agencies will prepare some analysis to demonstrate in any subsequent litigation that they have considered all the required factors. The true cost of analysis under E.O. 12291 is the incremental cost that it imposes in excess of the cost of the analyses that the agencies would have done anyway. While we attempted to determine from selected agencies what this incremental cost was, none of the agencies was able to provide us with the needed information. Therefore, we have only been able to estimate the total costs of preparing the regulatory analyses. The portion of the cost attributable to the Executive order is uncertain.

The principal data we have developed are on the average costs of performing regulatory analyses. We also present some limited information on the costs of review and oversight of the regulatory analysis process. We believe these data are helpful in getting some idea of the potential monetary costs of E.O. 12291.

We surveyed eight executive branch departments and agencies and gathered cost data on 38 regulatory analyses for new regulations, all of which were performed under E.O. 12044. 4/ Table 1 displays these cost data, as reported by the agencies. The data reveal that these analyses cost an average of $212,000 to conduct. We urge caution in the use of this average cost figure since, as the table illustrates, there is a very wide range in the costs of individual analyses within as well as across agencies. Also, we are not confident that our sample is completely representative.

In general, though, we believe our estimated average cost should be viewed as a lower bound on the costs of doing analyses meeting the standard of E.O. 12291 for the following reasons:

--All costs of analysis are not included. For example, costs of data gathering may not be included for particular regulations, because some of the data gathering is done outside the agency; overhead costs of planning, which may provide part of the analytical foundation for rulemakings, are not usually attributable to particular regulations.

--The standards are more rigorous and the scope of analysis is broader under E.O. 12291 than under E.O. 12044. All of the analyses from which the average cost figure was derived were done under E.O. 12044. E.O. 12044 was ambiguous in defining the scope of analysis required. Generally, E.O. 12044 may be interpreted to have required cost-effectiveness analysis; E.O. 12291 is unambiguous in requiring strict cost-benefit analysis where the benefits must outweigh the costs. 5/ One important implication of this change is that agencies are now expected to do more work on regulatory benefit measurement. The difficulties

Table 1

Costs of Regulatory Analyses by Agency a/
($ in thousands)

Agency/Office	Average Cost	Number of Analyses	Cost Range	Total Cost
Office of Conservation and Renewable Energy, Economic Regulatory Administration (DOE)	175.0	16	2.6-718.0	2,800.7
Food and Drug Administration (HHS) b/	68.6	9	- c/	617.6
Occupational Safety and Health Administration (DOL)	338.0	5	40.0-750.0	1,690.0
Office of Surface Mining (DOI)	800.0	1	-	880.0
National Highway Traffic Safety Administration and U.S. Coast Guard (DOT) b/	145.7	2	68.5-222.9	291.4
Environmental Protection Agency	372.7	5	34.3-1235.0	1,863.6
Total	212.2	38 d/	2.6-1235.0	8,063.3

a/The analyses in the sample include both draft and final regulatory analyses. As a result, the average cost data are probably biased downwards.

b/These agencies provided only staff-year estimates for completing RIAs. To compute the dollar cost of in-house staff time, we used the average cost, including overhead, of a typical GAO staff year. Inaccuracies may be introduced by imputing the same staff year cost to these two agencies, but we do not believe they will be very great.

c/We are unable to provide a cost range for these analyses because the FDA only provided us with a total cost figure for a number of analyses and did not provide data on the costs of individual analyses.

d/The agency totals given here are simply the totals of those analyses for which we have cost data. These figures do not represent the total number of regulatory analyses done in any year by the various agencies.

endemic to benefits analysis are widely recognized. While we do not have government-wide estimates of the average costs of benefits analyses, we do have cost data for 11 benefit studies that the EPA had underway or had completed (as of the time of our survey) in the pollution area. They cost an average of $226,000 per study.

--Many of the analyses we reviewed provide less than adequate support for their conclusions, implying that the observed average cost data may underestimate the true costs of doing analyses that would strictly conform to the new Executive order. As indicated in our response to Question 1, we found instances of inadequate consideration of costs and benefits, inadequate attention paid to alternatives to proposed regulations, and inadequate data. Resolution of all these shortcomings could add substantially to the costs of analysis.

We also attempted to gather data on the average costs of reviewing existing regulations, but at the time of our survey, agencies provided little information on the costs of these reviews. Table 2 presents data for five reviews conducted primarily under E.O. 12044 for which agencies provided cost data. Because this is an extremely small sample, the average cost data are not reliable for estimating the average costs of regulatory reviews. However, it is possible that some regulatory reviews might cost more than regulatory analyses of newly proposed regulations. An analysis of an existing regulation may include not only the costs of a retrospective review of its performance but also the costs of a prospective view of alternatives to the existing regulation, if a revision is indicated. On the other hand, the possibility of having a data base on the actual costs and benefits of the rule may make the sunset review less expensive than trying to forecast future costs and benefits. On the whole, we think it most likely that regulatory reviews will cost as much as analyses of new regulations. 6/ In the absence of reliable data on the average costs of analyzing existing regulations as well as an inventory of all the regulations that exist and would be reviewed, we are unable to estimate the potential costs of analyses as required by the sunset review provision of E.O. 12291.

The costs of regulatory analysis include not only the costs of preparing the analyses but also the costs of oversight and review of compliance. Regulatory analysis may be seen as a central component of a regulatory management process. If economic analysis is to be integrated into regulatory decisionmaking, staff are needed to manage the process and to ensure standards of quality, accuracy, and objectivity.

In an effort to identify the actual costs of regulatory oversight by OMB's Office of Information and Regulatory Affairs, we examined OIRA's budget. However, since OMB's appropriation does not categorize the amount of its resources devoted to over-

Table 2

Cost of Select Reviews of Existing Regulations Under E.O. 12044
($ in thousands)

Agency/Office	Average Cost	Number of Analyses	Total Cost
Food and Drug Administration (HHS)	118.6 a/	2	237.2
National Highway Traffic Safety Administration (DOT)	1,500.0 b/	1	1,500.0
Environmental Protection Agency			
Office of Drinking Water (completed)	350.0	1	350.0
Office of Drinking Water (estimated)	200.0	1	200.0
Total	457.4	5	2,287.2

a/These figures are based on the estimated staff time required for the analyses. They suffer from two possible sources of bias: they include an arbitrary share of FDA's overall clerical overhead and exclude the staff time for review and oversight by agency management.

b/This review was underway for several years, beginning before E.O. 12044 was issued and completed under E.O. 12291.

seeing regulatory analyses, we cannot estimate how much of its budget request of $4.5 million for FY 1982 is to be used for this. Much of OIRA's resources is intended to be devoted to review of information and paperwork collection requests and related issues by the Paperwork Reduction Act of 1980 (which established OIRA). 7/ Even if most of the $4.5 million budget were devoted to regulatory review, we would still not be confident that OIRA had sufficient resources to perform an effective oversight role, 8/ particularly given the high analytical standards of E.O. 12291, the extensive responsibilities assigned to OIRA by E.O. 12291, 9/ and the case-

APPENDIX II

by-case approach OIRA has taken (see discussion in response to Question 4, pp. 47-51). Another dimension of oversight relates to the resources required by the agency review units. We have no estimates on this aspect of the costs of oversight. 10/

As indicated earlier, we have information on the costs of performing individual regulatory analyses and regulatory reviews, but we do not have enough information to estimate the total costs of the regulatory analysis requirement in E.O. 12291. 11/ Nonetheless, for the reasons just indicated we have sufficient information to believe that the average costs of regulatory analyses will be higher under the new Executive order than they were under E.O. 12044.

Delay that may be induced by regulatory analysis provisions of E.O. 12291

While we sought information on how long regulations were delayed by the requirement to prepare regulatory analyses, good data were not generally available. The centralized oversight review function of OMB under E.O. 12291 may cause increased delay and uncertainty. (For a discussion of reasons for this, see our response to Question 4, pp. 50-51.)

COST OF IMPLEMENTING S. 1080

Beyond the costs associated with E.O. 12291, S. 1080 would impose additional costs on the regulatory analysis and review process. However, there is no good way of making a precise estimate of these costs. The S. 1080 provisions that might increase costs are

- inclusion of analyses conducted by independent regulatory agencies, which are not covered under E.O. 12291;
- restrictions on the use of consultants; and
- expanded legislative and judicial review.

S. 1080 will require more regulations to be analyzed

The most obvious effect of S. 1080 is that it will require independent regulatory agencies, as well as executive branch agencies, to review both their new and existing regulations. Estimating the costs imposed by S. 1080 on independent regulatory commissions requires information both on the costs of analyzing their new and existing regulations and on the expected number of analyses to be performed annually. 12/ We did include three independent commissions in our survey on the costs of analyses. While two--the Federal Communications Commission and the Interstate Commerce Commission--indicated that they performed some analysis comparable to the requirement of E.O. 12291, neither

had any data on the costs of those analyses. The staff of the Consumer Product Safety Commission, however, did provide some information on the costs of their analyses. They indicated that three analyses, completed between 1979 and 1980, 13/ cost an average of $131,000. 14/ In general, we believe it is reasonable to assume that average costs for analyses by independent regulatory agencies would be approximately the same as those performed by executive agencies (i.e., over $200,000 for new regulations and as high for existing regulations).

S. 1080 also expands coverage of executive branch agencies beyond the requirements of E.O. 12291 15/ in several other respects.

- S. 1080 requires a comprehensive review of all major rules every 10 years, whereas E.O. 12291 requires reviews of existing rules only when the agency head decides to or the Director of OMB directs it. 16/

- S. 1080 expands coverage of RAs by limiting exemptions that exist in the present Administrative Procedure Act (APA) and in the Executive order so that the regulations that implement hundreds of Federal grant, entitlement, insurance, credit, and urban programs might be considered "major rules" for which a regulatory analysis must be done (amendment to §553(a)(2)). (Also see our answer to Question 3, p. 35.)

- S. 1080 lacks the broad discretionary waiver authority granted to OMB under E.O. 12291.

- S. 1080's "major rule" criterion clearly indicates that deregulatory initiatives that would cause significant reductions in benefits will be considered "major" rules for which a regulatory analysis must be prepared.

- S. 1080 provides for judicial review of an agency's determination of which rules are "major." This might lead the agencies to decide to perform RAs, not because they are needed, but to forestall litigation. 17/

We have no basis on which to estimate the possible magnitude of increased costs because of this more complete coverage.

S. 1080 may increase the average costs of a regulatory analysis

S. 1080 may not only increase the number of regulations that must be analyzed, it may also increase the average cost of preparing each analysis. This might occur because of restrictions on the use of consultants and because the threat of legislative and judicial review may cause more elaborate analyses to be prepared, especially because analyses would then be legally required.

S. 1080 prohibits people outside the agency from preparing the analysis, although it does allow consultants to gather information. 18/ This provision is to ensure that analyses are conducted by government officials legally entrusted with regulatory decisionmaking. It is not clear how the restriction on the use of consultants will affect either the costs or quality of regulatory analyses. It may not be possible to draw a strict line between data gathering and analysis, and agencies may rely on contractors to the same extent as before, simply rechristening their work "data gathering." Where data gathering is clearly distinguishable from analysis, agencies may have to develop their own in-house analytical staffs instead of using consultants.

The use of consultants can be beneficial. Agencies report that they often turn to consultants who have specialized expertise that the agency needs only for a short time. To the extent that consultants are used for purposes that cannot be accomplished as cheaply internally, the restriction in S. 1080 could increase the costs of preparing regulatory analyses, or lead to regulatory decisions being based on less-informed analysis.

The effect of the provision on changing costs will vary according to how often each agency uses consultants. Figure 1 shows spending for consultants and for in-house analysis by agency for the eight agencies for which we have obtained such data. We found in our sample of RAs that some agencies and offices within agencies, such as OSHA, rely very heavily on consultants for help in performing regulatory analyses. Other offices within agencies, such as the National Highway Traffic Safety Administration and EPA's Office of Mobile Source Air Pollution Control, report that they do most of their regulatory analyses in-house and would be unaffected by any legal requirements affecting consultants.

S. 1080 is also likely to increase the average costs of preparing regulatory analyses because the prospect of expanded legislative and judicial review is likely to produce more detailed and comprehensive analyses. 19/ Given our findings on the quality of many analyses, there is reason to believe that adherence to the analytical standards defined in the Executive orders can be improved (see Questions 1 and 4). Statutorily requiring the regulatory analysis may serve to promote a welcome improvement in quality but may lead to an increase in expenditures for analysis.

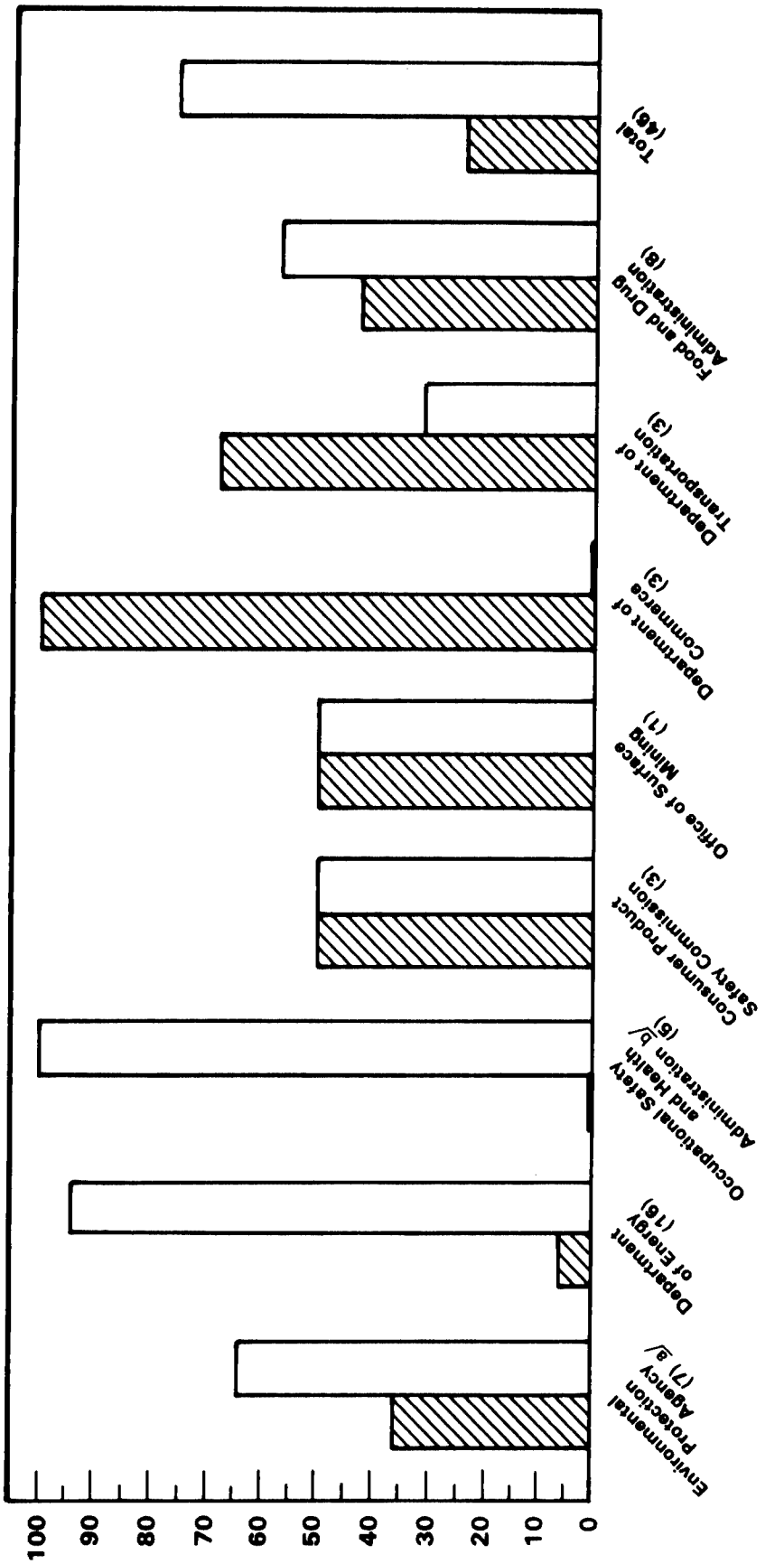
Delay that may be induced by regulatory analyses and related provisions of S. 1080

If agencies are required to deal with the increased costs of regulatory analyses caused by S. 1080 but are not given additional resources, it is conceivable that some of the increased burden will be manifested in increased delays in regulatory proceedings. If the agency does not have enough staff to analyze all the regulations it is required to analyze, some regulations will

APPENDIX II

FIGURE 1

CONSULTANTS' SHARES OF COSTS OF SELECTED REGULATORY ANALYSES PERFORMED IN 1979 AND 1980



a/ Number in parentheses indicate total number of analyses for which data were provided.

b/ OSHA does have a small unit responsible for managing preparation of regulatory analyses by consultants, but at the time of our review, the agency attributed none of the costs of that staff to the costs of the analyses for which data were provided.

APPENDIX II

be deferred, and others will proceed at a slower pace. This problem could, of course, be obviated if agencies were provided with sufficient resources for meeting the prescribed analytical obligations. Delays in other parts of the rulemaking process could also be reduced if more rigorous regulatory analyses lead to the design of more cost-effective regulation. Insofar as agencies are required to substitute in-house staff for consultants, delays may be occasioned in the short run because of the time required to hire permanent staff and to organize effectively for integrating economic analysis into the agency's regulatory decisionmaking procedures. Finally, some delay will be caused by the bill's expanded legislative, judicial, and executive review requirements, as well as delays due to "hybrid rulemaking" procedures.

Other costs associated with S. 1080

S. 1080's provisions on "hybrid rulemaking" (proposed §553 (c)(2), (3), and (4)) may substantially increase the cost of what has previously been considered "informal rulemaking." These provisions require that hearings be conducted on major rules, with opportunity for cross-examining witnesses. This admixture of elements of formal rulemaking into informal rulemaking (thus producing a formal/informal "hybrid") could substantially increase delay, costs to the agency, and costs to parties interested in the regulation.

S. 1080's legislative veto provisions could impose a large burden on congressional staff to review regulations. Neither members nor staff would have sufficient time to evaluate fully the record for any one regulation. Because congressional review may not focus on the analysis per se, and because legislative vetoes may represent reversals of explicit statutory directions, the signals given to agency decisionmakers and analysts may be unclear. This may reduce both the efficiency with which regulatory reviews are conducted and the accountability of the agencies. 20/

In sum, although we do not have a sufficient basis for estimating the costs of the analysis and related provisions of S. 1080, it does seem clear that costs will be incurred in addition to those imposed by E.O. 12291. The Congressional Budget Office (CBO) estimated that the aggregate incremental costs of the analysis and related provisions of S. 1080 would be $7 million to $9 million. We believe that this estimate should be viewed only as a lower bound on expected costs. 21/

EFFECT OF COSTS OF REGULATORY ANALYSES AND REVIEW ON REGULATORY AGENCIES

We have some information on regulatory analysis costs. However, it is much harder to predict how the costs implied by the regulatory analysis and review requirements of either E.O. 12291

or S. 1080 will affect regulatory agencies. To assess whether agencies are or may be prevented from fully complying with the regulatory analysis requirement because of staff and budget shortages, we would need to know the difference between available and needed agency resources. While we do not have either of those kinds of data, we think it likely that performing the more demanding regulatory analyses under E.O. 12291 requires more resources than were required before. If sufficient resources are not available, the potential for the RA requirement to improve the economic foundation for new and existing regulations may not be realized.

Other consequences of inadequate resources may be that

--needed regulations might be delayed for lack of timely analyses;

--the types of quality problems we have identified with the regulatory analyses we reviewed may persist;

--agencies might forgo analysis of innovative alternatives and continue to promulgate more restrictive and costly command-and-control techniques; and

--ineffective or excessively costly regulations could continue.

In light of the resource constraints faced by all agencies, and given the problems we have found with existing analysis, we believe increased attention needs to be focused on the resources required to implement the analysis requirements for major Federal regulations under either E.O. 12291 or S. 1080. If regulatory analysis is to be effective in improving understanding of the need for and consequences of regulation, the agencies need sufficient resources to do the job. As we have previously noted when commenting on H.R. 3263, "Paradoxically it may be that for the costs of regulation to decrease, agencies must receive increased resources." 22/

HOW CAN SCARCE ANALYTICAL RESOURCES BE USED MOST EFFECTIVELY?

The increased costs imposed by S. 1080 increase the importance of using the agencies' scarce analytical resources as efficiently as possible. It has been suggested that one possible way of reducing the analytical burden on the agencies is to waive the regulatory analysis requirement for deregulatory actions. A modified deregulatory waiver has been incorporated into H.R. 746 (proposed §621(2)(C)). The Senate, by contrast, has made it clear that deregulatory rulemaking should be analyzed on the same basis as "regulatory" rulemakings (i.e., those that impose increased compliance costs).

We concur with the intent of the Senate that no blanket waiver be granted for "deregulatory" proposals. Such analysis might not only be helpful in determining whether to deregulate, 23/ but can also be instructive on how to deregulate. 24/ Deregulatory initiatives also often have substantial hidden costs, such as forgone benefits, that are important to consider.

It is not clear to us whether S. 1080 would provide sufficient agency or Presidential discretion to channel scarce analytical resources to those cases where they will be most effective in producing more cost-effective and better-justified rules. This is particularly true of S. 1080's comprehensive requirement for the review of all major rules every 10 years. Some major rules should possibly be reviewed more frequently, while others could perhaps be reviewed less often. We believe that some discretionary authority for waiving the regulatory analysis requirement, or varying the required frequency of sunset reviews, might be desirable. But we also believe that any such discretion should only be authorized subject to well-defined standards and exercised subject to procedures that allow the public to verify that the standards have been satisfied.

FOOTNOTES

1/The coverage of E.O. 12291 is described in Question 3, pp. 35-36.

2/Letter from Wayne G. Granquist, Associate Director for Management and Regulatory Policy, OMB, to Abraham A. Ribicoff, Chairman, Committee on Governmental Affairs, U.S. Senate, March 12, 1980.

3/One factor affecting the number of major rules is that the $100 million criterion for a "major" rule, which was originally formulated in 1974, is getting smaller and smaller in real terms due to inflation. A 1974 rule with an impact of $54 million would have qualified as a major rule in 1981.

4/We requested data on the costs of all regulatory analyses done in 1979 and 1980 by the eight executive branch departments and agencies in our sample. We decided to use the data provided by six agencies only since two of the agencies (Departments of Agriculture and Commerce) provided data that either did not distinguish between major and non-major rules or were only for non-major rules. We excluded data on the costs of analyses by independent regulatory agencies.

5/Cost-effectiveness analysis generally requires that alternatives producing equal benefits be compared to find the one that is least costly. Cost-benefit analysis generally requires that alternatives of varying costs and benefits be compared to find the one whose benefits exceed its costs by the largest amount. Cost-benefit analysis can be more demanding because it can require that both costs and benefits be expressed in the same units, usually dollars.

6/Again we caution that these figures on new and existing regulations may overstate the incremental costs imposed by E.O. 12291 because our cost figures measure the total costs of preparing regulatory analyses, not the (smaller) incremental costs attributable to E.O. 12291.

7/For a discussion of GAO concerns regarding the adequacy of the OIRA effort to implement the objectives of the Paperwork Reduction Act of 1980, see Statement of Charles A. Bowsher, Comptroller General of the United States, Before the Subcommittee on Legislation and National Security of the House Committee on Government Operations, "On Implementation of the Paperwork Reduction Act Public Law 96-511," October 1981; and Statement of William J. Anderson, Director, General Government Division, GAO, before the Subcommittee on Federal Expenditures, Research and Rules of the Senate Committee on Governmental Affairs, "On Implementation of the Paperwork Reduction Act, Public Law 96-511," April 1982.

APPENDIX II

8/It appears that despite major responsibilities assigned to OIRA by both the Paperwork Reduction Act of 1980 and E.O. 12291, OIRA has fewer resources than the total of the components that were combined to form OIRA. In the paperwork area, CBO has previously estimated that functions that were transferred from GAO, Commerce, and OMB to form the new OIRA were funded at $3.5 million for FY 81 (S. Rep. No. 96-930, 96th Cong., 2nd Sess. 62 (1980)). Moreover, new responsibilities such as establishment of the Federal Information Locator System, some new clearance responsibilities, and records management functions that were previously unfunded were assigned to OIRA by the Paperwork Reduction Act of 1980. In the regulatory area, OIRA absorbed the regulatory review staff of the former Council on Wage and Price Stability (authorized at $940,000 for FY 81) as well as most functions performed by the former Regulatory Council (authorized at $2.5 million for FY 81). The components that were merged to form OIRA thus had a total budget of $6.9 million in FY 81, while OIRA's FY 82 budget is only $4.5 million. Since the oversight function has been centralized in OIRA, the responsibilities have increased while the total resources devoted to regulatory oversight appear to have declined.

9/In addition to the review of proposed rules (estimated at 4200 for FY 82), including major rules (estimated at 35-70 for FY 82) and supporting analyses, OIRA monitors review of existing rules (estimated at 111 for FY 82), reviews regulatory legislative proposals (estimated at 250 for FY 82), and provides staff support for the Presidential Task Force on Regulatory Relief. Additionally, OIRA is assigned responsibility to provide guidance and criteria for preparing RIAs (Sec. 3(b)), identify and promote resolution of overlap or inconsistencies in existing or proposed rules (Sec. 6(a)(5)), and develop procedures for estimating the effects of regulations on an aggregate and economic or industrial sector basis (Sec. 6(a)(6)).

10/For a discussion of a regulatory oversight unit in one agency, see GAO, "Improved Oversight and Guidance Needed to Achieve Regulatory Reform at DOE" (EMD-82-6), November 6, 1981. For a discussion of the broader concept of agency management systems at another agency and the importance of adequate staffing, see GAO, "Interim Report on the Federal Emergency Management Agency's Organization and Management Systems" (GGD-82-24), December 7, 1981.

11/We note that CBO estimated that implementation of the analysis provision of E.O. 12291 would cost somewhere between $21 and $36 million annually. We are not confident that the CBO method of extrapolating an estimate of the number of new analyses and reviews from recent data is sufficiently reliable for representing the number of analyses needed to comply fully with E.O. 12291 consistent with existing substantive statutes.

12/We have no basis for estimating how many analyses of new or existing regulations might be performed annually. The CBO, in estimating the costs of S. 1080, assumed independent regulatory agencies would conduct 40 analyses of new regulations annually at an average cost of $150,000 each and 25 analyses of existing regulations annually at an average cost of $80,000 each.

13/These analyses were not done pursuant to the CPSC's "voluntary compliance" with E.O. 12044, but rather in response to detailed cost and analysis directives in the Consumer Product Safety Act.

14/The range was relatively narrow, the low being $113,000 and the high $154,000.

15/For a more detailed discussion of the possible differences in coverage of E.O. 12291 and S. 1080 see Question 3, pp. 35-41.

16/A major uncertainty of the regulatory review provisions of S. 1080 is the number of "major" rules that are currently in effect that would have to be reviewed. The Code of Federal Regulations is divided up into Titles, Chapters, Subchapters, Parts, Subparts, and Sections that could be aggregated in any number of ways, and the number of "major" rules in the CFR would depend on how they were aggregated.

17/See Senate floor debate on potential impact of judicial review of "major" determination, in 128 Congressional Record, March 23, 1982, pp. S2607 to S2613.

18/Proposed Section 622(f).

19/For a discussion of the possible effects of the proposed revisions of the standard for judicial review, see the relevent recommendations of the Administrative Conference of the United States at 1 CFR §§305.79-6, 305.81-2 (1981), "Elimination of the Presumption of Validity of Agency Rules and Regulations in Judicial Review, as Exemplified by the Bumpers Amendment," and "Current Versions of the Bumpers Amendment."

20/The Administrative Conference of the United States has opposed enactment of an across-the-board legislative veto on a number of practical grounds. See 1 CFR §305.77-1, "Legislative Veto of Administrative Regulations."

21/CBO's estimated cost per analysis of existing regulations appears low. In particular, we question whether the CBO estimates of the number of new and existing rules to be analyzed annually reflect the broader coverage of S. 1080 and its more

APPENDIX II

restricted waiver authority. Perhaps most significantly, CBO's implicit assumption that the resources necessary for compliance by executive branch agencies with E.O. 12291 are in place has not been supported by our review.

22/Testimony on H.R. 3263 by Morton A. Myers, Deputy Director, Program Analysis Division, U.S. General Accounting Office, before the Judiciary Subcommittee on Administrative Law and Government Relations, U.S. House of Representatives, November 29, 1979, p. 15.

23/". . . such analysis can make a significant contribution to determining whether the conditions which originally justified government intervention continue to exist." U.S. Senate, Committee on Governmental Affairs, Study on Federal Regulation, Vol. VI, Framework for Regulation, December 1978, 95th Cong., 2nd. Sess., Committee Print, p. XXIII.

24/Id. pp. 88-99 includes a discussion of the many market and distributional effects of economic deregulation.

QUESTION 3

HOW HAS THE REGULATORY ANALYSIS REQUIREMENT OF E.O. 12291 AFFECTED DEREGULATORY INITIATIVES? TO WHAT EXTENT WILL S. 1080 INTERFERE WITH PRESIDENT REAGAN'S PROGRAM TO DEREGULATE THE ECONOMY?

The rationale for the regulatory analysis requirement has been that it will provide a system for identifying and considering the effects of regulatory decisions not reflected in agencies' budgets. The requirement's focus has been on improving the Government's anticipation of what effects, both intended and unintended, its actions will have on the economy. Anticipating these effects could either give or deny support to a deregulatory initiative.

To assess the applicability and effect of regulatory analysis on deregulatory initiatives, we address the following issues:

1. What is meant by the term "deregulation"?

2. How broad is the coverage contemplated by the regulatory analysis requirement of E.O. 12291? Has the requirement created an impediment to deregulatory initiatives?

3. How broad is the coverage contemplated by the regulatory analysis requirement of S. 1080? What effect might these provisions have on the scope and timing of deregulation? How might S. 1080 interfere with the Administration's program to deregulate the economy?

MEANING OF DEREGULATION

The term "deregulation" has increasingly come to be associated with many different types of regulatory changes. Deregulation was originally associated with the dismantling of the older economic regulatory schemes (e.g., price and entry controls of the airline, trucking, and railroad industries). Deregulation also refers to the decontrol of energy prices--a more recent regulatory program, but also economic in character. Deregulation has also been used to connote the postponement or cancellation of proposed regulations that appear unjustified. Another concept of deregulation relates to revising regulations so as to reduce burdens placed on taxpayers or on State and local governments by Federal spending programs. Deregulation may also connote actions to withdraw a Federal role in the expectation of an enhanced State or local role. A broader definition of deregulation might include the adoption of more flexible and less costly market-based regulatory approaches, such as performance standards.

Each of these is a different type of regulatory action or reform. Yet, in all of these "types" of deregulation, there is

an important common denominator. In each circumstance there is a belief that regulatory change is needed to prevent the government from imposing costs greater than the benefits it bestows. It is the effect of the requirements for regulatory analysis in E.O. 12291 and S. 1080 on this broadly defined and efficiency-based notion of deregulation that we examine here.

COVERAGE OF E.O. 12291 AND EFFECT ON DEREGULATION

The effect of E.O. 12291 on the various types of deregulation depends in part on the coverage of the regulatory analysis requirement as defined by the Executive order. If the coverage is broadened, then more deregulatory initiatives will be required to satisfy the criteria of the Executive order before they can be put into effect. The extent to which deregulatory initiatives are covered by the requirements of E.O. 12291 is affected by several provisions: the definition of rules, the definition of "major," and various specific and general exemptions.

The definition of rules or regulations in the Executive order is roughly parallel to that of the Administative Procedure Act. Basically, it can be described as covering statements of general applicability and future effect that carry out or interpret law or prescribe policy. 1/ E.O. 12291 classifies a rule as major if it results in

--an annual effect on the economy of $100 million or more;

--a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions;

--significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete in domestic or export markets.

A rule can also be classified as major if the Director of OMB designates it as major. It is unclear whether the $100 million effect refers only to cost increases or to benefit reductions as well. As a result, it is not clear whether a deregulatory proposal that reduces costs but also reduces benefits, perhaps by more than $100 million, would be defined as major and trigger the RIA requirement.

Executive Order 12291 provides for exemptions for general procedures in the following cases:

--any regulation that responds to an emergency situation, 2/

--any proposal for which analysis would conflict with statutory or court-imposed deadlines, 3/

APPENDIX II

--any rule, 4/ or class of rules, 5/ at the discretion of the Director of OMB, subject to the direction of the President's Task Force on Regulatory Relief.

Classifying possible exemptions so broadly gives OMB sufficient flexibility to permit exemption of deregulatory proposals from the analysis requirement (subject to Task Force direction).

OMB has narrowed the coverage of the Executive order by exempting 20 classes of regulations between February 17, 1981, (when E.O. 12291 was issued) and December 31, 1981. Ten of these classes of rules "relax or defer regulatory requirements, or . . . delegate regulatory authority to the States." 6/ These exemptions indicate a clear intention to exempt at least some deregulatory initiatives from the order's requirements.

OMB has also used its authority expressly to waive the RIA requirement for rules that have been designated as "major." Between February 17, 1981, and December 31, 1981, OMB waived the RIA requirement for 21 of the 43 major regulations (either proposed or final) published in 1981. While OMB cited five factors for determining whether to waive the RIA requirement for major regulations, only 10 of the 21 major rules had one or more of these reasons cited by the agency. 7/ For the other 11 rules, the agencies provided no explanation, indicated that the rule was "consistent with the principles of the Executive order" or differed with OMB's designation of the rule as major. The documentation provided by OMB or by the agencies in their Federal Register notices supporting the waivers appears too weak to clarify or substantiate the true reasons for the waivers.

Deregulatory (in the sense of burden-reducing) proposals have not all been exempted from the RIA requirement. RIAs were done on 22 major rules in 1981 even though the Office of Information and Regulatory Affairs, in its 1981 annual report, noted that "none of the major regulations issued in 1981 imposes substantial new regulatory burdens" and that most of the published "major" rules are either "cost-saving modifications or rescissions of existing regulations" or "related to programs which are primarily budgetary in nature." 8/ Even though RIAs are being done for burden-reducing proposals, the reform program embodied in E.O. 12291 is explicitly designated as a "relief" program, 9/ and it appears that it is being executed to ensure that RIAs do not impede such burden-reducing actions. 10/

We have identified several types of discretionary actions that have allowed over half of the major deregulatory initiatives to go forward without being delayed by E.O. 12291. The major economic deregulatory action of the Administration was the early rescission of petroleum price and allocation controls. This was accomplished by Executive Order 12287 (January 28, 1981) 11/ followed up by implementing regulations. 12/ The order and the regulations were carried out immediately under the "public interest" exemption of the Administrative Procedure Act. 13/ The

regulations implementing the order were granted a general exemption from the requirements of E.O. 12291. 14/ Several deregulatory initiatives in the grants and entitlements area were exempted from the RIA requirement of E.O. 12291, generally on the grounds that they were non-discretionary under the Omnibus Budget Reconciliation Act of 1981. These included rules affecting Food Stamps, 15/ the School Lunch Program, 16/ Aid for Families with Dependent Children, 17/ and Medicaid. 18/

One example of an innovative regulatory technique adopted by the Administration is the Diesel Average Particulate Standard, a sort of "mobile bubble" for pollution from diesel-powered cars and light trucks. 19/ This standard amended an earlier rule published on March 5, 1980. While the original rule was considered a major rule, the proposed amendment was not treated as a major rule "because it involves no negative cost impacts. . . ." It thus was not subjected to the RIA requirement.

All of these regulatory actions are burden reducing in the sense that they reduce burdens on at least some of the parties affected by the rule (the changes in entitlement programs, for example, reduce burdens on the Federal budget, even though in many cases they increase burdens on recipients). Other such burden-reducing regulatory initiatives have similarly been expedited either by determining that the rule is not major or by waiving the RIA requirement for rules that are major. While RIAs were prepared for some such burden-reducing actions (such as NHTSA's rescission of the passive restraint rule), these RIAs did not always delay the effect of those actions. In any case, insofar as "deregulation" simply means making regulation more efficient, we believe the regulatory impact analysis requirement can contribute to--rather than detract from--that goal.

COVERAGE OF S. 1080 AND POTENTIAL EFFECT ON DEREGULATION

The effect of S. 1080 on deregulation depends on

- how S. 1080 broadens coverage of the RIA requirement relative to the requirements of the current Administrative Procedure Act and E.O. 12291,
- the effect of these changes in coverage by S. 1080 on deregulation, and
- the extent to which S. 1080 would interfere specifically with the Reagan Administration's program to deregulate the economy.

S. 1080 broadens coverage and limits exemptions

S. 1080 potentially expands the effect of the regulatory analysis requirement on deregulatory initiatives by broadening that requirement's coverage and by narrowing exemptions. Various

provisions of the bill expand the coverage of the Administrative Procedure Act's requirements generally (and, hence, potentially of the analytical requirements that would become part of the APA under S. 1080) and specify that deregulatory initiatives are subject to regulatory analysis requirements on the same basis as other regulatory initiatives. Some provisions also make sunset review requirements much more comprehensive than under E.O. 12291.

The bill expands coverage of general APA requirements by limiting the exemptions for interpretive rules, general statements of policy, and rules of agency organization, procedure, and practice to those rules not substantially affecting those outside the agency (proposed §553(a)(3)). It also narrows the current exemption in §553(a)(2) 20/ for matters relating to "public property, loans, grants, benefits, or contracts." 21/

Coverage is also limited by a number of provisions of S. 1080 that provide various exemptions and exceptions. The more general exemptions are in section 3 of the bill, i.e., proposed §553(b)(3), which can be invoked when the regulatory impact is insignificant, proposed §553(b)(2)(A), when compliance is impracticable or contrary to the public interest, and proposed §621(3)(A), which excludes rules of particular applicability. 22/ Despite the variety of exemptions in S. 1080, no general authority to grant waivers is given to the President or his designee.

The coverage of the regulatory analysis requirement is expanded because the "major rule" criterion in S. 1080 explicitly includes certain major deregulatory initiatives. S. 1080 defines a rule or closely related group of rules as major if it is likely to result in

1. a $100 million annual effect on the economy in reasonably quantifiable direct and indirect costs; or

2. a substantial increase in costs or prices for wage earners, consumers, individual industries, nonprofit organizations, Federal, State and local governments, or geographic areas; or

3. significant adverse effects on competition, employment, investment, productivity, innovation, the environment, public health or safety or competition in domestic or export markets. 23/ [emphasis added]

Reports of both the Judiciary and Governmental Affairs Committees of the Senate make clear that deregulatory proposals could be designated as major under the provisions of proposed §621. The Senate Governmental Affairs Committee noted

> where one effect of a proposed 'deregulatory' change will be to reduce the benefits from the regulation

> . . ., such a reduction in the benefits should be counted as a regulatory cost for purposes of making the major rule determination . . . . The Committee expects that where such changes rise to the level of being major rules, a regulatory analysis should be prepared and, where not inconsistent with its enabling statute, the agency must find that the benefits of the deregulatory change will justify the cost and that the change will be adopted in the most cost-effective manner possible. 24/ [emphasis added]

Finally, S. 1080 substantially expands the coverage of the sunset review provision in E.O. 12291. While E.O. 12291 provides for sunset review at the discretion of either the agency head or the Director of OMB, S. 1080 mandates a comprehensive review of all major rules every 10 years. While the number of major rules in existence is highly uncertain (since regulations are not codified as "rules" or "regulations" that can be readily evaluated according to the criteria for major rules), it seems likely that it would far exceed the number of rules that the Administration appears to contemplate reviewing under E.O. 12291. The broad coverage of the sunset review provisions in S. 1080, of course, is meant to encourage--rather than inhibit--efficiency-based deregulation.

Expanded coverage will require more analysis of deregulatory initiatives

As indicated, S. 1080 appears to expand significantly the RA requirement's coverage relative to E.O. 12291 while reducing the President's or his designee's freedom to waive the requirment. The broadened coverage may be expected to require more RAs for many categories of deregulatory rules.

RAs may have a very constructive effect on deregulation since RAs can play an important role in determining both where and how to deregulate. This is particularly true given the broad meaning of deregulation, encompassing not only actions to remove existing government controls (for which the forum is the sunset review required by proposed §631) but also actions to ensure that new regulations are the least costly means for achieving objectives (part of the role of the RA for newly proposed regulations required by proposed §622).

Regulatory analysis can contribute to effective economic deregulation by, for example, identifying markets that are sufficiently competitive that prices will be set at reasonable levels. Analysis can help to ensure that regulations that implement grant and entitlement programs will achieve the distributional objectives desired at the lowest possible cost to the Federal Government and the least necessary compliance burden on State and local governments. Regulatory analysis could often be the source of deregulatory initiatives embodying market-based techniques that

can help to reduce regulatory burdens without reducing the benefits of the rules.

RAs, however, may best serve deregulation by helping to achieve the objectives of the sunset review requirement. Regulatory analysis, as required under the sunset review provision of S. 1080, is contemplated as a driving force for streamlining and rationalizing the vast inventory of existing regulations. 25/ In many cases "deregulation" will most appropriately be a redirected rule rather than an abolished rule, and regulatory analysis can help point the way to more efficient alternatives than the present rule.

The Senate Governmental Affairs Committee notes that RAs should be used to evaluate alternatives outside the bounds of the statute and to help identify statutory changes needed to permit the most cost-effective means for achieving the objectives of enabling statutes. 26/ In many cases, congressional amendments to enabling statutes remain the primary avenue for deregulation that eliminates a Federal role. The threshold decision to regulate stems in all cases from legislation. However, while RAs can help point to needed changes in legislation, RAs cannot be expected to identify or analyze all areas where legislative deregulation may be needed and appropriate. Where the excessive costs or ineffectiveness of regulations stem directly from statutes, RAs cannot be expected to be the primary source; instead RAs can only be input to the identification of needed statutory revisions.

S. 1080 might interfere with the Administation's program to deregulate the economy

It is difficult to say exactly what overall effect the regulatory analysis requirement in S. 1080 will have on the Administration's program to deregulate the economy because it could affect different parts of that program in different ways. The Administration's program consists partly of the procedures required by E.O. 12291 and the principles embodied in that order. S. 1080 is supportive of actions taken consistent with those principles. The Administration's program consists partly of policy decisions on, for example, enforcement and budget priorities made by the heads of regulatory agencies appointed by the President. S. 1080 would not affect the Administration's deregulatory program insofar as that program was effected through changes in budgets and enforcement policy. The Administration's program also consists of broad policy priorities set by the President and the Task Force on Regulatory Relief on proposed regulatory legislation, regulatory relief for different industries, etc. S. 1080 could interfere with efforts to provide relief for particular industries if that relief were not consistent with the principles of E.O. 12291. For example, the U.S. Court of Appeals for the District of Columbia Circuit recently held that the National Highway Traffic Safety Administration's decision to

APPENDIX II

provide relief for the automobile industry by rescinding the passive restraints rule 1) was not based on adequate information; 2) was likely, based on the information available, to result in potential costs exceeding its potential benefits; 3) did not maximize the net benefits to society; and 4) did not seriously consider, much less choose, the alternative with the least net cost to society. 27/ While the court decision does not explicitly assess the compliance of the agency with the principles of Executive Order 12291, its findings suggest that the agency violated four of the principles of the Executive order in an effort to provide relief to a major industry.

The extent to which S. 1080 might interfere with the Administration's program thus depends in part on which aspect of the Administration's program is the basis for any particular regulatory policy initiative.

S. 1080 would also necessitate a change in the Administration's program since it would curtail the authority of the President or his designee to waive the RIA requirement. 28/ In implementing S. 1080, the President and/or the courts may interpret §533(b)(3), which allows the RIA to be waived upon a showing of "good cause," to apply generally to deregulatory initiatives. However, S. 1080 appears to intend that analyses not generally be waived for deregulatory initiatives.

FOOTNOTES

1/5 U.S.C. 551(4).

2/In such cases, the agency must as soon as practicable notify the Director of OMB, publish a statement in the Federal Register of the reasons why it is impractical to comply, and prepare and transmit an RIA to OMB. Section 8(a)(1).

3/In such cases, the agency must explain the conflict to OMB and publish in the Federal Register the reasons why it is impractical to follow Executive order procedures, but must adhere to the requirements of the Executive order to the extent permitted by statutory and judicial deadlines. Section 8(a)(2).

4/§6(a)(4).

5/§8(b).

6/This was one of four categories cited in OMB, "Executive Order 12291 on Federal Regulation: Progress During 1981," April 1982, pp. 35-36. The report does not explicitly state how many classes fall into each category. OMB notes that exemptions for classes of rules in this category were granted only for nonmajor and noncontroversial regulations.

7/The five factors were (1) emergency regulations, (2) regulations subject to statutory deadlines, (3) non-discretionary regulations related to spending programs, (4) regulations for which sufficient analysis had already been conducted, and (5) regulations for which OMB finds it appropriate to delay preparation of an RIA until a later stage in the proceeding. Id., p. 28. The reasons given by agencies were found by examining the Federal Register notices for the 21 major rules exempted from the RIA requirement.

8/Id. at 27.

9/See the Press Release from the Office of Vice President George Bush on the Charter of the Presidential Task Force on Regulatory Relief (January 22, 1981) and the Press Release on the signing of E.O. 12291 (February 17, 1981).

10/OMB has, in fact, received direction to ensure that neither the RIA requirement nor OMB review serve as a barrier for deregulatory initiatives. James C. Miller III, then Director of OIRA and Executive Director of the Task Force, stated in 1981, "To the extent that we who are administering the executive order on a day-to-day basis have a problem today, it is to get out of the way of reform initiatives that the new regulatory appointees want to take . . . both the Vice President and OMB Director David Stockman have admonished me to make sure that requests for waivers to shortcut the procedure in

the case of clearly drawn reform initiatives are handled as quickly as possible." (Regulation, March/April 1981, p. 16.)

11/46 Fed. Reg. 9909, January 30, 1981.

12/46 Fed. Reg. 20508, April 3, 1981.

13/5 U.S.C. §553(b)(B).

14/46 Fed. Reg. 20511, April 3, 1981.

15/46 Fed. Reg. 44712, September 4, 1981.

16/46 Fed. Reg. 44452, September 4, 1981; (subsequently withdrawn, 46 Fed. Reg. 48688, October 2, 1981); 46 Fed. Reg. 51366, October 20, 1981; and 46 Fed. Reg. 60041, December 8, 1981.

17/46 Fed. Reg. 46750, September 21, 1981.

18/46 Fed. Reg. 47996, September 30, 1981.

19/46 Fed. Reg. 62608, December 24, 1981.

20/The current §553(a)(2) would be replaced by proposed §553(a)(4) in S. 1080. Hundreds of programs previously exempted, including activities as diverse as entitlements, insurance, urban affairs, and civil rights, may now be covered by the rulemaking requirements of §553. Because of the magnitude of these programs, an RA may be triggered by either the $100 million criterion of proposed §621(4)(B)(i) or the more discretionary criteria of proposed §621(4)(B)(ii). For an indication of the potential breadth and types of Federal programs whose rules GAO believes may be covered by the RA requirement of S. 1080, see appendix VII. The Administrative Conference of the U.S. has long advocated the elimination of this exemption because of the impact of these rules on the public. See 1 CFR §305.69-8.

21/The Senate Judiciary Committee Report indicates "the Committee agreed that an exemption for loans, grants, and benefits was no longer needed . . .," S. Rep. No. 97-284, 97th Cong., 1st Sess. (1981), p. 115. While the Judiciary Committee prevailed in inserting this provision in the bill, the Senate Governmental Affairs Committee had come to a different conclusion about such coverage. In their report on S. 1080 they note: "Although there has been substantial scholarly criticism of the exemption for loans, grants and benefits, some uncertainty and concern has been expressed over the effects of eliminating this exemption. Several members of the Committee felt that further hearings and study of this issue are appropriate before any action should be taken to eliminate this exemption." S. Rep. No. 97-305, 97th Cong., 1st Sess. (1981), p. 18.

22/More specific exemptions are provided for certain rules of the Federal Reserve System, proposed §621(3)(B); Federal Election Commission, proposed §621(3)(C); Federal Communications Commission, proposed §621(3)(C); Internal Revenue Service, proposed §621(4)(I); Food and Drug Administration, proposed §621 (4)(II), which exempts rules that authorize the introduction into commerce or recognize the marketable status of a product, pursuant to Sections 408, 409(c), and 706 of the Federal Food, Drug and Cosmetic Act; Federal Deposit Insurance Corporation, proposed §621(4)(IV); Federal Savings and Loan Insurance Corporation, proposed §621(4)(IV); National Credit Union Administration, proposed §621(4)(IV); and Nuclear Regulatory Commission, proposed §624(d).

23/Proposed §621(4)(A) and (B)(i) and (ii), emphasis added.

24/S. Rep. No. 97-304, emphasis added.

25/While the sunset review requirement of proposed §631 is thus a device clearly intended to help identify and eliminate unneeded regulations, there are other objectives to that process. The Senate Judiciary Committee noted that it "does not view regulatory analysis as merely a device to minimize the burdens of Federal regulation. Rather, by explicitly considering the value judgments involved in regulatory choices, by arraying the range of data available about the effects of those choices, and by requiring a public judgment about those choices to be made, regulatory analysis imposes a regimen which will lead toward more effective use of our resources on behalf of our national objectives." S. Rep. No. 97-284, 97th Cong., 1st Sess. (1981), p. 74.

26/"The agency should . . . identify and briefly discuss any reasonable alternative that lies beyond the scope of its statutory authority. This will help to identify those changes in its enabling statute necessary to provide the needed flexibility to better achieve regulatory objectives." (S. Rep. No. 97-305, p. 50.)

27/State Farm Mutual Insurance Company v. Department of Transportation, 680 F.2d 206 (1982).

28/The later S. 1080 becomes effective, the less of an effect it will have on the President's program.

APPENDIX II

QUESTION 4

WHAT HAS BEEN THE EFFECT OF CENTRALIZING REGULATORY OVERSIGHT AT OMB?

Concern about the cost and efficiency of Federal regulation has led to calls not only for a more analytical approach to regulation but also for more central oversight of the regulatory process. As far back as the 1930s, the Brownlow Committee described regulatory agencies as a "headless 'fourth branch' of the Government." 1/ The Attorney General's report of 1941 recommended that an Office of Federal Administrative Procedure be created under Presidential control. 2/ A central oversight process has been viewed as a primary force in ensuring the overall quality of regulatory actions and eliminating problems of conflict and inconsistency among regulations of different agencies.

During the Nixon Administration, "quality of life" reviews were initiated as a way for OMB to monitor regulation, although in practice the procedure was only used to review rules proposed by EPA. In the Ford Administration, this process was generalized to require "Inflation Impact Statements" for "major" regulations at all executive branch agencies. 3/ At the same time, the newly created Council on Wage and Price Stability was given statutory responsibility to review whatever Federal regulations it chose (including those issued by independent regulatory agencies) and comment in public filings on how the regulations affected inflation. 4/ CWPS chose to define an "inflationary" regulation as one that could not pass a cost-benefit test and the "inflation impact statement" as requiring a cost-benefit analysis. So CWPS acquired the role of reviewing the analyses prepared by the agencies and commenting on their adequacy. 5/

During the Carter Administration, Executive Order 12044 was issued. This order continued the requirement to perform analyses of new regulations and placed new emphasis on public participation, writing regulations in "plain English," accountability of agency heads for their regulations, and "sunset" reviews of existing regulations. 6/ In addition, two new organizations were created to exercise regulatory oversight. These were the Regulatory Council, which published the Regulatory Calendar and ran several projects designed to promote coordination and improve regulatory techniques, and the Regulatory Analysis Review Group (RARG), which was established to provide peer review for a small number of major regulations each year. Staff from the Council of Economic Advisors and the Domestic Policy Staff were also active in overseeing regulatory policy. OMB monitored the agencies' progress in carrying out E.O. 12044 and reported on their successes and failures. The CWPS staff continued to file its public comments on the regulations and regulatory analyses issued by the agencies and served as staff for the RARG reviews. All of these organizations were purely advisory, however, and agencies were generally free to ignore their comments. 7/

On February 17, 1981, the Reagan Administration issued Executive Order 12291, establishing a substantially strengthened process of regulatory oversight. 8/ The CWPS regulatory staff was absorbed by OMB's new Office of Information and Regulatory Affairs, while the other regulatory oversight groups (i.e., the Regulatory Council and the RARG) were abolished. On January 22, 1981, the Task Force on Regulatory Relief was also created as a cabinet level body. It was designed to function as a regulatory appeals board between the agencies and OMB and as a general policymaking body, especially in proposing new regulatory legislation.

The major innovation of the new process is that it requires OIRA to review all regulations before publication and the agency to refrain from publishing the rule until they receive and respond to OMB's formal written comments (unless such review would conflict with statutory or judicial deadlines). In addition, the Executive order made more rigorous the requirement that Regulatory Impact Analyses, which must also be reviewed by OMB before publication, be prepared for major rules.

The principles of E.O. 12291 that agencies are directed to follow and OMB is directed to enforce are as follows:

--Rulemaking shall be based on adequate information.

--Net benefits shall be maximized.

--Potential benefits shall outweigh potential costs.

--The least costly regulatory alternative meeting a given objective shall be chosen.

--The condition of the national economy and of particular industries, as well as the effect of other regulatory actions contemplated for the future, shall be considered.

Besides establishing these generally new and more rigorous efficiency standards, the Executive order confers a variety of powers on OMB, including the authority to

--prescribe procedures for agencies to follow in conducting their regulatory impact analyses, including specifying any particular data that the agency must obtain and consider;

--designate any rule or set of rules as a major rule, thus requiring that a regulatory impact analysis be prepared for it;

--waive any requirements of the Executive order for any rule or class of rules, thus allowing a rule to be issued expeditiously when desired;

APPENDIX II

--designate existing rules for review and establish schedules for their review; and

--extend the review of final rules and RIAs beyond the 30 days provided for in the Executive order.

OMB is also responsible for prescribing criteria for designating major rules, coordinating implementation of the Executive order with the Paperwork Reduction Act of 1980, identifying conflicts and overlaps among different agencies' rules, specifying a format for regulatory agendas, doing exploratory work toward a regulatory budget, reviewing proposed regulatory legislation advanced by the agencies, and overseeing the reviews carried out attendant to the regulatory "freeze" of January 29, 1981. 9/ The new Executive order thus provides a powerful tool for exercising control over both regulations and regulatory analyses. Mandatory OMB review also offers an opportunity to make certain that the rules issued by one agency do not conflict with those issued by others.

To determine what effect the centralization of regulatory oversight in OMB under E.O. 12291 has had, we address several related questions:

1. What procedures does OMB use in exercising its regulatory oversight? 10/

2. Has OMB review increased delays in the regulatory process?

3. Has OMB promoted consistency in regulatory policies procedures?

4. How much of an effect does OMB have in revising the regulations and analyses prepared by the agencies?

5. Has OMB review reduced the frequency of problems associated with the quality of regulatory analyses?

OMB'S OVERSIGHT PROCEDURES

OMB receives for review every regulation proposed by an executive branch agency, except for emergency rules and those falling into certain exempt categories (see Question 3, pp. 35-36). It also receives a few rules voluntarily from independent agencies, primarily from the CAB (see Question 6). The number and disposition of the rules OMB reviewed in 1981 are shown in table 3. These rules are reviewed both for their compliance with E.O. 12291 and for their effect on paperwork under the Paperwork Reduction Act of 1980.

Table 3

Disposition of Regulations
Reviewed by OMB Under E.O. 12291, 1981 a/

	All New Rules		Major New Rules	Frozen Rules b/	
Approved as Submitted	2446	91%		112	65%
Approved After Minor changes c/	138	5%	60 d/		
Approved After Substantial Amendment				12	7%
Returned Unapproved	45	2%	1		
Withdrawn e/	50	2%	1	18	10%
Still pending f/				30 g/	17%
Total	2679 h/	100%	62 i/	172	100% j/

APPENDIX II

a/All these data are for rules issued between the effective date of the Executive order on February 17, 1981, and December 31, 1981. Source: "Executive Order 12291 on Federal Regulation: Progress During 1981," OMB, April 1982.

b/Pursuant to President's Memorandum of January 29, 1981, "Postponement of Pending Regulations," 46 Fed. Reg., 11227, February 6, 1981, which "froze" all rules' effective dates for 60 days.

c/"Minor changes" typically involved clarifications in the preamble to the Federal Register notice rather than substantive changes to the rule.

d/No data are provided identifying the number of major rules approved as submitted, after minor changes, or after substantial changes.

e/i.e., withdrawn by the agency before review by OMB was completed.

f/This category applies only to the "frozen rules" because the first two columns list only rules for which OMB has completed review.

g/As of April 23, 1982.

h/A total of 2,803 rules were submitted to OMB for review, but 124 were exempt or improperly submitted and therefore not reviewed.

i/While 62 major rules were submitted to OMB for review, only 43 were published in 1981.

j/Percentages do not add to 100 percent because of rounding.

APPENDIX II

OMB often has an input to the development of a rule before it is formally sent over for review. According to OMB officials, OMB discusses pending rules with agency personnel both before and after the rule is sent over for OMB review. For some rules, the substance of these discussions is then summarized in a letter from the Administrator of OIRA to the relevant official at the agency. Executive Order 12291 provides that if the Director of OMB believes a regulation would be inconsistent with the principles of the Executive order, the Director is to inform the agency, and the agency must respond to the Director's concerns before issuing the regulation in final form. Sec. 3(f)(2) requires that when OMB submits views on a final agency rule, agencies must incorporate those views and the agency's response in the rulemaking files. It is our understanding, however, that this procedure is not routinely used, but rather reserved for those rare cases in which the agency refuses to accept OMB's informal recommendations. In general, with regard to their communications with agencies, OMB reported to us that

> such communications generally are through telephone conversations or meetings at the staff level. We find that the exchange of the kind of technical information needed in producing and reviewing regulatory impact analyses is generally more efficiently and productively carried out informally by staff rather than through formal, written memoranda. Therefore, we do not have a written record of such communications.

OMB oversight thus takes the form of review, consultation, and judgment of proposed regulations and regulatory analyses.

DELAYS

OMB review under E.O. 12291 has not in general directly resulted in increased delays in the regulatory process. OMB reports that its reviews are generally completed within one month, which is usually a small part of the overall regulatory process (though reviews of 3 to 10 months have occurred). The requirement to prepare regulatory impact analyses has also not significantly increased delays. OMB classified only 43 of the regulations published between February 17 and December 31, 1981 as major regulations for which an RIA would normally be required under E.O. 12291. Moreover, in 21 out of 43 cases, OMB waived the RIA requirement.

On the other hand, revisions of the regulation and/or analysis by the agency in response to OMB comments may be quite time-consuming. Even for minor changes, such as minor clarifications in the preamble, delays of 1 to 2 months are possible, given the number of approvals for any change that must be secured within an agency. More substantive changes take longer. The most extensive delays have been experienced in rules that were frozen on January

APPENDIX II

29, 1981. As noted in table 3, 30 of these frozen rules were still under agency review on April 23, 1982. 11/

The knowledge that all regulations must be reviewed by OMB may indirectly cause delay. Many of the agency personnel interviewed indicated that review within a cabinet department, particularly within the Office of the Secretary in each department, has become more time-consuming because of the anticipated OMB review. FDA's Quality Control rule for Infant Formula, for example, while never classified as a major rule, was subjected to over 1 year of analysis before it was submitted to OMB. Delay may, of course, provide time to improve the quality of the regulations. Moreover, better regulations may reduce subsequent delays due to, for example, litigation.

PROMOTION OF CONSISTENCY BY OMB

OMB does not appear to exercise its powers under E.O. 12291 to reduce conflicts among regulations or to ensure consistent application of the regulatory analysis process. One of the major purposes of central oversight of the regulatory process is to achieve greater consistency in regulatory policy across the entire Government. 12/

E.O. 12291 authorizes the Director of OMB to identify existing and proposed rules that conflict with, duplicate, or overlap other rules or statutes. It also authorizes the Director to require appropriate interagency consultation to minimize or eliminate such duplication, overlap, or conflict. OMB officials told us that they make no systematic effort to uncover potential conflicts among proposed regulations, or between proposed rules and existing rules, and that they are addressing the issue in only an ad hoc way. OMB is planning a semi-annual regulatory agenda review system that could help to identify potential conflicts among proposed regulations; however, it is still in an "exploratory" stage and its functions are not clearly defined.

E.O. 12291 also contemplates OMB promoting consistency in procedures and methods used in implementing the RIA requirement. For example, E.O. 12291 invites the Director of OMB to promote consistency by authorizing him to "promulgate uniform standards for the identification of major rules." 13/ Consistency is important because it both provides for the equitable treatment of different kinds of rulemaking and allows for the efficient use of analytical resources. OMB has not issued standards for identifying major rules beyond the standards given in the Executive order, which are subject to varying interpretations. It is not clear, for example, whether the "$100 million effect" referred to in the Executive order refers to costs, or benefits, or the sum of costs and benefits. In a published interview, the former Administrator of OMB's Office of Information and Regulatory Affairs declined to clarify these ambiguities. Some agencies have suggested

that the "effect" refers only to costs, not benefits, while others interpret it as referring to both.

There is also potential for inconsistency in initiating reviews of existing rules and in waiving RIA requirements for major rules. OMB has neither announced nor published criteria for selecting rules targeted for review. The principles of E.O. 12291, which are the basis for the reviews, suggest that rules with the lowest net benefits would be selected for review first, yet there is no process for identifying which rules are likely to fall into that category. 14/ There also seems to be no explicit policy on waiving the RIA requirement for major rules. While OMB has cited five "situations" in which the RIA requirement might be waived, 11 of the 21 rules for which the RIA requirement was waived did not indicate that any of those five situations applied (see discussion in our response to Question 3, p. 36). Instead, the Federal Register notices of these rules cited a variety of other reasons for granting the waiver. There thus appears to be no coherent policy guiding the waiver.

The provisions of the Executive order that authorize the development of procedures for compiling a regulatory budget (Sec. 6(a)(6)) and that require agencies to take into account other regulatory actions contemplated for the future (Sec. 2(e)) imply a need for achieving consistent methodologies for measuring regulatory impacts. Inconsistent methodologies and assumptions in regulatory analyses affecting the automobile industry were identified in a report prepared for the U.S. Regulatory Council. 15/ Such inconsistency impairs the ability of decisionmakers to assess the cumulative and interactive effects of regulation. Although OMB stressed the importance of developing consistent measurement methodologies in its November 1980 report 16/ and provided very general guidance in its June 1981 "Interim Regulatory Impact Analysis Guidance," problems of coordinating methodologies for estimating costs and benefits in any given industry have not been addressed.

THE EFFECT OF OMB IN REVISING THE REGULATIONS AND ANALYSES PREPARED BY THE AGENCIES

E.O. 12291 reserves to the agency head the formal authority, which he or she is given by the agency's enabling statute, to make regulatory decisions. However, the broad authority granted to OMB by the Executive order suggests that the agency head will be expected to comply with the substantive recommendations of OMB. 17/ On the other hand, OMB oversight is exercised "subject to the direction of the Task Force," 18/ so that an agency head who objects to OMB's recommendations can appeal to the Presidential Task Force on Regulatory Relief (chaired by the Vice President), and, ultimately, to the President. 19/

For those rules in which OMB takes an active interest, there is normally extensive consultation between OMB and the agency on the substance of the rule, both before and after the proposed rule

APPENDIX II

is submitted to OMB for review. Since none of these discussions are fully documented, it is not clear to what extent the final rule represents the thinking of OMB or the agency. OMB officials claim a major effect on some of these rules. OMB has not had sufficient staff, however, to give most rules more than brief attention.

In 1981, OMB returned to the agencies 45 rules for major changes, in effect rejecting them in their proposed form. None of these rejections were appealed by the agency to the Task Force. The first case in which an agency appealed OMB's decision on a rule was the case of OSHA's chemical labeling ("Hazard Communication") rule in the spring of 1982. OMB opposed OSHA's proposed regulation, and OSHA appealed to the Task Force. The Task Force decided in favor of OSHA. Even in this case, however, the final decision on the substance of the rule was apparently made by the Vice President, rather than by the Secretary of Labor, as provided for in the Occupational Safety and Health Act. 20/

OMB clearly had a significant effect on the 45 rules that it returned to the agencies for major revisions in 1981, since none of these proposed changes were appealed by the agencies. While table 3 indicates that OMB objected to only 7 percent of the rules it reviewed, this figure does not include OMB's influence through informal pre-submission comments. Also, OMB's effect varies significantly by agency. For example, while only 1 U.S. Department of Agriculture rule was disapproved (0.15 percent of those submitted), 20 EPA rules were disapproved (2.7 percent of those submitted), and 4 Justice Department rules were disapproved (7.5 percent of those submitted).

OMB's approach to regulatory oversight under E.O. 12291 blurs the source of regulatory decisions. Not only does OMB generally communicate with agencies orally rather than in writing, but in at least one case, OMB resisted putting its opinions on paper even when the agency asked it to do so. When OMB opinions are put in writing, they generally do not provide a full explanation of OMB's objections. Instead, the opinions frequently refer to earlier staff discussions. The result of this non-documented approach to rulemaking is that the public cannot determine at whose initiative a rule was issued. While the agency formally remains accountable for its rules, the record does not show whether the agency made its decisions primarily on the basis of its interpretation of the evidence available to it or in response to OMB directives. The lack of documentation also makes it impossible for others in the Federal Government to comment on the basis for a rulemaking decision and to play a "peer review" role.

Because OMB's influence is potentially great, its apparent openness to ex parte communications (communications with interested parties that are not recorded in the public record and for which public notice to all parties is not given) about pending rules raises similar disclosure concerns. 21/ While OMB's expressed policy is to encourage those who contact it about a rule

to submit a notice to the agency for the public record, OMB has no monitoring system to ensure that this takes place. Thus not only may OMB's views be communicated to the agency without being placed in the public record, but the views of outside parties may be communicated, using OMB as a conduit, without being placed in the public record. 22/ The public cannot determine either who made the regulatory decision, or on what basis it was made. 23/

S. 1080 addresses this problem in part by requiring that any changes in the rule made at the behest of OMB be explained in the public record. However, it does not require that ex parte sources of these changes be revealed.

QUALITY OF REGULATORY ANALYSES

The high standards for regulation and regulatory analysis established in Executive Order 12291 are laudable. Nevertheless, our comparison of 19 RIAs done after E.O. 12291 was issued with 38 RIAs done before it was issued indicates that many of the same problems exist in the overall quality of the analyses, with roughly the same frequency of occurrence. In performing the comparison, only analyses done by the same Federal agencies were examined to provide some assurance that the same resources were available to perform the analyses to comply with the two Executive orders.

Problem statements developed under the new Executive order continued in some cases not to specify the magnitude of the problems. In other cases, there was no discussion of the problem the regulation was intended to address. In some cases, the range of alternatives considered was quite narrow, and in one case no alternatives were examined. Benefits analyses were sometimes based on overly optimistic assumptions or failed to monetize benefits or defined benefits too narrowly. In the case of cost analyses, the discussion of the nature of costs was in some cases poor or assumptions about the magnitude of costs were not supported with evidence. Furthermore, the range of costs was sometimes too narrowly defined. In a few cases, cost estimates were completely omitted. With regard to the choice of alternative that was made, there were cases where no clear comparison of costs and benefits was used to justify the choice. In other cases, no reason was given for the alternative chosen, or the comparison of costs and benefits of alternatives studied was incorrect.

Strictly in terms of relative frequency, the rationale for choosing one alternative over another was the most serious continuing deficiency with the analyses conducted under the new Executive order. In sum, our analysis indicates that problems with the quality of regulatory analyses conducted under the old Executive order persist in analyses performed under E.O. 12291.

CONCLUDING OBSERVATIONS

The record of OMB oversight under E.O. 12291 can be considered mixed. Delays in rulemaking have generally been kept to a

minimum, at least for most rules. However, shortcomings with regulatory analyses carried out under E.O. 12044 are still prevalant in analyses conducted under E.O. 12291. The actual effect of OMB on most rules is modest, largely because of the great number of rules that they review. Finally, we have reason to believe that OMB's review has serious disclosure and consistency problems.

As we have indicated, regulatory oversight might take and has taken a variety of forms. While the Task Force provides a central body for coordinating regulatory policy, the abolition of the Regulatory Council and the Regulatory Analysis Review Group eliminates some of the supportive, educational, coordinative, and peer review functions filled by these organizations. OMB's present role is primarily one of monitoring and reviewing the work done by the agencies. Moreover, when the regulatory reviewers were at CWPS, they reviewed rules from both executive branch and independent regulatory agencies. At OMB, rules from independent regulatory agencies are now only reviewed if they are voluntarily submitted by the agency. Only three such agencies have done so (see our answer to Question 6). Finally, the CWPS and RARG reviews, unlike OMB's, were publicly filed. This kept the public informed of the nature and basis of the executive office's participation in the regulatory process. 24/

OMB's centralized position offers it the potential to play a more supportive role by pressing for more influence and adequate budgetary support for regulatory analysis in the agencies. It could also spotlight examples of innovative regulatory approaches and encourage their emulation by other regulatory agencies. OMB might also prompt needed improvement in analyses by providing some opportunity for "peer review," both of the analyses done by one agency and of written OIRA critiques, by analysts from other agencies as well as the public. A more positive effort to promote better regulatory approaches would help. The potential to make that effort exists, but OMB's resources may not be sufficient to realize that potential (see Question 2).

Though OMB is not specifically mentioned in S. 1080, it is generally assumed that the President's "designee" mentioned in the bill would be the Director of OMB. The reports of both Senate Committees as well as the floor debate on the bill make clear that the Senate expected White House oversight to be purely procedural, rather than substantive. At the same time, a number of Senators noted that they believed the oversight procedures put in place by President Reagan were consistent with the intended procedural emphasis and that S. 1080 was meant to endorse and strengthen that program. However, our review of OMB oversight under E.O. 12291 leaves doubt about whether OMB's role is basically procedural. 25/ While one can imagine a purely procedural form of oversight, 26/ the location of OMB in the Executive Office of the President is likely to facilitate substantive oversight to make regulations conform to the President's general policy orientation, as well as to enforce purely procedural requirements. If the Congress believes that centralized oversight of regulatory analyses should

APPENDIX II

be limited to ensuring procedural compliance, it will be necessary for OMB to conduct its review in a more open and public way than it has done so far. S. 1080 incorporates some requirements that would force OMB to disclose some of its comments on pending rules. It may be necessary to expand the scope of these requirements to ensure that OMB plays the role intended for it by the Congress.

APPENDIX II

FOOTNOTES

1/U.S. President's Committee on Administrative Management, Report of the Committee with Studies of Admininstrative Management in the Federal Government (1937), p. 40.

2/Administrative Procedure in Government Agencies, report of the Committee on Administrative Procedure, appointed by the Attorney General, Senate Document No. 8, 77th Cong., 1st Sess., (1941).

3/Executive Order 11821, 39 Fed. Reg. 41501 (1974).

4/Council on Wage and Price Stability Act of 1974 (Public Law 93-387, as amended by Public Law 94-78, 12 U.S.C. 1904 note).

5/For a review of the effectiveness of the analysis requirement see Thomas D. Hopkins, "An Evaluation of the Inflation Impact Statement Program, prepared for the Economic Policy Board by the Staff of the Council on Wage and Price Stability and the Office of Management and Budget," December 7, 1976.

6/Executive Order 12044, 43 Fed. Reg. 12661 (1978) (see appendix III).

7/This brief background on and subsequent references to the regulatory reform program of previous administrations are provided primarily to provide historical perspective. References to these programs are only included as examples of types of programs or objectives that may be useful, and reflect no assessment of whether they were successfully implemented by the previous administrations.

8/46 Fed. Reg. 13193 (1981).

9/President's memorandum of January 29, 1981, "Postponement of Pending Regulations," 46 Fed. Reg. 11227, February 6, 1981.

10/In describing the approach being taken by OMB, we concentrate on their review of proposed rules and analyses rather than the overall reform or relief program of the Administration. As a result, for example, we do not evaluate the "New Federalism" initiatives as they relate to regulation, or the analysis behind proposed shifts of responsibilities from the Federal level to State and local levels. Also, we have not systematically reviewed the role or effectiveness of the President's Task Force on Regulatory Relief.

11/These reviews of frozen rules were, however, apparently initiated by the agencies, not by OMB.

12/The Preamble of Executive Order 12291, for example, states ". . . in order to . . . minimize duplication and conflict of regulations, it is hereby ordered . . . "

13/Sec. 6 (a)(2).

14/Many of the early rules chosen for review were selected because earlier CWPS reviews had suggested that they had negative net benefits. There is no procedure, however, for identifying such rules from the vast majority of rules that have not been reviewed by CWPS.

15/"Assessing Regulatory Impacts: The Federal Experience With The Auto Industry," submitted to U.S. Regulatory Council, March 1981.

16/OMB, "Improving Government Regulations: Current Status and Future Directions," November 1980, p. 89.

17/James C. Miller III, then Administrator of OMB's Office of Information and Regulatory Affairs, suggested last year that any agency head who rejected OMB's recommendations on a rule (unless they had been overruled by the Vice President or President) might be fired. See "Deregulation HQ: An Interview with Murray L. Weidenbaum and James C. Miller III," Regulation (March/April, 1981), p. 16.

18/E.O. 12291, Sec. 3(e)(1).

19/In this section, we do not address the question of what effect OMB should have on regulatory decisionmaking, only what effect it does have. The information available for addressing the effect of OMB on agency decisionmaking was incomplete. Ideally, to isolate the role OMB plays in regulatory decisionmaking, we would have reviewed agency proposals that reflect no OMB input prior to submission to OMB; documentation of OMB comments made to the agency, whether made orally or in writing; and the version of the proposal as finally published. The first two of these three types of documents did not generally exist. OMB generally discussed proposals with agencies before proposals are submitted to OMB, so no "pure" agency proposal exists. Also, in response to our requests for documentation of OMB comments to agencies on seven different proposals, OMB indicated they generally have no written record of their communications with agencies regarding RIAs or proposed rules.

20/The rule was published as a proposed rule on March 19, 1982 (47 Fed. Reg. 12092). White House intervention in rulemaking had taken place occasionally before E.O. 12291, e.g., in the case of OSHA's Cotton Dust standard.

21/An OMB document lists 36 ex parte contacts during the period January 27, 1981, to March 24, 1981 (enclosure to letter from James C. Miller III, Administrator for Information and Regulatory Affairs, OMB, to Honorable John D. Dingell, Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives, April 28, 1981).

APPENDIX II

22/In attempting to assess OMB's influence over agency proposals and analyses, we were limited both by the general unavailability of documents and by the necessarily narrow scope (given time constraints) of our work. With additional time, we might, for example, have sought to determine whether any new factual data were transmitted to the White House or OMB, but not the agency; whether OMB published notification of the ex parte contact; and what effect such contact may have played in redirecting rulemaking proposals.

23/The Administrative Conference of the U.S. has addressed these issues. See 1 CFR §305.80-6 "Intragovernmental Communication in Informal Rulemaking Proceedings."

24/The absence of public filing of OMB comments is in contrast to the public filing required for OMB comments under the Paperwork Reduction Act of 1980 (see 44 U.S.C. §3504 (h)(2))

25/See Christopher DeMuth, "Memorandum for Members of the Presidential Task Force on Regulatory Relief" on OSHA's "Hazard Communication" proposal, January 7, 1982.

26/Purely procedural oversight might be concerned, for example, with ensuring that each agency prepared a regulatory analysis for each major rule, and that each regulatory analysis contained a statement of the problem, a range of reasonable alternatives, an estimate of costs and benefits for each alternative, and a comparison of the alternatives in terms of their costs and benefits. It might also be concerned with whether the agency had appropriately applied methods for measuring the costs and benefits it had identified, although it would stop short of a substantive judgment of whether the agency's choice of a particular alternative was correct.

QUESTION 5

TO WHAT EXTENT DO THE PROVISIONS OF E.O. 12291 AND S. 1080 CONFLICT WITH OR PRE-EMPT EXISTING REGULATORY LEGISLATION?

A regulatory analyses requirement could potentially conflict with existing regulatory legislation in two principal ways. First, the agency's use of a cost-benefit standard could lead to substantive results different from those intended by the regulatory statute. Second, review by the White House to enforce the regulatory analysis requirement could cause White House decisions to conflict with the discretion vested in the agency by its enabling legislation. 1/

POTENTIAL FOR CONFLICT OF SUBSTANTIVE REGULATORY STATUTES WITH EXECUTIVE ORDER 12291

Executive Order 12291 has a variety of exemptions making it applicable only if it does not conflict with existing statutes. 2/ Nothing in the Executive order would require an agency to do anything directly contrary to what its regulatory statutes require. Moreover, in many respects a regulatory analysis can make a positive contribution to achieving a statute's objectives. If a statute requires an industry to achieve health and safety goals, for example, and if the industry is constrained by limited investment resources, regulatory analyses could help. It could possibly point to the most cost-effective regulatory approaches, thereby allowing the industry to achieve a higher level of health and safety with its limited resources than would otherwise be possible.

However, in some cases the regulatory analysis requirement or the way it is implemented might have indirect effects that could lead to conflicts with the mandates of the agency's regulatory statutes. First, there is some ambiguity about what regulatory statutes require or permit. Some, such as the Delaney Amendment to the Federal Food, Drug, and Cosmetic Act, are generally recognized as expressly prohibiting consideration of a regulatory analysis. Most statutes are sufficiently ambiguous--incorporating phrases like "to the extent feasible," to the extent "practicable," "reasonably necessary," etc.--that a regulatory analysis can at least be considered. Even if a statute permits consideration of a regulatory analysis, however, it may emphasize particular factors, such as types of costs to be avoided or benefits to be assured, either expressly in the statute or in the legislative history. By singling out certain economic effects, the Congress may intend that such factors be afforded greater weight than others in regulatory decisions. The potential for an RA to displace congressional intent may be greatest when OMB requires that the expected benefits clearly be demonstrated to outweigh expected costs before any action is justified. This may be particularly true when extensive uncertainty surrounds the measurement or valuation of such effects.

An agency subject to a well-defined regulatory analysis requirement and an ambiguously defined statute may be more likely to conform its decisionmaking to the dictates of the analysis requirement, since contravening the analysis requirement would be more obvious than contravening the statute. If the agency, faced with apparently conflicting requirements, conforms with the requirements that are most clearly defined, then the regulatory analysis requirement could conflict with the intent of the Congress in enacting different agencies' statutes. Of course, litigation can clarify the requirements of statutes, 3/ but litigation will not always occur or always produce a definitive opinion when it does occur. 4/

The second indirect effect of a regulatory analysis requirement is that, insofar as it delays issuance of rules, it could forestall compliance with the agency's regulatory mandate. Regulatory statutes are generally not merely permissive; they require the agencies to achieve certain results, sometimes within specific time limits. If rulemaking is delayed by a regulatory analysis requirement and OMB reviews, the agency may not be able to achieve the results mandated by law. At some point, an interested party might petition a court to require the agency to act, thus allowing the agency to justify ignoring further compliance with the regulatory analysis requirement. But, such a result would depend upon the uncertain prospect of an affected party bringing suit. 5/

The cost of preparing regulatory analyses may be sufficiently high that an agency experiencing budget cutbacks may be forced to reduce the number of rules it issues. Insofar as budget cutbacks include curtailment of the budget for preparing regulatory analyses, the budget cutbacks may constrain the number of analyses the agency can prepare, and that may in turn constrain the number of rules the agency can issue. Some rules needed to meet the agency's statutory mandate may be delayed.

Thus, while the Executive order is drafted so as to exclude any direct conflict with the agencies' regulatory statutes, there may be indirect effects that create the potential for conflict with those statutes.

POTENTIAL DISPLACEMENT OF AGENCY DECISIONMAKING BY THE WHITE HOUSE UNDER EXECUTIVE ORDER 12291 6/

Under Executive Order 12291, the agencies still have the discretion they were given under their regulatory statutes (Sec. 3(f)(3)). As we indicated in our response to Question 4 (pp. 52 to 53), OMB has a significant effect on some regulatory proposals. Even when OMB was overruled, as in the case of OSHA's Hazard Communication rule, it was apparently overruled by the Vice President, in his capacity as Chairman of the Presidential Task Force on Regulatory Relief, not by the agency head. There is a potential that agency officials who decide to exercise their discretion could be relieved of their responsibilities. 7/

While there has been no test under the Executive order of what would happen if the head of an agency decided to resist the views of both OMB and the Vice President, it is possible that if the President felt strongly about the rule in question he could remove the official in charge of the agency, if the official persisted in issuing the rule. As a practical matter then, the President has the authority to exercise a preponderant amount of influence over agency rulemaking. In the past, Presidents have exercised this power on an occasional, ad hoc basis. Executive Order 12291 establishes a formal structure (the Task Force and OMB's OIRA) and systematic procedures (the clearance of all regutions by OIRA) to exercise this influence over rulemaking. The Executive order thus does not create any Presidential powers, but it does appear to signal an intention to exercise those powers more systematically and comprehensively than they have been.

POTENTIAL FOR PRE-EMPTION OF CONGRESSIONAL INTENT UNDER S. 1080

The sponsors of S. 1080 made it clear during floor debate over the bill, as well as in its substantive provisions (proposed §622(g) and Sec. 11), that they do not intend S. 1080 to change the vesting of rulemaking authority in the agencies or the substantive standards for rulemaking in regulatory statutes. 8/ Nevertheless, insofar as Presidential oversight affected substantive agency decisions, or insofar as substantive rulemaking standards other than those embodied in the statutes were applied, conflict with congressional intent in enacting various statutes could still potentially occur under S. 1080.

Even in the absence of a statute like S. 1080, there is potential for the regulatory analysis and Presidential oversight process to displace congressional intent. With the addition of §624 of S. 1080, that potential would appear stronger. That section would authorize the President to "ensure" that an agency carries out the cost-benefit standards and analysis required by the bill (proposed §624(a)). While under Sec. 11 of the bill, both executive and independent agencies would retain such authority as they now have, it is not clear how the President could ensure agency implementation of a provision that requires agencies to select cost-effective regulations without exercising substantive oversight of the agencies. If an agency, for example, submitted an inadequate regulatory analysis, a President (or his designee) required to ensure implementation of the regulatory analysis requirement would probably try to prevent issuance of the regulation until an adequate regulatory analysis had been prepared. It does not appear to be entirely clear how much authority the President would have to prevent the rule from being issued. Part of the legislative history suggests that he has the authority to make binding recommendations.

On the other hand, S. 1080 reduces the discretion available to the agencies by requiring them, when not prohibited by statute, to use a cost-benefit framework in their rulemaking. As a result,

even though the bill may strengthen the President's ability to displace agency discretion, it also reduces the amount of discretion available to be displaced.

S. 1080 broadens the coverage of the RA requirement and offers fewer opportunities for waiving the regulatory analysis requirement than does E.O. 12291 (see Question 3). The heavier workload of regulatory analyses will not only increase costs, as we indicated in our answer to Question 2, but could also increase the potential for conflict with regulatory statutes by making it more difficult, in some cases, for agencies to fulfill the mandates of their statutes.

In view of these possibilities, it is particularly important that the Congress maintain strong oversight of the proposed Act. This oversight might focus both on possible conflict with the substantive provisions of regulatory statutes and on the potential for displacement of the decisionmaking authority of the agencies by the White House.

MORE SPECIFIC GUIDANCE ON USE OF COST-BENEFIT ANALYSIS COULD FORESTALL CONFLICTS

As indicated, regulatory statutes often leave the agencies a great deal of substantive discretion, partly by granting them discretion in the factors that the agency can consider in reaching their decisions. Broad substantive discretion is often important so that the agency can make use of its specialized technical expertise and have the flexibility to use market-based approaches. Broad discretion may, however, invite displacement of agency decisionmaking by expanding the scope within which the White House can influence the decision without being in conflict with the statute's substantive requirements. As we have noted, while S. 1080 narrows the substantive discretion of the agencies by providing more specific guidance on what factors are to be considered in reaching a regulatory decision, in other respects S. 1080 may increase the potential for displacing congressional intent embodied in other regulatory statutes. The Congress could reduce the potential for displacement by providing more guidance in substantive regulatory statutes on both the various kinds of costs and benefits that should be considered and the extent to which cost-benefit tradeoffs can be considered.

In the case of some statutes, congressional intent may be consistent with a balancing of costs and benefits, even if the language of the statute has inadvertently precluded such a balancing. Amending the statute to permit (or require) a balancing of costs and benefits could increase the cost-effectiveness of regulation and clarify congressional intent. In the case of other statutes where the Congress considers the balancing of costs and benefits inappropriate, an explicit provision to that effect could be inserted into the statute to ensure that congressional intent is not violated. If in certain cases the Congress chooses

to preclude the use of cost-benefit analysis in the assessment of regulations, it becomes increasingly important that the effects of the legislation be known. Senate Rule 26.11(b) requires that a regulatory impact evaluation be included in the committee report accompanying all public bills and joint resolutions. Implementation of this rule is necessary to ensure adequate consideration of the costs associated with legislation and the resulting regulations in cases where agencies are precluded from considering costs.

COMMENTS ON THE LIMITS OF OUR FINDINGS

Our response to this question focuses on the potential for E.O. 12291 or S. 1080 to conflict with existing regulatory legislation. We have not sought to identify any actual conflicts with statutes. Since any endeavor to identify actual conflicts or preemption must necessarily have the structure, caliber, and rigor of a legal investigation, we reasoned that such an investigation was beyond the scope of our work. The potential sources of conflict that we have identified, however, indicate the need for careful oversight to ensure that these potential conflicts are not realized.

Another limitation in our response to this question resulted from its late introduction into the scope of our work. By the time the question was added, we had already completed all our agency interviews. Because re-opening that phase of our audit work would have required considerable time, we chose to rely on detailed interviews with officials at OMB and an examination of available records. As a result, we have not generally incorporated agency views on OMB's influence in particular rulemakings.

APPENDIX II

FOOTNOTES

1/A third possible form of conflict would be conflict between the procedural requirements of the Administrative Procedure Act and the requirements of an Executive order. However, we consider the question asked by the committee to be directed primarily at displacement of substantive rather than procedural legislation.

2/See Executive Order 12291, Secs. 2, 3(a), 3(f)(3), 6(a), 7(e), 7(g), 7(j), and 8(a)(2).

3/See, for example, Aqua Slide 'N' Dive Corporation v. Consumer Product Safety Commission, 569 F.2d 831 (5th Cir., 1978) and EPA v. National Crushed Stone Association et al., 449 U.S. 64 (1980).

4/As happened, for example, in the Cotton Dust case. See American Textile Manufacturers Institute, Inc., et al. v. Donovan, Secretary of Labor, et al. 452 U.S. 490 (1981).

5/Two major rules in 1981, DOE's Variable Net Profit Share Bidding System and the Treasury Department's Handicapped Discrimination Regulations, were exempted from the RIA requirement because of court-ordered deadlines resulting from civil suits. See 46 Fed. Reg. 29680 (June 2, 1981) and 46 Fed. Reg. 41047 (August 14, 1981).

6/While most regulatory statutes vest authority for rulemaking in the official in charge of an agency, these officials serve at the pleasure of the President, who therefore exercises a substantial amount of control over their actions. Whether regulatory decisionmaking should be carried out at the discretion of the head of the regulatory agency, as provided by statute, or whether that discretion should be limited by Presidential oversight, as is suggested by the Constitutional delegation of "executive" powers to the President, is a hotly debated question on which views vary widely. We shall make no attempt to resolve the issue here. See Morton Rosenberg, "Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12291," 80 Michigan Law Review 193 (1981); and Memorandum of Acting Assistant Attorney General Larry L. Simms, "Proposed Executive Order entitled 'Federal Regulation,'" February 13, 1981.

7/James C. Miller III, then Administrator of OMB's Office of Information and Regulatory Affairs, suggested last year that an agency head who defied White House preferences on a rulemaking "still has the legal authority to issue the regulation, but that action could be risky--meaning that the President of the United States might decide to remove such a person from office." See "Deregulation HQ: An Interview on the New Executive Order with Murray L. Weidenbaum and James C. Miller III," Regulation (March/April, 1981), p. 16.

8/See particularly the colloquy between Senator Glenn and the floor managers of S. 1080, Congressional Record, March 22, 1982, pp. S2503 - S2506.

APPENDIX II

QUESTION 6

WHAT EFFECT WILL PRESIDENTIAL OVERSIGHT OF REGULATORY ANALYSIS HAVE ON INDEPENDENT AGENCIES?

Under S. 1080, Presidential authority to oversee rulemaking is extended to independent regulatory agencies. Assessing the effect of this extension requires understanding

1. what independence the independent regulatory agencies have now, in the absence of S. 1080;

2. to what extent independent regulatory agencies have voluntarily complied with the requirements of Executive Orders 12044 and 12291; and

3. how their independence would be modified by the oversight authority granted to the President by S. 1080.

HOW INDEPENDENT ARE INDEPENDENT AGENCIES?

The Congress created independent regulatory agencies to administer complex regulatory statutes that require some intermixture of legislative, judicial, and executive functions. Largely to protect the fairness of their adjudicatory functions, the Congress and the courts have attempted to insulate these agencies from direct political interference from the executive branch. 1/ The independence of these agencies is primarily achieved through restricting the powers of the President to remove and appoint their commissioners. Commissioners of most independent regulatory agencies can be removed only for certain causes, such as neglect of duty, inefficiency, misconduct, etc., that are specified in their enabling statutes. While the President can suggest courses of action to the commissioners of independent regulatory agencies, he cannot, as a practical matter, enforce those suggestions without the power to remove commissioners from office at his discretion.

The independence of these agencies is manifested and reinforced by a number of their characteristics. For some of the agencies, their budgets can be submitted directly to the Congress without being cleared by OMB. Similarly, testimony can be presented and legislation proposed without being cleared through OMB. Also, Executive orders are generally not viewed by independent agency personnel as binding.

However, the President retains some elements of control and this keeps the agencies from being completely independent. Even though agency commissioners serve for staggered terms that are longer than the President's, a President can often take advantage of unfilled vacancies or resignations before the end of a commissioner's term to fill a commission with persons sharing similar

views on controversial issues. Furthermore, the chairmen of some agencies, such as the FCC, SEC, and FTC, are appointed by the President and serve at his pleasure. Moreover, since passage of the Paperwork Reduction Act of 1980, all independent agencies have been subjected to paperwork burden reviews by OMB, although majority votes of their members can nullify adverse OMB decisions in this area. 2/

Finally, the limits of the President's authority to remove commissioners for cause have not been defined clearly by the courts. Some authorities suggest that the President could subject an independent regulatory agency to an Executive order concerning the general efficiency of government, such as one requiring the use of cost-benefit analyses, and then remove the commissioners on grounds of "inefficiency" if they refused to comply. 3/ In view of the above considerations, independence is not absolute and its degree is unclear.

TO WHAT EXTENT HAVE INDEPENDENT AGENCIES VOLUNTARILY COMPLIED WITH EXECUTIVE ORDERS 12044 AND 12291?

Several independent agencies have voluntarily complied with at least some of the requirements of Executive Orders 12044 and 12291. 4/ For example, while E.O. 12044 was in effect, the FCC and SEC reviewed a number of their existing rules to eliminate ones that were not cost-effective or were excessively burdensome to small businesses.

Vice President Bush formally requested that 17 independent agencies voluntarily comply with the sections of Executive Order 12291 setting out the principles governing the issuance of regulations, the preparation of regulatory analyses, and the review of all regulations by OMB. Many of the agencies indicated support for the goals of the Executive order but withheld any commitments to comply with it. According to OMB, as of June 1981 eight agencies apparently had not responded to the Vice President's letter. 5/ Several of the agencies indicated that they had their own internal analysis and review requirements, and they felt these obviated the need to comply with the Executive order. None of the agencies committed themselves to respond to OMB comments on their rules, and only one, the Civil Aeronautics Board, committed itself to provide OMB with an opportunity for pre-publication review. A few rules were also submitted by the Federal Communications Commission and the Federal Maritime Commission. Several agencies promised to comply with the Executive order "to the fullest extent possible," but without making any explicit commitments.

HOW WOULD THE AGENCIES' INDEPENDENCE BE MODIFIED BY S. 1080?

S. 1080 gives the President authority to "monitor, review, and ensure agency implementation" of the regulatory analysis provisions of the bill for both executive branch and independent

APPENDIX II

regulatory agencies (proposed §624). As passed by the Senate, S. 1080 does not distinguish between the degree of Presidential authority that can be exercised over executive departments and agencies and that that can be exercised over independent regulatory agencies. In reports by both the Judiciary and Governmental Affairs Committees of the Senate, they suggest that the authority to "monitor, review, and ensure agency implementation" of the Act authorizes the sort of oversight currently being exercised over executive branch agencies under E.O. 12291. 6/ The Governmental Affairs Committee recommended that that authority, as applied to independent regulatory agencies, be limited to "non-binding advisory recommendations." The Judiciary Committee recommended no such limitation, and this version was adopted by the Senate. The implication of rejecting the restriction recommended by the Governmental Affairs Committee could be that the President is authorized to make binding recommendations to independent and executive branch regulatory agencies alike.

While Sec. 11 of the bill reserves to the agencies, both executive and independent, such authority as they now have, it is not clear how much authority the independent regulatory agencies now have, nor how the President would ensure agency implementation of the regulatory analysis requirement without substantive authority over them. Even if the emphasis of oversight is on procedures as called for in proposed §624, the core of the RA process is the substance of regulatory decisionmaking. In addition, to the extent that the Presidential oversight provision of S. 1080 is implemented along the lines of E.O. 12291, there is further potential for S. 1080 to diminish the independence of the independent regulatory commissions. In such a case, the source for regulatory decisionmaking might be blurred and the intended political independence could be impaired. Given the ambiguity about how much independent authority these agencies now have and the uncertainty about the limits of Presidential authority in proposed §624, the effect of S. 1080 could be to encourage future Presidents (and the courts) to broaden their interpretation of the existing range of Presidential authority over independent agencies.

FOOTNOTES

1/See, for example, Robert E. Cushman, The Independent Regulatory Commissions, chaps. 6 and 10, (New York: Oxford University Press, 1941).

2/Paperwork Reduction Act of 1980 (P.L. 96-511).

3/Cushman, p. 465.

4/In assessing the extent to which independent agencies complied with E.O. 12044 and 12291, we relied on written documents expressing the stated intent of various independent regulatory agencies (in correspondence with OMB)and on OMB records of regulations submitted by these agencies. We conducted no investigation of the actual analyses being performed by independent agencies or the extent to which such analyses may meet the analytical requirements of E.O. 12291.

5/Hearing before the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, U.S. House of Representatives, "Role of OMB in Regulation," June 18, 1981, p. 139.

6/S. Rep. No. 97-305, 97th Cong., 1st Sess., 61-68 (1981) and S. Rep. No. 97-284, 97th Cong., 1st Sess., 158-161 (1981).

APPENDIX III

presidential documents

Title 3—The President

[3195-01]

Executive Order 12044 • **March 23, 1978**

Improving Government Regulations

As President of the United States of America, I direct each Executive Agency to adopt procedures to improve existing and future regulations.

SECTION 1. *Policy.* Regulations shall be as simple and clear as possible. They shall achieve legislative goals effectively and efficiently. They shall not impose unnecessary burdens on the economy, on individuals, on public or private organizations, or on State and local governments.

To achieve these objectives, regulations shall be developed through a process which ensures that:

(a) the need for and purposes of the regulation are clearly established;

(b) heads of agencies and policy officials exercise effective oversight;

(c) opportunity exists for early participation and comment by other Federal agencies, State and local governments, businesses, organizations and individual members of the public;

(d) meaningful alternatives are considered and analyzed before the regulation is issued; and

(e) compliance costs, paperwork and other burdens on the public are minimized.

SEC. 2. *Reform of the Process for Developing Significant Regulations.* Agencies shall review and revise their procedures for developing regulations to be consistent with the policies of this Order and in a manner that minimizes paperwork.

Agencies' procedures should fit their own needs but, at a minimum, these procedures shall include the following:

(a) *Semiannual Agenda of Regulations.* To give the public adequate notice, agencies shall publish at least semiannually an agenda of significant regulations under development or review. On the first Monday in October, each agency shall publish in the FEDERAL REGISTER a schedule showing the times during the coming fiscal year when the agency's semiannual agenda will be published. Supplements to the agenda may be published at other times during the year if necessary, but the semiannual agendas shall be as complete as possible. The head of each agency shall approve the agenda before it is published.

At a minimum, each published agenda shall describe the regulations being considered by the agency, the need for and the legal basis for the action being taken, and the status of regulations previously listed on the agenda.

Each item on the agenda shall also include the name and telephone number of a knowledgeable agency official and, if possible, state

APPENDIX III

whether or not a regulatory analysis will be required. The agenda shall also include existing regulations scheduled to be reviewed in accordance with Section 4 of this Order.

(b) *Agency Head Oversight.* Before an agency proceeds to develop significant new regulations, the agency head shall have reviewed the issues to be considered, the alternative approaches to be explored, a tentative plan for obtaining public comment, and target dates for completion of steps in the development of the regulation.

(c) *Opportunity for Public Participation.* Agencies shall give the public an early and meaningful opportunity to participate in the development of agency regulations. They shall consider a variety of ways to provide this opportunity, including (1) publishing an advance notice of proposed rulemaking; (2) holding open conferences or public hearings; (3) sending notices of proposed regulations to publications likely to be read by those affected; and (4) notifying interested parties directly.

Agencies shall give the public at least 60 days to comment on proposed significant regulations. In the few instances where agencies determine this is not possible, the regulation shall be accompanied by a brief statement of the reasons for a shorter time period.

(d) *Approval of Significant Regulations.* The head of each agency, or the designated official with statutory responsibility, shall approve significant regulations before they are published for public comment in the FEDERAL REGISTER. At a minimum, this official should determine that:

(1) the proposed regulation is needed;

(2) the direct and indirect effects of the regulation have been adequately considered;

(3) alternative approaches have been considered and the least burdensome of the acceptable alternatives has been chosen;

(4) public comments have been considered and an adequate response has been prepared;

(5) the regulation is written in plain English and is understandable to those who must comply with it;

(6) an estimate has been made of the new reporting burdens or recordkeeping requirements necessary for compliance with the regulation;

(7) the name, address and telephone number of a knowledgeable agency official is included in the publication; and

(8) a plan for evaluating the regulation after its issuance has been developed.

(e) *Criteria for Determining Significant Regulations.* Agencies shall establish criteria for identifying which regulations are significant. Agencies shall consider among other things: (1) the type and number of individuals, businesses, organizations, State and local governments affected; (2) the compliance and reporting requirements likely to be involved; (3) direct and indirect effects of the regulation including the effect on competition; and (4) the relationship of the regulations to those of other programs and agencies. Regulations that do not meet an agency's criteria for determining significance shall be accompanied by a statement to that effect at the time the regulation is proposed.

APPENDIX III

SEC. 3. *Regulatory Analysis.* Some of the regulations identified as significant may have major economic consequences for the general economy, for individual industries, geographical regions or levels of government. For these regulations, agencies shall prepare a regulatory analysis. Such an analysis shall involve a careful examination of alternative approaches early in the decision-making process.

The following requirements shall govern the preparation of regulatory analyses:

(a) *Criteria.* Agency heads shall establish criteria for determining which regulations require regulatory analyses. The criteria established shall:

(1) ensure that regulatory analyses are performed for all regulations which will result in (a) an annual effect on the economy of $100 million or more; or (b) a major increase in costs or prices for individual industries, levels of government or geographic regions; and

(2) provide that in the agency head's discretion, regulatory analysis may be completed on any proposed regulation.

(b) *Procedures.* Agency heads shall establish procedures for developing the regulatory analysis and obtaining public comment.

(1) Each regulatory analysis shall contain 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.

(2) Agencies shall include in their public notice of proposed rules an explanation of the regulatory approach that has been selected or is favored and a short description of the other alternatives considered. A statement of how the public may obtain a copy of the draft regulatory analysis shall also be included.

(3) Agencies shall prepare a final regulatory analysis to be made available when the final regulations are published.

Regulatory analyses shall not be required in rulemaking proceedings pending at the time this Order is issued if an Economic Impact Statement has already been prepared in accordance with Executive Orders 11821 and 11949.

SEC. 4. *Review of Existing Regulations.* Agencies shall periodically review their existing regulations to determine whether they are achieving the policy goals of this Order. This review will follow the same procedural steps outlined for the development of new regulations.

In selecting regulations to be reviewed, agencies shall consider such criteria as:

(a) the continued need for the regulation;

(b) the type and number of complaints or suggestions received;

(c) the burdens imposed on those directly or indirectly affected by the regulations;

(d) the need to simplify or clarify language;

(e) the need to eliminate overlapping and duplicative regulations; and

(f) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions or other factors have changed in the area affected by the regulation.

Agencies shall develop their selection criteria and a listing of possible regulations for initial review. The criteria and listing shall be published for comment as required in Section 5. Subsequently, regulations selected for review shall be included in the semiannual agency agendas.

SEC. 5. *Implementation.*

(a) Each agency shall review its existing process for developing regulations and revise it as needed to comply with this Order. Within 60 days after the issuance of the Order, each agency shall prepare a draft report outlining (1) a brief description of its process for developing regulations and the changes that have been made to comply with this Order; (2) its proposed criteria for defining significant agency regulations; (3) its proposed criteria for identifying which regulations require regulatory analysis; and (4) its proposed criteria for selecting existing regulations to be reviewed and a list of regulations that the agency will consider for its initial review. This report shall be published in the FEDERAL REGISTER for public comment. A copy of this report shall be sent to the Office of Management and Budget.

(b) After receiving public comment, agencies shall submit their revised report to the Office of Management and Budget for approval before final publication in the FEDERAL REGISTER.

(c) The Office of Management and Budget shall assure the effective implementation of this Order. OMB shall report at least semiannually to the President on the effectiveness of the Order and agency compliance with its provisions. By May 1, 1980, OMB shall recommend to the President whether or not there is a continued need for the Order and any further steps or actions necessary to achieve its purposes.

SEC. 6. *Coverage.*

(a) As used in this Order, the term regulation means both rules and regulations issued by agencies including those which establish conditions for financial assistance. Closely related sets of regulations shall be considered together.

(b) This Order does not apply to:

(1) regulations issued in accordance with the formal rulemaking provisions of the Administrative Procedure Act (5 U.S.C. 556, 557);

(2) regulations issued with respect to a military or foreign affairs function of the United States;

(3) matters related to agency management or personnel;

(4) regulations related to Federal Government procurement;

(5) regulations issued by the independent regulatory agencies; or

(6) regulations that are issued in response to an emergency or which are governed by short-term statutory or judicial deadlines. In these cases, the agency shall publish in the FEDERAL REGISTER a statement of the reasons why it is impracticable or contrary to the public interest for the agency to follow the procedures of this Order. Such a statement shall include the name of the policy official responsible for this determination.

SEC. 7. This Order is intended to improve the quality of Executive Agency regulatory practices. It is not intended to create delay in the process

APPENDIX III

or provide new grounds for judicial review. Nothing in this Order shall be considered to supersede existing statutory obligations governing rulemaking.

SEC. 8. Unless extended, this Executive Order expires on June 30, 1980.

THE WHITE HOUSE,
March 23, 1978.

[FR Doc. 78-8091 Filed 3-23-78; 12:58 pm]

APPENDIX IV

Federal Register
Vol. 46, No. 33
Thursday, February 19, 1981

Presidential Documents

Title 3—

The President

Executive Order 12291 of February 17, 1981

Federal Regulation

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and insure well-reasoned regulations, it is hereby ordered as follows:

Section 1. *Definitions.* For the purposes of this Order:

(a) "Regulation" or "rule" means an agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the procedure or practice requirements of an agency, but does not include:

(1) Administrative actions governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code;

(2) Regulations issued with respect to a military or foreign affairs function of the United States; or

(3) Regulations related to agency organization, management, or personnel.

(b) "Major rule" means any 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 for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

(c) "Director" means the Director of the Office of Management and Budget.

(d) "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), excluding those agencies specified in 44 U.S.C. 3502(10).

(e) "Task Force" means the Presidential Task Force on Regulatory Relief.

Sec. 2. *General Requirements.* In promulgating new regulations, reviewing existing regulations, and developing legislative proposals concerning regulation, 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 action;

(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

APPENDIX IV

particular industries affected by regulations, the condition of the national economy, and other regulatory actions contemplated for the future.

Sec. 3. *Regulatory Impact Analysis and Review.*

(a) In order to implement Section 2 of this Order, each agency shall, in connection with every major rule, prepare, and to the extent permitted by law consider, a Regulatory Impact Analysis. Such Analyses may be combined with any Regulatory Flexibility Analyses performed under 5 U.S.C. 603 and 604.

(b) Each agency shall initially determine whether a rule it intends to propose or to issue is a major rule, *provided that,* the Director, subject to the direction of the Task Force, shall have authority, in accordance with Sections 1(b) and 2 of this Order, to prescribe criteria for making such determinations, to order a rule to be treated as a major rule, and to require any set of related rules to be considered together as a major rule.

(c) Except as provided in Section 8 of this Order, agencies shall prepare Regulatory Impact Analyses of major rules and transmit them, along with all notices of proposed rulemaking and all final rules, to the Director as follows:

(1) If no notice of proposed rulemaking is to be published for a proposed major rule that is not an emergency rule, the agency shall prepare only a final Regulatory Impact Analysis, which shall be transmitted, along with the proposed rule, to the Director at least 60 days prior to the publication of the major rule as a final rule;

(2) With respect to all other major rules, the agency shall prepare a preliminary Regulatory Impact Analysis, which shall be transmitted, along with a notice of proposed rulemaking, to the Director at least 60 days prior to the publication of a notice of proposed rulemaking, and a final Regulatory Impact Analysis, which shall be transmitted along with the final rule at least 30 days prior to the publication of the major rule as a final rule;

(3) For all rules other than major rules, agencies shall submit to the Director, at least 10 days prior to publication, every notice of proposed rulemaking and final rule.

(d) To permit each proposed major rule to be analyzed in light of the requirements stated in Section 2 of this Order, each preliminary and final Regulatory Impact Analysis shall contain the following information:

(1) A description of the potential benefits of the rule, including any beneficial effects 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 the identification of those likely to bear the costs;

(3) A determination of the potential net benefits of the rule, including an evaluation of effects that cannot be quantified in monetary terms;

(4) A description of alternative approaches that could substantially achieve the same regulatory goal at lower cost, together with an analysis of this potential benefit and costs and a brief explanation of the legal reasons why such alternatives, if proposed, could not be adopted; and

(5) Unless covered by the description required under paragraph (4) of this subsection, an explanation of any legal reasons why the rule cannot be based on the requirements set forth in Section 2 of this Order.

(e) (1) The Director, subject to the direction of the Task Force, which shall resolve any issues raised under this Order or ensure that they are presented to the President, is authorized to review any preliminary or final Regulatory Impact Analysis, notice of proposed rulemaking, or final rule based on the requirements of this Order.

(2) The Director shall be deemed to have concluded review unless the Director advises an agency to the contrary under subsection (f) of this Section:

(A) Within 60 days of a submission under subsection (c)(1) or a submission of a preliminary Regulatory Impact Analysis or notice of proposed rulemaking under subsection (c)(2);

(B) Within 30 days of the submission of a final Regulatory Impact Analysis and a final rule under subsection (c)(2); and

(C) Within 10 days of the submission of a notice of proposed rulemaking or final rule under subsection (c)(3).

(f) (1) Upon the request of the Director, an agency shall consult with the Director concerning the review of a preliminary Regulatory Impact Analysis or notice of proposed rulemaking under this Order, and shall, subject to Section 8(a)(2) of this Order, refrain from publishing its preliminary Regulatory Impact Analysis or notice of proposed rulemaking until such review is concluded.

(2) Upon receiving notice that the Director intends to submit views with respect to any final Regulatory Impact Analysis or final rule, the agency shall, subject to Section 8(a)(2) of this Order, refrain from publishing its final Regulatory Impact Analysis or final rule until the agency has responded to the Director's views, and incorporated those views and the agency's response in the rulemaking file.

(3) Nothing in this subsection shall be construed as displacing the agencies' responsibilities delegated by law.

(g) For every rule for which an agency publishes a notice of proposed rulemaking, the agency shall include in its notice:

(1) A brief statement setting forth the agency's initial determination whether the proposed rule is a major rule, together with the reasons underlying that determination; and

(2) For each proposed major rule, a brief summary of the agency's preliminary Regulatory Impact Analysis.

(h) Agencies shall make their preliminary and final Regulatory Impact Analyses available to the public.

(i) Agencies shall initiate reviews of currently effective rules in accordance with the purposes of this Order, and perform Regulatory Impact Analyses of currently effective major rules. The Director, subject to the direction of the Task Force, may designate currently effective rules for review in accordance with this Order, and establish schedules for reviews and Analyses under this Order.

Sec. 4. *Regulatory Review.* Before approving any final major rule, each agency shall:

(a) Make a determination that the regulation is clearly within the authority delegated by law and consistent with congressional intent, and include in the **Federal Register** at the time of promulgation a memorandum of law supporting that determination.

(b) Make a determination that the factual conclusions upon which the rule is based have substantial support in the agency record, viewed as a whole, with full attention to public comments in general and the comments of persons directly affected by the rule in particular.

Sec. 5. *Regulatory Agendas.*

(a) Each agency shall publish, in October and April of each year, an agenda of proposed regulations that the agency has issued or expects to issue, and currently effective rules that are under agency review pursuant to this Order. These agendas may be incorporated with the agendas published under 5 U.S.C. 602, and must contain at the minimum:

(1) A summary of the nature of each major rule being considered, the objectives and legal basis for the issuance of the rule, and an approximate

APPENDIX IV

schedule for completing action on any major rule for which the agency has issued a notice of proposed rulemaking;

(2) The name and telephone number of a knowledgeable agency official for each item on the agenda; and

(3) A list of existing regulations to be reviewed under the terms of this Order, and a brief discussion of each such regulation.

(b) The Director, subject to the direction of the Task Force, may, to the extent permitted by law:

(1) Require agencies to provide additional information in an agenda; and

(2) Require publication of the agenda in any form.

Sec. 6. *The Task Force and Office of Management and Budget.*

(a) To the extent permitted by law, the Director shall have authority, subject to the direction of the Task Force, to:

(1) Designate any proposed or existing rule as a major rule in accordance with Section 1(b) of this Order;

(2) Prepare and promulgate uniform standards for the identification of major rules and the development of Regulatory Impact Analyses;

(3) Require an agency to obtain and evaluate, in connection with a regulation, any additional relevant data from any appropriate source;

(4) Waive the requirements of Sections 3, 4, or 7 of this Order with respect to any proposed or existing major rule;

(5) Identify duplicative, overlapping and conflicting rules, existing or proposed, and existing or proposed rules that are inconsistent with the policies underlying statutes governing agencies other than the issuing agency or with the purposes of this Order, and, in each such case, require appropriate interagency consultation to minimize or eliminate such duplication, overlap, or conflict;

(6) Develop procedures for estimating the annual benefits and costs of agency regulations, on both an aggregate and economic or industrial sector basis, for purposes of compiling a regulatory budget;

(7) In consultation with interested agencies, prepare for consideration by the President recommendations for changes in the agencies' statutes; and

(8) Monitor agency compliance with the requirements of this Order and advise the President with respect to such compliance.

(b) The Director, subject to the direction of the Task Force, is authorized to establish procedures for the performance of all functions vested in the Director by this Order. The Director shall take appropriate steps to coordinate the implementation of the analysis, transmittal, review, and clearance provisions of this Order with the authorities and requirements provided for or imposed upon the Director and agencies under the Regulatory Flexibility Act, 5 U.S.C. 301 *et seq.*, and the Paperwork Reduction Plan Act of 1980, 44 U.S.C. 3501 *et seq.*

Sec. 7. *Pending Regulations.*

(a) To the extent necessary to permit reconsideration in accordance with this Order, agencies shall, except as provided in Section 8 of this Order, suspend or postpone the effective dates of all major rules that they have promulgated in final form as of the date of this Order, but that have not yet become effective, excluding:

(1) Major rules that cannot legally be postponed or suspended;

(2) Major rules that, for good cause, ought to become effective as final rules without reconsideration. Agencies shall prepare, in accordance with Section 3 of this Order, a final Regulatory Impact Analysis for each major rule that they suspend or postpone.

(b) Agencies shall report to the Director no later than 15 days prior to the effective date of any rule that the agency has promulgated in final form as of the date of this Order, and that has not yet become effective, and that will not be reconsidered under subsection (a) of this Section:

(1) That the rule is excepted from reconsideration under subsection (a), including a brief statement of the legal or other reasons for that determination; or

(2) That the rule is not a major rule.

(c) The Director, subject to the direction of the Task Force, is authorized, to the extent permitted by law, to:

(1) Require reconsideration, in accordance with this Order, of any major rule that an agency has issued in final form as of the date of this Order and that has not become effective; and

(2) Designate a rule that an agency has issued in final form as of the date of this Order and that has not yet become effective as a major rule in accordance with Section 1(b) of this Order.

(d) Agencies may, in accordance with the Administrative Procedure Act and other applicable statutes, permit major rules that they have issued in final form as of the date of this Order, and that have not yet become effective, to take effect as interim rules while they are being reconsidered in accordance with this Order, *provided that,* agencies shall report to the Director, no later than 15 days before any such rule is proposed to take effect as an interim rule, that the rule should appropriately take effect as an interim rule while the rule is under reconsideration.

(e) Except as provided in Section 8 of this Order, agencies shall, to the extent permitted by law, refrain from promulgating as a final rule any proposed major rule that has been published or issued as of the date of this Order until a final Regulatory Impact Analysis, in accordance with Section 3 of this Order, has been prepared for the proposed major rule.

(f) Agencies shall report to the Director, no later than 30 days prior to promulgating as a final rule any proposed rule that the agency has published or issued as of the date of this Order and that has not been considered under the terms of this Order:

(1) That the rule cannot legally be considered in accordance with this Order, together with a brief explanation of the legal reasons barring such consideration; or

(2) That the rule is not a major rule, in which case the agency shall submit to the Director a copy of the proposed rule.

(g) The Director, subject to the direction of the Task Force, is authorized, to the extent permitted by law, to:

(1) Require consideration, in accordance with this Order, of any proposed major rule that the agency has published or issued as of the date of this Order; and

(2) Designate a proposed rule that an agency has published or issued as of the date of this Order, as a major rule in accordance with Section 1(b) of this Order.

(h) The Director shall be deemed to have determined that an agency's report to the Director under subsections (b), (d), or (f) of this Section is consistent with the purposes of this Order, unless the Director advises the agency to the contrary:

(1) Within 15 days of its report, in the case of any report under subsections (b) or (d); or

(2) Within 30 days of its report, in the case of any report under subsection (f).

APPENDIX IV

(i) This Section does not supersede the President's Memorandum of January 29, 1981, entitled "Postponement of Pending Regulations", which shall remain in effect until March 30, 1981.

(j) In complying with this Section, agencies shall comply with all applicable provisions of the Administrative Procedure Act, and with any other procedural requirements made applicable to the agencies by other statutes.

Sec. 8. *Exemptions.*

(a) The procedures prescribed by this Order shall not apply to:

(1) Any regulation that responds to an emergency situation, *provided that,* any such regulation shall be reported to the Director as soon as is practicable, the agency shall publish in the **Federal Register** a statement of the reasons why it is impracticable for the agency to follow the procedures of this Order with respect to such a rule, and the agency shall prepare and transmit as soon as is practicable a Regulatory Impact Analysis of any such major rule; and

(2) Any regulation for which consideration or reconsideration under the terms of this Order would conflict with deadlines imposed by statute or by judicial order, *provided that,* any such regulation shall be reported to the Director together with a brief explanation of the conflict, the agency shall publish in the **Federal Register** a statement of the reasons why it is impracticable for the agency to follow the procedures of this Order with respect to such a rule, and the agency, in consultation with the Director, shall adhere to the requirements of this Order to the extent permitted by statutory or judicial deadlines.

(b) The Director, subject to the direction of the Task Force, may, in accordance with the purposes of this Order, exempt any class or category of regulations from any or all requirements of this Order.

Sec. 9. *Judicial Review.* This Order is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person. The determinations made by agencies under Section 4 of this Order, and any Regulatory Impact Analyses for any rule, shall be made part of the whole record of agency action in connection with the rule.

Sec. 10. *Revocations.* Executive Orders No. 12044, as amended, and No. 12174 are revoked.

Ronald Reagan

THE WHITE HOUSE,
February 17, 1981.

[FR Doc. 81-5790
Filed 2-17-81; 3:19 pm]
Billing code 3195-01-M

APPENDIX V

97TH CONGRESS
2D SESSION

S. 1080

AN ACT *

To amend the Administrative Procedure Act to require Federal agencies to analyze the effects of rules to improve their effectiveness and to decrease their compliance costs; to provide for a periodic review of regulations, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Regulatory Reform Act".

DEFINITION OF RULE

SEC. 2. Section 551(4) of title 5, United States Code, is amended by inserting before the semicolon at the end thereof a comma and the following: "except that the term 'rule' does not include agency statements involving a matter relating to public property or contracts or general statements of policy of the Tennessee Valley Authority except where an applicable

*This is a copy of S. 1080 as passed by the Senate in March 1982.

APPENDIX V

statute requires notice and hearing pursuant to this chapter or the statement to be made on the record after opportunity for an agency hearing".

RULEMAKING

SEC. 3. Section 553 of title 5, United States Code, is amended to read as follows:

"§ 553. Rule making

"(a) This section applies to every rule making, according to the provisions thereof, except to the extent that there is involved—

"(1) a matter pertaining to a military or foreign affairs function of the United States;

"(2) a matter relating to the management and personnel practices of an agency;

"(3) an interpretive rule, general statement of policy, or rule of agency organization, procedure, or practice, unless such rule or statement has general applicability and substantially alters or creates rights or obligations of persons outside the agency; or

"(4) a rule relating to the acquisition, management, or disposal by an agency of real or personal property or of services that is promulgated in compliance with criteria and procedures established by the Administrator for Federal Procurement Policy or the Administrator of General Services.

"(b)(1) General notice of proposed rule making shall be published in the Federal Register, unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. Each notice of proposed rule making shall include—

"(A) a statement of the time, place, and nature of public rule making proceedings;

"(B) a succinct explanation of the need for and specific objectives of the proposed rule;

"(C) an explanation of the specific statutory authority under which the rule is proposed;

"(D) the proposed provisions of the rule;

"(E) a statement that the agency seeks proposals from the public and from State and local governments for alternative methods to accomplish the objectives of the rule making that are more effective or less burdensome than the approach used in the proposed rule;

"(F) a description of any data, methodologies, reports, studies, scientific evaluations, or other similar information on which the agency plans to substantially rely in the rule making, including an identification of each author or source of such information and the purposes for which the agency plans to rely on such information; and

APPENDIX V

"(G) a statement specifying where the file of the rule making proceeding maintained pursuant to subsection (f) of this section may be inspected and how copies of the items in the file may be obtained.

"(2) Except when notice or hearing is required by statute, a final rule may be adopted and may become effective without prior compliance with the provisions of this subsection and subsections (c) and (f) of this section if—

"(A) the agency for good cause finds that providing notice and public procedure thereon before the rule becomes effective is impracticable or contrary to an important public interest;

"(B) the agency publishes the rule in the Federal Register with such finding and a succinct explanation of the reasons therefor; and

"(C) the agency complies with the provisions of this subsection and subsections (c) and (f) of this section to the maximum extent feasible prior to the promulgation of the final rule and fully complies with such provisions as soon as reasonably practicable after the promulgation of the rule.

"(3) Except when notice or hearing is required by statute, this subsection and subsections (c) and (f) of this section do not apply to a rule when the agency for good cause finds that notice and public procedure thereon are unnecessary due

to the insignificant impact of the rule and publishes, at the time of publication of the final rule, such finding and a succinct explanation of the reason therefor.

"(4) Whenever the provisions of a final rule that an agency plans to adopt are so different from the provisions of the proposed rule that the original notice of proposed rule making did not fairly apprise the public of the issues ultimately to be resolved in the rule making or of the substance of the rule, the agency shall publish in the Federal Register a notice of the final rule the agency plans to adopt, together with the information relevant to such rule which is required by the applicable provisions of this section and which has not previously been published in the Federal Register. The agency shall allow a reasonable period for comment on such final rule.

"(c)(1) After providing the notice required by this section, the agency shall give interested persons at least sixty days to participate in the rule making through the submission of written data, views, or arguments..

"(2) In order to collect relevant information, and to identify and elicit full and representative public comment on the significant issues of a particular rule making, the agency may use such other procedures as the agency determines are appropriate, including—

APPENDIX V

"(A) the publication of an advance notice of proposed rule making;

"(B) the provision of notice, in forms which are more direct than notice published in the Federal Register, to persons who would be substantially affected by the proposed rule, but who are unlikely to receive notice of the proposed rule making through the Federal Register;

"(C) the provision of opportunities for oral presentation of data, views, information, or rebuttal arguments at informal public hearings, which may be held in the District of Columbia and other locations;

"(D) the provision of summaries, explanatory materials, or other technical information in response to public inquiries concerning the issues involved in the rule making; and

"(E) the adoption or modification of agency procedural rules to reduce the cost or complexity of participation in a rule making.

The decision of the agency to use or not to use such other procedures in a rule making pursuant to this paragraph shall not be subject to judicial review.

"(3)(A) The opportunity for participation in a rule making for a major rule (as defined in section 621(4) of this title) shall include the opportunity for oral presentation of

data, views, and information at informal public hearings. Such public hearings—

"(i) may include an opportunity for oral rebuttal or argument where appropriate; and

"(ii) shall include an opportunity for direct and cross-examination of the principal agency employees or other persons who prepared for the agency data on which the agency substantially relied in formulating the rule, and of any other persons who present testimony, documents, or other information at such hearings, where other procedures, such as the convening of public meetings, conferences or panel discussions, or the presentation of staff arguments for comment and rebuttal, are determined to be inadequate for the resolution of significant issues of fact upon which the rule is based.

"(B) No court shall hold unlawful or set aside an agency rule because of a failure by the agency to use a particular procedure pursuant to subparagraph (A) of this paragraph unless—

"(i) an objection to the failure to use such procedure was presented to the agency in a timely fashion or there are extraordinary circumstances that excuse the failure to present a timely objection; and

APPENDIX V

"(ii) the court finds that such failure substantially precluded a fair consideration and informed resolution of a central issue of the rule making taken as a whole.

"(4) To ensure an orderly and expeditious proceeding, the agency may establish reasonable procedures to regulate the course of informal public hearings under paragraphs (2) and (3) of this subsection, including the designation of representatives to make oral presentations or engage in direct or cross-examination on behalf of several parties with a common interest in a rule making. Transcripts shall be made of all such public hearings.

"(5) An agency shall publish any final rule it adopts in the Federal Register, together with a concise statement of the basis and purpose of the rule and a statement of when the rule may become effective. The statement of basis and purpose shall include—

"(A) an explanation of the need for, objectives of, and statutory authority for the rule;

"(B) a discussion of any significant issues raised by the comments on the proposed rule, including a description of the reasonable alternatives to the rule proposed by the agency and by interested persons, and the reasons why each such alternative was rejected; and

"(C) an explanation of how the factual conclusions upon which the rule is based are substantially support-

ed in the rule making file maintained pursuant to subsection (f) of this section.

"(6) When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

"(d)(1) An agency shall publish the final rule adopted in the Federal Register at least thirty days before the effective date of the rule. An agency may make a rule effective in less than thirty days after publishing the final rule in the Federal Register in the case of a rule that grants or recognizes an exemption or relieves a restriction, or in the case of a rule for which the agency for good cause finds that such a delay in the effective date would be contrary to an important public interest and publishes such finding and an explanation of the reasons therefor, with the final rule.

"(2) In promulgating a final rule, the agency may not substantially rely on any factual or methodological material that was not placed in the rule making file maintained pursuant to subsection (f) of this section in time to afford an adequate opportunity for public comment thereon during the period for public participation in the rule making. Notwithstanding the preceding sentence, an agency may rely on such material—

"(A) if, in the case of material developed by or for the agency, such material was placed in the rule

APPENDIX V

making file promptly upon its completion and, if such material is of central relevance to the rule making, was made available in time for interested persons to have an adequate opportunity to comment thereon;

"(B) if, in the case of material submitted by a person outside the agency, such material was placed in the rule making file promptly upon its receipt by the agency and, if such material is of central relevance to the rule making, the agency provided not less than fifteen days for interested persons to comment thereon in addition to the period for comment provided under paragraph (1) of subsection (c);

"(C) if such material is material of which the agency properly can take official notice; or

"(D) if such material is material referred to in subsection (f)(3) of this section and the agency has complied with the requirements of that subsection.

"(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule, for an interpretation regarding the meaning of a rule, and for a variance or exemption from the terms of a rule if the agency may grant such variance or exemption. The agency shall act on such petitions with reasonable promptness. The response of the agency to each such petition shall be in writing accompanied by a statement of reasons.

"(f)(1) The agency shall maintain a file for each rule making proceeding conducted pursuant to this section and shall maintain a current index to such file. The file and the material excluded from the file pursuant to paragraph (2) of this subsection shall constitute the rule making record for purposes of judicial review. Except as provided in paragraph (2) of this subsection, the file shall be made available to the public beginning on the date on which the agency makes an initial publication concerning the rule. The file shall include—

"(A)(i) the notice of proposed rule making and any supplement to or modification or revision of such notice; and

"(ii) any advance notice of proposed rule making;

"(B) copies of all written comments received on the proposed rule;

"(C) a transcript of any public hearing conducted in the rule making;

"(D) copies, or an identification of the place at which copies may be obtained, of all material described by the agency pursuant to subsection (b)(1)(F) of this section and of other factual and methodological material not described by the agency pursuant to such subsection that pertains directly to the rule making and that the agency considered in connection with the rule

APPENDIX V

making, or that was prepared by or for the agency in connection with the rule making;

"(E) any statement, description, analysis, or any other material that the agency is required to make public in connection with the rule making, including any preliminary or final regulatory analysis issued by the agency pursuant to chapter 6 of this title;

"(F) copies of all written material pertaining to the rule, including any drafts of the proposed and the final rule, submitted by the agency to the President or his designee directed by the President to review proposed or final rules for their regulatory impact; and

"(G) a written explanation of the specific reasons for any significant changes made by the agency in the drafts of the proposed or final rule which respond to any comment received by the agency on the draft proposed, proposed draft final, or final rule, made by the President or his designee directed by the President to review proposed or final rules for their regulatory impact.

"(2) The agency shall place the materials described in clauses (A) through (H) of the last sentence of paragraph (1) in the file required by such paragraph as soon as practicable after such materials become available to the agency.

"(3) The file required by paragraph (1) of this subsection need not include any material that need not be made available to the public under section 552 of this title if the agency includes in such file a statement that notes the existence of such material and the basis upon which the material is exempt from public disclosure under such section. The agency may not substantially rely on any such material in formulating a rule unless it makes the substance of such material available for adequate comment by interested persons. The agency may use summaries, aggregations of data, or other appropriate mechanisms so as to protect the confidentiality of such material to the maximum extent possible.

"(4) No court shall hold unlawful or set aside an agency rule because of a violation of paragraph (1) of this subsection unless the court finds that such violation has precluded fair public consideration of a material issue of the rule making taken as a whole. Judicial review of compliance or noncompliance with paragraph (1) of this subsection shall be limited to review of action or inaction on the part of an agency.

"(g) For a period of one year after the effective date of a final rule issued pursuant to this section, such rule shall not substantially change the requirements of any contract, cooperative agreement, or grant existing on such effective date between a Federal agency and a State or local government. The preceding sentence does not apply to any case in which

APPENDIX V

the agency for good cause finds that a delay in the effect of the rule would be contrary to an important public interest and publishes such finding and an explanation of the reasons therefor, with the final rule.

"(h) Nothing in this section authorizes the use of appropriated funds available to any agency to pay the attorney's fees or other expenses of persons participating or intervening in agency proceedings.".

REGULATORY ACTIVITIES: ANALYSIS; PRIORITIES AND REVIEW; REPORT

SEC. 4. (a) Chapter 6 of title 5, United States Code, is amended by adding at the end thereof the following:

"SUBCHAPTER II—ANALYSIS OF AGENCY PROPOSALS

"§ 621. Definitions

"For purposes of this subchapter and subchapters III and IV of this chapter:

"(1) The term 'agency' has the same meaning as in section 551(1) of this title.

"(2) The term 'person' has the same meaning as in section 551(2) of this title.

"(3) The term 'rule' has the same meaning as in section 551(4) of this title, except that such term does not include—

"(A) a rule of particular applicability that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers or acquisitions, or accounting practices or disclosures bearing on any of the foregoing;

"(B) a rule relating to monetary policy proposed or promulgated by the Board of Governors of the Federal Reserve System; or

"(C) a rule issued by the Federal Election Commission or a rule issued by the Federal Communications Commission pursuant to sections 315 and 312(a)(7) of the Communications Act of 1934.

"(4) The term 'major rule' means—

"(A) a rule or a group of closely related rules that the agency, the President, or the officer selected under section 624 of this title reasonably determines is likely to have an annual effect on the economy of $100,000,000 or more in reasonably quantifiable direct and indirect costs; and

"(B) a rule or a group of closely related rules that is otherwise designated a major rule by the agency proposing the rule, or is so designated by the President, or by the officer selected under sec-

APPENDIX V

tion 624 of this title, on the ground that the rule is likely to result in—

"(i) a substantial increase in costs or prices for wage earners, consumers, individual industries, nonprofit organizations, Federal, State, or local government agencies, or geographic regions; or

"(ii) significant adverse effects on competition, employment, investment, productivity, innovation, the environment, public health or safety, or the ability of enterprises whose principal places of business are in the United States to compete in domestic or export markets.

For purposes of subparagraph (A) of this paragraph, the term 'rule' does not mean—

"(I) a rule that involves the internal revenue laws of the United States;

"(II) a rule that authorizes the introduction into commerce or recognizes the marketable status of a product, pursuant to sections 408, 409(c), and 706 of the Federal Food, Drug, and Cosmetic Act;

"(III) a rule exempt from notice and public procedure pursuant to section 553(a) of this title; or

"(IV) a rule relating to the viability, stability, asset powers, or categories of accounts of, or permissible interest rate ceilings applicable to, depository institutions the deposits or accounts of which are insured by the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Share Insurance Fund of the National Credit Union Administration Board.

"(5) The term 'benefit' means the reasonably identifiable significant benefits and beneficial effects, including social and economic benefits and effects, that are expected to result directly or indirectly from implementation of a rule or an alternative to a rule.

"(6) The term 'cost' means the reasonably identifiable significant costs and adverse effects, including social and economic costs and effects, that are expected to result directly or indirectly from implementation of a rule or an alternative to a rule.

"§ 622. Regulatory analysis

"(a) Prior to publishing notice of proposed rule making for any rule, each agency shall determine whether the rule is

APPENDIX V

or is not a major rule within the meaning of section 621(4)(A) of this title and, if it is not, whether it should be designated a major rule under section 621(4)(B) of this title. For the purpose of any such determination or designation, a group of closely related rules shall be considered as one rule. Every notice of proposed rule making shall include a succinct statement and explanation of the agency's determination of whether or not the rule is a major rule within the meaning of section 621(4)(A) of this title and, if applicable, of its designation as a major rule under section 621(4)(B) of this title.

"(b) The President or the officer selected by the President under section 624 of this title may determine that a rule is a major rule within the meaning of section 621(4)(A) of this title or may designate a rule as a major rule under section 621(4)(B) of this title not later than thirty days after the publication of the notice of proposed rule making for that rule. Such determination or designation shall be published in the Federal Register, together with a succinct statement of the basis for the determination or designation. The President or the officer selected by the President under section 624 of this title may designate not more than seventy-five rules as major rules under section 621(4)(B) of this title in any fiscal year.

"(c)(1) When the agency publishes a notice of proposed rule making for a major rule, the agency shall issue and place in the rule making file maintained under section 553(f) of this

APPENDIX V

title a preliminary regulatory analysis and shall include in such notice of proposed rule making a summary of the analysis. When the President or the officer selected by the President under section 624 of this title has published a determination or designation that a rule is a major rule after the publication of the notice of proposed rule making for that rule, the agency shall promptly issue and place in the rule making file maintained under section 553(f) of this title a preliminary regulatory analysis for the rule and shall publish in the Federal Register a summary of such analysis. Following the issuance of a preliminary regulatory analysis under the preceding sentence, the agency shall give interested persons an opportunity to comment thereon pursuant to section 553 of this title in the same manner as if the preliminary regulatory analysis had been issued with the notice of proposed rule making.

"(2) Each preliminary regulatory analysis shall contain—

"(A) a succinct description of the benefits of the proposed rule, including any beneficial effects that cannot be quantified, and an explanation of how the agency anticipates each benefit will be achieved by the proposed rule, including a description of the persons, classes of persons, or particular levels of Government likely to receive such benefits;

APPENDIX V

"(B) a succinct description of the costs of the proposed rule, including any costs that cannot be quantified, and an explanation of how the agency anticipates each such cost will result from the proposed rule, including a description of the persons, classes of persons, or particular levels of Government likely to incur such costs;

"(C) a succinct description of reasonable alternatives for achieving the identified benefits of the proposed rule, including alternatives that—

"(i) require no Government action;

"(ii) will accommodate differences between geographic regions; and

"(iii) employ performance or other standards which permit the greatest flexibility in achieving the identified benefits of the proposed rule;

"(D) a statement—

"(i) identifying any source of funds available from the Federal Government to pay State and local governments the costs incurred by such governments as a result of the proposed rule; or

"(ii) specifying that the agency does not know of any such source;

"(E) in any case in which the proposed rule is based on scientific evaluations or information, a de-

scription of action undertaken by the agency to verify the quality, reliability, and relevance of such scientific evaluations or scientific information; and

"(F) where it is not expressly or by necessary implication inconsistent with the provisions of the enabling statute pursuant to which the agency is proposing the rule, an explanation of how the identified benefits of the proposed rule are likely to justify the identified costs of the proposed rule, and an explanation of how the proposed rule is likely to substantially achieve the rule making objectives in a more cost-effective manner than the alternatives to the proposed rule.

"(d)(1) When the agency publishes a final major rule, the agency shall also issue and place in the rule making file maintained under section 553(f) of this title a final regulatory analysis, and shall include a summary of the analysis in the statement of basis and purpose required by section 553 (c)(6) of this title. Notwithstanding the preceding sentence, in any case in which an agency, under section 553(b)(2) of this title, is not required to comply with subsections (b) through (f) of section 553 of this title prior to the adoption of a final rule, an agency is not required to comply with the preceding sentence prior to the adoption of the final rule but shall comply with such sentence when complying with section 553(b)(2)(C) of this title.

APPENDIX V

"(2) Each final regulatory analysis shall contain—

"(A) a description and comparison of the benefits and costs of the rule and of the reasonable alternatives to the rule described in the rule making; and

"(B) where it is not expressly or by necessary implication inconsistent with the provisions of the enabling statute pursuant to which the agency is acting, a reasonable determination, based upon the rule making file considered as a whole, that the benefits of the rule justify the costs of the rule, and that the rule will substantially achieve the rule making objectives in a more cost-effective manner than the alternatives described in the rule making.

"(e)(1) An agency shall describe the nature and extent of the nonquantifiable benefits and costs of a proposed and a final rule pursuant to this section in as precise and succinct a manner as possible. The description of the benefits and costs of a proposed and a final rule required under this section shall include a quantification or numerical estimate of the quantifiable benefits and costs. Such quantification or numerical estimate shall be made in the most appropriate unit of measurement and shall specify the ranges of predictions and explain the margins of error involved in the quantification methods and in the estimates used.

"(2) In evaluating and comparing costs and benefits, the agency shall not rely on cost or benefit information submitted by any person that is not accompanied by data, analysis, or other supporting materials that would enable the agency and other persons interested in the rule making to assess the accuracy and reliability of such information. The agency evaluations of the relationships of the benefits of a proposed and final rule to its costs required by this section shall be clearly articulated in accordance with the provisions of this section. An agency is not required to make such evaluation primarily on a mathematical or numerical basis.

"(f) The preparation of the preliminary or final regulatory analysis required by this section shall only be performed by an officer or employee of the agency. The provisions of the preceding sentence do not preclude a person outside the agency from gathering data or information to be used by the agency in preparing any such regulatory analysis or from providing an explanation sufficient to permit the agency to analyze such data or information. If any such data or information is gathered or explained by a person outside the agency, the agency shall specifically identify in the preliminary or final regulatory analysis the data or information gathered or explained and the person who gathered or explained it, and shall describe the arrangement by which the informa-

APPENDIX V

tion was procured by the agency, including the total amount of funds expended for such procurement.

"(g) The requirements of this section do not alter the criteria for rule making otherwise applicable under other statutes.

"§ 623. Judicial review

"(a) Compliance or noncompliance by an agency with the provisions of this subchapter shall not be subject to judicial review except according to the provisions of this section.

"(b) Any determination by the President or by the officer selected under section 624 of this title that a rule is a major rule within the meaning of section 621(4)(A) of this title, and any designation by the President or the officer selected under section 624 of this title that a rule is a major rule under section 621(4)(B) of this title, or any failure to make such a designation, shall not be subject to judicial review in any manner.

"(c) The determination of an agency of whether a rule is or is not a major rule within the meaning of section 621(4)(A) of this title shall be set aside by a reviewing court only upon a clear and convincing showing that the determination is erroneous in light of the information available to the agency at the time it made the determination. Any designation by an agency that a rule is a major rule under section 621(4)(B) of

this title, or any failure to make such a designation, shall not be subject to judicial review in any manner.

"(d) Any regulatory analysis prepared under section 622 of this title shall not be subject to judicial consideration separate or apart from review of the rule to which it relates. When an action for judicial review of a rule is instituted, any regulatory analysis for such rule shall constitute part of the whole rule making record of agency action for the purpose of judicial review of the rule and shall, to the extent relevant, be considered by a court in determining the legality of the rule.

"§ 624. Executive oversight

"(a) The President shall have the authority to establish procedures for agency compliance with this subchapter and subchapter III of this chapter. The President shall have the authority to monitor, review, and ensure agency implementation of such procedures. The President shall report annually to the Congress on agency compliance or noncompliance with the requirements of this chapter.

"(b) Any procedures established pursuant to the authority granted under subsection (a) of this section shall be adopted after the public has been afforded an opportunity to comment thereon, and shall be consistent with the prompt completion of rulemaking proceedings. If such procedures include review of preliminary or final regulatory analyses to ensure

APPENDIX V

that they comply with the procedures established pursuant to subsection (a), the time for any such review of a preliminary regulatory analysis shall not exceed thirty days following the receipt of that analysis by the President or by an officer to whom the authority granted under subsection (a) of this section has been delegated pursuant to subsection (c) of this section, and the time for such review of a final regulatory analysis shall not exceed thirty days following the receipt of that analysis by the President or such officer. The times for each such review may be extended for good cause by the President or such officer for an additional thirty days. Notice of any such extension, together with a succinct statement of the reasons therefor, shall be inserted in the rule making file.

"(c) The President may delegate the authority granted by subsection (a) of this section, in whole or in part, to the Vice President or to an officer within the Executive Office of the President whose appointment has been subject to the advice and consent of the Senate. Any such notice with respect to a delegation to the Vice President shall contain a statement by the Vice President that the Vice President will make every reasonable effort to respond to Congressional inquiries concerning the exercise of the authority delegated under this subsection. Notice of any such delegation, or any revocation or modification thereof, shall be published in the Federal Register.

APPENDIX V

"(d) The authority granted under subsection (a) of this section shall not apply to rules issued by the Nuclear Regulatory Commission.

"(e) Any exercise of the authority granted under this section, or any failure to exercise such authority, by the President or by an officer to whom such authority has been delegated under subsection (c) of this section, shall not be subject to judicial review in any manner under this Act.

"SUBCHAPTER III—REGULATORY PRIORITIES AND REVIEW

"§ 631. Review of agency rules

"(a)(1)(A) Not later than nine months after the effective date of this section, each agency shall prepare and publish in the Federal Register a proposed schedule for the review, in accordance with this section, of—

"(i) each rule of the agency which is in effect on such effective date and which, if adopted on such effective date, would be a major rule under section 621(4)(A) of this title, and

"(ii) each rule of the agency in effect on such effective date (in addition to the rules described in clause (i)) which the agency has selected for review.

"(B) Each proposed schedule required by subparagraph (A) shall include—

APPENDIX V

"(i) a brief explanation of the reasons the agency considers each rule on the schedule to be such a major rule under section 621(a)(4)(A) of this title or of the reasons why the agency selected the rule for review;

"(ii) a date set by the agency, in accordance with the provisions of subsection (b)(1) of this section, for the completion of the review of each such rule; and

"(iii) a statement that the agency requests comments from the public on the proposed schedule.

"(C) The agency shall set a date to initiate review of each rule on the schedule in a manner which will ensure the simultaneous review of related items and which will achieve a reasonable distribution of reviews over the period of time covered by the schedule.

"(2) At least ninety days before publishing in the Federal Register the proposed schedule required under paragraph (1), each agency shall make the proposed schedule available to the President, or to the Vice President or other officer to whom oversight authority has been delegated under section 624(b) of this title. The President or that officer may select for review in accordance with this section any additional rule that the President or such officer determines to be a major rule under section 621(4)(A) of this title.

"(3) Not later than one year after the effective date of this section, each agency shall publish in the Federal Regis-

APPENDIX V

ter a final schedule for the review of the rules referred to in paragraphs (1) and (2) of this subsection. Each agency shall publish with the final schedule the response of the agency to comments received concerning the proposed schedule.

"(b)(1) Except where explicitly provided otherwise by statute, the agency shall, pursuant to subsections (c) through (e) of this section, review:

"(A) each rule on the schedule promulgated pursuant to subsection (a) of this section;

"(B) each major rule under section 621(4) of this title promulgated, amended, or otherwise renewed by an agency after the date of the enactment of this section; and

"(C) each rule promulgated after the date of enactment of this section which the President or the officer designated by the President pursuant to subsection (a)(2) of this section determines to be a major rule under section 621(4)(A) of this title.

Except where an extension has been granted pursuant to subsection (f) of this section, the review of a rule required by this section shall be completed within ten years after the effective date of this section or within ten years after the date on which the rule is promulgated, amended, or renewed, whichever is later.

APPENDIX V

"(2) A rule required to be reviewed under the preceding subsection on grounds that it is major need not be reviewed if the agency determines that such rule, if adopted at the time of the planned review, would not be major under the definition previously applied to it. When the agency makes such a determination, it shall publish a notice and explanation of the determination in the Federal Register.

"(c) An agency shall publish in the Federal Register a notice of its proposed action under this section with respect to a rule being reviewed. The notice shall include—

"(1) an identification of the specific statutory authority under which the rule was promulgated and a statement specifying the agency's determination of whether the rule continues to fulfill the intent of Congress in enacting that authority;

"(2) an assessment of the benefits and costs of the rule during the period in which it has been in effect;

"(3) an explanation of the proposed agency action with respect to the rule; and

"(4) a statement that the agency seeks proposals from the public for modifications or alternatives to the rule which may accomplish the objectives of the rule in a more effective or less burdensome manner.

"(d) If an agency proposes to repeal or amend a rule under review pursuant to this section, the agency shall, after

issuing the notice required by subsection (c) of this section, comply with the provisions of this chapter and chapter 5 of this title or other applicable law. The requirements of such provisions and related requirements of law shall apply to the same extent and in the same manner as in the case of a proposed agency action to repeal or amend a rule which is not taken pursuant to the review required by this section.

"(e) If an agency proposes to renew without amendment a rule under review pursuant to this section, the agency shall—

"(1) give interested persons not less than sixty days after the publication of the notice required by subsection (c) of this section to comment on the proposed renewal; and

"(2) publish in the Federal Register notice of the renewal of such rule and an explanation of the continued need for the rule, and, if the renewed rule is a major rule under section 621(4) of this title, include with such notice an explanation of the reasonable determination of the agency that the rule complies with the provisions of section 622(d)(2)(B) of this title.

"(f)(1) Any agency, which for good cause finds compliance with this section with respect to a particular rule to be impracticable during the period provided in subsection (b) of this section, may request the President, or the officer desig-

APPENDIX V

nated by the President pursuant to subsection (a)(2) of this section, to establish a period longer than ten years for the completion of the review of such rule. The President or that officer may extend the period for review of a rule to a total period of not more than fifteen years. Such extension shall be published in the Federal Register with an explanation of the reasons therefor.

"(2) An agency may, with the concurrence of the President or the officer designated by the President pursuant to subsection (a)(2) of this section, or shall, at the direction of the President or that officer, alter the timing of review of rules under any schedule required by this section for the review of rules if an explanation of such alteration is published in the Federal Register at the time such alteration is made.

"(g) In any case in which an agency has not completed the review of a rule within the period prescribed by subsection (b) or (f) of this section, the agency shall immediately publish in the Federal Register a notice proposing to amend, repeal, or renew the rule under subsection (c) of this section, and shall complete proceedings pursuant to subsection (d) or (e) of this section within one hundred and eighty days of the date on which the review was required to be completed under subsection (b) or (f) of this section.

"(h)(1) Agency compliance or noncompliance with the provisions of subsection (a) of this section shall not be subject to judicial review in any manner.

"(2) Agency compliance or noncompliance with the provisions of subsections (b), (c), (e), (f), and (g) of this section shall be subject to judicial review only pursuant to section 706(a)(1) of this title.

"(i) Nothing in this section shall relieve any agency from its obligation to respond to a petition to issue, amend, or repeal a rule, for an interpretation regarding the meaning of a rule, or for a variance or exemption from the terms of a rule, submitted pursuant to section 553(e) of this title.

"§ 632. Regulatory agenda and calendar

"(a) Each agency shall publish in the Federal Register in April and October of each year an agenda of the rules that the agency expects to propose, promulgate, renew, or repeal in the succeeding twelve months. For each such rule, the agenda shall contain, at a minimum, and in addition to any other information required by law—

"(1) a general description of the rule, including a citation to the authority under which the action with respect to the rule is to be taken, or a specific explanation of the congressional intent to which the objectives of the rule respond;

APPENDIX V

"(2) a statement of whether or not the rule is or is expected to be a major rule;

"(3) an approximate schedule of the significant dates on which the agency will take action relating to the rule, including the dates for any notice of proposed rule making, hearing, and final action on the rule;

"(4) the name, address, and telephone number of an agency official responsible for answering questions from the public concerning the rule;

"(5) a statement specifying whether each rule listed on the previous agenda has been published as a proposed rule, has been published as a final rule, has become effective, has been repealed, or is pending in some other status; and

"(6) a cumulative summary of the status of the rules listed on the previous agenda in accordance with clause (5) of this subsection.

"(b) The President or an officer in the Executive Office of the President whose appointment has been subject to the advice and consent of the Senate shall publish in the Federal Register in May and November of each year a Calendar of Federal Regulations listing each of the major rules identified in the regulatory agendas published by agencies in the preceding month. Each rule listed in the calendar shall be accompanied by a summary of the information relating to the

rule that appeared in the most recent regulatory agenda in which the rule was identified.

"(c) An agency may propose or promulgate a major rule that was not listed in the regulatory agenda required by subsection (a) of this section only if the agency publishes with the rule an explanation of the omission of the rule from such agenda and otherwise complies with this section with respect to that rule.

"(d) Any compliance or noncompliance by the agency with the provisions of this section shall not be subject to judicial review.

"§ 633. Establishment of deadlines

"(a)(1) Whenever any agency publishes a notice of proposed rule making pursuant to section 553 of this title, the agency shall include in such notice an announcement of the date by which it intends to complete final agency action on the rule.

"(2) If any agency announcement under this section indicates that the proceeding relating to such rule will require more than one year to complete, the agency shall also indicate in the announcement the date by which the agency intends to complete each major portion of that proceeding. In carrying out the requirements of this subsection, the agency shall select dates for completing agency action which will assure the most expeditious consideration of the rule which is

APPENDIX V

possible, consistent with the interests of fairness and other agency priorities.

"(3) The requirements of this subsection shall not apply to any rule on which the agency intends to complete action within one hundred and twenty days after providing notice of the proposed action.

"(b) If an agency fails to complete action in a proceeding, or a major portion of the proceeding, by the date announced pursuant to subsection (a) of this section, or, in the case of a proceeding described in paragraph (3) of such subsection, if an agency fails to complete action within one hundred and twenty days after providing notice of such proposed action, and the expected delay in completing action will exceed thirty days, the agency shall promptly announce the new date by which the agency intends to complete action in such proceeding and new dates by which the agency intends to complete action on each major portion of the proceeding.

"(c) Compliance or noncompliance by an agency with the provisions of this section shall not be subject to judicial review except in accordance with subsection (d).

"(d) In determining whether to compel agency action unreasonably delayed pursuant to section 706(a)(1) of this title, the reviewing court shall consider, in addition to any other relevant factors, the extent to which the agency has failed to comply with this section.

"SUBCHAPTER IV—REPORT TO THE CONGRESS

"§ 641. Annual report

"Not later than January 31 of each year, the President shall report to the Congress on the regulatory activities of the Government. The report shall include—

"(1) a description of the regulatory functions and activities of the Government, and the relationship of such functions and activities to national needs; and

"(2) an estimate, for the national economy and for each of the major sectors of the national economy, of the costs and benefits resulting from—

"(A) all major rules promulgated during the preceding fiscal year;

"(B) all major rules included on the regulatory agenda published under section 632 of this title during April and October of the year preceding the year in which the report is made; and

"(C) all major rules scheduled for review under section 631 of this title to the extent possible.".

(b) Such chapter is further amended—

(1) by inserting after the chapter analysis the following new subchapter heading:

"SUBCHAPTER I—REGULATORY FLEXIBILITY";

and

APPENDIX V

(2) by striking out "this chapter" each place it appears in subchapter I and inserting in lieu thereof in each such place "this subchapter".

(c) The chapter analysis of such chapter is amended—

(1) by inserting after the chapter heading the following new subchapter heading:

"SUBCHAPTER I—REGULATORY FLEXIBILITY";

and

(2) by adding at the end thereof the following:

"SUBCHAPTER II—ANALYSIS OF AGENCY PROPOSALS

"Sec.
"621. Definitions.
"622. Regulatory analysis.
"623. Judicial review.
"624. Executive oversight.

"SUBCHAPTER III—REGULATORY PRIORITIES AND REVIEW

"631. Review of agency rules.
"632. Regulatory agenda and calendar.
"633. Establishment of deadlines.

"SUBCHAPTER IV—REPORT TO THE CONGRESS

"641. Annual report.".

JUDICIAL REVIEW

SEC. 5. Section 706 of title 5, United States Code, is amended to read as follows:

"§ 706. Scope of review

"(a) To the extent necessary to decision and when presented, the reviewing court shall independently decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of agency action. The reviewing court shall—

"(1) compel agency action unlawfully withheld or unreasonably delayed; and

"(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege, or immunity;

"(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

"(D) without observance of procedure required by law;

"(E) unsupported by substantial evidence in a proceeding subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

"(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

"(b) In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

"(c) In making determinations concerning statutory jurisdiction or authority under subsection (a)(2)(C) of this sec-

APPENDIX V

tion, the court shall require that action by the agency is within the scope of the agency jurisdiction or authority on the basis of the language of the statute or, in the event of ambiguity, other evidence of ascertainable legislative intent. In making determinations on other questions of law, the court shall not accord any presumption in favor of or against agency action, but in reaching its independent judgment concerning an agency's interpretation of a statutory provision, the court shall give the agency interpretation such weight as it warrants, taking into account the discretionary authority provided to the agency by law.

"(d) In making a finding under subsection (a)(2)(A) of this section, the court shall determine whether the factual basis of a rule adopted in a proceeding subject to section 553 of this title is without substantial support in the rule making file.".

VENUE

SEC. 6. (a) Section 2112 of title 28, United States Code, is amended—

(1) by striking out the last three sentences of subsection (a);

(2) by redesignating subsections (b) and (c) as subsections (c) and (d), respectively; and

(3) by inserting the following new subsection:

"(b)(1) If proceedings have been instituted in two or more courts of appeals with respect to the same agency action and the first such proceeding was instituted more than five days before the second, the record shall be filed in that court in which the proceeding was first instituted. If the first such proceeding was not instituted more than five days before the institution of a later proceeding with respect to the same agency action, and the agency, board, commission, or officer concerned has received written notice from the parties instituting each of these proceedings, the agency, board, commission, or officer concerned shall promptly advise in writing the Administrative Office of the United States Courts, with respect to the first proceeding and all proceedings initiated within five days of the first proceeding, that such multiple proceedings have been instituted and shall identify each court for which it has notice that such proceedings are pending. Pursuant to a system of random selection devised for this purpose, the Administrative Office thereupon shall select the court in which the record shall be filed from among those identified by the agency. Upon notification of such selection, the agency, board, commission, or officer concerned shall promptly file the record in such court. For the purpose of review of agency action which has previously been remanded to the agency, board, commission, or officer concerned, the

APPENDIX V

record shall be filed in the court of appeals which remanded such order.

"(2) Where proceedings have been instituted in two or more courts of appeals with respect to the same agency action and the record has been filed in one of such courts pursuant to paragraph (1), the other courts in which such proceedings are pending shall promptly transfer such proceedings to the court of appeals in which the record has been filed. Pending selection of a court pursuant to subsection (1), any court in which a proceeding has been instituted may postpone the effective date of the agency action until fifteen days after the Administrative Office has selected the court in which the record shall be filed. Such postponement by the court may thereafter be modified, revoked, or extended by the court in which the record is to be filed.

"(3) Any court in which a proceeding with respect to any agency action is pending, including any court selected pursuant to paragraph (1), may transfer such proceeding to any other court of appeals for the convenience of the parties or otherwise in the interest of justice.".

(b) Section 604(a) of title 28, United States Code, is amended—

(1) by redesignating paragraphs (17) and (18) as paragraphs (18) and (19), respectively, and

(2) by inserting after paragraph (16) the following new paragraph:

"(17) Pursuant to section 2112 of this title, where proceedings with respect to action of any agency, board, commission, or officer have been instituted in two or more courts of appeals, administer a system of random selection to determine the appropriate court in which the record is to be filed.".

ADVISORY COMMITTEE

SEC. 7. Clause (iii) of section 3(2)(C) of the Federal Advisory Committee Act is amended to read as follows: "(iii) any committee which is composed wholly of full-time officers or employees of the Federal Government, or elected officials of State or local governments acting in their official capacities or their representatives or representatives of their national organizations.".

RESOLUTION OF AGENCY JURISDICTIONAL CONFLICT

SEC. 8. (a) Section 2201 of title 28, ~~of the~~ United States Code, is amended by inserting "(a)" before "In" and by adding at the end thereof the following new subsections:

"(b)(1) Except as provided in paragraph (3), upon the filing of an appropriate pleading by a regulatory agency or a public utility, the district courts shall have original jurisdiction of any civil action or proceeding to resolve a controversy between two or more regulatory agencies, with respect to

APPENDIX V

jurisdiction to regulate any of the rates, services, or records relating thereto, of a public utility unless all of such agencies are agencies of the same State.

"(2) If any party shall apply to the court before whom the pleading is filed for leave to adduce additional evidence relevant to a finding of jurisdiction, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such additional evidence in proceedings before one or more of the regulatory agency parties to the action brought hereunder, the court may order such additional evidence to be taken before any of such regulatory agencies and to be adduced upon the hearing in such manner and upon such terms and conditions as the court deems proper.

"(3) If the courts of appeals have exclusive original jurisdiction to review agency action of a regulatory agency, then an action or proceeding under this subsection with respect to a controversy to which such regulatory agency is a party shall be brought in such court of appeals rather than in the district court.

"(c) The court may declare the rights and other legal relations of the parties to an action or proceeding brought under subsection (b) to the extent necessary to resolve the controversy with respect to jurisdiction and may take any action necessary to maintain the status quo pending such dec-

laration, or pending appeal of such declaration, including staying any civil action or proceeding that might be affected by such declaration. Such action or declaration shall not be withheld—

"(1) on the ground that a controversy with respect to matters other than jurisdiction to regulate may exist between or among the parties,

"(2) due to failure to pursue or exhaust any administrative remedies, or

"(3) due to inconsistent provisions of other statutes providing for judicial review of such agency action, including the regulatory statutes under which the controversy has arisen.

Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

"(d) For purposes of this subsection—

"(1) the term 'State' includes the District of Columbia and any territory or possession of the United States;

"(2) the term 'public utility' is any entity which offers its services to the public or any segment thereof, and whose rates are subject to regulation on a cost of service or rate of return basis by one or more regulatory agencies;

APPENDIX V

"(3) the term 'regulatory agency' includes any agency having or exercising any regulatory function with respect to any public utility; and

"(4) the term 'agency' means the United States, a State or political subdivision of a State, or any agency or instrumentality of the United States or any such State subdivision or agency.".

(b)(1) Chapter 151 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 2203. Process and procedure

"In any civil action or proceeding under section 2201(b) of this title, (1) the United States or any agency of the United States may join or be joined as a party, (2) any State or State subdivision or agency thereof may join or, with its consent where necessary, be joined as a party, and a district court may issue its process for such purposes without regard to territorial limitations.".

(2) The table of sections for chapter 151 of title 28, United States Code, is amended by adding at the end thereof the following new item:

"2203. Process and procedure.".

(c)(1) Chapter 87 of title 28, United States Code, is amended by adding at the end thereof the following new section:

APPENDIX V

"§ 1409. Public utility jurisdictional controversies

"Any civil action or proceeding for a declaratory judgment under section 2201(b) of this title may be brought in any judicial district in which the public utility resides or has its principal office, or in the United States District Court for the District of Columbia, except that whenever one or more States or subdivisions thereof or the agencies of a State or a subdivision thereof are parties, the civil action or proceeding must be brought in a judicial district within one of such States.".

(2) The table of sections for chapter 87 of title 28, United States Code, is amended by adding at the end thereof the following new item:

"1409. Public utility jurisdictional controversies.".

PROHIBITION AGAINST INTERVENOR FUNDING

SEC. 9. (a) Subchapter II of chapter 5 of title 5, United States Code, is amended by adding at the end thereof the following new section:

"§ 560. Prohibition against intervenor funding

"Except as provided in section 504 of this title, section 2412 of title 28, section 319 of the Federal Power Act, section 18(h) of the Federal Trade Commission Act, section 7(c) of the Consumer Product Safety Act, section 22 of the Act entitled 'An Act to provide certain basic authority for the Department of State', approved August 1, 1956, and paragraphs (4) and (5) of section 6(c) of the Toxic Substances

APPENDIX V

Control Act, and except as otherwise expressly authorized by statute, no appropriated funds available to any agency may be used to pay the expenses of persons participating or intervening in agency proceedings.".

(b) The table of sections for such chapter is amended by adding at the end thereof the following:

"560. Prohibition against intervenor funding.".

USE OF STATE AND LOCAL REQUIREMENTS

SEC. 10. (a) Subchapter II of chapter 5 of title 5, United States Code, is amended by adding at the end thereof the following new section:

"§ 56ϕ. Use of duplicative State or local requirements

"(a) Except as otherwise provided by law, the head of each Federal agency is authorized, in the administration of a Federal statute with respect to any State or locality, to adopt as a Federal rule a regulation of that State or local government or use as a Federal recordkeeping or reporting requirement or implementation procedure a recordkeeping or reporting requirement or implementation procedure of that State or locality if the head of the agency determines—

"(1) that such State or local government regulation, implementation procedure, recordkeeping requirement, or reporting requirement duplicates a Federal regulation, procedure, recordkeeping requirement, or reporting requirement; and

"(2) that such State or local government regulation, implementation procedure, recordkeeping requirement, or reporting requirement is substantively equivalent to or more stringent than the Federal regulation, procedure, recordkeeping requirement, or reporting requirement.

"(b) When the head of an agency determines to use a State or local recordkeeping or reporting requirement, or implementation procedure, as a Federal recordkeeping or reporting requirement or implementation procedure in that State or locality, the head of the agency shall prepare at a minimum, a written statement of the reasons for any determination made under subsection (a), and shall make such statement available to the public.

"(c) This section does not limit the authority or responsibility of the head of any agency to enforce Federal law.".

(b) Section 551 of title 5, United States Code, is amended by inserting the following between "rule" and the semicolon: ", or the adoption of a rule pursuant to section 56ϕ of this title".

(c) The table of sections for chapter 5 of such title is amended by inserting after the item relating to section 559 the following new item:

"56ϕ. Use of duplicative State or local requirements.".

APPENDIX V

PRESIDENTIAL AUTHORITY

SEC. 11. Nothing in this Act (1) limits the exercise by the President of the authority and responsibility that he otherwise possesses under the Constitution and other laws of the United States with respect to regulatory policies, procedures, and programs of departments, agencies, and offices, or (2) alters in any manner rulemaking authority vested by law in an agency to initiate or complete a rulemaking proceeding, or to issue, modify, or rescind a rule.

CONFORMING AMENDMENTS

SEC. 12. (a) Section 33(c) of the Federal Energy Administration Act of 1974 (15 U.S.C. 789(c)) is amended by striking out "(without regard to subsection (a)(2) thereof)" and inserting in lieu thereof "(without regard to clauses (2) and (4) of subsection (a) of such section)".

(b)(1) Section 3(e)(1) of the Federal Hazardous Substances Labeling Act (15 U.S.C. 1262(e)(1)) is amended by striking out "(other than clause (B) of the last sentence of subsection (b) of such section)" and inserting in lieu thereof "(other than paragraphs (2)(A) and (3) of subsection (b) of such section)".

(2) Section 3(e)(3)(C) of such Act (15 U.S.C. 1262(e)(3)(C)) is amended by inserting "(a)" after "section 706".

(c)(1) Section 5(a) of the Poison Prevention Packaging Act of 1970 (15 U.S.C. 1474(a)) is amended by striking out "(other than paragraph (3)(B) of the last sentence of subsection (b) of such section)" and inserting in lieu thereof "(other than paragraphs (2)(A) and (3) of subsection (b) of such section)".

(2) Section 5(b)(3) of such Act (15 U.S.C. 1474(b)(3)) is amended by inserting "(a)" after "section 706".

(d) Section 19(c)(1)(B)(iii)(II) of the Toxic Substances Control Act (15 U.S.C. 2618(c)(1)(B)(iii)(II)) is amended by striking out "section 553(c)" and inserting in lieu thereof "section 553(c)(6)".

(e) Section 4218(b) of title 18, United States Code, is amended—

(1) by striking out "section 553(b)(3)(A)" and inserting in lieu thereof "section 553(a)(3)"; and

(2) by striking out "statements" and inserting in lieu thereof "statement".

(f) Section 409 of the General Education Provisions Act (20 U.S.C. 1221e–4) is amended by striking out "exception provided under section 553(b)" and inserting in lieu thereof "exceptions provided under subsection (a)(3) and paragraphs (2)(A) and (3) of subsection (b) of section 553".

(g)(1) Section 508 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 358) is amended—

APPENDIX V

(A) by striking out "section 4 of the Administrative Procedure Act (5 U.S.C. 1003)" in subsection (c) and inserting in lieu thereof "section 553"; and

(B) by striking out "section 4 of the Administrative Procedure Act (5 U.S.C. 1003)" in subsection (e) and inserting in lieu thereof "section 553".

(2) Section 514(e)(4) of such Act (21 U.S.C. 360d(e)(4)) is amended by striking out "subsection (b)(A)" and inserting in lieu thereof "subsection (a)(3)".

(h) Section 426(a) of the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. 936(a)) is amended by striking out "subsection (a) thereof" and inserting in lieu thereof "subsection (a) (1), (2), and (4) of such section".

(i) Section 5(a) of the Deepwater Port Act of 1974 (33 U.S.C. 1504(a)) is amended by striking out "without regard to subsection (a) thereof" and inserting in lieu thereof "without regard to clauses (1), (2), and (4) of subsection (a) of such section".

(j) Section 10(a) of the Act of June 30, 1936 (49 Stat. 2036, as amended; 41 U.S.C. 43a(a)) is amended by striking out "section 4 of the Administrative Procedure Act, such Act" and inserting in lieu thereof "section 553 of title 5, United States Code, the provisions of chapters 5, 6, and 7 of such title".

(k) Section 2(a)(2) of the Act of June 25, 1936 (52 Stat. 1196; 41 U.S.C. 47(a)(2)) is amended by striking out "subsections (b), (c), (d), and (e) of section 553 of title 5, United States Code," and inserting in lieu thereof "section 553 of title 5, United States Code (without regard to clauses (1), (2), and (4) of subsection (a) of such section)".

(l) Section 170A(c) of the Atomic Energy Act of 1954 (42 U.S.C. 2210a(c)) is amended by striking out "(without regard to subsection (a)(2) thereof)" and inserting in lieu thereof "(without regard to clauses (2) and (4) of subsection (a) of such section)".

(m) Section 6(c)(2) of the Noise Control Act of 1972 (42 U.S.C. 4905(c)(2)) is amended by striking out "the first sentence of".

(n) Section 501(b)(3) of the Department of Energy Organization Act (42 U.S.C. 7191(b)(3)) is amended by striking out "subsection (a)(2) of such section with respect to public property, loans, grants, or contracts" and inserting in lieu thereof "subsection (a)(4) of such section".

(o) Section 307(d) of the Clean Air Act (42 U.S.C. 7607(d)) is amended by striking out "subparagraphs (A) or (B) of subsection 553(b)" in paragraph (1)(N) and inserting in lieu thereof "subsection (a)(3) and paragraphs (2)(A) and (3) of subsection (b) of section 553".

APPENDIX V

(p) Section 102(a) of the Ocean Thermal Energy Conversion Act of 1980 (42 U.S.C. 9112(a)) is amended by striking out "without regard to subsection (a) thereof" and inserting in lieu thereof "without regard to clauses (1), (2), and (4) of subsection (a) of such section".

(q) Section 310 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1740) is amended by striking out "section 553(a)(2)" and inserting in lieu thereof "clauses (2) and (4) of section 553(a)".

CONGRESSIONAL REVIEW

SEC. 13. (a) Title 5, United States Code, is amended by inserting immediately after chapter 7 the following new chapter:

"CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULE MAKING

"§ 801. Definitions

"For purposes of this chapter—

"(1) the term 'agency' has the same meaning as in section 551(1) of this title;

"(2) the term 'rule' means any rule which is subject to section 553 of this title;

"(3) the term 'resolution of disapproval' means a concurrent resolution of the Congress, the matter after

the resolving clause of which is as follows: 'That the Congress disapproves the recommended final rule issued by dealing with the matter of , which rule was transmitted to the Congress on the first blank being filled with the name of the agency issuing the rule, the second blank being filled with the title of the rule and such further description as may be necessary to identify it, and the third blank being filled with the date of transmittal of the rule to the Congress; and

"(4) the term 'appropriate committee' means the committee of the House of Representatives and the committee of the Senate which has primary legislative jurisdiction over the statute pursuant to which an agency issues a rule.

"§ 802. Congressional review of agency rules

"(a)(1) The provisions of this section do not apply to—

"(A) any rule for which an agency makes a finding under section 553(b)(3) of this title;

"(B) any rule of particular applicability that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing; and

APPENDIX V

"(C) any rule if—

"(i) the agency made a finding with respect to such rule under section 553(b)(2) of this title; or

"(ii) the head of the agency determines that the rule is being issued in response to an emergency situation or other exceptional circumstances requiring immediate agency action in the public interest; and

"(iii) on the date on which the agency issues the rule, the head of the agency submits to the chairman and ranking minority member of the appropriate committees a written notice specifying the reasons for the determination of the agency under clause (i) or (ii) of this subparagraph.

"(3) Notwithstanding any other provision of law, unless earlier withdrawn by the agency or earlier set aside by judicial action, a rule to which paragraph (1)(C) of this subsection applies shall terminate one hundred and twenty days after the date on which it is issued.

"(b)(1) Notwithstanding any other provision of law, any final rule subject to this section shall be considered a recommendation of the agency to the Congress and shall have no force and effect as a rule unless such rule has become effective in accordance with this section.

"(2)(A) Notwithstanding any other provision of law, no recommended final rule of an agency may become effective until the expiration of a period of forty-five days of continuous session of Congress after the date on which the rule is received by the Congress under paragraph (4) of this subsection. If before the expiration of such forty-five-day period, either appropriate committee orders reported or is discharged from consideration of a resolution of disapproval with respect to such rule, such rule may not become effective if within thirty days of continuous session of Congress after the date on which such committee orders reported or is discharged from further consideration of such resolution, one House of Congress agrees to such resolution of disapproval of the rule and within thirty additional days of continuous session of Congress after the date of transmittal of the resolution of disapproval to the other House, such other House agrees to such resolution of disapproval.

"(B) Whenever an appropriate committee reports a resolution of disapproval pursuant to this paragraph, the resolution shall be accompanied by a committee report specifying the reasons for the committee's action.

"(C) Notwithstanding subparagraph (A) of this paragraph, a recommended final rule may become effective at any time after the day on which either House of Congress defeats

APPENDIX V

a resolution of disapproval, and, in the case of the Senate, a motion to reconsider such resolution is disposed of.

"(3)(A) Except as provided in subparagraph (B) of this paragraph, if Congress adjourns sine die at the end of a Congress prior to the expiration of the periods specified in paragraph (2)(A) of this subsection with respect to a recommended final rule, the rule shall not become effective during that Congress. The agency which issued such recommended final rule may transmit such rule at any time after the first day of the following Congress in accordance with paragraph (4) of this subsection, and the periods specified in paragraph (2)(A) of this subsection with respect to any such rule shall begin on the date such rule is transmitted to the Congress.

"(B) If—

"(i) Congress adjourns sine die at the end of a Congress prior to the expiration of the periods specified in paragraph (2)(A) of this subsection with respect to a recommended final rule;

"(ii) an agency transmits such recommended final rule to the Congress at least forty-five days of continuous session of Congress prior to the day on which Congress adjourns sine die at the end of a Congress; and

"(iii) either House of Congress does not adopt a resolution of disapproval with respect to such recom-

mended final rule prior to the day on which Congress adjourns sine die at the end of a Congress,

such rule may become effective at any time after the day on which Congress adjourns sine die at the end of a Congress.

"(4)(A) On the day on which a recommended final rule is transmitted for publication to the Federal Register, an agency shall transmit to the Secretary of the Senate and the Clerk of the House of Representatives a copy of the complete text of such recommended final rule and a copy of any other materials transmitted to the Federal Register with such rule.

"(B)(i) If either House of Congress is not in session on the day on which a recommended final rule is transmitted for publication to the Federal Register, the periods specified in paragraph (2)(A) of this subsection with respect to such rule shall begin on the first day thereafter when both Houses of Congress are in session.

"(ii) The Secretary of the Senate and the Clerk of the House of Representatives are authorized to receive recommended final rules and materials transmitted under this paragraph on days when the Senate or the House of Representatives, as the case may be, is not in session.

"(C) On the day on which the Secretary of the Senate and the Clerk of the House of Representatives receive a recommended final rule and the materials transmitted with such

APPENDIX V

rule, the Secretary and the Clerk shall transmit a copy of such rule and such materials to the appropriate committees.

"(c)(1) If a recommended final rule of an agency is disapproved under this section, the agency may issue a recommended final rule which relates to the same acts or practices as the disapproved rule. Such recommended final rule—

"(A) shall be based upon—

"(i) the rule making record of the recommended final rule disapproved by the Congress; or

"(ii) such rule making record and the record established in supplemental rule making proceedings conducted by the agency in accordance with section 553 of this title, in any case in which the agency determines that it is necessary to supplement the existing rule making record; and

"(B) may reflect such changes as the agency considers necessary or appropriate including such changes as may be appropriate in light of congressional debate and consideration of the resolution of disapproval with respect to the rule.

"(2) An agency, after issuing a recommended final rule under this subsection, shall transmit such rule to the Secretary of the Senate and the Clerk of the House of Representatives in accordance with subsection (b) of this section, and

such rule shall only become effective in accordance with such subsection.

"(d) Congressional inaction on or rejection of a resolution of disapproval with respect to a recommended final rule shall not be deemed an expression of approval of such rule.

"§ 803. Procedures for consideration of resolutions of disapproval

"(a) The provisions of this section, paragraphs (3) and (4) of section 801, and paragraphs (2)(B) and (4)(C) of section 802(b) are enacted by Congress—

"(1) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of resolutions of disapproval; and they supersede other rules only to the extent that they are inconsistent therewith; and

"(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

"(b) Except as provided in subsection (e) of this section, resolutions of disapproval shall, upon introduction or receipt

APPENDIX V

from the other House of Congress, be immediately referred by the presiding officer of the Senate or the House of Representatives to the appropriate committee of the Senate or the House of Representatives, as the case may be.

"(c)(1)(A) Except as provided in subparagraph (B) of this paragraph, if the committee to which a resolution of disapproval has been referred does not report such resolution within thirty days of continuous session of Congress after the date of transmittal to the Congress of the recommended final rule to which such resolution relates, it shall be in order to move to discharge the committee from further consideration of such resolution.

"(B) If the committee to which a resolution of disapproval transmitted from the other House has been referred does not report such resolution within twenty days after the date of transmittal of such resolution from the other House, it shall be in order to move to discharge such committee from further consideration of such resolution.

"(2) Any motion to discharge under paragraph (1) of this subsection must be supported in writing by one-fifth of the Members, duly chosen and sworn, of the House of Congress involved, and is highly privileged in the House and privileged in the Senate (except that it may not be made after a resolution of disapproval has been reported with respect to the same rule); and debate thereon shall be limited to not

more than one hour, the time to be divided in the House of Representatives equally between those favoring and those opposing the motion to discharge and to be divided in the Senate equally between, and controlled, by the majority leader and the minority leader or their designees. An amendment to the motion is not in order.

"(d)(1) Except as provided in paragraphs (2) and (3) of this subsection, consideration of a resolution of disapproval shall be in accord with the rules of the Senate and of the House of Representatives, respectively.

"(2) When a committee has reported or has been discharged from further consideration of a resolution of disapproval, or when the companion resolution from the other House has been placed on the calendar of the first House, it shall be in order, notwithstanding the provisions of rule XXII of the Standing Rules of the Senate or any other rule of the Senate or the House of Representatives, at any time thereafter (even though a previous motion to the same effect has been disagreed to) to move to proceed to the immediate consideration of either such resolution. The motion is highly privileged in the House and privileged in the Senate and is not debatable. An amendment to the motion is not in order.

"(3) Debate on a resolution of disapproval shall be limited to not more than two hours (except that when one House has debated its resolution of disapproval, the companion reso-

APPENDIX V

lution shall not be debatable), which shall be divided in the House of Representatives equally between those favoring and those opposing the resolution and which shall be divided in the Senate equally between, and controlled, by the majority leader and the minority leader or their designees. A motion further to limit debate is not in order. An amendment to, or motion to recommit the resolution is not in order. A motion to reconsider shall be in order only on the day on which occurs the vote on adoption of the resolution of disapproval, and shall not be debatable. Any other motions shall be decided without debate.

"(e) If a resolution of disapproval has been ordered reported or discharged from the committee of the House to which it was referred, and that House receives a resolution of disapproval with respect to the same rule from the other House, the resolution of disapproval of the other House shall be placed on the appropriate calendar of the first House. If prior to the disposition of a resolution of disapproval of one House, that House receives the companion resolution of disapproval from the other House, the vote in the first House shall occur on the resolution of disapproval of the other House.

"(f) The provisions of this chapter supercede any other provision of law requiring action by both Houses of Congress for Congressional review or disapproval of agency rules to

the extent such other provisions are inconsistent with this chapter. The provisions of this chapter do not supercede any other provisions of law requiring action by only one House of Congress for Congressional review or disapproval of agency rules.

"(g) For the purposes of this chapter—

"(1) continuity of session is broken only by an adjournment sine die at the end of a Congress; and

"(2) the days on which either House is not in session because of an adjournment or recess of more than fifteen days are excluded in the computation of days of continuous session.".

(b) The table of chapters for part I of title 5, United States Code, is amended by inserting immediately after the item relating to chapter 7 the following:

"8. Congressional Review of Agency Rule Making ..... 801".

(c) This section and the amendments made by this section shall take effect on the first day of the Ninety-eighth Congress.

SEVERABILITY

SEC. 14. If the provisions of any part of this Act or the amendments made by this Act, or the application thereof, to any person or circumstances is held invalid, the provisions of the other parts of this Act or the amendments made by this Act and their application to other persons or circumstances shall not be affected.

APPENDIX V

OPEN MEETINGS

SEC. 15. Section 552b(a)(1) of title 5, United States Code, is amended by inserting before the semicolon a comma and "and also means the Chrysler Corporation Loan Guarantee Board".

EFFECTIVE DATE

SEC. 16. (a)(1) Sections 2, 3, 5, and 12 of this Act, and the provision of section 4 of this Act adding a new subchapter II of chapter 6 of title 5, United States Code, shall take effect on January 1, 1983, and shall not apply to any proceeding for which a notice of proposed rulemaking was issued before such effective date or to any other agency action initiated before such effective date.

(2) The provisions of section 621(4)(IV) of title 5, United States Code, shall not be in effect after June 30, 1985, unless the President certifies that the extension or reinstitution of those provisions is necessary to allow the Federal agencies authorized to issue rules identified in that section to take expeditious and appropriate action to preserve the viability, safety, or soundness of federally insured depository institutions. Any certification by the President under this subsection may only be made for a single one-year period beginning after June 30, 1985.

(b) The provisions of section 4 of this Act adding a new subchapter III to chapter 6 of title 5, United States Code,

APPENDIX V

shall take effect six months after the date of enactment of this Act and shall apply according to the provisions thereof.

(c) Section 6 of this Act shall take effect three months after the date of enactment of this Act and shall apply, according to the provisions thereof, to review proceedings instituted after such date.

(d) The provision of section 4 of this Act adding a new subchapter IV of chapter 6, United States Code, and sections 7, 10, 11, and 15 of this Act shall take effect immediately upon enactment.

(e) The amendments made by section 8 shall take effect on the date of enactment of this Act, and shall not apply to any civil action commenced prior to such date.

(f) The amendments made by section 9 of this Act shall take effect on the date of enactment of this Act.

~~(g) The provisions of section 14 of this Act shall take effect on the date of enactment.~~

Passed the Senate March 24 (legislative day, February 22), 1982.

Attest:

Secretary.

CRITERIA USED IN EVALUATING REGULATORY ANALYSES

PROBLEM STATEMENT

(See E.O. 12291 §2(a), Interim Regulatory Impact Analysis Guidance Sec. (1))

Qualitative

Qualitative ratings exclude consideration of quantitative data even though the discussion may clearly be very incomplete without it. The analysis should provide an adequate discussion of each of the components; background should give a clear sense of causes; magnitude may be described in relative terms.

Quantitative

The analysis should provide good data for each of the target variables; data should be included for both the base case and acceptable values.

IDENTIFICATION OF ALTERNATIVES

(See E.O. 12291 §3(d)(4), Interim Regulatory Impact Analysis Guidance Sec. (2))

The analysis should identify the most important alternative approaches to the problem.

DISCUSSION OF BENEFITS

(See E.O. 12291 §3(d)(1), Interim Regulatory Impact Analysis Guidance Sec. (3)(a))

Qualitative

The analysis should provide an adequate discussion of each of the components; discussion should be clearly related to base case and defined problem; all sectors affected should be discussed; timeframe should be clear; direct as well as indirect effects should be included; significance of benefits should be described.

Quantitative

--Numbers. The analysis should provide a clear indication of magnitude and significance of benefits.

--Dollars. The analysis should provide reliable monetary measures of the value of the projected benefits.

APPENDIX VI

DISCUSSION OF COSTS

(See E.O. 12291, §3(d)(2), Interim Regulatory Impact Analysis Guidance Sec. (3)(b))

Qualitative

The analysis should provide an adequate discussion of each of the components; discussion should be clearly related to the base case; all identified sectors affected should be discussed.

Quantitative

--Numbers. The analysis should provide a clear indication of magnitude and significance of costs.

--Dollars. The analysis should provide good monetary measures of the costs, though not necessarily for all sectors.

RATIONALE FOR RECOMMENDED ALTERNATIVE

(See E.O. 12291 §§2, 3(d)(3), Interim Regulatory Impact Analysis Guidance Sec. (3)(c) and Sec. (4))

The analysis should provide a clear indication why chosen alternative was superior, including a quantitative comparison of benefits and costs across alternatives.

APPENDIX VII

TWO CATEGORIES a/ OF FEDERAL PROGRAMS FOR WHICH REGULATORY ANALYSES MAY BE REQUIRED BY S. 1080

Ten Major Entitlement Programs b/	FY 83 Estimate Outlays c/ ($ billions)
Social Security Old Age Survivors (SSA)	$149.11
Medicare (HCFA)	55.4
Federal Employees' Retirement and Insurance (OPM)	37.6
Unemployment Assistance (ETA)	23.7
Social Security-Disability (SSA)	19.2
Medicaid (HCFA)	17.0
Veterans Compensation and Pensions (VA)	14.2
Food Stamps (FNS)	9.6
Aid to Families with Dependent Children (SSA)	5.5
Revenue Sharing (Treasury)	4.6
Total	$335.9

a/Selected categories were derived from classifications for data maintained in GAO's Legislative, Authorization, Program and Budget Information System.

b/These ten accounts represent about 15 percent of the accounts in the category and approximately 85 percent of the total entitlement outlays.

c/From President's Budget for Fiscal Year 1983, January 1982.

APPENDIX VII

Ten Largest Federal Urban Programs a/	FY 83 Total Obligations b/ ($ millions)
Subsidized Housing Program (HUD)	$ 8,851
Revenue Sharing (Treasury)	4,566
Community Development Grants (HUD)	3,467
Urban Mass Transportation Fund (DOT)	3,346
Public Housing Operating Subsidies (HUD)	1,075
Urban Development Action Grants (HUD)	476
Northeast Corridor Improvement Program (DOT)	115
Health Services (HSA - HHS)	1,613
Community Services Block Grants (HDS - HHS)	113
Low-rent public housing - loans and other expenses (HUD)	1,008
Total	$24,631

a/These 10 accounts represent 19 percent of the accounts in the category and approximately 66 percent of the total Federal urban obligations. We excluded the Federal payment to and capital investment for the D.C. Government when identifying the ten largest programs.

b/Obligations are a more accurate indicator of the activity of urban programs than outlays.

(972115)

23518

AN EQUAL OPPORTUNITY EMPLOYER

UNITED STATES
GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE,$300

POSTAGE AND FEES PAID
U. S. GENERAL ACCOUNTING OFFICE

U.S.MAIL

SPECIAL FOURTH CLASS RATE
BOOK