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

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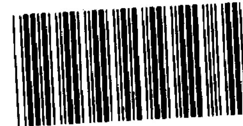
B-163628

January 7, 1980



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The Honorable Peter W. Rodino, Jr.
Chairman, Committee on the
Judiciary
House of Representatives

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Dear Mr. Chairman:

This letter is in response to your request for our comments on H.R. 3263, the Regulation Reform Act of 1979. Since we have already testified on this bill before the Subcommittee on Administrative Law and Government Relations, this letter will be confined to specific suggestions we have for amending the bill.

The GAO strongly supports the general thrust of this bill that regulatory agencies should carefully and comprehensively evaluate the effects of proposed and existing rules as has been required for executive agencies by Executive Order 12044. We do, however, want to make a number of specific suggestions for improving this bill.

DEFINITION OF A MAJOR RULE

Title I requires regulatory analyses of every rule defined as major. The definition of a major rule, however, needs to be clarified. Section 601 defines a major rule as one that is likely to result in an effect on the economy of at least $100 million. Additionally, the bill accounts for the problem of differential impact by providing as an alternative standard to the $100 million threshold that a rule is major if it will cause a substantial change in costs or prices for individual industries, geographic regions, or levels of government. The bill provides that a major rule is also any rule that an agency otherwise determines will have a "major impact."

It is not clear why the monetary standard is set at $100 million except that this is the amount that was used in Executive Order 12044. $100 million may be too high or not high enough. Or, more importantly, it may be that no single dollar figure is appropriate and the purposes of the legislation may be served just as well by using qualitative standards. Indeed, the Office of Management and Budget, which has monitored compliance with Executive Order 12044, commented in its report,

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Improving Government Regulations: A Progress Report, that regulatory agencies currently place "too much emphasis ... on the $100 million criterion as the 'trigger' for analysis." OMB went on to state that it should have made clear that regulatory analysis should be considered more the rule than the exception.

Another problem is that the bill, as presently drafted, is not clear about what is meant by a $100 million effect. If any specific dollar figure is to be used, the intended components of that figure need to be defined.

An effect on the national economy of $100 million might include new economic costs, indirect costs, or the transfer of costs or monetary income from one segment of society to another. If you decide to retain a specific dollar criterion, we suggest that it be defined as the incremental cost of compliance to directly regulated industries or other entities (local governments, etc.). These projected compliance costs cannot be estimated precisely, but they are far easier to estimate in advance than any other specific economic effect.

Setting a specific dollar figure in the legislation also could be troublesome if there is continued inflation. An increasing percentage of regulations will come under this standard over the coming years. We, therefore, suggest that the impact standard be indexed to an appropriate inflation index such as the implicit price deflator for GNP so that the monetary threshold will be implemented in constant dollars. Alternatively, the President could be given authority to adjust the figure.

We favor the criterion in Section 601(4)(3) defining a major rule as one which may cause a substantial change in costs or prices for individual industries, geographic regions, or levels of government. In addition, to the extent that the structure of an affected industry is of concern, a provision for the consideration of that factor should be included in the definition of a major rule. Similarly, inasmuch as there are numerous government programs to protect and promote small business, we recommend that a regulatory analysis be undertaken if there are anticipated major effects on small businesses within affected industries.

GUIDELINES FOR ANALYSIS

With some reservations, we support the guidelines for the initial and final regulatory analyses set forth in the bill, and we would like to present our views on how those guidelines can be most effectively implemented.

Among the components of the required regulatory analyses in Section 602 is "an anlaysis of the projected benefits and the adverse economic and other effects of the rule." This could imply a dichotomy which may not apply in many regulatory situations because one person's cost may be another's benefit.

Furthermore, estimating the costs and benefits of regulation is not a precise science. A quantitative cost-benefit analysis requires information on all possible costs and benefits and the probabilities that they will occur, but reliable data on both these dimensions is frequently impossible to obtain. There are also qualitative benefits of regulation that reflect the values of our society. These benefits constitute the primary objective of some government intervention, and therefore must be taken into account if the analysis is to be complete.

We suggest that the guideline be changed to include an analysis of the projected economic effects and the projected health, safety, and other noneconomic effects. It would also be advisable to use this legislation to consolidate into this one analysis all required single purpose impact analyses.

REVIEW OF PAST REGULATIONS

Just as the projected effects of proposed regulations should be analyzed, the current effects of existing rules should also be evaluated in light of experience and changing circumstances. We have long supported the need for agencies to evaluate their own policies and programs. This is just as applicable to regulatory programs as to any other. We, therefore, support the bill's requirement for continuing evaluation of past regulations. Although Part C of the bill is entitled "Periodic Review of Regulatory Requirements," the language of the section does not appear to us to explicitly require more than a one-time review of existing regulations.

THE NEED FOR CONGRESSIONAL OVERSIGHT

H.R. 3263 provides for oversight of the regulatory decision-making process by the Office of Management and Budget, but does not fully specify the nature of that oversight. The OMB is to receive copies of agencies' initial and final regulatory analyses. However, the proposed legislation neither states what OMB is to do with these analyses nor establishes any specific responsibilities for OMB in monitoring agency compliance. In contrast, the bill does establish a more explicit structure of OMB oversight of the scheduling and implementation of agency reviews of existing regulation.

We are concerned that the H.R. 3263 does not set forth an explicit role for congressional oversight. We believe that effective congressional oversight of the regulatory analyses and the review of past regulations is essential. Such oversight is all the more important because the proposed legislation would not permit judicial review of the regulatory analyses provided for in this bill.

In terms of oversight of the regulatory process, we prefer an approach which would have a congressional support agency monitor compliance with the requirements for regulatory analysis and review. We believe the GAO is the appropriate agency for this role.

ADMINISTRATIVE LAW JUDGES

Title II of H.R. 3263, Reorganizing and Improving Agency Proceedings and Administrative Law Judge Selection and Evaluation, addresses many of the issues we raised in our report, "Administative Law Process: Better Management Is Needed," (FPCD-78-25, May 15, 1978).

H.R. 3263 assigns responsibility for Administrative Law Judge (ALJ) performance appraisal to the Administrative Conference of the United States (ACUS). We have several concerns about this provision, although we support the assignment of the ALJ performance appraisal function to an organization outside the agencies.

We strongly believe that effective employee performance appraisals serve many purposes, only one of which is discipline of non-productive personnel. Appraisal is the crucial foundation of any personnel management system. H.R. 3263 could be improved by clearly stating the purpose of ALJ performance appraisal similar to the statement provided by Section 4302 of the Civil Service Reform Act of 1978. As currently written H.R. 3263 proposes to evaluate ALJ performance for the purpose of discipline and paying judges performance bonuses.

We are concerned about two other provisions of Title II--bonuses and establishment of an Administrative Law Judge Career Service. The administrator of ACUS is charged with prescribing those ALJ's who are to receive pay performance awards based on the results of performance appraisals. However, the bill only provides for appraisals at least once every seven years. If bonuses are going to be paid, they should be based on a current appraisal.

The bill also does not explain the rationale for ALJ pay performance bonuses. Currently, no criteria for ALJ performance exist to guide such decisions. Further, the chairman, ACUS has the sole authority for approval of bonus payments. If ALJ's are to receive bonuses, they should be reviewed and recommended by performance and qualification review boards to ensure that the awards are made on the basis of merit alone.

H.R. 3263 assigns responsibility for evaluation of ALJs to the Administrative Conference. Additionally, it assigns the Administrative Conference responsibility for ALJ recruitment, but does not restructure it to accommodate its increased role in ALJ personnel management. These functions, particularly the ALJ recruitment process, are far beyond the current mission of the Administrative Conference, which is basically a small research organization.

We recommend that responsibility for initial screening of ALJ candidates should remain with the Office of Personnel Management in order to avoid wasteful duplication. If, however, Congress wishes to designate the Administrative Conference as the organization responsible for recruitment and/or evaluation of Administrative Law Judges, it will be necessary to restructure and increase the resources of the Administrative Conference. Currently, the size of the staff and its research orientation would make it impossible for the Administrative Conference to accomplish the ALJ personnel responsibilities set forth in this bill. We are concerned that imposing these additional functions on the Administrative Conference would detract from the valuable function it presently provides to agencies in making recommendations concerning administrative law formulated by an organization with a unique mixture of governmental and private expertise.

OMB's REPORT ON EXECUTIVE ORDER 12044

We have also been requested by the staff of the Subcommittee on Administrative Law and Government Relations to supplement GAO's comments on H.R. 3263 with observations on OMB's report on implementation of Executive Order 12044 (Improving Government Regulations - A Progress Report, September 1979).

OMB apparently did not use systematic sampling principles in preparing its report. Thus, it is difficult to judge the representativeness of OMB's assessment. Nonetheless, some valuable lessons were gleaned from this report; namely, that an effective program of regulatory reform requires an active oversight mechanism; the easier elements of Executive Order 12044 were implemented well, but the more difficult analytical requirements had not been mastered by the regulatory agencies; and regulatory analysis requires highly trained specialists.

More specifically, we are impressed with the evidence marshalled by OMB suggesting significant procedural reforms in some agencies. Developing informative semiannual agendas of regulations, extending public comment periods, and improving management oversight are examples of such reforms prompted by the executive order.

Unfortunately, similar progress in analytical reform has been lacking. While procedural reform undoubtedly improves the decisionmaking process, it is not a good substitute for sound economic analysis of regulatory alternatives. Thus, the danger exists that procedural reform in the absence of similar progress on the analytical front may add an aura of improvement to the regulatory process without effecting significant change in regulatory decisionmaking. It was also clear from the report that the required analyses necessitated the use of highly trained specialists.

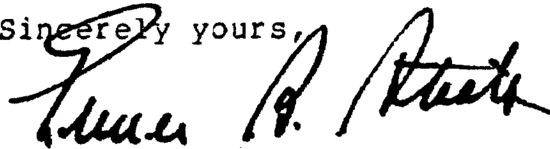
OMB has suggested ways for improving performance under Executive Order 12044, but in many cases these suggestions lack specificity. For example, on page 22 the OMB report states "... we will establish a more formal procedure to help us identify common problems that agencies are having, share examples of good analysis among agencies and examine various methodologies used by the agencies." The OMB report also found that agencies were not doing "an adequate job of determining when a regulatory analysis is required," OMB offered the following solution:

> "...we will stress to the agencies that a regulatory analysis should be done for: (1) any sufficiently important or controversial rule that the agency head thinks deserves anlaysis; and (2) any rule with potentially major cost/price effects on a particular region, group, industry or economic sector. Finally, if the other two 'gates' are passed, an analysis should be done for any rule that would have a potential $100 million effect on the economy."

This does not appear to be different from what is already in the order. This response by OMB may indicate that the problem of selecting rules for analysis has yet to be satisfactorily resolved.

A final point raised in the OMB report which is pertinent to both Executive Order 12044 and pending legislation is the question of accountability of the independent regulatory agencies. The President asked these agencies "to voluntarily comply with the order." OMB discusses their voluntary compliance very briefly and offers a few examples of actions taken by the agencies in response to the executive order. In particular, there is almost no examination of regulatory analyses. Thus, it is impossible to assess the operation of the executive order in the independent agencies based on the OMB report.

Sincerely yours,



Comptroller General
of the United States