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SUMMARY

GAO strongly supports the use of regulatory analysis, which can contribute to more cost-effective regulation. We found, however, that regulatory analysis has not fully achieved its potential for improving regulatory decisionmaking under Executive Order 12291. To remedy this, we recommend that (1) the quality of underlying data be improved by requiring that data submitted to rulemaking records be accompanied by sufficient documentation to assess their validity and that (2) explicit guidelines for waiving analytical requirements be developed. We are also concerned about the adequacy of agency resources for performing good analyses.

With respect to the relationship between executive oversight and the quality of regulatory analysis, we believe that OMB could improve the quality of analyses if it played a broader, more supportive role and promoted government-wide consistency in the application of the tool. We recommend in addition that OMB make its substantive comments publicly available and identify its sources of information.

Finally, we point out that a potential exists in some cases for confusion as to whether statutory provisions preclude the use of regulatory analysis. We observe that resolution of this matter would require the Congress to identify those statutes where use of cost-benefit analysis and related analytical tools are prohibited.

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U.S. GENERAL ACCOUNTING OFFICE

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STATEMENT OF  
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ACTING DIRECTOR, PROGRAM ANALYSIS DIVISION  
BEFORE THE  
HOUSE SUBCOMMITTEE ON ADMINISTRATIVE LAW AND  
GOVERNMENTAL RELATIONS  
COMMITTEE ON THE JUDICIARY  
ON  
REGULATORY REFORM ACT OF 1983

Mr. Chairman and Members of the Committee:

We are pleased to appear today to discuss H.R. 2327, the Regulatory Reform Act of 1983. We support the bill's objectives to make regulations more cost-effective, to improve regulatory planning and management, and to enhance public participation in the regulatory process.

You requested that we address the effect of E.O. 12291 and the potential effect of H.R. 2327 on the regulatory process. In responding, we rely on our earlier analysis and findings regarding the impact of E.O. 12291 on the regulatory process contained

in our 1982 report entitled "Improved Quality, Adequate Resources, and Consistent Oversight Needed if Regulatory Analysis is to Help Control Costs of Regulations". The importance of both the executive order and the proposed legislation lies in their regulatory analysis requirements and in their provisions for executive oversight.

GAO has supported and continues to support the use of regulatory analysis. This tool can contribute to more cost-effective regulation by systematically laying out the advantages and disadvantages of alternative regulatory approaches. In addition, the availability of regulatory analyses can provide structure and focus for meaningful public debate.

These analyses have been required for all major rules proposed by Executive agencies since 1974. However, two significant refinements were introduced by President Reagan's Executive Order 12291. First, the analytical requirements were made much more stringent. The order directs that net benefits be maximized and that no action be taken unless the potential benefits are shown to outweigh the potential costs to society. Second, Executive oversight of agencies' regulatory actions was expanded considerably.

Despite the higher analytical standards and increased oversight authority of the Executive, we found that regulatory analysis has not yet fully achieved its potential for improving regulatory decisionmaking. Many of the regulatory analyses reviewed by GAO, (including several approved by OMB), did not provide adequate support for their conclusions. Most significantly, many of the analyses failed to consider an appropriate

range of alternatives to proposed regulations. Many also failed to identify various costs or benefits or failed to compare the costs and benefits of different alternatives.

I would like to highlight the suggestions contained in our report for remedying this problem and offer several observations on how the proposed legislation might affect the quality of regulatory analyses.

First, we recommended that measures be taken to improve the quality of underlying data. Section 622 of H.R. 2327 is helpful in this regard by requiring agencies to identify the studies they have relied on in performing their analyses, and to describe the steps taken to evaluate the quality of such studies.

Another important factor limiting the importance of the tool has been OMB's frequent use of its waiver authority under E.O. 12291. We found that OMB waived the analytical requirement for 21 of the 43 major rules it reviewed in 1981 and for 16 of the 56 major rules in 1982. We note here that H.R. 2327 would not allow any analysis of a regulation designated as major to be waived by the executive. In our report we recommended that written OMB guidelines be established for waiving the analysis requirement so that the basis for such waivers would be more explicit and the requirement would be applied more consistently.

In our report we indicated that the costs of performing regulatory analyses are high. We expressed concern that, in light of these costs and the budget austerity measures that Federal agencies are being asked to take, such analyses may be given a lower priority. As a result, the quality of analyses may suffer.

We note that H.R. 2327 includes provisions which may, on balance, raise the costs of performing regulatory analysis and that the wherewithal to fund these increased costs is not addressed in the proposed legislation. The bill would tend to increase costs because it requires that agencies provide an opportunity for formal cross-examination during rulemaking, eliminates the waiver, and extends the analytical requirements to independent agencies.

I would like to turn at this point to discuss our views on the nature of Executive oversight; the second important aspect of both E.O. 12291 and H.R. 2327. There are two important areas worthy of discussion; the function of oversight and the potential for conflict between executive oversight and Congressional intent.

There are various functions that Executive oversight can perform in the implementation of the regulatory analysis requirement. OMB can play a supportive role by pressing for more influence and adequate budgetary support for regulatory analysis in the agencies. Second, OMB could take advantage of its centralized position to promote consistent and coordinated use of analytical techniques, assumptions, and methodologies between different agencies. We urge that OMB give these activities extremely high priority. Finally, OMB could review agency analyses to promote adherence to minimal standards of quality. This is the main activity that it has confined itself to but only through a case by case review of rules. It is very difficult to determine how adequately this function is being performed. OMB's comments on agency analyses are almost entirely communicated via telephone

or in staff level meetings. Without more written documentation of OMB's comments and critiques of individual analyses, there is little opportunity for review of the quality of oversight. We note that H.R. 2327 attempts to promote public visibility of executive oversight by requiring that any written comments made by OMB be included in the rulemaking record.

With regard to general oversight, H.R. 2327 intends to restrict the role of OMB to one that is strictly procedural. In doing so, it states that "the Director may not participate in any way in deciding what regulatory action" the agency will take. In light of the fact that comments are generally conveyed orally, it is difficult for the public to determine the analytical basis on which decisions are made. We therefore believe that the bill could be strengthened by requiring OMB to put all its substantive comments related to the analysis performed in writing, to identify the sources of its information, and to submit these materials for the record. This would enhance the opportunity for review of the quality of oversight.

In short, we believe OMB could play an important role in upgrading the quality of analyses and regulatory decisionmaking if it played a broader, more supportive role, promoted consistency in the application of the tool and made its critiques of agency analyses publicly available. We have made a number of recommendations to OMB focused on improving its oversight performance in each of these areas.

Turning briefly to the issue of conflict between executive oversight and legislative intent, we believe the potential still exists for this to occur under both E.O. 12291 and H.R. 2327

despite the language in each designed to prevent such conflicts. The source of this potential lies in a confusion in some cases as to whether statutory provisions preclude the use of regulatory analysis. Ultimate resolution of the matter would require the Congress to explicitly identify those statutes where use of cost-benefit analysis and related analytical tools are prohibited.

That concludes my prepared statement. I would be happy to respond to any questions you may have.