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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

GENERAL GOVERNMENT
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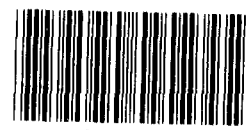
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The Honorable David A. Stockman
Director, Office of Management
and Budget

Dear Mr. Stockman:

Subject: Issues Concerning Implementation of a Revised Process for Intergovernmental Review of Federal Programs (GAO/GGD-85-2)

This report presents the results of our survey of the early implementation of Executive Order 12372: Intergovernmental Review of Federal Programs. On October 1, 1983, the Administration, as part of its New Federalism initiatives, implemented this new coordination process to foster an intergovernmental partnership. The new process relies on state and local governments to develop their own procedures for reviewing financial assistance and direct developments proposed by federal agencies. Federal agencies are to use the process to obtain the views of state and local governments on these activities and, to the extent possible, accommodate their concerns. This process replaced the review and comment process under former Office of Management and Budget Circular A-95.

Because of interest in the Congress and the intergovernmental community about the new process, we conducted a survey in five states and at five federal agencies to identify the progress made in achieving the Executive Order's objectives and carrying out related statutory requirements. We also examined the regulations of all 23 agencies which issued final regulations to compare them for consistency with the Executive Order. Because of the limited scope of our survey, our observations can not be projected to all states or federal agency programs.

Your Office is conducting its own review of the Executive Order's implementation and, for that reason, we are suspending further work on this matter. However, we want to bring several matters to your attention. They are: (1) the different perspectives of federal agencies and state governments as to which programs are covered by the Executive Order, (2) the different procedures established by the individual federal agencies for

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operating the review and comment process, and (3) some apparent inconsistencies between agencies' regulations implementing the Executive Order and provisions of the Demonstration Cities and Metropolitan Development Act of 1966.

These matters are discussed in more detail below. The scope of our survey is described in the enclosure to this letter.

THE INTERGOVERNMENTAL COORDINATION PROCESS AND EXECUTIVE ORDER 12372

With the increase in both the number of federal programs and dollars in the 1960s, the Congress recognized the importance of communication among the various governmental levels--federal, state, and local--in protecting the vast investments of the federal government in its own development activities and those of its grantees. Coordination of federal activities and grant programs with state, areawide, and local plans was mandated by the Demonstration Cities and Metropolitan Development Act of 1966 and the Intergovernmental Cooperation Act of 1968. Essentially, the legislation called for federal agencies to obtain and consider the views of affected state and areawide agencies in formulating decisions on funding proposed federal or federally assisted programs or projects.

To implement these acts, the Office of Management and Budget (OMB) developed and issued Circular A-95 in 1969 to establish a uniform review and comment process by which consultations could take place. This process encouraged early contact between applicants for federal assistance and parties such as state and local governments that might be affected by the federally assisted projects. At the state and local levels, OMB encouraged the establishment of A-95 clearinghouses--state and areawide organizations recognized by OMB as the appropriate agencies to facilitate the review and comment process. The responsibilities of the A-95 clearinghouses as well as those of applicants and federal agencies were spelled out in the Circular.

On July 14, 1982, the Administration, concerned that the A-95 process had become highly bureaucratic and burdensome, issued Executive Order 12372 to rescind Circular A-95 and establish a new process for obtaining state and local comments on proposed federal actions. According to a White House announcement, annual reviews under Circular A-95 of over 100,000 grant applications had created "a staggering paperwork burden costing over $50 million each year--with little positive return to state and local governments and their citizens."

The new process, which became effective on October 1, 1983,[1] was intended to achieve the same statutory objectives but shift the initiative for setting review procedures and priorities to the states and localities. The White House announcement accompanying the Executive Order stated that the new process was designed to

--provide states with the opportunity to establish their own review and coordination procedures;

--encourage more timely and effective participation by state and local elected officials in federal funding decisions;

--reduce federal regulatory requirements; and

--diminish the influence of special purpose agencies created primarily to administer federally funded programs.

Under the Executive Order, each federal agency was to issue its own regulations which would provide opportunities to state and local governments to review proposed federal financial assistance and direct federal development activities for which the governments provided the nonfederal share or which directly affected their governments. In addition, federal agencies were to use the state-established process for obtaining state and local officials' views and to either accommodate state and local officials' concerns or explain why the concerns could not be accommodated. This Order also required OMB to report to the President on federal agencies' compliance with the Order.

Working under the direction of OMB, most federal agencies published their proposed rules on January 24, 1983. Twenty-three agencies, which provide most of the federal assistance to state and local governments, published similar final regulations in June 1983 to implement the Order.

PROGRAM COVERAGE-- FEDERAL AND STATE OFFICIALS HAVE DIFFERENT PERSPECTIVES

Each of the major participants in the intergovernmental review process we interviewed--the federal agencies and the states--perceived a primary role for itself in determining what programs and activities would be subject to review under the Executive Order. State officials read the Order as giving them the primary role in determining program coverage. The federal agencies read the Order differently, and, accordingly, specified which programs would be available for state review. Because the

[1]The Order originally required implementation of the new process by April 30, 1983, but implementation was delayed until October 1 to provide more time for transition to the new policies.

federal agencies determined program coverage, officials of some states say they are not afforded the opportunity to review many programs and activities.

According to the Order, federal agencies are to provide opportunities for review and comment to elected officials of those state and local governments which either provide nonfederal funds for, or which would be directly affected by, proposed federal financial assistance or direct federal development. The Order further grants state and local officials the discretion to exclude certain federal programs from review and comment.

Program coverage: The federal perspective

The 23 federal agency regulations described certain categories of programs and activities which they judged were neither federal financial assistance nor direct federal development. For example, agency regulations excluded

--military weapons procurement,

--national security issues,

--federal budget formulation,

--most block grants,

--many research and development programs and activities,

--federal criminal and civil law enforcement matters, and

--programs where state or local governments were not grant recipients.

In addition to these specific exclusions, some agencies restricted applicability of the Executive Order on covered programs under certain circumstances. For example, Commerce excluded applications for the sea grant program and the marine pollution research program when the grant recipient was not a state or local government. Most of Housing and Urban Development's small assistance projects under its housing programs were not subject to state or local review.

The introduction to the June 1983 final regulations issued by the 23 federal agencies pursuant to the Executive Order provided the rationale for excluding certain programs and activities from coverage. The introduction said, "It is appropriate for federal agencies to decide which of their activities are federal financial assistance or direct federal development." The federal agencies thus determined which programs and activities involved "federal assistance" or "direct federal development," and which "directly affect" state and local governments. For example, Agriculture excluded certain programs, noting that "the

Department has determined that these programs do not meet the established criteria for inclusion under the Executive Order."

Federal officials maintained that it was their prerogative to determine which programs and activities directly affected state or local governments, and what was meant by the Executive Order terms "financial assistance" and "direct federal development." According to the 23 federal agencies which issued regulations, states were free to select for review the programs and activities which the federal agencies had determined were covered by the Order.

Program coverage: The state perspective

Many states believed they and their local governments, not the federal agencies, would decide which programs and activities would be available for their review and comment. Fifteen states, in their comments to the agencies on the proposed federal regulations, expressed concern over federally imposed limitations on program coverage. Many state officials viewed the Executive Order provisions as granting state and local officials broad authority to review proposed federal grant applications and development plans for any or all programs and direct federal activities in their areas.

The issue of programs subject to intergovernmental review has been of interest to state and local officials for some time. In a 1982 report[2] on the transition from Circular A-95 to the Executive Order, the Advisory Commission on Intergovernmental Relations noted that proposals to restrict the number of programs subject to review and comment were quite controversial. The report stated, "It is one thing to decide not to comment on a project about which notification was received, and quite another thing never to have been notified about the project." According to the report, state reviewers want to be selective in determining which applications to review, but they are precluded from making a choice when entire programs are excluded.

Four of the five states we visited selected for review most or all federal programs made available for their review. (The fifth state had not yet established a review process.) However, officials in these four states wanted more programs covered than those listed in the federal regulations. Some of the programs that these officials believe they should have the discretion to review involve research and development projects, block grants, and hydroelectric projects licensed by the Federal Energy Regulatory Commission.

[2]Intergovernmental Consultation Changes Provide Opportunities Information Bulletin, Advisory Commission on Intergovernmental Relations, December 1982.

In addition to the states we visited, other states in their comments to OMB expressed a desire for broadened program coverage. For example, officials from three other states proposed that agencies amend their regulations by adding a clause stating that, unless otherwise provided by law, all financial assistance programs and direct federal development activities should be subject to Executive Order 12372.

PROBLEMS NOTED IN AGENCIES' PROCEDURES FOR IMPLEMENTING ORDER

The regulations implementing Executive Order 12372 require agencies to issue procedures to be followed in the intergovernmental review process. Twenty-three agencies issued regulations under the Order and, as of February 1984, 20 had developed procedures for implementing them. Some of the key issues that had to be covered by the agencies' procedures were:

--How and when applicants for federal assistance would be notified of Executive Order requirements.

--Whether, how, and when states would be notified of upcoming financial assistance and proposed direct federal development.

--How states would be notified of applications that should have undergone the consultation process but had not.

--Alternative means for "starting the clock" on the state comment period.

--Whether the state review and comment process would precede federal review.

In February 1984, the Council of State Planning Agencies (CSPA) published the results of a Florida survey of federal agencies' procedures which showed that variances existed among the federal agencies on several issues.[3] For example, on the issue of whether the state process would precede federal review, some federal agencies allowed applicants to submit applications simultaneously to the state and federal agencies. Other federal agencies required applicants to submit applications to states first and then to the agencies. One federal agency required applicants to submit applications first to the agency, who in turn would provide them to the state. According to the CSPA study, the significant procedural differences among the 20 agencies were contributing to confusion in the states. Also, some states were encountering problems in initiating and operating a single

3The Promise of Partnership, The Council of State Planning Agencies, February 1984.

process to respond to the many variations in federal agencies' procedures.

We also noted some inconsistencies between agency regulations issued under the Executive Order and Section 204 of the Demonstration Cities and Metropolitan Development Act of 1966. Section 204 established requirements governing local review of applications for certain types of projects in metropolitan areas.

The main purpose of section 204 is to ensure that appropriate local governments are afforded the opportunity to review applications for federal assistance and for applicants to consider their comments before submission of the formal applications to the granting federal agencies. To accomplish this goal, the section requires, among other things, that any comments received from reviewing entities must accompany the application to the granting agency and that the applicant must state that the comments were considered or that the reviewing entity had the application for 60 days but no comments were received.

Six agencies--the Departments of Agriculture, Commerce, Housing and Urban Development, Justice, and Transportation, and the Environmental Protection Agency--identified programs which fall under the provisions of the act. The regulations issued by these agencies incorporate three of the eight specific requirements of section 204. Five section 204 requirements were omitted from agencies' regulations. For example, they do not require that comments received from reviewing entities accompany the application to the granting agency or that applicants include a statement that comments were considered or, if applicable, that none were received.

Further, under the agencies' regulations, applicants might not be afforded the opportunity to consider views of areawide planning agencies or units of local government. The regulations establish the states as the focal point for obtaining comments from both state and local governments. Where the state has no recommendation, commenting entities are authorized by the regulations to submit comments directly to the federal agency. This authority, if exercised, could circumvent the section 204 requirement that the comments be provided to the applicant so that the applicant can consider the views, if any, of the areawide planning agency or unit of local government before submitting the application to the agency.

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Our survey showed that there are some matters to be resolved in implementing Executive Order 12372, namely differing views on program coverage and inconsistencies in agencies' regulations and procedures. Resolving these matters will help ensure that the new intergovernmental coordination process can operate as effectively and efficiently as possible. In early June we

briefed your staff on the results of our survey and later provided them with a detailed briefing paper. Your staff said that these matters would be considered in the OMB study.

We are sending copies of this report to appropriate Senate and House committees and other interested parties.

Sincerely yours,

W. J. Anderson

William J. Anderson
Director

Enclosure

ENCLOSURE

OBJECTIVES, SCOPE, AND METHODOLOGY

We conducted a survey of the impact of the new Executive Order between October 1983 and April 1984. We undertook this survey to provide an assessment of the extent to which changes made by federal, state, and local agencies achieve the Executive Order's objectives and carry out the statutory requirements. We examined the regulations of all 23 federal agencies who are governed by the Order to compare them for consistency with the Executive Order. We also interviewed an official of the Council of State Planning Agencies and reviewed the Council's February 1984 report. We interviewed headquarters officials at OMB and at the Departments of Health and Human Services, Commerce, and Transportation (DOT). We selected these agencies because they have many of the programs covered by the Executive Order.

To determine whether agencies' regulations and procedures incorporated certain statutory provisions, we compared the regulations and procedures of six agencies--DOT, Commerce, Justice, the Environmental Protection Agency, Housing and Urban Development and Agriculture--with applicable requirements of the Demonstration Cities and Metropolitan Development Act of 1966. These agencies were selected because they have the types of developmental programs subject to the provisions of the act.

To obtain an initial understanding of how the new process was working, we conducted interviews and examined records at state executive offices in five states which we judgmentally selected--California, Montana, Idaho, Arizona, and Nevada. We also interviewed officials of areawide clearinghouses in California, Idaho, and Nevada. We reviewed OMB files containing the comments of 15 states on the proposed federal regulations dealing with program coverage.

Our observations cannot be projected to all states or federal agency programs because the coverage was not scientifically selected. Nevertheless, these observations should provide OMB with useful insights for its report to the President on implementation of the Executive Order.

This survey was performed in accordance with generally accepted government auditing standards.