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Date

5/3/90

TO: (Name, office symbol, room number, building, Agency/Post)		Initials	Date
1.	Jeffrey R. Holmstead		
2.			
3.			
4.			
5.			

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Coordination	Justify	

REMARKS

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FROM: (Name, org. symbol, Agency/Post)	Room No.—Bldg.
E. Donald Elliott	537WT
Assistant Administrator and General Counsel	Phone No. 475-8044 8040

5041-102

GPO : 1987 0 - 196-409

OPTIONAL FORM 41 (Rev. 7-76)
Prescribed by GSA
FPMR (41 CFR) 101-11.206

Document Originally
Attached to
Following Page

Subject:

Regulatory

Review -

Process

Document Originally
Attached to
Following Page



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

MAR 28 1990

MEMORANDUM

SUBJECT: OMB Coordination Procedures

FROM: E. Donald Elliott *ED Elliott*
Assistant Administrator
and General Counsel

J. Clarence Davies *JD*
Assistant Administrator, OPPE

TO: Assistant Administrators

The Office of Information and Regulatory Affairs (OIRA) has recently raised concerns that some procedural variations from existing practices may be occurring on EPA rulemakings submitted to OMB under Executive Order 12291. We believe that a summary of existing EPA procedures related to OMB review under Executive Order 12291 would be helpful.

A. Imminent Statutory or Court Ordered Deadline

Where we can reasonably anticipate that the full time period allowed for OMB review cannot be provided because a statutory or court ordered deadline is imminent, we should use concurrent OMB review. This policy is summarized in a former Administrator Lee Thomas letter to Chairman John D. Dingell, dated January 19, 1988, which is provided at Attachment 1. This is an issue that should be addressed at workgroup or Steering Committee closure.

B. Rulemaking Litigation

In lawsuits that challenge the timing of pending or future Agency rulemaking, seek to compel EPA to engage in rulemaking, or in which a commitment to engage in rulemaking may be part of a settlement agreement, OMB should be notified. See Deputy Attorney General Memorandum, dated April 18, 1985, which is provided at Attachment 2. Since defensive litigation is involved, OGC should confirm that OMB has been notified regarding any lawsuit that meets the above criteria.

C. Premature Release of EPA Rules

As a general rule, we should avoid premature release of the text of EPA rules in draft form until after the Administrator has

signed the rule. Even in those instances where a draft rule is statutorily required to be placed in the public record, the draft rule should be put in the public record at same time as the proposed or final rule is put in the public record. The public record can be opened right after the Administrator has signed the rule.

D. Scope of Executive Order 12291 Review

Executive Order 12291 provides for OMB review over Agency "regulations" or "rules". The term "regulation" or "rule" is defined in the Executive Order at Section 1(a) to mean:

"...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."

If you have any questions as to whether Executive Order 12291 applies to any work product produced by your office, we are available to answer them.

E. Additional References

For your information, we are providing at Attachment 3 a copy of OMB Director Memorandum, dated April 3, 1989, entitled "Presidential Review of Agency Rulemaking". At Attachment 4, we are providing a copy of a GAO Fact Sheet on Regulatory Review which also contains copies of Executive Order 12291 on Federal Regulation and Executive Order 12498 on Regulatory Planning Process.

We have also been asked to bring to your attention Executive Order 12612 on Federalism and Executive Order 12630 on Governmental Actions and Interference With Constitutionally

Protected Property Rights at Attachment 5 and 6, respectively. If you have any questions as to how these Executive Orders may apply to any work product produced by your office, we are available to answer them.

Attachments (6)

cc: Administrator
Deputy Administrator
Associate Administrators
Associate General Counsels
Steering Committee Representatives



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D C 20460

FEB 8 1988

OFFICE OF
THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Congressman Dingell Letter Concerning Concurrent
Red Border-OMB Review of EPA Rules

FROM: A. James Barnes
Deputy Administrator *Jim Barnes*

TO: Assistant Administrators
Deputy Assistant Administrators

Recently, the Administrator responded to a letter from Congressman Dingell concerning OMB review of Agency rules simultaneously with internal Red Border review. Apparently, an earlier draft of the response was inadvertently stamped as if it had been signed by the Administrator and distributed to some offices. Since the final letter differed significantly from the earlier draft, I am attaching a copy of the actual signed response dated January 19, 1988, to clear up any possible confusion.

As the final response points out, the Administrator believes that it is preferable to complete Red Border review before submitting a rule to OMB, unless compelled by a legislative or judicial deadline to do otherwise. Your offices should look at current schedules for ongoing rule-making actions and make appropriate changes to provide sufficient time for sequential review. In the future, schedules for the development of new rulemaking actions that involve OMB review should provide for sequential review.

Attachment



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D. C. 20460

JAN 19 1988

THE ADMINISTRATOR

Honorable John D. Dingell
Chairman, Subcommittee
on Oversight and Investigations
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

Thank you for your letter of October 26, expressing concern about EPA's internal review process for rules. Under Executive Order 12291, EPA sends each proposed and final rule to OMB for review before issuing it. As you note in your letter, EPA has often submitted its rules for OMB review simultaneously with the Agency's internal "Red Border" review. Red Border review is the formal mechanism for senior management review and approval of or comments on regulatory packages before they come to me for a final decision.

We have designed our regulatory development process with the intent that it should result in the identification and resolution of issues before Red Border review. The workgroup and Steering Committee processes have, in fact, been working effectively to identify significant issues. If major policy issues within the Agency are known to exist at the start of Red Border, the Agency will not ordinarily send the rule to OMB unless a statutory or court ordered deadline is imminent. Over time, as issues within EPA have been resolved earlier in the process and the number of rules with deadlines has increased, concurrent OMB and Red Border review has become the predominant practice.

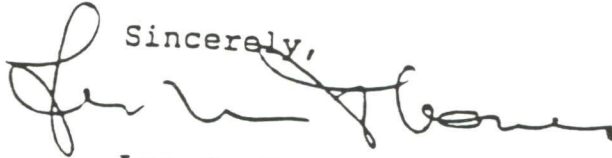
We believe, however, that it is preferable to complete all phases of internal review, including Red Border, before submission to OMB, unless compelled by a legislative or judicial deadline to do otherwise. This will assure that all issues between Assistant Administrators have been identified before review beyond the Agency occurs.

- 2 -

The Assistant Administrator for Policy, Planning, and Evaluation will follow the practice outlined above in initiating future OMB reviews under E.O. 12291. Please let me know if you have any further questions.

With best wishes,

Sincerely,

A handwritten signature in dark ink, appearing to read 'Lee M. Thomas', written in a cursive style.

Lee M. Thomas

S.FURLONG:PM-223:11/10/87:415WT:382-7202:DISK Scott:OSR#59:CONTROL NO: AL703848

JOHN D. DINGELL, MICHIGAN, CHAIRMAN

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CHIEF COUNSEL/STAFF DIRECTOR

U.S. House of Representatives
Subcommittee on Oversight and Investigations
of the
Committee on Energy and Commerce
Washington, DC 20515

January 28, 1988

The Honorable Lee M. Thomas
Administrator
Environmental Protection Agency
Waterside Mall -- West Tower
401 M Street, S.W.
Washington, D.C. 20640

Dear Mr. Thomas:

I am greatly pleased to receive your January 19, 1988 letter committing to a practice which you properly call "preferable" of completing "all phases of internal review, including Red Border, before submission to OMB" of proposed regulatory matters "unless compelled by a legislative or judicial deadline to do otherwise." I applaud this action and commend you. I only wish you had taken it a year earlier and applied it to the pending and very controversial onboard/volatility rules. But this is progress and most importantly, sound public policy.

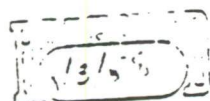
With best wishes.

Sincerely,



JOHN D. DINGELL
Chairman
Subcommittee on
Oversight and Investigations

*AL 703747 - CITE/A - 11-4



Advance
Thomas
Waterside
Mall
West Tower
401 M Street
S.W.
Washington
D.C. 20640

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MICHAEL F. SARRETT, JR.
CHIEF COUNSEL/STAFF DIRECTOR

U.S. House of Representatives
Subcommittee on Oversight and Investigations
of the
Committee on Energy and Commerce
Washington, DC 20515

October 26, 1987

The Honorable Lee M. Thomas
Administrator
Environmental Protection Agency
Waterside Mall -- West Tower
401 M Street, S. W.
Washington, D. C. 20460

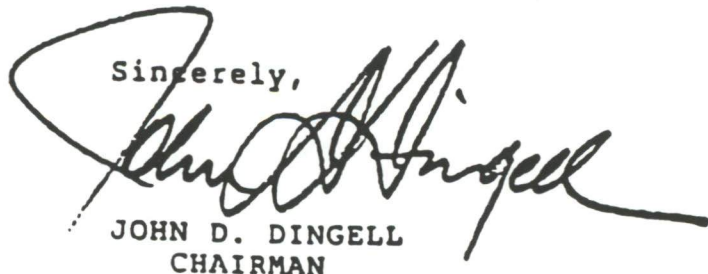
Dear Mr. Thomas:

Earlier, as part of the Subcommittee's ongoing investigation of ozone nonattainment issues, including refueling issues, you will recall that I asked the Government Accounting Office (GAO) to review the legality of your agency's Red Border concurrent review practices. Enclosed is the GAO's reply which concludes that section 307 of the Clean Air Act "does not prohibit concurrent review, provided that a copy of the Red Border draft is placed in the docket." The GAO, however, casts doubt on the contention by the Environmental Protection Agency (EPA) that this practice saves appreciable time.

While this practice may be legal, I think it is of questionable value and policy. I therefore will want to examine section 307 of the law whenever the full Committee considers amendments to the Clean Air Act with the view of possibly prohibiting the practice except under clear criteria. In the meantime, I request your statement of the criteria applied by the Assistant Administrator of the Office of Policy Planning and Evaluation in deciding whether to use the practice for any specific rule.

With best wishes.

Sincerely,



JOHN D. DINGELL
CHAIRMAN

Enclosures

RECEIVED
10/30/87

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AR
EPA
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A



U.S. Department of Justice
Office of the Deputy Attorney General

ATTACHMENT 2

The Deputy Attorney General

Washington, D.C. 20530

April 18, 1985

MEMORANDUM

TO: All Assistant Attorneys General and
United States Attorneys
[Signature]

FROM: D. Lowell Jensen
Acting Deputy Attorney General

SUBJECT: Coordination of Litigation Involving
Executive Order 12291, Executive Order
12498, the Paperwork Reduction Act,
and the Regulatory Flexibility Act

By the attached memorandum of September 22, 1983, Deputy Attorney General Schmults established a "clearinghouse" for the coordination of litigation involving Executive Order 12291, the Paperwork Reduction Act, and the Regulatory Flexibility Act. Under E.O. 12291, the Office of Management and Budget (OMB) is generally responsible for performing prepublication reviews of proposed and final rules issued by Executive Branch agencies. The clearinghouse receives, reviews, and reports information concerning litigation involving E.O. 12291, as well as litigation concerning the Paperwork Reduction Act and the Regulatory Flexibility Act.

Effective operation of the clearinghouse depends to a large extent on timely notice to the clearinghouse and to OMB that a case involving E.O. 12291 has been filed or that such an issue has arisen in litigation. The operation of the clearinghouse has greatly assisted the management of these important cases, and your cooperation and assistance in this effort is appreciated.

This memorandum is to inform you of several new matters of significant concern which may arise in litigation and which are to be reported to the clearinghouse. First, on January 4, 1985 the President issued Executive Order 12498, which establishes the Regulatory Planning Process to complement the E.O. 12291 Regulatory Review Process. Pursuant to E.O. 12498, each agency is to submit to the Director of OMB an overview of the agency's regulatory objectives for the program year and information concerning significant regulatory actions planned or underway, including actions taken to consider whether to initiate

rulemaking. Since E.O. 12498 is so closely related to E.O. 12291, you should also inform the clearinghouse and OMB of any cases which involve E.O. 12498 directly.

Second, we have determined that certain cases of a related nature also require your attention and notification to the clearinghouse. In addition to lawsuits which involve E.O. 12291 or E.O. 12498 directly, the clearinghouse should be notified of those cases which challenge the timing of pending or future agency rulemaking, seek to compel an agency to engage in rulemaking, or in which a commitment to engage in rulemaking may be part of a settlement agreement. Accordingly, please send to the clearinghouse and OMB a statement of any such pending cases not already reported and in the future inform the clearinghouse and OMB of such cases. */ The statement should include the name of the attorney assigned to the case, his or her telephone number, and the case caption, and should enclose any major pleadings in the case. To ensure the clearinghouse's effectiveness, you should also continue to report cases in accordance with the original September 22, 1983 memorandum and make it clear to your client agencies that the guidance in this and the 1983 memorandum applies equally to them where the Department has delegated litigating authority to them.

An additional purpose of this memorandum is to call your attention to the responsibility of our client agencies to comply with the E.O. 12291 and E.O. 12498 review processes in the context of litigation. Agencies must provide for sufficient time and flexibility in making litigation and settlement decisions involving rulemaking to ensure that the review processes function fully and effectively. Therefore, in individual cases Department attorneys should remind client agencies that under the review processes they should submit to OMB all agreements and commitments they propose to make in the course of litigation that may:

1. Commit agencies to initiate, continue, or complete rulemaking;
2. Commit an agency to rulemaking when whether to engage in rulemaking at all is discretionary by statute;

*/ Communications to the clearinghouse should be directed to Robert G. Damus, Room 3744, Civil Division, Department of Justice, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20530; Telephone: (FTS) 633-3315. Communications to OMB should be directed to Richard M. Irby, Assistant General Counsel, Office of Management and Budget, Room 464, Old Executive Office Building, 17th & Pennsylvania Avenue, N.W., Washington, D.C. 20503; Telephone: (FTS) 395-5600.

3. Set or agree to a schedule for any rulemaking, or agree to proceed in an expedited fashion;
4. Limit the discretion of the agency head as to the outcome of a rulemaking that has been initiated; or
5. Agree to any discovery concerning communications between agencies and OMB during the review processes.

While client agencies have the above-noted responsibilities under E.O. 12291 and E.O. 12498 to submit materials to OMB, I do not mean to create a new level of clearance responsibility for Department attorneys under which they must obtain official OMB "sign-off" on final settlement documents or other court pleadings. However, I do ask that Department attorneys contact the clearinghouse before committing in court to doing anything listed in the preceding paragraph.

Please inform all attorneys in your Office or Division of this memorandum. Questions may be addressed to the clearinghouse.

Attachment



U.S. Department of Justice
Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

September 22, 1983

MEMORANDUM

TO: All United States Attorneys and
Assistant Attorneys General

FROM: Edward C. Schmults *EC*
Deputy Attorney General

SUBJECT: Coordination of Litigation Involving Executive
Order 12291, the Paperwork Reduction Act and
The Regulatory Flexibility Act

On February 17, 1981 the President issued Executive Order 12291, 46 Fed. Reg. 13193, which is intended to minimize costs and maximize benefits of regulations promulgated by Executive Branch agencies through informal rulemaking proceedings. The Order represents an important mechanism by which the President may exercise his constitutional authority over Executive Branch rulemaking. The Office of Management and Budget ("OMB") is generally responsible under the Order for performing pre-publication review of proposed and final rules and preliminary and final Regulatory Impact Analyses. Specifically, OMB is given authority, inter alia, to prepare uniform standards for measuring costs and benefits, to consult with agencies concerning their preparation of rules, to state its views regarding proposed rules for the administrative record, to require agencies to respond to these views and defer rulemaking while consulting with OMB, and to establish schedules for reviewing existing major rules.

An increasing number of lawsuits have been filed challenging both agency rulemaking conducted under E.O. 12291 and the legality of certain provisions of the Order. However, because E.O. 12291 issues may arise in a wide variety of litigation, attorneys in the litigating divisions and the United States Attorney offices may be called upon to defend the legality of the Order with little or no prior knowledge or experience concerning its origin, justification and operation. In view of the variety of contexts in which such issues may arise -- and the need for prompt notification to OMB to allow for appropriate OMB input -- the Department is establishing a "clearinghouse" for cases involving E.O. 12291, as well as two related statutes, the Paperwork Reduction Act, 44 U.S.C. 3501 et seq., and the Regulatory Flexibility Act, 5 U.S.C. 601 et seq.

The clearinghouse will receive, coordinate and provide information concerning litigation involving E.O. 12291, the Paperwork Reduction Act and the Regulatory Flexibility Act. The clearinghouse should be notified of all litigation involving E.O. 12291, the Paperwork Reduction Act or the Regulatory Flexibility Act, and be sent copies of relevant papers concerning such litigation. It will advise the Offices of Legal Policy and Legal Counsel of significant developments and will periodically circulate within the Department litigation status reports. In addition, it will make copies of documents available to the divisions and the United States Attorney offices. Effective operation of the clearinghouse will depend to a large extent on timely notification to the clearinghouse that a case involving the Order or one of the Acts has been filed or that such an issue has arisen in pending litigation. Thus, your cooperation and support in providing such notification is essential.

To initiate operation of the clearinghouse, the following immediate steps are required:

1. By October 15, 1983, send to the clearinghouse coordinator, Robert Damus of the Federal Programs Branch, Civil Division, a statement of pending cases involving E.O. 12291, the Paperwork Reduction Act or the Regulatory Flexibility Act; the statement should be substantially in the form of attachment A to this memorandum. If there are no pending cases, your statement should so indicate. In any event, include in your statement the name of an attorney in your office who will serve as a contact with the clearinghouse should the need arise for communication other than that between the clearinghouse and the attorneys assigned to specific cases.
2. Whenever a case involving E.O. 12291, the Paperwork Reduction Act or the Regulatory Flexibility Act is filed or when such an issue arises in pending litigation, immediately provide to the clearinghouse and to OMB pertinent information on the case, the name of the attorney assigned to the case and copies of relevant papers. Where to direct such communications is indicated below.
3. All attorneys assigned to cases involving E.O. 12291, the Paperwork Reduction Act or the Regulatory Flexibility Act are responsible for reporting significant litigation developments to the clearinghouse as soon as they occur and providing the clearinghouse with relevant pleadings, decisions or other papers concerning the litigation. They are also responsible for informing the clearinghouse of OMB input in the case, and sending relevant copies of correspondence with OMB to the clearinghouse.

The attorney operating the clearinghouse will assemble E.O. 12291, Regulatory Flexibility Act and Paperwork Reduction Act litigation materials and make them available to Department attorneys as needed or requested. Attorneys should feel free to contact the clearinghouse attorney concerning available litigation materials and the names of attorneys who have had experience in litigation involving the Order or one of the Acts.

Communications to the clearinghouse should be directed to Robert Damus, Room 3748, Civil Division, Department of Justice, 10th & Pennsylvania Avenue, N.W., Washington, D.C. 20530; Telephone: FTS 633-3315. Communications to OMB should be directed to Richard M. Irby, Assistant General Counsel, Office of Management and Budget, Room 464, Old Executive Office Building, 17th & Pennsylvania Avenue, N.W., Washington, D.C. 20503; Telephone: FTS 395-5600.

Please inform the attorneys in your office or division of the matters set forth in this memorandum.

Attachment

Memorandum



Subject

Pending Litigation Involving Executive
Order 12291, the Paperwork Reduction
Act or the Regulatory Flexibility Act

Date

TO Robert G. Damus
Assistant Director
Federal Programs Branch
Civil Division

From

This [office, division] is currently handling the following cases involving E.O. 12291, the Paperwork Reduction Act or the Regulatory Flexibility Act:

<u>Case Title</u>	<u>Assigned Attorney</u>	<u>Telephone Number</u>
-------------------	--------------------------	-------------------------

Copies of decisions and major pleadings filed in these cases are attached.

The attorney in this office who may be contacted on clearing-house matters is _____, telephone number _____.

[The completed memorandum should be sent to Robert Damus, Room 3748, Civil Division, Department of Justice, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20530.]

Attachment A



EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

THE DIRECTOR

April 3, 1989

M-89-15

MEMORANDUM FOR THE HEADS OF DEPARTMENTS AND AGENCIES

FROM: Richard G. Darman
Director

A handwritten signature in dark ink, appearing to read "Richard G. Darman", written over a horizontal line.

SUBJECT: Presidential Review of Agency Rulemaking

This is to call your attention to the requirements of Executive Order Nos. 12291 and 12498, and of the Paperwork Reduction Act of 1980. In the Executive Orders, the President delegated to the Office of Management and Budget (OMB) the responsibility for Executive Office of the President review of agency rulemaking (including not only formal regulations but other directives that are not solely for intra-agency administration). Similarly, the Paperwork Act requires the review of agency information collections and delegates the responsibility to OMB. The attached paper summarizes the review processes that implement these requirements.

It is the goal of OMB to carry out these procedures as expeditiously and cooperatively as possible. Experience has shown that the process of review is aided, both for the agency and for OMB, if a senior representative of your office -- often the Deputy or Under Secretary -- is designated as the responsible policy official for these activities. Within OMB, the office responsible for both regulatory and paperwork reviews is the Office of Information and Regulatory Affairs (OIRA). Upon designation of your office's representative, the Administrator of OIRA will be glad to meet to discuss the process and the review status of pending rules and related issues.

Attachment

March 1989

IMPLEMENTATION OF EXECUTIVE ORDER NOS. 12291 AND 12498 AND THE PAPERWORK REDUCTION ACT.

I. Executive Order No. 12498.

E.O. No. 12498 requires the Administration annually to publish a Regulatory Program of the United States Government outlining the Administration's regulatory priorities and upcoming important regulatory actions. The Order also creates the annual regulatory planning process that results in the publication of this book.

In a process similar to the fiscal budget process, at the beginning of each year each major regulatory agency drafts its regulatory program -- a summary of its regulatory policies, and a list of specific regulatory development projects underway. These draft regulatory programs are reviewed by OMB for consistency with the Administration's regulatory principles and priorities, and the planned actions of other regulatory agencies. If a planned regulatory action is consistent with these principles and priorities, then the action is included in the published Regulatory Program.

The next Regulatory Program, covering the regulatory activities of 26 agencies for the period April 1, 1989 through March 31, 1990, will provide the Congress and the public with descriptions and timetables for these significant regulatory actions. The rulemaking actions could be preliminary, in the sense of studies or other activities intended to lead to a decision of whether to undertake a rulemaking, as well as those underway as proposed or final rules. The 1989 Regulatory Program also provides agency heads an opportunity to focus on the upcoming work of their agencies, determine agency goals and regulatory priorities, and determine whether a particular regulatory action is worth starting before committing agency resources to it. Under the Executive Order, if an agency later requests OMB review of an important draft proposed or final rule that was not included in the 1989 Regulatory Program, but that should have been, OMB may return it to the agency for further work and for inclusion in the next year's Regulatory Program.

Note: Agencies were to submit their draft 1989 regulatory programs for OMB review by January 9, 1989. Most agencies have already submitted them. New agency heads and policy officials should review these submissions, and revise them as may be necessary to reflect their regulatory strategies for the upcoming year; at the request of a newly-appointed agency head, OMB will defer final review to provide reasonable opportunity for agency reassessment.

II. Executive Order No. 12291.

E.O. No. 12291 establishes Presidential oversight of agency rulemaking, requiring review of regulatory actions before they are proposed for public comment, and again before they are issued in final form. The Order defines "regulation" or "rule" broadly to include all agency policy guidance that affects the public, including procurement practice, grant or loan procedures, guidance to the public, interpretations of rules and statutes, and regulatory actions that relate to international trade.

Following transmittal to OMB by the head of the agency of a draft proposed rule, generally called a notice of proposed rulemaking, OMB reviews this draft proposed rule for consistency with the regulatory principles stated in the Order. The review includes assessing whether the rule is based on adequate information concerning the need for and consequences of the proposed government action; whether the potential benefits to society of the regulation outweigh its costs; whether the regulatory objectives are chosen to maximize the net benefits to society; and whether the regulatory alternative chosen involves the least net cost to society. Additional guidance for review was promulgated by the Presidential Task Force on Regulatory Relief in August 1983.

An important part of OMB review of the draft rule includes evaluation for possible impact on the programs of other agencies. OMB arranges for review by affected agencies, and for the coordination of agency positions as necessary.

If the rule is a "major" rule as defined by the Executive Order (i.e., a rule likely to result in an impact of \$100 million or more annually, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity or a particular industry, or as otherwise designated by OMB), the agency must prepare a written analysis called a Regulatory Impact Analysis (RIA). The RIA must contain an analysis of the rule's full social impact, including its costs and benefits. This is submitted to OMB along with the applicable draft rule. The preparation of this Regulatory Impact Analysis is important to assist the agency head in evaluating the need for and consequences of possible Federal action and in selecting from alternate ways to structure the rule, and to provide OMB and the public with a broader understanding of the scope of the issues that may be involved. OMB published detailed draft Regulatory Impact Analysis guidance in the 1988 Regulatory Program.

In the course of its review of the proposed rule (and the accompanying RIA, where applicable), OMB works closely with the agency. When OMB has completed its review of a proposed rule,

OMB notifies the agency that it has concluded review. After receiving notification from OMB that it has concluded review, the agency may proceed to issue the proposed rule.

Following publication of the proposed rule, the agency receives and reviews the public comments. After it drafts the rule in its final form, the draft final rule is submitted to OMB for review in much the same fashion as the draft proposed rule, and a similar review process is conducted. In the case of regulations subject to statutory or judicial deadlines, OMB will not unilaterally delay publication beyond the deadline. In such cases it is incumbent upon the agency to submit the rule to OMB in a timely fashion, so as to provide a meaningful opportunity for Executive Office review. When necessary due to delays in agency clearance procedures, the draft rule should be submitted to OMB for preliminary review at the same time as it is being reviewed by the agency's senior policymakers.

III. Paperwork Reduction Act.

The Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35) requires that OMB approve all collections of information by an agency before they can be implemented. A collection of information includes (1) requests for information, written or oral, for transmission to the government, and (2) requests that one party disclose information to another. Many information collections and recordkeeping requirements are contained or authorized by regulations as monitoring or enforcement tools, while others appear in written questionnaires and their accompanying instructions. The Act's underlying goal is to minimize the Federal paperwork burden on the public. At the same time, the Act recognizes the importance of information to the successful completion of agency missions, and charges OMB with the responsibility of weighing the burdens of the collection on the public against the needs of the agency.

Agencies must justify, in writing, to OMB and to the public each proposed collection of information, and include estimates of the reporting burden on respondents. In submitting a clearance request to OMB, an agency must demonstrate that the collection of information is the least burdensome way of obtaining information necessary for the proper performance of its functions, that the collection is not duplicative of others, and that the collection has practical utility.

To alert the public, agencies must publish a notice in the Federal Register of the agency's submission to OMB of a request for approval and, in certain circumstances, publish the draft information collection itself. The public -- during OMB's review and at any other time -- is to have full opportunity to make its views known concerning any Federal data collection, both as to its perceived need and the reporting burdens involved.

Under the Act, OMB approval for an agency to use each data collection instrument can last a maximum of three years. Failure to obtain OMB approval means that the requirement for the public to provide the data collection is without legal force, and that an agency may not subject the respondent to any penalty for failure to comply with the request for information.

GAO

United States General Accounting Office

Fact Sheet for the Chairman of the
Committee on Government Operations,
House of Representatives

ATTACHMENT 4

July 1989

REGULATORY REVIEW

Information on OMB's Review Process

C O N T E N T S

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ABBREVIATIONS

CWPS	Council on Wage and Price Stability
EPA	Environmental Protection Agency
OIRA	Office of Information and Regulatory Affairs
OMB	Office of Management and Budget
PRA	Paperwork Reduction Act of 1980

HISTORY AND DESCRIPTION OF OIRA REGULATORY REVIEW PROCESS

HISTORY OF EXECUTIVE BRANCH REGULATORY REVIEW

For the past 20 years, the executive branch has had some form of regulatory review.¹ Presidents Nixon, Ford, and Carter all made efforts to strengthen and centralize regulatory management. In 1971, President Nixon established the "Quality of Life Review," which required that significant proposed rules be submitted to OMB prior to their publication in the Federal Register. OMB then circulated the rules to other agencies for their comments. President Ford's regulatory review process focused on inflationary impacts. Under Executive Order 11821, agencies were required to submit inflationary impact statements to OMB, and OMB was authorized to prescribe procedures for the evaluation of regulations that would have significant inflationary impact. In 1974, he established the Council on Wage and Price Stability (CWPS) and charged CWPS with developing analyses of the economic consequences of proposed regulations.

President Carter continued the emphasis on inflationary impacts and cost-effectiveness. Executive Order 12044 required agencies to develop detailed regulatory analyses of major rules and to establish a process, approved by OMB, for the development of significant regulations. President Carter also created the Regulatory Analysis Review Group. Composed primarily of staff economists of the Council of Economic Advisers, this group prepared analyses of the costs and benefits of major regulations that were filed during the rulemaking public comment period.

President Reagan further centralized regulatory management by establishing the Presidential Task Force on Regulatory Relief and issuing Executive Orders 12291 and 12498. The Task Force, set up to assure that regulatory burdens were reduced wherever possible, was the initial focal point of the administration's regulatory activities. In 1983 the Task Force was abolished and its charge assumed by OMB.

¹A study by the National Academy of Public Administration, "Presidential Management of Rulemaking in Regulatory Agencies," published in January 1987, provides a detailed discussion of the history and issues surrounding regulatory management.

OIRA AND CURRENT EXECUTIVE BRANCH REGULATORY REVIEW

The current regulatory review process is stipulated in President Reagan's Executive Orders 12291 and 12498. OIRA, created by the Paperwork Reduction Act of 1980 (Public Law 96-511), implements regulatory reviews as prescribed by the Executive Orders in addition to its paperwork functions. Whereas under previous administrations OMB's role focused more on enhancing regulatory analyses as conducted by agencies themselves, under the new Executive Orders, a more formalized regulatory review process within OMB was established.

Executive Order 12291

Executive Order 12291, issued in 1981, lays out principles with which every regulation issued by executive agencies must comply. The Order requires, among other things, that the potential benefits of every rulemaking must outweigh the costs, and the agency must choose the alternative involving the least net cost. As experience with Executive Order 12291 accumulated, the Presidential Task Force on Regulatory Relief refined these principles and developed a set of 10 Regulatory Policy Guidelines to assist agency analysis. The Executive Order called for Formal Regulatory Impact Analyses to be submitted to OMB for major rules.² Major rules are ones that are predicted to affect the economy by \$100 million or more each year or those that have major impacts on consumers; industries; geographic regions; or federal, state, and local governments.³

Under Executive Order 12291, the agency submits its proposed rule, accompanied by a Regulatory Impact Analysis if it is a major rule, to OMB 60 days prior to the publication of the Notice of Proposed Rulemaking in the Federal Register. OMB is expected to complete its review within that 60 days. The process is repeated in the final rulemaking stage, with the agency submitting the final rule and the final Regulatory Impact Analysis to OMB 30 days prior to publication of the final rule in the Federal Register. Again, OMB is expected to complete its review within that time frame of 30 days. For nonmajor rules, the agency submits both the Notice of

²Both the "Regulatory Policy Guidelines" and a draft "Regulatory Impact Analysis Guidance" appear in OMB's Regulatory Program of the United States Government, April 1, 1988 -- March 31, 1989.

³See Section 1 (b) of Executive Order 12291 in appendix VII for definition of "major" rule.

Proposed Rulemaking and the final rule to OMB 10 days prior to publication, and OMB is expected to complete its review within those 10 days. The Executive Order instructs the agency to refrain from publishing its final rule until the agency has responded to the OMB Director's concerns and incorporated those views and the agency's response in the rulemaking file. OMB or the agency may take the issue to an appropriate Cabinet body or the President in the case of a disagreement.

Executive Order 12498

To improve executive regulatory oversight, President Reagan issued Executive Order 12498 in 1985. The Order established a regulatory planning process by which each executive agency is required to send to OMB (1) an overview of regulatory policies, goals, and objectives; and (2) information on all significant regulatory actions planned or in process. The Reagan Administration said that more should be done to improve executive regulatory oversight advance planning. Executive Order 12291 reviews, they said, often came late in the regulatory process, after huge investments of agency time and resources and often after agency staff commitments to constituents had made it extremely difficult to consider any acceptable, but previously ignored, regulatory alternative.

Executive Order 12498 gives OMB the opportunity to review the most important pre-rulemaking activities of agencies and to determine whether or not they are consistent with the administration's policies and priorities before significant agency resources are invested toward their development. In designing a regulatory program, agencies are advised to follow the same principles to which regulations must adhere under Executive Order 12291. OIRA's review involves identifying regulatory or deregulatory actions that may be necessary in order to achieve consistency with the administration's program. According to OIRA, it never disapproves of an agency's proposed regulatory program; rather, it describes the process as one of consultation and negotiation between OIRA and the agency. Any change, however, in an agency's regulatory activity that is not consistent with the plan requires OMB clearance; and unless required by statute, court proceedings, or emergencies, an agency is instructed not to move on a proposed regulatory action until OMB completes its review. The same appeal process exists under the two Executive Orders in that disagreements under Executive Order 12498 may be brought, just as with Executive Order 12291, before the appropriate Cabinet body or the President by either the agency head or OMB. The approved plans are compiled and published in the annual Regulatory Program of the United States.

Paperwork Reduction Act

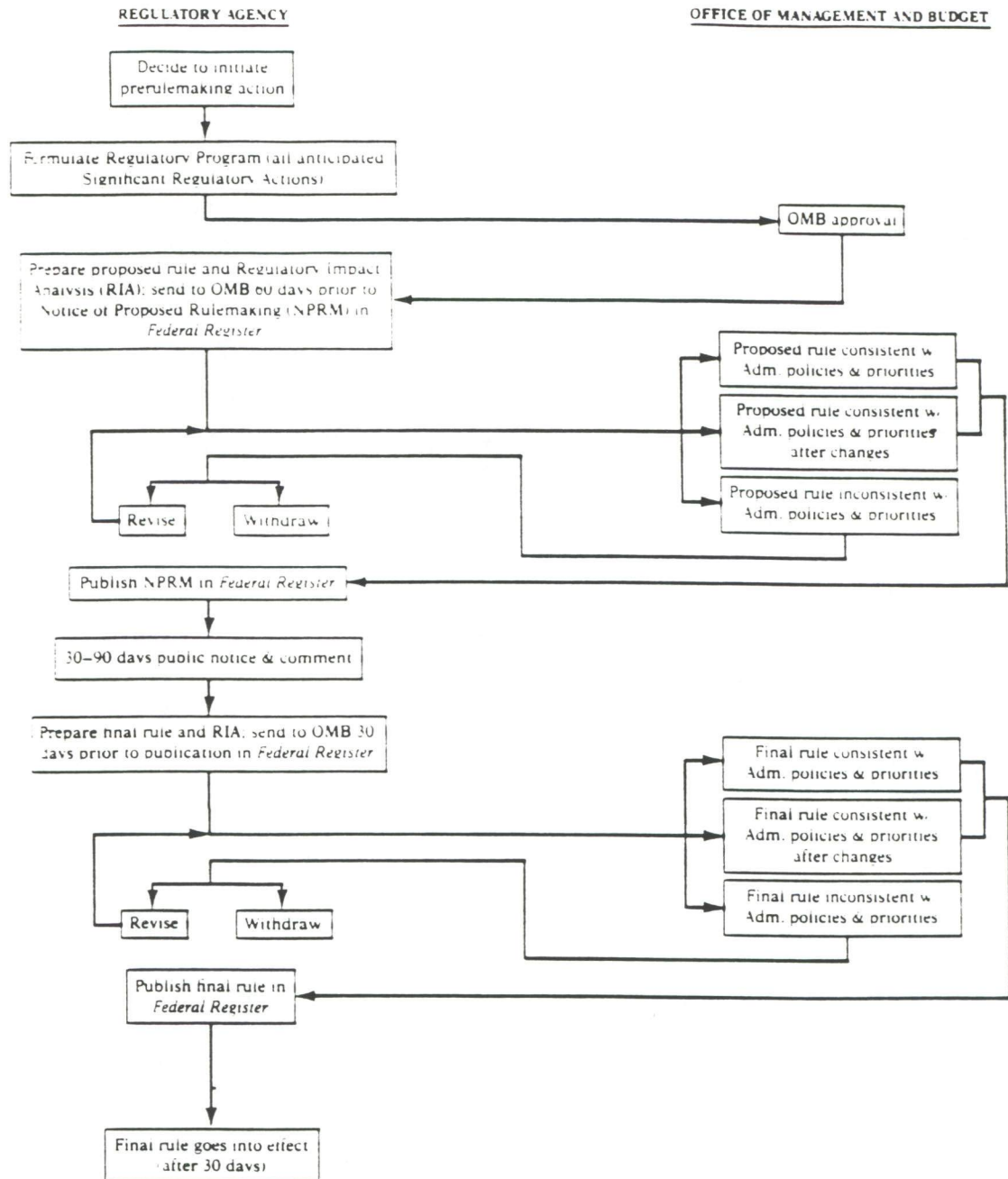
One of the purposes of the Paperwork Reduction Act is to minimize the information burden imposed on the public by the federal government and the cost to the government of collecting, maintaining, using, and disseminating information. The act gave OMB broad clearance authority: executive and independent agencies are required to submit all proposed information collection and recordkeeping requirements to OMB for approval. The act sets information burden reduction targets, and OMB developed the Information Collection Budget to place a limit on individual agency demands.

When information collection requests are contained in regulations, OIRA submits public comments after the Notice of Proposed Rulemaking is published in the Federal Register. The agency is required to respond to OIRA's concerns when it publishes the final rule, including why the agency has rejected OIRA's concerns if this is the case. If OIRA is not satisfied with the agency's rationale for rejecting OIRA's concerns, OIRA does have the authority, under the Paperwork Reduction Act, to disapprove any collection of information requirement within 60 days of its publication as a final rule.

The information collection requests contained in regulations are also subject to OIRA reviews under Executive Order 12291. Because many of the federal forms, surveys, reports, and other information collection mechanisms subject to OMB clearance under the Paperwork Reduction Act involve pre-rulemaking or are actually parts of rules, the review of rules under both authorities is commonplace. OIRA said that the Paperwork Reduction Act and the two Executive Orders "create mutually supportive, interactive Presidential oversight mechanisms that focus on the paperwork and regulatory impacts of Federal programs" and "go hand-in-hand with OMB's oversight of other aspects of Federal programs."

The Mechanics of the OIRA Regulatory Review Process

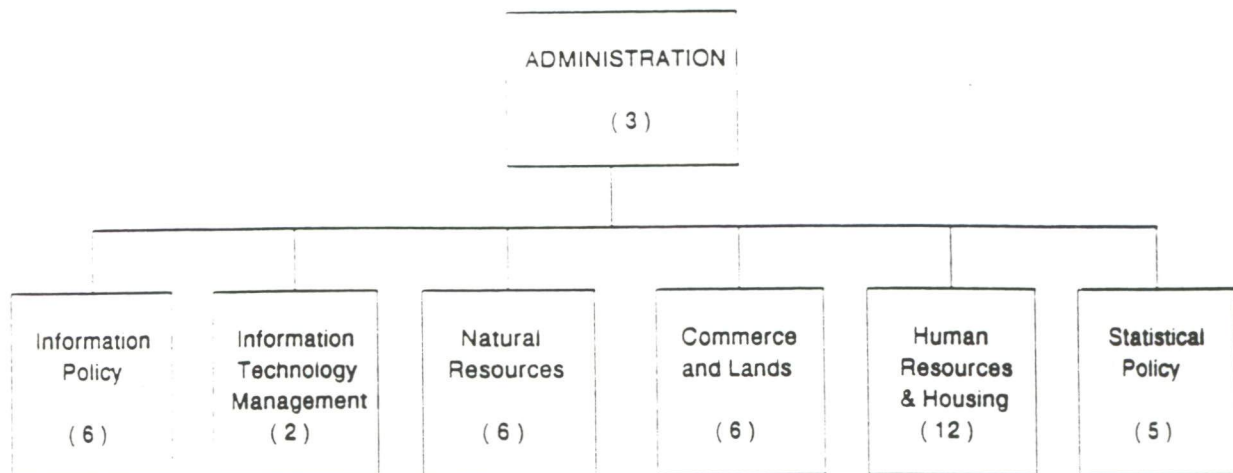
Agencies submit proposed and final regulations to OIRA. OIRA desk officers, organized by federal department or agency, review the regulations as specified in the Executive Orders. For regulations that include an information-collection component, OIRA desk officers review the regulation under procedures for both Executive Order 12291 and the Paperwork Reduction Act. The regulatory review process under Executive Orders 12291 and 12498 is depicted in the attached flow chart. Copies of the Executive Orders appear in appendix VII.

Figure I.1: Executive Branch Regulatory Management Process

INFORMATION ON OIRA STAFF AND ACTIVITIES

As of June 1989, OIRA had a total of 56 staff, 16 of whom were clerical or support staff. OIRA staff make reviews of regulations under Executive Orders 12291 and 12498, as well as activities related to the Paperwork Reduction Act of 1980 (PRA). Three of OIRA's branches--Information Policy, Information Technology Management, and Statistical Policy--devote almost all of their efforts to carry out certain provisions of PRA. The three other branches--Natural Resources, Human Resources, and Commerce and Lands--were staffed largely by desk officers, who spend their time on implementation of PRA paperwork burden activities and regulatory review. OIRA's organizational structure is shown below. The numbers in parentheses indicate the number of staff in each branch, excluding the clerical/support staff.

Figure II.1: OIRA Organization Chart



OIRA does not maintain staff time records separately for activities under PRA and the Executive Orders. To determine the relative staff workload, OIRA periodically surveys its six branches. On the basis of these surveys, OIRA estimated that approximately 75 to 80 percent of its total efforts (and budget) supports and carries out the provisions of PRA. The remaining 20 to 25 percent was attributed to regulatory and other review functions that did not involve PRA. Because of the overlapping nature of duties under PRA and the Executive Orders, OIRA officials said it was difficult to determine the precise time spent on each. We did not independently verify these estimates.

Table II.1: Background Statistics on OIRA Employees
as of June 1989

WORK EXPERIENCE:				GRADE STRUCTURE:	
Years of experience	Number of employees with experience in			Grade	No. of employees
	OMB	Other govt.	Private sector		
No experience	0	10	20	GS 9-11	5
Less than one year	3	2	4	GS 12	6
1 to 3 years	12	7	10	GS 13	6
More than 3 years	25	21	6	GS 14	5
				GS 15	12
Average years	5.98	5.19	1.88	SES and above	6
Range (in yrs)	0.2-17	0-24	0-26		

TYPE OF DEGREE:		FIELD OF STUDY	
(highest degree)	No. of employees	Type of major	No. of employees
Bachelor	5	Public Policy/ Admin.	15
Master	20	Economics/Finance	8
Law (JD, LL.M., LL.B.)	5	Law	5
Doctorate	10	Science/Math	5
		Other	7

UNIVERSITIES GRADUATED FROM:	
(highest degree)	
University	No. of employees
Harvard Univ.	7
Univ. of Chicago	3
Princeton Univ.	2
Univ. of Pennsylvania	2
Univ. of Maryland	3
Univ. of Washington	2
George Washington Univ.	2
Univ. of California at Berkeley	2
Columbia Univ.	2
Univ. of Wisconsin	2
Other	13

Note: All tables have a total of 40 staff. The 16 clerical/support staff were not included.

TYPES OF ACTIONS TAKEN ON AGENCY RULES
FOR 1988 AND 1989

Table III.1: Types of Actions Taken on Agency Rules in 1988

Agency	Total reviews	Percent of govt. total	Actions taken on rule reviews (numbers show percent of total reviews)					
			Consistent without change	Consistent with change	With-drawn by agency	Returned for reconsideration	Statutory or judicial deadline	Other
Agriculture	441	18.7	82.5	12.7	1.1	2.3	0.2	1.1
HHS	320	13.5	65.3	31.6	1.6	0.9	0.3	0.3
Transportation	257	10.9	65.8	30.7	1.2	0.8	1.2	0.4
EPA	210	8.9	51.0	27.6	2.9	3.3	14.8	0.5
Interior	152	6.4	36.8	9.2	3.3	0.7	0.0	0.0
Commerce	145	6.1	66.2	13.1	1.4	0.7	15.9	2.8
HUD	105	4.4	54.3	29.5	10.5	0.0	5.7	0.0
Education	123	5.2	66.7	31.7	1.6	0.0	0.0	0.0
VA	82	3.5	52.9	14.6	1.2	1.2	0.0	0.0
Labor	77	3.3	48.1	46.8	2.6	1.3	1.3	0.0
OPM	74	3.1	33.8	14.9	0.0	0.0	0.0	1.4
GSA	57	2.4	73.7	21.1	1.8	1.8	1.8	0.0
Justice	52	2.2	34.6	15.4	0.0	0.0	0.0	0.0
SBA	37	1.6	54.1	32.4	5.4	2.7	2.7	2.7
Treasury	37	1.6	86.5	13.5	0.0	0.0	0.0	0.0
FEMA	30	1.3	60.0	23.3	16.7	0.0	0.0	0.0
Energy	20	0.8	70.0	20.0	0.0	5.0	5.0	0.0
Other agencies	143	6.1	34.6	9.8	4.9	0.0	0.7	0.0
All government	2,362	100.0	70.9	21.9	2.4	1.2	3.0	0.6

Notes: Data is for reviews completed during calendar year 1988.

"Consistent without change" means the proposed rule is consistent with the principles of Executive Order 12291 as submitted by the agency.

"Consistent with change" means the proposed rule is consistent with the Executive Order after the agency adopted changes suggested by OIRA during the review period.

Agencies can withdraw regulations or OIRA can also return a regulation to the agency for reconsideration.

Rules that have statutory or judicial deadlines are reviewed by OIRA if time permits; however, such regulations may be published without the OIRA review process.

Source: Office of Information and Regulatory Affairs; however percentages were calculated by GAO.

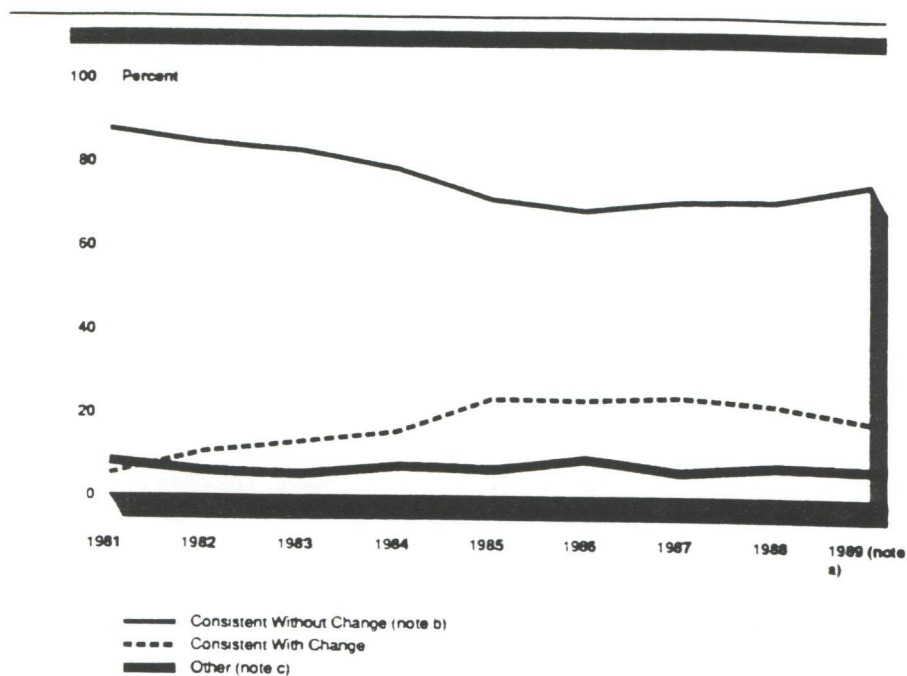
Table III.2: Types of Actions Taken on Agency Rules in 1989

Agency	Total reviews	Percent of govt. Total	Actions taken on rule reviews (numbers show percent of total reviews)					
			Consistent without change	Consistent with change	With-drawn by agency	Returned for Reconsideration	Statutory or judicial deadline	Other
Agriculture	213	20.4	84.5	13.6	0.9	0.5	0.0	0.5
HHS	139	13.3	64.7	29.5	2.2	3.6	0.0	0.0
Transportation	98	9.4	78.6	20.4	1.0	0.0	0.0	0.0
EPA	94	9.0	52.1	26.6	2.1	6.4	12.8	0.0
Interior	48	4.6	85.4	10.4	4.2	0.0	0.0	0.0
Commerce	89	8.5	89.9	6.7	2.2	0.0	0.0	1.1
HUD	35	3.3	42.9	22.9	28.6	2.9	2.9	0.0
Education	50	4.8	70.0	28.0	2.0	0.0	0.0	0.0
VA	34	3.3	88.2	11.8	0.0	0.0	0.0	0.0
Labor	22	2.1	50.0	50.0	0.0	0.0	0.0	0.0
OPM	28	2.7	75.0	7.1	7.1	7.1	3.6	0.0
GSA	27	2.6	74.1	22.2	3.7	0.0	0.0	0.0
Justice	37	3.5	83.8	5.4	0.0	0.0	5.4	5.4
SBA	25	2.4	76.0	20.0	0.0	0.0	4.0	0.0
Treasury	13	1.2	84.6	15.4	0.0	0.0	0.0	0.0
FEMA	14	1.3	71.4	21.4	7.1	0.0	0.0	0.0
Energy	13	1.2	76.9	0.0	7.7	0.0	7.7	7.7
Other agencies	66	6.3	83.3	10.6	1.5	0.0	3.0	1.5
All government	1,045	100.0	75.1	18.2	2.8	1.4	1.9	0.6

Note: Data is for January 1 through May 31, 1989.

Source: Office of Information and Regulatory Affairs; however percentages were calculated by GAO.

TYPES OF ACTIONS TAKEN ON AGENCY RULES
1981 - 1989



Note a: All data is for the calendar year, except 1989 data is for January 1 through May 31, 1989.

Note b: Definitions of actions are shown in the notes to appendix III.

Note c: Other includes: withdrawn by agency; returned for reconsideration; statutory or judicial deadline; and other.

Note d: From January 1981 through May 31, 1989, 19,984 draft rules were reviewed by OIRA; 77 percent were consistent without change and 16.4 percent were consistent with change.

Source: Office of Information and Regulatory Affairs.

AVERAGE OIRA REVIEW TIME BY AGENCY
BY TYPE OF RULE, 1986-1989

Table V.1: Number of and Average Review Time for Proposed Major Rules

Agency	1986		1987		1988		1989	
	No. of reviews	Days	No. of reviews	Days	No. of reviews	Days	No. of reviews	Days
Agriculture	3	12	11	25	10	18	8	37
Commerce	1	127	0	NA	1	144	0	NA
DOD	0	NA	2	4	0	NA	0	NA
Energy	2	34	0	NA	1	125	1	12
HHS	6	9	2	225	5	40	1	1
HUD	2	60	3	56	2	30	0	NA
Interior	1	5	1	5	2	65	1	1
Justice	0	NA	1	4	0	NA	0	NA
Labor	1	9	3	162	5	138	2	140
Transportation	3	11	2	19	5	83	0	NA
EPA	5	45	12	49	10	64	3	83
Other agencies	1	51	3	66	2	102	1	19
All government	25	29	40	48	43	65	17	51

Table V.2: Number of and Average Review Time for Final Major Rules

Agency	1986		1987		1988		1989	
	No. of reviews	Days	No. of reviews	Days	No. of reviews	Days	No. of reviews	Days
Agriculture	19	13	8	11	14	11	12	49
Commerce	0	NA	0	NA	0	NA	1	6
DOD	1	30	1	6	0	NA	0	NA
Energy	0	NA	0	NA	0	NA	0	NA
HHS	9	28	1	36	3	79	0	NA
HUD	1	14	2	4	3	15	2	83
Interior	4	7	2	4	2	2	0	NA
Justice	0	NA	1	1	0	NA	0	NA
Labor	2	110	3	102	4	103	3	91
Transportation	4	40	2	24	4	16	2	121
EPA	2	30	7	46	6	28	0	NA
Other agencies	6	62	3	19	3	43	2	20
All government	48	30	30	27	39	31	22	60

Note: See notes and source on the next page.

Table V.3: Number of Reviews and Average Processing Time for Proposed and Final Nonmajor Rules.

Agency	1986		1987		1988		1989	
	No. of reviews	Days	No. of reviews	Days	No. of reviews	Days	No. of reviews	Days
Agriculture	396	18	401	19	417	19	193	17
Commerce	128	15	134	19	144	35	88	13
DOD	8	28	14	12	12	22	2	4
Energy	14	15	20	24	19	42	12	42
HHS	266	37	311	36	312	32	138	39
HUD	65	32	59	21	100	31	33	19
Interior	139	11	183	20	148	22	47	27
Justice	46	8	82	6	52	17	37	13
Labor	53	47	58	46	68	84	17	42
Transportation	189	19	198	32	248	41	95	28
EPA	190	41	196	35	194	48	91	48
Other agencies	440	21	598	17	566	29	252	27
All government	1,934	24	2,246	25	2,280	32	1,005	27

Notes:

Major rules are defined as ones that are predicted to affect the economy by \$100 million or more each year; those that have major impacts on consumers, industries, state and local governments, or other federal agencies; or those that have adverse impacts on competition, employment, the ability of U.S. firms to compete with foreign companies, or other factors. All other rules are defined as nonmajor rules.

Notices of proposed rulemaking (proposed rules) are reviewed by OIRA prior to their publication in the Federal Register. OIRA also reviews the rule in final form after publication of the proposed rule in the Federal Register and the public comment period. (See flow chart in appendix I.)

Days indicate the number of days from receipt in OIRA until returned to the agency.

Data is for calendar year; 1989 data is from January 1 through May 31, 1989.

Source:

Office of Information and Regulatory Affairs.

AGENCIES ELECTING TO INSTITUTE THE
EPA DISCLOSURE PROCEDURES

The Environmental Protection Agency (EPA) disclosure procedures refer to a subset of procedures contained in a June 1986 memorandum from OIRA to heads of departments and agencies that lays out OIRA's disclosure procedures under Executive Orders 12291 and 12498.⁴ The intent of the disclosure procedures was to address EPA's concern that it be apprised of information OIRA received from individuals or groups outside of the federal government that might have bearing on OIRA's review of a regulation. For example, if OIRA was meeting with industry representatives who would have substantial interest in the scope of a particular regulation, EPA--under these procedures--is to be advised of, and invited to, such meetings. Furthermore, EPA wanted additional assurance that all information pertaining to its rulemaking activities is included in the rulemaking dockets. The EPA disclosure procedures provide the following:

- OIRA will send EPA copies of all written material concerning EPA's rules that OIRA receives from persons who are not employees of the federal government.
- OIRA will advise EPA of all oral communications concerning EPA's rules (e.g., meetings, telephone calls) that OIRA has with persons who are not employees of the federal government. (Only the OIRA Administrator and Deputy Administrator, or other specifically authorized person, are permitted to meet or talk with members of the public regarding regulatory reviews under Executive Orders 12291 and 12498).
- OIRA will invite EPA to all scheduled meetings with such persons concerning EPA's rules.

OIRA will extend these procedures to any agency that elects to institute them. As of June 1989, five agencies have elected to institute these procedures. They are: Department of Housing and Urban Development, Department of Labor, Department of Transportation, Department of the Treasury, and the Environmental Protection Agency.

⁴The June 1986 memorandum appears in OMB's Regulatory Program of the United States Government, April 1, 1988 -- March 31, 1989. In addition to the EPA disclosure procedures, the memorandum includes other procedures that require OIRA to make available, upon written request and after their publication, copies of draft regulations and regulatory plans, as well as correspondence concerning draft rules between OIRA and the agency head.

EXECUTIVE ORDERS 12291 AND 12498EXECUTIVE ORDER NO. 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, 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 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 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 inter-agency 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. 601 *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).

(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 it 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 statutes 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.

THE WHITE HOUSE
February 17, 1981

RONALD REAGAN

EXECUTIVE ORDER NO. 12498 OF JANUARY 4, 1985

Regulatory Planning Process

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to create a coordinated process for developing on an annual basis the Administration's Regulatory Program, establish Administration regulatory priorities, increase the accountability of agency heads for the regulatory actions of their agencies, provide for Presidential oversight of the regulatory process, reduce the burdens of existing and future regulations, minimize duplication and conflict of regulations, and enhance public and Congressional understanding of the Administration's regulatory objectives, it is hereby ordered as follows:

Section 1. *General Requirements.* (a) There is hereby established a regulatory planning process by which the Administration will develop and publish a Regulatory Program for each year. To implement this process, each Executive agency subject to Executive Order No. 12291 shall submit to the Director of the Office of Management and Budget (OMB) each year, starting in 1985, a statement of its regulatory policies, goals, and objectives for the coming year and information concerning all significant regulatory actions under way or planned; however, the Director may exempt from this order such agencies or activities as the Director may deem appropriate in order to achieve the effective implementation of this order.

(b) The head of each Executive agency subject to this Order shall ensure that all regulatory actions are consistent with the goals of the agency and of the Administration, and will be appropriately implemented.

(c) This program is intended to complement the existing regulatory planning and review procedures of agencies and the Executive branch, including the procedures established by Executive Order No. 12291.

(d) To assure consistency with the goals of the Administration, the head of each agency subject to this Order shall adhere to the regulatory principles stated in Section 2 of Executive Order No. 12291,

including those elaborated by the regulatory policy guidelines set forth in the August 11, 1983, Report of the Presidential Task Force on Regulatory Relief, "Reagan Administration Regulatory Achievements."

Sec. 2. *Agency Submission of Draft Regulatory Program.* (a) The head of each agency shall submit to the Director an overview of the agency's regulatory policies, goals, and objectives for the program year and such information concerning all significant regulatory actions of the agency, planned or under way, including actions taken to consider whether to initiate rulemaking; requests for public comment; and the development of documents that may influence, anticipate, or lead to the commencement of rulemaking proceedings at a later date, as the Director deems necessary to develop the Administration's Regulatory Program. This submission shall constitute the agency's draft regulatory program. The draft regulatory program shall be submitted to the Director each year, on a date to be specified by the Director, and shall cover the period from April 1 through March 31 of the following year.

(b) The overview portion of the agency's submission should discuss the agency's broad regulatory purposes, explain how they are consistent with the Administration's regulatory principles, and include a discussion of the significant regulatory actions, as defined by the Director, that it will take. The overview should specifically discuss the significant regulatory actions of the agency to revise or rescind existing rules.

(c) Each agency head shall categorize and describe the regulatory actions described in subsection (a) in such format as the Director shall specify and provide such additional information as the Director may request; however, the Director shall, by Bulletin or Circular, exempt from the requirements of this order any class or category of regulatory action that the Director determines is not necessary to review in order to achieve the effective implementation of the program.

Sec. 3. Review, Compilation, and Publication of the Administration's Regulatory Program. (a) In reviewing each agency's draft regulatory program, the Director shall (i) consider the consistency of the draft regulatory program with the Administration's policies and priorities and the draft regulatory programs submitted by other agencies; and (ii) identify such further regulatory or deregulatory actions as may, in his view, be necessary in order to achieve such consistency. In the event of disagreement over the content of the agency's draft regulatory program, the agency head or the Director may raise issues for further review by the President or by such appropriate Cabinet Council or other forum as the President may designate.

(b) Following the conclusion of the review process established by subsection (a), each agency head shall submit to the Director, by a date to be specified by the Director, the agency's final regulatory plan for compilation and publication as the Administration's Regulatory Program for that year. The Director shall circulate a draft of the Administration's Regulatory Program for agency comment, review, and inter-agency consideration, if necessary, before publication.

(c) After development of the Administration's Regulatory Program for the year, if the agency head proposes to take a regulatory action subject to the provisions of Section 2 and not previously submitted for review under this process, or if the agency head proposes to take a regulatory action that is materially different from the action described in the agency's final regulatory program, the agency head shall immediately advise the Director and submit the action to the Director for review in such format as the Director may specify. Except in the case of emergency situations, as defined by the Director, or statutory or judicial deadlines, the agency head shall refrain from taking the proposed regulatory action

until the review of this submission by the Director is completed. As to those regulatory actions not also subject to Executive Order No. 12291, the Director shall be deemed to have concluded that the proposal is consistent with the purposes of this Order, unless he notifies the agency head to the contrary within 10 days of its submission. As to those regulatory actions subject to Executive Order No. 12291, the Director's review shall be governed by the provisions of Section 3(e) of the Order.

(d) Absent unusual circumstances, such as new statutory or judicial requirements or unanticipated emergency situations, the Director may, to the extent permitted by law, return for reconsideration any rule submitted for review under Executive Order No. 12291 that would be subject to Section 2 but was not included in the agency's final Regulatory Program for that year, or any other significant regulatory action that is materially different from those described in the Administration's Regulatory Program for that year.

Sec. 4. Office of Management and Budget. The Director of the Office of Management and Budget is authorized, to the extent permitted by law, to take such actions as may be necessary to carry out the provisions of this Order.

Sec. 5. 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 WHITE HOUSE
January 4, 1985

RONALD REAGAN

Federal Register

Vol. 32, No. 230

Friday, October 31, 1967

Presidential Documents

Title 3—

Executive Order 12812 of October 28, 1967

The President

Federalism

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to restore the division of governmental responsibilities between the national government and the States that was intended by the Framers of the Constitution and to ensure that the principles of federalism established by the Framers guide the Executive departments and agencies in the formulation and implementation of policies, it is hereby ordered as follows:

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

- (a) "Policies that have federalism implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.
- (b) "State" or "States" refer to the States of the United States of America, individually or collectively, and, where relevant, to State governments, including units of local government and other political subdivisions established by the States.

Sec. 2. Fundamental Federalism Principles. In formulating and implementing policies that have federalism implications, Executive departments and agencies shall be guided by the following fundamental federalism principles:

- (a) Federalism is rooted in the knowledge that our political liberties are best assured by limiting the size and scope of the national government.
- (b) The people of the States created the national government when they delegated to it those enumerated governmental powers relating to matters beyond the competence of the individual States. All other sovereign powers, save those expressly prohibited the States by the Constitution, are reserved to the States or to the people.
- (c) The constitutional relationship among sovereign governments, State and national, is formalized in and protected by the Tenth Amendment to the Constitution.
- (d) The people of the States are free, subject only to restrictions in the Constitution itself or in constitutionally authorized Acts of Congress, to define the moral, political, and legal character of their lives.
- (e) In most areas of governmental concern, the States uniquely possess the constitutional authority, the resources, and the competence to discern the sentiments of the people and to govern accordingly. In Thomas Jefferson's words, the States are "the most competent administrations for our domestic concerns and the surest bulwarks against antirepublican tendencies."
- (f) The nature of our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires. In the search for enlightened public policy, individual States and communities are free to experiment with a variety of approaches to public issues.

(g) Acts of the national government—whether legislative, executive, or judicial in nature—that exceed the enumerated powers of that government under the Constitution violate the principle of federalism established by the Framers.

(h) Policies of the national government should recognize the responsibility of—and should encourage opportunities for—individuals, families, neighborhoods, local governments, and private associations to achieve their personal, social, and economic objectives through cooperative effort.

(i) In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual States. Uncertainties regarding the legitimate authority of the national government should be resolved against regulation at the national level.

Sec. 3. Federalism Policymaking Criteria. In addition to the fundamental federalism principles set forth in section 2, Executive departments and agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have federalism implications:

(a) There should be strict adherence to constitutional principles. Executive departments and agencies should closely examine the constitutional and statutory authority supporting any Federal action that would limit the policymaking discretion of the States, and should carefully assess the necessity for such action. To the extent practicable, the States should be consulted before any such action is implemented. Executive Order No. 12372 ("Intergovernmental Review of Federal Programs") remains in effect for the programs and activities to which it is applicable.

(b) Federal action limiting the policymaking discretion of the States should be taken only where constitutional authority for the action is clear and certain and the national activity is necessitated by the presence of a problem of national scope. For the purposes of this Order:

(1) It is important to recognize the distinction between problems of national scope (which may justify Federal action) and problems that are merely common to the States (which will not justify Federal action because individual States, acting individually or together, can effectively deal with them).

(2) Constitutional authority for Federal action is clear and certain only when authority for the action may be found in a specific provision of the Constitution, there is no provision in the Constitution prohibiting Federal action, and the action does not encroach upon authority reserved to the States.

(c) With respect to national policies administered by the States, the national government should grant the States the maximum administrative discretion possible. Intrusive, Federal oversight of State administration is neither necessary nor desirable.

(d) When undertaking to formulate and implement policies that have federalism implications, Executive departments and agencies shall:

(1) Encourage States to develop their own policies to achieve program objectives and to work with appropriate officials in other States.

(2) Refrain, to the maximum extent possible, from establishing uniform, national standards for programs and, when possible, defer to the States to establish standards.

(3) When national standards are required, consult with appropriate officials and organizations representing the States in developing those standards.

Sec. 4. Special Requirements for Preemption. (a) To the extent permitted by law, Executive departments and agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of State law, or when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute.

(b) Where a Federal statute does not preempt State law (as addressed in subsection (a) of this section), Executive departments and agencies shall construe any authorization in the statute for the issuance of regulations as authorizing preemption of State law by rule-making only when the statute expressly authorizes issuance of preemptive regulations or there is some other firm and palpable evidence compelling the conclusion that the Congress intended to delegate to the department or agency the authority to issue regulations preempting State law.

(c) Any regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated.

(d) As soon as an Executive department or agency foresees the possibility of a conflict between State law and Federally protected interests within its area of regulatory responsibility, the department or agency shall consult, to the extent practicable, with appropriate officials and organizations representing the States in an effort to avoid such a conflict.

(e) When an Executive department or agency proposes to act through adjudication or rule-making to preempt State law, the department or agency shall provide all affected States notice and an opportunity for appropriate participation in the proceedings.

Sec. 5. Special Requirements for Legislative Proposals. Executive departments and agencies shall not submit to the Congress legislation that would:

(a) Directly regulate the States in ways that would interfere with functions essential to the States' separate and independent existence or operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions;

(b) Attach to Federal grants conditions that are not directly related to the purpose of the grant; or

(c) Preempt State law, unless preemption is consistent with the fundamental federalism principles set forth in section 2, and unless a clearly legitimate national purpose, consistent with the federalism policymaking criteria set forth in section 3, cannot otherwise be met.

Sec. 6. Agency Implementation. (a) The head of each Executive department and agency shall designate an official to be responsible for ensuring the implementation of this Order.

(b) In addition to whatever other actions the designated official may take to ensure implementation of this Order, the designated official shall determine which proposed policies have sufficient federalism implications to warrant the preparation of a Federalism Assessment. With respect to each such policy for which an affirmative determination is made, a Federalism Assessment, as described in subsection (c) of this section, shall be prepared. The department or agency head shall consider any such Assessment in all decisions involved in promulgating and implementing the policy.

(c) Each Federalism Assessment shall accompany any submission concerning the policy that is made to the Office of Management and Budget pursuant to Executive Order No. 12291 or OMB Circular No. A-19, and shall:

(1) Contain the designated official's certification that the policy has been assessed in light of the principles, criteria, and requirements stated in sections 2 through 5 of this Order;

(2) Identify any provision or element of the policy that is inconsistent with the principles, criteria, and requirements stated in sections 2 through 5 of this Order;

(3) Identify the extent to which the policy imposes additional costs or burdens on the States, including the likely source of funding for the States and the ability of the States to fulfill the purposes of the policy; and

(4) Identify the extent to which the policy would affect the States' ability to discharge traditional State governmental functions, or other aspects of State sovereignty.

Sec. 7. Government-wide Federalism Coordination and Review. (a) In implementing Executive Order Nos. 12291 and 12498 and OMB Circular No. A-19, the Office of Management and Budget, to the extent permitted by law and consistent with the provisions of these authorities, shall take action to ensure that the policies of the Executive departments and agencies are consistent with the principles, criteria, and requirements stated in sections 2 through 5 of this Order.

(b) In submissions to the Office of Management and Budget pursuant to Executive Order No. 12291 and OMB Circular No. A-19, Executive departments and agencies shall identify proposed regulatory and statutory provisions that have significant federalism implications and shall address any substantial federalism concerns. Where the departments or agencies deem it appropriate, substantial federalism concerns should also be addressed in notices of proposed rule-making and messages transmitting legislative proposals to the Congress.

Sec. 8. Judicial Review. This Order is intended only to improve the internal management of the Executive branch, 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.

Ronald Reagan

THE WHITE HOUSE

October 28, 1987.

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Billing code 3195-01-M

Presidential Documents

Title 3—

Executive Order 12630 of March 15, 1988

The President

Governmental Actions and Interference With Constitutionally Protected Property Rights

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to ensure that government actions are undertaken on a well-reasoned basis with due regard for fiscal accountability, for the financial impact of the obligations imposed on the Federal government by the just Compensation Clause of the Fifth Amendment, and for the Constitution, it is hereby ordered as follows:

Section 1. Purpose. (a) The Fifth Amendment of the United States Constitution provides that private property shall not be taken for public use without just compensation. Government historically has used the formal exercise of the power of eminent domain, which provides orderly processes for paying just compensation, to acquire private property for public use. Recent Supreme Court decisions, however, in reaffirming the fundamental protection of private property rights provided by the Fifth Amendment and in assessing the nature of governmental actions that have an impact on constitutionally protected property rights, have also reaffirmed that governmental actions that do not formally invoke the condemnation power, including regulations, may result in a taking for which just compensation is required.

(b) Responsible fiscal management and fundamental principles of good government require that government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights. Executive departments and agencies should review their actions carefully to prevent unnecessary takings and should account in decision-making for those takings that are necessitated by statutory mandate.

(c) The purpose of this Order is to assist Federal departments and agencies in undertaking such reviews and in proposing, planning, and implementing actions with due regard for the constitutional protections provided by the Fifth Amendment and to reduce the risk of undue or inadvertent burdens on the public fisc resulting from lawful governmental action. In furtherance of the purpose of this Order, the Attorney General shall, consistent with the principles stated herein and in consultation with the Executive departments and agencies, promulgate Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings to which each Executive department or agency shall refer in making the evaluations required by this Order or in otherwise taking any action that is the subject of this Order. The Guidelines shall be promulgated no later than May 1, 1988, and shall be disseminated to all units of each Executive department and agency no later than July 1, 1988. The Attorney General shall, as necessary, update these guidelines to reflect fundamental changes in takings law occurring as a result of Supreme Court decisions.

Sec. 2. Definitions. For the purpose of this Order: (a) "Policies that have takings implications" refers to Federal regulations, proposed Federal regulations, proposed Federal legislation, comments on proposed Federal legislation, or other Federal policy statements that, if implemented or enacted, could effect a taking, such as rules and regulations that propose or implement licensing, permitting, or other condition requirements or limitations on private property use, or that require dedications or exactions from owners of private property. "Policies that have takings implications" does not include:

(1) Actions abolishing regulations, discontinuing governmental programs, or modifying regulations in a manner that lessens interference with the use of private property;

(2) Actions taken with respect to properties held in trust by the United States or in preparation for or during treaty negotiations with foreign nations;

(3) Law enforcement actions involving seizure, for violations of law, of property for forfeiture or as evidence in criminal proceedings;

(4) Studies or similar efforts or planning activities;

(5) Communications between Federal agencies or departments and State or local land-use planning agencies regarding planned or proposed State or local actions regulating private property regardless of whether such communications are initiated by a Federal agency or department or are undertaken in response to an invitation by the State or local authority;

(6) The placement of military facilities or military activities involving the use of Federal property alone; or

(7) Any military or foreign affairs functions (including procurement functions thereunder) but not including the U.S. Army Corps of Engineers civil works program.

(b) Private property refers to all property protected by the Just Compensation Clause of the Fifth Amendment.

(c) "Actions" refers to proposed Federal regulations, proposed Federal legislation, comments on proposed Federal legislation, applications of Federal regulations to specific property, or Federal governmental actions physically invading or occupying private property, or other policy statements or actions related to Federal regulation or direct physical invasion or occupancy, but does not include:

(1) Actions in which the power of eminent domain is formally exercised;

(2) Actions taken with respect to properties held in trust by the United States or in preparation for or during treaty negotiations with foreign nations;

(3) Law enforcement actions involving seizure, for violations of law, of property for forfeiture or as evidence in criminal proceedings;

(4) Studies or similar efforts or planning activities;

(5) Communications between Federal agencies or departments and State or local land-use planning agencies regarding planned or proposed State or local actions regulating private property regardless of whether such communications are initiated by a Federal agency or department or are undertaken in response to an invitation by the State or local authority;

(6) The placement of military facilities or military activities involving the use of Federal property alone; or

(7) Any military or foreign affairs functions (including procurement functions thereunder), but not including the U.S. Army Corps of Engineers civil works program.

Sec. 3. General Principles. In formulating or implementing policies that have takings implications, each Executive department and agency shall be guided by the following general principles:

(a) Governmental officials should be sensitive to, anticipate, and account for, the obligations imposed by the Just Compensation Clause of the Fifth Amendment in planning and carrying out governmental actions so that they do not result in the imposition of unanticipated or undue additional burdens on the public fisc.

(b) Actions undertaken by governmental officials that result in a physical invasion or occupancy of private property, and regulations imposed on private property that substantially affect its value or use, may constitute a taking of

property. Further, governmental action may amount to a taking even though the action results in less than a complete deprivation of all use or value, or of all separate and distinct interests in the same private property and even if the action constituting a taking is temporary in nature.

(c) Government officials whose actions are taken specifically for purposes of protecting public health and safety are ordinarily given broader latitude by courts before their actions are considered to be takings. However, the mere assertion of a public health and safety purpose is insufficient to avoid a taking. Actions to which this Order applies asserted to be for the protection of public health and safety, therefore, should be undertaken only in response to real and substantial threats to public health and safety, be designed to advance significantly the health and safety purpose, and be no greater than is necessary to achieve the health and safety purpose.

(d) While normal governmental processes do not ordinarily effect takings, undue delays in decision-making during which private property use is interfered with carry a risk of being held to be takings. Additionally, a delay in processing may increase significantly the size of compensation due if a taking is later found to have occurred.

(e) The Just Compensation Clause is self-actuating, requiring that compensation be paid whenever governmental action results in a taking of private property regardless of whether the underlying authority for the action contemplated a taking or authorized the payment of compensation. Accordingly, governmental actions that may have a significant impact on the use or value of private property should be scrutinized to avoid undue or unplanned burdens on the public fisc.

Sec. 4. Department and Agency Action. In addition to the fundamental principles set forth in Section 3, Executive departments and agencies shall adhere, to the extent permitted by law, to the following criteria when implementing policies that have takings implications:

(a) When an Executive department or agency requires a private party to obtain a permit in order to undertake a specific use of, or action with respect to, private property, any conditions imposed on the granting of a permit shall:

(1) Serve the same purpose that would have been served by a prohibition of the use or action; and

(2) Substantially advance that purpose.

(b) When a proposed action would place a restriction on a use of private property, the restriction imposed on the use shall not be disproportionate to the extent to which the use contributes to the overall problem that the restriction is imposed to redress.

(c) When a proposed action involves a permitting process or any other decision-making process that will interfere with, or otherwise prohibit, the use of private property pending the completion of the process, the duration of the process shall be kept to the minimum necessary.

(d) Before undertaking any proposed action regulating private property use for the protection of public health or safety, the Executive department or agency involved shall, in internal deliberative documents and any submissions to the Director of the Office of Management and Budget that are required:

(1) Identify clearly, with as much specificity as possible, the public health or safety risk created by the private property use that is the subject of the proposed action;

(2) Establish that such proposed action substantially advances the purpose of protecting public health and safety against the specifically identified risk

(3) Establish to the extent possible that the restrictions imposed on the private property are not disproportionate to the extent to which the use contributes to the overall risk; and

(4) Estimate, to the extent possible, the potential cost to the government in the event that a court later determines that the action constituted a taking. In instances in which there is an immediate threat to health and safety that constitutes an emergency requiring immediate response, this analysis may be done upon completion of the emergency action.

Sec. 5. Executive Department and Agency Implementation. (a) The head of each Executive department and agency shall designate an official to be responsible for ensuring compliance with this Order with respect to the actions of that department or agency.

(b) Executive departments and agencies shall, to the extent permitted by law, identify the takings implications of proposed regulatory actions and address the merits of those actions in light of the identified takings implications, if any, in all required submissions made to the Office of Management and Budget. Significant takings implications should also be identified and discussed in notices of proposed rule-making and messages transmitting legislative proposals to the Congress, stating the departments' and agencies' conclusions on the takings issues.

(c) Executive departments and agencies shall identify each existing Federal rule and regulation against which a takings award has been made or against which a takings claim is pending including the amount of each claim or award. A "takings" award has been made or a "takings" claim pending if the award was made, or the pending claim brought, pursuant to the Just Compensation Clause of the Fifth Amendment. An itemized compilation of all such awards made in Fiscal Years 1985, 1986, and 1987 and all such pending claims shall be submitted to the Director, Office of Management and Budget, on or before May 16, 1988.

(d) Each Executive department and agency shall submit annually to the Director, Office of Management and Budget, and to the Attorney General an itemized compilation of all awards of just compensation entered against the United States for takings, including awards of interest as well as monies paid pursuant to the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601.

(e)(1) The Director, Office of Management and Budget, and the Attorney General shall each, to the extent permitted by law, take action to ensure that the policies of the Executive departments and agencies are consistent with the principles, criteria, and requirements stated in Sections 1 through 5 of this Order, and the Office of Management and Budget shall take action to ensure that all takings awards levied against agencies are properly accounted for in agency budget submissions.

(2) In addition to the guidelines required by Section 1 of this Order, the Attorney General shall, in consultation with each Executive department and agency to which this Order applies, promulgate such supplemental guidelines as may be appropriate to the specific obligations of that department or agency.

Sec. 6. Judicial Review. This Order is intended only to improve the internal management of the Executive branch 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 WHITE HOUSE
March 15, 1988.

Ronald Reagan



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

May 1, 1990
(House)

STATEMENT OF ADMINISTRATION POLICY

(THIS STATEMENT HAS BEEN COORDINATED BY OMB WITH THE CONCERNED AGENCIES.)

H.R. 743 - Negotiated Rulemaking Act
(Pease (D) Ohio and 9 others)

The Administration, while not objecting to House passage of H.R. 743, does have a number of concerns about the bill. The Administration is concerned that H.R. 743 would:

- Permit payment to private parties to represent their own interests in a negotiated rulemaking committee.
- Reduce accountability for agency spending by permitting the Administrative Conference to pay agency expenses for a negotiated rulemaking committee.
- Allow negotiated rulemaking committees to continue to exist until promulgation of a final rule. The responsibilities of such a committee should properly end when it provides its report and accompanying records to an agency.

The negotiated rulemakings undertaken pursuant to H.R. 743 must also be conducted in a manner that would not undermine the accountability and responsibility of Executive Branch officers to conduct rulemaking functions.

* * * * *

(Not to be Distributed Outside Executive Office of the President)

This draft Statement of Administration Policy was developed by the Legislative Reference Division (Blum), in consultation with the Departments of Justice (McGuiness, Dulmage), Transportation (Donelan), Interior (Harris), EPA (Basseuner), GSA (Brady), Administrative Conference (Edles), Federal Mediation and Conciliation Service (Chaskelson), White House Counsel (Holmstead), GC (Damus), OIRA (Hill, McConnell), GO (Newman), and TCJ (Vandenberg).

The Department of Justice advised informally that it will seek to have a statement read during House floor consideration of H.R. 743 clarifying that agency decisions concerning recommendations of negotiated rulemaking committees are not subject to review.

A copy of H.R. 743 as reported is not yet available for review. House Judiciary Committee staff (Coffey) advises that H.R. 743 would establish a statutory framework for conducting negotiated rulemaking, as discussed below.

Background

Negotiated rulemaking refers to the process used by a Federal agency to invite affected parties to form a committee with the agency to develop a consensus draft of a regulation. If the committee members are able to reach a consensus, the committee presents the draft rule to the agency. The agency reviews the draft and uses it as the basis for publishing in the Federal Register a proposed rule for public comment. Currently, Federal agencies conduct negotiated rulemakings on an ad hoc basis -- i.e., there are no statutory procedural requirements.

Description of H.R. 743

-- Determination of Need for Negotiated Rulemaking

H.R. 743 provides that a Federal agency may establish a negotiated rulemaking committee if the agency head determines that the use of such a committee is in the public interest. Factors relevant to this determination include: (1) the existence of a relatively small group of interested parties who can agree on representatives and are willing to negotiate in good faith; and (2) a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time. The bill authorizes agencies to employ "conveners" to gather information and advise whether to try a negotiated rulemaking in a particular setting.

-- Public Notice

Agencies which decide to use a negotiated rulemaking must publish in the Federal Register a notice of intention to establish a negotiated rulemaking committee. The notice must describe the rule to be developed, the issues to be considered and the interests which the agency believes are "likely to be significantly affected by the rule." In addition, the notice must list the names of persons proposed to represent such interests and a description of the administrative support (e.g., conference rooms for meetings and funds for participants' expenses) to be provided by the agency. The bill would also provide that persons who believe their interests will not be adequately represented may apply or nominate another person for membership on the negotiated rulemaking committee.

-- Establishing Negotiated Rulemaking Committees

The agency head may establish the negotiated rulemaking committee after reviewing comments received in response to the Federal Register notice. H.R. 743 would require that the committee comply with most of the requirements of the Federal Advisory Committee Act. This Act requires that committees hold open meetings and maintain records of activities and expenses.

H.R. 743 would require agencies to limit committees to 25 persons unless the agency head determines a greater number of members is necessary. Each such committee must include at least one person representing the agency conducting the negotiated rulemaking. The bill would also require the agency to provide appropriate administrative support to the negotiated rulemaking committee.

-- Other Provisions

Major provisions of H.R. 743 governing the operation or termination of negotiated rulemaking committees would:

- Provide that a negotiated rulemaking committee shall terminate upon promulgation of the final rule under consideration unless the committee's charter (required by the Federal Advisory Committee Act) contains an earlier termination date.
- Authorize agencies to employ individuals or organizations to impartially aid in discussions and negotiations of negotiated rulemaking committees. H.R. 743 specifies that the Federal Mediation and Conciliation Service may provide services and facilities to assist agencies.
- Authorize agencies to pay for a member's reasonable travel and per diem expenses, expenses to obtain technical assistance, and a reasonable rate of compensation if such member does not have adequate financial resources to participate in the committee.
- Provide that any agency action concerning establishing, assisting, or terminating a negotiated rulemaking committee shall not be subject to judicial review.

In addition, H.R. 743 contains a sunset provision that would take effect six years after enactment.

-- Role of the Administrative Conference

H.R. 743 would authorize appropriations not to exceed \$500,000 to the Administrative Conference of the United States for each of FYs 1991-1993 to carry out its purposes. The Conference, along with the Federal Mediation and Conciliation Service, would be required to maintain a list of individuals available to:

(1) assist agencies in determining whether a negotiated rulemaking is feasible; or (2) aid in the actual negotiation. The Conference would develop procedures to permit agencies to obtain the services of such persons. Payment for such services would be made by the agency unless the Chairman of the Conference agreed to pay for such services.

H.R. 743 would also require the Conference to "compile and maintain data related to negotiated rulemaking" and to "act as a clearinghouse" for agencies and other participants looking for information on the negotiated rulemaking process. Agencies would be required to provide the Conference with copies of any reports received by its negotiated rulemaking committees. The Conference would be required to provide a biennial report to Congress containing recommendations for effective use by agencies of negotiated rulemaking. In addition, H.R. 743 would specify that the Conference may provide training in negotiated rulemaking techniques to Federal personnel. The Conference would be authorized to pay all or part of the expenses of a negotiated rulemaking committee.

Administration Position To Date

In May 1989, the Department of Transportation and the Federal Mediation and Conciliation Service (FMCS) testified before a House Judiciary subcommittee concerning H.R. 743. FMCS indicated that in appropriate circumstances negotiated rulemaking is a useful procedure. The Department of Transportation stated that it supported the negotiated rulemaking process and agreed with the general purpose of the bill. In addition, Transportation advised that it believed the bill merely codified existing practices used by agencies and did not provide any additional authority.

On August 3, 1989, the Senate passed a similar bill, S. 303.

Legislative Reference Division Draft
5/1/90

EPA's Rulemaking Process

June 20, 1990

Purposes of Regulation

Development Process

1. **Priorities** about 250 reg a year.
Game program office has to decide whether to play
2. **Issues**
3. **Experts**
4. **Direction** - usually from A.A. level. But from Hank about 4 times in last 8 months.
5. **Quality** "The more people, the better quality"
6. **Ripeness**

STEERING COMMITTEE

1. Steering committee has to "chart" every workgroup
2. Decides on process
3. Refers issues to be resolved

OPPE CHAIR (ORME) OE



ORD



OPTS



OSWER



OGC



OAR



OW



OARM



OAR Rob Brenner.

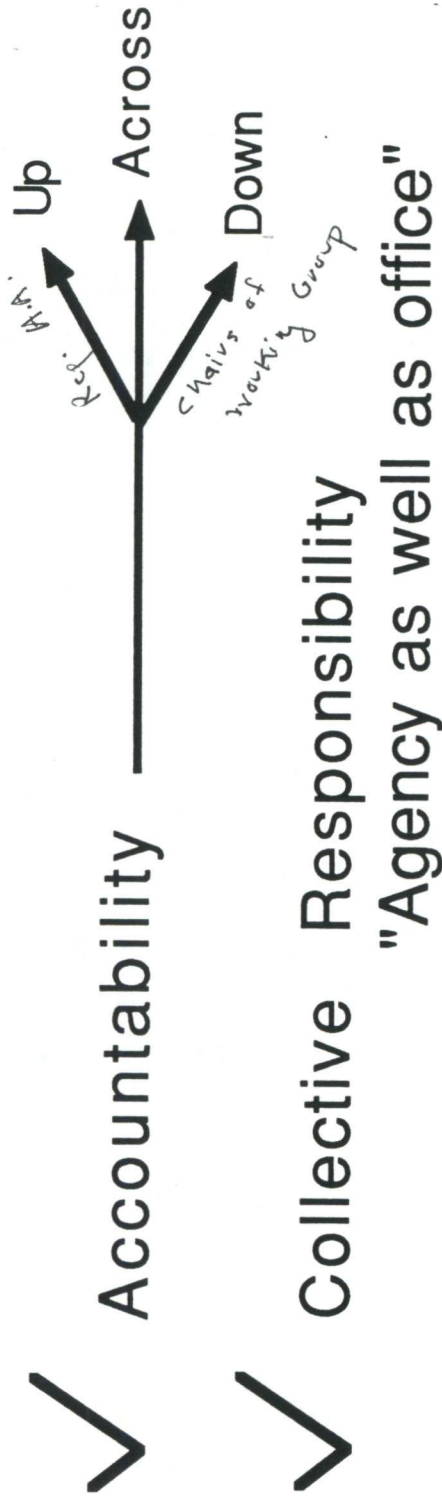


Regions

usually lowest level
policy person that covers
whole thing.

Program & Workgroup Reps

STEERING COMMITTEE THEMES



EPA publishes reg agenda. Basically a staff level effort

Start-Up and Planning

Development plan, then back to steering committee. Basically on A.A.s. agreement away

SAR Start Action Request must be to steering committee 2 weeks in advance	Workgroup	Develop Plan
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✓ Initiate work

✓ Get commitments

✓ Lay out tasks

Issues/alternatives
Expectations

Decision, Drafting, Closure

For Health
or N. Irving

major issues
are resolved by committee. Passed
an steering committee in these
referred to

Regulatory Scoping	Workgroup Reports	Workgroup Closure
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Paul
by

Workgroup rep comes
together to say whether
their A.M. concurs, non-
concurs, concurs w/ conditions.

- Assess option
- Work through issues
Sometimes referred
to as Hank even
at workgroup
closure.
- Conduct analysis
- Prepare documents
Raises issues to
be fought out
at red border
- Reach closure

Concurrence and Issuance



Federal
Register

- ✓ Elevate/resolve/decide final issues
- ✓ Obtain concurrence & comment of record
- ✓ Complete OMB review
- ✓ Approval & signature
- ✓ Public notice

EPA's RULEMAKING PROCESS

Primary purpose is to facilitate Agency-wide participation in developing rules, policies and guidelines.

Process is flexible, and tailored to suit complexity and scope of individual actions.

Purposes

- o Set priorities
- o Provide senior management direction
 - Administrator can give direction at the outset
- o Identify cross-media issues
- o Resolve/elevate issues

Major Players

- o Workgroups
 - Chaired by program office
- o Steering Committee
 - Representatives from each AA & OGC
 - Oversees process
 - Charters workgroup

- Establishes specific process, based on scope and cross-media impacts
- Ensures issues are resolved or elevated
- o Office of Regulatory Management & Evaluation, OPPE
 - ORME Director Chairs Steering Committee
 - Manages rulemaking process

Design

- o Start Action Request (SAR)
 - Alerts other Offices of lead Office's intent to develop rule
 - Gives Steering Committee opportunity to discuss and plan for intermedia aspects of action
 - Used to establish review process and workgroup for the rule
- o Development Plan
 - Explains need for the action, presents major issues and alternatives and presents workplan
 - Presented to Steering Committee for approval and agreement on regulation development process
- o Regulatory Scoping
 - Administrator/Deputy give early guidance on which options to develop
 - Gives AAs/RAs chance to raise issues/concerns at outset

o Workgroup Report

- Describes issues that have been resolved and issues that need to be elevated
- Steering Committee concurrence with report ensures that issues resolved by workgroup are not raised again, and unresolved issues are addressed

o Workgroup Closure Meeting

Provide forum to assure:

- issues are resolved or clearly defined
- rulemaking package is ready for AA/RA review (Red Border Review)

o Red Border Review

- Review mechanism by which senior management (AAs/RAs) review and approve regulatory packages before they are presented to the Administrator
- Review always includes AA/OPPE and the General Counsel. Other AAs/RAs participate if their Offices were active in the workgroup

o OMB Review

- 60 days for major rules at proposal and 30 days at final
- 10 days for non-major proposed and final rules

House Panel Backs Cable Rate Curbs

*Bill Slightly Tougher
Than Senate Version*

W 12/8/90 W/P

By Paul Farhi
Washington Post Staff Writer

After two days of furious back-room politicking, a House subcommittee yesterday approved a bill that would make it tougher for cable television operators to dramatically increase the rates they charge subscribers.

The bill, passed on a unanimous voice vote by the House telecommunications subcommittee, is slightly tougher on the issue of rate regulation than a similar bill passed by the Senate Commerce Committee earlier this month.

Under the House bill, consumers would have to show that their cable rates are "unreasonable" compared with those of a similar-sized cable operator to win a rate rollback. In the Senate bill, consumers would have to prove that an operator's rate increase was "significantly excessive," based on a complex set of factors, before the Federal Communication Commission would be permitted to intervene.

The draft of the legislation was rewritten three times Tuesday and early yesterday to reconcile the interests of an array of competing interests—broadcasters, cable-system owners, program producers, direct-broadcast satellite advocates, "wireless" cable companies and telephone companies, among others.

Despite the stronger rate-regulation standard, the cable industry ap-

See CABLE, C5, Col. 4

Panel Backs Tougher Controls on Cable Rates

CABLE, From C1

appeared to score victories on two cherished side issues during yesterday's committee action. First, the cable lobby was able to push through a compromise that will make it more difficult for the industry's competitors to gain access to the programs that now run exclusively on cable television stations. Further, an amendment that would have allowed telephone companies to compete with cable operators was withdrawn before the bill came to a vote.

The issue of "program exclusivity" has been a heated one during the months of debate over the re-regulation bill.

The issue essentially boils down to

a face-off between two powerful interests: cable companies, which now carry such fare as ESPN and CNN on an exclusive basis, and an upstart competitor, Sky Cable, a proposed direct-broadcast satellite (DBS) service bankrolled by four giants, including Rupert Murdoch's News Corp. and General Electric Co.'s NBC unit. Sky Cable has been seeking to break cable's exclusive hold on its programs to make itself into an attractive alternative to cable.

In a blow to the cable industry, the Senate bill passed earlier this month gives no assurances to cable operators that they can buy their programs on an exclusive basis. But the House version passed yesterday allows the industry to make exclu-

sive program deals provided that they don't break antitrust laws.

Separately, Reps. Rick Boucher (D-Va.) and Edward Madigan (R-Ill.) scrapped a plan to introduce an amendment that would allow the phone companies to offer cable service. Boucher, who noted that the measure did not have enough votes, said he would present the amendment to the House Energy and Commerce Committee as a separate bill next month. Nevertheless, the powerful National Cable Television Association said it would not support the House bill because of its opposition to the rate-regulation and program-access provisions. The bill now moves to the Energy and Commerce Committee, where it is expected to be taken up after the July 4th holiday.