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Regulatory Systems

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**IMPROVING
REGULATORY
SYSTEMS**

NATIONAL PERFORMANCE REVIEW

Accompanying Report Number xx
September 1993

IMPLEMENTATION CATEGORIES

The following code is located immediately after each recommendation. They summarize who needs to take action on the recommendation. Appendix A organizes all recommendations according to these codes.

- (1) Agency heads can do themselves.
- (2) President, Executive Office of the President, or Office of Management and Budget can do.
- (3) Requires legislative action.
- (4) Good idea, but will require additional work, or may be better suited for future action.

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ABBREVIATIONS

ACUS	Administrative Conference of the United States
ADR	Alternative Means of Dispute Resolution
APA	Administrative Procedure Act
APHIS	Animal and Plant Health Inspection Service
CFC's	chlorofluorocarbons
CPSC	Consumer Product Safety Commission
DOE	Department of Energy
DOT	Department of Transportation
EEO	equal employment opportunity

EO	executive order
EPA	Environmental Protection Agency
FAA	Federal Aviation Administration
FACA	Federal Advisory Committee Act
FCCSET	Federal Coordinating Council for Science, Engineering and Technology
FDA	Food and Drug Administration
FDIC	Federal Deposit Insurance Corporation
FHWA	Federal Highway Administration
FTC	Federal Trade Commission
GAO	General Accounting Office
GNP	Gross National Product
HUD	Department of Housing and Urban Development
IRS	Internal Revenue Service
LEI	Legal Education Institute
NAPA	National Academy of Public Administration
NMFS	National Marine Fisheries Service
NHTSA	National Highway Traffic Safety Administration
NPR	National Performance Review
NRC	Nuclear Regulatory Commission
OIRA	Office of Information and Regulatory Affairs
OMB	Office of Management and Budget
OPPE	Office of Policy Planning and Evaluation
OSTP	Office of Science and Technology Policy
RCG	Regulatory Coordinating Group
RSPA	Research and Special Programs Administration
SAB	Science Advisory Board
TQM	Total Quality Management
VDT	Video Display Terminal

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SUMMARY

INTRODUCTION

America's regulatory system is widely perceived as needing reform. The National Performance Review has concluded that, while the basic procedural statutes that govern agency activities are largely sound, a series of coordinated administrative and managerial steps need to be taken within that statutory framework to achieve a change in the Government's regulatory culture.

Implementing the changes recommended in this report should lead federal agencies to (1) better coordinate their approaches to regulation, (2) use innovative, incentive-based approaches to ensure that the regulatory solution matches the problem, (3) prioritize regulatory objectives, (4) take meaningful efforts to involve the public so that regulatory solutions are based on better information, are more workable and more acceptable, and (5) streamline their process for issuing rules.

BACKGROUND

The regulatory process is defined as the process by which federal agencies develop, issue and enforce rules that are backed by the use of penalties and are intended specifically to modify private sector behavior. Much of governmental policy, from the mundane to the most major, is effected through the rulemaking process.

The scores of agencies that issue rules and regulations must follow the statutory directives in the 1946 Administrative Procedure Act (APA). The basic procedure for issuing rules under the APA is simple and straightforward. The agency must publish a notice of proposed rulemaking (in the *Federal Register*), allow the public a reasonable opportunity (30 to 60 days) to file written comments, evaluate the comments, and publish the final (revised) rule.

Summary

Since 1946, other statutes (e.g., Paperwork Reduction Act, Regulatory Flexibility Act, National Environmental Policy Act) have added additional requirements as have particular programmatic statutes such as the Clean Air Act. Since the early 1970's, Presidents, through Executive Orders, have required a centralized review and clearance process for executive agency rules by OMB. Because of these developments, and due to increasingly intensive judicial review of rules by the federal courts, agencies have developed complicated internal review procedures that often must be navigated twice -- once for the proposed rule and once for the final rule.

PROBLEM

In a nutshell, the regulatory process has become increasingly complex and time consuming. Interested outside groups feel relegated to a frustrating written comment process, the President and Congress have (especially in the past 12 years) jostled over control of the regulatory process, agencies feel over-controlled and understaffed, coordination and long-term planning have suffered and the regulatory process, as a whole, has lost respect.

The regulatory process has not only become overly layered and cumbersome, it has not been receptive enough to innovative procedural and substantive approaches to regulation. Nor has it kept up with the technological and scientific demands placed upon it. Moreover, the lack of a strong coordinative mechanism has produced redundant regulation and prevented agencies from making best use of their resources. Finally, important "actors" in the process, including presidentially-appointed agency heads and career regulatory staffs, lack the training and the cross-pollinating experience that are essential to avoid simple mistakes and to encourage innovation.

There is a great need for coordination within the executive branch on regulatory matters. In the past, OMB's review of rules has been on a rule-by-rule basis, and, apart

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from the work of the Administrative Conference on administrative procedure problems, there has been no place in the executive branch to coordinate regulatory concerns. Since the demise of the Carter Administration's short-lived Regulatory Council, no forum has existed for agencies to share their substantive concerns about regulatory matters.

It is also crucial that the legislative and executive branches develop improved relations and better communications. In many cases, the agency's hands are tied because of inflexible statutory commands. Both branches must work together to develop new ways to approach regulatory problems. Too often the statute dictates a prescriptive, command-and-control solution to a perceived societal problem. And too often an agency, given discretion, will rely upon such a solution. This is not because innovative approaches (such as performance standards, marketable rights, monetary incentives or information disclosure) are unheard of, it is because the legislators and regulators do not feel comfortable enough in selecting a more appropriate approach for a given problem. In part this is because agencies often feel constrained from giving drafting advice to Congressional staff on individual pieces of legislation before it is too late. But it also results from the fact that no useful guide to regulatory design is currently available.

Within the agencies themselves, especially environmental and health and safety agencies, there is a great need for prioritization of regulatory targets and for better scientific advice on regulatory matters. All agencies share the need to anticipate future regulatory problems, to streamline their procedures periodically, and to seek new ways to promote consensus-based regulation and enhanced participation by the interested public in regulatory issues. Finally, agencies need to find the resources to train their personnel, and to reward excellence, innovation and consensus-building on the part of their staffs.

MAJOR RECOMMENDATIONS

This report makes recommendations to address the need for: improved coordination

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within the executive branch, innovative regulatory approaches, improved communications between Congress and the agencies, better planning and prioritization of regulatory targets, more reliable scientific advice, meaningful public participation, streamlined internal procedure, consensus-based dispute resolution, and better training for key "actors" in the process.

The recommendations are:

- (1) Create a Regulatory Coordinating Group
- (2) Develop a *Deskbook on Regulatory Design*
- (3) Support negotiated rulemaking and other methods for consensus-based rulemaking
- (4) Encourage development and use of techniques to provide increased public participation in rulemaking
- (5) Streamline agency rulemaking procedures to cut costs and improve results
- (6) Increase use of alternative dispute resolution techniques in regulatory implementation
- (7) Require risk-regulatory agencies to prioritize the risks within their regulatory purview
- (8) Encourage more structured long-range "anticipatory" future planning by agencies
- (9) Encourage agencies that must rely on science to create a science advisory board
- (10) Allow agencies to provide drafting advice more freely to Congress
- (11) Provide "basic training" for presidential appointees and career regulatory staff
- (12) Create a Presidential Award for Excellence in Regulation.

IMPROVING REGULATORY SYSTEMS

INTRODUCTION

When our society decides government intervention is necessary to solve problems in fields such as transportation, banking, health, agriculture, education, housing, or the environment, the federal government often responds with regulations. Congress enacts legislation allowing or requiring an agency to come up with a solution, and then the agency issues regulations that detail how the solution will be implemented.¹

Regulatory programs have significantly improved our quality of life. A trip to former Eastern block countries illustrates the benefits of environmental regulation. The Department of Transportation (DOT) estimates that over 200,000 lives have been saved since 1966 as a result of highway traffic safety regulations (particularly safety standards for automobiles.)² The Consumer Product Safety Commission (CPSC) helped cut in half the number of electrocutions involving consumer products.³

Despite the many benefits of regulatory programs, too many businesses and individuals feel constrained by the cumulative burden of regulations issued by many diverse federal agencies, and particularly by those regulations that are poorly conceived or redundant. It is not hard to come up with examples of regulations that do not appear to make sense. The American public's desire to get government off their backs is strong. Yet, public opinion polls have shown that "while Americans dislike regulations as a general matter, when asked about specific programs, such as for health and safety, they respond favorably."⁴ No one wants to return to the days when even minor accidents could be fatal or seriously disfiguring because cars were not required to have seat belts or windshields made of safety glass, or when unchecked water pollution was causing dead lakes and burning rivers.

The challenge facing government is how to do both -- get rid of or avoid unnecessary, burdensome regulations while still providing the public, the government's ultimate customer, with the protection and services it expects at a reasonable cost. Further

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complicating the picture, most agencies will be required to provide more services with fewer resources. Regulatory agencies have already seen workloads skyrocket while resources stayed level or decreased.⁵ Given the budget deficit, most agencies will not have increased resources in the near future.

WHAT ARE REGULATIONS?

Regulations are federal requirements, directives or standards, backed by the use of penalties, that are intended specifically to modify the behavior of state and local governments and of individuals and firms in the private sector. Much of what the federal government does requires the issuance of regulations, including the distribution of grants, benefits, contracts and other subsidies; the imposition of taxes and other financial service requirements; and the enforcement of health, safety and environmental laws.⁶

Usually when people think of regulation, they think of command-and-control regulations -- where the government decides precisely what action regulated entities need to take. A requirement that coal-fired power plants install a scrubber (a specific type of pollution control equipment) is an example of command-and-control regulation.

Some regulatory programs leave more discretion with the regulated entity and take advantage of market forces to achieve the desired result. For example, performance standards might require power plants to emit no more than a given number of tons of sulfur dioxide per million Btu produced. Alternatively, information disclosure might require food processors to label their products for content and nutrition, to permit consumers to make informed choices.

Instead of issuing regulations, agencies also rely on other methods to establish agency policy, such as policy statements, guidance documents, and memos to agency personnel. Although legally these policies cannot bind people outside the agency, as a practical matter, they may have that effect. These other methods are not required to undergo the regulatory review procedures described below.

HOW ARE REGULATIONS DEVELOPED?

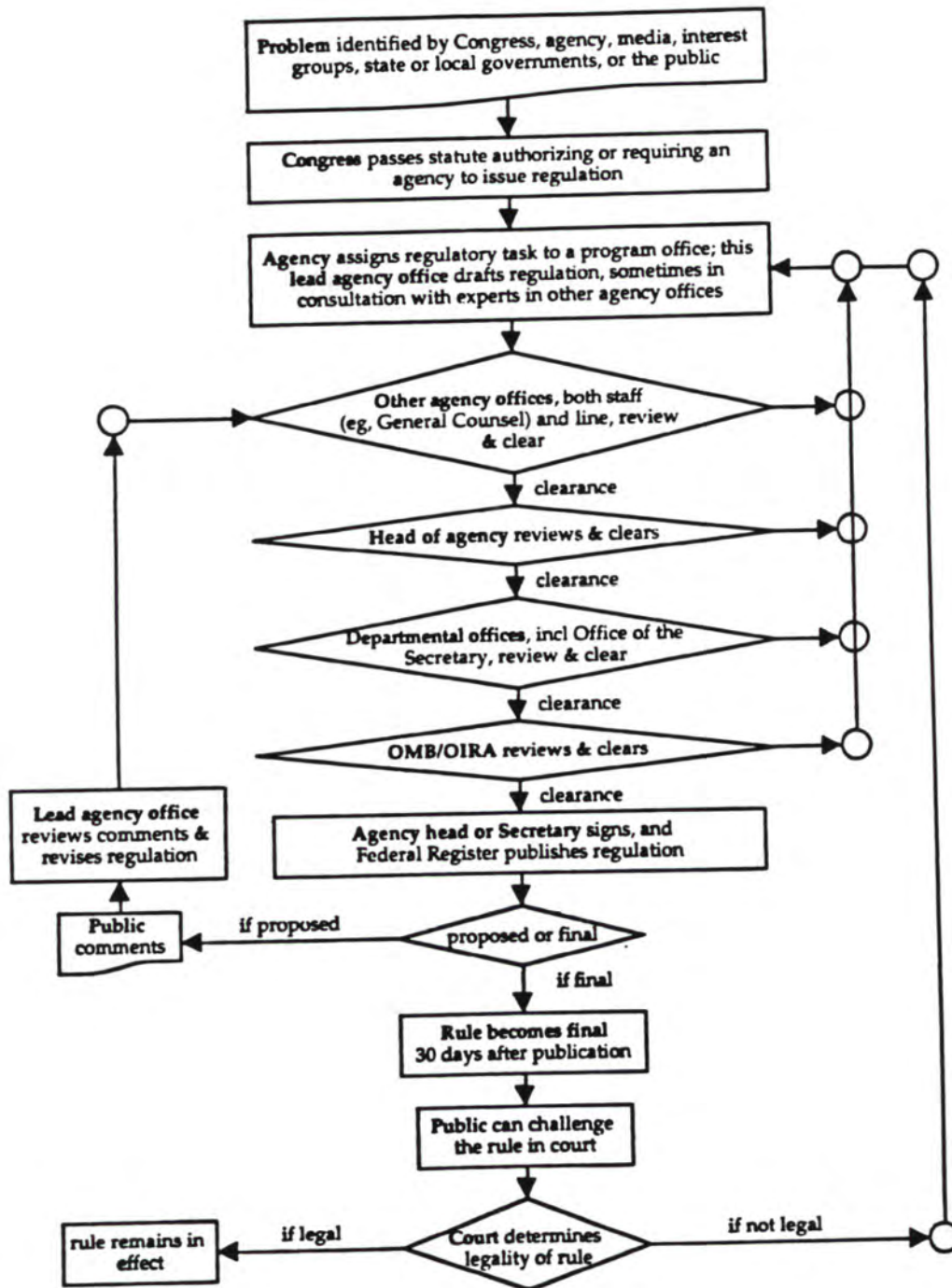
Four key "actors" are involved in developing regulations. *Congress* passes legislation that authorizes or requires an agency to issue regulations. The *Executive Branch* (including independent regulatory agencies), working within the statutory limits imposed by Congress, decides the form and extent of regulation and issues individual rules through a rulemaking process. *Federal courts* review rules when suits are brought against the government and can command agencies to revise rules when they determine that rules do not meet appropriate statutory criteria. Interested members of *the public* provide input to Congress, comment on regulations proposed by agencies, and may challenge final regulations in court.

[INSERT FIGURE 1]

The process by which agencies issue rules is governed by a number of statutes, Executive Orders and internal agency policies and requirements. A simplified, typical version of the rulemaking process is described in the flow chart in Figure 1. In fact, the process is far more complicated, as is evidenced by flow charts of several agency processes. One was 18 feet long with 373 boxes describing the different steps.⁷ Another had 52 different clearance points.

Although the amount of time it takes an agency to develop a rule varies dramatically,⁸ in general, a relatively common time line for production of a regulation would be 12 to 18 months from enactment of the authorizing statute to issuance of a Notice of Proposed Rulemaking (NPRM) and another 12 to 18 months between the NPRM and the issuance of the final rule.

**FIGURE 1
THE RULEMAKING PROCESS**



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Basic rulemaking process. The Administrative Procedure Act⁹ (APA), the basic legal structure governing the rulemaking process, establishes a simple framework.¹⁰ Under Section 553 of the APA, the agency generally must publish a notice of proposed rulemaking in the *Federal Register* that either sets forth the proposed rule or describes what the agency intends to do. The agency must allow the public to comment in writing on the proposed rule (agencies usually allow at least a 30-day public comment period). Sometimes the agency will also allow public comment at a hearing on the proposed rule. The agency then is required to review the public comments, modify the rule as appropriate, and publish the rule in final form, accompanied by a "statement of basis and purpose," in the *Federal Register*.

Over the years, a large number of other requirements have been layered on top of this simple process. Although individually there are good reasons for each requirement, cumulatively the burden on the rulemaking process has become excessive.

Additional statutes governing the rulemaking process. Several other statutes govern the rulemaking process:

- The Paperwork Reduction Act¹¹ requires the Office of Management and Budget to review all regulations that require the public to submit information to the government.
- The Regulatory Flexibility Act¹² requires agencies to consider the special needs and concerns of small entities, particularly small businesses, and to prepare a "regulatory flexibility analysis" describing the rule's effect on them.
- The Federal Advisory Committee Act¹³ governs the use and creation of committees of non-federal employees to get advice or recommendations on a regulation.
- The Negotiated Rulemaking Act¹⁴ governs certain types of consensual-based rulemaking.
- Specific substantive statutes (e.g., the Clean Air Act,¹⁵ the Occupational Safety and Health Act¹⁶) add yet further procedural requirements.

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Executive orders governing the rulemaking process. Requirements have also been added by Executive Orders. Presidents Nixon, Ford and Carter each developed their own procedures for review of executive agency rules. During the Reagan and Bush Administrations, Executive Order 12291 (February 1981), which governed the review process used the last 12 years, required agencies¹⁷ to forward to the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) all¹⁸ proposed and final rules for review before issuing them in the *Federal Register*.¹⁹ OMB would then notify other offices within the Executive Office of the President (EOP) and other agencies of the draft proposal or rule. Conflicts or inconsistencies in policies or requirements, to the extent they were identified, were then worked out before OMB would complete its review of the proposed or final rule. As a practical matter, rules were rarely issued without OMB clearance.²⁰

During the last half of the Bush Administration, some controversial rules were also reviewed by the Council on Competitiveness. The Council, though chaired by then-Vice President Quayle and nominally composed of key Cabinet officials, worked through a White House staff that wielded great power over agency rulemaking through its participation in the OMB review process. It was criticized for permitting special access by business interests. President Clinton eliminated the Council soon after taking office.

During the Reagan and Bush Administrations, coordination and regulatory planning were also covered by Executive Order 12498 (January 1985), which required each agency to submit to OMB annually a draft regulatory program, described as "a statement of [the agency's] regulatory policies, goals and objectives for the coming year and information concerning all significant regulatory actions underway or planned." OMB then reviewed the draft programs for consistency with Administrative principles and priorities and the planned actions of other agencies.²¹ During this time, other Executive Orders also required agencies to analyze regulations for federalism implications, family values, regulatory takings and litigation effects.²²

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The Clinton Administration will soon issue a new Executive Order revoking the previous regulatory review Executive Orders and replacing them with its own. The Clinton Administration's regulatory review process is designed to continue the concept of centralized review while avoiding pitfalls such as delay, lack of adequate participation, and lack of transparency. The process improves the planning system, eliminates the proliferations of impact statements, and establishes a *triage* system by which agencies and OIRA seek to identify, together, which upcoming rules are significant enough to warrant OMB review. It should be noted that this new Executive Order was drafted by another White House task force and NPR's mandate did not include making recommendations on Executive oversight of rules. Nonetheless, the two task forces kept each other informed and several of the recommendations made in this report will likely be incorporated, at least partially, in the new Executive Order.

Agency requirements governing rulemaking. In addition to the requirements imposed by Congress through statute and by the President through Executive Orders, most agencies that engage in substantial rulemaking activities have developed lengthy internal review procedures to ensure coordination among agency and department offices so that the rule benefits from the full range of expertise and perspectives within the department. The office in charge of the rule often must obtain clearance from certain staff offices (*e.g.*, general counsel's office) and sometimes from other program offices. For those agencies that are part of a cabinet department (such as the Federal Aviation Administration, which is part of the Department of Transportation), clearances are also required at the department level. The entire review process, within the agency, within the department, and within the Administration, is normally repeated twice -- first when the rule is proposed and then when the rule is finalized.

WHAT ARE THE PROBLEMS WITH THE CURRENT SYSTEM?

There are problems with both the substance of regulations and the process by which regulations are issued, and sometimes the problems are linked. These problems are

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addressed at length in the issue papers that follow, and the most significant ones are summarized here.

One of the major problems is that regulatory programs rely too heavily on traditional command-and-control regulation rather than on more innovative, market-oriented control mechanisms that allow the regulated entity greater flexibility in meeting the regulatory objectives. This over-reliance on command-and-control stems from a variety of causes, including congressional and agency lack of knowledge about innovative regulatory design; congressional distrust of agencies, which makes Congress hesitant to grant agencies the flexibility to try new approaches; lack of information necessary to design an innovative regulatory approach; and agency and congressional distrust of regulated entities.

Another major problem with the content of regulations is that society does not always get the maximum benefits from the amount it spends on regulation. In part it is due to insufficient planning and prioritization, which can lead to inefficient expenditures, including forcing society to spend more money to fix small problems than to fix bigger ones. This is also due to the over-reliance on command-and-control regulation.

Lack of information is also a serious problem. To a certain extent, this stems from the adversarial nature of the rulemaking process -- in many rulemakings regulated entities, public interest groups, and other parties are more interested in protecting their own positions than in providing useful information to the agency and finding a solution to the problem. This is exacerbated when the rule is likely to be litigated. Incomplete scientific data and the pressures of time also require agencies to make decisions without as much information as would be ideal.

The long time it frequently takes agencies to issue rules also is a major problem because it delays resolution of the problem the rule is supposed to address and creates uncertainty. Some delay is, of course, necessitated by the need to obtain public comments or additional scientific or other information. Conversely, delay can be caused by inappropriately long agency and Executive Branch clearance processes.

WHAT SHOULD A RULEMAKING PROCESS ACCOMPLISH?

The rulemaking process has evolved over time to the complicated, lengthy process described above. Over the years, new steps were added to remedy perceived shortcomings. To determine how to improve the regulatory system, it is necessary to identify its objectives. Ideally, the rulemaking process should:

produce a rule that:

- addresses an identifiable problem,
- implements the law faithfully,
- implements the President's policies,
- is in the public interest,
- is consistent with other rules and policies
(federal, state, local and international),
- is based on adequate information,
- is adequately and rationally justified,
- accomplishes goals in a cost-effective manner,
- can be implemented,
- is acceptable and enforceable,
- is easily understood, and
- stays in effect only as long as is necessary;

through a process that:

- responds in a timely manner,
- is efficient,
- is fair and perceived as fair.

The rulemaking process requires agencies to balance these objectives because some of them are at odds with each other. For example, collecting adequate information takes time and may prevent an agency from responding in a timely manner. Circumstances or our understanding of the science may have changed since legislation was passed so that a rule that implements the law faithfully may no longer address an identifiable problem. The

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easiest rule to enforce may not be the most efficient. Thus, in designing a process and in individual rulemakings, agencies must make trade offs between the different goals of the regulatory process.

ENDNOTES

1. Although many statutes require agencies to issue regulations to implement and clarify the statute, some statutes are self-implementing or detailed enough that regulations are unnecessary.
2. CITE to DOT report.
3. U.S. Consumer Product Safety Commission, Report on Accomplishments and Planned Activities (DATE).
4. Adler, Klitzman and Mann, "Shaping up Federal Agencies: A Basic Training Program for Regulators," *The University of Virginia Journal of Law & Politics*, p. 347, n. 15.
5. The Carnegie Commission on Science, Technology, and Government reported that:
[B]etween 1980 and 1985, EPA's staff decreased by approximately 10 percent, even though the agency assumed responsibility for the substantial Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1980; Congress also reauthorized and significantly expanded three other acts in EPA's jurisdiction during this period.
... [I]mports of substances under [FDA's] jurisdiction tripled from 500,000 entries in 1971 to more than 1.5 million in 1990. Between 1985 and 1990, R&D expenditures in the pharmaceutical industry doubled, leading to a sharp upturn in applications for new products submitted to FDA. In 1989, agency reviewers received 82 percent more applications than in 1980. From 1980 to 1988, FDA was required to implement 21 new laws and amendments, while its overall work force decreased by 11 percent.
Carnegie Commission on Science, Technology, and Government, *Risk and the Environment: Improving Regulatory Decision Making* (June 1993), pp. 33-34 (footnotes omitted).
6. This report does not look at regulations controlling how the federal government runs itself because other National Performance Review reports are addressing these topics (e.g., personnel, budgeting, procurement).

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7. This particular agency, which has a good reputation as a regulatory, has since changed its internal rulemaking process.
8. For example, FAA can modify a flight regulation within hours of an accident. At the other extreme, the rule requiring passive restraint devices in cars took 20 years from initiation of development through litigation to promulgation of the final rule.
9. 5 U.S.C. SS 551-559.
10. Although the accompanying text describes the standard APA procedures, those procedures may not apply in certain circumstances because of special provisions in the APA. For a full description of the basic process and the exceptions contained in the APA see ACUS, *Guide to Federal Agency Rulemaking* [COMPLETE CITE].
11. 44 U.S.C. SS 3501-20.
12. 5 U.S.C. SS 601-12.
13. 5 U.S.C. App. (1988).
14. 5 U.S.C. SS581-90 (1990).
15. 42 U.S.C. SS 7401-7626.
16. [CITE]
17. Independent agencies were not subject to the requirement to clear regulations through OMB.
18. Certain categories of time-sensitive, technical and noncontroversial rules did not have to be cleared by OMB pursuant to agreements OMB reached with some agencies.
19. Technically, a rule could be published without OMB clearance if obtaining such clearance conflicted with statutory or court-ordered deadlines or in emergencies. EO 12291, Sec. 8(a). For practical, political reasons, agency heads seldom chose to publish rules without OMB clearance, except when faced with true emergencies or court-ordered deadlines.
20. Although the head of an agency or department usually had legal authority to issue the rule, politically it was almost impossible to do so prior to clearance from OMB.
21. Memorandum for the Heads of Departments and Agencies from Richard G. Darman,

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Director of Office of Management and Budget, re Presidential Review of Agency Rulemaking (April 3, 1989), Attachment.

22. Executive Orders 12612, 12630, 12778 (list others).

BACKGROUND

Federal regulatory agencies confront numerous overlapping and cross-cutting issues. One reason for the overlap is that the government has to divide itself into organizational units even though the problems the government has to solve do not neatly fit into one classification scheme. Overlap is also caused by science, economic and policy issues that cut across a wide variety of problems and agencies.¹ Agencies also face similar cross-cutting concerns about how best to administer the regulatory process.

Overlap exists. Some of the governmental divisions of responsibility may not make sense, but even those that are sensible create potential for conflicting or redundant regulations. For instance, it is logical to have one agency in charge of workplace safety and another in charge of food safety. This division can cause problems when as, for example, the Occupational Safety and Health Administration (OSHA) required that asbestos baffles be used to protect workers in the chocolate industry from noise, while the Food and Drug Administration (FDA) required that the same baffles be stainless steel to protect food quality.²

It is common for agencies to have overlapping jurisdiction for the same or related problems. For example, at least three agencies regulate food safety: FDA (food items exclusive of meat and poultry), the Department of Agriculture (USDA) (meat and poultry), and EPA (pesticide tolerances). Housing is regulated by the Departments of Housing and Urban Development (HUD), the Department of Veterans Affairs (through VA loan standards), and USDA (through Farmer Home Administration loan standards), among others.

Regulatory Coordinating Group

The potential for conflict also arises because individual industries are regulated by several agencies. For example, the auto industry has to meet vehicle safety and fuel economy standards issued by the National Highway Traffic Safety Administration (NHTSA), vehicle and plant emission standards issued by EPA, worker safety standards issued by OSHA, advertising requirements issued by the Federal Trade Commission, and securities regulations governed by the SEC, to name just a few.

The same chemical hazard may be regulated by different agencies in different settings. Lead, for example, poses problems that fall in numerous agencies -- representatives of 15 different agencies are on the HUD-EPA Interagency Task Force on Lead (including HUD, EPA, FDA, the Consumer Product Safety Commission (CPSC), and the Department of Defense).³

Current mechanisms for coordinating. Currently, interagency coordination is done on an *ad hoc* basis when a specific need is identified by the Executive Branch, Congress or agency staff, with OMB providing a backstop on a rule-by-rule basis through its Executive Order review.⁴

At times, agencies do coordinate with each other on specific problems. For example, FDA, USDA and EPA recently announced joint efforts to address problems posed by pesticide residues in food.⁵ The Departments of Transportation (DOT) and Energy (DOE) and EPA coordinate on the corporate average fuel economy (CAFE) standards for automobiles. An interagency committee on migrant farmworkers; led by the Departments of Health and Human Services (HHS), Education and Labor; deal with problems caused by overlapping jurisdictions.

A limited number of opportunities also exist to coordinate or exchange information about broader regulatory issues. General counsels from various agencies and chairs of independent regulatory commissions meet occasionally under the *aegis* of the Administrative Conference of the United States (ACUS), which serves as an advisory agency and a clearinghouse on administrative law procedure. The Office of Science and

Regulatory Coordinating Group

Technology Policy (OSTP) and the Federal Coordinating Council for Science, Engineering and Technology (FCCST) also occasionally coordinate scientific issues, as when OSTP issued its carcinogen risk guidelines.⁶

Coordination, or at least exchange of information, also occurs at the staff level in several more or less formal forums. Scientists from different agencies researching in a particular field often communicate with each other about their research.⁷ A small group of career staff regulators from various agencies have a brown bag lunch once a month to exchange experiences and ideas about ways to improve the regulatory process. A larger group of career regulators from various disciplines and agencies administers the Interagency Regulatory Colloquium, which has monthly speakers on subjects of interest to regulators.⁸

OMB also serves as a backstop to catch and require resolution of conflicting regulations. For example, OMB found that OSHA was proposing to issue a regulation requiring radon in mines to be vented to the outside to reduce mine workers' exposure. EPA, on the other hand, planned to issue a regulation prohibiting the venting of radon from mines so as to protect the surrounding communities. OMB would not complete its review until the conflict was resolved.⁹

NEED FOR CHANGE

Under the *ad hoc* coordination process, coordination does not occur at the proper levels on a number of problems that could benefit from it. For example, the HUD-EPA Interagency Task Force on Lead was established by Congress -- presumably because it believed the agencies were not coordinating sufficiently on their own. Research scientists at the different agencies were sharing information, but coordination was insufficient at the program level. The FDA-USDA-EPA task force on pesticides was created only recently in response to a National Academy of Sciences report even though pesticide residue in food is a long-standing problem.

OMB's rule-by-rule review process, although it does catch some problems and has benefits as a method of Executive oversight, is not a particularly comprehensive method for coordinating regulatory policy. By the time a rule gets to OMB, policy options are already constrained and each agency is heavily invested in proceeding with its rule. Additionally, OMB's rule-by-rule review by itself tends to force policy development and coordination into the context of the development of a single rule or issue. This can result in reactive and fragmented policy development that inhibits the government's ability to manage the regulatory process effectively.

A variety of problems are caused when agencies fail to coordinate on overlapping and cross-cutting issues. Duplicative or conflicting regulations are a common focus of complaints about federal regulation. "Expert" agencies look rather inexperienced when different agencies produce different rulings about a chemical's hazard. Lack of coordination can cost agencies money when there is a series of wheel reinventions rather than a trading of experiences and wisdom.

Less obvious problems are also caused by the existing division of responsibility within the government. Grouping regulators by expertise (e.g., worker safety, product safety, environment) facilitates issuing regulations, but can interfere with compliance. For instance, regulations from different agencies are not usually coordinated such that a process or product need only be changed once to take into account several regulatory changes. In fact, it is difficult to do this within one agency or department, much less between or among departments.

- It took the intervention of the Secretary of the DOT to get the Federal Aviation Administration (FAA) and NHTSA (both within DOT) to adopt regulations for child safety seats that could meet aircraft and car safety seats requirements. Otherwise, airplane trips would have required parents to bring along two child seats -- one for the plane ride and one for the car trip.

- EPA touts as a new development its recent rulemaking for the pulp and paper industry in which it addressed water and air pollution regulations simultaneously.¹⁰ Although it undoubtedly is beneficial to look at total emissions from specific types of facilities, the fact that this is a relatively new development illustrates how far government agencies have to go in looking at the picture from the regulatees' viewpoint.

Lack of coordination also results in less serious inefficiencies. Exchanging information on the rulemaking process could help agencies help each other. For example, some offices in EPA have been using direct final rulemaking (described in REG05) for 10 years as a way of streamlining procedures and reducing unnecessary paperwork for minor rules. When staff from other agencies were told of this process, many expressed interest in using the idea or adapting it slightly as needed for their particular circumstances.

The Carnegie Commission on Science, Technology, and Government recently identified lack of coordination as a significant problem in our country's efforts to control environmental and other risk-related hazards. "Worse probably than the occasional high-profile mistake is the sum of the myriad inefficiencies and inconsistencies that result from lack of interagency communication, any one of which by itself might be considered minor."¹¹

A systematic, but short-lived, attempt at coordinating regulatory policy was made during the last two years of the Carter Administration. After a successful forum was created among EPA, OSHA, CPSC and FDA (known as the Interagency Regulatory Liaison Group), President Carter created the United States Regulatory Council late in 1978 to coordinate improve regulations.¹² The Council was disbanded when President Reagan took office.

The Council had a variety of projects aimed at increasing the use of innovative approaches to regulation and at coordinating regulatory efforts among agencies. It started a calendar of federal regulations. It issued a set of pamphlets on innovative approaches to

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regulation.¹³ Coordination was attempted in several ways: several projects looked at how regulation and other government actions affected specific industries (e.g., the auto and coal industries); one project looked at a science policy issue that cut across several agencies (a cancer policy); one project looked at how government regulation was viewed by citizens in a small city (Janesville, Wisconsin). Although the Council's projects were not equally successful, and the Council was not in operation all that long, it was moving in the right direction. People involved with the Council liked the fact that the agencies set the agenda, and it was seen as a way for the agencies to help themselves improve regulation.¹⁴

RECOMMENDATION

1. Create an interagency Regulatory Coordinating Group to share information and coordinate approaches to regulatory issues. (2)

President Clinton should establish an interagency Regulatory Coordinating Group (RCG) to provide agencies with a mechanism to share information and coordinate approaches to regulatory issues. An Executive Order will soon be issued that will establish such a group to be composed of top political appointees from the key domestic regulatory agencies (including independent agencies) and the Administrative Conference of the United States (ACUS), to be chaired by OMB's Office of Information and Regulatory Analysis (OIRA).

Mission of the RCG. The RCG's mission is to provide a forum for agencies to discuss issues of common concern, to assist agencies in finding more innovative substantive approaches to regulation and better methods of developing regulation, and to improve coordination of regulatory policies. Meetings of the RCG will allow high-level regulators to discuss specific problems they are confronting and seek advice from similarly-situated peers.¹⁵ The RCG also will decide what issues the Group should address and, as needed, establish task forces or working groups (including identifying a lead agency, designating

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which agencies and types of representatives should participate, and setting a goal for the group).

The RCG also can be used as a forum to identify areas requiring coordination of two or more agencies on program development (similar to the joint efforts now underway on lead and pesticides), although the RCG should not necessarily oversee this coordination or resolve substantive conflicts. Once the area and relevant agencies have been identified, the affected agencies should establish the proper structure for coordination and would not necessarily report back to the RCG..

Structure of the RCG. The RCG itself needs to be composed of political appointees. Absent high level support and direction, agency staff are unlikely to spend the necessary time on RCG projects. Only top political appointees can speak authoritatively for each agency, decide on the issues to which the agencies will commit resources, reach consensus on policies coming from the working groups, and direct implementation of recommendations.

The RCG should accomplish most of its work by acting as an umbrella organization with task forces or working groups addressing specific issues. The task forces could be political appointees or career staff, depending on the goal of the task force. Representatives from different levels and disciplines within the agencies will be needed to address different tasks. For some issues it might be best for working groups to present a consensus view. In other situations, the best result might be a full statement of opposing views with the points of contention highlighted.

Although the RCG may need a small staff to run the organization (set agendas, coordinate work groups, etc.), the primary staff work should be done by agency staffs in the task force or work group structure. This will allow agency experts who deal with a specific issue on a routine basis to compare notes with experts from other agencies. Resolution of scientific issues, for example, is much better done by scientists who can critique each

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other's work. Similarly, improving agency/Congressional relationships is probably best handled by a task force of agency Congressional liaisons.

Issues for the RCG. The RCG's tasks should include the following:

- The RCG should actively encourage the use of innovative approaches to regulation. It should oversee the development of the *Deskbook on Regulatory Design* (see REG02.1) and identify innovative regulators from the agencies that can serve as resources for other regulators to contact for assistance in developing innovative approaches.¹⁶ An RCG group should also educate Congress on why and how statutes should be drafted to allow or require innovative approaches.
- The RCG should establish task forces on substantive policy areas that are in need of coordination (e.g., risk prioritization (see REG07), value of life, value of eco-systems).
- The RCG should establish task forces on ways to improve the rulemaking process, such as increasing public participation (see REG04), the use of information technology (see REG04.4), removing procedural barriers (see REG05), improving agency/Congressional relationships (see REG09).
- The RCG should have at least one task force looking at ways for agencies to help people comply with regulations.¹⁷

FISCAL IMPACTS

LOW COST annually -- less than \$200,000. Estimate based on 2 FTE annually to support the RCG. Savings long run from better run agencies and avoidance of duplication between agencies. The FTEs could be covered in turn by member agencies.

CROSS-REFERENCES

(1) Program Design Office in OMB.

- (2) Congressional/Agency Relationships in Leadership and Management Systems Report.

ENDNOTES

1. For example, different agencies use different values for life in determining the monetary benefits of a rule. CITE TO ACUS RECOMMENDATION.
2. [CITE]
3. [CONFIRM NUMBER OF AGENCIES]
4. OMB review as a means of Executive oversight of rule development was beyond the scope of NPR's mandate because a separate working group in the Clinton Administration was in the process of preparing an Executive Order on this issue.
The planning required by Executive Order 12498 has proven less than useful. Don Elliott, [CITE].
5. CITE to newspaper article in Post, mid-June
6. Office of Science and Technology Policy, "Chemical Carcinogens: A Review of the Science and Its Associated Principles, February, 1985," 50 *Federal Register* 10371-10442 (1985).
7. Scientists researching various aspects of the problems posed by lead shared information before any formal mechanism was established for interagency coordination on this issue. Telephone interview with Ronnie Levin, [GET FULL NAME AND TITLE] EPA (July 22, 1993).
8. Telephone interview with Paula Cohen, [TITLE], Department of Agriculture.
9. [CONFIRM AND CITE]
10. Wendy Cleland-Hamnet, Journal article [CITE}.
11. Carnegie Commission on Science, Technology, and Government, *Risk and the Environment: Improving Regulatory Decision Making* (June 1993), p. 64.
12. The Regulatory Council, which was composed of 20 Executive departments and 18 independent regulatory agencies, was directed "to identify and resolve conflicts in regulation, manage government-wide efforts to better measure and plan the effect of new regulations on different sectors, and to identify and eliminate barriers to more cost-effective

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and less burdensome regulation. "United States Regulatory Council, Report from the Director," July 1980 at 1.

The member departments and agencies of the Regulatory Council were: the Administrative Conference of the United States; the Departments of Agriculture, Commerce, Education, Energy, Health and Human Services, Housing and Urban Development, the Interior, Justice, Labor, Transportation, and the Treasury; the Environmental Protection Agency; the Equal Employment Opportunity Commission; the Federal Emergency Management Agency; the General Services Administration; the National Credit Union Administration; the Small Business Administration; the United States International Trade Commission; the Veterans Administration; the Civil Aeronautics Board; the Commodity Futures Trading Commission; the Consumer Product Safety Commission; the Federal Communications Commission; the Federal Deposit Insurance Corporation; the Federal Election Commission; the Federal Energy Regulatory Commission; the Federal Home Loan Bank Board; the Federal Maritime Commission; the Federal Mine Safety and Health Review Commission; the Federal Reserve System; the Federal Trade Commission; the Interstate Commerce Commission; the National Labor Relations Board; the Nuclear Regulatory Commission; the Occupational Safety and Health Review Commission; the Postal Rate Commission and the Securities and Exchange Commission. United States Regulatory Council, Report From the Director," July 1980 at 13.

13. [CITES]

14. Interview with Doug Costle, Former Chair, U.S. Regulatory Council (June 28, 1993).

15. Members of the Regulatory Council reported that they found the Regulatory Council a very useful way to get advice from people in similar situations. These portions of the meeting may need to be principals only.

16. The RCG task force on innovative approaches should coordinate with the Program Design Office in OMB recommended in Program Design Rec. X.

17. One hindrance to compliance is that the government regulates and organizes its regulations by subject area (e.g., labor, equal employment opportunity, highway safety, environmental) rather than by industry sector (e.g., gas stations, chemical companies, auto companies). Currently, if a small business wants to find out what regulations govern its actions, it has to go through each of the substantive parts of the multi-volume *Code of Federal Regulations* areas to determine its obligations (although there may be private services that compile this information more usefully). It would be easier for the small business if there were an industry-specific listing of what regulations apply. Compiling such a listing and making it useful may be a very complicated proposition. It might be easier to

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have an office that helps businesses wend their way through the regulatory maze. The RCG should consider a pilot program to determine what is feasible.

The RCG should also look at other ways to coordinate regulation by looking at regulation from the regulated entities' perspective. RCG should consider whether it would be useful to compile planned regulations by industry sector, as the Regulatory Council did for the auto industry.

REG02 ENCOURAGE MORE INNOVATIVE APPROACHES TO REGULATION

BACKGROUND

One of the biggest challenges federal regulators face is choosing the right regulatory tool to solve the problem. Among the tools they may consider first are non-regulatory approaches, which may include information disclosure, consumer education, audited industry self-certification, jawboning, and efforts to spur technological innovations. For example, to address the problem of airline delays, the Federal Aviation Administration (FAA) simply publishes a monthly report comparing actual and scheduled arrivals and departures. The Department of Energy (DOE), the Environmental Protection Agency (EPA) and 24 electric utilities jointly created a "Golden Carrot" program to encourage design of a more energy efficient and environmentally-friendly refrigerator. Regulation by state or local governments, when it is deemed more effective, may also be an alternative to federal regulation.

If regulation is necessary, agencies must select from a wide range of regulatory tools. A number of approaches may effectively solve the problem. One of the major factors regulators must consider in choosing among alternative approaches is the cost to the regulated industry and the government entailed in each possible solution.

While regulation is necessary to achieve health, safety, environmental, economic and social objectives, it does impose significant costs on those being regulated. For example, industries may be required to pay for installing equipment to reduce pollution, for investing in monitoring systems to meet worker health standards, and even for hiring additional personnel to maintain compliance records.

EPA estimates that the proportion of the Gross National Product (GNP) devoted to environmental protection alone will rise from 1.9 percent in 1990 to 2.7 percent in the year 2000, with the private sector bearing most of these costs.¹ The National Highway Traffic Safety Administration (NHTSA) and the Federal Highway Administration (FHWA) estimate

that between 1966 and 1990 the federal and state governments and the automobile industry spent an average of \$6.9 billion annually on highway, traffic and motor vehicle safety.²

Experience has shown that in many situations, costs of meeting regulatory goals can be significantly reduced by choosing regulatory approaches that rely more on market mechanisms (versus the command-and-control approach) and place more decisions in the hands of the private sector. Tapping the forces of the market can also produce more effective regulation. The mandatory deposit-refund systems for beverage containers ("bottle bills"), which have been implemented in a number of states, demonstrate how powerful economic incentives can be in influencing the behavior of large numbers of people.

Command-and-control approaches, because they dictate what individual firms must do, provide no incentives for regulated industries to exceed the standards. Thus, there is no incentive for industries to develop technologies or methods for solving the problem in a better way. Market-oriented regulation, on the other hand, decentralize decisionmaking. This can allow the market to find the least-cost solution to a particular regulatory goal. Unlike command-and-control, market orientation provides greater flexibility to regulated industries and encourages innovation.

Among the regulatory approaches which allow greater flexibility and feature more market-orientation are:

- performance standards
- marketable rights
- monetary incentives
- information disclosure

Performance standards are generally preferred to prescriptive or design standards because they give the regulated industry the flexibility to determine the best technology to meet established standards. For example, a design standard for ladders might specify what materials must be used and exact dimensions for production, whereas a performance standard might state simply that the ladder support a minimum weight. The Occupational

Safety and Health Administration (OSHA) has often been criticized for its very prescriptive design standards for plants and equipment relating to worker safety.³ In 1990 OSHA initiated rulemaking which would introduce performance standards where possible. The proposal followed complaints by industry that current standards provided insufficient flexibility and inhibited technological developments.

The EPA's "bubble" concept for limiting pollution emissions is a type of performance standard. Under the bubble concept, emission limits are established for facilities or group of facilities. This allows plant flexibility in choosing what emissions source to reduce in order to meet the overall limit for emission under the bubble. EPA estimated that facilities under the 80 or so bubbles established prior to 1986 saved \$435 million in meeting emissions standards.⁴

Marketable rights allow the market, rather than the government, to distribute scarce resources. The 1990 Clean Air Act Amendments established an allowance trading system for sulfur dioxide emissions from utilities, in an effort to reduce acid rain. Utilities are allowed to trade initially-allocated allowances, each representing one ton of emissions. This allows more of the reduction in emissions to be done by those plants that can reduce emissions at lower costs. EPA estimates that this system will save from \$700 million to \$1 billion per year.⁵

In 1985 the Department of Transportation issued a rule allowing the sale of airport takeoff and landing rights (slots) at four major airports. Previously, these slots had been allocated by a committee, which frequently deadlocked. Under the 'buy-sell' rule, airlines are permitted to sell slots. This allows the market to determine the value of the slots and to allocate them most efficiently. Similarly, the National Marine Fisheries Service (NMFS) implemented in 1990 a transferable quota system for allocating fisheries rights in the New England and Mid-Atlantic regions.

Monetary incentives, if correctly set, can be effective in influencing behavior. More than 100 communities now charge for garbage collection on the basis of volume. Because

households have an incentive to reduce the amount of garbage generated, the effect has been to reduce tonnage collected and to increase recycling. Many states and counties have imposed taxes on auto tires to pay for disposal. Ten states have implemented deposit-refund systems for lead batteries to ensure proper disposal.

Information disclosure provides consumers information they need to make informed choices.⁶ Labels, routinely required on such products as over-the-counter drugs and pesticides, are probably the most common form of information disclosure. NHTSA provides information on tire safety to consumers by requiring manufacturers to grade and mark tires based on a testing protocol to measure traction, treadwear and temperature resistance.

Information disclosure requirements can also provide an incentive to industries to move toward regulatory objectives. The Federal Trade Commission's (FTC) introduction of standard test procedures for tar and nicotine content in cigarettes led to the introduction of low-tar cigarettes. The 1986 Emergency Planning and Community-Right-to-Know-Act requires companies to disclose information on the use and release of hazardous chemicals. EPA attributes a significant portion of the 31 percent decrease in air emissions of these hazardous chemicals to voluntary reductions brought about by increased industry and public awareness of emission levels.

NEED FOR CHANGE

Federal agencies, for a number of years, have been encouraged to use alternative approaches to regulation, including more market-oriented regulation. President Carter in a 1980 Presidential Memorandum directed the agencies to find areas where alternative techniques could be used and to apply alternatives to new regulatory areas. His Regulatory Council created a short-lived Project on Alternative Regulatory Approaches, which created a series of guides describing alternative approaches. Under his and later Presidential Executive orders, agencies were required to include, in their regulatory analyses of all

Innovative Approaches

major rules, a discussion of alternative approaches considered. Presidents Reagan and Bush also supported use of market-oriented approaches, but their message was somewhat diluted by a lack of specific guidance on use of such techniques.

Despite more than a decade of high-level support, innovative approaches are not widely used by agencies. There are a number of constraints to more widespread use. Congress and agencies commonly respond to problems by pulling the familiar command-and-control tool out of the toolbox. It is always easier to model a new program after an old one, and most often, existing regulations are command-and-control. Lack of information and knowledge about when other tools should be used is a significant constraint to introduction of innovative techniques. Even where staff have expertise in designing innovative regulation, their ideas may not be accepted without strong support by agency leadership. Agencies generally do not actively elicit ideas for regulatory approaches from the regulated industry or interest groups. (See REG03 and REG04). Finally, statutes may not give agencies sufficient discretion in designing a regulatory approach.

RECOMMENDATIONS

1. Establish use of innovative regulatory approaches as administration policy. (2)

Re-directing the regulatory system from the command-and-control end of the regulatory spectrum toward more flexible and market-oriented approaches will require strong leadership. Congress and the agencies will need to be more accountable for choosing the right tool for the job. President Clinton should emphasize his support for agency use of such approaches in his Executive Order on regulation. The Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) should provide guidance to agencies on how to use these techniques.

2. Develop a *Deskbook on Regulatory Design*. (1)

The Regulatory Coordinating Group should oversee the development of a *Deskbook*

on *Regulatory Design* for legislative and regulatory staffs. The *Deskbook* would improve understanding of the full range of alternative approaches by providing both policymakers and staff with ready information about the range of regulatory approaches. It would also identify resource people, both within and outside of government, for development of innovative approaches. Project staff should work closely with Congressional regulatory specialists in developing the *Deskbook*.

The *Deskbook* should describe in detail the conditions under which each approach should be considered. In this context, the *Deskbook* should highlight the strengths and weakness of each approach. For example, market-oriented approaches, while they may be more economically efficient, can be difficult to design and cannot be applied in all circumstances. In drafting the *Deskbook*, the RCG should draw on existing sources, such as the handbooks prepared by the Regulatory Council in the 1970's and the experience of other countries.⁷

The *Deskbook* should also provide an in-depth survey of how innovative approaches have been used in both federal and state governments. Case studies should be used for each approach. The *Deskbook* should be designed in a format to accommodate new information, so that it can be regularly updated. In addition to printed versions, the *Deskbook* should be made available in electronic format to maximize its usefulness. An electronic format would also allow more extensive information to be provided, such as actual texts of regulations employing innovative approaches or additional commentary on the development of such regulations.

FISCAL IMPACT

REG02.1: NO COST

REG02.2: LOW COST.

Drafting of the *Deskbook on Regulatory Design* will require a small task force of federal employees, perhaps a consultant and publication expenditures.

CROSS REFERENCE

EPA 08 Reform EPA Regulations to Include Economic and Market Incentives for Environmental Protection
Program Design - Office of Program Design?

ENDNOTES

1. U.S. EPA November 1990. Environmental Investments: The Cost of a Clean Environment, Report of the Administrator of the Environmental Protection Agency to the Congress of the United States. Report No. EPA-230-11-90-083. Washington, D.C.
Estimates of the total costs to the private sector of complying with federal regulation range from \$430 to 562 billion annually. Hahn and Hind (Yale). Tom Hopkins (Rochester).
2. National Highway Traffic Safety Administration and the Federal Highway Administration. Moving America More Safely. An Analysis of the Risks of Highway Travel and the Benefits of Federal Highway, Traffic, and Motor Vehicle Safety Programs. September, 1991.
3. Cite OSHA study
4. Creekmore, Andrew T. 1989. "Emission Trades for Sources of Volatile Organic Compounds." Air and Waste Management Association Annual Meetings, In...
5. 56 Federal Register 63002-351, December 3, 1991
6. Information Disclosure. Project on Alternative Regulatory Approaches. 1981.
7. OECD report.

BACKGROUND

The traditional model for rulemaking is that of agency experts deciding the best way to regulate, offering the public an opportunity to comment on the agency's proposed rule or to object to its adoption, and then issuing binding rules telling regulated entities what to do. Even if the agency experts chose wisely, the traditional model had very little buy-in from outside the agency, which hurts the acceptability of the rule. This traditional process encouraged adversarial, uncooperative behavior on the part of private industry or others who might be affected by an agency's decisions, frequently leading to protracted litigation. This has been particularly true in controversial areas such as environmental regulation or the health and safety of workers, where an agency proposing a regulation drafted by its own staff routinely finds itself under attack from various private parties who are unhappy with the rule.

The traditional process rarely leads to cooperative efforts to resolve problems. On the contrary, a barrage of written critical comments followed by litigation in the federal courts is frequently inevitable, accompanied by long delays and excessive costs. These costs include the direct costs of pursuing or defending the court case and the cost to industry and society of long periods of uncertainty about the final outcome. The expectation of litigation usually has the effect of sharpening the divisions between parties during the rulemaking process and may foreclose any willingness to recognize the legitimate viewpoints of others. The parties have little incentive to focus on finding constructive, creative solutions to problems that take account of legitimate differing needs.¹

NEED FOR CHANGE

A small number of federal agencies have successfully pioneered a consensus-based approach to drafting regulations. Negotiated rulemaking (sometimes called regulatory

Consensus-Based Rulemaking

negotiation or "reg neg") brings together representatives of the agency and the various affected interests, in a cooperative effort to develop regulations that not only meet the standards required by Congress, but also are acceptable to the people who ultimately will have to live with the regulations.²

Since 1982, approximately 35 federal agency negotiated rulemakings have taken place or are currently under way. Almost half have been at EPA, which is the only federal agency with a small office assigned specifically to assist other parts of the agency in doing reg negs. Other users include the Departments of Agriculture (APHIS), Education (required in certain programs by statute), Labor (OSHA), and Transportation (Office of the Secretary, NHTSA, Coast Guard), Farm Credit Administration, Federal Communications Commission, and Nuclear Regulatory Commission.³ Enactment of the Negotiated Rulemaking Act of 1990⁴ established a statutory framework for agency use of reg neg.

How does reg neg work? First, an agency would normally ask one or more "conveners" -- either outside contractors or government employees who are not otherwise involved in the proceeding -- to determine whether the rule is appropriate for reg neg. (As discussed below, reg neg is not appropriate for all rules.) If the convener recommends reg neg and if the agency head determines that use of reg neg is in the public interest, a reg neg committee would be chartered under the procedures of the Federal Advisory Committee Act.⁵

A reg neg committee must be composed of representatives of all concerned interests. The agency and the convener must make reasonable efforts to ensure that all relevant interest groups and others affected by the rule are aware of the proceeding. The agency must also publish a notice explaining the proposed reg neg and offering the opportunity to apply for participation by interests not already adequately represented.⁶

Meetings of the negotiating committee are conducted by a mediator or facilitator (often the convener), who may be a government employee or from the private sector. The agency should participate fully in the negotiations, making sure that at all times the participants are aware of what action the agency is likely to take if the committee does not reach an agreement.

Consensus-Based Rulemaking

The goal of the negotiators is to reach consensus on the text of a "proposed" regulation or rule through a process of evaluating their own priorities and making tradeoffs to achieve an acceptable result. In this way, the competing interests try to work out a practical solution to the problem necessitating regulatory action. Through the give-and-take of the negotiating process, participants try to obtain a favorable outcome on the issues of greatest importance to them, while recognizing and accommodating the legitimate needs of others. Throughout the process, the agency's function is to protect the public interest by implementing all applicable statutory or other legal requirements. The procedure is open to the public to observe, and public comments are invited, before, during and after the negotiations.

If consensus is reached, the agency ordinarily would publish the consensus draft rule in a notice of proposed rulemaking. If consensus is not reached, the agency ordinarily publishes its own proposal for a rule, often making good use of the information it has obtained through the course of the negotiations.

Benefits of negotiated rulemaking. The long-term benefits of negotiated rulemaking include reduced time, money and effort expended on developing and enforcing rules;⁷ earlier implementation; higher compliance rates; and more cooperative relationships between the agency and other affected parties. These benefits flow from the broader participation of the parties, the opportunity for creative solutions to regulatory problems, and the potential for avoiding litigation.

If the parties can come to a consensus, the resulting rule is likely to be easier to implement and the probability of subsequent litigation is diminished. Negotiations that do not result in consensus on a draft rule can still be very useful to the agency by narrowing the issues in dispute, identifying information necessary to resolve issues, ranking priorities, finding potentially acceptable solutions, and improving the agency's understanding of the real-world impact of alternative regulatory options.

Negotiation sessions provide all participants with an opportunity to have their assumptions and data questioned and tested by parties with other perspectives. The dynamic

Consensus-Based Rulemaking

nature of negotiating forces each party to participate in crafting solutions to issues that are on the table for resolution. In short, the process fosters creative activity by a broad spectrum of interested persons, targeted at producing better, more acceptable rules.

In regulatory programs with a history of adversarial rulemaking, it is not unusual for parties to negotiate a settlement under the supervision of a court after the rule has been published. Particularly in such programs, negotiation of a rule *prior to the agency's publication of a proposed rule* can save the agency and other parties both time and resources. By avoiding litigation, regulated businesses can plan capital expenditures or production changes earlier than if they faced years of litigation and uncertainty about the outcome. Moreover, beyond reducing litigation cost, EPA (which is the most frequent user of the technique) has indicated that its regulatory negotiations on average takes slightly less time than other significant or other major agency rulemakings.⁸

Time savings can translate into both monetary savings for industry and greater satisfaction all around. For example, because of a reg neg, EPA's wood-stove emission standards went into effect as much as 2 years earlier than expected. The participant from the Natural Resources Defense Council was quoted as expressing satisfaction on behalf of environmental interests that over 1 1/2 million wood-stoves sold during the 2-year period would be covered by the new regulation. Manufacturers were spared 2 years of uncertainty and could begin re-tooling for the new standards.⁹

There can also be important intangible benefits. Even in programs with no history of adversarial rulemaking, the agency may obtain a better factual basis for the regulation and a better understanding of the practical consequences of different regulatory choices--whether or not consensus is attained. Regulatory negotiations can help enfranchise parties with important interests at stake, who may otherwise feel relatively powerless. Rules drafted by persons who must ultimately be governed by them are more likely to be practical, and therefore more acceptable.¹⁰

The most significant disincentive to using negotiated rulemaking is its up-front cost, for the process can be resource-intensive in the short term for both the agency and the other

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participants. While there are likely to be considerable long-term savings in total resources required, the concentrated investment of effort and expense in the short term may be a serious obstacle -- particularly if the savings and the costs appear in the budgets of different operating components of the agency. Additional costs may include services of mediators and conveners, research conducted on behalf of the negotiating committee, administrative support for the committee, expenses of participation for some of the negotiators, and some training costs.

RECOMMENDATION

1. Encourage use of negotiated rulemaking. (1)

Agencies should use negotiated rulemaking more frequently. The President should encourage agencies to use reg neg and should require regulatory agencies (e.g. those named to the Regulatory Coordinating Group -- see REG01) to review their upcoming rulemaking agendas for opportunities to use reg neg and to explain why it would not be feasible to use this approach for any of their rulemaking initiatives during the year. The Administration should facilitate efforts to use reg neg by identifying and removing any administrative barriers to its use.

Negotiated rulemaking should rarely, if ever, be required by statute for particular rulemakings because its success depends on the voluntary participation of all participants, including the agency.¹¹ Moreover, Congress should recognize that statutory deadlines to issue proposed or final rules are inimical to negotiated rulemaking, especially if they are shorter than two years.

FISCAL IMPACT

The actual recommendation -- that agencies should consider using reg neg is NO COST. Reg negs themselves are LOW COST with potential MEDIUM SAVINGS.

ENDNOTES

1. See Harter, Philip J., *Negotiating Regulations: A Cure for Malaise*, Georgetown Law Journal, Vol. 71, p.1 (1982).
2. Administrative Conference of the U.S., Recommendations 82-4 and 85-5, "Procedures for Negotiating Proposed Regulations," 1 CFR Sec. 305.82.4 and 305.85.5 (1993); Administrative Conference of the U.S., *Negotiated Rulemaking Sourcebook* (David M. Pritzker & Deborah S. Dalton, eds.) (1990).
3. Administrative Conference of the U.S., "Federal Agency Experience with Negotiated Rulemaking," (March 1, 1993), staff paper updating Chapter 10 of *Negotiated Rulemaking Sourcebook*, *id.*
4. Public Law No.101-648, codified at 5 U.S.C. Sec. 581-590 (1992 Supp.).
5. 5 U.S.C. App. (1988).
6. For a recent notice, see *Federal Register*, Vol. 58, No. 119 (June 23, 1993) p. 34,011 (EPA notice of Wood Furniture Manufacturing Negotiated Rulemaking Committee).
7. It is difficult to obtain reliable data about the costs of regulatory proceedings. However, some information is available that may give an indication of potential savings from using reg. neg. The best data come from the Environmental Protection Speaking in 1984, former EPA Administrator William Ruckelshaus estimated that more than 80% of EPA's rules were challenged in court and that approximately 30% of the rules were changed significantly as a consequence. [cite] Ruckelshaus also estimated that the annual effort to handle this litigation took 50 person-years from EPA's Office of General Counsel, 75 person-years from EPA program offices, 25 person-years from the Department of Justice, and 175 person-years on the part of plaintiffs' counsel. *Id.*
Administrator Lee Thomas, speaking in 1987, pegged the level of litigation at more than 75%.⁴ By contrast, of the first 10 negotiated rulemaking proceedings brought to completion by EPA, only 2 were challenged in court, and both rules were essentially upheld. [cite] Reduction of litigation rates from 75% to 20% obviously would produce great savings if this level of improvement were maintained.
8. EPA's estimate for negotiated rulemaking (including initial program office work, evaluation, negotiations, public comment, analysis of comments and promulgation of the final rule) was 26.5 months. Environmental Protection Agency, *Franco-American Judicial Exchange -- Presentation on Negotiated Rulemaking and Alternative Dispute-Resolution Techniques* (Office of the Administrator, September 1990, Looseleaf, Tab. 1). Figures for EPA rulemaking are available in Cornelius M. Kerwin and Scott R. Furlong, "Time and Rulemaking: An Empirical Test of Theory," *Journal of Public Administration Research and*

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Theory, Vol. 2, 1992, p. 113-138.

9. McClintock, Regulating Wood-Stove Emissions, *Washington Post* (Home Section) 5 (September 25, 1986).

10. Negotiated rulemaking is not appropriate for all rules. Certain characteristics of rulemaking proceedings favor using reg neg. The number of distinct interests concerned with the proposed rule, including any relevant government agencies, must be small enough so that they can be fairly represented by not more than 20 to 25 negotiators. There should be a number of diverse issues that participants can rank according to their own priorities, so that there will be room for compromise on some of the issues as an agreement is sought. However, it is essential that the issues to be negotiated not require compromise of principles so fundamental to the parties that productive negotiations are unrealistic. Parties must be willing to negotiate in good faith, and no single interest should be able to dominate the negotiations. A statutory requirement on the agency to issue some type of rule is often helpful.

11. Three statutes have mandated that the Department of Education use reg neg for specific rulemakings and another statute required the NRC to do so. All were subject to relatively short statutory deadlines and these deadlines constrained the negotiation process. Interview with David Pritzker, Senior Staff Attorney, Administrative Conference of the U.S., July 20, 1993.

BACKGROUND

Under the Administrative Procedure Act, agencies are required to provide only a minimal opportunity for public comment -- generally, agencies must accept only written comments filed between issuance of the proposed and final rules. The agency then reviews these comments and responds to them when the rule is finalized. If affected members of the public disagree with the rule, they can challenge it in court.

The traditional rulemaking model, particularly for controversial rules, can be very adversarial. (See REG03) For example, EPA believes that 80 percent of its major rules get challenged.¹ The adversarial nature of the rulemaking process causes several problems. A court challenge delays or hinders implementation because, during the year or more that it takes to litigate a case, challenging parties are focusing efforts on winning the court case rather than on complying with the new rule. Court remand of a rule can set a program back several years more.

The fear of court challenges also hinder development of a rule by affecting the dynamics of the rulemaking process. Agencies may spend more time than is really beneficial preparing detailed rationales for a rule and responses to comments to protect themselves in case of court challenge.

NEED FOR CHANGE

Public participation during the rulemaking process. Without exception, those people from outside the government that NPR interviewed on the regulatory process -- whether from industry or public interest groups -- said they wanted earlier and more frequent opportunities to participate in the rulemaking process. There are a number of good reasons to provide such opportunities. Earlier and more interactive public participation can help the

agency develop innovative regulations, provide information otherwise unavailable to the agency, build bridges among the agency and affected interest groups, and improve acceptability of the rule by achieving buy-in from some affected parties.

The traditional rulemaking model limits public participation in ways that dampen the type of interaction likely to lead to innovative solutions. First, by the time the agency proposes a rule, it has committed so much time, resources, and energy to the proposal that, although it may be open to changing the details of the approach, it may not be inclined to change direction significantly. (E.g., if the agency has chosen a command-and-control approach, it is unlikely that the agency will shift to information disclosure or marketable permits.) This is particularly true if the agency is operating under a statutory or court-ordered deadline because, even if it had the inclination to change the approach, it is unlikely to have the time.

Second, the public input often does not involve a real dialogue between the public and the agency or among different segments of the public. This makes it difficult to probe the reasons for a suggested change or to obtain comments if an approach is modified based on public comments. Solving problems, particularly with innovative approaches, is often an iterative process -- a suggested approach elicits information, which causes a change in or clarification of the approach, which elicits additional information, and so on. A one- or two-shot opportunity for public comment is inconsistent with an iterative process.

The traditional model tends to place the agency and affected interest groups in adversarial relationships. The possibility that a rule will be challenged in court may make interested parties hesitant to release information or recognize the validity of another party's point. Giving outside parties more meaningful opportunities for affecting the regulatory outcome can create more cooperative relationships among agencies and outside parties.

Agencies should improve regulatory programs by increasing public involvement in the rulemaking process and moving towards a more consensus-based model. Agencies have a wide variety of methods for increasing public participation.

Negotiated rulemaking ("reg neg") is a structured way to increase public

participation (or at least affected interest group participation) (see REG03). Agencies have also used less formal mechanisms to increase public participation. For assistance with a specific rule, an agency can form a *policy discussion group* with membership very similar to a reg neg committee and then call the group in at various times for advice on agency options papers, draft proposals, specific issues, etc. Such committees still have to be chartered as federal advisory committees and meetings must be open to the public, but the formal convening process is avoided and the quest for consensus does not drive the process.² EPA used such a group for assistance in developing the acid rain program regulations.³ The Department of Transportation used such a group for assistance in developing regulations under the Americans with Disabilities Act.⁴

Agencies should consider holding *public meetings* after they have selected an approach but before the details are worked out or at other stages of the rulemaking process. A description of the agency's preferred approach, draft rule proposals, or options papers usually should be made available prior to or at the meeting so the agency can get comments from the public and answer questions. The Department of the Interior recently convened such a meeting with representatives of rock climbing enthusiasts, conservationists and others to discuss the growing problem that rock climbers pose in national parks.⁵

Agencies can also use *focus groups* to obtain information about how different approaches to or aspects of a regulation would actually work in practice.

Agencies should experiment with ways to *make public meetings and hearings more useful and accessible*. Possibilities include:

- providing the public opportunities to ask questions of agency experts at public hearings or meetings about the proposed regulatory initiative. DOT had made agency experts available for informal discussions one hour prior to the start of a hearing or meeting.
- arrange meetings by topic so that presenters will have to stay, listen to and learn from others' presentations rather than presenting testimony and leaving.
- have round table discussions rather than formal presentations.

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- hold some hearings at night or outside D.C.
- broadcast proceedings or use teleconferencing capabilities.

For major rules, *early requests for input* or notices of impending agency action for rules and related policy statements, non-regulatory programs, or guidance documents should be the norm rather than the exception. Agencies should use traditional means, such as publishing Notices of Inquiry or Advance Notices of Proposed Rulemaking in the *Federal Register*, or nontraditional means, such as using (or establishing) specialized computer bulletin boards to circulate requests for information or draft agency papers. Early public participation may pave the way for an agency's use of "direct final" rulemaking (see REG05).

Agencies should consider *providing funding* for participants in the rulemaking process where such funding is needed to broaden the viewpoints and improve the quality of the information presented in a proceeding, and when policy discussion groups are used to ensure that differing perspectives are presented or to create the balance needed to achieve consensus. Funding could be limited to reimbursement for travel and other expenses, rather than for labor or time. Such funding would be less than what the government is required to pay when a person or group successfully challenges a rule in court.

There is no one formula for deciding what method or level of public participation is appropriate for a given rule. Increasing the level of public participation can make it more difficult to achieve some of the objectives of the rulemaking process -- it takes additional staff time, increases costs, and may contribute to a delay in issuing a rule. Regulators must balance these costs of increased public participation with the benefits when it picks and chooses from the various methods to craft appropriate opportunities for public participation for each rule.

Public involvement during implementation of a rule. Members of the public are affected by the implementation of a rule either because they have to comply with it or because they are supposed to benefit from it. Agencies need to communicate with the public during implementation of the rule to assist compliance. At a minimum, agency policy statements,

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guidance documents and other papers explaining how a program works must be made easily accessible to the public, which is not always the case now. For example, in some program areas, EPA has numerous guidance documents that explain details of program implementation, but these documents are neither published nor collected in one place that is accessible to the public.

Agencies also need to seek public input after the rule has been promulgated to determine how effective it is or what unintended problems it has caused. NHTSA found it useful to collect information on the use of seat belts and on why consumers were not returning tire registration cards that would allow notification of a defect. This is not common practice now for agencies. In part because it was not viewed as a significant enough activity to warrant assigning scarce resources to it. The value of such information will continue to increase with the passage of the Government Performance and Results Act of 1993⁶ and increasing emphasis in the government on total quality management (TQM). In part, problems in getting OMB clearance for focus groups and customer surveys have been a barrier to seeking such information.⁷

Ombudsmen offices may also help implementation efforts. The IRS has established a high-level taxpayer ombudsman with a large and nationally dispersed Program Resolution Program Staff. The Food and Drug Administration recently created an office of Chief Mediator and Ombudsmen, which has been lauded by the FDA Commissioner as "invaluable...an integral part of the agency."⁸ The newly-appointed Comptroller of the Currency announced in June that he would appoint an ombudsman and establish a toll-free telephone number to provide banks and consumers a new channel for challenging regulatory decisions.⁹ Other agency ombudsmen have been created by the EPA (Hazardous Waste Ombudsman; Small Business/Asbestos Ombudsman) and Social Security Administration. The Administrative Conference has recommended the technique to other agencies, and provided useful guidelines about the role and authority of the office.¹⁰

Developments in information technology provide new tools to assist compliance efforts. DOT developed an automated telephone call-in system and a computer bulletin

board to help implement drug testing requirements for transportation workers. For a small fee, small trucking firms and others can call in, get a brief description of their obligations related to drug testing, and then order documents that them more information.¹¹ EPA's Office of Air Quality and Standards Planning has set up a project to cover segments of clean air programs. It gives the public access to EPA data bases, informs users of (and seeks comments on) upcoming policy statements and guidance documents, and generally is used as a means of providing information to regulated entities and state and local air pollution regulators.¹²

Advanced information technology may create even greater opportunities for interactive public participation. For example, a proposed project would create and link three separate data bases -- regulations governing nuclear power plants, codes and specifications of materials and equipment used in such plants, and design information about specific plants. Someone designing a facility, a regulator, or the public (except for confidential business information) could then check the design of the plant against the other two data bases, see what changes would be needed when a particular design component is changed, or determine how much a particular change would affect safety.¹³

Public involvement in setting the agency's agenda. Public involvement in the formation of regulatory policy extends beyond the confines of individual rules -- the public (both at large and in specific interest groups) affects the regulatory agenda through its influence on the legislative process. Congress and agencies often complain that long-range plans cannot be followed because the crisis of the day dictates congressional policy, which in turn establishes regulatory mandates. Some argue that individual crises are driving policy irrationally because the public does not understand or see the big picture. For example, in the past, public reaction to floods and other disasters has resulted in calls for better federal insurance, which has resulted in additional development in flood plains, which increases the size of the next disaster, as the flooding of the Mississippi and tributaries has shown vividly this summer.

[The bombing of Pan Am Flight 103 over Lockerbie, Scotland, provides another

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example of crisis-driven regulatory requirements. Because Pan Am took as long as three days to notify survivors of some of the crash victims (although most were notified within one day), a statute was passed requiring the Federal Aviation Administration (FAA) to issue regulations requiring airlines to collect information from passengers about whom should be notified in case of death so each notification would occur within 24 hours. According to [whose] current estimates, it will cost \$750,000 for each notification that otherwise would have taken more than 24 hours.^{14]}

Responsiveness to public outcry is not inherently problematic. However, "the irony is that political responsiveness to mood swings in the American public, coupled with paralysis in the institutions of government, makes it very difficult to address problems requiring a steady, sustained, and unphotogenic response."¹⁵ To move away from a situation where the crisis of the minute dictates long-term policy, the public needs to be better educated about the problems facing the country. Reports of a study done by the Public Agenda Foundation, founded by Cyrus Vance, demonstrated that when members of the public were given short, balanced presentations on solid waste and global warming issues, they were able to grasp the scientific issues, which, in turn, changed their views on how the issues should be handled to more closely parallel the experts' views.¹⁶

RECOMMENDATIONS

1. Increase public participation during the rulemaking process. (2)

The President should direct agencies to provide opportunities for early, frequent and interactive public participation in a way that is transparent and open to all interested parties. The President should direct the Regulatory Coordinating Group (see REG01.) to promote and exchange information to assist agencies in implementing this direction.

The RCG needs to ensure that regulators realize they have a variety of tools for getting public comments on a rule and they need to learn when it is appropriate to use which tool. The RCG should also provide guidance on how to manage the process carefully to prevent abuses or perceived abuses. Although increased public participation is an

important goal that should help improve the quality and acceptability of agency regulations, granting access behind closed doors to interest groups representing only one side of an issue creates major problems.¹⁷ Care must be taken to allow access by a wide variety of interests and to ensure that *all* affected groups are represented in formal or informal negotiations. The RCG should include guidance on when contacts with outside parties should be docketed.

Until the RCG issues its guidance, agencies are encouraged to use the following methods of interacting with the public in the rulemaking process: regulatory negotiation, policy discussion groups, focus groups, more useful public hearings and meetings, and early requests for input.

2. Enhance public awareness and evaluation of programs. (1)

During the implementation phase of a rule, there are two aspects of public interaction that are necessary. First, agencies periodically need to check the effectiveness and workability of their programs. In addition to measuring results (*e.g.*, reduced fatalities from car accidents), agencies should also check with the people who have to comply with the regulations. This can be done through the use of focus groups or customer surveys. OMB should facilitate gathering information in this way. (See ICS.5.)

Agencies also need to ensure that the entities that must comply with regulatory programs are given the information necessary to do so. Informal guidance and policy statements should be collected in one place and be accessible to the public. Electronic access also should be provided. Agencies also should consider establishing an ombudsmen office to assist compliance efforts.

3. Increase use of information technology and other education techniques. (4)

Information technology has a number of possible applications that should be explored by agencies through a task force operating under the auspices of the Regulatory Coordinating Group. At a minimum, agencies should explore computerization of rulemaking dockets. DOT found that, although there would be initial start-up costs to institute such a

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program, those costs would more than be made up for by cost savings in storage space. It would also permit the public to have more meaningful access to rulemaking documents and policy guidance documents.

Agencies also should consider establishing computer bulletin boards that could be accessed by interested parties. The RCG should also look at the possibility of supporting pilot programs that explore advanced information technology capabilities

Where lack of public understanding about programs or issues is driving policy irrationally, agencies need to develop and implement strategies for educating the public and the press.

FISCAL IMPACTS

LOW COST initially. Should allow rechannelling of efforts in the long run.

CROSS-REFERENCES

- (1) Improving Customer Service
- (2) IT (maybe)

ENDNOTES

- 1. [EPA TRAINING MATERIALS]
- 2. Federal Advisory Committee Act, [CITE]
- 3. [CITE]
- 4. CONFIRM WITH BOB ASHBY.
- 5. [CONFIRM]
- 6. [CITE]
- 7. The Paperwork Reduction Act, [cite], requires agencies to obtain clearance from OIRA for most information collection requests to 10 or more people. See Improving Customer Service Issue x.

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8. Telephone interview with Dr. David Kessler, Commissioner of the FDA, (July 12, 1993).
9. *Wall Street Journal*, June 11, 1993, p. A12.
10. ACUS Recommendation 90-2, *The Ombudsman in Federal Agencies*, 1 CFR § 305.90-2. See also Anderson and Stockton, *Ombudsmen in Federal Agencies: The Theory and Practice*, 1990 ACUS RECOMMENDATIONS AND REPORTS, at 105.
11. Unfortunately, this system may be terminated. It is not self-supporting, and DOT is prohibited from selling capability on the system to other federal agencies that want a similar system. [CONFIRM WITH BEA VANDERWOK]
12. [CHECK WITH IT TEAM ON RECOMMENDATION REGARDING E-MAIL ACROSS THE GOVERNMENT]
13. [CONFIRM DETAILS]
14. [CONFIRM DETAILS]
15. The National Academy of Public Administration, *Beyond Distrust: Building Bridges Between Congress and the Executive*, (January 1992), p. 76.
16. Carnegie Commission Report.
17. One of the major complaints against the Council on Competitiveness was that it selectively allowed back-door access for big business interests to influence the rulemaking process.

REG05 STREAMLINED PROCEDURES

BACKGROUND

In an effort to coordinate policies within an agency and within the Executive Branch, numerous layers of review and analyses have been added on top of the relatively simple notice-and-comment requirements of the Administrative Procedure Act (APA). Clearance is required by numerous offices within the agency (and again within the department if the agency is part of a department) and by the Office of Management and Budget (OMB). The entire process is repeated twice -- first at the proposal stage, then again when the rule is finalized. After a several-month long study by a contractor, one agency found that it took a 18-foot flow chart with 373 boxes to describe its rulemaking process.¹ Another agency has 52 clearance steps.

The simple APA notice-and-comment rulemaking process has become so formalized that its usual name -- informal rulemaking -- now seems a misnomer. Some agencies, however, have additional statutory requirements that make their rulemaking process even more cumbersome. For example, some agencies are required to conduct trial-type hearings that allow cross-examination of witnesses.²

NEED FOR CHANGE

Basically the same process and the same number of clearances are required regardless of the significance or complexity of a rule.³ A process with numerous checks makes sense for significant rules (*e.g.*, ones that announce a major policy, initiate a new regulatory program, have a significant effect on the economy, or are particularly controversial). However, a large number of the thousands of rules issued each year are not significant and do not warrant extensive review by numerous offices. Anecdotal evidence indicates that insignificant rules (which may be a clarification of an existing rule or a small change needed to undo an unintended consequence of an existing rule) often spend a long

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time on reviewers' desks because they are not high priority and the reviewers are busy. Even relatively minor changes to an existing program can easily take nine months or more.⁴

The failure to establish a process that differentiates between significant and insignificant rules is costly. The lengthy process prevents agencies from making quick, minor adjustments to existing programs, wastes time of numerous reviewers, and frustrates staff responsible for getting the rules out and keeping programs functioning. Evidence that the rulemaking process has become too cumbersome is provided by the frequency with which agency staff turn to other methods of establishing agency policy, such as by issuing policy statements, guidance documents, and memos to agency personnel that are often not required to go through public comment, extensive internal agency clearance or OMB review.⁵

One reason for the extensive internal review is the fear of litigation challenging the rule. Agencies sometimes spend considerable resources developing a rule only to have the rule nullified in court because the rule was based on an impermissible statutory interpretation. Agencies may spend a significant amount of time buttressing their support for issues no one has raised during the public comment period because someone might bring a court challenge and raise the issue then. If a successful challenge is brought long after the rule is promulgated, an entire program may be thrown into a state of disarray.⁶

Some agencies have statutory provisions that help reduce the amount of litigation preparation needed during the rulemaking process. For example, some statutes prohibit litigants from challenging a rule on any basis other than ones raised during the public comment period and require challenges to be brought within 60 days of the day the rule is promulgated.⁷

Some efforts at streamlining. The Clinton Administration's regulatory review process is designed to cut unnecessary steps from the review of insignificant rules by focusing OMB resources on significant rules.⁸

EPA also has made efforts to streamline its process by avoiding the "double" review process (*i.e.*, all clearances required both at proposal and final rule stage) for certain rules

that it believes the public will not comment on. (Although EPA issues many rules that are controversial and that benefit from public comment, there are a number of rules on which no one submits comments.) These rules include minor modifications of existing rules (such as directions about where to submit information or technical changes to testing standards that have been adopted by a professional association) and federal approval of changes to a state plan implementing federal law (especially where the federal agency has very little discretion or the change has already gone through notice-and-comment proceedings at the state level).

In its "direct final" rulemaking approach, EPA publishes a notice in the Federal Register⁹ saying that a rule will become effective in 60 days unless someone files [or notifies the agency of an intent to file] an adverse or negative comment in 30 days. If no such comments are filed, the rule becomes final without going through a second round of intra- and inter-agency review. If even one person files a negative or adverse comment, EPA withdraws the rule, republishes it as a proposed rule, and proceeds with normal notice-and-comment rulemaking and the second round of review.

This approach avoids the second round of clearances and review, which otherwise delays rules, wastes time and should be superfluous (especially if all reviewers are warned the first time that the rule might go final without further review). Theoretically the second review ought to be very quick, but getting clearance on any piece of paper from numerous government offices takes time. The paper shuffling also wastes the reviewers' time by requiring them to look at something twice when once would have sufficed.

In a pilot project testing this procedure for EPA approval of state implementation plans under the Clean Air Act, -- rules were processed in an average of --- days, which was considerably better than the --- days it took to process comparable rules prior to the use of the direct final process.¹⁰ EPA has adopted the process for use nationwide and has used it approximately --- times. In 1989, as a result of an "informal reg neg" process with industry and environmental groups, EPA adopted the direct final rulemaking process for chemical significant new use rules promulgated under the Toxic Substances Control Act.¹¹ EPA has

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also used direct final rules occasionally for other types of rules. The agency has rarely had to withdraw a rule because public comments were filed. No one has ever challenged these rules for failure to comply with the APA.

Some agencies have streamlined the process by issuing broad, generic rules to resolve common issues or to establish standards applicable to multiple industries instead of conducting separate rulemakings for each issue or industry. For example, the Social Security Administration and the Nuclear Regulatory Commission each have successfully issued rules concerning common problems arising in disability claims and applications for power plants, respectively. On the other hand, OSHA has been stymied by a court reversal of its attempt to use a generic, instead of a hazard-by-hazard, approach for permissible exposure levels for air contaminants.

RECOMMENDATIONS

1. Streamline internal agency rulemaking procedures. (2)

The President should direct agencies to review and streamline their internal rulemaking processes. The Regulatory Coordinating Group (RCG) (see REG01), in consultation with the Administrative Conference of the United States (ACUS), should assist the process by providing a forum for agencies to exchange information and coordinate hiring of contractors (if such is needed) to avoid duplicative studies of rulemaking procedures. A variety of principles can be adopted to streamline the process and reduce the cost of issuing rules, including:

- Agencies should differentiate between significant and insignificant rules and use a shorter process for insignificant rules. Because OIRA is adopting a policy of reviewing only significant rules, agencies should also strive to tier or group rules and then adjust the process so that the number of steps in the clearance process varies with the significance or importance of the rule.
- Executive Departments (such as the Department of Health and Human Services) should review their internal delegations to determine whether agencies headed by

Presidential appointees (such as FDA or HCFA) can issue some or all rules without departmental review.

- Agencies should determine whether there are continuing, unnecessary road blocks in the process and then determine how to remove them.
- Agencies should also concentrate on getting early input from top policy makers on the regulatory approach so that agency resources are not wasted.

2. Use "direct final" rulemaking to reduce needless "double" review of noncontroversial rules. (2)

The President should require each regulatory agency to use "direct final" rulemaking or a similar approach at least five times in the next year (or explain why it cannot do so) for rules that the agency believes are so noncontroversial that no one will file adverse or negative comments on the proposal. Under the "direct final" process, the agency would publish a "direct final rule" in the *Federal Register*. The rule would become effective in 60 (or some other number) days if, within 30 (or some other number) days, the agency did not receive notice from any person of the intention to file adverse or negative comments. If the agency were notified that adverse comments would be filed, the agency would be required to withdraw the direct final rule, republish it labeled as a proposed rule, and go through the usual notice and comment procedures.¹²

3. Develop rules for expedited treatment of rulemaking petitions. (1)

Agencies should publish regulations inviting petitions for rulemaking and specifying the requirements for such petitions.¹³ Such regulations should specify that detailed petitions, complete with a text of a proposed rule and underlying analyses, will undergo expedited review by the agency and may be published as a notice of proposed rulemaking. After a public comment period, the agency could then either withdraw the proposal or modify it as necessary and adopt it as a final rule.¹⁴

4. Evaluate and draft proposed legislative changes to speed the rulemaking process. (4)

The Regulatory Coordinating Group, ACUS and individual agencies should identify existing statutes that unnecessarily require cross-examination and other adjudicative fact-finding procedures and should develop legislation implementing the necessary changes.

The RCG, ACUS, and individual agencies should identify which substantive statutes should be amended to limit the amount of time parties have to challenge a rule or to limit the issues on judicial review to those that were raised during the public comment period, and should develop legislation implementing the necessary changes.

The RCG and ACUS also should determine whether amendments are needed to ensure that regulatory statutes provide sufficient flexibility for agencies to issue "generic rules" that would settle in one proceeding issues that would otherwise recur in numerous separate rulemakings or enforcement proceedings. More specifically, changes should be recommended to permit OSHA to take such an approach.¹⁵

The RCG and ACUS should recommend whether the Federal Advisory Committee Act¹⁶ (FACA) should be amended to exempt advisory committees that meet only once from the requirements of FACA.

The RCG and ACUS should determine whether it would be feasible, useful and constitutional for agencies to be able to seek judicial resolution (similar to a declaratory judgment) by a court of difficult statutory interpretations that are important to resolve *before* an agency finalizes a rule and expends significant resources. If such authority would be useful, feasible and constitutional, the RCG and ACUS should develop legislation establishing this procedure. The procedure should ensure that affected interests are represented and the issues are not presented prematurely (*i.e.*, before the agency has definitively determined that there is an actual problem of statutory interpretation).

FISCAL IMPACTS

LOW COST initially. LOW SAVINGS after first year. We can check with EPA and FDA

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to see whether they have any numbers for this.

CROSS-REFERENCES

None.

ENDNOTES

1. That agency has since modified its process. If other agencies undertook similar exercises, there would be numerous 18-foot charts.
2. [GIVE AN EXAMPLE]
3. For example, the American Waterways Operators reports that an OIRA staffer noted that "the Coast Guard's rigorous internal review process applies equally to rules of sweeping consequence and minor technical guidelines." The American Waterways Operators, "The Federal Regulatory Process: Opportunities for and Obstacles to Government/Industry Cooperation," (May 1992), p. 17.
4. CITE TO INTERVIEW WITH WILSON
5. To a certain extent, the use of such other methods allows agencies to differentiate between significant and insignificant "rules" and is a useful development. However, there are drawbacks to these methods -- although technically these policies cannot bind people outside the agency, as a practical matter, they may have that effect. Unlike rules (which are published in the *Federal Register* and codified in the *Code of Federal Regulations*), less formal statements of agency policy are not necessarily compiled in one place and may not be accessible to the public. There is a general sense that agencies are turning to policy statements and guidance too frequently. CITE to article done for ACUS.
6. Corrosion Pipe Fittings case [CITE].
7. CITE to CLEAN AIR ACT.
8. OIRA and each agency will sort rules into two groups -- significant and insignificant. OIRA review will only be required for significant rules.
9. See, e.g. [CITE].
10. CITE TO FEDERAL REGISTER
11. Cite to CFR section.

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12. Agencies can use direct final rules without new legislation, although the process does pose some litigation risk. Arguably, direct final rules meet the requirements of the APA. However, an argument could be made to the contrary. Agencies should determine when it is appropriate to take that risk after consulting with their general counsels to determine the significance of the risk. Two factors that may make it easier for EPA to use the process are special provisions in the Clean Air Act that require anyone challenging a rule to bring the judicial challenge within 60 days after the rule is final and that limit judicial challenges to issues that have been raised during the administrative process. CITE

Agencies that do not want to take the litigation risk associated with direct final rules should consider structuring review procedures to accomplish nearly the same thing. Instead of a direct final rule automatically going into effect unless the agency withdraws it, the agency could publish a notice of no adverse comment in the *Federal Register* that makes the rule final. Internal and OMB review procedures should not require review of such a notice, provided that everyone was warned that this process might be used.

13. CITE TO ACUS RECOMMENDATION.

14. In setting up such procedures, care must be taken not to turn the governmental functions of setting the agency's agenda and analyzing rules over to private parties. The agency's decision to withdraw a proposal should not be subject to additional judicial review merely because the agency has invited rulemaking petitions.

15. CITE to ACUS Recommendation.

16. CITE

BACKGROUND

Developing and enforcing regulatory policy engenders a myriad of disputes. Enforcing regulations and encouraging compliance with regulatory requirements in the least costly, least adversarial and most effective way are crucial to ensuring that the policies underlying regulations are implemented.

Enforcement of regulations often requires substantial litigation. Disputes before agency administrative law judges or in federal court¹ are often lengthy, expensive, and highly contentious. Ultimate outcomes are frequently unsatisfactory, and may undercut future efforts to ensure effective compliance by creating an atmosphere of antagonism and distrust. In the long run, encouraging compliance is likely to be more effective than litigating over enforcement.

Current enforcement dispute resolution systems tend to emphasize litigation. There are some good bases for this policy. Regulated communities must understand that they must comply with regulations or face sanctions. At early stages of regulatory programs, it is important to develop precedents; successful litigation by the government may serve as a deterrent to future wrongdoing. Ensuring regulatory compliance is, after all, a federal law enforcement role.

However, the fact is that a high percentage of enforcement disputes are ultimately resolved not through litigation but through settlement negotiations.² There are a variety of reasons for this, including inadequate resources to pursue all cases through the full litigation process, and evidentiary problems in particular cases. Moreover, in some situations, the remedies available through the adjudicatory process (be it at the administrative level or in court) may not provide the optimal practical solutions. Negotiated settlements often occur, however, only after substantial adversarial maneuvering, or at the proverbial "courthouse

steps."

NEED FOR CHANGE

Alternative dispute resolution (ADR) can be useful in resolving a significant number of enforcement disputes earlier, with fewer resources, and with better results than might otherwise occur. ADR can be an alternative to litigation, and it can also serve as an improved way to handle negotiated resolutions. Because ADR processes are designed to develop consensual solutions to disputes, they should reduce contentiousness and may result in relationships between the regulators and the regulated that are more cooperative and more conducive to future voluntary compliance.

Alternative dispute resolution encompasses a collection of techniques designed to help disputing parties resolve their disputes in mutually acceptable ways.³ Although the scope of what constitutes ADR varies depending on who is using the term, it is generally considered to include dispute resolution systems where a neutral third party or "neutral" serves to help parties resolve the dispute.

ADR has become increasingly popular as a way to help resolve the wide variety of disputes in which individuals, businesses, governments, and others get involved. Although some variations of ADR have been around for centuries, in recent time, court backlogs have served as an impetus for wider consideration of ADR techniques. Courts (both federal and state) are increasingly providing ADR programs to litigants.⁴ Labor and management have for decades used ADR processes to resolve disputes. Private industry has begun to look to ADR as a way to prevent disputes from escalating and absorbing large amounts of resources.⁵ Community-based programs and family mediation programs have used ADR processes to address interpersonal disputes. An increasing number of states have incorporated the use of ADR into courts and agencies. As President Clinton said (while Governor of Arkansas), "[One] thing we need, in every state, is an alternative dispute resolution mechanism that would encourage people to look for a way, short of litigation, to

resolve their disputes."⁶

ADR comes in a variety of forms. Some, like mediation, are fairly well-known. Others, such as minitrials, are less familiar. Among the more common types of ADR are: mediation,⁷ early neutral evaluation,⁸ factfinding,⁹ settlement judges,¹⁰ minitrials,¹¹ and arbitration.¹² ADR is of course not appropriate for every dispute. The bottom line on when ADR is potentially appropriate is whether the dispute is one in which the parties might be willing to accept a negotiated settlement.¹³

Because ADR processes are inherently flexible, and can be designed to meet the needs of the disputing parties, they should be considered in the largest scope of cases possible.

The Administrative Dispute Resolution Act. The Administrative Dispute Resolution Act of 1990¹⁴ (ADR Act) governs agency use of ADR in non-rulemaking disputes. It reflects Congress' interest in and recognition of the potential benefits of ADR, and it authorizes and encourages the innovative use of ADR by providing a flexible framework that agencies can adapt to their own needs.

The Act requires relatively little, but authorizes much. It does require each federal agency to develop a policy for using ADR. It directs agencies to review the types of disputes they have, how they are currently resolved, and whether ADR processes might be useful in improving the dispute resolution process. The Act also requires that each agency appoint a senior official as a "dispute resolution specialist," who will serve as the coordinator and point person for agency ADR activities. These requirements are aimed at ensuring that agencies make educated and thoughtful decisions about the use of ADR.

The Act amends the APA to provide express authority to use ADR where the disputants agree to use it. It provides authority not previously existing for federal agencies to enter into binding arbitration, with some limitations. It provides statutory protection for confidentiality of ADR processes, and contains provisions relating to the acquisition of dispute resolution "neutrals."

While the passage of the ADR Act was intended to encourage agency use of these processes, agency compliance with the Act has been inconsistent. Despite clear success stories, some agencies have not yet filled vacancies in the Dispute Resolution Specialist positions mandated by the Act or have appointed an insufficiently highly ranked official to the post.¹⁵

Federal agency use of ADR. Over the last decade, however, some federal agencies have begun to give serious attention to the use of ADR. ADR has been used by several agencies in enforcement cases and other regulatory proceedings. Agencies have also used ADR in resolving contract disputes, personnel and EEO disputes, among others. Agencies as various as the Environmental Protection Agency, the Departments of Labor and Health and Human Services, the Federal Deposit Insurance Corporation and the Resolution Trust Corporation, have used ADR. Others, like the U.S. Air Force, and the Internal Revenue Service, are in the planning stages for significant programs.¹⁶

Results of the use to date have been impressive. The Department of Labor last year ran a pilot program in one of its regional offices using mediation to resolve enforcement cases involving the workplace, including cases involving OSHA and wage and hour regulations. The Department's evaluation of the program documented that both agency and industry parties were quite satisfied with the use of ADR, and that in many cases, the mediated resolution was quicker and better than either face-to-face negotiation or litigation.¹⁷ The Department has recently decided to expand the program to all of its regions.¹⁸ The Farmers Home Administration found that it saved millions of dollars using mediation to avoid foreclosures in farmer-lender disputes.¹⁹ The FDIC saved over \$400,000 in litigation costs from a small pilot mediation program involving creditor claims arising from failed banks.²⁰ EPA has had significant successes using mediation to resolve Superfund hazardous waste cleanup proceedings.²¹

To maintain momentum, a new Executive Order on ADR is needed. The only existing Executive Order on ADR, E.O. 12778,²² is not specific enough to provide useful

guidance to the agencies.²³ The Order should not only be keyed to the ADR Act's provisions, it should also address other approaches to encouraging agency use of ADR, including increased budgetary incentives, personnel appraisal incentives, and streamlined procurement of outside neutrals.

Budgetary incentives. Although the goals of ADR include the conservation of resources in the long run, it is important that OMB provide agencies with budgetary incentives to using ADR. This has at least two aspects: ensuring that the resources necessary to develop ADR systems are available, and ensuring that budget incentives over the long-term do not undercut ADR use, but rather reward the consensual resolution of disputes and discourage the creation of large adjudicatory backlogs.

First, some resources are necessary to develop and implement a program for using ADR in agencies. While over the long run ADR should provide some savings to both the government and the private sector, seed money and personnel resources are often needed to get agency systems up and running. Thus, at least in the early implementation stages, some specific budget for ADR implementation may be necessary.

Second, the triggers for increased agency budgets often provide skewed incentives. For example, budgets may be set based on how many cases an agency opens, rather than also considering how many are resolved. Also, providing additional resources to an agency with a large adjudicatory backlog might remove the incentive to reduce that backlog. Moreover, the savings that may result from using ADR may not be felt by the same component of the agency to which any costs might accrue.

Personnel incentives. The ADR Act requires that the dispute resolution specialist and other agency personnel be provided training in ADR.²⁴ It is crucial that key agency officials be trained and educated in the use of ADR. (See REG10). Although ADR concepts are not extremely complicated, those who would be involved in using ADR, as well as those involved in decisions on whether and when to use it, need to understand how to participate effectively in these processes, understand their benefits, and know when it is appropriate to

use them.

Encouraging agency personnel to use ADR and resolve disputes consensually may also require performance evaluation criteria that provide the appropriate incentives. For example, some agencies give credit in individual performance appraisals for the number of cases opened, but not for the number of cases resolved or the efficiency and effectiveness of resolution. This should be altered so that both types of numbers are important.

Hiring of neutrals. Current contracting processes for obtaining a neutral can be extremely cumbersome. Neutrals are potentially available from a variety of sources. ACUS, for example, has a roster of neutrals from which agencies can select.²⁵ However, getting a candidate from the roster does not obviate the need for a system to hire and arrange to pay (if necessary) for the neutral's services. Depending on the amount of money involved, a more or less complicated competitive bidding system may be required. This process is frequently incompatible with the short time frames that may be available to use ADR effectively.

It is important that agency personnel interested in using ADR have access to neutrals in a timely fashion. Depending on whether the neutral is someone from the same agency, a different agency, or outside the government, mechanisms (including for sharing of neutrals among agencies) should be established to ensure ready availability. Agencies also have been and should be encouraged to continue training their personnel in mediation and related ADR techniques, so that they can make use of neutrals from their own and other agencies to help resolve disputes more quickly and less expensively.

RECOMMENDATION

1. Increase use of alternative means of dispute resolution (ADR). (2)

The President should strongly encourage ADR use by executive branch agencies by issuing an Executive Order. Governor Clinton recognized the need for every state to use

Alternative Dispute Resolution

ADR processes to avoid needless litigation; President Clinton should take the opportunity to apply that dictum to every federal agency.²⁶

A new Executive Order is necessary to substitute for the rather weak mention of agency use of ADR in Executive Order 12778, which was largely addressed to court litigation. It is also necessary to address lingering questions over budget, personnel and procurement administration that continues to cloud ADR use by agencies. A new Order will go far to letting agency personnel know that they should take the dictates of the ADR Act of 1990 seriously. Presidential leadership on this issue (including occasional White House meetings for agency dispute resolution specialists) is a low-cost but highly effective way to engender long term and widespread acceptance of the view that resolving disputes through ADR is not only acceptable, it is preferable.

FISCAL IMPACT

NO COST; LONG-TERM SAVINGS. Development of an Executive Order entails little cost, as does the occasional meeting with agency Dispute Resolution Specialists. ADR procedures, by definition, have a great potential to save litigation and implementation costs, over the long run.

ENDNOTES

1. Agencies have varying enforcement authorities. Many enforcement statutes permit agencies to bring enforcement proceedings before agency "administrative law judges" (with judicial review on the administrative record in the federal courts). Other agencies must seek enforcement (with the aid of the Department of Justice) in federal district court. In either case, litigation costs and delays can be a concern.
2. Get figure.
3. See Administrative Conference of the United States (hereinafter "ACUS"), Recommendation 86-3, "Agency Use of Alternative Means of Dispute Resolution," 1 CFR Sec. 305.86-3 (1993); Philip J. Harter, *Points on a Continuum: Dispute Resolution Procedures and the Administrative Process*, Administrative Law Journal (Vol. 1, No. 1,

1986) p. 141.

4. For example, the United States District Court for the District of Columbia has an ADR program at both the trial and appellate levels. State and local courts in many states, including California, Massachusetts, and Florida among many others, have set up ADR programs. (cites)

5. Companies in the insurance, automotive, and electronics industries are among those using ADR processes to resolve disputes. See Center for Public Resources, *Mainstreaming: Corporate Strategies For Systematic ADR Use* (Practical Guide Series, Looseleaf) New York (undated), Section E.

6. *Reader's Digest*, October 1992, at p. 61.

7. Mediation involves using a trained neutral third party to help disputants negotiate a mutually agreeable settlement. A mediator, by talking with each side, together and separately, can often help parties come to agreement, by helping them develop options and explore acceptable settlements. The mediator does not have the power to decide a dispute; rather, the parties develop any resolution themselves. Mediation is often a component of other ADR processes.

8. Early neutral evaluation involves using a neutral factfinder, often one with substantive expertise, to evaluate the relative merits of the parties' cases. After hearing an informal presentation of the highlights of parties' cases or positions, the neutral provides a nonbinding evaluation, which can give parties a more objective perspective on the strengths and weaknesses of their cases, thereby making further negotiations more likely to be productive.

9. "Factfinding" involves the use of neutrals to determine disputed facts. This can be particularly useful where disagreements about the need for or meaning of data are impeding resolution of a dispute, or where the disputed facts are highly technical and would be better resolved by experts. Factfinding usually involves an informal presentation by each side of its case, whereupon the neutral provides an advisory opinion on the disputed facts, which can be used by the parties as a basis for further negotiation.

10. A settlement judge serves essentially as a mediator or neutral evaluator in cases pending before a tribunal. The settlement judge is usually a second judge from the same body as the presiding judge. In some cases, a settlement judge may give an informal advisory opinion. See ACUS Recommendation 88-5, "Agency Use of Settlement Judges, 1 CFR 305.88-5; Daniel Joseph and Michelle Gilbert, *Breaking the Settlement Ice: The Use of Settlement Judges in Administrative Proceedings* (Administrative Law Journal, Volume 3,

No. ___, 1989), p. 571.

11. A minitrial is not really a trial, but a structured settlement process in which the disputants agree on a procedure for presenting their cases in a highly abbreviated form (usually no more than a few hours or a few days) to senior officials for each side who possess settlement authority. This process allows those officials to see first hand how their case, and that of the other parties, play out; this can serve as a basis for more fruitful negotiations. Often a neutral presides over the hearing, and may subsequently mediate the dispute or help parties evaluate their cases.

12. Arbitration is a relatively formal process, in which parties jointly select the decisionmaker(s), to whom they turn over the decisionmaking. The arbitrator(s), after hearing each side's case using procedures agreed on in advance by the parties, issues a decision. The standards for decision may also have been agreed on in advance by the parties. The arbitrator's decision may be nonbinding (in which case the process resembles neutral evaluation), or if the parties agree, it may be binding. See ACUS Recommendation 87-5, "Arbitration in Federal Programs," 1 CFR Sec. 305.87-5 (1993); ACUS, *Agency Arbitration*, (Studies in Administrative Law and Procedure 88-1) (1988), (discussing constitutional and statutory issues). Current law contains limitations on the use of binding arbitration by federal agencies. See section 4 of ADR Act, codified at 5 U.S.C. Sec. 585-91 (1992 Supp.).

13. For example, where a disputant is looking for a precedent, the case would need to go through the litigation process. If there is a fundamental principle at stake that a party is absolutely unwilling to negotiate, ADR is likely to be unsuccessful. However, since most cases do settle eventually, it is important for parties to assess carefully whether an issue really is nonnegotiable. If the costs of ADR would exceed the costs of resolution through other means, then other means should generally be used. Where a public record of the proceeding is needed, ADR may be inappropriate (although this concern may be accommodated through the parties' agreement). If a program requires complete uniformity of outcome, then individualized resolutions by the parties might not satisfy that need.

14. Public Law 100-552.

15. Conversations with ACUS staff. See also, letter from Leonard L. Riskin, Professor of Law, University of Missouri-Columbia, to Senator Christopher Bond (July 5, 1993), commenting that "notwithstanding the passage of the [ADR Act] in 1990, some agencies have show[n] great reluctance to employ alternative methods of dispute resolution," p.2.

16. See U.S. Air Force, Secretarial Memorandum re Implementation of the Administrative Dispute Resolution Act of 1990 (January 12, 1993); letter from David A.

Mader, Assistant Commissioner, IRS to Brian C. Griffin, Chairman of ACUS, July 15, 1993.

17. U.S. Department of Labor, "Report to the Secretary of Labor on the Philadelphia ADR Pilot Project (Oct. 14, 1992) at p. 52.

18. Conversation with Department of Labor officials.

19. Leonard L. Riskin, *The Farmer-Lender Mediation Program: Implementation by the Farmers Home Administration*, Report to ACUS, November 1991 at p. 18. (FmHA reports net savings to states in fiscal year 1989 as between \$18 and \$37 million and net savings to the federal government as between \$6.6 and \$14.8 million.)

20. FDIC staff paper, "Summary of FDIC ADR Creditor Claims Pilot Project," (April 1993) ("\$410,475 in legal fees and expenses avoided.")

21. EPA, "Superfund Enforcement Mediation, Regional Pilot Project Results" (October 1991); EPA, "Superfund Enforcement Mediation Case Studies" (April 1992).

22. Executive Order No. 12,778 *Civil Justice Reform* (October 23, 1991), 50 Federal Register 55195 (October 25, 1991).

23. Although the Order does support ADR training and notes that ADR use can be appropriate in litigation involving the United States and its agencies, it is lacking in guidance or specifics on how ADR techniques can and should be employed. Moreover, E.O. 12778's provisions relating to ADR primarily address ADR use in court litigation. The Order's mention of administrative proceedings (section 3) is limited to a citation to an Administrative Conference Recommendation on case management. [ACUS Recommendation 86-7, "Case Management as a Tool for Improving Agency Adjudication," 1 CFR Sec. 305.86-7 (1993). Recommendation 86-7 does include a short section encouraging ADR use]. This is especially weak given the opportunities presented by the Administrative Dispute Resolution Act, which is designed to facilitate ADR use at the agency level. Because section 2 of the Order prescribes requirements for regulations, at least that portion of the Order is likely to be revoked by President Clinton's new Executive Order on regulatory review.

24. ADR Act, section 3(c).

25. ADR Act, section 4, codified at 5 U.S.C. § 583(c) (1992 Supp.).

26. See note 6, *supra* and accompanying text.

BACKGROUND

Agency planning tends to be short-range rather than long-range. There is almost always a new crisis demanding immediate attention. The budget cycle is annual. Top agency policy-makers often are at the agency for only two years. All of this gives agencies incentives to develop short-term rather than long-term plans.

Nonetheless, long-term strategic planning is needed. Agencies have limited resources and limited demands they can make on the public. Agencies share responsibility with Congress for ensuring that we get the most for the money we spend on drug safety, the environment, and other matters. This requires agencies not only to set strategic goals, but also to determine whether those goals are being met.

This, in part, is the impetus behind the Government Performance and Results Act of 1993.¹ The Act's implementation should do much to advance strategic, performance-based planning by the agencies. But regulatory agencies should take additional steps to plan their future regulatory agendas (especially those relating to regulation of environmental, health and safety risks). The potential targets of regulations are so many, the implications so large, and regulatory resources so comparatively limited, that prioritization and long-range planning is imperative.

Regulatory agencies have begun to take some steps in this direction. Since 1985,² executive agencies have been required to submit their planned significant regulatory actions to OMB, which has published compilations annually as the *Regulatory Program of the United States*. Unfortunately, however, this process was not used as a significant planning document within the agencies or within the Administration as a whole.³ Moreover, the *Program* was not published in a timely fashion; for example, the *Program* for 1992 was not disseminated until February of 1993.⁴ The Clinton Administration, in its upcoming Executive Order on regulatory review, has an opportunity to make the annual regulatory planning process more meaningful and timely.

Compare and Rank Risks

EPA has begun a process that, although still in its early stages, can provide a model for the other 20 to so agencies that regulate environmental health or safety risks (including FDA, OSHA, CPSC and NRC).⁵ Its 1987 report, *Unfinished Business*,⁶ was based on an effort by 75 senior career managers to compare and rank the relative risks posed by 31 environmental problems regulated by the agency. These rankings, while based on professional judgments, were limited by incomplete data and the infancy of risk comparison methodologies. But the effort was a landmark in that it crossed programmatic lines and also explicitly pointed out the disparity between the rankings and the resource allocation at EPA.⁷ Interestingly, the EPA experts' rankings also differed markedly from prevailing public opinion about risk.⁸

In 1990, EPA turned to its Science Advisory Board to evaluate *Unfinished Business* and the agency's response to it. The Board's special 39-member Relative Risk Reduction Strategies Committee produced a report, *Reducing Risk*, that contained a series of recommendations to the Administrator on how to undertake risk prioritization so that EPA could "target its environmental protection efforts on the basis of opportunities for the greatest risk reduction."⁹

The Carnegie Commission has applauded *Unfinished Business* and *Reducing Risk* as a "ground-breaking enterprise,"¹⁰ and has specifically recommended that "other risk reduction agencies should attempt to incorporate into their own decision making and institutional culture the global perspective on risk that these reports and their implementation embody."¹¹

As a by-product of its recent focus on risk prioritization, EPA has devoted increasing attention to the identification of future risk. In 1988, the EPA Science Advisory Board produced a report, *Future Risk: Research Strategies for the 1990s*,¹² that catalogued risk reduction strategies for the future. Its first recommendation was that EPA should shift its regulatory strategy "from end-of-pipe controls to preventing the generation of pollution."¹³ Administrator Browner recently announced her intention to make "pollution prevention the guiding principle for all our programs at the [EPA]."¹⁴

Compare and Rank Risks

EPA has also employed its Office of Policy Planning and Evaluation (OPPE) to plan for the future. OPPE's Office of Strategic Planning and Environmental Data has a Futures Staff for this purpose.¹⁵ The Office also has recently joined with the Science Advisory Board to sponsor a new Environmental Futures Committee at the behest of Administrator Browner.¹⁶

Another agency now engaged in risk prioritization is the Research and Special Programs Administration in the Department of Transportation which regulates the safety of gas, offshore, and hazardous liquid pipelines. About 20 to 25 pipeline-related risks will be ranked as high, medium, or low as part of this initiative.¹⁷

NEED FOR CHANGE

As the Carnegie Commission report declared, "The fundamental problem in regulatory decision making at the agency level, as at the presidential and interagency levels, is how to set priorities. It is a great challenge for science-based regulatory agencies to compare and rank individual risks and families of risks within the universe they regulate."¹⁸

The scope of risk regulatory agencies' regulatory mandates far exceeds their rulemaking resources. For example, OSHA, which must issue health and safety standards for thousands of chemicals, carcinogens and other dangers in most of our nation's workplaces, only has sufficient resources to pursue 15 to 20 rulemaking efforts at any given time.¹⁹ Hence the dire need for prioritization. Prioritization by agencies will also help inform Congress about agency resource needs and may help Congress reorder its own thinking while also informing regulated parties about the agency's likely future agenda.

Risk prioritization can help agencies distinguish between regulatory targets that demand immediate attention from those that allow for mid- or long-range corrections. But in this fast-changing technological world, regulatory agencies must also begin to anticipate future problems before it is too late or before an expensive regulatory scheme must be imposed.

For example, the EPA's innovative green lights program, which has hastened the

Compare and Rank Risks

development and use of energy-efficient cool fluorescent light bulbs -- an extremely successful program in most respects -- failed to anticipate the waste-disposal problems caused by the mercury in such bulbs. Had this problem been anticipated (as it apparently was in the Netherlands, which also produces large quantities of such bulbs), reduced amounts of mercury could have been used. Now the U.S. is confronted with the Hobson's Choice of facing large clean-up costs or losing its market to the Dutch.²⁰ From this experience, EPA is finding solutions now to the analogous problem posed by the lithium in batteries used to power electric motor vehicles.²¹

OSHA, for another example, might have better anticipated the workplace stresses and injuries cause by the computerized office (non-ergonomic chairs, VDT exposure, carpal tunnel syndrome, etc.).

It is a truism to say that tomorrow's regulatory problems will likely differ markedly from today's. Changes in risk prioritizing must be anticipated from numerous sources. New knowledge about the hazards of existing technologies (e.g., CFCs) and exposures (e.g., radon) is always being developed. Solutions to one problem may cause another (e.g., increased indoor pollution in offices with energy efficient windows). Changes in behavior (e.g., increased use of lawn care pesticides), introduction of new technologies (e.g., biotechnology), side effects of government intervention (e.g., floodplain management), or changes in societal concerns (e.g., greater concern about costs or fairness of solutions) all bear on future risk regulation. These sorts of changes must be anticipated to the greatest feasible extent.²²

The bottom line is that regulatory agencies cannot simply be reactive. They must develop ways of, and devote resources to, anticipating the need for new research or regulatory initiatives -- and possibly for new or adjusted statutory mandates to forestall or remedy those problems.

RECOMMENDATIONS

1. Compare and rank the seriousness of environmental, health or safety risks. (1)

Compare and Rank Risks

Agencies involved in the regulation of environmental, health or safety risks should attempt to compare and rank the seriousness of those risks to permit better prioritization in their regulatory agendas. How that prioritization can best be accomplished should be left to individual agencies. EPA's initial use of its program managers with a review by outside experts assembled by its Science Advisory Board has worked well. An alternate approach was espoused by a recent study by the Administrative Conference of the U.S. The study, done at OSHA's request, urged that agency to establish a formal prioritization committee staffed by politically-sensitive technical experts who would serve staggered terms and be eligible for reappointment.²³ Agencies should coordinate their development of risk prioritization processes and standards through the Regulatory Coordinating Group, ideally sine specce once risk lists are better developed and tested, they should be compared and possibly even coordinated across agency lines.

No one can pretend, however, that this will be an easy task. Analytical methodologies and basic data must be improved, public perceptions of risk (which often differ markedly from that of scientists),²⁴ must be factored into the equation. The value judgments inherent in comparing health risks among different populations (or between human health concerns and degradation of ecosystems) are also impossible to quantify. Thus, precision in rankings may be unattainable. But ranking of risks into high, medium and low categories is realistic. The payoffs from such prioritization should far exceed the cost of the undertaking. It would inform the legislative process (since agency priorities are largely statute-driven), the budget process, the interagency coordination process, and ultimately, the public's understanding of risk.

2. Develop long-range future plans and anticipatory approaches to regulatory problems. (1)

Regulatory agencies should develop long-range future plans and anticipatory approaches to regulatory problems within their jurisdiction. Because of the differences in organizational structures among agencies, it is not possible to dictate just how such

Compare and Rank Risks

anticipatory planning can best be built into agency decisionmaking. Agencies with heavy reliance on policy planning offices should ensure that a "futures staff" is created within it. Other agencies should create, perhaps on a pilot basis, offices of anticipatory planning. Agency officials who serve in such offices could also meet under the aegis of the Regulatory Coordinating Group to discuss approaches to the problem.

FISCAL IMPACT

LOW to MEDIUM COST for both REG04.1 and REG04.2. EPA figures needed for a high baseline. Efforts by other agencies would not need to be so extensive or expensive.

ENDNOTES

1. Pub L. ___, S. 20, H.R. 286 (103rd Cong. 1st Ses.), ___. The Act authorizes ten three-year pilot projects to test program performance measures and requires Congress to vote in 1997 on mandatory government-wide implementation of five-year strategic planning, annual program goal-setting, and annual program performance reporting.
2. Executive Order No. 12,498, 50 Fed. Reg. 1036 (1985).
3. Discussions with agency regulatory officials convened at Department of Transportation ____.
4. *Regulatory Program of the United States Government (April 1, 1992-March 31, 1993)*, officially transmitted to Congress on January 15, 1993, but not available to agencies or to the public until February.
5. Other risk regulatory agencies would surely include the Animal Plant Health Inspection Service, the Food Safety and Inspection Service, and the Forest Service (USDA); National Oceanic and Atmospheric Administration (Commerce); Army Corps of Engineers (DOD), Office of Surface Mining and the Fish and Wildlife Service (Interior); Mine Safety and Health Administration (Labor); Coast Guard, the Federal Aviation Administration, the National Highway Traffic Safety Administration, and the Research and Special Programs Administration (DOT).
6. U.S. Environmental Protection Agency, *Unfinished Business: A Comparative Assessment of Environmental Problems*, (Washington, DC: EPA, 1987).

Compare and Rank Risks

7. Of course, to a large extent, at EPA budgetary priorities are set by legislation. See U.S. Environmental Protection Agency, *Reducing Risks* (Appendix B.4), SAB-EC-90-021B (Washington, DC: EPA 1990).
8. For example, while the public ranked nuclear accident radiation and industrial pollution of waterways as among the highest risks, EPA experts ranked them among the lowest. Conversely, the public seemed quite sanguine about radon and indoor air pollution, which were ranked as high risks by the EPA experts. See Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* (Harvard University Press 1993), Chart 7, "Rating Risks -- How the Public and EPA Rate Health Risks Associated with Environmental Problems." Derived from Russell, "What, Me Worry?" *American Health* 47 (June 1990). This problem may be affected by the media's perception of risk as well. See "Stories on Cancer's Causes Are Said to Be Misfocused-- Media Overplay Minor Environmental Threats to Health, Experts Contend," *Washington Post* (July 27, 1993), p. A6.
9. U.S. Environmental Protection Agency, *Reducing Risks: Setting Priorities and Strategies for Environmental Protection*, SAB-EC-90-021 (Washington, DC: EPA, 1990) at p. 6.
10. Carnegie Commission on Science, Technology and Government, *Risk and the Environment -- Improving Regulatory Decision Making* (Washington, DC: 1993) at p. 81.
11. *Id.* See also the favorable review in *American Industrial Health Council Quarterly*, "Developing a Mindset for Risk Prioritization," (Fall, 1990), p.3.
12. U.S. Environmental Protection Agency, *Future Risk: Research Strategies for the 1990s*, SAB-EC-88-040 (Washington, DC: EPA, 1988).
13. *Id.* at pp. 5, 8-9.
14. Carol M. Browner, EPA Administrator, Memorandum to All EPA Employees, "Pollution Prevention Policy Statement: New Directions for Environmental Protections" (June 15, 1993), p.1.
15. Interview with David Rejelski, Futures Staff Chief, Office of Strategic Planning and Environmental Data (OPPE), June 24, 1993.
16. The Charter of the new committee will be to conduct a short-term (five-year horizon) and long-term (20-year horizon) "scan of future developments that will affect environmental quality and the Nation's ability to protect the environment." The final report is scheduled for September 1994. Interview with Donald G. Barnes, Director, Science

Compare and Rank Risks

Advisory Board, July 7, 1993; U.S. Environmental Protection Agency, *Draft Charter*, Science Advisory Board, Environmental Futures Project (undated).

17. Telephone interview with Judith S. Kaleta, Chief Counsel, RSPA; RSPA FY 1994 Budget Submission, pp. 145-149 (detailing its "Risk-Based Prioritization Plan").

18. Carnegie Commission report, *supra*, note 10 at p. 73.

19. Sidney A. Shapiro and Thomas O. McGarity, "Reorienting OSHA: Regulatory Alternatives and Legislative Reforms," *Yale Journal on Regulation*, Vol. 6, No. 1 (Winter 1989) at p. 14, n. 85.

20. Interview with David Rejelski, *supra* note 13.

21. *Id.* Because of increasingly strict air quality rules in California, electric vehicles are expected to become more prevalent there in the next decade.

22. The foregoing paragraph is adapted from Richard N.L. Andrews, "Long-Range Planning in Environmental, Health, and Safety Regulatory Agencies," (draft background paper for Carnegie Commission, *supra* note 10, prepared May 4, 1991) at pp. 6-7.

23. Administrative Conference of the U.S., Recommendation 87-1, "Priority Setting and Management of Rulemaking by the Occupational Safety and Health Administration," 1 C.F.R. Sec. 305.87-1, 52 Federal Register 23,629 (June 24, 1987); derived from Shapiro and McGarity, *supra* note 19 at 18-23.

24. See note 8, *supra*.

BACKGROUND

Many regulatory decisions made by federal agencies are founded on scientific judgments.¹ Rules concerning limitations on airline pilot working hours depend on physiological and behavioral science concerning human sleeping needs.² The "age-60" limitation for commercial pilots depends on scientific judgments about aging and health risks.³ A myriad of EPA, OSHA, FDA and CPSC rules and enforcement actions depend on the adequacy of scientific judgments made by the agency.

To assist in making scientific judgments, agencies rely on both in-house scientific expertise and outside scientists. Agencies employ scientists both in staff advisory positions⁴ and in laboratories and research centers.⁵ Agencies must nurture in-house scientific expertise and attract top-flight scientists as employees.⁶ Regulatory agencies have also recognized that it is necessary to tap into outside scientific expertise -- through the use of specialized scientific advisory committees,⁷ referral to the National Academy of Sciences, or hiring of scientific research consultants. All of these approaches have their place, and agencies need to have the flexibility to use them.

Generally speaking, however, agency regulatory decisions are made by an agency head who is normally not a scientist, relying on the advice of program officials, administrative judges, and agency general counsels (all of whom are often lawyers without scientific training), with judicial review by non-scientist judges. This process is, perhaps understandably, regarded as deficient among scientists who follow the regulatory process.⁸

This is not a new problem. In the 1970's, proposals were advanced for a "science court" procedure to determine "the best available scientific judgment" for regulatory purposes.⁹ The premise was that scientific and technical determinations could be separated from the political and social decisions entrusted by Congress to the federal regulatory agencies. If so, proponents argued, a panel of eminent "scientist-judges" would be better

equipped to render a decision on the scientific merits than non-scientist government officials. Subsequently, those officials would deal solely with the socio-political choices, but in a scientifically-informed manner.

Science court proposals have since withered on the vine, largely because it is doubtful that scientific and policy issues can be separated -- in part because the process of defining the problem is often subjective and frequently laden with political considerations.¹⁰ This is particularly true in connection with risk assessment decisions, which often arise in emotionally charged contexts such as food safety or occupational or environmental exposure to carcinogens, poisons, or radiation. Another approach to the problem has, however, been developed: the science advisory board.

EPA's Science Advisory Board. The EPA has developed the most sophisticated, wide-ranging science board. The Science Advisory Board (SAB) in its present form was established in 1978 by statute,¹¹ although predecessor bodies date back to the early 1970's.

As a federal advisory committee, the SAB must comply with the Federal Advisory Committee Act¹² and related regulations. Consequently, the Board has an approved charter and must hold public meetings. The SAB charter provides a succinct statement of the Board's purpose: "The objective of the Board is to provide advice to EPA's Administrator on the scientific and technical aspects of environmental problems and issues."¹³

At present the SAB consists of an Executive Committee and ten Committees¹⁴ made up of 80 members, plus 300 "consultants" who serve on an "as needed" basis. The SAB operates within EPA as a staff office reporting directly to the Administrator, directed by a career SES Executive Director and 16 other staff members. Its budget is approximately \$1.7 million.¹⁵

The Board's activities are quite varied. It takes on reviews of scientific issues relating to EPA's mandate at the request of Congress, the Administrator, and program offices as well as on its own initiative. In recent years, the Executive Director has issued an annual agency-wide solicitation of issues.¹⁶ Most of the Board's work-product consists of

reports -- most often as a result of a requested peer review of an agency document which includes findings, recommendations and answers to specific questions addressed to the Board. Perhaps the most influential and celebrated SAB report was *Reducing Risk*, produced in 1990 by a special Relative Risk Reduction Strategies Committee (described in Reg.07). Such reports typically carry a disclaimer which reiterates the Board's independence within the agency.¹⁷

Beyond its important role in furthering EPA's risk prioritization activities, the recent Board reports cover a mix of highly technical (e.g., Review of the Drinking Water Criteria Document for Cryptosporidium) and not-so technical (e.g., Review of the draft revised *Homebuyer's and Seller's Guide to Radon*) reviews. They also show an increasing interest in forward-looking, strategic issues (e.g., Review of the Office of Research and Development's Bioremediation Research Program Strategy).¹⁸ To channel this sort of constructive criticism, Administrator Browner has requested that the Board assist in the agency's capacity to anticipate future environmental problems. The Board has accepted this request and is organizing a new Committee, the Environmental Futures Committee, to undertake this effort.¹⁹

The FDA Science Board. The Food and Drug Administration houses several national research centers (e.g., the Center for Biologics Evaluation, the Center for Drug Evaluation and Research, and the Center for Devices and Radiological Health). The agency has also historically relied on about 40 highly particularized advisory committees to assist these centers in looking at particularized products, such as over-the-counter drugs, blood products, or ophthalmic devices.²⁰ As Commissioner David Kessler told NPR, "Virtually every licensing decision of any significance in the agency is put before a scientific advisory committee."²¹

Because of the importance of science advisory committees in the agency, the Commissioner in June 1992 established the "Science Board to the Food and Drug Administration."²² The Board consists of 12 distinguished members (eight from academia,

three from corporations, and one from a foundation). Other temporary members or consultants may be called upon to serve when needed, and temporary subcommittees are authorized. The Board's Charter provides a broad mandate to provide advice on specific technical issues and emerging, evolutionary, research questions.²³

In his remarks at the Board's first meeting, Commissioner Kessler reiterated his hope that the Board will tackle important cross-cutting scientific issues:

"FDA convenes a variety of advisory panels. But this one is different from most. For the work you do will go beyond one product or one crisis. You are being asked to influence the very foundation of this Agency's work...for decades to come."²⁴

NEED FOR CHANGE

As the Carnegie Commission study, *Improving Regulatory Decision Making*, states in commending the activities of the EPA and FDA boards, "External science advisory boards serve a critically important function in providing regulatory agencies with expert advice on a wide range of issues."²⁵ Yet, with a few other exceptions, most regulatory agencies have not organized science advisory boards.²⁶

Creation of such science advisory boards not only should produce regulatory decisions and agenda setting that are founded on better science, they should also induce greater acceptance of those decisions by Congress, the courts, the general public and among scientist themselves. Moreover, referral of issues to a quasi-independent board should reduce political pressures on agency administrators and on agency scientists.

The bottom line is that regulatory agencies need help in making decisions that must be made in a context of significant scientific or technical uncertainty. Recent hard-to-predict questions have arisen, for example, concerning the permeability of different grades of latex to the AIDS virus or the possible risks posed by the sodium azide used in airbags when cars are junked. Given the difficulty in attracting top scientists into full-time

government staff positions, the best way to tap into their expertise to answer these kinds of questions is to "leverage" the low costs of travel and government per-diem rates into formation of a part-time science advisory board.

RECOMMENDATION

1. Create science advisory boards. (1)

A directive from the President²⁷ should mandate that regulatory agencies that conduct rulemaking or conduct other proceedings that depend heavily on scientific information and judgments create a science advisory board or explain why such a board is not needed.

Agencies which face scientific issues in R&D rather than regulatory contexts may have other options such as the Federal Coordinating Council for Science, Engineering and Technology (FCCSET).²⁸ Furthermore, regulatory agencies all have differences that may lead to different approaches to considering or creating such a board. FDA's reliance on scientific advisory committees led to a small overarching board, while EPA has an 80-member board with 10 committees. But all agencies, especially those with regulatory mandates involving risk-related questions, should consider creating a board that meets their specific needs.²⁹

Agencies with less frequent or less pressing scientific issues may wish to use established boards in other agencies. A fee-for-service approach should be developed to foster this approach. Moreover, agency science boards should be linked to one another, perhaps under the aegis of the Regulatory Coordinating Group [see REG01]. Such a linkage will facilitate synergy among the boards and will help agencies identify cutting-edge issues and others that would benefit from review by a quasi-independent board of outside scientific experts.

Agencies that do create such boards need to pay attention to their staff support as well.³⁰ They need not be expensive propositions. EPA's mega-board has an annual budget

of \$1.7 million, whereas the FDA Board's charter estimates the annual cost of travel, compensation and staff support to be below \$100,000. Both of these amounts seem like bargains, given the tremendous cost implications of EPA and FDA scientific decisions.

FISCAL IMPACT

The actual recommendation -- that agencies should decide whether they need a science board is NO COST. If agencies decide they need one, annual cost could range from \$100,000 (cost of FDA's board) to \$1.7 million (EPA's board).

ENDNOTES

1. See generally, J.D. Nyhart and Milton M. Carrow, *Law and Science in Collaboration -- Resolving Regulatory Issues of Science and Technology*, National Center for Administrative Justice, (Lexington Books, Lexington, MA, 1983).
2. FAA rule.
3. FAA rule.
4. E.g., EPA, where the Administrator and many of the Assistant Administrators have official science advisors.
5. E.g., FDA, which employs scientists in its highly-praised research centers. But see Jerry L. Mashaw and David L. Harfst, *The Struggle for Auto Safety*, (Harvard University Press 1990) at p. 197), describing the National Highway Traffic Safety Administration's Ohio test facility as "NHTSA's version of Siberia."
6. See Carnegie Commission on Science, Technology and Government, *Risk and the Environment -- Improving Regulatory Decision Making*, Washington, D.C., June 1993 at p. 91:

"The quality of the research, development, and assessment at all regulatory agencies can be substantially improved. To do so, agencies must recruit and retain first-rate scientists and engineers, provide them with state-of-the-art facilities and equipment, and give them the resources necessary to carry on research of the highest quality. Where internal capabilities are weak, bridges should be built to allow access to the best

scientists and engineers in academic and nongovernmental organizations."

7. See e.g., *Food and Drug Administration Advisory Committees*, Institute of Medicine (National Academy of Sciences) (1992). IOM found the existing FDA advisory committee system to be "fundamentally sound." *Id.* at vi.
8. Dr. Sheila Jasanoff, Director of Cornell University's Program on Science, Technology, and Society, opines, "Over the past twenty years, federal regulatory agencies have developed a reputation for slipshod science." Jasanoff, *Scientific Review and Agency Decisionmaking*, issues paper prepared for the Carnegie Commission on Science, Technology and Government, *supra* note 6 at p. 1 (1989).
9. See generally Symposium, "Twenty-five Year Retrospective on the Science Court," *Risk*, Vol. 4, No. 3 (Spring 1993) (Franklin Pierce Law Center, Concord N.H.).
10. Carl F. Cranor, "Science Courts, Evidentiary Procedures and Mixed Science-Policy Decisions," *Risk*, Vol. 4, No. 2 (Spring 1993) p. 113.
11. The Environmental Research, Development and Demonstration Authorization Act, 43 U.S.C. Sec. 4365 (1988).
12. 5 U.S.C. App. (1988).
13. U.S. Environmental Protection Agency, *Advisory Committee Charter for Science Advisory Board*, dated November 8, 1991, reprinted in U.S. Environmental Protection Agency, Science Advisory Board, *FY 1992 Staff Director's Annual Report, "Getting Results"* p A-2. Elaborate Board guidelines provide criteria and procedures for selection of members and consultants, terms of appointment, assignment of topics to committees and subcommittees, and rules concerning conflicts-of-interest and public disclosure of members' and consultants' interest in assigned topics. "Guidelines on Service on the Science Advisory Board," *id.* at Appendix D.
14. The ten committees cover the major environmental media (Clean Air Scientific Advisory Committee,* Radiation Advisory Committee, Indoor Air Quality Committee,* Drinking Water Committee), environmental effects (Ecological Processes and Effects Committee, Environmental Health Committee) and analytical issues (Environmental Engineering Committee, Research Strategies Advisory Committee, Clean Air Act Compliance Analysis Council,* Environmental Economics Advisory Committee). [Asterisked committees are mandated in separate statutes.] See *FY 1992 Staff Director's Final Report*, *Id.* at pp. 9-10.

15. *Id.* at p. 2 (Fiscal year 1992 budget).
16. Interview with Donald G. Barnes, Staff Director, July 7, 1992.
17. A recent draft SAB report carries the standard disclaimer:

This report has been written as a part of the activities of the Science Advisory Board, a public advisory group providing extramural scientific information and advice to the Administrator and other officials of the Environmental Protection Agency. The Board is structured to provide balanced, expert assessment of scientific matters related to problems facing the Agency. This report has not been reviewed for approval by the Agency and, hence, the contents of this report do not necessarily represent the views and policies of the Environmental Protection Agency, nor of other agencies in the Executive Branch of the Federal government....

U.S. Environmental Protection Agency, *Review of the Methodology for Developing Ambient Water Quality Criteria*, SAB-DWC-93XXX, EPA 1993.
18. The reports mentioned in this paragraph are listed in *FY 1992 Staff Director's Annual Report*, *supra* note 13 at Appendix G.
19. See note 16 and accompanying text in REG07. The Board has also shown a commendable willingness to reexamine its operations and role within EPA. A 1989 report, *The Mission and Functioning of the EPA Science Advisory Board*, constructively reviewed all aspects of the SAB, and has helped its Executive Committee and Staff Director improve the Board's performance and its influence within EPA. (Subcommittee report accepted by SAB Executive Committee on October 23, 1989.)
20. See *Food and Drug Administration Advisory Committees*, *supra* note 7 at pp. 33, 82-83.
21. Telephone interview with Commissioner Kessler, July 12, 1993.
22. U.S. Department of Health and Human Services, Food and Drug Administration, *Charter--Science Board to the Food and Drug Administration* (dated June 26, 1992) at p. 1.
23. The Board's charter reads as follows:

The Board shall provide advice primarily to the Agency's Senior Science Advisor and, as needed, to the Commissioner and other appropriate officials on specific complex and technical issues as well as emerging issues within the scientific

community in industry and academia. Additionally, the Board will provide advice to the Agency on keeping pace with technical and scientific evolutions in the fields of regulatory science; on formulating an appropriate research agenda; and on upgrading its scientific and research facilities to keep pace with these changes. It will also provide the means for critical review of Agency sponsored intramural and extramural scientific research programs.

24. Remarks by Commissioner David Kessler to Science Board Advisory Meeting, Washington, D.C., February 2, 1993, pp. 6-7.
25. Carnegie Commission Report, *supra* note 6 at p. 90. The Commission went on to caution, however, that agencies should not rely so heavily on external advice that they neglect the development of internal scientific expertise.
26. See Bruce L.P. Smith, *The Advisers -- Scientists in the Policy Process*, The Brookings Institution (1992), which describes the other, similar boards used to review R&D matters or research issues (Defense Science Board, Energy Research Advisory Board, NASA Advisory Council, and a bureau with the State Department). An NPR survey also discloses that the Minerals Management Service with the Department of Interior also has a science board.
27. Perhaps through the Assistant to the President for Science and Technology.
28. FCCSET was established in 1976 along with the White House Office of Science and Technology Policy (OSTP). According to the Carnegie Commission's study, "FCCSET's influence has varied over the past decade," although the recent creation of a federally-funded Critical Technologies Institute, established to assist OSTP and FCCSET in technology policy development many enhance FCCSET's influence. Carnegie Commission report *supra* note 6 at p. 40.
29. This follows the recommendation of the 1983 National Academy of Sciences report, *Risk Assessment in the Federal Government: Managing the Process*. (May 1983) (Recommendation 3, p. 156). See also the proposal by the American Industrial Health Council (AIHC) that OSHA create a science advisory committee, *AIHC Proposal for an Ad Hoc OSHA Science Advisory Committee* (August 28, 1990).
30. With respect to staffing, Bruce Smith has argued:
At a minimum the necessary elements seem to include the following: a full-time secretariat consisting of several persons;

additional staff support, preferably drawn from the rest of the agency, for each separate task group established; an adequate budget, including some funds for travel, consultants, and contract research; and a career pattern within the agency that makes a officials and for senior people). The advisory board's secretariat should comprise persons with enough stature to permit easy interaction with other senior executives in the agency (both appointive and career) and with the committee members.

The Advisers, supra note 7 at p. 205.

BACKGROUND

Much of what an agency can or cannot do to solve a problem is dependent on the legislation that Congress passes requiring or authorizing an agency to take action.¹ Agencies often complain that statutory constraints imposed by Congress are major impediments to more efficient, effective and sensible regulation.

Legislation that is overly restrictive, too detailed,² or poorly conceived or drafted, leads to a number of problems. It can force agencies to spend resources on minor or nonexistent problems while major problems remain unaddressed. Legislation that requires agencies to issue poorly conceived regulations is likely to result in the public blaming the agency for issuing "bad" regulations (the agency's defense that Congress gave the agency no choice may not be heard).³ "Bad" regulation gradually destroys the credibility of the agency and is likely to make even good regulations less acceptable.⁴

Problematic legislation comes in a variety of forms. First, legislation may require an agency to issue regulations that do not solve a problem and, therefore, do not benefit society at large. For example, the Federal Highway Act required the National Highway Traffic Safety Administration (NHTSA) to issue regulations requiring splash and spray suppression devices (fancy mud flaps) on trucks to decrease the amount of spray from trucks that could hinder visibility for car drivers.⁵ NHTSA's testing determined that although the fancy mud flaps decreased the amount of spray on car windshields, the decrease was so slight that it did not improve the car driver's visibility and, thus, had no safety benefits. The statute, however, gave NHTSA no choice other than seeking a legislative change or requiring mud flaps regardless of whether there were any safety benefits.⁶

Second, overly restrictive legislation does not allow agencies to change regulations as circumstances change. For example, Congress may require a regulatory scheme based on

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the assumption that one factor is the primary cause. If further research shows that a different factor is the primary cause, the agency may be forced to impose costly regulations that are not beneficial.

Third, legislation that requires command-and-control regulation may be preventing the agency from using or developing an innovative approach that would be more effective or efficient.⁷

Fourth, legislation may impose unrealistic (if not outright impossible) deadlines, which either makes the agency look bad when the deadlines are not met or may preclude the agency from doing the necessary background work for the rule.⁸ In 19--, Congress required the Department of Education to issue 83 regulations in 240 days. The sheer volume and complexity of the legal and policy issues involved made it virtually impossible for the Department to issue the regulations within the statutory timeframe.⁹

Fifth, legislation may have unintended consequences. A statute might inadvertently preclude the most common device for meeting a statutory goal by setting requirements that the device cannot meet.

NEED FOR CHANGE

Legislation that is overly restrictive, too detailed, or poorly conceived or drafted, results from a variety of circumstances, some of which are not unique to the regulatory process -- distrust between the Executive and Legislative branches, lack of congressional technical expertise, congressional failure to understand the difficulties in implementing a regulatory program, and lack of common understanding of complex issues between the Legislative and Executive branches. Although a more comprehensive discussion of relations between the Executive and Legislative branches and recommendations for improving them are contained in the Leadership and Management Systems Report (Recommendation xx), this general problem as it relates to regulatory problems is briefly discussed here..

The distrust between Executive and Legislative branches is one of the major reasons for legislation that is overly restrictive or poorly conceived or drafted. Some tension in the

relationship between Congress and the Executive branch is inherent in our system of governance. Agencies *should* perceive Congress as an entity that imposes constraints on the Executive -- that is part of the checks and balances established in the Constitution.

Nonetheless, the tension between the Executive branch and Congress has risen too high.¹⁰ A panel of the National Academy of Public Administration recently concluded that, "The outright confrontation and increasingly competitive relationship between the two branches has a high cost: a political system more and more unresponsive to national problems and unaccountable to the American people for addressing those problems."¹¹ It is time to find a better balance.

Congressional distrust of agencies affects legislation in a variety of ways. Congress was motivated to write overly prescriptive legislation because it had a legitimate basis for fearing that an Administration that disagreed with congressional policies and goals would substitute Administration policy for congressional policy when statutes were ambiguous or granted discretion to an agency.¹² Agencies' inability to issue regulations in a timely fashion, which was exacerbated by the perception that OMB was holding up agency rules, resulted in Congress imposing statutory deadlines with "hammers," like that for the food labeling rule, that would impose rigid statutory obligations on private parties if regulations were not promulgated on time.¹³

Some problems in legislation also result from a lack of understanding about how agencies work, about emerging issues, or the arcane details of existing programs. Very few Members or Hill staffers have worked in agencies and appreciate the complexities of implementing the statutes they write. Agencies have expertise that Congress lacks in specific fields and about the details of existing programs. Although many Members and Hill staffers are very knowledgeable in their areas of expertise, where new issues and scientific breakthroughs occur, Congress and the Administration (and federal judges) often lack a common understanding of the problems and emerging issues and an understanding of where the experts disagree.¹⁴

When the Administration supports legislation, agency staff provide technical

expertise and drafting advice to Congress. This help can be very useful to Congress and, thus, to the agency; it sometimes comes too late, however, because of the time it takes to reach an Administration-wide policy on legislation.¹⁵ In addition, in the past, some agencies did not give assistance if the Administration disagreed with the legislation. When legislation passed, though, agencies had to implement it, whether or not they had been able to correct technical glitches.

Some agencies have taken steps to diminish drafting problems even with legislation with which the Administration disagrees. The Department of Agriculture provides a technical drafting service to Congress. Upon written request from a member of Congress or a congressional committee, staff attorneys in the Office of the General Counsel will draft proposed legislative language implementing the requested policy. After clearance within the General Counsel's office, the proposed language is sent back to Congress. The Department makes it very clear that even though its staff has drafted the legislation that does not mean that the Administration supports the legislation. In fact, because the service is provided to all requesters regardless of the Administration's position, the fact that Agriculture provided drafting assistance is not an indicator of Administration policy.¹⁶ The U.S. Fish and Wildlife Service and the Minerals Management Service of the Department of Interior provide similar services.¹⁷

In addition to enhancing the Department's relationship with Congress, this cuts down on the unintended consequences of legislation. When the policy goal is to change a program only partially, the Department's experts are more likely to know how to limit or minimize changes to other parts of the program. The Department's experts are also more sensitive to implementation problems.

At first blush, it may seem strange to offer to draft legislation with which the agency may disagree, but Agriculture, the Fish and Wildlife Service, and the Minerals Management Service do not believe that doing so has resulted in legislation passing that would not otherwise have passed.¹⁸ Although helping to draft legislation does provide some assistance to the legislation's proponent, it also helps the agency. If the agency experts do not draft or

comment on statutory language, it is likely to be written by someone with less understanding of the program, of the ramifications of the legislation, and of implementation problems. It actually should be quite useful for an agency, without committing to support the legislation, to be able to comment on spillover into other parts of the program, unintended consequences and implementation problems.

RECOMMENDATION

1. Establish technical drafting services for congressional committees and subcommittees. (1)

Agencies should provide technical drafting services to ranking members of congressional committees and subcommittees and Legislative Counsel as a method of avoiding unintended consequences of legislation. It is important that such service be provided regardless of the Administration's substantive policy position. If responses have to wait for determination of Administration policy, such a service will not be effective because it will not provide timely input into the legislative process. Because an agency may have to implement legislation with which it disagrees, it should take care of technical glitches that may cause implementation problems. Furthermore, if the agency provides the service to all comers, responses cannot be interpreted as an early indication of Administration support (which could happen if agencies only provided assistance in response to select requests).

To ensure that it is the agency, rather than individual staff members, assisting Congress, the service should have certain safeguards built in. First, an agency should designate an office or senior agency official (perhaps the congressional liaison office or the general counsel's office) as the clearinghouse for all technical drafting services. Second, although legislative language would be drafted or revised by the agency's technical experts, it would then be cleared by an appropriate senior agency official (or officials). Given the time-sensitive nature of the legislative process and the fact that policy clearance is not needed, the number of clearances should be *very* limited. Third, requests for statutory language and responses containing such language should be in writing. Fourth, upon

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providing the response, the agency shall instruct the Congressional committee to disclaim that technical drafting services indicate Administration support.

FISCAL IMPACTS

LOW COST initially. LOW SAVINGS long run.

CROSS-REFERENCES TO OTHER NPR RECOMMENDATIONS

- (1) REG02.1 Distribute Deskbook to Congressional staff.
- (2) Program Design -- Establish Congressional program design capabilities in CRS, Leg Counsel, GAO.
- (3) Leadership and Management -- Agency/Congressional Relations

ENDNOTES

1. Agencies can take some actions without specific Congressional approval or authorization. Efforts to educate the public, like the Coast Guard's National Boating Safety Week, do not need Congressional approval.
2. The American Waterway Operators gave us the following example of a statute that contains too much detail. After the Exxon Valdez spill, Congress enacted the Oil Pollution Act of 1990, which contains the following specifics precluding vessels from operating in the navigable waters of the United States unless equipped with a double hull --
 - (A) in the case of a vessel of at least 5,000 gross tons but less than 15,000 gross tons --
 - (i) after January 1, 1995, if the vessel is 40 years old or older and has a single hull, or is 45 years old or older and has a double bottom or double sides;
 - (ii) after January 1, 1996, if the vessel is 39 years old or older and has a single hull, or is 44 years old or older and has a double bottom or double sides;
 - (iii) after January 1, 1997, if the vessel is 38 years old or older and has a single hull, or is 43 years old or older and has a double bottom or double sides;
 - (iv) after January 1, 1998, if the vessel is 37 years old or older and has a single hull, or is 42 years old or older and has a double bottom or double sides;
 - (v) after January 1, 1999, if the vessel is 36 years old or older and has

a single hull, or is 41 years old or older and has a double bottom or double sides;
(vi) after January 1, 2000, if the vessel is 35 years old or older and has a single hull, or is 40 years old or older and has a double bottom or double sides; and

(vii) after January 1, 2005, if the vessel is 35 years old or older and has a double bottom or double sides;

(B) in the case of a vessel of at least 15,000 gross tons but less than 30,000 gross tons --

(i) after January 1, 1995, if the vessel is 40 years old or older and has a single hull, or is 45 years old or older and has a double bottom or double sides;

(ii) after January 1, 1996, if the vessel is 38 years old or older and has a single hull, or is 43 years old or older and has a double bottom or double sides;

(iii) after January 1, 1997, if the vessel is 36 years old or older and has a single hull, or is 41 years old or older and has a double bottom or double sides;

(iv) after January 1, 1998, if the vessel is 34 years old or older and has a single hull, or is 39 years old or older and has a double bottom or double sides;

(v) after January 1, 1999, if the vessel is 32 years old or older and has a single hull, or is 37 years old or older and has a double bottom or double sides;

(vi) after January 1, 2000, if the vessel is 30 years old or older and has a single hull, or is 35 years old or older and has a double bottom or double sides;

(vii) after January 1, 2001, if the vessel is 29 years old or older and has a single hull, or is 34 years old or older and has a double bottom or double sides;

(viii) after January 1, 2002, if the vessel is 28 years old or older and has a single hull, or is 33 years old or older and has a double bottom or double sides;

(ix) after January 1, 2003, if the vessel is 27 years old or older and has a single hull, or is 32 years old or older and has a double bottom or double sides;

(x) after January 1, 2004, if the vessel is 26 years old or older and has a single hull, or is 31 years old or older and has a double bottom or double sides;

(xi) after January 1, 2005, if the vessel is 25 years old or older and has a single hull, or is 31 years old or older and has a double bottom or double sides; and

(C) in the case of a vessel of at least 30,000 gross tons --

(i) after January 1, 1995, if the vessel is 28 years old or older and has a single hull, or is 33 years old or older and has a double bottom or double sides;

(ii) after January 1, 1996, if the vessel is 27 years old or older

and has a single hull, or is 32 years old or older and has a double bottom or double sides;

(iii) after January 1, 1997, if the vessel is 26 years old or older and has a single hull, or is 31 years old or older and has a double bottom or double sides;

(iv) after January 1, 1998, if the vessel is 25 years old or older and has a single hull, or is 30 years old or older and has a double bottom or double sides;

(v) after January 1, 1999, if the vessel is 24 years old or older and has a single hull, or is 29 years old or older and has a double bottom or double sides; and

(vi) after January 1, 2000, if the vessel is 23 years old or older and has a single hull, or is 28 years old or older and has a double bottom or double sides.

Sec. 4115 of the Oil Pollution Act of 1990, 46 U.S.C. sec 3703a(c)(3).

3. For example, President Bush faced a very difficult political problem in the summer and fall of 1992 when the National Corn Growers Association and the ethanol industry claimed that ethanol would be cut out of the reformulated gasoline market unless EPA changed a proposed rule so as to allow a special waiver for gasoline mixed with ethanol. The fact that the Clean Air Act Amendments of 1990 did not allow EPA to grant the requested waiver did not stop this political pressure, nor did it stop the Senate [House?] from passing a sense of the Senate [House?] resolution that contradicted the Clean Air Act Amendments and criticized the Bush Administration's proposed rule. [CITES TO ARTICLES]

4. [CITE ARTICLE ON FTC'S "NATIONAL NANNY" PROBLEM AND ITS DECREASED EFFECTIVENESS AS A RESULT]

5. [CITE]

6. NHTSA eventually succeeded in getting this requirement repealed. [CONFIRM -- CITE] Seeking repeal or modification of problematic statutory requirements can be a difficult task, particularly where the requirements are part of a statute that required a great deal of political compromise to pass initially.

7. [EXAMPLE]

8. [CITE TO ACUS RECOMMENDATION]

9. U.S. General Accounting Office, *Education Regulations: Reasons for Delays in Issuance*, (Briefing Report to Congressional Requestors, Washington, D.C., November 15,

1990), pp. 1-2.

10. [CITE to WASHINGTON POST ARTICLE]

11. *Beyond Distrust: Building Bridges Between Congress and the Executive*, A Report by a Panel of the National Academy of Public Administration (1992) at 2-3.

12. The motivation to grant agencies' only very limited discretion may have been increased by the Supreme Court's decision in *Chevron*, [CITE], which said that a court would uphold an agency's reasonable interpretation of its statute if the statute was not clear on its face.

13. When Congress passed the Nutritional Labeling and Education Act, [CITE], it was "tired of what it regarded as FDA and White House foot-dragging on important regulations." Malcolm Gladwell, "Interagency Fight Puts Overhaul of Food Label Rules on Bush's Plate," *Washington Post* (November 15, 1992), p. x. The statute gave FDA one year to issue a proposed labeling rule and another year to finalize it. If the final rule deadline was missed, the "hammer" fell and FDA's proposed rule would become effective.

14. Cite to Carnegie Commission.

15. Interview with House Government Affairs Committee Staff (June xx, 1993).

16. [CONFIRM WITH JOHN GOLDEN]

17. Telephone interview Owen Ambur, Chief, Office of Legislative Services, U.S. Fish and Wildlife Services, Department of the Interior, July 22, 1993; telephone interview with Stephen Shaffer, Chief, Congressional and Legislative Affairs, Minerals Management Services, Department of the Interior, July 22, 1993.

18. [CONFIRM]

BACKGROUND

A regulatory system is only as good as the people implementing it. A well-trained and informed cadre of regulatory officials is crucial for an efficient, innovative regulatory system, that emphasizes choice of the appropriate regulatory approach. Proper training and performance incentives are needed to ensure that the agency officials involved in regulatory activities are as effective as possible. Inadequate training can result in errors, no matter how intelligent and well-meaning the officials may be. Nothing currently existing is adequate to provide the training necessary to effect the needed major changes in the federal government's regulatory culture.¹

As is well known, presidential appointees have widely diverse backgrounds and familiarity with the federal government. Many (but not all) are well-versed in their agency's substantive program, but few appointees can be expected to know, at the time of their appointment, the details of the arcane statutes and rules that govern the internal agency operations.² Yet a lack of understanding of these rules can slow and possibly trip the most eager of new appointees. It is crucial that this blank slate be filled quickly since studies show that nearly half of all presidential appointees leave office within two years³ -- hardly enough time for them to develop a meaningful understanding on their own.

There have been some attempts in the past to furnish training to presidential appointees. Based on a 1975 recommendation,⁴ the Administrative Conference of the U.S. provided a three-day seminar for commissioners of the independent regulatory agencies in 1977 (at the beginning of the Carter Administration), which covered a broad range of topics relating to regulation.⁵ No such systematic programs have been held since. The Administrative Conference has also more recently provided shorter, day-long or half-day programs on various aspects of administrative law and procedure relevant to regulatory

commissioners. A continuing, comprehensive approach is needed, however.

Some limited training opportunities do exist for career staff. The Legal Education Institute (LEI) within the Department of Justice's Office of Legal Education presents courses for government lawyers. The Federal Executive Institute provides management training for the Senior Executive Service, and some federal officials have attended courses at the Kennedy School of Government at Harvard University. These opportunities are limited, both in number and in scope, and fall short in ensuring that all relevant personnel are familiar with the pertinent laws and processes.

Career regulators and Hill staff often lack a broad perspective about the regulatory process because career paths are often combined to one agency. Rotational assignments among agencies in the executive branch and among the branches, are not common.

Although there are programs which accomplish some of these goals for entry level officials such as the two-year Presidential Management Intern program,⁶ there are no established career paths for regulatory professionals, nor do such officials have any real incentive to seek rotational assignments, since it is the person's "home-base" agency that continues to conduct performance appraisals and absence is not likely to "make the heart grow fonder." Members of the Senior Executive Service also theoretically have this opportunity but they are often in such high-level positions that there is little incentive for them to accept a rotational assignments.

NEED FOR CHANGE

Despite the increasing complexity of the regulatory process, little or no relevant training is currently available for regulatory officials. High-level policymakers, particularly those who are Presidential appointees, are often provided no training or background in the laws and processes they will be responsible for administering, and career staff have access only to limited, and often inadequate training opportunities.

The lack of training for presidential appointees is all the more glaring given the

availability of intensive orientation to members of Congress and the federal judges.⁷ Indeed, a survey by the National Academy of Public Administration (NAPA) reported that 79 percent of presidential appointees received no orientation of any kind.⁸ As NAPA has concluded:

It is hard to imagine that anyone could regard this disinterest in the orientation of new presidential appointees as a sound way to run the federal government. We believe the historical absence of such programs is a matter of great concern, a problem that should be permanently corrected.⁹

With respect to career regulatory staffs, the situation is only somewhat better. Training for non-lawyer career staff is hit-and-miss. The Legal Education Institute does an excellent job of training agency lawyers on a variety of issues, a number of which relate to agency rulemaking and regulation. These courses have typically been one-day courses held in Washington, D.C. with unpaid government faculty members. About 95% of the roughly 4000 attendees in 1991 were from Washington, DC.¹⁰

Unfortunately, in recent Department of Justice appropriations legislation, the Institute was re-located to Columbia, South Carolina as part of a move of the entire Office of Legal Education.¹¹ As a result, it is expected that either attendance by agency staff lawyers will drop significantly or training costs will rise significantly to cover the increased travel costs¹² to send personnel to South Carolina (as opposed to across town). Moreover, LEI's expenses for faculty would increase, since almost 95% of the faculty is local to Washington, and it is unlikely that as much of the necessary administrative law and regulatory expertise would be locally available in South Carolina.

In addition to training, a broad outlook on regulatory issues and first-hand awareness of a variety of perspectives can be extremely useful in developing regulatory programs. Providing select midlevel career staffs an opportunity to spend time at different agencies, on the Hill, at OMB, and/or in the judicial branch, would provide those people and their agencies with extremely useful expertise for effective implementation of regulatory

programs, as they discover how other agencies approach similar problems, what Congress's perspectives are, how the judiciary looks at regulatory issues as they come before the courts, and how OMB approaches problems of regulation. In addition, the quality of communication and coordination among agencies, Congress and OMB, might be improved through increased and ongoing contact. Also, OIRA, as a centralized locus for regulatory review could be a place to train agency staff. Agency staff could learn not only what Presidential review entails and the technical skills involved in regulatory analysis, but also how other agencies address various regulatory problems.

The need for this type of rotation has been increasingly recognized. Judge Stephen Breyer, in his new book on improving risk regulation,¹³ called for a "circulating career path" for "(eventual) high level executives," modeled on France's Conseil d'Etat. As Judge Breyer visualized it, an OMB "special group" could be created with a special civil service career path leading through agencies, congressional committee staffs, back to OMB, with possible presidential appointments for the most successful members. Such a concept would not only augment OMB (especially OIRA's capabilities) it would "seed" the government with experts in regulatory issues.

To encourage use of innovative techniques and greater efficiency in regulatory processes, appropriate use of incentives may be effective. Award programs for excellence in regulatory functions should be developed. In addition, an "honors" rotation program for select midlevel regulatory career staff can both reward effective personnel and provide them with a broad outlook and the opportunity to share expertise and experience in regulatory issues across agencies.

RECOMMENDATIONS

1. Establish a "basic" training program for Presidential appointees to regulatory agencies. (2)

An ongoing, comprehensive training program is needed to familiarize regulatory

officials with the broad range of information they need to perform effectively and efficiently. The President should assign the Administrative Conference, with its concentrated expertise in the administrative and rulemaking processes, and its contacts across the federal government and academia, the responsibility to establish an ongoing training program for presidential appointees on the issues and processes involved in regulatory development. Among the topics that should be included in the curriculum are the role and organization of regulatory agencies; personnel management; alternative regulatory approaches; the budget process; program evaluation; policy formation and the rulemaking process; the Administrative Procedure Act and various other applicable statutes and Executive Orders; the relationship between agency rulemaking and adjudication; the relationship between regulatory agencies, the White House and OMB; use (but not abuse) of cost-benefit analysis; judicial review; relationships with the public, the press, and state and local governments; and regulatory reform, and alternate dispute resolution.¹⁴ Faculty could include representatives from the White House, Congress, various federal agencies, the federal judiciary, OMB, academia and industry. Training programs should ideally be held at a "retreat" site outside of Washington and should last for at least three days. They should be organized on a periodic basis, most frequently in the first half of the Administration as new appointees are nominated or confirmed.

2. Move training programs for agency regulatory lawyers to Washington, DC, and expand to cover other career staff. (3)

LEI should be moved back to Washington. This would generate substantial cost savings,¹⁵ some of which could be used to provide additional training. Moreover, it may be advisable to incorporate LEI into the Administrative Conference, since a large portion of LEI's courses relate to various aspects of administrative law and process, which are the Conference's areas of expertise. In fact, Administrative Conference personnel currently coordinate several LEI courses. LEI's existing courses, supplemented with more focused

ones on, for example, alternative dispute resolution techniques (see REG09), could provide some of the necessary training for federal career regulatory officials.

3. Establish an "honors" rotation program for select midlevel career staffers. (1)

As the Carnegie Commission recently recommended:

The federal government should use its existing personnel authority to create opportunities for selected individuals to rotate in the early years of their career through environmental and risk-related regulatory agencies, Congress, the Executive Office of the President, and, in some instances, administrative offices of the Judiciary.¹⁶

The Regulatory Coordinating Group, in coordination with the Office of Personnel Management should be charged with developing guidelines and rules for such a rotation program. In the meantime, key agencies with cross-government mandates like OIRA in OMB should develop, on their own, strategies for rotating and exchanging staff with regulatory agencies.

4. Establish an Award for Excellence in Regulation. (2)

Achievements by federal officials in performing regulatory functions are worth rewarding, through performance appraisals, bonus systems, and awards. Performance appraisals and bonus systems within agencies should recognize achievements in innovative, consensus-based and effective regulation. In addition, the Chairman of the Administrative Conference should be authorized to recommend to the President a \$10,000 Award for Excellence in Regulation to a career regulatory official, based on nominations from regulatory agencies. While it is not easy to measure excellent performance by regulators, the same argument could be made in most contexts; the fact that it may not be easy should not prevent action being taken. The Administrative Conference should be asked to develop, through a public process, criteria for making this award, including whether or how to

recognize team (as opposed to individual) efforts.

FISCAL IMPACT

REG10.1 (Training for Political Appointees): LOW COST; less than \$100,000 per year.

REG10.2 (Move LEI Back to Washington and Increase Size of Training Program): NO COST to LOW SAVINGS. Recent budget of LEI in Washington is \$1.5 million. Conservative estimate of new travel expenses to keep program the same size in South Carolina is \$1.6 million. The program could be transferred to ACUS and doubled in size with no additional costs or minor savings.

REG10.3 (Rotation for Mid-Level Career Staff) NO COST.

REG10.4 Award for Regulation: LOW COST; estimate is \$15,000.

ENDNOTES

1. See generally Robert S. Adler, Stephen H. Klitzman and Richard A. Mann, "Shaping Up Federal Agencies: A Basic Training Program for Regulators," *Journal of Law & Politics*, vol. VI, no. 2 (Winter 1990) [Hereinafter "Shaping Up Federal Agencies."]
2. For a description of 18 such statutes, see Administrative Conference of the U.S., *Federal Administrative Procedure Sourcebook*, 2nd ed. (Washington, D.C. 1992).
3. National Academy of Public Administration, "Leadership in Jeopardy: The Fraying of the Presidential Appointment System" (Nov. 1985) pp. 4-5, as cited in "Shaping Up Federal Agencies," *supra* note 1 at 351, n. 30. [Hereinafter 1985 NAPA report.]
4. Administrative Conference of the U.S., "Statement on Strengthening Regulatory Agency Management Through Seminars For Agency Officials," (adopted June 5-6, 1975) 1 CFR Sec. 310.4 (1988 ed.)
5. Discussions with officials of ACUS. The program was discussed in "Shaping Up Federal Agencies," *supra* note 1, at 360-364.
6. See discussion in Carnegie Commission on Science, Technology, and Government, *Risk and the Environment--Improving Regulatory Decision Making*, Washington, DC, June

1993 at p. 94-95.

7. In this environment, regulatory appointees need and should be provided an orientation, as early as possible, in the basics of administrative law. Newly elected Congressmen are offered intensive orientation courses by the Congressional leadership, by outside seminars at Harvard's John F. Kennedy School of Government or by other non-governmental organizations (NGOs). Newly appointed federal judges have similar offerings available to them at the National Judicial College (located at the University of Nevada - Reno) and by the Federal Judicial Center. Even career civil servants have at least some opportunities for intensive training (at OPM's Federal Executive Institute and the USDA Graduate School, or the Harvard JFK School). Presidential appointees, ironically, are the only major regulatory actors who lack the necessary orientation and basic training.

8. 1985 NAPA report, *supra* note 3 at 20, as cited by "Shaping up Federal Agencies" at 364, n. 90.

9. *Id.*

10. Information is provided in unpublished data sheet prepared by LEI.

11. The Office consists of LEI and the much larger Attorney General's Advocacy Institute (AGAI) which trains assistant U.S. Attorneys drawn from all over the country. In 1991, LEI had 9 employees and an annual budget of \$1.5 million while AGAI had 14 employees and a budget of \$9 million. While an argument can be made for relocating AGAI, moving LEI was perhaps inadvertent. Because AGAI and LEI do not overlap and have separate staff, it would be a simple matter to separate them.

12. Travel costs from Washington, DC to Columbia, South Carolina amount to approximately \$400 per student (airfare plus one day's per diem). Assuming that 4,000 students from Washington, DC continue to attend courses in South Carolina each year, annual additional costs would amount to \$1.6 million.

13. Stephen G. Breyer, *The Vicious Circle: Toward Effective Risk Regulation*, (Cambridge: Harvard University Press, 1993).

14. Discussion with officials of ACUS. The list is derived from the 1977 ACUS program discussed in "Shaping Up Federal Agencies," *supra* note 1, at pp. 360-64.

15. See note 12, *supra*.

16. Carnegie Commission report, *supra* note 6 at p. 94.

APPENDIX A: SUMMARY OF RECOMMENDATIONS BY TYPE OF IMPLEMENTATION ACTIONS NEEDED

Agency heads can do alone (1):

- REG02.2 Develop a *Deskbook on Regulatory Design*.
- REG03.1 Encourage use of negotiated rulemaking.
- REG04.2 Enhance public awareness and evaluation of programs.
- REG05.3 Develop rules for expedited treatment of rulemaking petitions.
- REG07.1 Compare and rank the seriousness of environmental, health or safety risks
- REG07.2 Develop long-range future plans and anticipatory approaches to regulatory problems.
- REG08.1 Create science advisory boards.
- REG09.1 Establish technical drafting services for congressional committees and subcommittees.
- REG10.3 Establish an "honors" rotation program for select midlevel career staffers.

President, EOP, or OMB can do (2)

- REG01.1 Create an Interagency Regulatory Coordinating Group to share information and coordinate approaches to regulatory issues.
- REG02.1 Establish use of innovative approaches as administration policy.

President, EOP, or OMB can do (2) [continued]

- REG04.1 Increase Public Participation during the rulemaking process.
- REG05.1 Streamline internal agency rulemaking procedures.
- REG05.2 Use "direct final" rulemaking to reduce needless "double" review of noncontroversial rules.
- REG06.1 Increase use of alternative means of dispute resolution (ADR).
- REG10.1 Establish a "basic" training program for Presidential appointees to regulatory agencies
- REG10.4 Establish an Award for Excellence in Regulation.

Requires legislative action (3)

- REG10.2 Move training programs for agency regulatory lawyers to Washington, D.C., and expand to cover other career staff.

Good idea, but will require additional work, or may be better suited for future action (4)

- REG04.3 Increase use of information technology and other education techniques.
- REG05.4 Evaluate and draft proposed legislative changes to speed the rulemaking process.

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**STRENGTHENING THE PARTNERSHIP IN
INTERGOVERNMENTAL SERVICE DELIVERY**

**The National Performance Review
August 1993**

IMPLEMENTATION CATEGORIES

The following code is located immediately after each recommendation. They summarize who needs to take action on the recommendation.

- (1) Agency heads can do themselves.
- (2) President, Executive Office of the President, or Office of Management and Budget action.
- (3) Requires legislative action.
- (4) Good idea, but will require additional work, or may be better suited for future action.

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ACRONYMS

ACIR	Advisory Commission on Intergovernmental Relations
ADA	Americans with Disabilities Act
AFDC	Aid to Families with Dependent Children
CBO	Congressional Budget Office
CFR	Code of Federal Regulations
DHHS	Department of Health and Human Services
GAO	General Accounting Office
ISTEA	Intermodal Surface Transportation Efficiency Act of 1991
JOBS	Job Opportunity in Basic Skills
JTPA	Job Training Partnership Act
NCSL	National Council of State Legislatures
NGA	National Governor's Association
NPR	National Performance Review
OIRA	Office of Information and Regulatory Affairs
OMB	Office of Management and Budget

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SUMMARY

Background

Most federal domestic programs are financed through federal grants to state and local governments. These grants, which are estimated at \$226.1 billion in Fiscal Year 1994, result in services that are provided to citizens through states and local governments. As a result, the relationship among and between levels of government is central to the quality of overall public service delivery and the ability of the federal government to successfully pursue a domestic public policy agenda. As stated in the Fiscal Year 1994 Budget of the United States Government:

"State and local governments have a vital constitutional responsibility in providing government services. They have the major role in providing domestic public services ...".

The Problem

The intergovernmental administration of domestic programs is a hodgepodge of block and categorical grant programs. Moreover, the myriad of federal mandates and regulations that accompany these grant programs are cumbersome and extremely costly to administer, and lack a coordinated implementation strategy between levels of government. This situation adversely affects the timely delivery and quality of services to the citizen customer.

The number of separate grant programs has increased by 50% in the last decade. At the same time, the imposition of federally-mandated actions without adequate funding of the associated costs has become a frequently used method of realizing public policy objectives.

In addition, each separate grant program has its own array of separate rules and regulations which must be observed, regardless of their impact on the effectiveness and quality of customer service. States and localities are constrained in their ability to customize service delivery by integrating programs because of competing and often conflicting federal rules and requirements that attend each separate grant program.

Federal attention to the health of the intergovernmental partnership has waned over the past decade. Intergovernmental linkages have been eliminated or sharply reduced within the federal government at the very time that the federal government has become increasingly dependent on state and local governments to deliver its services!

The failure of government to pay attention to the way it does its work - eliminate duplication, rationalize service delivery, modernize business practices, and find mechanisms for effective intergovernmental problem solving - has diminished the quality of public service delivery. The result is that taxpayer cynicism increases as the respect the public has for its government declines.

The quality of public service delivery depends on changes in the way intergovernmental problems are viewed, solutions developed, and mutual accountability achieved. Creating an atmosphere of cooperation among and between levels of government and establishing bipartisan intergovernmental trust should be of highest priority for immediate attention.

Improving intergovernmental relations is important not simply in theory and not simply to correct years of bureaucratic excess. It is also essential if communities and neighborhoods are to work better. No vision for America can be achieved unless the government--whether it is federal, state or local--most directly at the point of contact between citizens and the services they require is skilled, competent, cost-effective and responsive.

Major Recommendations

Significant improvement in the quality of government-provided services requires that new ways are found to integrate programs serving individual citizen-customer, at the point of service delivery. NPR believes that this can be achieved by eliminating unnecessary rules and outdated procedures, and by reengineering the service delivery process.

Each of the partners in the intergovernmental system must work collaboratively with the others - federal, state, and local - to address system problems or dysfunctions which produce citizen perceptions that their government isn't working well.

There are six recommendations which will accomplish these objectives:

- 1) Consolidate grant programs by simultaneous bottom-up and top-down initiatives;
- 2) Reduce red tape and eliminate roadblocks by creating the capacity to waive regulations which detract from the accomplishment of program objectives or which get in the way of effective service delivery;
- 3) Simplify cost reimbursement procedures, saving time and money;
- 4) Eliminate needless paperwork by simplifying the compliance certification process;
- 5) Simplify administration by modifying the Common Grant Rule; and

6) Strengthen the intergovernmental partnership by establishing mechanisms and processes for collaboration between the federal government and its state and local intergovernmental partners.

STRENGTHENING THE PARTNERSHIP IN INTERGOVERNMENTAL SERVICE DELIVERY

Introduction

The American public is spending hundreds of billions of dollars each year to implement public policies at all levels of government that are designed to make the quality of life better. Hundreds of thousands of dedicated public employees, along with more thousands of committed citizens, work very hard to solve human and societal problems by helping each other and working to build a better country.

In spite of these efforts, as enormous and dedicated as they are, the problems that we as a society are concerned about continue. There is the constant and growing concern that the quality of the best efforts of our government institutions and programs aren't doing the job, and that there is need for reform.

For example, consider the following:

- o The percent of low birth weight babies in America is increasing. These children are seven to ten times more likely to have problems in school.
- o The number of single teens having babies is increasing. Three out of every four of these young women will end up on welfare.
- o Arrest rates for juveniles committing violent crimes is increasing. These youths have a high probability of becoming repeat clients of America's criminal justice system.
- o The number of children graduating from high school is decreasing. These youth will be unable to contribute to a nation that needs a highly skilled workforce.
- o Welfare roles and prison populations are on the rise. Trends that escalate the drain on our scarce national resources.

So what is the problem? Considering all of the money and effort expended, why aren't we succeeding?

The Problem

Notwithstanding years of debate at all levels about grant consolidation and simplification, the number of federal grant programs continue to escalate. Today there are more than 606 grant programs that will spend more than \$226 billion in 1994.

Numerous efforts to consolidate grants and reduce administrative red tape have occurred. General revenue sharing, while greatly supported by states and localities, was finally eliminated for both budgetary and accountability reasons. The Reagan effort in the early part of the first term to create a system of block grants met with limited success, but subsequent efforts to expand the model to other groups of categorical programs have almost universally failed. While federal funds as a percentage of total state and local general government spending has declined significantly (from a peak of 21% to the current approximately 16%), the number, complexity, and compliance requirements infrastructure associated with federal grants have increased dramatically since the mid-eighties.

As recently as this year, new proposals seeking grant consolidation solutions have again been offered (notably the National Governor's Association/National Council of State Legislatures "flexible grant" proposal, discussed in further detail below).

Throughout all of these efforts, the most intractable technical obstacles have been: how to ensure fair and equitable distribution of funds among and between jurisdictions; how to overcome interagency conflicts and turf problems; and how to overcome the obstacles to rational consolidation presented by the Congressional committee structure, rules and procedure.

Over the past two decades, as a means of federal policy implementation, both the Congressional and the Executive Branches have increasingly relied on imposition of requirements either statutorily or by regulation on states and localities, often without adequate compensation. As a result, these unfunded mandates have cumulatively imposed burdens with which state and local governments are struggling to comply.

The standards and practices by which federal grants are monitored and accounted for are themselves anachronistic, ineffective and burdensome. The cost principles governing state and local grants are more than a quarter of a century old. Not only do they ignore the revolution in state and local financial management that has occurred since the mid-seventies (which has resulted in reasonably standard and uniform accounting practices across jurisdictions¹), but they impose heavy bureaucratic monitoring and administrative burdens on already stressed federal departments.

The federal government's own institutions for managing the intergovernmental process have been all but eliminated in the past decade with the reorganization of OMB, GAO, and the relevant Congressional committees, and the significant reduction in funding proposed by Congress for the Advisory Commission on Intergovernmental Relations (ACIR). Rather than being treated as full partners in implementing national domestic public policy, many in Washington view states and localities as just one more set of special interests clamoring for precious federal resources.

To the taxpayer "a tax is a tax is a tax" and "a service a service" regardless of which level of government is responsible. "Reinvention" of the federal government must recognize this reality and must place a high priority on improved government management at all levels. In summary, the ability to meet the Administration's four broad goals of reinvention (cutting red tape to get results, learning to compete/using market mechanisms, creating a quality management culture, and improving

productivity) cannot be achieved in part without a new approach to intergovernmental partnership in the delivery of services to the public..

VISION

There was a broad consensus among those consulted² that the system of intergovernmental grant making and regulation is fundamentally broken. No one argued for marginal or incremental change. From state and local officials to federal managers at all levels, everyone calls for dramatic change.

In a perfect world, the 606 federal grant programs would be consolidated into broad funding pools, organized around major goals and desired outcomes: for example: safe and secure communities; a competitive workforce; healthy and self-sufficient families and children; or a clean environment.

Administrative mechanisms would be streamlined. Flexibility would be granted to take into account regional differences and the diversity of needs: accountability would be ensured by measuring performance and outcomes rather than transactions and errors; and program design and management responsibility would be ruthlessly driven down to the point of contact between the government and the end consumer--regardless of which level of government was responsible at that point.

A massive reform of the existing system of intergovernmental grantmaking would be required to realize such a vision. Such a reform would touch every federal department and agency, every Congressional committee and subcommittee, every special interest and advocacy group, and each and every one of the more than one-hundred thousand states, counties, cities, townships and special purpose districts throughout the country.

Yet, to a person, the political obstacles to the necessary changes were considered almost insurmountable. As noted above, prior administrations of both parties have failed to overcome the intense Congressional resistance to grant

consolidation or the legislature's lack of faith in the executive's ability (at all levels) to ensure program accountability and performance.

However, there is some evidence that Congress is becoming exasperated with the limitations of the current micro-managed categorical nature of grantmaking.³ As one person noted: "there is a tremendous pent-up legion of followers in Congress [and elsewhere] if forceful leadership is provided...." Recent actions, like the passage of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), demonstrate some willingness on the part of major Congressional committees to approach grantmaking more rationally.

Specific solutions can be perfected and refined over time, but the basic needs are, and have been, clear for more than a decade:

1. the number of categorical grants must ultimately be reduced;
2. program rules and regulations must be fundamentally rethought and their focus changed from compliance to outcomes, from sanctions to incentives;
3. governments at all levels (but especially the federal government) must reduce the degree to which unfunded mandates are imposed on lower levels of government; and
4. federal interdepartmental and intergovernmental collaboration must be actively facilitated if any real improvement in government's credibility is to be successful.

These goals will not be achieved easily or overnight. The federal government will have to work with states and localities to define a more viable federal partnership, find the optimal balance between flexibility and accountability, and deal with the budget constraints imposed by the federal deficit.

The process we envision focuses federal, state and local government attention on mutually agreed upon measurable outcomes. It is a partnership, not an adversarial or competitive system. It provides federal financial support to achieve broad goals, but provides latitude and flexibility in how to accomplish them. Rather than defining

accountability by inputs, transactions, error rates, and failures to progress, it holds state and local governments accountable for performance. It is a system designed to support 98% of the good progress being made, while sanctioning the other 2% through more direct enforcement.

The benefits of such a system are clear: savings in overhead and administrative costs at all levels; much greater flexibility up and down the line to design solutions that work; more effective concentration of limited resources; and a much greater likelihood that federal, state and local objectives will be achieved.

Note that grant simplification and consolidation *per se* do not provide significant opportunities for federal deficit reduction. While strategies are proposed in the recommendations to reduce federal, state and local overhead and administrative cost savings, significant reduction in total state and local program dollars is not contemplated in implementing the recommendations in this report, because the vast majority of program funds go to direct services to people in need.

This report reviews the current situation and recommends pragmatic changes that can be taken now to move us together toward a new intergovernmental partnership.

¹ The vast majority of states, localities, and special purpose districts now account for their financial management using *Generally Accepted Accounting Principles (GAAP)*.

² See acknowledgments.

³ See for example Solving the Maze of Federal Programs for Children and Families: Perspectives from Key Congressional Staff, The Institute for Educational leadership, May 1993.

FSL 1: IMPROVE THE DELIVERY OF FEDERAL DOMESTIC GRANT PROGRAMS

Background

In the past twelve years, the trend toward federal categorical grantmaking has escalated dramatically--more than 606 federal grant programs that will spend an estimated \$226.1 billion in 1994. Some grants are distributed on a formula basis; many others on a competitive or discretionary basis; and still others as entitlements depending upon the enrollment of eligible participants.

State and local governments, and the clients and customers of the programs these funds support, face a maze of different and sometimes contradictory rules, regulations, administrative procedures, and program standards and requirements across this myriad of grants.

Federal grantmaking is not an end in itself. Funds are intended to promote federal policy objectives and contribute to the resolution of real problems affecting real people.

Need for Change

Categorical funding fragments the ability of government at all levels to address people's needs holistically. By establishing discrete and often incompatible eligibility, administrative, and other rules and requirements, the proliferation of categorical grants has made governments at all levels less effective and has contributed to the frustration of individuals and families that depend on federal assistance, and to taxpayer and consumer cynicism about government's ability to manage.

Government programs are established as needs are identified. For example, a job training program is established to train the high school drop-out so that she or he

can obtain a job and support the family. Another program is established to help someone recover from drug abuse, be rehabilitated from injuries in an accident, or to help a person recover from a crime. Yet another program is established to help a person obtain safe, decent and sanitary housing that is affordable. All worthwhile programs.

But government service providers are hamstrung to integrate these programs if the customer happens to be the same person: They are operated by separate agencies (often across town from each other), by separate people with different expertise, and in accordance with rules and regulations developed and overseen by different federal agencies.

In the past few years, there has been increasing recognition at all levels of government that individuals and families, subordinate governments, special districts, and businesses and corporations, may simultaneously be the "client" of a wide variety of programs. The failure to see the intergovernmental system from the perspective of the citizen-customer not only perpetuates inefficiency and wasted time, effort, and money, but also leads to poor program design and a significantly reduced probability that the goals and outcomes desired will be achieved.

One by one, categorical grants and their accompanying rules and regulations may make sense; but in combination they often defeat the very purpose for which they were established and undermine, rather than enhance, the ability of service providers and managers to be truly accountable for outcomes.

For example, the Job Opportunity in Basic Skills (JOBS) is funded through the DHHS and is administered at a local level by social services departments. The JOBS goal is to help citizens become self-sufficient (get a job) by providing education, work experience, job search training and job placement.

The Job Training Partnership Act (JTPA) is funded through the Department of Labor and is administered at the local level by community groups known as Private

Industry Councils. The goal of this program is to help citizens become self-sufficient by providing training leading directly to employment.

Although these programs are intended to be compatible, they are seldom used together because: (1) they have different accounting requirements, (2) they have different evaluation procedures, (3) they have different eligibility requirements, and (4) funds from the two programs cannot be pooled, etc. A person wishing to take advantage of both programs, therefore, must go to two sites and be qualified under each program's guidelines. Then they must attempt to arrange the training they need under the programs and coordinate them. On an administrative level, the programs require separate staff, separate offices and other supporting costs. Consolidation of the programs would benefit the customer, the community and the federal government.

Or take, for example, a recent situation where local officials were working to restore a severely blighted but historic area of a city. Federal Community Development Block Grant funds were being used in conjunction with local public and private resources, to create new and rehabilitated, affordable housing for residents of the area. The city wanted to combine these housing and community redevelopment activities with federal job training funds to hire and train unemployed persons in the construction activity. However, this was not possible because of the conflicting regulations of the separate federal programs!¹

Recommendation

- 1. A legislative proposal should be submitted creating the option for state and local governments to consolidate separate grant programs from the bottom up in order to improve the quality of government service to the citizen-customer. (3)**

The Administration should submit a legislative proposal creating the option for state and local governments to improve service delivery by emphasizing integrated service to the customer. This Bottom-Up option would authorize a state or local grant recipient to elect to consolidate funding of a federal program grant with other federal

or local resources when it can be demonstrated that such consolidation will improve service delivery, the ability to meet federal policy goals in a timely and cost effective way, reduce costs and/or significantly enhance customer service. Such a consolidation will allow for the integration of service delivery **at the point of service delivery**, thereby improving the customer friendliness of government services. This would have the collateral effect of simplifying program administration, since the consolidating jurisdiction would be given the power to resolve any conflict between rules or regulations governing consolidated programs.

The bottom-up option would put the main burden of responsibility to rationalize categorical programs and reconcile competing and contradictory rules and requirements on states and localities. Federal executive and congressional oversight would, however, be maintained through rigorous performance reporting with an emphasis on the measurement of outcomes of service delivery, rather than input process and deficiencies in administration.

How Consolidation Would Work. After a grant award of federal funds has been made to a state or local government agency, that recipient agency may elect to consolidate all or part of the grant program with another program serving the same customers². To be eligible for consolidation, the following requirements must be met:

1. The integrated program must demonstrably address the national objectives set forth in the legislation authorizing the federal program to be consolidated;
2. The consolidating agency must define in writing, after appropriate consultation with stakeholder groups having an interest in the program, the measures of effectiveness that will be used to evaluate the success of the consolidated program;
3. If the federal grant fund amount to be consolidated is small (under \$5 million), the consolidation is triggered by written notification to the responsible federal awarding office (and state agency, if applicable) of the

decision to consolidate. The awarding office may respond with comments within thirty days. The notification must:

- a. Describe the way in which the consolidation will provide effective integration of service delivery, including appropriate descriptive information about the integrated program, such as information about the customers served or area covered;
 - b. Explain how the consolidated program will demonstrably address the national objectives of the federal program so consolidated;
 - c. Define the measures of effectiveness that will be used to judge the success of the program;
4. If the federal grant amount being consolidated is large, i.e., over \$5 million, the federal awarding office(s) (and state, if applicable) must approve the proposal to consolidate. Procedurally, the consolidating agency will notify each responsible federal (and state) agency, providing the same information required for small Bottom-Up consolidations.

If a federal agency objects to consolidation, it must respond in writing by describing any deficiencies causing the objection, so that the consolidating agency can revise its consolidation plan. All objections by the responsible federal agency(s) must be resolved for a large consolidation to take effect.

Other Features of the Bottom-Up Program

- > The cross-cutting requirements with which grant recipients must comply (e.g., civil rights compliance) would be unaffected by this approach. (See FSL:4 of this report, Compliance Certification).
- > Regular reporting on progress or service delivery goals to both federal agencies and congressional committees is assumed.
- > One of the primary impediments to effective service delivery integration is the confusing array of often conflicting rules and regulations. Under the concept of

Bottom-Up Grant Consolidation, the consolidating agency is authorized to resolve any conflict between the statutes or regulations of consolidated programs, by selecting which statute or regulation will be followed. The intent is to empower the integrating state or local agency to resolve such conflicts in favor of a customer-oriented program of service.

- > An state or local government which has successfully integrated, or which demonstrates plans to effectively integrate, a federal grant program with other services will be accorded preference in future grant.
- > A federal program which is administered through states is eligible for consolidation at the point of service delivery. If the consolidating agency is a unit of local government, the state as well as the responsible federal agency must be notified of the consolidation, and on large consolidations should be included in the decision-making review.

2. A legislative proposal should be submitted based upon the NGA/NCSL proposal for Federal-State Flexibility Grants. (3)

The National Governors' Association (NGA) and National Council of State Legislatures (NCSL) have proposed a "flexible grant" option to the new administration. This proposal would consolidate "...approximately 55 existing programs, with a funding level of approximately \$12.9 billion in fiscal 1993, into flexibility grants in six broad areas: education reform, workforce quality, air and land environmental management, water quality, defense conversion, and housing."

The proposal was designed to avoid questions concerning jurisdiction of Congressional committees, and reflects considerable thought about existing program interrelationships (see Appendix A).

Support for the NGA/NCSL recommendation must be conditioned upon the fact that there be no increase in grant funds going to overhead costs, or a related diminution in program allocations at the point of service delivery, concerns held by

local governments which now receive some of these funds directly from the federal government.

3. Establish an Interagency Working Group with representation from Federal agencies involved in domestic program service delivery. (2)

The federal government should better organize itself to improve the implementation of federal domestic service delivery by bringing together the cabinet officers in a regular manner. Formalization of an Interagency Working Group at the cabinet level, or use of the Domestic Policy Council, would serve the important need of leading the federal government in a new effort to improve the coordination and integration of major domestic program service delivery initiatives, toward the objective of integrating service delivery.

Additional flexibility is being recommended (see FSL:2 Reduce Red Tape Through Regulatory and Mandate Relief) to give federal agency heads more discretionary authority to improve service delivery by waiving rules and regulations. This new authority also will provide additional incentives for cabinet officers to collaborate on overall improvements in service delivery. In addition to the Interagency Working Group, agency heads should collaborate by bringing management teams together outside of Washington, closer to the point of service delivery, and by working with their intergovernmental partners, state and local government, to improve the service delivery system.

Fiscal Impact

These grant consolidation recommendations will have little fiscal impact on the Federal budget. This is because they are targeted on the improvement of service delivery or the improved execution of existing federal programs. The inevitable (but undeterminable in advance) savings in administrative costs will allow additional resources to become available for service improvement.

¹ This problem actually happened in the Betts-Longworth area of Cincinnati, Ohio.

² "...the same customer," must be liberally construed. Obviously a definition drawn to the specific individual would completely vitiate the concept.

FSL 2: REDUCE RED TAPE THROUGH REGULATORY AND MANDATE RELIEF

Background

The number of new requirements imposed on state and local governments, have increased dramatically during the last decade. As of December 1992, at least 172 separate pieces of federal legislation were in force that imposed mandates on states and localities--many of which are partially or wholly unfunded.¹ Facing a growing burden of complying with new unfunded requirements while experiencing severe budget constraints, state and local governments are demanding relief.

There is no more constant complaint about any federal practice than the imposition of unfunded mandates on lower levels of government. In *Reviving the American Dream*, Alice Rivlin notes that: "The federal government's own fiscal weakness has not made it any less eager to tell states and localities what to do. Indeed, when its ability to make grants declined, the federal government turned increasingly to mandates as a way of controlling state and local activity without having to pay the bill."² She goes on to note that: "Mandates add to citizen confusion about who is in charge. When the federal government makes rules for state and local officials to carry out [whether or not they have the resources to do so], it is not clear to voters who should be blamed, either when the regulations are laxly enforced or when the cost of compliance is high."³

The ability of federal departments and agencies to grant regulatory and mandate relief is more limited than many may appreciate. Authority to waive programmatic regulations is currently limited to research and demonstration projects under the auspices of the Secretaries of Health and Human Services and Agriculture (and is statutorily granted in the Social Security and Food Stamps legislation

respectively). While some latitude exists for other agency and department heads to modify, extend, and adjust executive regulations and compliance deadlines (e.g., in the Environmental Protection Agency) the majority of the most onerous federal mandates and regulations are statutorily imposed, affording little room for negotiation or flexibility.

Need For Change

As in the case of categorical grant programs, while each individual mandate and regulation may seem justified and reasonable, in combination they impose burdens on states and localities that make it less rather than more likely that overall federal goals can be met. The cumulative impact may force states and localities to adopt cost-ineffective strategies simply to achieve simultaneous compliance, or forego the ability to make real progress towards critical benchmarks because they lack sufficient resources to simultaneously achieve all the goals by the statutorily or administratively required deadlines.

Recommendations

1. A legislative proposal⁴ should be submitted granting management flexibility to Cabinet Secretaries and Agency Heads to authorize selective relief from regulations or mandates. (3)

Legislation is urgently required to grant management flexibility to heads of federal departments and agencies with domestic service delivery responsibility to more effectively administer domestic public policy.

The execution of public policy requires that managers have the freedom to manage, to weigh the issues involved when program requirements are in conflict, and to make operational decisions to best realize public policy objectives in the dynamic world of implementation. Such legislation will markedly enhance the ability of administrators to achieve desired national policy outcomes, because they will be able

to significantly improve the efficiency of the intergovernmental service delivery systems.

2. An Executive Order should be issued addressing the issues of unfunded federal mandates and regulatory relief. (2)

The new Executive Order should:

(1) Establish that new federal policy will limit the use of unfunded mandates in legislative proposals and in regulations. An executive order that narrows the circumstances under which departments and agencies can impose new unfunded burdens on subordinate governments is required to set the tone for a new partnership and to signal the Administration's commitment to reform in this area.

(2) Direct federal agencies to review their existing regulations for the purpose of reducing the adverse impacts and removing barriers to effective service delivery.

(3) Charge the Office of Management and Budget, Office of Information and Regulatory Affairs (OIRA), with the responsibility to assure that the adverse impact of new regulations, or legislation proposed by the executive branch, be considered in advance of adoption.

(4) Establish a collaborative process, such as regular meetings with the Director of OIRA, involving federal, state and local officials to work together to understand the effects of existing mandates and regulations, and to serve as a forum for developing solutions to identified problems. (see FSL:6 Strengthen the Intergovernmental Partnership).

Fiscal Impact

At the federal level a reduction in unfunded mandates and regulations will have little or no fiscal impact--although the quality of outcomes will improve significantly. At state and local levels, regulatory relief and more flexible systems for mandate compliance can have significant positive fiscal impact.

¹ < < to be added

² Rivlin, Alice, *Reviving the American Dream*, p.107.

³ Ibid, p.109.

⁴ Suggested text of the legislation is as follows: In administering funds appropriated to an agency for domestic service delivery purposes, the agency head would be granted authority to waive an provision of statute or regulation that the agency head administers in connection with the obligation by the agency head or any use by the recipient of the funds (except for requirements relating to fair housing and non-discrimination, the environment, and labor standards) upon finding that such waiver would demonstrably enhance the accomplishment of national objectives or demonstrably improve the efficiency of service delivery.

FSL 3: SIMPLIFY COST REIMBURSEMENT PROCEDURES

Background

Approximately \$19 billion of the grant funds provided annually by the federal government to states and localities is reimbursement for administrative costs (see Appendix B). Administrative costs include: (1) the federal portion of expenses states incur to administer public assistance programs such as Aid to Families with Dependent Children, Medicaid, and Food Stamps; (2) the direct and indirect administrative expenses associated with federal formula and block grants; and (3) the indirect costs of the various state departments which administer federal discretionary grants.

State and local governments account for administrative costs under a system established twenty-five years ago through OMB circular A-87, "Cost Principles for State and Local Governments," which sets forth principles, standards, and processes for determining charges to federal grants.

Because states and localities incur costs that benefit both the jurisdiction and a wide variety of separate federal programs, a complex allocation process is used to determine the equitable distribution of these common costs between the state and federal government and across multiple federal grant programs.

OMB Circular A-87 requires states to develop a cost allocation plan that must be reviewed and approved by the federal Department of Health and Human Services to determine: (1) the dollar amount of central services, e.g., purchasing, personnel management, financial management, to be allocated to the various state departments; and (2) the methodology for determining the amount of charges for central services which are funded on a billed or fee-for-service basis. In addition, state departments administering federal public assistance funds must receive prior DHHS approval of a

plan for allocating administrative costs among the various programs that they administer.

A number of large local governments must also receive advance approval of cost allocation plans. Other local governments receiving federal assistance are required to develop cost allocation plans and indirect cost proposals and retain them for audit. Also, each state department receiving federal funds negotiates an indirect cost rate with the federal department from which it receives the largest amount of funds.

Need for Change

Concerns regarding the effectiveness of the system in controlling costs as well as accounting and allocation burdens it imposes have been documented in GAO and DHHS audit reports and expressed by federal, state and local officials in interviews.

In recent years, administrative costs have been growing disproportionate to the growth in programs. For example, the federal share of administrative costs for AFDC, Medicaid and Food Stamps increased more than twice as rapidly as did the number of recipients between Fiscal Years 1987 and 1991.¹ Faced with their own fiscal pressures, many states and localities have explicitly pursued policies for administrative cost maximization, sometime utilizing consultants and firms specializing in federal cost reimbursement maximization strategies.

A healthy debate exists about these strategies--with states and localities arguing that they are simply claiming their "fair share" after years of unintentional underreporting, and federal managers asserting that this is simply "gaming the system." Either way, there is little question that uncontrolled growth in administrative costs could continue indefinitely in the face of severe federal deficit constraints.

The DHHS Inspector General has also concluded that not enough is being done at the federal and state levels to ensure that only allowable costs are being paid. The

Inspector General estimates that hundreds of millions of dollars in reimbursement have been paid historically for costs that would be disallowed if the federal government had the time or resources to conduct exhaustive and detailed audits.

In the past several years, the staff resources available in DHHS to audit as well as to review and approve cost allocation plans and negotiate indirect cost rates has decreased significantly, further diminishing the federal capacity to oversee the system.

Clearly, the existing system is overly-burdensome for both states and federal agencies. Huge disparities exist among and between jurisdictions²; states are often required to negotiate indirect cost rates with as many as 14 separate federal agencies; thousands of cost allocation plans are prepared annually for no purpose other than satisfaction of A-87 requirements; and, significant costs are incurred at the state and local level to administer the costing methods such as random moment time studies required by the plans. A draft DHHS audit report states that the system for accounting for administrative costs has "...grown arcane and has slowly degenerated into a highly technical accounting and allocation maze."

Various approaches to changing the system have been considered by members of Congress, OMB, DHHS, the Congressional Budget Office, the National Association of State Budget Officers, and the National Governors' Association, among others. In the past, no single proposal has had sufficient support for adoption. Nevertheless, there remains broad consensus that change is badly needed and OMB is currently preparing a revision to A-87.

Recommendation**Modify OMB Circular A-87 to provide a fee for service option in lieu of cost reimbursement. (2)**

In order to make significant progress, we recommend a fundamentally different approach to the issue of administrative cost reimbursement. OMB should modify its Circular A-87 to provide states and localities with the option of electing a fixed fee for service in lieu of the current method of administrative and overhead cost reimbursement.

This approach would "fix" the rate of administrative costs for individual states and localities based on each jurisdiction's experience, but allow total fees paid to increase or decrease in proportion to program expansion and contraction. The measure to which administrative costs are most sensitive, e.g., the number of clients, number of payments, program costs expended, would be determined for individual programs.

The actual administrative costs would be ascertained for individual states and localities for a base period³ and expressed as a percentage or unit cost of the measure identified. Administrative fees would be paid in the form of a "lump sum" from each program by applying this percentage or dollar amount⁴ to the selected program measure for each year. Although states or localities would have to absorb any deficits in relation to actual costs, they would retain any savings which they could develop through efficient management practices. This would maximize incentives for cost containment and efficiency and provide an opportunity for gainsharing by more efficient jurisdictions.

An administrative fixed fee system reduces costs by eliminating costly preparation and submission of allocation plans and indirect cost proposals, as well as by eliminating the applicability of federal requirements for maintaining cost records, reporting, and federal audits of administrative costs. Further, the fixed fee approach ensures that future changes in administrative funding are proportionate to program

growth, increasing the predictability of federal costs and concentrating precious resources on service delivery. The system would also provide new incentives for cost efficiencies in states and localities.

Fiscal Impact

The annual increase in administrative costs is estimated to be reduced by 3 percent for governments electing the fixed fee for service option. If all states and localities were to elect this option, the total federal savings would be \$4.4-billion during FY 94-98⁵. Since many, but not all, are expected to elect the option the savings will be somewhat less.

¹ The federal share of administrative costs for AFDC, Medicaid and Food Stamps increased by 43.2% between FY 87 and 91, while the number of recipients increased by only 18.2% in the same time frame.

² For example, in fiscal year 1991, Alaska spent \$300 per recipient to administer AFDC, Medicaid, and Food Stamps, while West Virginia spent only \$54.

³ Base period levels would have to be adjusted for one-time non-recurring costs (such as, major information system development) that would otherwise skew or misrepresent the true, on-going administrative burden.

⁴ Dollar amounts need to be adjusted annually for inflation.

⁵ This assumes that the rate of increase from 1994-1998 is the same or less than 1987-1991 and, therefore, that this cost can be avoided.

FSL 4: ELIMINATE NEEDLESS PAPERWORK BY SIMPLIFYING THE COMPLIANCE CERTIFICATION PROCESS

Background

States and localities are required to provide assurance of compliance with eighteen cross-cutting federal requirements¹ every single time a grant application is submitted to an individual Federal agency. These assurances, which consist of two pages in the standard federal grant application for a state and local government, stipulate that the applicant will comply with statutes such as the Civil Rights Act of 1964, the Hatch Act and Davis-Bacon Act(see Appendix C). States and localities submit thousands of grant applications each year and are currently required to recertify each time.

Need for Change

Thousands of pages of duplicative certifications are being needlessly prepared, processed and stored every year.

Recommendation

OMB should modify its requirements to simplify grant compliance certifications.
(2)

OMB should modify Circular A-102, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments," to require that the common grants management rule provide that certifications are to be submitted once to a single federal point of contact. Further OMB should modify the SF-424, "Application for Federal Assistance," to eliminate the assurances and to add the following statement: "By virtue of this signature, the applicant certifies that it:

(1) has submitted the cross-cutting assurances contained in the common rule; (2) will comply with the assurances; and (3) incorporates them by reference into the application."

Fiscal Impact

By eliminating redundant assurances, this recommendation reduces hassles and eliminates needless paperwork, with negligible cost impact.

¹ See Appendix C, "Assurances in Non-Construction Programs,"

FSL 5: SIMPLIFY ADMINISTRATION BY MODIFYING THE COMMON GRANT RULE

Background

Currently, OMB Circular A-102 sets a limit of \$25,000 in the aggregate for the use of small purchase procedures by local governments to secure services, supplies or other property.¹ Small purchase procedures allow a grantee to use relatively simple and informal procurement methods (e.g., obtaining price or rate quotations over the phone from an adequate number of qualified vendors).

Need for Change

Local governments have found the \$25,000 limit to be overly restrictive, especially for the purchase of small vehicles which often exceed this level. For example, to procure one small van with federal funds to satisfy Americans with Disabilities Act requirements, grantees must formally advertise and solicit sealed public bids. This requirement delays the procurement process and prevents grantees from acquiring rolling stock quickly.

Recommendation

OMB should modify Circular A-102 to require that the common grants management rule increase the dollar threshold for small purchases by local governments from \$25,000 to \$100,000. (2)

Fiscal Impact

The proposed change should result in an average savings of \$500 in grantee administrative costs on each small procurement between \$25,000 and \$100,000. It

should also result in lower prices because of increased competition, although it would be difficult to estimate the aggregate impact of this modification on the federal budget.

¹ State Governments are authorized to use their own procedures and are, therefore, not necessarily restricted to \$25,000..

FSL 6: STRENGTHEN THE INTERGOVERNMENTAL PARTNERSHIP

Background

To develop a seamless and high quality system of public services for the twenty-first century, the federal, state and local governments must work together in fundamentally more effective ways than has historically been the case.

However, during the past decade the institutional support for effective intergovernmental problem solving has been even further eroded. Intergovernmental offices in OMB and GAO were vitiated. Funding and political support for the Advisory Commission on Intergovernmental Affairs has been radically reduced. Congressional governmental operations committees have moved their focus away from complicated and often contentious intergovernmental issues, while the Executive Office of the President and departmental intergovernmental relations staff have, in recent years, increasingly turned their attention to constituent service issues, rather than substantive intergovernmental policy, let alone service delivery, concerns.

Need for Change

The decline of intergovernmental institutional support systems has resulted in a sense among state and local officials that the federal government is unconcerned about the intergovernmental effects of its decisions, because of the decreased communication and lack of effective input into federal decision-making.

If we are going to really reinvent government, to make it work better, we must start with the recognition that the preponderance of federal domestic programs are carried out by state and local governments. The partners in this intergovernmental system of delivering public services must work together in finding new ways to

improve joint policy-making and to improve service delivery systems. And the stakes are huge, nothing less than the effective use of \$226.1 billion of taxpayer money!

Recommendations

1. Establish a Service Improvement Advisory Committee of state and local government officials to advise the executive branch regarding the implementation of federal domestic programs. (2)

There is no established forum for state and local government officials to advise the executive branch regarding the development and handling of intergovernmental service delivery issues. By establishing a Service Improvement Advisory Committee, the Administration would take a major step forward in strengthening the intergovernmental partnership.

To be effective, such a Committee must meet regularly so that leaders charged with the execution of federal programs at all three levels of government can collaborate on ways to constantly improve the quality of program delivery. The Committee can also serve as a mechanism for addressing concerns regarding burdensome regulations or mandates.

Although the emphasis of this Committee is program execution, operational and service delivery issues, rather than policy development, there may be good reason to consider consultative relationships with: the Interagency Working Group, the Domestic Policy Council (referenced in FSL 1: Improve the Delivery of Federal Grant Programs), and the White House Intergovernmental Affairs Office.

- 2. The Advisory Commission on Intergovernmental Relations (ACIR) should be supported as an important focal point for the Intergovernmental Partners to collaborate in researching, analyzing, and communicating about mutual concerns.**
(2)

The Advisory Commission on Intergovernmental Relations was created in 1959 by Public Law 86-380. Its primary mandate is to provide substantive research and public policy analysis on legal, policy, and administrative issues affecting federal intergovernmental processes and relations. In order to effectively act in that role, the ACIR has a unique charter of powers and representation that make it unique to the Federal Executive System. For example, the Commission has the authority to hold public hearings and take testimony as well as hold *private* meetings with members of the public and private sectors without the pressure of media and public scrutiny. The Commission's 26 members must consist of bipartisan representatives from both the legislative and executive branches of the federal government, the private sector, and Mayors and Governors from state and local governments. Although not realized in recent years, this unique but powerful authorization of powers and research capabilities gives ACIR the potential to serve as a very important vehicle for federal intergovernmental relations.

- 3. The Service Improvement Advisory Committee should provide leadership in developing appropriate benchmarks and performance measures to improve our understanding of public service delivery effectiveness.**
(2)

A systematic process to define and measure national benchmarks should be undertaken and states and localities that have not already done so should be encouraged to initiate such efforts. Benchmarks, performance and outcome measures should be incorporated into federal budget practice and support should be given to ensure timely and effective implementation of the Government Performance and Results Act of 1993, recently signed into law by the President.

We believe that several actions can help move the nation in this direction. Development of national economic and social benchmarks can give all levels of government a clear framework for policy choice and priority setting. A focus on citizen-customers of federal programs can help us to rethink and redesign more effective intergovernmental program solutions. And better, more programmatic systems for budget planning and implementation (such as those recommended by NPR teams looking at Mission-Driven, Results Oriented Budgeting, Organizational Structures and Program Design) can help to reinforce the outcome focus in intergovernmental collaboration.

Fiscal Impact

No negative fiscal impact can come from better, more results-oriented, collaborative intergovernmental problem solving, or from renewed emphasis on accountability and performance measurement. While it is difficult to place a pricetag on the savings and cost avoidance that can potentially result, there is little doubt that the impact will be favorable at all levels--in terms of cost, public credibility, customer satisfaction, and more successful policy outcome.



National Conference of
State Legislatures



NATIONAL
GOVERNORS'
ASSOCIATION

March 11, 1993

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

In response to your vision for restructuring government, the National Governors' Association and the National Conference of State Legislatures are pleased to submit to you "Proposal for Federal-State Flexibility Grants." These flexibility grants, which we are asking you to include in your fiscal 1994 budget request to Congress, would provide states with more opportunities to innovate and to tailor responses to the unique needs of our citizens.

These grants could be a first step toward broader, more ambitious reforms. Flexibility grants would allow state legislators and governors to integrate funding from several different sources. They would encourage state governments to design their own strategies for moving forward on a range of domestic issues. They would relax stifling federal restrictions and would allow state leaders to focus once again on solving problems rather than on processing stacks of federal paperwork.

The enclosed proposal would combine approximately 55 existing programs, with a funding level of approximately \$12.9 billion in fiscal 1993, into flexibility grants in broad areas: education reform, workforce quality, air and land environmental management, water quality, defense conversion, and housing.

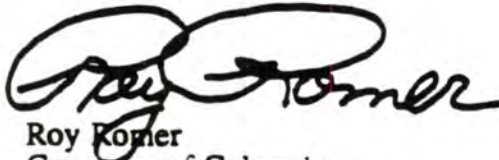
We believe that there are many other programs that could be combined in this way. In developing this proposal, we have attempted to be pragmatic. We have deliberately avoided possible flexibility grants that would cause questions concerning jurisdiction of congressional committees. We have also eliminated grants that involve local governments.

These flexibility grants would help reverse unfortunate trends toward centralization of decision making in our federal system, encumbering programs with unnecessary stipulations and regulations, and fragmented and inefficient spending for domestic programs. The nation's governors and state legislators look forward to working with you in refining this proposal and in moving it through Congress.

The President
March 11, 1993
Page 2

Please feel free to contact either one of us or Ray Scheppach or Bill Pound, organizations' executive directors, if you have any questions.

Sincerely,



Roy Komer
Governor of Colorado
Chairman, NGA



Art Hamilton
Minority Leader, Arizona Ho
President, NCSL

cc: Leon Panetta
Bob Rubin
Alice Rivlin

A PROPOSAL FOR FEDERAL-STATE FLEXIBILITY GRANTS

Financing the Implementation of Education Reforms
Improving Workforce Quality
Targeting High-Priority Environmental Needs Through Flexible Funding
Increasing State Involvement in Defense Firm Conversion and Adjustment
Increasing Access to HOME Affordable Housing Program Funds
and
Consolidating Efforts Within the Motor Carrier Safety Program

Developed by

The National Governors' Association
and
The National Conference of State Legislatures

March 11, 1993

FEDERAL-STATE FLEXIBILITY GRANTS

The National Conference of State Legislatures and the National Governors' Association have worked together over the past several years to promote the states' ability to innovate and to deliver services efficiently and creatively. NCSL, for example, has promoted federal legislation that would limit unfunded federal mandates. NGA has campaigned for the Legislative Reorganization Act of 1990 to ensure an expedited federal waiver process for states. Together, the organizations developed comprehensive and detailed proposals for consolidating several existing federal aid programs to state government.

A common theme pervades these and other projects. Governing in the United States works best when it is shared appropriately among federal, state, and local governments. We believe that states must have the flexibility to innovate and to respond to the unique and diverse needs of their residents. We believe that programs and services are most effective when it is the level of government that is accountable for them.

The change currently taking place in Washington offers fresh opportunities to adopt remedies for problems affecting the state-federal partnership. The problems are:

- the proliferation of relatively small categorical grants;
- the burden of legislative and regulatory requirements attached to block grants;
- the rigidity of current federal grant programs and the constraints and restrictions that hamper states' ability to respond to the needs of their residents;
- federal statutes and regulations that prevent state-to-state transferring funds among related programs;
- shrinking federal financial support for domestic discretionary programs; and
- the accelerating propensity of the federal government to add additional services and programs without adequate funding.

In combination and alone, these problems stifle innovation, reduce accountability, and degrade public services.

There are several ways to attack these problems. One, which has varying degrees of bipartisan support over the past two decades, combines a single grant with two or more federal programs dealing with related problems.

There are several current examples: the child care block grant, the community development block grant, and the social services block grant. In his State of the Union address, President Bush proposed combining more than \$12 to \$15 billion worth of "consolidated" grants. In Mandate for Change, David Osborne has advocated consolidating "more than 400 categorical and block grants into broad Challenge Grants."

This proposal, developed jointly by the National Conference of Legislatures and the National Governors' Association, offers several suggestions for beginning this process of consolidation. In addition, it proposes changes to other existing federal programs, streamlined and coherent waiver processes, that also would improve effectiveness and accountability of programs.

The proposal's six sections deal with education, workforce, environment, housing, defense conversion, and social services. The suggestions are consistent with criteria used in 1990 by NCSL and NGA to select programs for consolidation. In the interest of expediting consideration of suggestions, we have also tried to respect, as much as possible, the jurisdictional authority of congressional subcommittees and committees.

FINANCING THE IMPLEMENTATION OF EDUCATION REFORMS

OPTION 1: EDUCATION REFORM FLEXIBILITY GRANT

Background

The longest standing and largest block grant to state and local elementary and secondary education is provided under Chapter Two Elementary and Secondary Education Act of 1965. This grant for improving elementary and secondary programs was expanded through both the Education Consolidation and Improvement Act of 1981 and the Elementary and Secondary Schools Improvement Amendments of 1988. Using the Chapter Two program as a point of departure, this proposal combines into a single grant the programs aimed at education reform that are coordinated by the states.

Proposal

Create a state-level Education Reform Flexibility Grant by combining the following existing elementary/secondary education programs into a single grant to the states.

Elementary and Secondary Education

<u>Program</u>	<u>Fiscal 1993 Appropriations (in millions)</u>
Chapter One--State Administered Grants	\$ 60.7
State Program Improvement Grants	25.9
Chapter Two--State Block Grants	435.4
Eisenhower Math and Science	246.0
Foreign Language Assistance	10.9
Immigrant Education	294.6
Drug Free Schools--State Grants	498.5
Education for Homeless Youth	24.8
Follow-Through	3.4
State Agency Program:	
Education of Neglected and	35.4
Delinquent Children	
Total	<u>\$1,640.6</u>

States would be required to submit a plan outlining current and systemic reform efforts along with a series of performance indicators relate, where appropriate, to achieving the National Education Goals indicators could include student drop-out rates, student absenteeism graduation rates. The state would report annually to the Secretary of Education on changes in the indicators.

Postsecondary Education

Provide states with the authority to target State Student Incentive Grant (SSIG) by assisting students enrolled in teacher education programs training high quality teachers, both pre-service and in-service, consistent with the state's systemic reform efforts. The SSIG program is the only funding source for states in the postsecondary education area. The dollars are granted to students and institutions based on financial need. In fiscal 1993, \$72.5 million was appropriated.

Justification

Because of its flexibility, the Chapter Two Block Grant has proven effective in supporting state efforts to improve education systems as part of the effort to achieve the nation's six education goals. The Education Flexibility Grant would expand on the Chapter Two Block Grant to states with the incentive along with the needed flexibility to initiate and continue systemic reform.

OPTION 2: INCENTIVE GRANTS FOR STATE-LEVEL EDUCATION REFORM

Background

The longest standing and largest block grant to states and localities for elementary and secondary education is provided under Chapter Two of the Elementary and Secondary Education Act of 1965. This grant for elementary and secondary programs was expanded through both the Education Consolidation and Improvement Act of 1981 and the Elementary and Secondary Schools Improvement Amendments of 1988. Using the Chapter Two program as a point of departure, the proposal below combines programs that are coordinated by the states into a single grant.

Proposal

Permit states to treat funds allocated under several federal categorical programs as a single supplementing flexibility grant for elementary and secondary education. The grant serves as an incentive for states to initiate or continue existing systemic reform efforts directed toward achieving the National Education Goals. To merge funds from two or more programs, states would be required to submit to the Secretary of Education a plan identifying current and future statewide initiatives facilitating state-level education reform and the achievement of the goals. The state plan would include assurances that services currently provided to discrete populations under separate programs would remain consistent with the level of appropriations provided for those programs. Specific programs would include the following:

Elementary and Secondary Education

Program

Fiscal 1993 Appropriation
(in millions)

Chapter One—State Administered Grants	\$ 60.7
State Program Improvement Grants	25.9
Chapter Two—State Block Grants	435.4
Eisenhower Math and Science	246.0
Foreign Language Assistance	10.9
Immigrant Education	294.6
Drug Free Schools—State grants	498.5
Education for Homeless Youth	24.8
Follow-Through	8.4
State Agency Program:	
Education of Neglected and	
Delinquent Children	35.4
Total	<u>\$1,640.6</u>

Postsecondary Education

Provide states with the authority to target State Student Incentive (SSIG) by assisting students enrolled in teacher education programs training high quality teachers, both pre-service and in-service, consistent with the state's systemic reform efforts. The SSIG program is the only funding source for states in the postsecondary education area. The dollars are granted to students and institutions based on financial need. In fiscal 1993, \$72.5 million was appropriated.

Justification

Because of its flexibility, the Chapter Two Block Grant has proven effective in supporting state efforts to improve education systems as part of the effort to achieve the nation's six education goals. Incentive grants for state-level education reform would expand on the Chapter Two Block Grant to provide states with the incentives along with the needed flexibility to initiate or continue systemic reform efforts.

OPTION 3: GENERAL WAIVER AUTHORITY

Background

Currently, the Secretary of Education has minimal waiver authority to assist states with the regulatory relief needed to permit state-level systemic reform in education.

Proposal

Elementary and Secondary Education

Provide the Secretary of Education with general authority to waive regulations in selected programs. States would be required to submit a plan of current and future systemic reform efforts along with a request to waive specific regulations. The Secretary could waive regulations in the following program areas: Chapter Two, Jacob Javits Gifted and Talented Education Act, Drug Free Schools and Communities Act, Head Start Transition Act, Head Start Through Act, Dwight D. Eisenhower Math and Science Act, Carl Albert Vocational and Applied Technology Act, Job Training Partnership Act, English Language Immigrant Education Act, National School Lunch Act, and the Child Nutrition Act.

No limit would be placed on the number of states that could apply for waivers. A similar proposal was offered in the Neighborhood Revitalization and Improvement Act.

Postsecondary Education

Provide states with the authority to target State Student Incentive Grants to assisting students enrolled in teacher education programs that are to become high quality teachers, both pre-service and in-service, consistent with the state's systemic reform effort. The SSIG program is the only direct source for states in the postsecondary education area. The remaining \$100 million is granted to students and institutions based on financial need. In 1993, \$72.5 million was appropriated.

Justification

By providing such waiver authority, states can proceed with systemic reform efforts in the absence of federal barriers.

IMPROVING WORKFORCE QUALITY

OPTION 1: WORKFORCE IMPROVEMENT FLEXIBILITY GRANT

Background

Presently there are 125 different federal employment and training programs for adults and out-of-school youth administered by fourteen different agencies. At a time when states and localities are attempting to provide comprehensive, customer-driven services, they are constrained by the different eligibility, reporting, and program requirements of the myriad programs.

Proposal

States with Human Resource Investment Councils could be permitted to use a Workforce Improvement Flexibility Grant, providing funds for a wide range of workforce development programs and sidestepping a multitude of complex program requirements. Governors in a number of states have established Human Resource Investment Councils to coordinate adult and vocational education and job training programs. The state councils were authorized by federal law this fall, and a number of states are still in the process of creating them. States that have established Human Resource Investment Councils are, by definition, engaged in a great deal of coordination with existing systems. Instead of accessing job training and adult and vocational education monies through existing programs, if the Human Resource Investment Council so recommends, the state could take advantage of a Workforce Improvement Flexibility Grant. By giving sign-off to the Human Resource Investment Council, the key players will have bought into the flexibility grant.

States opting for the Workforce Improvement Flexibility Grant could use a single source of funds to provide adult and vocational education training and placement services as long as the state satisfies accountability measures.

In states where either there is no Human Resource Investment Council or the council does not want to access the Workforce Improvement Flexibility Grant, monies would continue to flow through existing programs.

Programs included in the flexibility grant:

Adult Education

Fiscal 1993 Appropriation
(in millions)

Adult Education: State Administered Programs	\$ 254.6
Adult Education for the Homeless	9.6
Workplace Literacy Partnerships	18.9
Literacy Programs for Prisoners	4.9
Total	<u>\$288.0</u>

Vocational Education

Vocational Education: Basic Grants to States	\$ 972.8
Vocational Education:	34.7
Consumer and Homemaking Education	
Vocational Education: State Councils	8.9
Bilingual Vocational Training	2.9
Vocational Education:	11.8
Community Based Organizations	
Tech Prep	104.2
Total	<u>\$1,135.3</u>

Training and Employment

Employment Service	\$ 810.9
Senior Community Service Employment	5.9
Employment and Training	
Assistance for Dislocated Workers	567.0
Youth Employment and Training Program	1,367.4
Veterans Employment Program	9.0
Adult Job Training Program	1,045.0
Defense Conversion Assistance	150.0
Defense Diversification Program	75.0
Trade Adjustment Assistance	211.0
Job Training for the Homeless	12.5

Total	<u>\$4,253.7</u>
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Total: Workforce Improvement Grant	<u>\$5,389.0</u>
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A number of criteria could be adopted to ensure accountability, including the following.

- Funds could be made available to the state only upon submission of a plan that demonstrates how funds will be used to foster workforce development.
- States could be required to distribute to local communities a proportion of funds that otherwise they would have been required to allocate.
- States could be required to serve individuals with special needs to the same degree that they would have otherwise, for example, disadvantaged individuals, disabled individuals, migrant workers, and veterans.
- States could be required to file annual reports to provide sufficient information for the legislative oversight of the states' use of funds under the grant.

OPTION 2: WORKFORCE QUALITY WAIVERS

Background

Presently, there are a multitude of definitions, reporting requirements, performance standards and the like that inhibit the provision of a coordinated system of workforce training services.

Proposal

States that have established Human Resource Investment Councils should be permitted to apply for waivers from law and regulations of, for example, the Job Training Partnership Act, the Carl Perkins Vocational and Technical Education Act, the JOBS Program authorized in the Family Security Act, the National and Community Service Act, the Adult Education and Vocational Rehabilitation Act, the Stewart McKinney Homeless Assistance Act (which authorizes a job training program for the homeless), the Wagner-

Act (the Employment Service), and the Food Stamp Employment and Training Program authorized in the Food Stamp Act. - States should be eligible to for waivers that would facilitate improved services, specifically waive regulation or law that prevent the application of consistent practice programs.

The waiver authority should include protections relating to, for example, distribution of funds and eligibility for services.

To facilitate an interdepartmental approach to waivers, a federal should be established that includes, for example, the Secretaries of Education, HHS, and Agriculture.

Justification

Both the Workforce Improvement Flexibility Grant and the Workforce Waivers will enable states to integrate more effectively a variety of state and federal programs designed to provide adults and youth with opportunities for education and training throughout their lifetimes.

TARGETING HIGH-PRIORITY ENVIRONMENTAL NEEDS THROUGH FLEXIBLE FUNDING

Background

The President's fiscal 1993 budget includes a total of more than \$500 million for fifteen separate EPA grants to states for the management of environmental programs. These grants are for the administration of specific programs for clean air, clean water, and hazardous waste. Generally these categories of programs require funds to be spent on specified activities, regardless of particular conditions or relative importance of those activities in a state. For example, funds are available for hazardous waste management only for that purpose, even though in a particular state environmental and health protection may be better served by investing in air pollution control instead of hazardous waste management.

Proposal

Two flexibility grants are proposed: one for air and land resources and one for water resources. In addition to water-related environmental management grants, the water flexibility grant includes the State Revolving Fund program for the construction of sewage treatment plants.

Air and Land Environmental Management Flexibility Grant

<u>Program</u>	<u>Fiscal 1993 Appropriation (in millions)</u>
Clean Air Program	\$ 174.5
Public Water Systems	58.9
Underground Injection	10.5
Special Studies	.5
Hazardous Waste	93.3
Underground Storage Tanks	9.0
Pesticide Enforcement	15.9
Pesticide Program	15.9
Radon Program	8.1
Toxics Enforcement	5.1
Total	<u>\$ 391.7</u>

Water Quality Flexibility Grant

<u>Program</u>	<u>Fiscal 1993 Appropriation (in millions)</u>
State Revolving Loan Fund	\$ 2,500.0
Clean Water Management	81.7
Clean Lakes	4.0
Nonpoint Source	50.0
Wetlands	10.0
104 (b) Special Studies	16.5
Total	<u>\$ 2,662.2</u>

Justification

Consolidation of these categorical grants into two block grant flexibility for states to allocate available funds among the program each block, would enable states to better prioritize their efforts and the specific environmental conditions and needs in the state. The grants also would eliminate separate applications and allow better use of state programs on high-priority environmental problems. In particular, resources could be used more easily to address multifaceted, related environmental problems in a specific geographic area by focusing attention on the area to be protected (e.g., an urban area or an estuary) rather than its individual components (e.g., its air or its wetlands).

INCREASING STATE INVOLVEMENT IN DEFENSE FIRM CONVERSION AND ADJUSTMENT

Background

The fiscal 1993 Defense Authorization Act and Defense Appropriations Act together created over twenty-five programs, committees, or task forces to assist workers, businesses, and communities cope with reduced federal defense spending. States play a role in assisting each affected group. However, this proposal is directed only toward states aimed at using federal funds to assist businesses adversely affected by defense downsizing.

Proposal

Consolidate these newly created programs into a smaller number of flexible programs. Specifically provide an opportunity for states to partner in determining feasible projects, developing industry-university-government consortia and regional cooperative efforts, and locating firms. Existing state programs are accessible to small and medium-sized firms who could most effectively be assisted through these programs.

Program

Fiscal 1993 Appropriation
(in millions)

Dual-Use and Critical Technology Development:

Defense Advanced Research Projects Agency (DARPA) Dual Use Critical Technology Partnerships Program	\$ 97.0
DARPA Commercial-Military Integration Partnerships	48.5
Advanced Manufacturing Technology Partnerships	24.3
DoD Manufacturing Technology	97.0
Dual Use Technology and Industrial Base Extension	97.0
Regional Technology Alliances Assistance Program (DoD funds to be disbursed in consultation with the Departments of Commerce and Energy)	97.0
Total	<u>\$460.8</u>

Alternative: Administrative Action to Promote State-Federal Partnership

Administrative action could be taken to direct the Department of Defense and other affected agencies to draft regulations that permit states to enter into partnership with the federal government in implementing these programs.

might include language permitting states to apply for waivers from certain program requirements to utilize these funds in implementing comprehensive defense conversion programs. Another option could be language making key players in the awarding of competitive grants, especially when matching funds are involved.

Justification

Several states have already invested in programs to assist companies in their states to convert from defense-related production to commercial production. Nearly all states have established public-private programs in some of these areas: promoting technology transfer among companies; technology transfer from research laboratories into commercial applications; manufacturing extension services; and business modernization through adopting existing technologies and adopting modern business practices (just-in-time inventory, total quality management, etc.).

Businesses seeking assistance in defense conversion could easily contact programs that would work with the federal government to establish, promote, and develop successful program models and strategies. As partners, businesses could assist in implementing national defense conversion/adjustment programs by matching business needs with available expertise, by developing partnerships and consortia to carry out conversion projects, or by evaluating competing proposals. States could become effective managers of these efforts. The federal government would save time and money and ensure access to assistance for small- and medium-sized businesses by developing an effective state-federal partnership.

INCREASING ACCESS TO HOME AFFORDABLE HOUSING PROGRAM FUNDS

Background

The HOME Investment Partnerships Program (HOME) was established under the National Affordable Housing Act of 1990. Designed as a federal, state, and local partnership to ensure more housing for low-income persons and families, HOME was intended as an incentive for states and localities to take a leadership role in providing affordable housing. Currently 40 percent of HOME funds go to states. However, statutory and regulatory requirements make it an expensive program to administer, especially for a relatively new program.

Proposal

By amending the HOME program, both through regulatory changes and statutory changes, the federal government could achieve its goal of more affordable housing, and states and localities could better use the funds to meet housing needs. Simplifying the program, making the targetting consistent with other housing programs, reducing the paperwork requirements, and reestablishing states and localities as primary partners would increase state participation in the program. Onerous regulatory requirements for the comprehensive affordability strategies (CHAS), which must be filed each year for program

eligibility, are only one example. Others include a controversial transfer and accounting scheme, a bias against new construction stiffer matching requirements, and prohibitively expensive project requirements. Partial improvements were achieved through legislation in 1992. However, action at this time could ensure that HOME funds are available across the country.

Program

Fiscal 1993 Appropriation
(in millions)

HOME Investment Partnerships Program

\$1,000.0

Alternative: Regulatory Relief within the HOME Program

By administrative action alone, the administration could improve the efficiency of the HOME program. Current CHAS regulations need to be simplified or waived for states to allow submission of state documents that address many of the same issues as the CHAS but in a more efficient manner. HUD could work with states on sections of the plan found deficient and that related to the top priorities of both HUD and the state. Regulations for HOME also could be streamlined to encourage development. By establishing simple and clear guidelines for eligibility, states and local jurisdictions could readily determine the applicability of HOME funds to a given project. Efforts to attain consistency with other programs, such as the low-income housing tax credit or revenue bonds, would also help.

Justification

The HOME program was established because more affordable housing is universally recognized as an important component to solving the problem of homelessness. However, complicated program restrictions have deterred jurisdictions from applying for funds. For example, existing restrictions were aimed at guaranteeing that funds not be directed only to new construction; that state match be made only of general revenue; that state funds be included in each and every project where HOME funds are directed; that states establish five-year plans to meet housing needs; that states publicly state where their resources would be directed, even though funding levels remained uncertain; that a percentage of the funds be directed to community organizations whether or not they existed in all communities; that states would collect data on homeless individuals including their use of drugs, alcohol, mental illness or family abuse contributed to their homelessness; that states develop more extensive inventories of existing housing to determine not only the location of housing in need of rehabilitation, but whether such housing is occupied by elderly or disabled families with children, racial minorities, etc. Many of these are good policy goals, but together they create an unmanageable and unnecessary burden. Easing these requirements and promoting a genuine partnership would ensure more affordable housing and a more cost-effective use of scarce HOME funds.

CONSOLIDATING EFFORTS WITHIN THE MOTOR CARRIER SAFETY PROGRAM

Background

Motor Carrier Safety Assistance Program funds are distributed by federal states that have adopted compatible federal safety regulations. The match is 20 percent. Under review this year, federal hazardous safety permit and registration programs have been slow to start. are levied on shippers and carriers and are used to finance state response grants. State and local governments also operate hazardous permit and registration programs. The scope of these programs is restricted by federal law which limits state and local governments to collect fees that are "reasonable and used for transportation related purposes."

Proposal

Consolidate programs related to motor carrier safety enforcement, inspection, permitting, and registration requirements. Eliminate duplicative requirements and unify state oversight of all motor carrier safety.

Program

Fiscal 1993 Appropriation
(in millions)

Motor Carrier Safety Assistance Program	\$ 65
Federal Registration and Permit Program	11.3
Total	<u>76.3</u>

Justification

States presently perform the preponderance of motor carrier safety inspection and enforcement. This includes efforts related to hazardous materials transportation as well. The elimination of the dual registration and permit programs to enable states to administer programs under federal standards would allow states to consolidate all enforcement efforts under a widely implemented program structure, the Motor Carrier Safety Assistance Program.

ATTACHMENT B: THE PROGRAMMATIC, FINANCIAL, AND ADMINISTRATIVE STRUCTURE OF THE GOVERNORS' FLEXIBILITY GRANT PROPOSAL

Programmatic Structure

Flexibility grants are intended to increase the effectiveness of programs by allowing state government greater conformity in the design and delivery of services. To provide such conformity, flexibility grant authorizing legislation should:

- Include a clear statement of purpose, including goals of the flexibility grant and a description of the measures that will be used to judge the effectiveness of the use of flexibility grant. (Such legislation should leave to states the specification of services and programs to be used to accomplish those purposes.

- Clearly define any limits on financial eligibility for serving the flexibility grant. (Such legislation generally should include categorical eligibility requirements, programmatic or other nonfinancial eligibility criteria not directly related to the purpose of the flexibility grant.)
- Authorize limited transfer of funds among or between flexibility grants to provide the conformity to accommodate differences in priorities. For example, 15 percent of flexibility grant X may be used for flexibility grant Y.

Financial Considerations

While flexibility grants increase state options and simplify administration, there is a continuing concern regarding the stability and responsiveness of future congressional appropriations. There is also a concern that uncertainty regarding federal audit standards may unnecessarily reduce flexibility and innovation. To address these concerns, flexibility grant legislation should:

- Make initial allocations of funds based on the application of a formula.
- Provide funding to allow for the upward adjustment in all grants based on the use of 1990 census data in the calculation of payments.
- Provide funding to allow for the upward adjustment in all grants based on increases for at-risk or targeted populations in addition to current formulas.
- Guarantee at least level funding plus the rate of inflation over a period of five years. This could be done by enacting a permanent appropriation or an entitlement.
- Should federal or state audits determine that flexibility grants are being spent in a manner inconsistent with the purpose of the flexibility grant, allow the funds subject to an audit exception to remain available for acceptable purposes for a period of 12 months subsequent to the determination.
- If flexibility grants contain matching requirements or maintenance-of-effort provisions, provide that such requirements be waived during severe economic downturns. Otherwise, the inability of states to provide matching funds or maintain program funding levels would result in a reduction in federal support.

Administrative Requirements

Flexibility grants are intended to improve government efficiency by eliminating unnecessary and duplicative administrative expenses. To accomplish these ends, it is critical that new and existing flexibility grants address the following concerns:

- Funds should be made available to the states upon submission of a state plan that demonstrates that funds will be used in a manner consistent with the authorizing legislation.
- In general, federal mandates should be limited to those related to the flexibility grant itself. If other requirements are to be imposed, the states should be allowed to certify compliance without the submission of a detailed plan.
- States should be given broad authority to determine the state or agencies to be held responsible for the administration of flexibility grant programs.
- States should be authorized to use existing legislative or regulatory procedures and/or to establish alternative methods to ensure input into the development of a state plan for the use of flexibility grant funds.
- States should be authorized to use existing state procedures for financial management and auditing of flexibility grant funds.
- States should have the authority to commingle flexibility grants with related programs as long as the overall purpose of the integrated program is consistent with the purpose of the flexibility grant.
- States should be authorized to establish and/or waive confidentiality requirements as necessary to facilitate the integration of programs.
- Flexibility grant funds may be used to fund their proportionate share of consolidated case management activities.
- Authorizing legislation shall not include limitations on administrative costs.
- Federal approval should not be required for the acquisition of processing systems.
- States should be expected to file annual reports that will provide sufficient data for the legislative oversight of the states' funds under the flexibility grant. Such data should be relevant to the state plan, and should not be standardized except as necessary to provide information relative to the performance measures established by statute.

These suggested provisions are based on the assumption that existing state laws and procedures are sufficient to ensure that funds are expended in a manner consistent with legal and political accountability. While it is reasonable for the federal government to require assurances that funds are being expended for the purposes set forth in federal legislation, there is no need for federal intervention in state administrative or legislative processes. Existing state programs already manage the distribution of state tax revenues far in excess of the value of any federal flexibility grants.

**SCHEDULE IDENTIFYING THE ESTIMATED AMOUNT
OF ADMINISTRATIVE DOLLARS THAT'S REIMBURSED TO
STATE AND LOCAL GOVERNMENT FOR THE
ADMINISTRATION OF FEDERAL PROGRAM - FISCAL YEAR 1994**

(In Billions)

Total Federal Grant Outlays	<u>\$226.1</u>	
DHHS Grant Outlays	<u>128.6</u>	57%

Admin. Cost for
Major HHS Programs:

Medicaid	\$3.12	
Child Support Enforcement	1.75	
AFDC	1.50	
Foster Care	<u>1.20</u>	
Subtotal	<u>\$7.57</u>	

Admin. Cost for
Major Non-HHS PA Program:

Food Stamps	<u>1.35</u>	
Total Major PA Programs		
Admin. Costs	<u>\$8.92</u>	\$ 8.92

Total All Other Entitlement
and Discretionary Programs (HHS):

o Discretionary	\$ 8.35	
o Other Entitlement	<u>12.70</u>	
TOTAL	21.05 (1)	
Times Conservative Admin. Cost %	<u>.10</u>	
	<u>\$ 2.11</u>	<u>2.11</u>
Total HHS & Food Stamp Admin. Cost		<u>\$11.03</u>

All Other Federal Department:

o All Other Benefits Minus		
Food Stamps	\$80.16	
o Times Conservative		
Admin. Costs %	<u>.10</u>	
	<u>\$ 8.02</u>	<u>8.02</u>

Total Admin. Cost for Grants	<u>\$19.03</u>	(2)
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(1) Includes Block Grants awarded to States of which legislation authorizes administrative costs up to 25%. A conservative figure of 10% was used to average the percentages out among the 7 block grant programs.

(2) Does not include administrative costs that are associated with over \$200B awarded for contracts annually or the administrative costs incurred by the some 39,000 local governmental entities that administer Federal programs, i.e., Public Assistance Programs and Local Educational Agencies.

ASSURANCES — NON-CONSTRUCTION PROGRAMS

Note: Certain of these assurances may not be applicable to your project or program. If you have questions, please contact the awarding agency. Further, certain Federal awarding agencies may require applicants to certify to additional assurances. If such is the case, you will be notified.

As the duly authorized representative of the applicant I certify that the applicant:

1. Has the legal authority to apply for Federal assistance, and the institutional, managerial and financial capability (including funds sufficient to pay the non-Federal share of project costs) to ensure proper planning, management and completion of the project described in this application.
2. Will give the awarding agency, the Comptroller General of the United States, and if appropriate, the State, through any authorized representative, access to and the right to examine all records, books, papers, or documents related to the award; and will establish a proper accounting system in accordance with generally accepted accounting standards or agency directives.
3. Will establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain.
4. Will initiate and complete the work within the applicable time frame after receipt of approval of the awarding agency.
5. Will comply with the Intergovernmental Personnel Act of 1970 (42 U.S.C. §§ 4728-4763) relating to prescribed standards for merit systems for programs funded under one of the nineteen statutes or regulations specified in Appendix A of OPM's Standards for a Merit System of Personnel Administration (5 C.F.R. 900, Subpart F).
6. Will comply with all Federal statutes relating to nondiscrimination. These include but are not limited to: (a) Title VI of the Civil Rights Act of 1964 (P.L. 88-352) which prohibits discrimination on the basis of race, color or national origin; (b) Title IX of the Education Amendments of 1972, as amended (20 U.S.C. §§ 1681-1683, and 1685-1686), which prohibits discrimination on the basis of sex; (c) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794), which prohibits discrimination on the basis of handicaps; (d) the Age Discrimination Act of 1975, as amended (42 U.S.C. §§ 6101-6107), which prohibits discrimination on the basis of age; (e) the Drug Abuse Office and Treatment Act of 1972 (P.L. 92-255), as amended, relating to nondiscrimination on the basis of drug abuse; (f) the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (P.L. 91-616), as amended, relating to nondiscrimination on the basis of alcohol abuse or alcoholism; (g) §§ 523 and 527 of the Public Health Service Act of 1912 (42 U.S.C. 290 dd-3 and 290 ee-3), as amended, relating to confidentiality of alcohol and drug abuse patient records; (h) Title VIII of the Civil Rights Act of 1968 (42 U.S.C. § 3601 et seq.), as amended, relating to nondiscrimination in the sale, rental or financing of housing; (i) any other nondiscrimination provisions in the specific statute(s) under which application for Federal assistance is being made; and (j) the requirements of any other nondiscrimination statute(s) which may apply to the application.
7. Will comply, or has already complied, with the requirements of Titles II and III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646) which provide for fair and equitable treatment of persons displaced or whose property is acquired as a result of Federal or federally assisted programs. These requirements apply to all interests in real property acquired for project purposes regardless of Federal participation in purchases.
8. Will comply with the provisions of the Hatch Act (5 U.S.C. §§ 1501-1508 and 7324-7328) which limit the political activities of employees whose principal employment activities are funded in whole or in part with Federal funds.
9. Will comply, as applicable, with the provisions of the Davis-Bacon Act (40 U.S.C. §§ 276a to 276a-7), the Copeland Act (40 U.S.C. § 276c and 18 U.S.C. §§ 874), and the Contract Work Hours and Safety Standards Act (40 U.S.C. §§ 327-333) regarding labor standards for federally assisted construction subagreements.

10. Will comply, if applicable, with flood insurance purchase requirements of Section 102(a) of the Flood Disaster Protection Act of 1973 (P.L. 93-234) which requires recipients in a special flood hazard area to participate in the program and to purchase flood insurance if the total cost of insurable construction and acquisition is \$10,000 or more.
11. Will comply with environmental standards which may be prescribed pursuant to the following: (a) institution of environmental quality control measures under the National Environmental Policy Act of 1969 (P.L. 91-190) and Executive Order (EO) 11514; (b) notification of violating facilities pursuant to EO 11738; (c) protection of wetlands pursuant to EO 11990; (d) evaluation of flood hazards in floodplains in accordance with EO 11988; (e) assurance of project consistency with the approved State management program developed under the Coastal Zone Management Act of 1972 (16 U.S.C. §§ 1451 et seq.); (f) conformity of Federal actions to State (Clear Air) Implementation Plans under Section 176(c) of the Clear Air Act of 1955, as amended (42 U.S.C. § 7401 et seq.); (g) protection of underground sources of drinking water under the Safe Drinking Water Act of 1974, as amended, (P.L. 93-523); and (h) protection of endangered species under the Endangered Species Act of 1973, as amended, (P.L. 93-205).
12. Will comply with the Wild and Scenic Rivers Act of 1968 (16 U.S.C. §§ 1271 et seq.) related to protecting components or potential components of the national wild and scenic rivers system.
13. Will assist the awarding agency in assuring compliance with Section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470), EO 11593 (identification and protection of historic properties), and the Archaeological and Historic Preservation Act of 1974 (16 U.S.C. 469a-1 et seq.).
14. Will comply with P.L. 93-348 regarding the protection of human subjects involved in research, development, and related activities supported by this award of assistance.
15. Will comply with the Laboratory Animal Welfare Act of 1966 (P.L. 89-544, as amended, 7 U.S.C. 2131 et seq.) pertaining to the care, handling, and treatment of warm blooded animals held for research, teaching, or other activities supported by this award of assistance.
16. Will comply with the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. §§ 4801 et seq.) which prohibits the use of lead based paint in construction or rehabilitation of residence structures.
17. Will cause to be performed the required financial and compliance audits in accordance with the Single Audit Act of 1984.
18. Will comply with all applicable requirements of all other Federal laws, executive orders, regulations and policies governing this program.

SIGNATURE OF AUTHORIZED CERTIFYING OFFICIAL	TITLE	
APPLICANT ORGANIZATION		DATE SUBMITTED