

ENSURING ACCOUNTABILITY FOR DEVELOPING
WELL-FOUNDED FEDERAL REGULATIONS

AN INITIAL "REPORT CARD" ON COMPLIANCE WITH KEY DIRECTIVES
OF THE REGULATORY EXECUTIVE ORDER (E.O. 12866)

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The Institute for Regulatory Policy

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Federal Focus, Inc.

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EXECUTIVE SUMMARY

- Recently, there has been a great deal of public debate over excessive Federal regulation.
- One way in which the Federal Government has attempted to restrict the number and burdens of regulations has been through Presidential Executive orders prescribing standards for their development and assigning the Office of Management and Budget to enforce compliance. In late 1993, President Clinton issued his own Executive Order to replace previous ones.
- Since then, other mechanisms for curbing unnecessary regulatory burdens have been proposed. Congress has under consideration a number of bills prescribing requirements for regulations that would be judicially enforceable. (The Executive Order directives are not judicially enforceable.)
- Federal Focus examined whether the Executive Order mechanism is operating effectively, or whether, as some argue, judicial accountability is needed.
- As a means of analyzing this issue, Federal Focus reviewed a large number of EPA rulemaking notices published in the *Federal Register*.
- To obtain a measure of the degree of compliance exhibited by those rules, Federal Focus compiled a "Report Card" showing the number of rulemaking notices that demonstrated compliance with certain key directives of the Executive Order.
- The Report Card indicates that only a limited number of the rulemaking notices demonstrated compliance with those key directives.

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"The importance of regulations in our society makes it imperative that the process by which they are developed and reviewed be characterized by integrity and accountability."

"OIRA reviews only 'significant' rules [W]e neither track nor evaluate the extent to which the more routine but numerous regulations that are being issued by the agencies meet the principles of the Order."²

"The question remains, are the philosophy and principles of the Order being applied to the fullest extent? Are we really getting smarter regulation? This is difficult to answer because . . . there is no direct measure of performance that we can use. We do have anecdotes, however, suggesting that the Administration is producing smarter regulations"³

The Executive Order

On September 30, 1993, President Clinton issued Executive Order No. 12866 on "Regulatory Planning and Review" to replace a similar Executive order (No. 12291) that had been issued in 1981. The Order contains three core features:

- First, it establishes a Regulatory Philosophy and a set of twelve regulatory Principles to be followed by Federal agencies in considering development of new regulations, reviewing existing regulations, and setting regulatory priorities.

¹ Report to President Clinton by OMB's Office of Information and Regulatory Affairs ("OIRA") on the first six months of implementation of E.O. 12866 (59 Fed.Reg. 24276, 24277, May 10, 1994).

² OIRA's one-year report to the President, at 4.

³ *Id.* at 29.

- Second, it designates the Office of Information and Regulatory Affairs ("OIRA") in the White House Office of Management and Budget as having lead responsibility for reviewing "significant" regulatory actions (as defined in the Order) to ensure they are consistent with the Philosophy and Principles established by the Order. There are also provisions for having the President or Vice President resolve conflicts between OIRA and an agency.
- Third, it requires public disclosure of certain types of information concerning regulatory reviews conducted by OIRA.

The Significance of the Executive Order in the Regulatory Reform Debate

At present, there are numerous "regulatory reform" bills pending before Congress. With the exception of those that would impose a moratorium or provide for a Congressional veto of regulations, all of them contain regulatory philosophy and principles that to a large extent mirror those in President Clinton's Executive Order (and the Executive order it replaced). For example, they address the need for risk analysis and cost-benefit analysis and evaluation of alternative means of regulating in order to select the most cost-effective and least burdensome approach.

Despite these similarities, the legislative proposals have aroused considerable controversy. One of the contentious issues is how to ensure accountability for compliance with those similar philosophies and principles. Like all Executive orders, E.O. 12866 expressly excludes judicial review of compliance with its directives. On the other hand, most of the pending bills do not contain such a prohibition, or they expressly provide for some form of judicial review.

If it is clear that the Executive Order is operating as intended to compel Federal agencies to comply with its Philosophy and Principles, the need for judicial accountability could be considered lessened (although not necessarily obviated, since Executive orders can be readily modified or rescinded).

The Purpose of the "Report Card"

Under the Executive Order, OIRA is entrusted with responsibility for providing "meaningful guidance and oversight so that each agency's regulatory actions are consistent with

applicable law, the President's priorities, and the principles set forth in this Executive Order and do not conflict with the policies or actions of another agency." Sec. 6(b).

OIRA's role is limited, however, to reviewing "significant" regulatory actions. To define "significant regulatory actions", the Executive Order uses various criteria, including criteria of economic significance. For example, a regulatory action is considered "significant" if it would impose costs of \$100 million or more annually or would have other "material" economic impacts. Consequently, as the Report Card indicates, OIRA reviews agency compliance for only a fraction of the substantive rules issued.

Since promulgation of the Order, OIRA has sent two six-months reports to the President on its implementation. As the quotations from those reports at the head of this paper acknowledge, however, to date neither OIRA nor any other entity has developed a means for clearly measuring and conveying to the public the extent to which the Federal regulatory agencies and OIRA are, or are not, complying with the Philosophy and Principles of the Executive Order, and the OIRA reports to the President have mainly provided anecdotal information suggesting some degree of compliance.

The purpose of the initial limited "Report Card" discussed and presented herein is to explore the use of a concise, objective format for periodically reporting on the extent to which agency rulemaking actions -- both those determined to be "significant" as defined in the Order and others -- appear to comply with certain key aspects of the Philosophy and Principles of the Order, and the extent to which OIRA is effectively enforcing the Order.

While this initial "report card" approach does not necessarily provide a definitive measure of compliance, we believe that it provides valuable insights into the degree to which current rulemaking indicates the effectiveness of the Executive Order. The Report Card has been prepared on the basis of rulemaking notices published in the *Federal Register*. As OIRA has pointed out in its reports to the President on this subject, the Order does not require that agencies demonstrate explicitly in their rulemaking notices that they have complied with the Order's precepts, yet OIRA believes it is desirable that the notices set forth the required analysis in order to allow for informed public comment.⁴ In this regard, the "report card" approach set out in this paper has value not only in providing an indication of the extent of compliance with the Order, but also in indicating the extent to which agency rulemaking notices convey, or fail to convey, such information to the public and their elected officials.

⁴ OIRA report to the President on the first six months of implementation, 59 Fed. Reg. at 24292 2d col. (May 10, 1994).

Methodology for the Report Card

Scope of the Review

The analysis in the Report Card covers all EPA notices of proposed and final rulemaking published in the *Federal Register* during the period from April 1 through September 30, 1994. This period represents the second six months of implementation of the Executive Order.

This period was chosen because the OIRA report on the first six months of implementation of the Order emphasized that there was an initial two- to three-month period when there were start-up difficulties. By the second six months, however, the OIRA report to the President indicated that the process had matured and initial implementation difficulties had been largely resolved. EPA was chosen as a representative agency because the OIRA reports indicated it was one of the agencies with the largest number of "significant" regulatory actions during this period, and because so much of the legislative debate has focused on EPA regulations.

A total of 510 EPA *Federal Register* rulemaking notices were examined manually. Of those, we considered 222 to be "substantive", meaning that they were not technical or administrative types of actions such as Clean Air Act State Implementation Plan ("SIP") approvals, minor amendments to previous rulemaking notices, solicitation of public comments, technical corrections, denials of petitions for stays, comment period extensions, reopening of comment periods, designations of air quality planning areas, and changes of address. The "substantive" rules examined included both those actions determined to be "significant" by the agency or OIRA for regulatory review purposes, and those that were not determined to be "significant".⁵

Criteria

The first section of the Executive Order directs agencies to comply with more than a dozen specific regulatory Principles. Those Principles address mainly analytical requirements such as cost-benefit analysis and assessment of alternatives. Because the Order contains such explicit directives, it should be possible to determine the degree of compliance with those directives through the examination of rulemaking notices.

⁵ Out of the 288 "non-substantive" rulemaking notices, the bulk, 255, were proposed or final actions on SIPs.

It is important to note that the Executive Order Philosophy and Principles apply to all regulatory actions to the extent permitted by law and where applicable, not just to the "significant" regulatory actions reviewed by OIRA. As OIRA has noted in its reports to the President, the Executive Order itself does not provide a process for ensuring, or a means for measuring, compliance with the other regulatory actions which are not reviewed by OIRA. Additionally, there is no entity other than OIRA itself currently providing public information the effectiveness of OIRA's oversight with regard to "significant" actions. The purpose of the "report card" approach set out in this paper is to endeavor to fill both those gaps.

Several of the Principles and other portions of the Order address non-analytical matters such as inter-agency and public consultation, regulatory planning and priority setting, the procedures for OIRA review of "significant regulatory actions", and public disclosure of certain aspects of the review process. The initial Report Card in this paper addresses only five basic analytical requirements of the Order that appear in its Philosophy and various Principles. Those are:

1. Evaluation of the need for a regulation: This analytical requirement is contained in the first statement of the President's regulatory Philosophy and is the first of the Principles. The Philosophy states that "agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failure of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people." Principle 1 states that each agency "shall identify the problem it intends to address (including, where applicable, the failure of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem."
2. Reasoned determination that benefits justify costs: Principle 6 states that agencies "shall . . . propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."
3. Assessment of costs: The Philosophy states that "in deciding whether and how to regulate, agencies should assess all costs . . . of available regulatory alternatives Costs . . . shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures" Principle 6 states that agencies "shall assess . . . the costs . . .

of the intended regulation" In addition, Principle 11 states that agencies shall, in tailoring regulations to impose the least burden, take into account, to the extent practicable, "the costs of cumulative regulations".

4. Assessment of benefits: Principle 6 and the Philosophy state that agencies shall assess benefits in "quantifiable measures (to the fullest extent that these can be usefully measured) and qualitative measures . . . that are difficult to quantify, but nevertheless essential to consider."

5. Consideration of alternatives: The Philosophy states that agencies should "assess all costs and benefits of available regulatory alternatives". Principle 3 states that agencies "shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public." Principle 8 states that agencies "shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt." Principle 5 states that agencies "shall design . . . regulations in the most cost-effective manner to achieve the regulatory objective." Finally, Principle 11 states that agencies "shall tailor . . . regulations to impose the least burden on society . . . consistent with obtaining the regulatory objectives"

The Report Card also provides information on some actions taken by OIRA or the agency during the regulatory review process. This information has been included because it could be considered indicative of the degree to which OIRA is enforcing compliance with the Order when that information is compared with the other information in the Report Card.

In future Report Cards, we plan to extend the analysis to other timeframes and other agencies. We believe it would also be useful to include information indicating the extent to which the public disclosure provisions of the Order are providing useful information to the public on the regulatory review interactions between OIRA and the agencies.⁶ Since

⁶ It should be noted, however, that while the Executive Order provides a regulatory policy and procedural role for the President and the Vice President, it is unlikely that the Report Card approach can provide information on interactions between the Office of the Vice President and outside parties or OIRA regarding regulatory actions. OIRA's reports and statements accompanying the release of the new

the OIRA reports to the President emphasize the great amount of consultation and coordination occurring between OIRA and the agencies, and since it appears that the above report card criteria can provide some measure of the degree of compliance with the Executive Order, reporting on the degree of communication between OIRA and the agencies reflected in the rulemaking files could provide some additional measure of the degree to which OIRA is enforcing the Philosophy and Principles of the Order and is disclosing its communications with regulatory agencies to the public.

Constraints

There were a number of constraints, some discussed above, regarding the methodology which may have influenced to some extent the numbers presented in the Report Card and its portrait:

- The review was limited to a six-month period.
- The review was limited to a single agency during that period.
- The review was limited to the information presented in the *Federal Register* rulemaking notices. We did not attempt to examine analytical documents that might reside in the agency's internal rulemaking dockets and which might contain additional information not presented in the notices.
- The specific statutes under which individual rules were issued may have precluded consideration of costs and benefits or the use of certain regulatory approaches, and therefore the agency may have omitted such analysis without expressly stating that it was precluded.

Executive Order emphasized that one of its objectives was to dispel criticisms of "secrecy" and "favoritism" that had been aimed at the regulatory review process under the previous Executive Order. These appeared to be clearly allusions to assertions of inappropriate contacts between the Office of the Vice President, and of inappropriate intrusions into the regulatory process by that Office, during the previous Administration. However, the new Executive Order contains no provisions requiring disclosure of contacts between the Vice President's Office and outside parties or with OIRA on regulatory matters. The only disclosure requirements pertain to OIRA. OIRA must keep a record of any communications it has had with parties outside the Executive Branch, and, after a final regulatory action has been published, must "make available to the public all documents exchanged between OIRA and the agency during the review by OIRA under this section."

**"Report Card" On E.O. 12866 Compliance:
EPA Regulatory Actions April - September 1994**

| | "significant" rules | other substantive rules |
|---|------------------------|----------------------------|
| total <i>Federal Register</i> rulemaking notices | 45 | 177 |
| need for regulation evaluated | 19 | 30 |
| -- "required by" or "to interpret" the law | 16 | 27 |
| -- "compelling public need" | 3 | 3 |
| determination that benefits justified costs | 6 | 0 |
| costs (or savings) assessed | 31 | 3 |
| benefits quantified | 15 | 4 |
| alternatives considered | 9 | 5 |
| -- selected most cost-effective or least burdensome alternative | 6 | 2 |
| regulatory review action | | |
| -- rejected/returned by OIRA ⁷ | 0 | n/a |
| -- withdrawn by regulatory agency ⁸ | 2 | n/a |

Findings

- Of the total of 222 substantive rulemaking notices examined --
 - 6 determined that there was a "compelling public need" for regulating
 - 6 determined that the benefits justified the costs

⁷ OIRA figure from one-year report to President, Table 1.

⁸ *Id.*

- 14 evaluated alternative approaches to regulating, and of those, 8 indicated that the most cost-effective or least burdensome approach was adopted.
- Of the overall total of 510 regulatory actions published, less than 10 percent were reviewed by OIRA under the Executive Order. On the other hand, 465 regulatory actions, including 177 substantive actions, were not reviewed by OIRA.
- None of the 45 rules reviewed by OIRA were returned to the agency for non-compliance.
- Of the 45 "significant" regulatory actions reviewed by OIRA --
 - 3 contained a determination of "compelling public need" (out of the 29 not "required by law")
 - 6 contained a determination that the benefits justified the costs (out of the 29 not "required by law")
 - 9 considered alternative approaches to regulating, and 6 of those stated that they had selected the most cost-effective or least burdensome alternative.
- Of the 177 other substantive rules not reviewed by OIRA --
 - 3 determined that there was a "compelling public need" (out of the 150 not "required by law")
 - 0 determined that the benefits justified the costs (out of the 150 not "required by law")
 - 5 considered alternatives, and out of those, 2 stated that they had adopted the most cost-effective or least burdensome approach.
- Although the Philosophy and Principles apply to all rules, there is no mechanism for monitoring compliance with the large number of rules not determined "significant" for purposes of OIRA review, and few of those reflected compliance.
- Few rulemaking notices, either for "significant" or for other substantive rules, contained a relatively comprehensive and organized presentation on compliance with the Philosophy and Principles of the Executive Order.

Request for Comments

As noted above, we envision this Report Card to be the first in a series that will be expanded to include other agencies and timeframes. We also recognize that the Administration, Federal agencies, and other interested parties may be able to provide valuable comments for refining the approach. Accordingly, we encourage comment on the approach and will be actively seeking the views of Executive Branch officials.

Federal Focus, Inc.

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Publications

Toward Common Measures: Recommendations for a Presidential
Executive Order on Environmental Risk Assessment and Risk
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