

OVERSIGHT OF AGENCY COMPLIANCE WITH EXECUTIVE  
ORDER 12044 "IMPROVING GOVERNMENT REGULATIONS"

*FYI*

*D.R.*

HEARING  
BEFORE THE  
SUBCOMMITTEE ON  
OVERSIGHT OF GOVERNMENT MANAGEMENT  
OF THE  
COMMITTEE ON  
GOVERNMENTAL AFFAIRS  
UNITED STATES SENATE  
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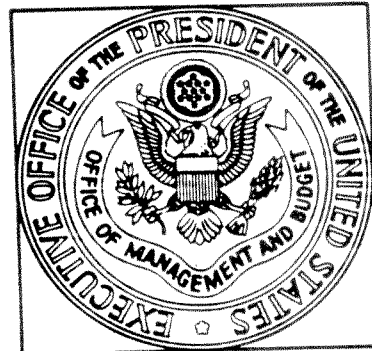
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*PPS-68*



PART I

# **IMPROVING GOVERNMENT REGULATIONS**

## **A Progress Report**



**SEPTEMBER 1979**

ERRATA SHEETThe Report

Errors on Page 21 - second paragraph, line 13, carcinogen is incorrectly spelled; line 18, the word case should read care.

The Appendix

Error on Page A-9 - Department of Agriculture.  
Add at the bottom of the page:

## CONCLUSION

The Department of Agriculture has made a strong and innovative start in implementing the Executive Order. It is evident that the Secretary is making a real effort to change the Department's procedures rather than simply adding its requirements to previous practices. However, more uniform performance throughout the Department is needed.

Error on Page A-64 - Department of Transportation. The Department has done 20 regulatory analyses, not 50.


Errors on Pages A-87/A-88 - Council on Wage and Price Stability. The reader should understand that, while the Council does not term its analyses of issues "regulatory analyses", it has published an extensive analysis of issues and options for its second-year standards program, which it termed a "Request for Comments on Modifications to Voluntary Pay and Price Standards." The Request was issued in August as part of the Council's regular review of standards and regulations, and has been followed by extensive consultations with consumer, labor, and business representatives and other members of the public.



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

September 17, 1979

MEMORANDUM FOR THE PRESIDENT

FROM: James T. McIntyre, Jr. 

SUBJECT: Improving Government Regulations

Here is our first full-scale report on agency performance under Executive Order 12044. It is a comprehensive document and a revealing one as well. It reflects not only the OMB staff's evaluation but the first-hand impressions of those citizens and groups who must deal with government regulatory agencies on a day-to-day basis. In this sense, it presents an accurate, real-life picture of where the Executive Order program is succeeding and where it is falling short.

In terms of overall compliance with the Executive Order, I have some significant, welcome news to report. For the first time in history, the Federal Government now has a framework for managing its regulatory responsibilities. This framework, moreover, is a sound one. Today there are forty executive agencies with a significant rulemaking function. All forty of these have now instituted procedures implementing Executive Order 12044. All eighteen independent regulatory agencies, while exempted from the Order itself, have taken some similar steps voluntarily.

I must also report, however, that some of the goals you have set forth in the Executive Order have been pursued more successfully than others. We can take pride, for example, in our government-wide efforts to promote greater public participation in the regulatory process. On the other hand, agencies must do much more to improve their regulatory analysis capability.

The purpose of this report, however, is not to demonstrate that we have finished a job, but how we have begun one. Bringing order and reason to the government's wide ranging regulatory activities is an important, necessary task. We will continue to pursue your commitment to regulatory reform with vigor, and expect to report further progress to you early next year.

## TABLE OF CONTENTS

	<u>Page</u>
<u>THE PROGRESS REPORT</u>	3
THE NEED FOR REFORM	4
THE ADMINISTRATION'S PROGRAM	5
ASSESSMENT OF EXECUTIVE ORDER 12044 PERFORMANCE	7
- BACKGROUND	7
- OVERVIEW OF PROGRESS	8
(1) Policy Oversight	9
(2) Public Participation	13
(3) Regulatory Analysis	18
(4) Sunset Review	24
(5) Plain English	26
- CONCLUSION	27
ACKNOWLEDGEMENTS	28
AGENCY COVERAGE OF EXECUTIVE ORDER 12044	31
- Subject Agencies	31
- Exempt Agencies	31
- Independent Regulatory Agencies	32
<u>THE APPENDIX: ASSESSMENTS OF AGENCY PERFORMANCE</u>	

	Page
	A-4
Department of Agriculture	A-10
Department of Commerce	A-16
Department of Defense	A-19
Department of Energy	A-28
Department of Health, Education and Welfare	
<u>Volume II</u>	A-37
Department of Housing and Urban Development	A-43
Department of the Interior	A-49
Department of Justice	A-53
Department of Labor	A-59
Department of State	A-61
Department of Transportation	A-68
Department of the Treasury	A-75
Environmental Protection Agency	A-85
Executive Office of the President	A-90
General Services Administration	A-92
Veterans Administration	A-95
Small Agencies	A-99
Independent Regulatory Agencies	

IMPROVING GOVERNMENT REGULATIONSA PROGRESS REPORT

Criticism of government regulation has become commonplace in recent years. Critics have cited cases of regulatory "overkill", bureaucratic confusion, delay and heavyhandedness. Unfortunately, the criticism has produced few constructive proposals to deal with the problems.

Some criticize regulators and regulations when their real concern is with the policies and statutes that underlie the rules. Others would impose such judicial or legislative restraints on the rulemaking process that regulators could not do their job--assuring that laws to promote environmental, health, safety and social goals are administered fairly and efficiently--without extraordinary delays and complicated litigation.

The Administration response to the regulatory problem emphasizes improving the management of the regulatory system. The President's goals are to assure that:

- regulations are cost-effective and operate efficiently;
- unnecessary regulations are eliminated or never issued;
- the public is fully involved in developing regulations;
- and rules are written with common sense in plain English.

To achieve these goals, President Carter issued Executive Order 12044 in March 1978. This Order had a number of objectives: first, to ensure that all new Federal regulations are written only under top-level agency supervision, with full opportunity for public participation and with full consideration of regulatory alternatives; second, to ensure that agency heads submit all existing Federal regulations to systematic reexamination; and, finally, that all government regulations be written in language that is both simple and clear.

The purpose of this report is to examine the impact of the Administration's program upon the government and the public, and to evaluate its effectiveness in improving the management of the regulatory system. The report provides a government-wide overview of performance to date. The Appendix assesses individual agency performance. The report is based on OMB and agency evaluations as well as the views of private organizations and citizens.

#### THE NEED FOR REFORM

Under the Constitution, Federal statutes are passed by the Congress and signed into law by the President. Upon enactment, such laws are refined and implemented by the various Government agencies.

In meeting their responsibility to refine and implement the will of Congress, government agencies issue regulations and other instructions which have the binding force of law. To ensure that agencies execute this role with fairness, Congress passed the Administrative Procedure Act of 1946. This Act established government-wide standards of due process in agency regulatory practices.

In the three decades since the Administrative Procedure Act was enacted, a body of standard administrative practice has developed for government regulation. Generally, this practice involves the following sequence: regulations are put forward in draft form by the agency staff; these draft regulations are published in the Federal Register; the public is given an opportunity to comment; these comments are reviewed and a revised version is published in the Federal Register; finally the regulation is placed in the Code of Federal Regulations.

In recent years, Federal regulations have grown in both number and complexity. The Code of Federal Regulations has expanded from some 23,000 pages in 1950 to almost 84,000 pages in 1978. The Federal Register has grown from 9,500 pages in 1950 to more than 61,000 pages in 1978.

Government regulations have also grown in their complexity. Where regulatory agencies created in the 1940's and 1950's focused primarily on economic factors, such as price and market share, those established in 1960's and 1970's addressed a broader range of concerns--the environment, civil rights, public health.



The newer regulatory areas had a broader impact. Where earlier regulatory agencies affected only one particular industry--communications, transportation, or finance--the newly created regulatory agencies affect every element of society. The growth and complexity of Federal grant programs has expanded the impact of Federal regulation even further.

As new laws were passed, new agencies were needed to carry them out. Often laws overlapped, resulting in regulations that were duplicative or in some cases contradictory. This historic change in both the nature and scope of Federal regulation made the Administrative Procedure Act out of date.

As agency regulatory responsibilities became more pervasive, regulatory decisions became harder to make. The consequences of regulations were more difficult to measure. Balanced public views were harder to obtain. Communicating an agency's actions to the general public became even more difficult.

There was no management of the regulatory process by top-level agency officials. Other problems arose. Seldom did agencies examine existing regulations to ensure their continued usefulness.

#### THE ADMINISTRATION'S PROGRAM

President Carter has made reform of government regulation a major goal of his Administration.

The first element in the Carter program involves the elimination of those regulations, or regulatory agencies, that have outlived their usefulness. A major example is the phasing out of the Civil Aeronautics Board. Reform initiatives are being developed in other areas: trucking, railroads, buses, communications, and banking.

A second element in the Administration program focuses on the more recent areas of government regulation, in health and safety, for example. Here the Administration is looking for more efficient, less burdensome ways to achieve broad regulatory objectives. For example, rather than prescribe specific equipment for pollution control, the government is setting overall pollution "ceilings" for individual plants or regions. In this way, government encourages industry to be more innovative in limiting pollution.

In addition to these specific reforms, the Administration has attacked the underlying regulatory problem--ineffective or non-existent management of agency regulatory decisions. A new government-wide framework for managing the regulatory process was established by Executive Order 12044. It provides the most fundamental overhaul of regulatory decisionmaking since 1946.

The Administration's overall regulatory reform effort is coordinated by three principal organizations--the Regulatory Council, the Regulatory Analysis Review Group, and the Office of Management and Budget. Their responsibilities are:

#### THE REGULATORY COUNCIL

Created by the President in October 1978, the Regulatory Council includes the heads of 35 Federal regulatory agencies. The Council's principal function is to develop and publish the Calendar of Federal Regulations, a synopsis and brief analysis of 100-150 regulations that are likely to have a substantial economic or public impact. It then uses the calendar to help identify the relationship of upcoming rules and develop coordinated plans for dealing with any significant cross-cutting regulatory issue. In addition, the Council undertakes special projects such as reviewing the cumulative effect of regulations on particularly vulnerable industries or sectors.

#### REGULATORY ANALYSIS REVIEW GROUP

The President also created the Regulatory Analysis Review Group (RARG) to examine in detail a limited number of agency analyses of regulations with substantial economic impact. This group is chaired by the Council of Economic Advisers and includes in its membership the principal economic and regulatory agencies of government. RARG uses the information supplied by the Calendar of Federal Regulations to help it identify candidates for review. The objectives of this group are to improve the quality of analysis supporting proposed regulations, identify and attempt to resolve common analytic problems among agencies, and assure adequate consideration of less costly alternatives. The group attempts to help agencies do a better job of analyzing alternative approaches to regulation. This is done by

developing a cross-section of agency views and submitting them for consideration as a part of the public comment on a proposed regulation. This affords all regulators the opportunity to be aware of and participate in the decisions of other agencies and to contribute their views to better regulatory decisions.

#### THE OFFICE OF MANAGEMENT AND BUDGET

The President directed that OMB oversee the departments' and agencies' implementation of the Administration's management reforms.

OMB is responsible for watching agency regulatory actions and for seeing that the compliance and paperwork burdens of regulations are minimized. The major OMB regulatory responsibility is assuring implementation of the President's Executive Order 12044, Improving Government Regulations. The Order is the cornerstone of the Administration's effort to improve regulatory management and control. OMB evaluates (1) the clarity of regulations; (2) the opportunities for public comment, (3) the consideration of alternative approaches to the design and enforcement of the regulations; and (4) the preparation of a regulatory analysis as appropriate.

OMB provides regular progress reports to the President and identifies agency shortcomings and areas for improvements.

Finally, it works closely with the Regulatory Council and the Regulatory Analysis Review Group to assure consistent and coordinated attention to the Administration's overall regulatory reform program.

#### ASSESSMENT OF EXECUTIVE ORDER 12044 PERFORMANCE

##### BACKGROUND

The Administrative Procedure Act set certain standards for how a regulation was to be promulgated. However, no coordinated management of the regulatory decisionmaking process existed in most agencies. Although budget and legislative decisions had elaborate procedures to ensure effective management control and coordination, nothing similar existed for regulatory activities.

Executive Order 12044 resulted from a year of extensive consultations with the agencies and the public. It was the first executive order to be published for public comment before being issued. More than 350 comments were received from individuals and organizations. These comments, along with those of the departments and agencies, helped form the final version of the Order.

The Order sets out five goals:

- 1) Effective policy oversight of the regulatory process;
- 2) Meaningful public participation in regulatory decisions;
- 3) Thorough analysis of regulatory alternatives;
- 4) Systematic review of existing regulations; and
- 5) Clear and understandable regulations.

Once the President signed Executive Order 12044, agencies developed and published their own implementing procedures and sought public comment. Final plans for implementing the Order were sent to the Office of Management and Budget for approval last fall. To date, 38 agencies have had their final plans approved; 27 agencies were granted exemptions from the Order, and 18 independent regulatory agencies were asked by the President to voluntarily comply with the Order. These agencies are listed at the end of this report.

#### OVERVIEW OF PROGRESS

This is the first progress report on Executive Order 12044. The Order has been in existence since March 1978, but it has been operational in most agencies only since January 1979. Even in this short time we have begun to see improvements in Federal regulatory practices that had gone largely unchanged for more than thirty years.

The basic theme found in many of the public comments and our own observations is that noticeable changes are taking place in the way regulatory agencies do business. But changing the practices and habits of any large organization-- particularly the Federal government--takes time. As is to be expected, more progress has been made in some areas, like increasing public participation, than in others, such as improving analyses of regulatory impacts. Never-

theless, we are pleased with the early signs of progress even though much more work needs to be done.

The management framework established by the Order is sound. The Order involves top policy officers in regulatory decisions and offers improved opportunity for the public to assist in the design of regulations. It also requires a thorough analysis of a range of alternatives early in the decision-making process as a basis for helping to decide the best and most cost-effective way to regulate. These requirements provide decisionmakers with information needed to develop effective and efficient regulatory solutions to national problems. We have found that the system is working in many agencies to bring order out of what has sometimes been undisciplined and chaotic activity.

This conclusion is confirmed by many of the people with whom we consulted--agency heads, outside groups, and individuals alike. For example, one association said that "the Executive Order creates an environment whereby agencies are encouraged to solicit public comment where they might not have done so earlier."

Another commented that "Executive Order 12044 is a good step toward shedding light on the world of regulation and encouraging improvement in the performance of executive agencies." However, others have pointed out that the results are at best mixed. One group noted ways "in which the Order does appear to have had some limited effect in achieving a portion of its purpose...", but the group goes on to state that "there continues to be a plethora of regulations literally spewing forth from all the many government agencies and we are increasingly burdened by their cumulative effect."

The remainder of this report reviews each of the five goals of the Order and provides an assessment of progress and problems across the government. It also includes our recommendations for improving government-wide compliance. The Appendix provides our assessment of agency performance.

#### (1) Policy Oversight

The Order requires the active involvement of agency heads and top policy officers in regulatory decisions. This is the most important element of the Order and the key to the success of the President's regulatory reform program.

Without effective oversight within the agencies, the other goals will not be achieved.

In the past, most decisions on when and how to regulate were made by regulators with narrowly focused program responsibilities. There was little incentive for them to consider the regulatory programs of other agencies. As a result, conflicting or overlapping regulations were often issued. Frequently, there was no high-level review of regulatory decisions by policy officials who could view the proposed action in the context of other programs and goals. Finally, too little attention was given to finding the most effective, common sense way to regulate.

Executive Order 12044 elevates regulatory decisions within the agency and includes in the decisionmaking process the views of senior-level officials. For the first time, the Order requires agency heads to take a comprehensive look at the regulatory actions of their agency. It requires policy officials to set priorities within the agency and to allocate scarce staff resources among competing program goals. Most important, it makes agency heads aware of regulations being developed early in the process. As one agency head reported, "regulatory decisions were made so far down in the bureaucracy, that the only time I would hear about them was when a Congressman or Senator called to complain."

The Order increases management oversight in two ways: first, by involving the head of an agency in the decision to develop a regulation and second by requiring agency head approval of the final regulation before it is issued. This is to ensure that the agency head directs the setting of priorities and the use of agency resources. The agency head provides a check to see that regulations are necessary; that they are written clearly, and that costs and other burdens have been minimized.

Regulators are now receiving guidance from the agency head before agency resources become invested in a particular course of action. In some cases, this earlier involvement has prevented the issuance of conflicting agency regulations. For example, when the Environmental Protection Agency Administrator was briefed on the start of a new regulation on coke oven emissions, he decided EPA should suspend work until the Occupational Safety and Health Administration has determined its plans on a similar rule. EPA regulations may not be required once OSHA acts. Or at least, by deferring EPA regulations, the standards issued by both agencies can be made compatible and avoid costly regulatory overlap or conflict.

A particularly effective technique for improving policy oversight used by some agencies is the creation of a regulations council within the agency. This is an executive committee of the agency's top level policy officers--assistant secretaries, the general counsel and others--often chaired by the deputy or under secretary. Such councils coordinate and/or approve regulations before they are issued, select regulations for "sunset" review, and determine agency priorities. In addition, several agencies have a central staff to analyze agency performance, ensure meaningful regulatory analysis, and monitor overall progress on regulations.

One agency head commented that his regulation council was improving the quality of proposed rules coming out of the agency. "The Assistant Secretaries are reluctant to bring sloppy, incomplete staff work to the Council to be examined by their peers."

Another tool of policy oversight is the requirement that agencies compile semiannual agendas of upcoming regulatory decisions. These agendas provide agency managers a comprehensive look at the regulatory activity within the agency. The agendas list significant rules being developed or reviewed by the agency and describe why action is needed. The agenda must be approved by the agency head to signal a go-ahead for agency action. It is also published to inform the public of the agency's plans. One agency official mentioned the value of the semiannual agenda as a tool to help manage the agency's resources. "Once I saw the full range of actions being contemplated or worked on in the agency, I was able to set priorities and stop work on projects I felt were less important." This gives policy officers an early opportunity to set the direction for regulations and helps to see that staff resources are devoted to the highest priorities.

In some agencies, oversight has been inadequate. Although a number of agencies have designed procedures to strengthen oversight, in practice improvement has not occurred. Accordingly agencies are attempting to identify priorities and set specific schedules for their regulatory actions.

Creation of a regulations council or a central staff may not be the choice of all agencies, but responsibility for compliance with the Order must be clearly assigned and officials must be held accountable for their actions.

Those agencies with a centralized unit have been most successful. In the coming months, OMB will continue to work with departments and agencies to find new, creative ways to help agency managers oversee their regulatory process. We plan for example, to hold a conference for agency managers to discuss particularly useful management techniques and to develop new methods for regulatory oversight.



(2) Public Participation

Public participation in rulemaking was required by the Administrative Procedure Act. In the past, however, agencies too often viewed public comment as a procedural nuisance, providing only minimum opportunity for the public to voice its opinion on a proposed rule. Public apathy and frustration were fostered by the lack of adequate opportunities to participate in regulatory decisions. It was difficult to find out what agencies were planning to do until the regulation was proposed. Once a regulation was proposed, many members of the public viewed the proposal as "locked in concrete" because very few agencies seemed willing to make major changes or to consider different approaches. The time given to the public to comment was often only 30 days when agencies had taken months or even years to work on the issues involved.

Opening the regulatory process to more and earlier opportunities for public participation was one of the more controversial aspects of the Order. Some agency staffs preferred the more closed and narrowly focused procedures used for more than 30 years; others argued that increasing public participation would cause delays. Despite initial agency reluctance, most progress has been made toward the goal of increasing public participation.

Public participation is achieved through a number of approaches:

(a) Semiannual Agendas of Regulations. The semiannual agenda of agency regulations is a list of significant regulations under development or review. It alerts the agency head and public to the agency's schedule for action on individual regulations and gives the earliest possible indication of upcoming opportunities for participation in specific rulemakings. The agenda also gives the name and telephone number of a knowledgeable agency official and the status of regulations listed on the previous agenda. Each agenda item identified as major must be explained more fully in the Calendar of Federal Regulations.

Before agendas were required, the public had difficulty learning that an agency was developing regulations. Nowhere could the public find an overview of what regulations were likely to be issued in the near future. The agendas provide the first systematic look at an agency's regulatory activities and the first comprehensive listing of knowledgeable agency officials who can answer questions on specific regulations. Armed with this early warning, the public now has more time to prepare its views on upcoming regulations.

The most consistently positive overall comment we received was that the semiannual agendas have been helpful. One corporation noted that the semiannual agenda "has been found to be very useful in assisting us to plan our activities. This should be extended to include the independent regulatory agencies." Another group pointed out that they found the "agenda of regulations so helpful that we printed it verbatim in our bulletin to members." A national association noted that "the agenda helps to keep us apprised of the status of ongoing agency proceedings, and it allows us to make an educated prediction of the value and amount of agency activity we can expect in the next six months." It goes on to note that "the accuracy of the agendas has been somewhat spotty" and urges improvement. From the public interest groups who commented we received almost universal agreement on the usefulness of the agendas. One group particularly noted that the agendas and longer comment periods increasingly afford the "opportunity to 'tap' experts from around the country, thus improving the quality of our responses."

However, a few problems have been pointed out by several commentators. First, the agendas have not always been published on schedule. Since predictability is important, OMB will closely monitor the timely publication of agency agendas. Agencies that miss the scheduled date are being asked to publish on that day a notice of the delay and announce a new date for publication. This will prevent the public from having to search in vain for the promised agenda. Second, setting prospective timetables and meeting target dates are often difficult, but some agencies have not attempted to give the public a sense of when to expect action on a regulation. Others have set clearly unrealistic target dates. Part of this problem is caused by statutory or court ordered deadlines that are unrealistic. Agencies are often unwilling to admit in the agenda that they will not meet those deadlines. At a minimum, we will ask all agencies to give the public a relative sense of when action will occur and we will encourage agencies to be as realistic as possible in their timetables.

Third, some agendas are not as helpful as others in their description of the need for and purpose of agency regulations. We have already brought this problem to the attention of several agencies. New formats for the next agendas are being developed by many agencies to help remedy this problem. The agendas are used as one basis for preparing the Regulatory Calendar published by the Regulatory Council. The Calendar makes possible the identification of the potential cumulative effects of all major upcoming regulatory proposals.

Agendas offer a unique overview of government-wide activity affecting many groups of people. However, these agendas are not yet being used to their fullest advantage by many groups. For example, associations representing a particular group could review all agendas and extract those rules which might affect its members. A list of pertinent regulations could then be mailed to the group's membership. We are working with small business groups and intergovernmental officials to find ways to make the agendas more useful--such as identifying regulations that will affect their particular constituencies. The agendas are a source of valuable information for many people and are a primary aid to increasing public participation in rulemaking.

(b) Advance Notices of Proposed Rulemaking. Another method to obtain early participation in the regulatory process is the use of Advance Notices of Proposed Rulemaking (ANPRMs). These notices, published in the Federal Register, call for public views on the issues being considered by an agency before a regulation is proposed formally for comment. They explain why the agency believes a rule is needed, identify the different approaches the agency may be examining, and/or ask specific questions that would help the agency decide whether to regulate and how.

Several agencies that had not used ANPRMs before--such as the National Credit Union Administration and the Internal Revenue Service--are now using them to involve the public in the regulatory development process. Many members of the public like this opportunity to help shape a rule; others feel some agencies are using it as a "cop out" to have the public do the work for them.

(c) Sixty-Day Comment Periods. One of the most common public complaints has been that agencies do not allow enough time for public comment. Thirty days has generally been used by agencies as the maximum time for comment. Often this did not allow enough time for people to receive the Federal Register in the mail, much less to respond with written comments. The Order requires at least a sixty-day comment period for significant regulations. In general, agency compliance with this provision has been good. Greater care is being taken to allow time for informed public comment. For example, the National Foundation on the Arts and Humanities provided a six-month comment period on its regulations on meeting special needs of the handicapped, established a special task force of interested members of the public to help draft the regulations, and prepared a brochure for the visually impaired to explain the regulations and solicit their comments. However,

some important regulations are still issued with inadequate allowance for public comment. For example, the recent energy emergency caused problems in this regard.

(d) Other Forms of Outreach. Many agencies have made successful efforts to extend outreach programs. The number of public hearings--particularly those outside Washington--is increasing. One trade journal recently noted that "a switch is taking place in Washington. Now legislators and bureaucrats are going out into the country to learn about... problems rather than operating in a vacuum along the Potomac."

Other less conventional approaches are being used. For example, the Federal Highway Administration took out ads in local newspapers (Baltimore, San Francisco, Denver, Dallas, New York City, and Washington, D.C.) to publicize hearings on the Highway Beautification Act. These ads resulted in extensive testimony from people who do not ordinarily read such notices in the Federal Register. The Department of Energy invited 160,000 people and institutions to add their name to issue-specific mailing lists being compiled by the Department in an effort to expand public involvement in DOE rulemakings. More than 29,000 have responded. Several agencies such as the Civil Aeronautics Board, the National Highway Traffic Safety Administration and the Food and Drug Administration are experimenting with "intervenor funding." This is the funding of participants who might otherwise not be able to afford to participate in rulemaking activities but who contribute valuable information or an important perspective. Still others are publishing notices of agency actions in newspapers, magazines or trade journals and using workshops or other forums to reach out beyond the pages of the Federal Register to more members of the general public.

(e) Special Problems. There are two government-wide problems that need to be resolved. First, we are not effectively coordinating regulatory actions with State and local interest groups and officials. Because of the complex interactions among Federal, State, and local laws and regulations, it is important that close coordination be maintained among all levels of government. When E.O. 12044 was issued, OMB Circular A-85 requiring such coordination was rescinded. To assure continued cooperation, agencies were required to state specifically their plans for coordinating with State and local groups in their revised regulatory procedures.

Reports on performance under this requirement are mixed. Some groups find agencies unaware of the requirement to consult with State and local government since A-85 was rescinded. Others noted that they are having "much less

contact with the agencies and more with OMB's intergovernmental staff." On the other hand, one local department of social services reported "at this relatively early stage, we have noted a marked improvement in the regulations development process of those agencies that we monitor." It cited agency outreach efforts, better explanatory material accompanying regulations, and the issuance of clearer and simpler rules as examples of noticeable improvement. In the future, we will work with the Regulatory Council, the agencies, and the Federal Regional Councils to find ways to highlight rules of major potential interest to State and local government and further encourage the participation of these groups in regulatory decisions.

Second, there is a growing concern that the Federal Advisory Committee Act (FACA) is reducing public participation. It was designed to keep advice-giving committees open and ensure participation of all significant public interests in government decisions. However, many agencies, organizations and individuals feel "the law is having an adverse effect on public participation." For example, one State and local interest group termed the Act "perverse in its effects" and said that "many individuals routinely violate the Act in order to get the technical expertise needed to make important decisions." In addition, one person told us she felt that one department "had taken a step backwards" in implementing the Order "because it no longer provided the public advance copies of its regulations for comment." She attributed this problem to the agency's "fear of being sued for violating the Federal Advisory Committee Act (FACA)".

The law is unclear as to how much or what type of public contacts agencies can have without creating an official advisory committee. In addition, case law has added to agency confusion over what type of contact is acceptable. For example, repeated meetings with interest groups can be a violation of law. But whether or not a series of written correspondence with these groups constitutes a "pattern of contact" is unclear. As a result, agencies are often uncertain of what actions they are allowed. This may lead to reducing an agency's dealings with the public. Although the Advisory Committee Act was intended to prevent undue influence by special groups, it was not intended to isolate government from needed information or expertise. We are investigating these apparent problems with FACA and will work with the agencies, GSA (administrator of the Act), the Administrative Conference of the United States, and the Congress to assist agencies to end the confusion. This investigation may lead to proposals to amend the law to alleviate these unintended problems and barriers to public participation.

(3) Regulatory Analysis

Efficient and effective government regulation requires that agencies analyze and compare the consequences of various regulatory alternatives. The regulatory analysis required by the Order has been the subject of much public debate. It is probably the most difficult part of the Order to implement. All departments and agencies need to devote more time and attention to improving the quality of their analysis and its usefulness to decisionmakers. One corporation told us that it often finds an agency "making a sham" out of the regulatory analysis requirement. It noted that there have been "many regulations issued which blithely contain the statement that the regulation will cause no significant economic impact when, in fact, the regulation will create a tremendous economic burden as a result of its implementation."

The regulatory analyses required by Executive Order 12044 are a marked departure from earlier "Impact Statement" requirements. Many of these statements were justifications of the particular approach chosen by the agency in designing a new regulation. Such justification statements were of little use to decisionmakers and provided little confidence that regulations were accomplishing their goals in the most cost-effective manner. Moreover, concern over how to do cost/benefit analysis often resulted in focusing debate more on numbers than on what made good common sense in developing a regulation.

Regulatory analysis, on the other hand, is designed to be a comparison of the different alternative approaches to regulating. A regulatory analysis is required for each regulation having an annual effect on the economy of "\$100 million or more or creating a major increase in costs or prices for individual industries, levels of government or geographic regions". In addition, the agency head may require an analysis for any proposed regulation whether or not it triggers one of these criteria. Each regulatory analysis is to contain a succinct statement of the problem; a description of the alternative ways of dealing with the problem; an analysis of the economic consequences of each of the alternatives; and a detailed explanation of the reasons for choosing one alternative over the others. A draft analysis is to be available to the public when the regulation is proposed and a final regulatory analysis is required when the regulation is issued.

The comparison of alternatives is to be done early in the decisionmaking process so that policy officials and the public can join in the debate over the most efficient and effective way to regulate. The analysis may compare different approaches (market incentives vs. enforcement of standards), different levels of stringency, alternative enforcement mechanisms, or the timing of compliance. The analysis is not designed to identify costs and benefits for a particular decision; it is intended to be a thorough, common sense consideration of the strengths and weaknesses of various alternative regulatory approaches based on both descriptive and numerical comparisons. The scope and nature of these comparisons is determined by the information available. But for all costly new regulations, decisionmakers have the benefit of a discussion of alternative choices, quantified to the greatest extent possible, before the agency proposes the new regulation.

For example, the Food and Drug Administration is analyzing various alternatives for providing patients needed information on the effects of prescription drugs. Several alternatives are available to FDA: providing an information insert with every prescription, including refills; putting inserts in original prescriptions only; or providing information through other means such as reference materials available at the pharmacy. Too often in the past, policy officials have not had enough information to know whether a less costly, more efficient alternative was even possible.

Some individual examples of good analyses are available, but no department can be commended for having a department-wide, continuously successful effort in place. Some agencies--DOT, USDA, FDA, and EPA among others--say they have found the analyses to be a major factor in reducing unnecessary compliance costs, improving rules, and assisting policymakers in reaching complex regulatory decisions. DOT and USDA do an economic evaluation for every new regulation early in the process. These evaluations are less detailed than a regulatory analysis, but they often determine whether an analysis is needed. The quality of the evaluations tends to vary, but FDA, DOT, and Agriculture have strengthened their credibility with the public by having an impact assessment available to document the reasons why a regulatory analysis is or is not required.

EPA is the leading agency in analyzing the effects of highly complex regulations. But even this agency is not a model.

More emphasis must be placed by all agencies, including EPA, on analyzing and comparing alternatives and explaining this comparison clearly and simply to the public.

Several factors have contributed to the lack of sufficient government-wide progress in doing regulatory analyses. First, some agencies have not developed the analytic talent needed to produce a regulatory analysis or to supervise contracts for such analysis. Some agencies do their analyses "in-house" using their own staff. Others hire outside contractors. Since contractors often believe they are "paid by the pound," studies may be lengthy, detailed and complex. These documents may be of little or no help to policymakers because, although they provide important technical details, they are not decision-oriented. Although contractor assistance is often needed to help gather data or provide sophisticated analytical techniques, the final comparison of different regulatory approaches must be done by agency staff who are most familiar with the program and issues and the kind of information decisionmakers need.

Second, agencies are not doing an adequate job of determining when a regulatory analysis is required. Too much emphasis is placed on the \$100 million criterion as the "trigger" for analysis. Relatively few agencies issue regulations of that magnitude; yet there are a number of very important rules with potentially major economic consequences for large segments of the population that deserve the careful weighing of alternatives required by a regulatory analysis. Too great an emphasis on dollar criteria and concern for methodology can undermine one of the basic goals of the Order.

In hindsight, we are responsible for some of the confusion over when a regulatory analysis should be done. Our explanations should have made clear that preparing regulatory analyses should be considered more the rule than the exception. To remedy this situation, we will stress to the agencies that a regulatory analysis should be done for: (1) any sufficiently important or controversial rule that the agency head thinks deserves analysis; (2) any rule with potentially major cost/price effects on a particular region, group, industry or economic sector. Finally, if the other two "gates" are passed, an analysis should be done for any rule that would have a potential \$100 million effect on the economy.



This would mean more regulations would be subjected to regulatory analysis and the public would be afforded a better opportunity to understand and participate in selecting the best regulatory approach.

A third problem is getting regulators to agree on how much flexibility or discretion is available under the law to select among alternatives. Too often regulatory managers are convinced that they have no discretion in deciding how to regulate to meet their statutory obligations. One commentator noted that "some agencies seem to feel, and in certain cases they may be correct, that the statutes under which they are regulating do not permit them to evaluate the economic impact on the public or the persons or industries affected by the regulations." For example, the Delaney amendment governing cancer-causing substances in foods mandates that regulators have no choice but to ban the use of a known carcinogen, no matter what the economic effect. Despite this, the FDA does a regulatory assessment for all of its significant regulatory actions. Generally, few laws are enacted that preclude the agencies from any discretion in how they are carried out. Greater care must be taken to ensure that all feasible alternatives are examined.

The fourth problem identified was the proliferation of "impact analysis" requirements. There are environmental impact statements, regulatory analyses, community and urban impact statements, statements on energy effects, and paperwork impact assessments. Some agencies, such as Agriculture and Labor, are taking steps to consolidate some or all of these requirements into a single analysis. This is in keeping with the spirit of E.O. 12044 and will help decisionmakers better understand the potential results of their actions. We will identify and provide to all agencies models that combine analytical requirements.

Finally, agencies are at times reluctant to do regulatory analyses and make them available to the public because they are "too hard." Agencies try to avoid the requirement afraid that if they do an analysis, it will be the subject of public "sniping" or peer criticism by the Regulatory Analysis Review Group (RARG). There is an inherent conflict in having agencies do a thorough analytic job because this automatically provides more ammunition for critics to argue against a regulation. In the future, we must come to grips with this paradox and avoid creating disincentives for agencies to do careful regulatory analyses. In short,

for the Order to be successful, regulatory analysis must be seen not as a requirement to be avoided, but as an essential tool for selecting the best regulatory decision and explaining it to the public.

We have been meeting with the agencies to increase policy officials' awareness of and attention to the regulatory analysis requirement. Throughout the year, agencies have been encouraged to do a regulatory analysis where none was contemplated. For example, when HEW recently proposed revisions in the rules governing eligibility for Federal grant or loan assistance for the construction of health care facilities, it announced that a regulatory analysis was not required. This decision was made without consulting top level policy officials or economists in the Department. After looking at several studies by health care institutions indicating that compliance costs of the proposed rules could exceed \$100 million, we asked the Department to reassess their decision on the need for a regulatory analysis. Reexamination of the rule confirmed that the economic impact would exceed \$100 million and could approach \$200 million, depending upon different assumptions. HEW did a regulatory analysis that resulted in substantially lowering overall compliance costs to health care providers. In addition, the 1,000 written comments received on the proposed regulation and the evidence presented in several public hearings resulted in more simplified recordkeeping requirements and generally more flexible regulatory requirements.

In other instances, departments have been encouraged to adopt the impact assessment procedure of FDA in order to build a more credible base for their decisions on whether or not a regulatory analysis is required for proposed regulations. To broaden the base of rules being analyzed, we will put more emphasis on the analysis of existing rules undergoing "sunset" review.

We are asking agencies to forward to us on a routine basis copies of all their regulatory analyses. Regulatory analyses are frequently requested from the agencies under current procedures, but not all analyses are reviewed by OMB. Given the extensive attention and debate focused on these analyses, we will establish a more formal procedure to help us identify common problems that agencies are having, share examples of good analysis among agencies and examine various methodologies used by the agencies.

The concept of the regulatory analysis is not always well understood. Regulators are often reluctant to document the cost of regulations, and disagreement over methodology and conclusions will always exist. But better, more efficient regulations cannot be achieved without a careful analysis of the consequences. Indeed, one Cabinet Officer observed "we should not be afraid to face up to the need to analyze our regulations. Good analysis will explain and document our decision. If it doesn't we shouldn't be regulating." Another agency has pointed out that the comparison of alternatives is such an integral part of decisionmaking, if the process were working right, a separate analysis would not be needed.

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(4) Sunset Review

The Order requires agencies to conduct a systematic review of existing regulations--to weed out those that are outdated and unnecessary and to update, clarify, or simplify those that continue to be necessary. Improvements in existing regulations are just as essential as improvements in the development of new regulations. In many ways, progress in improving existing regulations is even more important to members of the public who must live with the inefficiencies and inequities that have built up in government regulations over time. The public also knows the effects of existing regulations and what improvements might be made. Regulations are often issued "piecemeal" and old regulations are rarely reviewed as new ones are issued. Conflicts and overlaps, especially among the regulations of different agencies, build up slowly but create deepening public frustration.

Existing regulations are, however, difficult to change. Many people are comfortable with the existing system and current beneficiaries argue that no change is needed. Nevertheless, much work needs to be done and progress by the agencies is slower than we anticipated.

The Executive Order directed each agency to develop its own criteria for selecting regulations to be reviewed, based on the criteria included in the Order. These criteria were intended to achieve several types of changes in existing regulations, not just to eliminate them. The Order specifically notes that regulations should be reviewed to simplify or clarify language, to eliminate overlapping or conflicting requirements, and to update regulatory requirements in response to such things as technological or economic change. The review is to be an on-going, systematic program to reexamine all regulations, not just a one-shot evaluation.

Although many agencies have identified good initial targets for review or have committed to review all their regulations within a specific period of time, actual results have been disappointing. One problem has been the lack of specific timetables and deadlines for completing these reviews. Another factor is that agencies have been reluctant to review the more controversial or costly regulations. We have been working with agencies to reach agreement on new targets for sunset review. For example, HUD has just proposed a complete revision of the National Housing Act. This reassessment of HUD's underlying statutory authority will lead to a review

and simplification of the Department's rules. The Agriculture Department is doing a comprehensive review of its packers and stockyards regulations, concentrating on reducing and simplifying reporting burdens. The Department of Labor has modified nearly 1000 OSHA safety standards and has reduced 400 pages of fire safety standards to 30 pages.

Determining what changes are needed and what form they should take is a time-consuming effort. A few efforts deserve recognition. For example, in HEW (where Operation Common Sense was begun in 1977) over 2,500 pages of regulations have been reviewed and either rewritten, consolidated, or eliminated. This represents about one-third of HEW's regulations. Elsewhere, the Labor Department has eliminated 80 of 229 mine safety standards that were unnecessary. EPA is going through an initial "screening" of all its regulations to determine priorities for review.

Treasury is reviewing all of its regulations governing the production and distribution of wine and restricting the advertising of alcoholic beverages. DOT is reviewing its major safety regulations governing rail transportation. DOT believes that this review could result in a savings of up to \$500 million for the railroads without adversely affecting safety. Three agencies, HUD, VA, and the Farmers Home Administration in Agriculture, are examining their mortgage regulations to eliminate overlap and reduce paperwork burdens.

We have asked various outside groups to help identify regulations that are in need of sunset review. The Regulatory Council is working to identify and eliminate overlapping Federal/State and local regulations. It is also looking at inconsistencies in regulations governing coal mines. We will be working with these groups and the agencies to identify additional "sunset" targets and to establish specific schedules for the completion of the agency reviews. Together with the Regulatory Council we will work to see that agencies conduct in-depth reviews of the effect of government regulations on large sectors of the economy. For example, HEW is studying the cost that government regulation imposes on health care facilities. The study will include not only HEW's regulations but also the regulations of agencies such as OSHA, VA, and others. We hope to use this as a model for other interagency efforts.

(5) Plain English

It is almost impossible to measure progress on agencies' efforts to write their regulations in "plain English." What may be gobbledygook to some is crystal clear to others. Determining the audience for regulations and writing for that audience is in large part a subjective judgement. However significant improvements have been made in the clarity of some regulations. Some regulations have been written to avoid legal and technical terms that are confusing to most members of the public.

Too often in the past, the language of regulations required an "interpreter"--a lawyer, accountant, or other technician. Often the services of these interpreters were expensive and fostered frustration with government regulations. Most people simply wanted to know what to do and how to do it, but found government regulations overly complicated and confusing.

The President has made it clear that he wants government to stop communicating with the public in its usual lawyer-to-lawyer or technician-to-technician way. The President expects the Federal agencies to start explaining to people clearly and simply what the laws and regulations require and why it is important. Sometimes a regulation must be clear to the technicians--engineers, doctors, accountants--who will be applying it and there fore must be somewhat more complex and technical in its language. For example, IRS and Labor frequently get pleas from accountants and tax lawyers for regulations to be longer and more specific rather than more general and easier to read. In such instances, agencies can write a clear "preamble" or introduction to the rule that provides a clear explanation of the need for and purpose of the regulation, what alternatives were considered and why the agency chose a particular approach. On the other hand, regulations that must be followed by applicants for Social Security benefits should be clear and understandable in both the preamble and the regulations themselves. The Social Security Administration has made a laudable effort to simplify and clarify these regulations in "plain English."

Since the Order was issued, most agencies are writing clearer preambles to their rules and some agencies have had notable successes in rewriting individual regulations--HEW's Operation Common Sense, CEQ's revised National Environmental Policy Act (NEPA) rules, or FCC's Citizen Band Radio re-write are good examples. However, in general, much more can be done. Gobbledygook quotes still appear frequently as humorous bits in newspapers and magazines.

Even when agencies do try to do a better job of explaining in the preamble to a regulation what the regulations means, how the decisions were made, what effect it is expected to have, this material is printed only in the Federal Register. When the regulation is put in the Code of Federal Regulations as a continuing requirement of the Federal Government, the preamble is seldom reprinted, only the language of the regulation itself. The public must, therefore, read the Federal Register regularly, be on special mailing lists for explanatory materials, contact the agency with questions, or struggle through the regulation itself--on their own or with the help of appropriate experts.

On the whole, some members of the public seem to be noticing a difference in the way government regulations are written. One community service agency noted that regulations issued since the Order have been "simpler, clearer, and more precise." Another group stated that "ERA (DOE's Economic Regulatory Administration) Federal Register materials have improved tremendously in clarity and in usefulness of the information. I know this view is shared by many people. FERC notices on the other hand, seem to have improved much less." Another group wrote "there has been some improvement in the language used in regulations. While there certainly is still room for improvement...the regulations are more clearly and simply written."

Several agencies have established "checkpoints" to screen their regulations for clear writing. Others have sent regulation writers to workshops on improving the clarity of writing. Working with both the Office of the Federal Register and the Office of Personnel Management, we will strive to make plain English the language of the government.

#### CONCLUSION

We believe that the management reforms required by Executive Order 12044 are essential to the fundamental reform of government regulations. The results to date are mixed.

This first progress report outlines successes and shortcomings. In coming months, we will work with the agencies and the public to identify improved opportunities for reform. Future reports will cover this progress.



## ACKNOWLEDGEMENTS

One of the primary objectives of Executive Order 12044 is to improve public understanding of and participation in regulatory decisions. The only way to determine whether the Order is achieving that objective is to consult with those groups and individuals who deal with the regulatory agencies and are willing to give us their thoughts and suggestions about agency compliance with the Order.

We appreciate the help of the following groups and individuals in assessing the effect of the Order. Without it, we could not have presented this assessment of agency progress.

We look forward to continuing our consultations with members of the public. We welcome the submission of comments on agency compliance at any time, and we hope that the public will continue to provide us assistance in developing future reports.

Academy for Contemporary Problems  
 AFL-CIO  
 American Association of Collegiate Registrars  
 American Association of School Administrators  
 American Council on Education  
 American Gas Association  
 American Health Planning Association  
 American Hospital Association  
 American Medical Association  
 American Paper Institute  
 American Petroleum Institute  
 American Public Welfare Association  
 American Public Transit Association  
 American Trucking Association  
 AMVETS  
 Association of American Railroads  
 Association of American Medical Colleges  
 Atlantic Richfield Company  
 Business Advisory Council on Federal Reports  
 Center for Auto Safety  
 Center for Community Change  
 Chief State School Officers  
 Children's Defense Fund  
 Cities Service Company  
 College of William and Mary - School of Law

Committee on Governmental Relations  
Common Cause  
Consumers Union  
Consolidated Coal  
Continental Oil Company  
County of Los Angeles -  
    Department of Public Social Services  
Distilled Spirits Council of the United States  
Energy Consumers and Producers Association  
Environmental Policy Center  
Equal Employment Advisory Council  
Farmers Union Credit Exchange, Inc.  
FMC Corporation  
Getty Oil Company  
Houston Oil and Minerals Corporation  
Idaho Mining Association  
Industrial Research Institute, Inc.  
Kaiser Aluminum and Chemical Corporation  
Laurence G. Spielvogel, Inc.  
Leadership Conference  
McNally Pittsburgh Manufacturing Corporation  
Minnesota Mining and Manufacturing Company  
Mobil Oil Corporation  
Monsanto Corporation  
Motor Vehicle Manufacturers Association  
National Association of Beverage Importers, Inc.  
National Association of Counties  
National Association of Housing and  
    Redevelopment Officials  
National Association of Manufacturers  
National Association of Realtors  
National Association of State Universities  
    and Land Grant Colleges  
National Broiler Council  
National Coal Association  
National Customs Brokers and Forwarders Association  
    of America  
National Governors Association  
National Helium Corporation  
National League of Cities  
National Milk Producers Federation  
National Petroleum Refiners Association  
National Oil Jobbers Council  
National Resources Defense Fund  
Phillips Petroleum Company  
PPG Industries

ShIPLEY Smoak & Akerman  
Sierra Club  
Standard Oil of Indiana  
State of Delaware Welfare Association  
Tacoma Boat Company, Inc.  
Tax Executives Institute  
The American Legion  
University of Michigan Law School  
U. S. Conference of Mayors  
U. S. Chamber of Commerce  
U. S. Steel Corporation  
Veterans of Foreign Wars

## AGENCY COVERAGE OF THE EXECUTIVE ORDER 12044

Agencies Complying with E.O. 12044

## ACTION

Administrative Committee of the Federal Register  
 Agency for International Development  
 Agriculture Department  
 American Battle Monuments Commission  
 Commerce Department  
 Committee for Purchase from the Blind and other Severely Handicapped  
 Community Services Administration  
 Defense Department  
 Energy Department  
 Environmental Protection Agency  
 Environmental Quality Council on  
 Equal Employment Opportunity Commission  
 Farm Credit Administration  
 Federal Mediation and Conciliation Service  
 General Services Administration  
 Health, Education and Welfare Department  
 Housing and Urban Development Department  
 Interior Department  
 Justice Department  
 Labor Department  
 Management and Budget Office of  
 National Aeronautics and Space Administration  
 National Capital Planning Commission  
 National Credit Union Administration  
 National Foundation on the Arts and the Humanities  
 National Science Foundation  
 Pennsylvania Avenue Development Corporation  
 Personnel Management Office of  
 Railroad Retirement Board  
 Selective Service System  
 Small Business Administration  
 State Department  
 Tennessee Valley Authority  
 Transportation Department  
 Treasury Department  
 Veterans Administration  
 Water Resources Council

Agencies Exempted from the Order

Export-Import Bank of the United States  
 Inter-American Foundation  
 International Communication Agency

Central Intelligence Agency  
 Marine Mammal Commission  
 Overseas Private Investment Corporation  
 Commission on Civil Rights  
 U. S. Arms Control and Disarmament Agency  
 Federal Services Impasses Panel  
 Advisory Commission on Intergovernmental Relations  
 U. S. Federal Labor Relations Council  
 National Security Agency  
 Board for International Broadcasting  
 Office of the Special Representative for Trade Negotiations  
 Advisory Council on Historic Preservation  
 Harry S. Truman Scholarship Foundation  
 Foreign Claims Settlement Commission  
 Panama Canal Company  
 Canal Zone Government  
 National Transportation Safety Board  
 Appalachian Regional Commission  
 Delaware River Basin Commission  
 Susquehanna River Basin Commission  
 U.S. Railway Association  
 National Mediation Board  
 International Trade Commission  
 Joint Board for the Enrollment of Actuaries

Independent Regulatory Commissions  
 (Voluntarily Complying with E.O. 12044)

Civil Aeronautics Board  
 Commodity Futures Trading Commission  
 Consumer Product Safety Commission  
 Federal Communications Commission  
 Federal Deposit Insurance Corporation  
 Federal Election Commission  
 Federal Energy Regulatory Commission  
 Federal Home Loan Bank Board  
 Federal Maritime Commission  
 Federal Reserve Board  
 Federal Trade Commission  
 Interstate Commerce Commission  
 Federal Mine Safety and Health Review Commission  
 National Labor Relations Board  
 Occupational Safety and Health Review Commission  
 Postal Rate Commission  
 Nuclear Regulatory Commission  
 Securities and Exchange Commission

APPENDIX:

ASSESSMENTS OF AGENCY PERFORMANCE

The assessment of agency performance is based on our observations of agency compliance, the agencies' own assessments of their progress, and public views of agency successes and shortcomings. To seek public comment, a plan for evaluating agency performance was published in the Federal Register on April 24, 1979. It posed a number of questions and criteria on which agencies would be judged. For example, it specifically asked for views on whether or not the Order is making a difference in agency practices and requested examples of good and bad agency performance in achieving the Order's five goals.

In addition, views were solicited from all those who commented on the draft Executive Order. By telephone, letter, or through informal meetings, we consulted with a number of major outside groups. Their comments have contributed significantly to this report. Those who took the time to assist in this first evaluation are identified in the body of the report.

Finally, several informal "case studies" at selected agencies helped to gather information for this report. These studies were helpful in evaluating and verifying agency performance and in providing insight on why certain agencies have accomplished more than others. Additional "case studies" will be conducted in preparation for the next report to the President.

In reading the detailed agency assessments that follow, several things should be kept in mind. First, many of the provisions of the Order cannot be measured quantitatively. Consequently, there is subjectivity in this evaluation. For example, the definition of "plain English" has been the subject of several different and conflicting interpretations and there is no common standard to measure agency performance. What may be plain English to some may be too general and confusing to the technician who must make sure the regulation is followed. Decisions on a rule's "audience" must be made on a case by case basis.

Second, agencies' performance should not be compared too closely because of the varied nature of their regulatory responsibilities. For example, it is difficult to compare the Social Security Administration's regulations on eligibility to Energy's rules on gasoline pricing. In addition, a few agencies had systems for managing the regulatory process in place before the Executive Order was issued; others did not. Thus agency progress cannot be measured against an absolute standard.

Third, agencies were directed to adapt the Order's basic requirements to fit their own individual circumstances. Therefore, some diversity in agency procedures is both necessary and desirable. An approach that appears logical for one agency may be ill-advised for another. Consequently, it would be unfair and virtually impossible to judge all agencies against a single, fixed standard.

Finally, the public and the agencies often differ in their views on agency compliance and the purpose of the Order.

To some, reform means more regulation--speeding up the agencies' work. For example, one group complained that "the Executive Order has unduly inhibited necessary rulemaking, both in quantity of output and scope." Others will view the Order as a failure unless the number of regulations being issued each year is considerably slowed or stopped. A variety of comments have been incorporated into the assessments in order to convey the range of opinions on the effect of the Order and individual agency compliance.

This Appendix provides individual assessments of sixteen agencies and short discussions of both small agency performance and the voluntary compliance of the independent regulatory agencies.



## DEPARTMENT OF AGRICULTURE

Twenty-one agencies in the U.S. Department of Agriculture (USDA) issue regulations affecting the production, pricing, and distribution of agricultural commodities as well as the conservation and development of agricultural resources. Oversight of regulatory responsibilities is provided by the Secretary and Deputy Secretary.

The Secretary has provided strong personal support for implementation of the Order. Guidelines for each phase of E. O. implementation have been issued, conferences have been held with agency administrators, and analytical staff assistance has been made available to agencies.

In addition, the General Counsel has circulated a memorandum citing legal authorities and court decisions relating to aims and objectives similar to those of the Order. The case law cited in the memorandum demonstrates the need for analysis as a basis for regulatory decisions and stresses the importance courts place on involving the public.

Two semiannual agendas have been published. In addition, a schedule of regulations identified for sunset review has been published. Two hundred and sixty-nine "significant" items were identified. The Department's agendas contain all the required information and have been found helpful by the public. One organization observed that contemplated actions are "no longer a big secret." Another commented that although the "agendas need to set a more realistic timetable, USDA is being a little more responsive in explaining to the public why it did what it did."

The semiannual agenda is used as a planning device within the Department. Plans are now underway to make it even more of a management tool. For example, Agriculture has begun to do a weekly update and summary that is sent to top policy officials to advise them of the analyses and decisions scheduled for the following week.

## POLICY OVERSIGHT

Before the Order, there was no systematic oversight of the Department's policy decisions. While all statutory authority for action rests with the Secretary, virtually all program authority was delegated to agency administrators. No uniform procedures for the review of policy alternatives or the planning of decisions existed. Some programs which were controversial received in-depth review.

A-5

Agriculture's new oversight procedures are not limited to "major" or "significant" regulations as required by the Order. Rather, they apply to all decisions since many of the major programs which burden or affect the public are not regulatory programs implemented by rulemaking. The Department maintains a central log which tracks the development of all decisions. This log or decision calendar provides the Secretary an up-to-date overview of all regulatory initiatives.

The Department reports that many actions have been turned back for revision before going to the Secretary for approval. For example, 30 Food Safety and Quality Service rules were returned on the grounds of insufficient analysis. Also, Food and Nutrition Service (FNS) analysis of its rules for the Food Stamp Quality Control program were substantially re-written in order to provide direct linkage between the rules and explicit program objectives.

The development of significant rules and analyses is monitored and assisted by the Economics, Policy Analysis and Budget staff. This group is responsible for E.O. 12044 matters and must approve the analyses before publication of proposed and final rules. It also approves the public participation plans required for each significant rule.

#### PUBLIC PARTICIPATION

The Department has made progress in increasing public participation.

A public participation plan is developed for every proposed rule. The Department's plan and performance to date is one of the best in government. The Department cites recent grain standards regulations as a good example of how public participation improved the quality and lessened the burden of proposed regulations. The number of affected firms was reduced from 200 to 150 with less than a 2 percent loss in surveillance by adopting changes proposed by the public. In addition, a background study and draft regulations covering complex and controversial new programs established by the 1978 Grain Standards Act were published for early comment. One hundred and seventy-eight comments were received, resulting in substantial revision and improvement in the regulations when they were proposed.

The quality of public participation efforts is not uniform throughout the Department. Planning for the development of some regulations has not made allowance for full 60 day public comment periods. For example, regulations on performance

A-6

reporting in food stamp programs and the Special Supplemental Food Program for Women, Infants and Children were given less than 60 day comment periods. Some State welfare officers feel that FNS does not adequately consult with them in the course of developing new rules. Similarly, a trade association noted that many of the Department's public participation notices "seem to be advance publicity to generate interest in areas where they think they'll get the best response." Though these examples are important, it should be noted that 269 significant rules have been proposed since November 15, 1978, and of these, less than a dozen have not had at least 60 days of public comment.

The Department's public participation directives go beyond the requirements of the Order, because they apply to all decisions and actions rather than just to "significant" regulations. In addition, the Department is now receiving comments (and has held three regional hearings) on proposed regulations to cover reimbursement of participants in USDA rulemaking proceedings. The Department reports that while comments received from the public have been quite useful, the amount of public participation has been low in spite of large scale mailings of notices and copies of the proposed rule.

Although "formal rulemaking" was exempted from the Order, USDA discovered a significant amount of outside interest in the marketing order programs that was not being accommodated through the formal hearing process. In particular, certain consumer groups desired greater opportunity for suggesting issues to be considered.

To meet these needs, the marketing order programs have been made fully subject to the Department's E.O. 12044 procedures, adapted in such a way as to accommodate the formal rule-making process. In particular, a prenotice public participation requirement has been established. The new procedure requires any interested person to be given the opportunity to contribute ideas to a proposed marketing order program before a notice of hearing is issued so that all contributions may be discussed at a hearing.

The Agricultural Marketing Service (AMS) will develop and annually update a mailing list for sending out prenotices on significant, non-emergency actions. Each prenotice will contain a statement of the issues and who will be affected; the standards in the applicable act, rule, or regulation against which the action is judged; and a statement on how interested parties can participate. The result will be a prenotice investigation which frames the issues to be covered to reach an adequate decision.

The Farmers Home Administration has initiated procedures for incorporating public involvement in its rulemaking procedures and in two instances (guidelines for self-help technical assistance grants for home construction, and implementation of part of the Power Plant and Industrial Fuel Act of 1978) received substantial comment from the public. The comment and testimony in each instance resulted in significant changes from what would otherwise have been proposed. In the latter case, the final action was made simpler and with less detailed information required in applications.

#### REGULATORY ANALYSIS

Agriculture is the only department that has integrated all impact analyses into a single requirement. This means that Regulatory Analyses, Environmental Impact Statements, and Community and Urban Impact Statements are done as a single analysis. It is also one of the few agencies to require such an analysis on all rules and to require that the analysis be made available to the public. Since November 15, 1978, of the 269 rules that have been determined to be significant, an analysis on 98 has been completed.

In the case of major commodity program decisions, this analysis is made available to the interagency Working Group on Food and Agricultural Policy for interagency review before decisions are made final. Draft impact analyses supporting significant actions are routinely transmitted to others in the Executive Branch having an interest in them. Circulating regulatory analyses has helped USDA to acquaint others with the basis for a decision rather than just the decision per se.

Staffing arrangements for analysis vary from agency to agency in USDA. In some, there is a central staff to conduct the analysis; in others, it is done entirely by program staff; and in still others, it is a mixture, with analysis being initiated by program staff and completed by central agency staff. At this point, the last arrangement appears to be most successful.

The quality of analysis varies. Identifiable weaknesses include inadequate quantification of impacts, unimaginative development of alternative options, tardy preparation of the analysis, and unnecessary reluctance to reveal areas of uncertainty or the negative effects of options. However, agencies have, on their own, begun to make noticeable improvements in their analytic products. Some have increased their

capacities by adding analysts to their staff; others have better organized their internal procedures to take advantage of existing personnel; a few have obtained assistance from the Economics Statistics and Cooperatives Service, the economic research agency of the Department which has a broad analytic capability.

Examples of other efforts include:

--Veterinary Services now requires a preliminary draft impact analysis to be prepared before the decision is made on the assignment of staff resources to regulatory initiatives. This gives decisionmakers the opportunity to review alternatives early enough to change direction before major commitment is made to an unworkable alternative.

--The Food Safety and Quality Service has established a new unit to assist program offices with analysis and public participation. This agency also has established a long-term arrangement with ESCS for analytical help on its major proposals. On the basis of preliminary analysis, action on some 30 regulations has been suspended pending further consideration by policy officials.

--The Soil Conservation Service analysis of its proposed rules governing the provisions of technical and financial assistance for reclaiming rural abandoned coal mines identified conflicts with Administration policy. Significant changes resulted, including (1) restricting assistance to non-federal lands to avoid interagency conflict and duplication and (2) a decision to restore land to an "environmentally sound" rather than a higher level of reclamation. The cost sharing formula was also adjusted so that only public benefits would be achieved and private benefits would be denied.

Several outside organizations have commented positively on USDA regulatory analyses. One observed that they assist public participation because "we don't have the person power to do analysis." Another noted that a "good and thorough job is being done . . . even though we may differ with the conclusions." Still another told us "USDA has made a strong effort to meet the Order's requirements . . . the fact basis is there."

No USDA rule has been subjected to RARG review.

## REVIEW OF EXISTING REGULATIONS

Agriculture has chosen some good targets for priority review. These include Watershed Protection rules, and Meat and Poultry Inspection and Packers and Stockyards regulations. These reviews involve controlling erosion of stream banks, and the development of new poultry inspection methods.

The Department's procedures provide for reviewing existing regulations over a five year period. So far, 125 regulations have been scheduled for review. Impact analyses and public comment have been initiated on 113. Of these, 59 have resulted in proposed revisions and 30 have been completed. Because the Department has just begun tracking and reporting process on these reviews, the net effects cannot yet be measured.

## PLAIN ENGLISH

The Department's performance in this area has been inconsistent. For example, although FNS significantly improved the Food Stamp Application form, the guidance it has provided for people to determine applicant eligibility is very complicated. In another case, USDA has identified and prohibited the use of a 150-word boiler plate sentence previously used in preambles to marketing order regulations.

Each USDA agency has been directed to establish a checkpoint for the review of language clarity in all regulatory notices appearing in the Federal Register. Agencies are now required to certify that such a review has occurred before the decision log is finally approved by the Department staff.

USDA has found that often it is difficult for program staff to set aside their intimate familiarity with the program and write about it in simpler terms. A special course has been offered in the USDA Graduate School on writing clearer regulations and results of that course are being reviewed. Serious consideration is being given to establishing a position on the Department staff--an attorney with writing skills--to monitor the language in dockets and provide assistance to both the agencies' and General Counsel attorneys. Although we received few comments in this area, one person noted that there has been noticeable improvement in the Department's use of plain English.

## DEPARTMENT OF COMMERCE

The Department of Commerce (DOC) acted with reasonable promptness to implement the Executive Order, but its initial performance was divergent and uneven because little control was exerted over its separate operating components. In the last few weeks, the Department has taken significant steps to strengthen central management of implementation in a way that promises real achievement.

The Department is not a major regulatory agency, but it issues regulations in some important and sensitive areas: exports, oceans and fisheries, maritime shipping, patents, and economic development.

On May 30, 1978, Commerce published for public comment proposed procedures to implement the Executive Order. These procedures were revised in response to public and OMB comments, and published as final procedures in the Federal Register on January 9, 1979, effective immediately.

## POLICY OVERSIGHT

Effective policy level oversight is often the indicator of an agency or department's performance. The Department's final implementation plan showed a modest improvement in policy oversight at the Department level, but the operating units still retained autonomy in the interpretation and implementation of the Executive Order. As a result of recent changes, the Department's performance should improve significantly.

Department level oversight is exercised by the Assistant Secretary for Policy who is responsible for ensuring that all operating units comply with all provisions of the Executive Order.

The head of each operating unit, usually an Assistant Secretary is responsible for procedural compliance with the Executive Order. This official sets the criteria for determining whether a regulation is significant or requires a regulatory analysis. Effective performance of this critical function is an important concern. According to the Department, the Assistant Secretary for Policy will use the second agenda to review the accuracy of these decisions in the operating units.

A-11

The operating unit head must also approve the plans for developing significant regulations, approve significant regulations before final publication in the Federal Register, and otherwise ensure that the provisions of the Executive Order are properly observed.

Commerce has established a regulatory council, composed of senior representatives from the various operating units. According to Commerce, this council is to assist in reviewing regulatory matters before the Department. The council has, in fact, contributed very little towards the Department's implementation of the Executive Order, but instead has been more of a forum for the discussion of regulatory matters involving other agencies and departments.

With strong encouragement from the Under Secretary, the Department has assumed a more vigorous role in ensuring effective uniform implementation of the Executive Order. For instance:

-- an inventory of all existing Department regulations is being compiled;

-- within the next nine months all major regulatory units will do at least one regulatory analysis, even if no regulation under current consideration meets the threshold criteria;

-- an audit procedure is being established to review selected regulations developed by the operating units for compliance with the Order;

-- the agenda will be used to review the decisions of operating units on: (1) which regulations are significant and (2) whether appropriate regulations have been selected for sunset review.

Since these actions have all been taken in the last two months, it is too early to assess their impact. Nonetheless, by these actions, top management is beginning to exercise significantly greater policy oversight.

#### PUBLIC PARTICIPATION

Commerce has made improvements in securing public participation. The quality and effectiveness of these improvements has not been consistent throughout the agency, but in this aspect, too, the Department has upgraded its implementation plans in ways that give confidence for better performance.



A-12

The Department's first agenda was published March 7, 1979, with an addendum published on April 30, 1979. Publication of the second agenda has been delayed and is now scheduled for publication shortly. A total of 47 significant new regulations were identified, and an additional 47 existing regulations were selected for review.

In addition to the required information, each description of a significant regulation identified in the agenda includes a timetable for publication of the advance notice, notice of proposed rulemaking, and final rule.

The department has attempted to go beyond the requirements of the Executive Order by identifying all significant regulations under consideration in the next 12 months. However, in one important instance, the Department failed to identify a significant regulation on blue tuna that was made final within six months after the publication of the agenda. The quality of information also varies sharply. Many of the regulations included the notation that it was unknown whether or not a regulatory analysis was required. In part, this may be a result of the decision to project regulatory activity over a 12 month period. Few documents were actually identified as being available to the public. Finally, the plans for public participation varied markedly between operating units. Some rely almost exclusively on publication in the Federal Register, while at least one generally offers a much broader public outreach program.

The Department has taken other steps to expand its outreach to the public. These efforts include increased use of advance notices, publication in trade journals, direct mailings, and public hearings. To date, however, the Department's performance in this area is uneven:

-- For rulemaking under the Public Telecommunications Financing Act, the public had only 20 and 34 days to file comments in response to a ANPRM and NPRM, respectively. The explanation for the short time periods was the need to obligate funds before the end of the fiscal year. To alleviate the possible adverse effects on the public's ability to comment, the department sent a direct mailing that included applicants, trade associations, and State and local government agencies. Some 1,500 copies of the issues paper, 2,000 copies of the ANPRM and 3,000 copies of the NPRM were mailed.

A-13

--The Department published without opportunity for public comment one rule that concerned new civil rights requirements for receiving Federal economic development assistance. The Department did this because it believed that it had no real discretion. On the other hand, other agencies developing similar regulations did not feel their discretion was totally restricted.

The Department is now making a concerted effort to improve its public outreach programs. These prospective efforts should lead to a program that goes substantially beyond the requirements of the Executive Order. For example, the Department plans this year to:

--Prepare a periodic (monthly, unless there are no regulatory activities) notice of regulatory actions forthcoming in the following month. The notice will be distributed to the media and the public.

--Conduct regional forums so the public can make known their views on specific regulations proposed by the Department.

#### REGULATORY ANALYSIS

The Department specified a lower threshold figure of \$50 million for any impact upon the general economy, and \$25 million for any specific sector or level of government. To date, four regulatory analyses have been completed, seven are in draft stage, and 10 are in preparation. The 11 analyses that have been prepared all relate to fisheries management plans.

The completed regulatory analyses--although of varying quality--have been used extensively in rulemaking activities associated with fisheries management plans. For example, in the stone crab plan, the draft regulation analysis indicated that the proposed regulation would have major economic and social effects on both crab and shrimp fishermen. As a result, the regulations were revised to more equitably distribute the impact of the regulation.

The Department's Chief Economist reviews the draft analyses. These analyses vary in quality and many are deficient. The Chief Economist assists operating units in revising their analyses. Problems identified so far include: limited data; lack of appropriate economic models to judge changes in costs, prices, productivity, employment, and other specific conditions such as supplies of fish; and limitations on the number of

A-14

personnel qualified to do analyses. No review of Commerce regulations has been made by the Regulatory Analysis Review Group (RARG).

The Under Secretary has requested the components with the most regulations to do at least one regulatory analysis annually on a pending or existing regulation that has a large economic impact, regardless of the Department's threshold figure.

#### REVIEW OF EXISTING REGULATIONS

In the Department's first semiannual agenda, a total of 47 existing regulations were listed for review. Of these, 10 were determined to be significant. Of the 47 regulations, 13 have been reviewed to date. Only two of these were significant.

Each operating unit is committed to reviewing all of its regulations within a four-year cycle. Most operating units are on target. A number of regulations have already been amended or dropped. For example, the Department will rescind two standards pertaining to barrels and containers, and has amended its regulations regarding the organization of economic districts. However, review of regulations in some components has just begun. There has been noticeable slippage in the review dates to which some units were initially committed, and we are concerned that they may have to delay review of some significant regulations (e.g., the anti-boycott procedural regulations).

#### PLAIN ENGLISH

More attention should be given to the Department's plain English effort. Last January, the operating units were directed to provide a list of employees designated as plain English experts responsible for reviewing regulations appearing in the Federal Register. Such a list was compiled recently. All operating units have indicated that they have improved their efforts and have established checkpoints. A spot check, however, has revealed some inadequacies. For example, some operating units have selected as plain English reviewers the attorneys who draft the regulations in the first place. The Department is now reportedly taking corrective measures to assure that a more independent review takes place.

A-15

Only two operating units have reported sending employees responsible for drafting regulations to writing workshops. Only one has hired readability experts, developed model regulations, or established formal complaint groups to respond to public concerns. This component has also developed its own correspondence manual to improve employee writing style, but despite these efforts, this unit still receives some public criticism for the complexity of its regulations.

Recently, the proposed amendments to the conservative dividend policy were substantially rewritten by the Office of the General Counsel to make the amendments more understandable to the public. These important amendments dealt with the distribution of dividends to stockholders of federally subsidized shipping companies.

#### CONCLUSION

The Commerce Department's performance has been uneven but recent initiatives are encouraging. Consistent attention from the Department's leadership in addressing regulatory issues should result in improved public participation, clearer regulations, and concrete results from the sunset review efforts.

## DEPARTMENT OF DEFENSE

With the exception of procurement and the Army Corps of Engineers' Civil Works activities, the Department of Defense (DoD) is not a major regulator. It does have some other regulatory activities that affect the public such as regulations governing entrance into the services, civilian use of military bases, and service eligibility conditions for schools with ROTC courses. As a rule, however, much of DoD's regulatory effect upon the public is not significant in the context of Executive Order 12044.

Executive Order 12044 contains several specific exclusions that exempt much of DoD's regulatory activities. These include Federal procurement regulations, military or foreign affairs regulations, and agency management and personnel regulations. Despite this fact, DoD has committed itself to follow the Executive Order's procedures for more than 80 percent of its regulatory activities, including its internal directives and administrative instructions. DoD issued its plan for implementing the Order on November 30, 1978.

## POLICY OVERSIGHT

Several internal directives have been issued by the Secretary of Defense giving coordination oversight responsibilities to the Deputy Assistant Secretary of Defense (Administration). Those responsibilities are limited to keeping the Secretary of Defense informed of the status of significant regulations, informing him of the department's compliance with E.O. 12044, and preparing the consolidated semiannual agenda of significant regulations. DoD's first agenda (approved by the Secretary of Defense) listed two regulations under development and 54 under review. Public response to the agenda was minimal, primarily because DoD is not viewed as a regulator.

The secretaries of the military departments retain responsibility for all regulations affecting their departments. This arrangement does not appear to have substantively changed the management practices of those departments.

## PUBLIC PARTICIPATION

The Department has not significantly expanded opportunities for increased public participation in the rulemaking process. There is greater use of longer comment periods but there are

A-17

still instances in which the public has been given only 30 days to comment on proposed regulations. The Department reports that few regulations receive more than one or two comments from the public and that it is quite common to receive none at all.

On the other hand, significant public comment is received by the Army Corps of Engineers on its public works regulations. These come primarily from environmental organizations. The Corps of Engineers makes a serious effort to keep these groups informed and involved in its regulatory process. The Department has not initiated any new outreach programs or increased the use of public hearings in the rulemaking process. However, we have received no complaints in this regard.

#### REGULATORY ANALYSIS

DoD's implementation plan delegates authority to establish procedures for developing regulatory analyses to the heads of the military departments and agencies. Since DoD has yet to propose any new regulations or review any existing regulations that meet the minimum \$100 million threshold that triggers preparation of regulatory analyses, its performance cannot be evaluated at this time. As in other agencies, it appears DoD places heavy emphasis on the dollar threshold and that its performance could be improved by requiring the consideration and comparison of alternatives of its rules.

#### REVIEW OF EXISTING REGULATIONS

This is the area in which DoD has made the most progress. The Department has directed that all regulations be reviewed to determine need, accuracy, applicability and readability. Specific review and termination dates are now being applied to all new and revised regulations by each military department. For example, the Department of the Army now requires that all regulations be reviewed every 18 months. The Army discloses that as a result of this review program, 30 regulations have been eliminated. Two sets of regulations governing the Women's Army Corps and the Army Nurse Corps were eliminated because both Corps no longer exist.

The review process has been expanded to include not only the regulations covered by E.O. 12044, but also all internal regulations and directives as well. A complete review of all

1,032 internal DoD directives and instructions was initiated in 1978. As of April 1, 1979, 161 of these documents have been completely revised. DoD cites that the average length of each document has been reduced by 70 percent. Thirty-seven of the 161 documents were determined to affect the public in some way. These were modified and published in the Federal Register.

#### PLAIN ENGLISH

Each of the three military departments has initiated procedures designed to improve the clarity and readability of new and revised regulations. A Department of the Air Force directive requires a certification that the average length of regulations matches the level of the target audience. The Department of the Army has established an editorial control division that reviews and edits all materials before publication. An awards program has been established to recognize employees who significantly contribute to improving Army publications. The Army has edited 240 regulations and reduced the average reading level to the 11th and 12th grades. It has reduced the page volume of its regulations by 13 percent.

Although DoD has made progress in improving the clarity and simplicity of its regulations, improvement varies among the military departments and agencies.

#### CONCLUSION

DoD does not issue a large number of regulations and most of them do not meet the criteria for "significant" established in the Executive Order. The Department has done a credible job in making its regulations simpler and easier to understand and has gone beyond the Order by requiring all internal directives to be reviewed for clarity and simplicity. Thus far, the Department's reform program does not appear to have increased substantially policy oversight or enhanced public participation in the rulemaking process.

A-19

## DEPARTMENT OF ENERGY

The Department of Energy (DOE) was created in 1977 to consolidate the major energy programs scattered throughout government as part of the President's effort to establish a unified National Energy Policy. Because of the "energy crisis" and the emergence of several new regulatory responsibilities, DOE has had to operate in a crisis atmosphere that has not permitted the Department to meet the regulatory reform goals of the Order.

DOE has several regulatory components; however, the Economic Regulatory Administration (ERA) administers most of the DOE regulatory programs. Its functions include the oil pricing, allocation, and import programs; coal conversion, natural gas import/export controls, curtailment priorities and emergency allocations; and regional coordination of electric power system planning. In addition, Conservation and Solar Applications directs programs designed to improve energy efficiency and reduce energy consumption. Resource Applications manages programs to increase domestic supplies of petroleum, natural gas, coal and uranium.

The Federal Energy Regulatory Commission (FERC) is an independent, five member commission within DOE. It retains many of the functions of the former Federal Power Commission, such as setting rates and charges for the transportation and sale of natural gas and for the transmission and sale of electricity and the licensing of hydroelectric power projects. FERC's role, vis-a-vis the rest of DOE, is unique. By law, many DOE regulations must be submitted to FERC so that it can decide whether to exercise "independent" jurisdiction. DOE is able to set time tables for FERC action, but unless FERC concurs, DOE cannot implement them. As a practical matter, FERC's regulatory responsibilities require close interaction with the rest of DOE. As an independent regulatory agency, FERC's compliance with the Order is discussed in another section of this report.

On November 8, 1978, President Carter signed the National Energy Act (NEA) into law. Enactment of this legislation increased the regulatory activity of the Department by roughly 50 per cent. Thirty separate regulatory initiatives were required to be implemented at the same time. Many of these would have major economic impacts requiring regulatory analysis. In addition, the Department has played a major role in developing energy policy proposals, including a solar energy program, gasoline rationing plans, a program for phased decontrol of crude oil, and an import reduction program.



Some of these initiatives have resulted in White House directives to issue regulations in particular areas on timetables that did not permit normal public comment periods or compliance with E.O. 12044.

The Executive Order recognizes that situations may arise that do not permit the extensive analysis and public comment periods which the Order normally requires and authorizes waiver of its provisions in an emergency.

Recently, DOE requested a "blanket" waiver for petroleum price and allocation regulations, stating that as long as serious shortages of crude oil exist, waivers of the Executive Order provisions will be required. While we agree that in limited instances there may be a need to shorten the 60-day opportunity for public comment, or to have a more informal regulatory analysis, we do not feel a general waiver would be wise and we have denied DOE's request. We realize that continuation of price controls for petroleum products means that allocation regulations will be needed during periods of shortage, and that these regulations may often require adjustment to market situations at short notice. However, energy regulations are of the highest public interest and deserve the kind of well managed open process contemplated by the Order. We will be working with the Department to accommodate its unique situation to the goals of the Order.

#### INCREASING POLICY OVERSIGHT

DOE has established clear procedures to assure effective oversight of the regulatory process. Regulatory reform efforts are directed by a Regulatory Reform Task Force, chaired by the Deputy Secretary. The task force meets quarterly. DOE established a special staff unit (the Regulatory Program Division in the Office of Policy and Evaluation) to oversee compliance with the Order and other regulatory reform tasks. After extensive public participation, DOE promulgated an internal order that goes beyond the Executive Order in some respects. For example, the Order requires the responsible official to evaluate eight criteria before issuing a regulation; DOE has 12 criteria which is part of the regulatory staff checklist. A computerized Action Coordination and Tracking System (ACTS) has been established to monitor progress over time on regulatory actions.

A-21

These procedures for oversight, however, have not always resulted in compliance with the Order. Some members of the public suggest that greater top level policy attention and more careful planning could prevent frequent revision of regulations that causes instability, uncertainty and unneeded burdens on the public. For example, ERA had in effect three different base periods for motor gasoline allocation in less than nine weeks. In addition, ERA established allocation ground rules for retail gasoline outlets to be effective for four months, but two months later, ERA cut back on certain permitted allocations.

In another instance, while the special State set-aside for diesel fuel was being continued, special provision was made for allocating 100 percent of current needs--first, for agricultural production. Two weeks later, special provision was made for the trucking of perishable foods and passenger mass transportation. DOE acted quickly to respond to "emergency conditions" and helped to avert serious disruption for farmers. As a result, however, "lesser priority" users (other truckers and barges) did not have adequate fuel. This is a case where broader policy oversight and more effective planning could have avoided public confusion and broader disruptions to the marketplace.

In these cases, even though top level policy attention existed, external factors were responsible for the changes that were made. For example, "emergency" conditions sometimes dictated frequent change. In some cases, the need for immediate action resulted in regulations with some inadvertent loopholes or other unforeseen consequences which had to be corrected by a subsequent regulatory action. The Department hopes to address some of these problems with more comprehensive advance planning. We believe such planning would assist policy officers to understand and explain DOE's actions.

#### PUBLIC PARTICIPATION

Although effective public participation has been complicated due to the emergency nature of the "energy crisis," in general, public participation is where DOE has accomplished the most. Where possible, comment periods have been increased to conform to the 60-day requirement. Special mailing lists, with 29,000 names, have been developed on an issue specific basis to respond to individuals' requests for information. Public hearings--particularly those held outside Washington--

are being used more often (94 in the past 12 months). Four special hearings were held on DOE's regulatory reform initiatives generating over 200 written and oral comments. DOE held six public hearings and received over 100 written comments on the second National Energy Plan. In general, DOE hearings have been well attended and have stimulated public comment.

DOE has published a citizens' participation manual to guide citizens toward more effective public participation techniques. A series of workshops based on this manual will be held later this year.

On the other hand, DOE's performance on price and allocation regulations has been less satisfactory. DOE has recently adopted a pattern of emergency rulemaking which denies the public advance opportunity to comment. As one trade association wrote us, "opportunities for participation in rulemaking have lessened and response times have been either non-existent, too short, or extended beyond the time for which regulatory changes have been effected." This shortening of time periods appears to have cut back the number of comments received and the attendance at hearings, and given an impression that DOE is not receptive to public comments.

For example, since May, four regulations concerning motor gasoline allocation base periods and set-asides were made effective with no advance notice and a full waiver of the Executive Order. This effectively denied most people the benefit of a regulatory analysis and opportunity to comment before adoption of the regulation. Recently, ERA issued a proposed regulation to mandate production levels for middle distillates. ERA provided only 10 days public comment period. There was a full waiver of the Executive Order and no regulatory analysis, even though the issues had been under discussion in the public and Congress for several months.

Two crude oil regulations have been made effective on issuance, with comments invited afterwards. Companies complain that this, in effect, assures instability; it "will obviously lead to completely new regulations or instructions, or, at a minimum, some type of change. This is devastating from an administrative standpoint."

Also, by inviting comments after a regulation has become final, DOE does not explain to the public how their comments are taken into account. One company stated that "we feel that

the requirements of the Administrative Procedure Act have been skirted by improperly invoking the emergency provisions, and that there has been considerable rulemaking through the exception process rather than the required APA process."

On the positive side, in March 1979, ERA issued a Notice of Inquiry soliciting public comments on changes to the natural gas curtailment priorities. Public comments provided the basis for the development of a draft regulatory analysis and environmental impact statement, which will be published this fall. For regulations concerning production incentives for marginal properties, 75 days advance notice was given, two regional hearings were held, and more than 60 comments were received. These regulations were then issued in final, but 33 more days of comment were allowed to help decide certain unresolved issues.

Conservation and Solar Applications (CSA) has a better record. For the Residential Energy Conservation Program, an ANPRM was published and proposed regulations were given 67 days advance notice and 8 regional hearings. Where the draft regulatory analysis was delayed for two weeks, it scheduled a separate 30-day comment period and an additional hearing. The Industrial Energy Conservation Program has had over 60 days advance notice and two regional hearings. The Consumer Products Conservation regulations included an ANPRM with 60 days advance notice, five regional hearings, and an assortment of more limited proposals also provided 60-days advance notice. To help implement grant programs quickly, CSA generally waives the 60-day notice requirement in favor of a shorter 30-day period.

Although only 21 days advance notice were given on the Energy Building Temperature Restrictions regulations, CSA held five regional hearings and received over 400 comments. These comments led directly to two changes in the regulations: the mandated summer minimum temperature was reduced from 80 to 78 degrees and reports will be required only from those entitled to an exemption--a saving of roughly 1.5 million reporting hours of compliance time.

#### EFFECTIVE REGULATORY ANALYSIS

DOE has prepared more than 20 regulatory analyses and has at least 20 more in process or under consideration. However, as in most agencies, the quality of the regulatory analysis effort at DOE has not been satisfactory.