

POLICY OVERSIGHT

We are continuing our program of policy oversight in the operating administrations and OST as discussed in our May report. In addition, we are appraising and refining our system. As discussed below, some operating administrations have revised their procedures or reorganized their staff to improve their oversight.

We are carefully monitoring our regulatory process to ensure that the Department's regulatory procedures are being fully complied with throughout the Department. The General Counsel's office has met recently with the staffs in two operating administrations to discuss procedural problems and how to resolve them. In most cases, the review process in OST has enabled us to correct errors before rules or notices are issued. For example, in one case, a draft Advance Notice of Proposed Rulemaking (ANPRM) was submitted to OST without a Regulatory Analysis. The administration was advised that the ANPRM could not be issued until the Analysis was prepared. We also carefully monitor whether the initiating administration has consulted with other operating administrations that are affected by the rulemaking and ensure that such consultation occurs.

Another problem area concerns the use of emergency rules. For example, in several cases, agencies have sought to expedite the completion of a rulemaking by publishing an emergency final rule. Generally, OST has been reluctant to concur in such actions, and the administrations have reconsidered their positions.

We are exploring the need for workshops and other kinds of activities to help improve our Regulatory Analyses and Evaluations, increase the use of plain English in regulatory documents and ensure compliance with DOT's Regulatory Policies and Procedures. We have asked the operating administrations what would be most effective and how many employees might attend. In addition, we are considering which activities would benefit from participation by other agencies such as OMB, the Council on Wage and Price Stability (CWPS) or the Office of the Federal Register.

STEPS TO IMPROVE PROCEDURES AND POLICY OVERSIGHT

Several operating administrations have reorganized their offices or revised their procedures to improve oversight and compliance with the Executive Order.

Federal Highway Administration

The Office of the Chief Counsel of FHWA recently consolidated its regulatory review function into one office. This move will give program and staff offices greater access to FHWA legal services, encourage early coordination and improve control. Centralization also will ensure more uniform compliance with provisions of the Administrative Procedure Act, the Executive Order and the Department's Regulatory Policies and Procedures.

FHWA's Bureau of Motor Carrier Safety (BMCS) recently established a Branch of Evaluation and Analysis. Its responsibilities include the evaluation and analysis of proposed and existing safety regulations within the BMCS' jurisdiction. Staff members will have backgrounds in research, safety, engineering, economics and statistics. It is expected that this group will enable FHWA to respond more effectively to the requirements of the Executive Order and the Department's procedures.

Federal Aviation Administration

The FAA Administrator has revised the basic policies and procedures governing the FAA's regulatory program. The objectives of the revision are to:

- Update and streamline the rulemaking process while formally implementing the Executive Order and Departmental policies
- Eliminate unnecessary levels of review
- Eliminate unnecessary paperwork
- Use teams to formulate or execute rulemaking projects
- Establish priorities for regulatory projects.

The FAA Administrator has also initiated a briefing process that permits him to exercise effective direct policy oversight. Overview briefings are given by each Associate Administrator for the regulations under his or her control. These are followed by more detailed briefings on specific regulatory projects, which the project officers present. Among other things, the Administrator reviews projected schedules and sets regulatory priorities. In addition, the Administrator has begun a

series of meetings, which he chairs, on all significant and some non-significant regulations. These meetings, which are attended by the Chief Counsel and other high-level agency officials, keep the Administrator informed on important rulemaking actions and permit him to discuss alternative approaches with those who develop the regulatory documents.

Airworthiness Review Amendment No. 8, which involves issues related to airplane cabin safety and other matters, illustrates the effectiveness of these new procedures. Because of the Administrator's interest in cabin safety, this issue was separated from the other portions of the proposal. Meetings were held with the Administrator, Chief Counsel, Associate Administrator for Aviation Standards and staff working on the project. Questions were resolved and processing of the amendment is being expedited. The airplane cabin safety issues covered in this rulemaking are among the most controversial the FAA faces, and the Administrator's action in separating them from the other portions of the proposal will ensure they receive the special attention they deserve.

Coast Guard

As the May report stated, the Coast Guard Marine Safety Council believes that early oversight of proposed regulations will help eliminate those that are unnecessary. The Council now reviews regulations when they are still in the work plan stage. New projects are reviewed for need, feasibility and reasonableness. The Council already has rejected some proposed rulemakings because they did not meet these criteria.

Urban Mass Transportation Administration

The Chief Counsel's office in UMTA has been working with the heads of the program offices to ensure effective oversight over all stages of the development of regulations. In one instance it was able to help a program office establish priorities and schedule projects. The Chief Counsel's office is also encouraging teams working on regulatory projects to consult with the program heads at all stages of the drafting process to discuss policy issues and resolve questions as they arise.

EXAMPLES OF EFFECTIVE POLICY OVERSIGHT

Drawbridge Operations

The Coast Guard's original draft Notice of Proposed Rulemaking (NPRM) on drawbridge operations was transmitted to OST for review and comment

prior to submission to the Secretary. However, after initial review, the General Counsel's office determined that two key operating administrations, UMTA and FRA, which would be affected by the regulation, had not been fully consulted. Both of the administrations seriously questioned certain provisions of the regulation related to the amount of time allocated for bridge openings and closings. OST, FRA and UMTA also raised questions concerning the Regulatory Evaluation. The Coast Guard was asked to provide additional information in a number of areas, including the history of the regulation, the costs to affected parties and the potential impacts on railroad and commuter rail operations. The three administrations have been meeting to work out their differences. OST has been closely monitoring the progress of this NPRM in an attempt to have it revised and issued without delay.

Highway Beautification Program

FHWA drafted an ANPRM calling for comprehensive review of the highway beautification program. After OST review, the ANPRM was redrafted to expand discussion of some of the policy issues. It was also modified to elicit more helpful public comment on the issues.

55 mph Speed Limit Certification and Monitoring Requirements

The Surface Transportation Act of 1978 required FHWA, with NHTSA concurrence to issue new monitoring and certification requirements for enforcement of the 55 mph national speed limit. Since the Act was effective immediately, FHWA published an interim rule on an emergency basis.

FHWA was planning to issue a NPRM and provide for public comment before issuing the final rule. However, it later changed its mind and thought it should issue the rule on an emergency basis. FHWA submitted the regulatory documents to OST and consulted with it on whether an emergency rule was appropriate. Because OST was concerned about issuing this rule as an emergency regulation, a Department Regulations Council meeting was convened. The issues raised at the meeting included compliance with the Executive Order. Specifically, the issues involved: (1) the need for a meaningful period for public comment; (2) whether there was a clear need for the emergency publication of this regulation; and (3) the need for full review by OST and the Secretary before publication. At the meeting, members of the Council from FHWA, the other operating administrations and OST fully discussed these issues and the advantages and disadvantages of the alternative approaches. Then it was agreed that a NPRM and a limited final rule should be issued. This approach permitted thorough Departmental review and an opportunity for public comment.

Northeast Corridor Improvement Program Determination

In September, the Secretary concurred in the issuance of the FRA's decision concerning the parts of railroad stations and related facilities that would be eligible for cost-sharing between the Federal government and a local entity during reconstruction under the Northeast Corridor Improvement Project. The Office of the Assistant Secretary for Budget and Programs worked with FRA throughout the decisionmaking process. By setting guidelines and continually meeting with the FRA staff, the budget office was able to monitor and help limit the potential impact of the proposals on other agencies as well as make sure that the congressionally mandated cost-sharing process was effectively implemented.

Radioactive Materials Rule

RSPA has nearly completed a NPRM for the highway routing of radioactive materials. The NPRM proposals are based on testimony at a public hearing and extensive comments received in response to the initial ANPRM. During the development of the rule, the Administrator and key members of the RSPA staff, together with policymakers in OST, substantially improved the draft NPRM and the Regulatory Evaluation. Specifically, the role of States and local governments in imposing routing requirements was clarified and expanded, and the policy on routing in urban areas was revised. The Regulatory Evaluation was expanded to include a discussion of the uncertainty involved in estimating the risks associated with transporting radioactive materials on highways.

PUBLIC PARTICIPATION

The Department has continued its efforts to increase public participation in its rulemakings, and we have adopted some new techniques. We are also evaluating certain components of our citizen participation program to determine whether it can be made more effective.

RECENT DEVELOPMENTSConsumer Workshop

In May 1979, the Department sponsored a two-day conference in Washington, D.C., to provide consumers with information related to current transportation issues. More than 250 persons attended the conference. A wide variety of workshops was offered, including "Communication Skills in Citizen Participation," "Paid Participation Program in NHTSA" and "Local Transportation Planning." In addition, the Secretary, the President's Special Assistant on Consumer Affairs and other high-level Departmental officials addressed the participants. A workshop on "DOT's Rulemaking Process," presented by personnel from the Office of the General Counsel, was attended by more than 60 persons. It focused on providing practical advice such as how to comment on DOT rules, how to find out about future rulemaking activities, how to file rulemaking petitions and how to use the Federal Register. The workshop was generally well received, and we are hoping to hold more workshops in other areas of the country. (A copy of the program is attached.)

Steps to Aid Commenters

Many participants at the consumer conference wanted the Department to acknowledge in writing that we had received their comments on proposed rules. In response, the Department is now including a notice in each proposed rule instructing persons who wish to be so notified to enclose a stamped, self-addressed postcard along with their comments, which the docket supervisor will return.

To help people deliver comments in person to the operating administrations' rule dockets, and to make the dockets more accessible, we have asked that each ANPRM and NPRM indicate exactly where the dockets are located and when they are open to the public. We also are considering whether to include this information for all operating administrations in an appendix to the Agenda.

In order to assist and encourage people to participate in its decision-making, NHTSA has prepared a booklet informing individuals and organizations about its public participation program. NHTSA plans to widely distribute this guide.

In September 1979, FHWA sent out the first 1,300 of some 10,000 mailers entitled, "You and the Rulemaking Process." The mailer announced FHWA's intention to send, on a routine basis, free copies of all rulemaking notices to people who request them. A postage-paid return card is provided with the mailer for people who wish to be placed on future mailing lists. The first batch of mailers elicited 166 responses, or a 13 percent return. (A copy is attached.)

Regulations Agenda

We are continuously revising the Department's Semi-Annual Regulations Agenda to make it a more readable, useful tool for the public. In August 1979, we published a new, improved format that has prompted favorable comment. (See attached copy.)

We are also planning to include, in an appendix to the Agenda, the names, telephone numbers and addresses of contacts within each operating administration who could answer general questions about rulemakings. Although the Agenda currently lists contacts for specific rulemakings, the public sometimes has difficulty obtaining general information about an administration's procedures or current rules. The contact could provide this information or refer the inquiry to the appropriate person.

Evaluation of Participation in Planning Process

DOT has established a work group to review and evaluate the adequacy of the requirements for citizen participation in the planning processes associated with the Department's grant programs (e.g., highway, airport, mass transit, and so forth). An Advance Notice of Proposed Policy has been issued to solicit the public's views on the process. This fall, the members of the work group are visiting more than 15 cities and interviewing some 200 consumer and public interest group representatives, State and local government officials, and regional Federal government officials to gather a cross-section of opinion. Based on the responses to the Advance Notice of Proposed Policy, the interviews and an internal review of existing requirements, we will decide whether changes in current requirements are needed and what form they should take.

Consultative Process for Legislation

Recognizing the importance of involving the public at the very earliest stages, we have taken steps to increase public participation in the development of proposals for legislation. This process has helped us develop better legislation. Moreover, we think that early discussion of the legislative proposal will also help us identify potential problems before the regulations implementing the legislation are drafted. For example, before the Administration's major trucking bill was submitted to the Congress in June 1979, the Department notified consumer and public interest groups; affected labor, business and industry interests; State and local governments; and other Federal agencies of our interest in exploring the trucking issue. We held numerous meetings with interested groups to help develop our proposed legislation. A draft version of the bill was widely circulated to the affected groups for their comments. We believe we made a conscientious and largely successful effort to permit every relevant group to present its views. Similar procedures were successfully used in the development of the airline deregulation bill.

FINANCIAL ASSISTANCE

As noted in our May report, the Department's demonstration program in NHTSA makes funds available to help individuals and organizations participate in certain rulemaking proceedings. NHTSA publicizes these proceedings in various ways including press releases. In addition, the agency identifies those who either have an interest or some expertise in the general subject of the rulemaking proceeding. Letters describing the proceeding and inviting applications for financial assistance are sent to those individuals and organizations.

Since the establishment of the funding program, the variety of rulemaking participants has increased markedly. For example, in a recent proceeding on truck safety, numerous truck drivers offered comments and testimony on the issues under consideration. Before the public participation program was implemented, truck drivers would almost certainly have been underrepresented or totally unrepresented in such a proceeding.

NHTSA is having similar results in its most recent rulemaking proceeding concerning vehicle child restraints. The agency has received applications for funding from a broad range of groups and individuals who should be able to offer important testimony at an upcoming meeting. Participants will include physicians, disabled citizens, health professionals, public interest groups, educators, researchers, and other knowledgeable citizens. This is definitely a broader range of participation than would have occurred before the funding program was undertaken.

The funding program has not delayed the regulatory proceedings. In fact, it has facilitated them because it has enabled NHTSA to consider more complete data and a wider range of views.

ADVANCE NOTICES OF PROPOSED RULEMAKING

In general, the Department has found ANPRMs useful for obtaining information. Comments on ANPRMs have accelerated the analysis and evaluation steps in rulemaking proceedings.

The Department has issued three ANPRMs and one request for comments in the past six months. They are described below.

Multipiece Rims on Trucks and Buses

NHTSA's ANPRM on multipiece wheel rims on trucks and buses was intended as a request for information rather than as a notice of an impending rulemaking. The ANPRM, which cited controversial accident data on rim defects and failures, elicited about 100 comments and aroused intense interest among people who would be directly affected by rulemaking in this area. Attorneys from law firms representing the rim industry challenged legal aspects of the proposal. In addition, the potential economic impact of any action was a major factor in the protests, and NHTSA received inquiries from members of Congress whose constituents appeared to be directly affected.

In general, because the notice posed specific questions related to cost and safety, the comments were especially valuable. The commenters provided information that had been unavailable to NHTSA previously but would be needed to prepare any future NPRM or to explain why further proceedings would be unnecessary.

Fuel System Integrity

NHTSA also issued an ANPRM that discussed the possible establishment of specific performance requirements for nonmetallic fuel tanks used in motor vehicles. It prompted 68 comments, which are currently being analyzed. The comments concerning the best way to ensure the integrity of nonmetallic tanks were particularly helpful because opinion varies on this issue.

Innovative Project Grants

Another NHTSA ANPRM discussed possible procedures and criteria for awarding grants for innovative highway safety projects. Eighteen comments have been received to date and are under review.

Vehicle Speed Control

Trailways Bus Company petitioned NHTSA for a motor vehicle safety standard to require a road speed governor (a device that limits speed capability) for all commercial vehicles. The agency published a request for comments concerning the petition, which included specific questions regarding the various types of governors available, expected fuel savings and potential safety problems and costs. The notice was published as a request for comments, rather than as an ANPRM, to inform the public that the agency would need more information before it considered rulemaking. NHTSA received more than 1,000 comments, which have been very helpful. The comments demonstrate that a majority of the motoring public would like governors on large trucks and trailers, but that truck drivers and trucking companies are vehemently opposed to such a proposal. Truckers' comments regarding possible safety hazards associated with governors (e.g., passing capability on steep grades) have helped the agency focus on this issue.

PUBLIC HEARINGS/MEETINGS

Evaluation of Hearings

The General Counsel's office is examining how to improve the Department's public hearings. The office is gathering data on such matters as who attends these hearings, whether the people testifying are different from those who submitted written comments, whether the oral testimony differs from the written comments and whether the witnesses stay to listen to the presentations other people make. In addition, the office is asking the agencies which techniques they have used most successfully in their public hearings. It is particularly interested in such things as whether agency presentations on the state of the art and evening hearings as well as question and answer and rebuttal periods have been valuable. This information will be disseminated to all operating administrations so that they can benefit from each other's experience, thereby improving their own hearings.

Coast Guard

The Coast Guard recently held five hearings on the proposed rules for tank barge construction. In addition to notices in the Federal Register, the hearings were announced in trade publications, which was a valuable publicity technique. The hearings were well attended, and four were virtual sellouts with approximately 200 participants each.

A number of the comments received at the hearings pinpointed areas where barge owners and operators thought that the draft Regulatory Analysis needed to include or address additional issues. The Coast Guard is evaluating all the comments to determine the adequacy of the original Analysis and improve it where necessary.

The Coast Guard also recently held a number of evening hearings. These appear to be most successful in cases where there is substantial interest from the general public. Three evening hearings held on the proposed rules on size limitations and operational requirements for vessels operating in Puget Sound drew private citizens who, in the Coast Guard's opinion, could not otherwise have attended. Local interest was so great that the Port Angeles, Washington, hearing was broadcast live on a local radio station.

Office of the Secretary/Office of the General Counsel

The General Counsel's office recently concluded a rulemaking that resulted in moving a time zone boundary. The Department held three public hearings in Alaska to give the potentially affected population an opportunity to comment. Two were held in the evening to give as many people as possible a chance to attend.

National Highway Traffic Safety Administration

In planning a recent public meeting on truck safety, NHTSA thought that truck driver participation would be especially important. To encourage this, the truck driver community was notified by a direct mailing to thousands of drivers. Articles appeared in truck driver magazines and posters were distributed to more than 700 truck stops. In addition, various truck driver organizations informed their members directly. NHTSA also installed a toll-free number, which it advertised widely so that drivers could call the NHTSA Consumer Participation Office with questions about the proceeding. More than 40 truck drivers attended the public meeting and offered testimony, and hundreds of truck drivers have called on the toll-free number.

NHTSA will hold a meeting on child transportation safety issues in December to consider future rulemaking to curb juvenile deaths and injuries associated with automobile accidents. More than 700 letters have been sent to interested individuals and organizations, inviting them to participate in the proceeding.

Federal Highway Administration

As a part of its rulemaking on the reassessment of the highway beautification program, FHWA recently conducted public hearings at 11 locations throughout the country. FHWA ran display advertisements in major local newspapers in eight cities across the country. These ads were designed to inform people who do not read the Federal Register about the hearings and to encourage their participation. Approximately 875 people attended and 435 testified. Commenters offered a wide range of views about the future direction of the beautification program. Speakers at the hearings represented the outdoor advertising industry, advertisers, State and local government officials, anti-billboard groups and concerned citizens.

FHWA also held a public meeting to obtain views on updating the Manual on Uniform Traffic Control Devices (MUTCD), which the States must follow for all streets and highways. At the meeting, methods for optimizing public participation in the development of proposed changes to the MUTCD were discussed.

Federal Aviation Administration

The FAA has held a series of informal meetings in 37 cities to obtain public opinion on tentatively proposed Terminal Control Areas (TCAs). These are areas of increased air traffic control. The meetings were held in the cities associated with the proposed TCAs. In most cases only one meeting was held on each TCA; however, four were held in the Los Angeles area. The number of attendees and comments varied considerably. In some locations, only one or two comments were received, while in a few cases the FAA received close to 100 comments. Meeting attendance varied from approximately 25 to 350 persons.

Federal Railroad Administration

FRA is required by statute to hold hearings on all of its safety rulemakings. At these hearings, a panel of experts is present, witnesses are questioned and rebuttal statements are permitted. During the past six months, FRA has held five public hearings. FRA has, in the past, held all its meetings in Washington. However, for its regulation on alerting lights for locomotives, it held an additional hearing in Chicago. This hearing attracted approximately 75 people compared with 20 who attended a hearing on the same subject in Washington. The Chicago commenters also presented more diverse views. Based on the success of the Chicago hearing, and subject to time and financial constraints, FRA hopes to hold more meetings outside Washington for selected proceedings.

In addition to its hearings, FRA conducts regional seminars and workshops throughout the nation concerning railroad safety regulations. These activities provide a forum for explaining the requirements of railroad safety regulations to railroad officials and labor representatives. They have proven to be especially effective in achieving a better understanding and a uniform interpretation and application of new and revised railroad safety regulations.

Research and Special Programs Administration

RSPA recently held a public meeting on polyethylene packagings during which informal views of the public were solicited on general performance criteria. Approximately 140 people attended, and 50 offered comments.

RSPA also held a public hearing on its proposed regulations on cryogenic liquids. Approximately 100 people attended and 10 commented. The comment period on the proposed regulations was extended to permit further consideration of the issues raised at the hearings.

ACTIONS TAKEN IN RESPONSE TO PUBLIC COMMENT

Public comment on two proposals recently caused the FAA to withdraw them. FAA withdrew its proposal on controlled visual flight rules because of numerous adverse public comments and an FAA determination that the regulation, as proposed, might not be the best way to reduce the en route collision risk problem at which the rulemaking was directed. In addition, the FAA withdrew its proposal on elimination of certain flight plan requirements for civil aircraft operating between the United States and Canada or Mexico. This decision was made in light of the convincing arguments of some of the commenters, who stressed the value of the present regulation for search and rescue and law enforcement purposes.

FHWA issued a final rule on commercial motor vehicle inspection, repair and maintenance in July, with an effective date of August 31, 1979. Comments were invited on the final rule. Seventeen comments were received, the majority of which requested a four month extension of the effective date. These commenters were motor carriers who desired the extension in order to deplete current stocks of vehicle report forms before introducing the new forms required under the revised rule. In addition, several commenters requested exemptions for vehicles which are operated under certain conditions. In August a notice was published which extended the effective date and comment period to December 31, 1979. This action will allow the carriers to deplete their stocks of forms and allow additional time for comments.

REVIEWS OF REGULATIONS

The Department continues to emphasize the need for reviews of its regulations. In addition, we are working with the independent transportation regulatory agencies to improve their regulations. The progress made in recent months is described below.

Federal Aviation Administration

The Department's regulatory reviews vary greatly in scope and detail. In the FAA, for example, a review can be informal or highly structured.

The most informal review simply involves an internal analysis of letters from the public, technical reports, congressional correspondence and FAA investigative and field reports. These reviews, which usually are conducted by a project manager or a team composed of appropriate program or legal staff, result in either an informed decision that regulatory action is unnecessary or in the issuance of an ANPRM or NPRM to obtain additional information from the public. For instance, when the FAA recently reviewed its operating rules for certain larger airplanes, its analysis concentrated largely on the results of on-site inspections and a review of enforcement proceedings and accident reports. The analysis indicated that standards more directly related to the size of the airplane instead of economic criteria would be more easily complied with and enforced. As a result, the FAA is proposing a NPRM to revise the standards.

The FAA's more detailed regulatory reviews involve a lengthy, systematic process for development of new standards or revisions to existing rules. In these cases, the FAA selects a regulatory area to consider. The public is notified through the Federal Register, or by direct mail, of the initiation of a regulatory review program. Specific information and a schedule of the proceedings is given for the area being reviewed. The public is invited to submit proposals for new or revised regulations.

Internally, the FAA canvasses headquarters and regional program offices for their views and establishes teams that screen the proposals for adequacy. The agency prepares a compilation of the FAA proposals and proposals made by the public, which it makes available for public comment. After the comments have been received, the agency prepares a workbook containing the original proposals and all comments. The workbook is

also made available to the public. The FAA then convenes a public rule-making conference, using the workbook as a basis for discussion. Finally, a NPRM is prepared based on a transcript of the conference and the information in the workbook. This review system permits meaningful public participation at a very early stage and facilitates important regulatory revisions in areas involving complex technical issues.

A recent example of this process is the review of light transport airplane airworthiness standards. A public conference was held in connection with this review. In order to promote greater international participation, the Administrator sent personal invitations to foreign directors of civil aviation. As a result, approximately 90 foreign representatives attended. At the conference, discussion was encouraged to resolve disagreement between the FAA, the aircraft manufacturing industry, operators, official foreign representatives and other interested persons concerning passenger and gross weight limitations. The FAA proposed that the new standard apply to airplanes with a passenger capacity of no more than 30, while the industry and operators supported a 55-passenger limit. The FAA will give full consideration to the views of the conference participants as the NPRM is developed.

Future conferences are being scheduled for other reviews. A notice of a conference on the Rotorcraft Regulatory Review has been issued, and proposals to be discussed at the conference have been made available to the public. In addition, in compliance with the requirement in the Executive Order that new regulations be evaluated for effectiveness, a conference will be held to discuss the impact of the new air taxi regulations for the operation of aircraft with fewer than 30 passengers. The results will be used to make appropriate refinements to the rule and adjustments to the levels of surveillance used for these operations.

Urban Mass Transportation Administration

In the course of developing regulations to implement recent legislation, UMTA has decided to review all of the regulations governing its major formula grant program. It is consolidating rules from several sources, eliminating redundant and unnecessary requirements, writing in plain English and simplifying requirements. It is expected that this project will simplify application procedures for financial assistance and decrease delays in processing grants.

National Highway Traffic Safety Administration

In September, NHTSA completed its review of the side impact protection standard for automobiles. The agency issued a technical report which concluded that the performance requirements of the standard are effective, and that the standard is cost-effective because it prevents many deaths and injuries. At present there are no plans to revise these regulations.

NHTSA's Uniform Tire Quality Grading Rule, which was published in March 1979, is undergoing review in compliance with the Executive Order. So far, NHTSA has conducted surveys of consumer attitudes on tire buying. This study is almost completed. As a long-term project, the staff is preparing a study that will track certain tire types and will examine the effect the grading system has on prices, buying patterns, etc.

Office of the Secretary/Federal Highway Administration

The Department's Office of Civil Rights, with the assistance of FHWA's Office of Civil Rights, is involved in an effort to consolidate the equal employment and affirmative action regulations of FHWA, FRA, and UMTA into one regulation. The enforcement provisions of these regulations have already been consolidated. It is expected that this action will simplify compliance procedures and reduce burdens for the States by eliminating conflicts and duplication.

Federal Railroad Administration

In May 1978, the FRA announced a General Safety Inquiry to evaluate and improve its safety regulatory program. This inquiry, initiated in response to the Executive Order, included a series of five two-day public hearings. As a result of these hearings, FRA has proposed major revisions of the safety standards for freight cars, locomotives, and track. One will substantially increase the safety requirements of the existing rules. Others will substantially reduce costs without adversely affecting safety.

In the NPRM on freight cars, published in January 1979, FRA estimated that the proposed revision would save the industry more than \$100 million annually. The final rule is very close to completion.

The NPRM on locomotives, published in May 1979, proposed revisions that would result in an estimated annual saving of approximately \$50 million and a one-time capital cost saving of \$200 million. In addition, several reporting forms currently required would be eliminated altogether or consolidated into a single form, substantially reducing the recordkeeping burden.

In September 1979, a proposed revision of the track safety standards was published. It is designed to strengthen safety requirements in order to deal with the problem of deteriorating roadbeds on the nation's railroads. FRA anticipates the proposal would result in a one-time track rehabilitation cost of about \$20 million and a total increase of \$3.5 million in annual operating expenses.

Finally, revisions of several other components of the safety regulatory program are close to being issued as NPRMs.

REGULATORY ANALYSIS AND EVALUATION

In response to OMB's report to the President, we are exploring, with the operating administrations, ways to improve the quality of our Regulatory Analyses and Evaluations. Among other things, we are considering a training course/seminar on this subject. In addition, as noted in the policy oversight discussion, OST and the operating administrations are continuing to monitor the Analyses and the Evaluations to ensure that they examine costs and benefits effectively.

Since the last report, we have completed a review of the Regulatory Analysis for Coast Guard's rule on tanker safety and pollution prevention. That Analysis was successfully combined with the Environmental Impact Statement (EIS). RSPA also recently combined an EIS with its Regulatory Evaluation on the radioactive materials rule. On the basis of this experience, we are encouraging the operating administrations to combine these documents in future rulemakings so that the Regulatory Analysis/Evaluation becomes the key decisionmaking document.

Our August report discussed the pending Regulatory Analyses in detail. We have no new information except that NHTSA is preparing a draft Regulatory Analysis for its proposed ANPRM on truck and trailer brake systems. The ANPRM will seek information on a number of alternatives to resolve braking problems on heavy duty trucks. Due to the early stage of the rulemaking and because some proposed braking systems or additional equipment are not commonly used, impacts and benefits were addressed in the Analysis but not quantitatively analyzed. NHTSA anticipates that industry responses to the ANPRM should help provide more information for this purpose.

PLAIN ENGLISH

We are continuing the efforts described in our August report to monitor regulations for plain English and to improve the writing skills of the hundreds of technical people in the Department who draft regulations. Plain English will be an important part of the courses and workshops discussed above. One positive note -- a major interest group stated that a recently issued NPRM was "the clearest set of regulations that UMTA had ever issued."

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

November 13, 1979

IN REPLY REFER TO:

Senator Carl Levin
United States Senate
Washington, D.C. 20510

Dear Senator Levin:

Enclosed are answers to the questions that you posed to me in your letter of October 24, 1979, and the material you asked to have supplied for the record. I hope the answers are useful in marking up the regulatory reform bills.

Sincerely,



Nina W. Cornell, Chief
Office of Plans and Policy

Enclosure

RESPONSE BY DR CORNELL TOQUESTIONS OF SENATOR LEVIN

1) You oppose judicial review of regulatory analysis studies. But--in the case of an independent agency, such as the FCC--how can we be certain that you will comply with the requirements of regulatory analysis? In this regard, do you think that OMB should be given greater powers of oversight over your agency?

A. Yes, I oppose judicial review of regulatory analysis studies, but the reason I oppose it, although I am not sanguine about the possibility of preventing it, is because regulatory analysis is too simplistic a notion to insure that agencies do the right kinds of analysis prior to passing on regulations. Once Congress has decided that there should be a requirement for any kind of pre-decisional activity, judicial review is the ultimate sanction to insure that it takes place. Moreover, adding additional powers for OMB will not preclude judicial review later and only adds an additional layer of oversight on the agency and thereby greatly adds to regulatory delay.

But I wish to return to the question of regulatory analysis itself. The reason I oppose judicial review is not because I oppose judicial review per se, but, because I see the problems that arise when a particular type of analysis is mandated for all decisions. When an analysis requirement is not part of a general balancing test that leads to the question: Was this a reasonable agency action given the information available to the agency and did the agency make reasonable attempts to get all the necessary information? then the format, the form, the technical completeness, if you will, of the analysis itself becomes the end question of judicial review. Not whether the regulation was a good one or a bad one but whether all the peculiarities of the particular type of analysis were followed. This is certain to increase delay in regulatory decision making. Worse, it is not all certain, indeed, in many cases involving economic regulations, it may be irrelevant to improving regulatory decisions. The same is not true with social regulations, but is true with economic regulations.

2). You state that regulatory analysis was designed for health and safety regulations-- rather than economic regulations. But why isn't it necessary to consider costs, benefits and alternatives for decisions on economic controls, such as licensing?

A. The issue of whether it is necessary to consider cost benefits and alternatives for decisions on economic controls such as licensing is relevant at the time one decides to institute an entire program of licensing. That is, should we have 214 control over entry into the common carrier business. Unfortunately, that is not a regulatory decision; it was a decision made by the framers of the Communications Act. Certainly when a whole regulatory program is designed, it is important to consider costs, benefits and alternatives. When the question is whether to have economic regulation, such as licensing, entry controls, tariffs and the like, Congress decides that such programs should exist. The agencies do not decide that. What the agencies decide is should a particular applicant be allowed to enter the industry. In many cases it is extremely difficult to do a cost/benefit test of that question and particularly to put it out in advance for comment because that is the issue that is put out for comment, should there be entry in this particular market at this particular time. It is certainly appropriate at the end of the rule making process to state that the agency has decided either that more entry gives more benefits than it costs or that it does not, but not to put that not in advance because to do so is to prejudge the issue.

3). If your agency decides to lessen a regulatory burden as in radio regulation, would it normally decide not to undertake a regulatory analysis?

Wouldn't an analysis still be useful to choose the best way to deregulate?

A. In the case of radio deregulation, as in the case of the cable television deregulatory rule making, the agency did undertake extensive economic analysis that really can be seen as a type of cost/benefit analysis in its logic. In both cases the analysis looked to see whether the gains to society from such regulations outweighed the costs, and in both cases came tentatively to a conclusion that the gains of continuing regulation did not outweigh the costs. This goes back to the issue raised in Question 2. In the case of cable, and in the case of the particular regulations in the radio field, the regulatory programs being examined were ones that had been decided upon by the agency. The agency now re-examined, did a cost/benefit type calculation but without an ability to quantify either the costs or the benefits, and has reached a tentative conclusion that the regulations may not be in the public interest. In these cases, however, it isn't a question of whether the analysis can help choose the best way to deregulate, as one either removes the regulation or one doesn't. If the question is whether or how a regulation should be modified, yes, economic analysis can help provide insights into the best way to modify a regulation.

4). You state that "sunset" review of existing regulations has proved controversial and time-consuming. What ideas do you have to facilitate that process?

A. The only way that the Sunset process can become less time-consuming, and at that only marginally so, is to reduce the burden an agency faces in showing why it is deviating from past practice. Currently, under the whole structure of due process and judicial precedent, the agency faces a heavy burden of proof every time it changes from its past pattern of behavior. The reason that this heavy burden of proof has arisen through past judicial precedence goes back to how controversial changing pattern is. Once a pattern is established, there are groups in society who benefit from continuation of that pattern. When changes are proposed these groups are likely to litigate to try to protect the benefits they feel they enjoy. Because most changes benefit diffuse, diverse, not well-represented interests, and, in addition those benefits are often speculative and not well-understood by those who will receive them, there are no counter groups suing to ensure change. The result of these two factors leads to the controversy and large expenditures of time involved in Sunset review. There seems little that can be done to facilitate that process.

5) You note that each year the FCC prepares a report entitled "Major Matters Before the FCC." We understand that among the items on that agenda for some time now is a rulemaking on reimbursement for public participation in rulemakings.

What's the status of this rulemaking?

What is the purpose of just listing items on an agenda if they don't move?

A. The Notice of Inquiry on Gen. Docket 78-205, "Reimbursement of Expenses for Participation in Commission Proceedings," was initiated in June, 1978. The comment and reply comment periods were initially designated for September 15, and October 15, 1978, and later extended for an additional month. The comments are now under review by members of the Commission staff in preparation for consideration by the full Commission.

The latest edition of the Report, "Major Matters Before the Commission," was released December 31, 1978. Items submitted for inclusion in the Report represent an overview of significant matters likely to be considered within the following year; the precise order of consideration, however, is not always known at the time of preparation of the Report.

6) When will FCC publish its first semi-annual agenda of regulations under review or development?

A. The FCC published its first semi-annual agenda of regulations on October 29, 1979 at 44 Fed. Reg. 61979. Copies are available on request from the FCC's Office of Public Affairs.

7) In response to a Subcommittee survey question last May on FCC's goals to reduce or simplify its rules, the agency responded that Regulation Task Forces in the bureaus and offices throughout the FCC were deleting, consolidating and simplifying rules wherever applicable. The agency also stated that in 1978, 366 rules were deleted through re-regulation and consolidated in a new Part 90 of the Code of Federal Regulations.

What is the general composition of these Regulation Task Forces and how do they coordinate their efforts?

What impact have these Task Forces had?

How many rules are there in the newly created Part 90 of the Code of Federal Regulations?

A. Reregulation of FCC rules and regulations continues to be an ongoing function throughout the Commission.

In September, 1978, as part of the FCC's response to the President's letter on improvements in the regulatory process, Chairman Ferris designated Commissioner Tyrone Brown to take on the responsibility for overseeing the Commission's regulations review effort. Commissioner Brown established an agency-wide task force to examine FCC rules and paperwork requirements to determine areas in which the agency can make improvements to meet the goals of the President's Executive Order 12044. The permanent members of the task force consist of staff from the General Counsel's Office, the Office of Plans & Policy, the Office of Science & Technology, the Executive Director's Office, and the Consumer Assistance Office. When examination of regulations of a particular bureau occurs, staff from that bureau will participate. The task force meets periodically for the purpose of, for example, focusing on the reports and forms (including license applications) which the Commission asks regulatees to file, what information is asked for, what is

done with the information obtained, why is this information necessary, how many copies of each form are required to be filed, how long does staff review take, and in general, is there a public interest justification for the form and the information requested. The goal is to decrease the burden of work required of licensees and of the Commission's staff.

Additionally, task forces in the different bureaus have continued their individual deregulation efforts.

The Broadcast Bureau has a Reregulation Staff, located in the Policy & Rules Division, composed of an attorney, an engineer, and a broadcast specialist. Their function is one of oversight and review of rules written throughout the Bureau. They subject all broadcast regulations to continuous review to determine their current validity in light of the present state of the broadcast art. To date, approximately 1,115 modifications or deletions have been made by the use of some 65 separate Orders, Notices of Inquiry, Notices of Proposed Rulemaking, studies and projects. "Summary of Actions," a three-volume document containing Public Notices and summaries of what has been accomplished to date, is enclosed for your information.

While the Cable Television Bureau has an individual in its Policy Review & Development Division who continues to perform the functions originally assigned to the Cable Television Re-Regulation Task Force, the functions of that unit have expanded so as to occupy the majority of the time of the entire Division and a significant amount of the time and resources of the entire Bureau. This expansion has coincided with a shift in emphasis from the initial effort to improve the day-to-day functioning of the rules and relieving burdens on small businesses, to a major reappraisal of the need for various types of rules. Under two phases of reregulation review, the Cable Television Bureau's efforts have brought about major changes (in some 12 docketed proceedings) including: relief for systems with under 1,000 subscribers from obligations of most of the rules (Docket 20561), various changes in restrictive rules to provide some greater flexibility to system operators (Dockets 19859, 19995, 20028, 20371, 20482, 20487, 20496, 20553), elimination of specific Commission approval before commencing operation by each system operator (Docket 78-206), and elimination as well of almost all regulations governing contents of franchise agreements (Docket 21002). Now under way are efforts to eliminate the last franchise standards (Docket 21002) and elimination of all distant signal and program exclusivity rules (Dockets 20988 and 21284).

Over the past few years, the Private Radio Bureau has had several task forces involved in projects to improve regulations. These task forces are generally small, informal groups assigned to a particular regulatory improvement project. Before any of these projects are taken before the Commission consultation with other Commission offices and bureaus that have an interest in the project have taken place. The regulatory improvement projects have been in such areas as: "Plain English" CB Radio Service Rules; proposed simplification of the rules for Recreational Boaters;

proposed "Plain English" Radio Control Rules; and the new Part 90 Reregulation. The Private Radio Bureau's efforts are on-going and long-term, reviewing all its regulations with a view toward no regulation where possible.

In response to the third part of this question, there are 189 rules in the newly created Part 90 of the Code of Federal Regulations.

8) What specific problems or frustrations has your agency encountered in trying to implement the Executive Order and how has your agency dealt with them or how does it propose to deal with them?

A. Because the FCC is an independent regulatory agency, we have not had the kinds of problems and frustrations that executive agencies have faced as they have attempted to implement the Executive Order. Instead, we have been implementing all but the regulatory analysis portion as time and resources permit, and we are now well along, as my testimony indicates. Virtually all parts of that Order except cost/benefit analysis as an economist uses that term, have been implemented. Additionally, we have been increasing the use of and application of economic analysis to all major, significant, and important activities that the FCC has been undertaking. We have, however, been using the kind of economic analysis that seems the most appropriate to find the best solution to the problems facing the agency, not necessarily cost/benefit analysis.

9) To what extent has your agency had to redirect scarce resources from its primary functions in order to carry out the provisions of the Executive Order?

A. Because the Executive Order is not mandatory for the FCC, the agency has not had to redirect scarce resources from primary functions. The Commission has been in the process of improving its economic capability by increasing the number of economists employed at the agency and those people have been put to work to develop basic responses to regulatory issues.

10) The OMB report cited five factors which it says "have contributed to the lack of sufficient, government-wide progress on doing regulatory analysis":

- lack of in-house analytic talent
- over reliance on the \$100 million criteria as a trigger for analysis and understating of compliance costs to avoid the threshold.
- agency uncertainty on how much flexibility or discretion is available under the agency's statutes to select among alternatives
- proliferation of "impact analysis" requirements
- other disincentives, including difficulty, fear of public or RARG criticism, etc.

What is your agency doing to address each of these problems?

A. a) The FCC is in the process of building in-house analytic talent, particularly economic talent, but also engineering, technical and legal talent across the board. My office now contains nine economists who work with the other parts of the agency to prepare economic analyses of all significant issues.

b) Again, because the FCC is not covered by the Executive Order, we have neither over-relied nor under-relied on the \$100 million criteria as a trigger for analysis. Nor have we been involved with understating compliance costs to avoid the threshold. My office has been allowed to become involved in any issue that we found important or significant, many of which have costs that can never be quantified and therefore never compared at all with any dollar trigger.

c) There certainly has been lots of discussion at the FCC about how much flexibility or discretion is available under the agency's statutes to select among alternatives, but that has not impeded economic analysis and its application.

d) Again, because the FCC is an independent agency, except for environmental impact analyses, it has not been subject to most of the analysis requirements.

e) The FCC has not hesitated to do economic analysis because it is difficult or would be criticized. One of the most difficult economic studies performed was the Cable Economic Inquiry Report that is now out for comment. As an independent regulatory agency, our analyses are not subject to RARG review.

11) Please describe what procedures, if any, your agency has to review an initial decision that a regulation is not "major" under the Executive Order and therefore does not require a regulatory analysis.

A. The FCC has no procedures to decide or to review an initial decision that a proposed regulation is not "major" under the Executive Order. Economic analysis is included as part of a rulemaking whenever either the Chief of the originating Bureau or I decide that there are important economic questions involved.

12) Has the regulatory analysis procedure delayed or forced a cutback in any of your regulations required by statute? If so, please describe in detail.

A. No.

13) Where do you get the data you need to do regulatory analysis and what controls do you have on its quality?

A. The data we use in economic analyses come from many sources, particularly from our regulatees. As a licensing body, we have some ability to enforce the quality of the data they report.

14) OMB has recommended that:

- a. agencies devote more time and attention to improving the quality of their regulatory analysis;
- b. agencies review more existing regulations and expedite that review; and
- c. agencies conduct more regulatory analyses with regulatory analysis to be considered "more the rule than the exception".

Given your resources at the present time, can you effectively and efficiently implement all three recommendations simultaneously?

Do you believe that your efforts can be more effective initially by focusing on only one or two of the recommendations? If you believe priorities should be set, how would you rank them?

A. Once again, as I noted in my testimony, regulatory analysis, particularly rigorous, quantitative cost/benefit analysis, is rarely appropriate for FCC regulations. If we were nonetheless required to perform such analysis given current resources, all three recommendations could not be effectively and efficiently implemented simultaneously. I would set b) as the first priority, c) as the second, and a) last. If agencies put out economic analyses for comment as part of rulemakings, public comments and criticisms will help ensure more time and attention to improving quality.

15) The OMB report noted that one major effect of the Executive Order has been "a significant power shift within agencies from the assistant secretary level to agency heads." Is this a correct statement at your agency and what sort of resources is your agency head putting into oversight of the rulemaking process?

A. No, there has not been a shift of power to the agency head because the Commission as a whole has always made the decisions about whether to issue regulations. In the past two years there has been increased emphasis on the role of the major offices (Office of General Counsel, Office of Science and Technology, and Office of Plans and Policy) for overseeing the legal, technical and economic adequacy of proposed actions.

INFORMATION TO BE FURNISHED
FOR THE RECORD BY DR. CORNELL

1) A detailed discussion of the specific problems which would result if the Executive Order were applied by statute to an independent regulatory agency like the FCC.

1. The major problem with the application of the Executive Order to the FCC would be the shortage of personnel capable of conducting cost/benefit studies. The agency already faces severe resource constraints that have resulted in significant backlogs in licensing would-be radio users. While rulemaking and licensing personnel are different, many rulemakings arise out of efforts to find speedier methods of licensing. These rulemakings, like others, would be slowed down by a regulatory analysis requirement, even if sufficient additional resources were provided. The imposition of a new procedural requirement without providing significant additional resources would cause even greater delays.

The problem of initial delay would be compounded by the additional litigation that would be forthcoming if the Executive Order were written into law. Congress has recently moved to reduce the litigation in energy cases arising from the requirement for environmental impact analyses. Similar litigation and attending delays could be expected from regulatory analysis requirement.

Finally, because the particular analytic tool required is not appropriate to many of the issues facing the FCC, requiring it by law may well preclude the agency from deregulating or reducing regulatory burdens in many areas.

2) A specific, numerical estimate as to how many rules and regulations your agency currently has in the Code of Federal Regulations. Of these, how many have been sunsetted, how many have been reviewed and how many are scheduled for review under the Executive Order?

2. Because Chapter 1, Title 47, Code of Federal Regulations (CFR) represents all codified regulations promulgated by the FCC, we used the 1978 edition of that as our sole source for the count of FCC regulations.*/ The sole use of the CFR eliminated any regulations/rules established in the Communications Act, or through judicial precedent. We felt this appropriate because the FCC was not necessarily responsible for the regulations established outside the CFR.

*/ Chapter 1, entitled Federal Communications Commission, of Title 47 of the Code of Federal Regulations is divided into 4 volumes as follows:

- Volume 1 contains Parts 0-19
- Volume 2 contains Parts 20-69
- Volume 3 contains Parts 70-79
- Volume 4 contains Parts 80-99

While it appears that Chapter 1 is divided into 100 parts, only 42 of those parts are actually used.

For the sake of consistency we counted on a regulation only those sections of the Code of Federal Regulations designated with a part and section number. For example on page 390 of the 2d volume of Title 47, we counted the sections with the following part and section numbers as regulations: 34.4925, 34.4931 and 34.4932. While we realize this method is fairly arbitrary, it is consistent.

From a random sample of 20 pages from the CFR we found that the estimated average number of regulations per page was 1.55. Because there are 2502 pages containing at least parts of regulations, we estimate that Chapter 1, Title 47 CFR contains approximately 3878 regulations as defined in the paragraph above. This number is subject to sampling error, and the true number could be higher or lower.

3) A description of your agency's experience in measuring the indirect costs and benefits of regulations: your agency's successes, failures, and frustrations, the possibilities and impossibilities of measuring indirect costs and benefits, etc.

3. The FCC has not attempted to measure other than direct costs and benefits of regulations in quantitative terms. FCC regulatory activities have major indirect effects on: diversity of viewpoints that get expressed on the broadcast media; diversity of consumer telecommunications services that could be provided under alternative market structures; and future pattern of technological change. These are either benefits or costs depending upon whether FCC regulations encourage or discourage diversity and technological change. In neither case are the effects quantifiable.

4) Estimates of the cost of undertaking regulatory analysis at your agency, of the money saved as a result of regulatory analyses and of the paperwork expense and staffing requirements necessary for these analyses.

4. There is not an estimate of the cost of undertaking regulatory analysis at the FCC, nor is there an estimate of money saved as a result of doing such analyses because the FCC is not subject to the Executive Order. The economic analysis done for the Cable Economic Inquiry involved at least five person years of FCC staff plus the services of five expert economists as consultants and contractors.



AMERICAN HOSPITAL ASSOCIATION
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November 16, 1979

Honorable Carl M. Levin, Chairman
Subcommittee on Oversight of Government Management
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for the opportunity to present the attached statement on behalf of the American Hospital Association to be included in the record of your Subcommittee's hearings with regard to implementation of Executive Order 12044, "Improving Government Regulations."

Hospitals and the health care field are among the most highly regulated sectors of our economy and we commend your committee for your work to improve the regulatory process. We will appreciate your consideration of the comments and recommendations set forth in our statement and assure you of our desire to be helpful in any further way we can.

Sincerely,

Leo J. Gehrig, M.D.
Senior Vice President

rgs

attachment



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STATEMENT OF THE AMERICAN HOSPITAL ASSOCIATION
 TO
 THE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT OF THE
 SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS
 ON
 IMPLEMENTATION OF EXECUTIVE ORDER 12044

November 16, 1979

The American Hospital Association, which represents some 6,100 health care institutions, including most of the nation's hospitals, long-term care institutions, mental health facilities, hospital schools of nursing, and over 30,000 personal members, appreciates this opportunity to present comments on the implementation of Executive Order 12044, "Improving Government Regulations," and on the recent report on this subject issued by the Office of Management and Budget (OMB). We commend the Governmental Affairs Committee and its Subcommittee on Oversight of Government Management for their continuing study of federal regulation and the need to improve the regulatory process.

HOSPITAL INDUSTRY INVOLVEMENT IN THE REGULATORY PROCESS

Our testimony before the full Governmental Affairs Committee on June 5 of this year described in detail the nature of the regulatory environment facing hospitals as they endeavor to meet the health needs of their communities. At the outset it should be noted that the Department of Health, Education, and Welfare (soon to be redesignated the Department of Health and Human Services) is the source of most federal regulations relating to hospitals. Over 700 proposed or final regulations are published by HEW each year, and approximately 75 percent of these deal with health programs.

A proliferation of regulations, sometimes highly specialized and frequently not coordinated with other relevant regulations, has driven up the cost of delivering health care. Total administrative costs to the government for all federal regulatory activities, estimated at over \$4 billion annually, have more than doubled in the last five years.

The costs of compliance that must be borne by the private sector are also staggering. Some of the costs of compliance are easily identified, such as increases in paperwork, time, and effort. However, more difficult to isolate and quantify are other costs to society in the form of reductions in innovation incentives and shifts to less efficient but more expensive modes of activity.

An AHA estimate of the cost of compliance associated with just one federal regulation, the Environmental Protection Agency's (EPA) proposed hazardous waste regulations published on December 18, 1979, indicates a cost impact of \$1 billion for hospitals in capital expenditures alone, plus additional costs to cover the increased record keeping the regulations would require. Echoing concerns expressed by the AHA to the EPA, the General Accounting Office (GAO) in 1979 recommended that the infectious waste definition proposed by the EPA be revised because "it could result in government overregulation."

As a result of concerns over the existing regulatory environment facing hospitals, the AHA has been heavily involved in efforts to improve the regulatory process and to require that analyses be made of proposed regulations. Much of this effort has been related specifically to rulemaking procedures of HEW. It has led to significant participation by the hospital industry in the development of those portions of the OMB report dealing with HEW.

In September 1977, prior to issuance of the Executive Order, HEW developed a plan called "Operation Common Sense" for review of existing regulations and revising regulatory procedures. At the Department's request, AHA provided suggestions for

the Operation Common Sense program's priorities. When HEW published a summary of the program in November for public review, AHA pointed to the program's failure to recognize the need for assessing the costs of compliance with proposed regulations. We also submitted comments on the initial draft of Executive Order 12044 when it was published by OMB. When the Order was signed by the President in March 1978, agencies were given 60 days to publish their plans for compliance.

In May 1978, HEW published its compliance plan in the form of modifications to the Operation Common Sense program. Commenting on this plan in August, AHA indicated that in our opinion the Department intended to make only minor revisions in its Operation Common Sense program for the purpose of creating compliance on paper with the Executive Order but without achieving the goals and intent of the Order. We particularly criticized the HEW proposal as inadequate with respect to public participation, determination of need, analysis of alternatives, and assessment of economic and compliance burdens. For example, the Department's proposed program would have circumvented actual compliance with the Executive Order in the following ways:

- a restrictive categorization of regulations (especially by the use of an intermediate "policy significant" classification) would have allowed HEW to avoid the regulatory analyses requirement in the case of certain significant regulations and most health regulations;
- public notice and status information on regulations would be provided as required by the Executive Order, though in a less comprehensive and timely manner than the Order provides;
- oversight of policy development by division heads would have been governed by less stringent criteria;
- analysis of regulatory alternatives would be based on less stringent criteria than provided in the Order;
- alternative procedures (reinterpretations, transmittal letters, "standard setting") could be used to effect policy changes without public participation;
- case-by-case discretion would be permitted with regard to the amount of notice and comment time afforded to affected parties; and
- different, less restrictive interpretations were made of the Order's criteria for regulatory impact analyses.

Although public comment on HEW's plan was completed by September 1978, and clearance was reportedly granted to the modified plan by OMB in December 1978, the final regulatory reform procedures were held up by the Secretary of HEW until October of 1979. HEW apparently was unwilling to commit the Department to expanded requirements for regulatory analyses during the major portion of 1979, during which time significant regulations were issued to establish Medicare hospital inpatient reimbursement limits, Professional Standards Review Organization reimbursement ceilings, and Medicare malpractice reimbursement.

During this interim period, the AHA responded to a request from OMB for information to assist in the preparation of the Executive Order compliance report. At a meeting with OMB staff in July, AHA representatives expressed serious concerns regarding HEW's ability to voluntarily execute needed reforms and outlined specific deficiencies in HEW's existing procedures. The problem areas identified in these discussions were incorporated in OMB's final report.

FINDINGS OF THE OMB REPORT

The OMB evaluation of agency compliance with Executive Order 12044, issued this September, recognizes the hospital industry's concerns that segments of HEW -- notably the Health Care Financing Administration (HCFA) and the Health Resources Administration -- have not complied fully with regulatory reforms mandated by the Order. While HEW's overall compliance was rated "good" on balance, the Department came under sharp criticism for continued noncompliance with the requirement for regulatory analyses. Many of the HEW activities that were commended by OMB and that apparently led to the overall "good" rating were activities of HEW's Office of Education and the semi-independent Food and Drug Administration.

Close examination of the individual report on HEW's compliance shows OMB's substantial agreement with past criticisms voiced by the hospital industry. For example, the report:

- recognizes that over one year after issuance of the Executive Order and over six months after the close of public comment, HEW still had not published final revisions to the Operation Common Sense "in part because of HEW's initial reluctance to adapt existing procedures to the Order's requirements";
- acknowledges that on several occasions HEW had to be forced to provide the minimum public comment period of 60 days — HCFA's malpractice reimbursement regulations are cited as an example — and notes that HEW has treated the 60-day requirement as a maximum rather than a minimum public comment period;
- acknowledges that HEW has, for the most part, ignored "considerable external pressure" to perform regulatory analyses on proposals considered to have "substantial economic impact." Specifically cited are regulations on malpractice reimbursement, Hill-Burton, and the System for Hospital Uniform Reporting (SHUR), and it is noted that only a handful of the 425 regulations currently under development have been scheduled for regulatory analyses; and
- recognizes that HEW's poor compliance with both the content and publication requirements for semiannual agendas of regulations have limited the usefulness of the Department's agendas in increasing public participation.

While all of these deficiencies are of concern to the hospital industry, of greatest concern is HEW's poor performance to date with respect to regulatory analyses. This is a paramount requirement for a rational and systematic process for developing regulations. Certainly it is logical and reasonable that before regulatory decisions are made, consideration should be given to estimates of compliance costs and projected benefits, as well as the need for and objectives of the proposed rule together with an examination of alternative means of achieving the desired results.

The positive effects such an analysis can yield are confirmed by the remarks of Douglas Costle, Administrator of EPA, in testimony before the Committee on Governmental Affairs on April 6, 1979. He stated, "EPA has been preparing such regulatory analyses for some time now, and I can report that they do help me try to find the best regulatory approach. Regulatory analysis on an important rule provides me with a thorough assessment of each of the options before me, giving me a much clearer picture of the environmental, economic, and other aspects of a complex and difficult decision."

We believe that requirements for regulatory analyses are appropriate and needed, particularly in the case of the health care industry. It should be recognized in connection with the national concern over health care costs that the proliferation of regulatory actions are major contributors to such costs. Careful impact analyses of proposed rules and regulations can provide reliable information on the cost burdens they would impose.

Executive Order 12044 requires agency heads to establish criteria for determining which regulations require regulatory analyses. The criteria established are to ensure that such analyses are prepared for all regulations which will result in an annual effect in the economy of \$100 million or more, or a major increase in costs or prices for individual industries, levels of government, or geographic regions.

As an indication of HEW's lack of attention to this requirement, in its August 16, 1979 regulatory agenda of 425 regulations listed as under development, HEW stated it was preparing regulatory analyses on only three proposals, with possible analyses of only six others.

Further, HEW has historically interpreted the concept of economic effects narrowly and inappropriately to mean increases in cost or prices only. Other relevant factors, such as the displacement of jobs or the shifting of costs from the public sector to the private sector, have been ignored.

HEW's approach to date has been to ignore the analysis requirement until the public outcry on a published Notice of Proposed Rulemaking (NPRM) becomes so great that it is forced to develop an analysis. This, of course, defeats the intent of the process. By the time the analysis is finally completed, it examines only the alternative selected, rather than the range of alternatives available; the analysis is not made available to the public with the NPRM; and, finally, the analysis is actually used as a justification for agency actions rather than as a decision-making tool to ensure cost-effective regulation.

There are many examples of significant failures by HEW to provide analyses of important health care regulations including the following:

- the Hill-Burton charity care regulations initially published as proposed rules on October 25, 1978, which have an estimated cost of \$97 million in the first year and a projected annual cost of \$257 million for 1984, did not include a regulatory analysis. The Office of Management and Budget, citing AHA's testimony and its own opinion regarding compliance costs, criticized HEW's failure to prepare a regulatory analysis of the economic impact of the regulations and requested that a regulatory assessment be performed. An analysis was eventually published with the final regulations, at which time the analysis was of no value in the development of public comment. Further, the analysis did not evaluate the substantial cost impact of the proposed charity care obligations on private pay patients;
- HEW's proposed System for Hospital Uniform Reporting (SHUR) was released January 23, 1979, without a regulatory analysis of its economic impact, despite the clear cost burdens the SHUR proposal would impose. Subsequent industry estimates have estimated that the cost of compliance would be in excess of \$180 million. Congressional concern over the burdens imposed by the SHUR proposal resulted in enactment of a requirement that HEW present a revised draft of SHUR to the appropriate congressional committees for approval. This unique inroad into the regulatory process was the direct result of HEW's indifference to regulatory analysis requirements. We understand that HEW now plans to publish an impact analysis to accompany the next revision of the SHUR proposal; and
- HEW failed to prepare a regulatory analysis on the March 15, 1979, proposed regulation on apportionment of malpractice insurance premium costs to Medicare, despite the Department's own estimate that this regulatory change would cost hospital patients and private insurers \$310 million in fiscal year 1980 alone by shifting costs now covered by Medicare to non-Medicare patients.

The latter example clearly illustrates how the absence of a regulatory analysis can result in poor policy decisions and have serious, unforeseen effects. Previously, Medicare paid its share of hospital malpractice insurance costs based on the percentage of a hospital's patients that are Medicare beneficiaries. HEW's new regulation has changed this policy so that Medicare's reimbursement of malpractice insurance is based on the actual malpractice claims experience of Medicare beneficiaries. As noted, this change shifts over \$300 million in costs per year from Medicare to the private sector. However, HEW refused to recognize this cost shifting as a basis for a regulatory analysis, stating that the requirements for such analysis applied only to "new" costs.

As a result, HEW was not forced to examine alternative methods of reducing specified levels of malpractice insurance costs. AHA has indicated to HEW that the apportioning method chosen is conceptually flawed. Specifically, hospitals in many states are required by law to carry malpractice insurance, regardless of the proportion of patients who are Medicare beneficiaries. For those hospitals, insurance expenses are as much a cost of doing business for Medicare patients as for any other types of patients. Further, many hospitals have very high proportions of government program beneficiaries and, consequently, few private patients to whom the Medicare costs can be shifted. In such circumstances, the hospitals could be forced to absorb the extra costs by reducing services.

The AHA believes that proper regulatory analysis of the new Medicare malpractice reimbursement regulations would have identified these conceptual deficiencies and resulted in an entirely different kind of rule. Instead, hospitals and patients are now faced with substantial compliance costs as well as the necessity of litigation to undo an ill-conceived rulemaking decision.

We believe that HEW should give greater attention to regulatory analyses and we are heartened by the emphasis given to such analyses in HEW's recently published revisions of Operation Common Sense. We agree strongly with the statement of Wayne Granquist of OMB to your Subcommittee that preparation of regulatory analyses should be considered more the rule than the exception. We also agree that too much emphasis has been placed on the \$100 million trigger rather than the two other criteria -- agency head discretion and individual industry or sector impact. The emphasis should be changed to require a regulatory analysis first, for any sufficiently important or controversial rule identified by the agency head; second, for rules with major potential cost/price effects on a particular region, group, industry, or economic sector; and, finally, for regulations not meeting the above criteria with a potential \$100 million effect on the economy.

We are hopeful that HEW's new procedures, although failing to completely adopt this approach, signify a new commitment to the spirit of the Executive Order and its requirements for timely regulatory analyses. We would note, however, that at this time we have no record against which to judge the adequacy of these new HEW procedures or their manner of implementation.

HEW's FINAL OPERATION COMMON SENSE PROCEDURES

In keeping with HEW's commitments to OMB during the preparation of the compliance report that the Department would correct deficiencies in Operation Common Sense, HEW published final regulatory reform procedures on October 16, 1979 that contain significant modifications of the original May 30, 1978 proposal:

- HEW will provide a minimum 60-day comment period on every "policy significant" proposal as well as every "major" proposal. The majority of key hospital regulations fall into HEW's "policy significant" category, which includes all regulations that "affect one segment of the population or an important category of institutions, such as hospitals, schools, or nursing homes"; and
- Although HEW refused to modify its basic economic criteria that mandate performance of a regulatory analysis (\$100 million national cost/price increase or a 10 percent cost/price increase in any one sector of the economy), four supplementary criteria have been added that, in the absence of a contrary decision by the Secretary of HEW, will require such an analysis. Of particular importance to hospitals is the fourth of these: "If a regulation is likely to create exceptional controversy over costs, including shifting of burden from the government to the private sector, regardless of cost estimates". This provision, presumably, would have mandated a regulatory analysis of the Medicare malpractice reimbursement regulation and also of proposed new PSRO reimbursement ceilings, which would create relatively little in new costs, but would shift substantial government costs to the private sector.

Also included in the final Operation Common Sense procedures are proposed criteria and procedures for conducting analyses of reporting burdens. These proposed procedures would require an assessment of reporting requirements for every "major" or "policy significant" new regulation. In-depth analysis of reporting burdens would be required if:

- the total reporting burden imposed by the regulation would involve 50,000 or more work hours annually;
- the average respondent would spend 50 or more work hours annually to comply with the regulations reporting requirements; or
- the total compliance costs to the government and the public would exceed \$500,000.

OUTLOOK/CONCLUSIONS

The AHA has participated actively in initiatives by the Administration to improve the regulatory process, and hopes to continue to provide useful input in efforts for regulatory reform. Our experiences, some of which we have described in this statement, have led us to conclude that the initiatives to date have been inadequate. HEW's selective inattention to the requirements of Executive Order 12044 has created an atmosphere of frustration and skepticism toward regulatory activities in the health care industry. This situation is in itself counterproductive, since cost-effective answers to identified problems can only result if industry input is an element of their development. Full compliance with the requirements of the Executive Order is essential to the difficult decisions which encompass the regulation of health care institutions. We agree fully with the statement of George Eads of the Council of Economic Advisors to your Subcommittee that requiring agencies to consider the consequences of their actions through regulatory analyses responds to important public concerns and serves to improve the regulatory process.

Certainly a major impediment to the fulfillment of requirements for regulatory analyses has been the lack of staff expertise in this task within HEW and other regulatory agencies. As Mr. Eads pointed out, the regulatory analysis requirement calls for major changes in the way agencies do their business. However, this internal expertise must be developed. Contract analysis, done outside the agency, diminishes the value of the requirement. Regulated industries want the regulators to understand the effects of their decisions and to include this analytical approach in the formulation of a regulatory plan. We, therefore, urge continued emphasis on

adherence to the requirement for regulatory analyses by the agency involved in issuing the regulation.

We are pleased to learn that HEW is working to correct many of the deficiencies identified in the OMB report. The key question that will remain in the future is how closely the Department will adhere to the newly-developed procedures. We, therefore, again commend your Subcommittee for the concern you have shown by these oversight activities, and we hope for continued congressional surveillance of the regulatory process.

The AHA has supported various legislative proposals for regulatory reform that are being considered by the Committee on Governmental Affairs. We would like to state again our position that proposals which merely codify the Executive Order probably do not offer definitive relief to the problems we have identified. A main failure of the Executive Order is its lack of any means for assuring its enforcement. None of the regulatory reform proposals currently under consideration in the Congress contain provisions that can fully assure agency compliance. In fact, to the extent that the bills restrict judicial review, enforcement assurances would be weakened. Any successful regulatory reform measure must include enforcement capability. We urge the Subcommittee to consider the problem of ensuring compliance with regulatory procedures in its evaluation of these oversight hearings.

The American Hospital Association shares with this Subcommittee a belief that there is a need to improve the regulatory process and to assure more rational decision-making through timely regulatory analyses. With increasing public concern for containing health care costs, it is essential that the regulatory process be a facilitator for, and not a burden to, the appropriate and efficient use of the nation's health care resources. We will be pleased to provide any additional information or assistance we can.