

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

MEMORANDUM FOR THE PRESIDENT

FROM: JAMES T. McINTYRE

SUBJECT: Executive Order on Improving Government
Regulations

As promised in the State of the Union, the Executive Order on Improving Government Regulations is ready for your approval. Jody Powell is scheduling a signing ceremony for next Thursday, March 23, 1978. This Order carries out your pledge to the American people that regulations be written in plain English and that they not impose unnecessary burdens.

As you know, this Executive Order was drafted in order to:

1. Increase public participation in and understanding of government regulations;
2. Assure effective oversight of the process for developing agency regulations by agency decisionmakers;
3. Assure rigorous analysis of regulations that will have major consequences for the general economy; and
4. Initiate a review of existing regulations to assure that they are achieving policy goals effectively and efficiently.

In keeping with the spirit of the Order, it was published in draft form in the Federal Register for public comment. This was the first time in history that a President had asked for public comment on an Executive Order before it was issued. More than 350 letters were received voicing overwhelming support and encouragement.

The Executive Order is intended to apply to informal rulemaking proceedings where significant general policy regulations are developed and where there is not now sufficient public involvement and agency accountability. You should note that not all regulations are covered by this Order. For example, regulations developed by formal rulemaking proceedings tend to be narrowly focused on litigative issues and are governed by specific statutory requirements that assure adequate public participation. Similarly, procurement regulations are excluded since they are required by statute to be developed in an open process and a major consolidation and review of these regulations is already underway. The Order, therefore, concentrates on the areas of greatest need.

Finally, two issues require decisions by you: (1) whether or not to apply the Order to independent regulatory commissions and (2) how best to enforce the Order.

Issue 1 - Coverage of the Independent Regulatory Commissions

Background

The relationship of the President to the independent regulatory commissions has long been the subject of dispute. While the Senate and House view them as "arms of the Congress," the public associates the regulatory actions of the independent agencies with the President and the Executive Branch.

There is, however, no clear legal definition of the extent to which a President may direct the activities of an independent commission through Executive Orders. The Department of Justice is of the opinion that the President has the constitutional and statutory authority to require independent agencies to comply with the procedural reforms in this Executive Order. That view ✓ is strongly contested by all but one of the independent agencies that commented (the Nuclear Regulatory Commission made no objection), and by many Senators and Congressmen.

The Chairmen of the Senate Judiciary and Governmental Affairs Committees and the Chairmen of the House and Senate Commerce Committees are particularly opposed to applying the Executive Order to independent agencies. While supportive of the procedural requirements spelled out in the Order, they view its application to the independents as a direct challenge to their independence and to Congressional control. The same issue of authority will arise again soon over whether CEQ's regulations on NEPA can be applied to the independent commissions. The policy should be coordinated in both cases.

The public comments on the proposed Order were overwhelmingly in favor of applying it to the independent commissions, with the notable exception of the Business Roundtable, which was doubtful of the legal authority of the President to do so.

Recommendation

We believe that applying the Executive Order to the independent regulatory agencies would provoke a confrontation with the Congress and attract attention away from the substantial improvements the Order can make in the management of regulation in the Executive Branch.

We recommend, therefore, that you exclude the 18 independent commissions from the language of the Order and request the Chairmen of these agencies (most of whom are your designees) to take appropriate steps to carry out the policies of the Order in their agencies. You should also ask them to report their progress periodically to you and the Congress. At the same time, however, you will need to stress the importance of working with the Congress to ensure more effective accountability for the independent regulatory agencies.

Issue 2 - Enforcement

Background

The Order contains a number of specific requirements but leaves many important decisions to the discretion of the departments and agencies.

The draft Order contained a very limited role for OMB in assuring that the Order was implemented. It also contained a statement that nothing in the Order should be grounds for court review of agency compliance. The public perceived these two conditions as a lack of "teeth" and a fundamental flaw in the Order.

Much of the public support for the Order was conditioned upon strengthening the enforcement of its provisions. Many respondents were doubtful that agencies would comply with the fullest intent of the Order. They felt that adequate enforcement must come through either court review of agency action or strong OMB enforcement of the Order.

We continue to believe that court review would be counter to the intent of the Order. Court review of compliance with the Order could add significant delays to the regulatory process. Moreover, if regulations are delayed or overturned due to a court decision on the adequacy of a regulatory analysis, Congress might pass legislation to prevent agencies from performing such analyses. Although we cannot explicitly prohibit judicial review of agency compliance with this Order, it is important to take every possible action to minimize the possibility of the Courts becoming involved in determining the adequacy of the regulatory analysis as they have with Environmental Impact Statements. We would rather rely on the Regulatory Analysis Review Group (which was approved by you and is under the direction of CEA) to enforce the adequacy of the analysis and we will stress this point when we issue the final Order.

However, public concern for effective enforcement still needs to be addressed. Members of the public frequently called for a stronger OMB enforcement role. In addition, they often called for an OMB role in addressing overlapping and conflicting regulations.

A formal requirement for an OMB approval or appeal process on the substance of individual regulations would be undesirable and counter to the emphasis on agency accountability in the Executive Order. OMB can assure effective agency compliance with the Order by the power of persuasion, backed up by its ability to focus high-level attention on specific problems, and by regular reports to the President on individual agency performance. Flagrant abuses of the Order would be subject to the fullest attention and action of OMB, but in most cases OMB will work with the agencies to help achieve the goals of this Order. I will assure that adequate resources are devoted within OMB to these important efforts.

Recommendation

The Order requires OMB to report semiannually to the President on the effectiveness of the Order. In addition, we suggest that language to discourage judicial review be left in the Order as an indication of our intent to minimize delay.

Next Steps

If you agree with our conclusions on both these issues, we recommend that you:

- (1) Approve the Executive Order. (The Justice Department has cleared the legality and form of the Order.) TAB A.
- (2) Sign letters to the independent regulatory agency Chairmen. TAB B.
- (3) Sign a memorandum to the Heads of Departments and Agencies explaining the relationship of the Order to intergovernmental consultations. TAB C.
- (4) Review the draft signing statement. TAB D.

Attachments