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Statement of George C. Eads before the
Subcommittee on Oversight and Investigations,
Committee on Energy and Commerce,
United States House of Representatives
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Mr. Chairman, Members of the Committee. I am pleased to have been invited to appear here today to comment on certain aspects of the Reagan Administration's regulatory reform efforts. At the outset I need to state for the record that the views I will express are my own and do not necessarily reflect the opinions of The Rand Corporation or of any of the agencies or organizations that support its research.

I want to concentrate on the efforts by the Reagan Administration to increase White House control over the activities of the Executive Branch regulatory agencies--agencies such as EPA, OSHA, and NHTSA. Thus, I will not refer, at least in this prepared statement, to the question of the relationship between the White House and statutorily independent regulatory commissions such as the ICC, CAB, FCC, CPSC, FTC, and FERC.

My concerns with the Reagan regulatory oversight process are spelled out in the attached article that will be published within a few days in the May/June issue of the American Enterprise Institute's journal Regulation. I'd like to thank AEI for permitting the article to be released early to enable me to refer to it at this hearing. Since you have it before you, I will merely summarize.

The article has two purposes: first, to describe in some detail the differences between the regulatory oversight procedures and institutions employed during the Carter Administration and those established by President Reagan; and second, to suggest what these differences may imply for regulatory reform. I conclude that while the Reagan program bears some resemblance to Carter's (and to those of Presidents Nixon and Ford as well),

there can be no doubt that it is intended to move considerably beyond any of these earlier programs. Unfortunately, I am unable to conclude that the Reagan program will advance the cause of regulatory reform. Indeed, I fear just the opposite.

Changes in the General Requirements for Rulemaking

Let me begin by discussing the set of general requirements for rule-making outlined in the Reagan Executive Order. The Carter Administration always took pains to stress that its requirements for regulatory analysis should not be interpreted as subjecting rules to a "cost-benefit test." Agencies were to identify costs and benefits, to quantify them insofar as possible, and either to choose cost-effective solutions or to explain why they had not. The burden of proving that proposed rules were not cost-effective, and of pursuing the matter with the President if need be, lay with senior White House aides.

In contrast, except where expressly prohibited by law, President Reagan's Executive Order requires that a cost-benefit test be applied--and met--and places the burden of proof for showing this on the agencies. Regulatory actions are not even to be proposed unless agencies can demonstrate that the potential benefits to society outweigh the potential costs. (How they are to make such a demonstration, especially when many regulatory benefits and costs are nonquantifiable, is left unspecified.) If the agency determines to regulate, it must choose (1) the objectives that maximize net benefits to society, and (2) the specific regulatory approaches that minimize net costs to society. Finally, each agency is to set its regulatory priorities so as to maximize aggregate net social benefits taking into account the condition of the national economy, the condition of the industries affected by its regulations, and the impact on those industries of regulatory actions contemplated by other agencies.

These requirements might not be all that objectionable if viewed as broad principles toward which agencies might strive in order to improve the efficiency of their regulatory programs. But as hard and fast demonstrations that must be made before new regulations can be issued--or existing regulations reformed--they are straitjackets which could paralyze the agencies.

To some, this result would be fine. As far as such people are concerned, the best thing that could be done with the regulatory process is to shut it down. They consider anything which looks like a move in that direction to constitute progress. This view is naive on at least two counts.

First, it ignores the role that regulation _must_ play in a society as complex as ours. Regulation has been misused at times in the past and even useful regulation has sometimes been inappropriately administered. But regulation is and will continue to be a legitimate activity of government. It cannot be "shut down" anymore than can the government's other essential activities.

Second, this view ignores the need to reform the body of regulations now in place. Paralyzing the process by which new rules are issued paralyzes the reform of existing regulations. Agencies cannot merely wave a wand and eliminate regulations. Facts must be gathered supporting the proposed changes, analyses on these changes must be performed, and public comments gathered. As Nino Scalia has argued so eloquently, even those who believe that the best regulation is no regulation should be aware of these "due process" requirements and should be concerned about erecting impossible barriers to the issuance of regulations.

Changes in the Organization of Oversight

New general rulemaking requirements are not the only thing that President Reagan announced. He also has drastically centralized the power to administer regulatory oversight. Under Carter, the various oversight functions were parceled out among several offices. In part this was a deliberate decision reflecting the specialized capabilities of certain organizations. In part it reflected the ongoing experimentation that occurred during the Carter Administration.

The Reagan Executive Order consolidates White House oversight functions in OMB's Office of Information and Regulatory Affairs--which I will refer to as OIRA. In effect, OIRA becomes the gate through which all important regulations must pass--not just once, but twice--on their way to becoming law. OIRA's powers are very broad. It can unilaterally determine which rules are "major" and thus subject to the full procedural requirements of the Executive Order. For those rules determined to be "major," OIRA can hold up the issuance of a Notice of Proposed Rulemaking until it is satisfied with its contents, subject only to being overruled by the President's Task Force on Regulatory Relief (which it helps staff). It can also delay the issuance of a final rule for a period of time, subject to the same check. It can designate existing rules for analysis and establish schedules for such reviews. It will publish the Regulatory calendar. It will oversee the implementation of the Regulatory Flexibility Act (which requires regulations to be structured to take account of their impact on small business) and the Paperwork Reduction Act. Finally, it is specifically charged with developing procedures for estimating the annual benefits and costs of agency regulations, on both an

aggregate and an industrial sector basis--"for purposes of compiling a regulatory budget."

OIRA's responsibilities are thus considerably broader than the sum of the responsibilities of the agencies and organizations it replaced. What procedures will it employ in carrying out these responsibilities? Again there have been significant changes.

One important difference between the Carter and Reagan oversight processes is in the use made of the formal public comment period. Under Carter, it was during this period that the Regulatory Analysis Review Group (RARG, for short) or the Office of Government Programs and Regulations in the Council on Wage and Price Stability prepared and filed "on the record" comments for important agency proposals. These filings served a useful public education purpose as well as helping to assure that White House concerns were made a part of the rulemaking record.

The Reagan plan dispenses with public filings by executive office agencies such as CWPS and by interagency groups such as RARG. Any views that OMB or any other agency may have on a proposed rule presumably will be reflected in the proposal when it is published. The public will have no opportunity to learn how these views may have differed from the views of the agency proposing the regulation. Some might consider that a good idea. I don't.

The Reagan and Carter procedures also differ substantially in the way they operate during the period after the formal public comment period has closed--the "post-comment" period. The Carter procedures provided for monitoring of important regulations by top presidential advisers--the CEA chairman, the OMB director, the President's assistant for domestic policy, his inflation adviser, and his science adviser. These individuals

--or, more usually, their aides--met regularly to track important rulemakings, assign responsibility for White House-agency liaison, and decide whether to involve the President. The substance of any White House-agency interaction was recorded by the agency and included in the rulemaking file.

Under Reagan, OIRA is the primary instrument of "post-comment" involvement. Thirty days before a rule is to be issued, the agency proposing it must transmit the rule, together with the final regulatory impact analysis, to OIRA. If OIRA objects, it can hold up the rule until its objections are resolved or until it is overruled by the President's Task Force on Regulatory Relief or by the President himself. Only in the event of disagreement on the final rule, and then possibly only in the event of <u>unresolved</u> disagreement, will the substance of these discussions be recorded and put into the rulemaking file, where they will be available to courts that may review the regulation.

Another aspect of the Reagan "post-comment" process that differs significantly from that employed by the Carter Administration is the attention paid to controlling <u>ex parte</u> contacts. The problem of policing such contacts is always difficult, but under Carter, great pains were taken to minimize the possibility that they could "taint" a rulemaking. Officials who either were or who might become involved in "post-comment" discussions were extremely careful to avoid contacts with outside parties such as industry representatives. The task of keeping in touch with an agency was informally assigned to a single person. Individuals from White House offices having most frequent contacts with industry were excluded from "post-comment" activities to avoid their becoming a conduit for information not on the public record. In those rare cases where

information relating to the rulemaking was inadvertently received by those in the White House following the rule, a copy was immediately passed on to the agency with a request that it be placed in the rulemaking file.

The Reagan Administration's decision to broaden the circle of individuals potentially involved in post-comment activities to include a number of cabinet officers (the members of the President's Task Force on Regulatory Relief) will make the policy of outside contacts substantially more difficult. It will be impractical to ensure that these individuals, or their aides, any of whom have only sporadic involvement in rulemaking and who, in the natural course of their duties, have numerous contacts with industry, will confine themselves to the rulemaking record in reaching decisions.

Is the Machinery Up to the Task?

Given the central role it will play in White House regulatory oversight, OIRA's ability to handle the duties assigned it becomes an extremely important question. If it wants to conduct effective regulatory oversight, OIRA must show everybody involved--the agencies, the Congress, the courts, the regulatees, and the general public--that it can use its power responsibly. Its assertion of authority must be matched by competence in exercising that authority.

Considering the enormous scope of its powers and its apparent intent to move aggressively, OIRA would find itself in trouble on these grounds even if its resources were ample, but they are not. Furthermore, to a large extent, the resources that OIRA does have are ill-suited to the task of regulatory analysis. This last point is particularly important for, considering the stress that the Reagan program lays on formal cost-benefit

analysis, the meagerness of OIRA's analytical resources cannot help but undermine its credibility.

Of course, OMB will have help with regulatory oversight just as it does with budgetary oversight. Indeed, the overwhelming bulk of the responsibility for preparing supporting regulatory analyses--including the formal cost-benefit analyses now required under Executive Order 12291 --must necessarily fall on the agencies themselves. A major paradox of the Reagan program is that, while giving OIRA an extremely broad mandate and high political visibility, it lays a much greater analytical burden on the agencies than did the Carter procedures. Unfortunately, the way the Reagan process is being operated is likely to weaken, not strengthen, the agencies' incentives to perform this role in a manner consistent with both presidential objectives and legal requirements.

How are the agencies to be motivated? The quick answer is that President Reagan is appointing agency heads who share his basic regulatory philosophy. But that answer is certainly too quick. A general desire to check regulation does not easily translate into an effective program of regulatory management. The agencies must possess both sufficient analytical capabilities and the incentive to use them wisely. Unfortunately, President Reagan's budget priorities show signs of reducing, not increasing agency resources directed to analysis--resources that even prior to recent budget cuts would likely have been inadequate to meet all the demands that the Reagan program places on them.

Even more serious is the threat that OIRA will give the signal that, despite the <u>words</u> of the Executive Order, analysis is really unimportant in determining whether regulations will be allowed to proceed; that the true "litmus test" is political acceptability. There are already signs

that this may occur. I cite one such instance in my article. I am aware of others.

If agencies are not adequately supplied with analytical resources or if, either intentionally or inadvertently, they are signaled that the analyses they do produce don't matter, the cause of regulatory reform will be set back seriously. Regulatory analysis will be returned to the state it was once in--a tool used to justify predetermined outcomes.

The Invisibility of the Reagan Process

Though I have already mentioned it in passing, I want to return briefly to an issue of great concern to me--that of public visibility and accountability. Under Carter, there were complaints that the regulatory oversight activities of the White House were not sufficiently visible to the public. Just how visible one can feasibly make any governmental process and still make it work is always a difficult question. But I don't see how anyone can charge that the Carter Administration did not go quite far--perhaps as far as feasible--toward making sure that its involvement with the agencies concerning rulemaking was visible and on the record.

In contrast, the Reagan process is intended to impose a virtual information blackout on intra-governmental discussions. From the time that OIRA and the agencies begin talking prior to the issuance of the Notice of Proposed Rulemaking until the OMB Director issues a notice of intent to submit views on the final rule, absolutely no public record will be kept. It is even questionable whether a record of OIRA-agency contacts during this critical final period will be kept if agreement is eventually reached. The Executive Order can be read as requiring that a record be kept only in the event that OIRA finally gets overruled. In any case, nothing assures that whatever record is kept will be anything but perfunctory.

It might be argued that this merely creates a regulatory review process analogous to that employed in putting together the financial budget and that its purpose is to encourage maximum give-and-take between OIRA and the agencies. I find the budget analogy faulty because once the financial budget is put together it is submitted to the Congress and defended in open hearings. I know of no proposal to subject important regulations to such a routine congressional review and would oppose such a thing, just as I oppose a congressional regulatory veto.

The second point cannot be so easily dismissed. But I think the procedures we used during the Carter Administration struck an appropriate balance between encouraging candid discussion--within the boundaries of the record--and keeping all interested parties reasonably well informed about what was going on. Furthermore, the system of "on the record" filings by RARG and CWPS performed a useful public education role and also encouraged the agencies to improve the quality of their analyses. I bemoan their loss as I do the other steps that have been taken to render the Reagan oversight process invisible.

Whither Regulatory Oversight?

In a real sense, the Executive Order of February 17 marks the final emergence of regulation as a governmental function deserving the same level of attention as the raising and spending of money. We do not yet have--and, indeed, may never have--a formal regulatory budget. But enough basic budget-like controls are now in place, at least on paper, to permit the President to shape regulatory programs, singly and overall. But this by itself does not assure meaningful regulatory reform. Whether the White House will use these controls to view regulation in the context of other federal activities and coordinate the whole--for this is surely what regulatory budgeting means--or whether it ends up acting merely as a

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sharpshooter, taking aim at this or that politically sensitive regulation, depends critically on the Office of Management and Budget and, more particularly, on its new Office of Information and Regulatory Affairs. Unfortunately, even at this early stage there are signs that OIRA will choose, or will be forced by events to settle for, the sharpshooter's role.

If these signs are correct then the result will be the hamstringing of regulatory reform. This will be a tragedy, for regulatory reform is indeed urgently needed.

Attachment