

Perspectives

on current developments

The Regulatory Calendar: A Catalog without Prices

The second edition of the *Calendar of Federal Regulations* released on November 28, 1979, provided cause for both hope and dismay among those interested in improving government regulation. Prepared by the Regulatory Council, the calendar is intended to present an overview of federal regulatory activity by setting forth basic information on all "major" regulations in the works—that is, all those having an economic impact of over \$100 million. Regulatory Council Chairman Douglas Costle calls the effort the "cornerstone of meaningful reform of the regulatory process."

The cause for hope lies mainly in the fact that the calendar exists—that any compilation of forthcoming federal regulations is better than no compilation at all. In addition, however, this second calendar is somewhat better than the first one, which was issued last February. Five more agencies have submitted entries, including this time the Federal Communications Commission and the Federal Trade Commission (both of which are independent agencies and hence not strictly required to participate in the calendar). Twenty-five regulatory agencies are now included, the Securities and Exchange Commission and the Federal Reserve Board being the only eligible agencies still declining to participate.

Regulatory Council Director Peter J. Petkas argues that coverage of the regulations themselves has also improved. He notes that the new regulatory calendar covers 129 regulations (in 228 pages) compared with the first edition's 109 (in 128) and that entries have been restructured to provide more useful information. Whereas entries in the first calendar opened with a confusing paragraph on "Objectives and Benefits," the new entries begin with a "Statement of Problem" intended to provide insight into the motivation behind the rule. Perhaps a

more important (though still largely cosmetic) change is the division of the old section on "Economic Effects" into separate sections on "Benefits" and "Costs."

The calendar is also bolstered by new and improved appendices. One appendix provides information on proposed regulations that appeared in the first calendar but do not appear in the second, because they were terminated, made final, or determined to be "not major." (Of the proposals listed in the February calendar, twenty-five had resulted in final rules by November 1.) Another appendix provides information on public participation in the regulatory process. Yet another gives the publication dates of the regulatory agendas, which are individual agency reports listing *all* regulations under development rather than only the major ones. Plans are in the making, Petkas says, to synchronize the publication dates of the regulatory agendas with that of the calendar, so that a complete listing of all regulations in process at all agencies would appear every six months, followed immediately by the summary regulatory calendar.

On balance, however, the calendar is still disappointing. One serious failing is the complete lack of data on the distributional effects of regulation. Agencies have long balked at the idea of identifying the groups that win and lose as a result of their regulatory decisions, and apparently they are continuing to do so.

By far the most important weakness, however, is the failure of the Regulatory Council to insist on useful, consistent data on benefits and costs. In an explanatory handout, the council notes that "because agencies do not report the same kinds of cost data, one cannot establish aggregate costs for a group of regulations. We are a long way from having standard methods for determining the cost of regulations." The handout then likens the council's difficulties in getting agencies to report consistent data to the data consistency problems faced by the Busi-

ness Roundtable study. But the comparison seems only partly valid. To a large extent, the problem faced in that study was one of measurement: the data needed to measure some of the effects hypothesized were simply not available. (On the Business Roundtable study, see Marvin H. Kosters, "Counting the Costs," *Regulation*, July/August 1979.) The problem faced by the council, however, is one of reporting: benefit-cost data that *are* available are not being reported in a useful, consistent form. For instance, entries in the calendar fail to distinguish between incremental compliance costs and total costs, between future costs and present costs, between capital costs and operating costs, and between cost estimates that are final and those that are preliminary. If the calendar is to fulfill its goal of providing an overview or "big picture" of upcoming regulations, cost data must be stated in a way that allows comparison and summation.

The Regulatory Council seems to realize these shortcomings, especially the need to identify distributional effects, and is trying to correct them. At a recent press briefing, Petkas noted that the council is working up a new set of guidelines for entries. The problems in the calendar, however, are too basic to be remedied by a set of voluntary guidelines.

Indeed, the need to lay down mandatory guidelines for regulatory analysis is exemplified by the fuzzy thinking so evident in many of the November calendar's entries. One (not exceptional) example is the Department of Agriculture's entry on its proposal to prohibit the before-lunch sale of "junk foods" in schools participating in the federal school-lunch program. In the section on the benefits of the proposal, there is a general discussion of the effects of eating nonnutritious food before eating lunch, leading to the conclusion that the rule "could in part help to reduce the prevalence of . . . nutritional disorders." But the Department of Agriculture does not specifically identify any suffering that would be avoided by the rule, nor does it estimate the number of children to be affected, the amount of "junk food" they might consume, or the effects of such foods on the children's health. Surprised by the absence of such information, the reader is further surprised to discover that at least some of the data needed to estimate benefits are included in the section on costs. In arguing that "[b]ecause of

the limited nature of the regulation, industries should not experience large changes in sales," the department states that "only a limited number of students" have access to "junk foods" and marshalls extensive empirical evidence to support its point. Such foods are available in schools attended by only 22 percent of the nation's school children, and the total sale amounts to 3.44 candy bars and 3.26 cups of soft drink per student per month at these schools. In other words, *the average number of candy bars and soft drinks consumed per student per month is less than one* (3+ times 22 percent)! Certainly this information, properly used, would call into question the significance of the proposal's benefits, as well as its costs; and the failure to use it has to be regarded either as ineptitude or as deliberate overstatement of benefits and understatement of costs.

What finally emerges from the regulatory calendar, then, is a picture of a regulatory apparatus that can draw up a list of its activities, but cannot—or will not—adequately describe the effects those activities may have. The only sure thing is that the effects, benefits as well as costs, loom large. The 129 "major" regulations included in the November calendar are there (with few exceptions) because they are expected to impose costs on the economy of more than \$100 million each. Assuming, conservatively, that each regulation would cost the minimum, \$100 million, the total expected cost of these regulations is nearly \$13 billion. Presumably, the agencies would allege that the aggregate benefits are even greater.

According to the calendar, regulations may soon ban advertising aimed at children, establish minimum cab space dimensions for trucks, regulate the market for milk around Boise, Idaho, and ration gasoline. Comprehensive carcinogen policy statements are about to be issued by the Occupational Safety and Health Administration and the Environmental Protection Agency. The Consumer Product Safety Commission is preparing to set new standards on furniture flammability. The Mine Safety and Health Administration is required to set standards for the health and safety training of 75,000 mine construction workers. And on and on. Moreover, the regulations included in the calendar are only the tip of the iceberg. Not included are the many "emergency" regulations that will be promulgated in the coming six

months, or the literally thousands of "nonmajor" regulations whose estimated costs are less than \$100 million.

Some of these regulatory proposals are presumably justified; others may not be. What is certain, however, is that the regulatory calendar provides few clues on which is which. As it now stands, the calendar is like a catalog without prices—fun to browse through, but not a basis for action.

Invisible Bureaucracy

Senator David Pryor (Democrat, Arkansas) recently characterized the growing number of government consultants as an "invisible bureaucracy" with no real accountability for its performance. At hearings of his civil service subcommittee in October, Pryor complained that two-and-one-half years after the President had requested information on the number and cost of consulting contracts signed by federal agencies, the Office of Management and Budget was still unable to provide it—much less to assess the quality of work obtained from these contracts. He reported, however, that conservative estimates put the total cost of such contracts at more than \$2 billion a year.

The need for sound management and accounting controls cannot be gainsaid, but criticism of the sheer number of consulting contracts raises more difficult issues. Successive administrations have actually encouraged increasing reliance on outside consultants. Partly this has been a device to evade cumbersome civil service restrictions and the across-the-board personnel freezes that every administration imposes for short periods when it wants to appear tough on government "growth." But it has also been a principled policy—of long standing, but considerably strengthened under President Ford—to encourage agencies to contract from the private sector all services that it would be more expensive to provide "in-house."

Research is a prime example of such a service. It frequently involves nonrecurring problems and issues, and thus requires skills that would not be employed full-time within any single agency, or perhaps even within the government as a whole. Whereas consulting contracts need not be renewed, research capacities

built up within an agency are hard to dismantle or reassign after the immediate need has passed—and carry with them such hidden costs as employee retirement benefits. As the scope of federal regulation has expanded, it has become increasingly inefficient for the government to maintain a sort of "shadow private sector" to oversee all of the highly technical subjects that now come within its ken.

But if efficiency is part of the reason for the consultancy boom, at least an equivalent part is the inability of the government to attract the necessary personnel on any other basis. First-rate experts in some fields often cannot be hired, though they will be prepared to devote as much as full time to a particular government project on an "end product" contract basis. In some areas of innovative research, this may be attributable to the fact that a consultancy arrangement leaves the contractor free to choose his next project, rather than having it assigned by management decree. But often the reason is simply that a negotiated contract can reflect the realities of the marketplace, whereas federal employment salaries in all fields—whatever the scarcity may be—are subject to an absolute ceiling that is ultimately determined by, and somewhat below, the level of congressional salaries.

The reality of the expert gap and the use of consultants to fill it is nicely exemplified by a recent proceeding under the Occupational Safety and Health Act, contesting the Labor Department's citation of a Reynolds Metals plant for excess noise levels. In the course of the case, the Occupational Safety and Health Review Commission—in order to protect Reynolds's asserted trade secrets—required that the department use a federal expert rather than an outside consultant to conduct a discovery inspection regarding feasible engineering controls. After conducting a search of twenty-six federal agencies, the department reported to the administrative law judge that it could find no expert equivalent in education and experience to the average outside expert it had previously used, and refused to proceed unless the ban were lifted. The judge, bound by the commission's earlier order, dismissed the citation and complaint. On appeal, the commission relented, requiring use of a federal expert only if Reynolds could first establish the existence of trade secrets—and even then only if the depart-