

SUMMARY AND ANALYSIS OF PUBLIC COMMENTS

The draft Executive order on Improving Government Regulations was published for public comment on November 18, 1977. It received an enthusiastic response from the public. Almost unanimously, comments urged action to improve the quality of Federal regulations. People were especially appreciative of the opportunity to comment on a draft Executive order. Letters were received from over 350 individuals and organizations offering many helpful suggestions for changes in the order, and the order has been revised accordingly.

Some respondents pointed out that a basic cause of regulatory problems is legislation that leads to over regulation and instances of overlapping and conflicting regulatory requirements. They, therefore, believe that the Executive order is not addressing the basic cause of the regulatory problem.

We agree that there is no single reform initiative that can address all of the problems created by the regulatory system. Legislative changes are an important part of regulatory reform and that is why President Carter has emphasized the need for legislative action in areas such as transportation regulation. However, many important administrative changes are also needed. This Executive order provides the framework for administrative reform.

The order contains both specific requirements, such as the publication of a semiannual agenda of regulations, and general policy guidance, such as the need to expand the opportunities for public comment. The order attempts to balance the need for clear instructions and common procedures with the flexibility agencies require to design their own procedures and avoid unnecessary delays and paperwork.

The responses to publication of the draft order have been very informative. The public is strongly encouraged to take advantage of the expanded opportunities for participation in the development of regulations afforded by this order. Public comment on the internal procedures of agencies will provide additional help to assure that the objectives of the order are effectively met. Agency reports on their procedures will be published in the *FEDERAL REGISTER* within the next 60 days.

In keeping with the spirit of the Executive order, a response to the major issues raised in the public comments on the draft order has been written in appreciation for the time and effort given by all who responded to our request for views on the order.

Major Issues Raised

Section 1. Policy

Applicability—The Policy section contains the President's overall objectives for improving Government regulations. Many respondents pointed out that these objectives are valid for all regulations issued by Federal agencies and suggested that the language of the draft order be strengthened to indicate the mandatory nature of this Policy statement. Therefore, the Policy section has been revised to make the policy statement mandatory for all regulations issued by Executive agencies. Not all regulations, however, are subject to the other sections of the order. Each section contains an explanation of which agency regulations are subject to its provisions.

Section 2. Reform of the process for developing significant regulations

Agenda

Publication of an Agenda—Many respondents favored publication of a semiannual agenda as a particularly good method of giving advance public

EDITORIAL NOTE: The President's remarks and statement of Mar. 23, 1978, on signing Executive Order 12044, and the text of his letter to the heads of independent regulatory agencies, dated Mar. 23, 1978, will be printed in the Weekly Compilation of Presidential Documents (vol. 14, no. 12).

notice of agency activities. Some opposed the agenda on the grounds that it could delay agency action and make unreasonable demands on an agency. The agenda has been retained. The provision that allows an agency to publish supplements to the agenda when necessary will prevent undue delay. Also, the information required to be published in the agenda is only that information which can reasonably be expected to be known by the agency at the time the decision is made to proceed with developing a regulation. Therefore, publishing this information should not be an unreasonable demand on the agency and should provide a valuable service to the public.

Time of Publication—Many respondents noted that if all agencies publish semiannual agendas in the months of January and July, the public would have to study too much information at one time. Others pointed out that knowing when the agendas will be published would be very helpful. To accommodate these concerns, the order has been changed to allow the agendas to be published on a schedule determined by each agency, with that schedule submitted to the FEDERAL REGISTER for publication on the first Monday in October. Thus, as each agency begins its fiscal year, the public will be notified in one FEDERAL REGISTER as to when each agency's agenda will be published. This change will allow a staggered publication schedule, but at the same time, the public will have the dependability of being able to go to one issue of the FEDERAL REGISTER to find out when each agency will publish its agenda.

Time Covered by the Agenda—Several respondents were concerned that the agenda would cover only a six month period. It is the intention of the order that any anticipated significant new regulations will be included, even if the development of that regulation is more than six months in the future. The order has been clarified on this point.

Work Plan as a Separate Document—Many persons and organizations favored the work plan but wanted it to be made public at an early stage in the development process. Several agencies, on the other hand, pointed out that information required by the work plan was already being provided to agency officials by other means and that a new requirement for a separate document would create excessive and unnecessary paperwork.

The work plan as a separate document has been deleted. The information that was to be included in the work plan has been divided into two parts. Information on the problem being addressed and the legal basis for the action being taken has been added

to the items to be printed in the semiannual agenda. This change responds to requests for early disclosure of these items.

Agency Head Oversight—The remaining information that was to be included in the work plan will now be supplied to the head of an agency in a manner each agency feels is appropriate. The importance of the early awareness and involvement of the agency head in significant regulations is emphasized by this new separate subsection. Early awareness is essential to establish clear accountability for agency action. At the same time, the manner in which information on issues and alternatives is given to the agency head should be flexible, so that the agency can incorporate this requirement into their existing practices. For example, this flexibility will allow agencies to incorporate this information with both the regulatory analysis and an environmental impact statement if either or both are required. Agencies may choose to produce one combined document or they may choose to design separate documents.

Public Participation

Opportunity to Comment—Most of the respondents recommended that the public role in the preparation of agency regulations be greatly increased. A few had reservations as to the effect of increased public participation on the timeliness of publication. Some doubted that agency efforts to increase participation would be meaningful.

The most frequent comment received was a strong request for more time to comment on proposed regulations. Most of the respondents regard 60-90 days as the minimum time necessary for a public comment period. Many people pointed out that it takes two weeks for most organizations to receive the FEDERAL REGISTER and that a comment period of 30 days is not adequate.

The Executive order has, therefore, been amended to provide for a minimum 60-day comment period whenever possible. This extended comment period recognizes that individuals and organizations must often respond to proposals from more than one agency at one time. There is, however, provision for a waiver of the 60-day time limit in instances where specific deadlines must be met in order to avoid undue delay. In those instances, the agency will be required to publish an explanation of the need for a shorter comment period.

Methods To Increase Public Participation—Respondents repeatedly stressed the need for early public participation in the rulemaking process. Since many people believe that a pro-

THE PRESIDENT

posed rule is almost impossible to change once published, they want an opportunity to give their views at an early point in the development process.

Many specific ways to increase public participation in rulemaking were suggested. Suggestions included: distribution of issue papers; use of advance notices of proposed rulemaking; use of open conferences; distribution of regulatory analyses to organizations affected by agency regulations; direct notification of trade associations, labor unions, and consumer federations; meetings between the regulation project manager and the public; use of advisory committees or temporary work groups; announcement of proposed regulations in "popular" publications such as general circulation newspapers, newsletters and trade journals; greater consultation with State and local government personnel; and regional public hearings.

The order gives each agency flexibility in choosing the most effective method for increasing public participation in different agency actions. Rather than mandating a specific set of public participation steps, the Executive order encourages Federal agencies to provide early opportunities for public participation in rulemaking and offers some examples of what can be done.

Consideration of Public Comments—Several respondents expressed doubt that agencies take public comments seriously. The Executive order has been strengthened to emphasize the need for public comments to be considered and that a response to the public be prepared before significant agency regulations are approved.

OMB Circular A-85—With the order's emphasis on new and expanded opportunities for public comment, several respondents felt that OMB Circular A-85 would no longer be needed. This circular will be rescinded. However, the objectives of Circular A-85 (early and meaningful consultation with State and local officials on matters that affect them) are such an integral part of this order that the President is issuing a separate memorandum to the heads of departments and agencies to emphasize the point.

Petition Procedure for Rulemaking—Some respondents believed there should be a uniform petition or procedure to initiate rulemaking. A petition procedure is already available under the Administrative Procedure Act and several agencies have already adopted specific procedures for initiating rulemaking. Therefore, a mandatory petition procedure is not being included in this order.

Approval of Regulations

Clarification of Language—This section has been revised to be consistent with changes in other sections of the order and to emphasize that the

agency head is responsible for reviewing the need for significant regulations as well as the validity of the agency proposal. The importance of considering public views has also been emphasized in response to several comments received.

Criteria for Determining "Significant"

Coverage—Several respondents raised questions about the criteria for determining "significant" and the way in which agencies would apply the criteria. It is recognized that "significant" is an imprecise term. Its use is intended to give agencies the discretion they need to determine what is significant to their programs and particular constituencies. Each agency will publish its proposed criteria for determining significance within 60 days. The agency will establish the final criteria after public comment. The agency will then follow those criteria in determining what is a significant regulation.

Section 3. Regulatory Analysis

Need—Respondents were generally in favor of better analysis of the economic consequences of agency actions. Many respondents expressed a belief that such analyses should be done for all regulations. Not all regulations, however, have important economic consequences. Even significant regulations may lack major economic consequences. For example, although a regulation may have a significant effect on the privacy of individuals, it may not have significant economic consequences. For this reason, the requirement for a regulatory analysis is limited to those regulations that have a major economic impact.

Many comments on the regulatory analysis program were particularly supportive of the change in focus from justifying the chosen alternative to better analysis of all feasible alternatives. Some respondents did want to retain the Economic Impact Statement program. However, an evaluation of the Economic Impact Statement program has shown that because these analyses were issued as a justification for a chosen approach, they provided little benefit to agency decision-makers. Economic analysis can contribute more to the development of more effective regulation if it is done at the time alternative approaches to designing the regulations are being considered. The final order, therefore, retains the requirements for an analysis of alternative approaches early in the decisionmaking process. Such analysis could include an examination of (1) the need for very specific requirements versus the benefits of allowing some discretion on the part of those subject to the regulation; (2) alternative types of compliance incentives (for example economic incen-

tives, such as loan guarantees, versus administrative incentives, such as reduced paperwork requirements if goals are met); (3) alternative enforcement mechanisms (such as on-site inspections or periodic reporting requirements); and (4) alternative levels of government for implementation (Federal, State or local).

Criteria—There was no clear consensus among the respondents on the specific criteria for requiring a regulatory analysis. Many respondents wanted no financial limitations to be associated with the first two criteria in the hope that this would encourage more analyses to be done. Others believed that without specific figures, many agencies would not do any analyses at all. Several respondents asked that agency criteria established in the Economic Impact Statement program remain in effect.

The final order includes two criteria to determine when a Regulatory Analysis will be required. The first requires that a regulatory analysis must be done if the regulation will have an annual effect of \$100 million on the economy. This amount is identical to the criterion used in the Economic Impact Statement program. Regulations of this magnitude require careful consideration.

This criterion also considers the potential impact on individual industries, levels of government, or geographic regions. The most frequent criticism of the EIS criteria was that the individual industry threshold (\$50 million in one year or \$75 million in two years) was too high. Regulation could threaten the existence of small industry but still not be subject to regulatory analysis under the first criterion. This criterion for regulatory analysis, therefore, is a general requirement which allows each agency to propose the specific threshold level appropriate for its programs. Agencies will determine their own numerical criteria, and the public will be asked to comment on each agency's proposals in order to assure that the criteria are reasonable and effective. The proposed criterion relating to "specific element of the population" was deleted after many problems with definition and application were noted.

The second criterion listed in the order giving discretion to agency heads is to be used in addition to, not as a substitute for, the first criterion. A regulation may not meet either part of the first criterion but may, in the opinion of the agency head, have implications sufficient to require a thorough examination of possible alternative approaches. Several respondents wanted the order to include a provision that would require an analysis if there were sufficient public demand or if the public reaction could be expected to be adverse. By providing the

agency head with discretion, it will be possible for an agency to be responsive to such concerns.

The President has established a Regulatory Analysis Review Group chaired by the Council of Economic Advisers (CEA) to review agency regulatory analyses and to consult with the agencies on the conduct of such analyses. Given the flexibility in these two criteria, CEA expects that each agency administering economic or financial assistance programs will do at least one regulatory analysis a year. CEA expects the Review Group to work with agencies as they carry out the Regulatory Analysis Program and to conduct an interagency review of 10-20 regulatory analyses each year. Some agencies may, in consultation with the Review Group, focus their regulatory analysis on the review of an existing regulation or set of regulations, but most regulatory analyses are expected to concentrate on new regulations.

Factors in the Analysis—Several respondents suggested that specific factors be covered in a regulatory analysis. No mandatory listing of factors is included in the order because the details of each analysis will vary with the situation. However, the Review Group will work with the agencies to ensure that their analyses are complete and responsive to the issues relating to specific regulations.

Information Needed for the Analysis—A few respondents raised concern that the regulatory analysis may lead to significant new information requirements for businesses and individuals. While recognizing that intelligent government decisions require accurate information and data, it is also true that the President has placed major emphasis on reducing unnecessary paperwork demands on the public. Agencies are, therefore, encouraged to gather essential data in the least burdensome way and to eliminate existing paperwork requirements unless they are absolutely essential.

When specific information needed for a regulatory analysis is requested by or shared voluntarily with an agency, current safeguards for proprietary information will be followed.

Availability—Several respondents requested that a draft regulatory analysis be made available at the time of an advanced notice of proposed rule-making. At that point, agencies may still be formulating the information needed to complete a regulatory analysis and a uniform requirement would be inappropriate. However, nothing in the order would preclude an agency from making the analysis available at that time if it chooses to do so.

Section 4. Review of Existing Regulations

Need—Review of existing regulations was strongly favored by a large number of respondents. Some respondents, however, were concerned about

the possibility that periodic reviews might promote noncompliance with a regulation soon to be reviewed. There was also concern that agency staffs might have to be increased in order to conduct such reviews. Choosing to review a regulation does not assume that it will be discarded or that it will not be enforced while under review. It is also arguable that as regulations are updated, clarified, and possibly deleted, fewer resources may be needed to interpret, enforce, and administer them. Given the many benefits of such a review noted by respondents, the review has been retained.

The review of existing regulations required by the Order may involve a major review of all existing agency regulations, such as "Operation Common Sense" in the Department of Health, Education, and Welfare, or it may concentrate on selected smaller projects. In all cases, the results are expected to be the simplification and clarification of regulations and the elimination of regulations that are no longer necessary.

Criteria—Based on suggestions received, the criteria listed for selection of agency regulations to be reviewed have been revised to incorporate such factors as advances in technology and other changing conditions that would necessitate a review of existing regulations.

"Sunset" and Time Limit on the Review—Several respondents suggested that the best way to require agency review of regulations was to issue them with "sunset" provisions. As a result, these regulations would automatically expire after a set time period, often suggested as 5 years, unless the agency justified their continuation. This process would remove any need to establish specific criteria for identifying regulations for review since every regulation would be reviewed under the "sunset" provisions.

Agencies cannot entirely eliminate regulations unless the law which authorized the regulations allows them to do so. Therefore, it is not possible to extend the full "sunset" concept to significant new regulations as suggested.

Other respondents favored the mandatory review of all regulations within a set time, usually 3-5 years after their issuance. This suggestion was not adopted. Instead, agencies are instructed to concentrate on those regulations which no longer serve their intended purpose, which have caused administrative difficulties, or which have been affected by new developments. Since agency resources are limited, the review requirement should concentrate on the areas of greatest need.

Agencies will publish criteria to identify existing regulations for review, and possible first choices for public comment in accordance with Section 4 of the order.

Section 5. Implementation

Agency Reports—Some respondents did not understand the kind of information to be included in the agency reports on implementation of this order. This section has been clarified. Moreover, agency reports will now be published for public comment before being submitted to OMB, so that the views of the public can be assessed before the reports are submitted in final form. Responses to the public comments will be included in the publication of the final agency reports.

OMB Enforcement—Most of the respondents who addressed the question of OMB's role in enforcement urged that OMB be given more clearly defined responsibilities including acting as an appeals body for agency decisions on individual regulations. A formal requirement for OMB to approve or provide appellate review of the substance of individual regulations would be inappropriate and counter to the emphasis on agency accountability in the Executive order. The Director of OMB has assured the President that OMB will closely monitor agency compliance with the order. After allowing the agencies the opportunity to work with the new requirements, OMB will report to the President on the effectiveness of the order and on agency compliance. The Director of OMB will report to the President at least twice a year and will assure the necessary resources to oversee implementation of the order.

Section 6. Coverage

Applicability

Scope—Several respondents found the Coverage section of the draft order confusing. In the final order, coverage has been clarified in each individual section. There are, however, some general exclusions which are listed in the Coverage section.

Confusion also arose over the need for and definition of the term "public". The final order omits any definition of the public and presumes that the reference to the public includes all interested or affected elements of the population.

Exclusions

Formal Rulemaking—Formal rulemaking is excluded from the order. Formal rulemakings tend to be narrowly focused, litigative proceedings conducted by an Administrative Law Judge. They are governed by specific procedural requirements that assure opportunities for public participation and adequate analysis of issues.

International Affairs and Internal Agency Matters—Regulations in these two areas are excluded from notice and comment requirements in the Administrative Procedure Act and are excluded from the order.

THE PRESIDENT

Procurement Regulations—The Office of Federal Procurement Policy has already increased opportunities for participation in the development of procurement regulations. In addition, a major review and consolidation of these regulations is under way. To apply the requirements of this order to procurement regulations is, therefore, unnecessary.

Independent Regulatory Agencies—Many of the respondents strongly urged that the Executive order apply to the independent regulatory agencies. However, several members of Congress stated that the President should not and cannot require these agencies to follow the policies set forth in the order. These agencies are, in their view, "arms of Congress". The Justice Department on the other hand, stated that most of the order could be made binding on the independent regulatory agencies.

President Carter believes that a confrontation with Congress over the applicability of the order to the independent regulatory agencies would only detract from the important reform steps being taken. Therefore, he has asked the chairmen of these agencies to voluntarily apply the policies and procedures of the Executive order. He has asked the chairmen to report their progress to him and to the Congress.

For purposes of this order, independent regulatory agencies include:

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

Many of the respondents emphasized that it made no difference whether regulations are issued by an

independent regulatory agency or by an executive branch agency since the problems are the same—undue delay, unnecessary paperwork, and excessive intrusion in lives of individuals and the operations of public and private organizations. Clearly, many improvements are needed in the performance of all regulatory agencies. President Carter intends to work with the Congress in a spirit of accommodation, not confrontation, to assure that the regulatory process is responsive to the needs of the American people.

Emergency Regulations—A primary purpose of this order is to assure more effective management of the regulatory process. It is not intended to create undue delays that would impede agency response to emergencies or to mandatory deadlines. In emergency situations, the order requires that a policy official explain to the public why the order has not been followed.

Section 7.

Judicial Review—Many respondents strongly advocated either judicial review or more effective enforcement by OMB to assure that the goals of the order are achieved. As explained in Section 5, the final order relies on strengthened OMB enforcement rather than judicial review. Again, the order is not intended to create more delays by increasing litigation. It is hoped that by improving the quality of regulatory decisions through increased public participation, judicial review of agency decisions will be reduced.

Section 8.

Sunset—Several respondents questioned why the order has an expiration date. A specific "sunset" date is in keeping with the order's emphasis of reviewing existing requirements. Based on an evaluation of the order's effectiveness, OMB will recommend to the President whether or not to extend it.

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