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ANALYSIS & PERSPECTIVE

REGULATORY REFORM

Executive Order on Regulation Boosts OMB's Power

By Paul C. Rosenthal

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Executive Order 12291, issued by President Reagan on Feb. 17, 1981, could significantly affect regulations issued by executive branch agencies. The executive order's requirements that a regulation's benefits exceed its costs and that an agency select the least costly regulatory approach are just two of the important changes in current law and practice.

Almost as significant as the new standards for regulations, however, is the order's explicit grant of power over regulatory matters to the Office of Management and Budget (OMB). Although the director of OMB cannot yet be called a regulatory czar, the office's new, more public role in managing the regulatory process deserves close scrutiny.

The executive order replaces President Carter's executive orders on government regulation and paperwork (E.O. 12044 and E.O. 12174, respectively) which in turn had superseded President Ford's executive orders requiring inflation and economic impact analyses (E.O. 11821 and E.O. 11949). The new order, which applies to the executive branch but not independent agencies, goes much further than its predecessors.

Section 2 of E.O. 12291 outlines general requirements to which agencies, to the extent permitted by law, must adhere when promulgating new regulations, reviewing existing regulations, and developing legislative proposals concerning regulation. Among these provisions are requirements that:

- ▶ a regulation's potential benefits exceed its potential costs;
- ▶ an agency choose the least costly approach to any given regulatory objective; and
- ▶ agencies take into account the particular industries affected by regulations, the condition of the national economy and other regulatory actions contemplated when setting priorities.

Because it is often easier to calculate the costs of a regulation than its benefits, strict application of these requirements could result in fewer and narrower regulatory initiatives. Similarly, the requirement that an agency actually choose the least costly approach to any given regulatory objective goes further than E.O. 12044, which merely required agency analysis and consideration of alternative regulatory approaches, and some major legislative proposals, which would require only that an agency explain why the least costly alternative was not chosen.[1]

Moreover, the provision requiring consideration of the national economy in setting agency priorities adds a safety valve for reluctant regulators. In times of economic distress—presumably an economic Dunkirk would qualify—and particularly for industries that are ailing or heavily regulated, this provision could be used to postpone or soften the impact of regulations.

Unlike the provisions for regulatory impact analysis (described below), these general requirements apply only to the extent permitted by law. Some would, in fact, be reviewable by a court.[4]

Section 3 of E.O. 12291 requires all agencies to conduct a regulatory impact analysis before issuing major regulations. The definition of major rule includes any rule likely to result in an annual effect on the economy of $100 million or more or a major increase in costs or prices for consumers, individual industries, federal, state or local government agencies or geographic regions. The definition also includes a rule which results in "significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets."[3] OMB estimates that 150 rules annually would fall within this definition.

Like E.O. 12044 the new executive order requires a preliminary regulatory impact analysis (RIA) to accompany a notice of proposed rulemaking and a final RIA to accompany publication of a final rule. The RIA must describe the potential costs and benefits of the rule as well as identify those likely to receive the benefits and bear the costs. The RIA must also describe the potential net benefits of the rule, including the effects that cannot be quantified in monetary terms.

The executive order requires an agency to forward to OMB for review all proposed and final rules, as well as all RIAs, before such documents are published. The length of time granted for OMB review varies according to the nature of the document reviewed.[5] The director, again subject to the Task Force, can order an agency not to publish a notice of proposed rulemaking or preliminary RIA until OMB's review is concluded. The director may also order the agency not to publish a final rule or RIA until the agency has responded to the director's views and incorporated those views and the agency's response in the rulemaking file.

Oversight

Although, under the executive order, the regulatory impact analysis would be part of the whole rulemaking record for purposes of judicial review, a court would not be empowered to decide whether the analysis was done properly or the agency otherwise complied with the requirements of E.O. 12291. The executive order vests the OMB director with strong oversight authority. That authority is, in turn, subject to the Presidential Task Force on Regulatory Relief, headed by Vice President Bush.[7]

Theoretically, an agency head or other interested person could appeal to the Task Force decisions made by the OMB director under the order. At present, however, OMB provides most of the staff for the Task Force. OMB Director David Stockman is a member of the Task Force, and OMB Administrator of Information and Regulatory Affairs, James Miller, serves as the Task Force's executive director. It remains to be seen whether and to what extent the Task Force will emerge as a distinct entity capable (and willing) to accept appeals from OMB decisions.

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New Powers

In addition to the power to review rules and analyses, E.O. 12291 grants the OMB director significant new authority. Among the important powers granted the director is the authority to:

- designate any proposed or existing rule as major;
- issue uniform standards for the identification of major rules and the development of RIAs;
- require an agency to obtain and evaluate additional data relevant to a regulation from any appropriate source; and
- waive the RIA and other requirements for proposed and existing rules.

Not all of the authorities mentioned above are totally new to OMB. The White House and its constituent offices have traditionally maintained that the president has inherent constitutional authority to manage the regulatory process.[9] Because of this inherent authority, during the last Congress OMB opposed "statutory specification of when and how the President may exercise his authority to oversee the regulatory operations of the Executive Branch."[10]

Using this "inherent" authority, OMB has in the past "jawboned" agencies about classification of rules as major. Likewise, the Council on Wage Price Stability's Regulatory Analysis Review Group (whose functions were recently transferred to OMB) critiqued agency regulatory analyses and presented comments to the agencies, both on and off the record.[11]

Moreover, the recently enacted Paperwork Reduction Act[12] provided a statutory base for OMB to coordinate agency regulations that impose a paperwork burden on the public. With respect to non-independent agencies, the act does not authorize the director to disapprove the accompanying rule itself insofar as the two are separable.[13]

The authorities granted by Execu-

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ve Order 12291 are significant not ust because they expand OMB's powers, but because they make those powers *explicit*. Now that the powers are available for all to see, they are unlikely to remain unused.

Opportunities to Influence

These new authorities not only give OMB tremendous power over the substance and timing of regulations, but they also provide new opportunities for interested persons to influence the regulatory process. For example, if an agency fails initially to designate a proposed rule as major (and therefore subject to an RIA), an affected

firm or industry could ask OMB to make that designation. Forcing an agency to conduct an impact analysis means that the rulemaking will take longer and cost the agency more money, as well as require analysis of information the agency might otherwise have ignored. Conversely, the OMB director's waiver authority could be used when an agency wants to deregulate or soften a regulation. Waivers of the RIA requirement could greatly accelerate a rulemaking.

Since OMB has not yet announced what procedures it will use to make these decisions a number of questions naturally arise. How will determinations that a rule is major be made? Will such determinations be based solely on data supplied by the affected industry to OMB staff or will others have an opportunity to comment on that data before OMB makes a decision? What criteria and procedures will be used for granting waivers?

Similar questions arise about how OMB will exercise its authority during the rulemaking process once a decision to conduct a regulatory impact analysis has been made. The executive order specifically requires an agency to consult with the OMB director, at his request, about any preliminary regulatory impact analysis and notice of proposed rulemaking covered by the order. Moreover, upon receiving notice that the director intends to submit views concerning any final regulatory analysis or final rule, the agency must refrain from publishing these documents until the agency has responded to the director's views and incorporated those views and the agency's response in the rulemaking file.

Ex Parte Contacts

Recent court decisions have made clear that *ex parte* contacts can impair the goals of fairness to interested persons and reasoned agency decisionmaking because interested parties are not given an opportunity to know about and comment on these secret communications.[14] OMB has historically taken the position that the agency is not bound by *ex parte* restrictions. Whether OMB's policy will remain the same in light of its new authority and expanded role remains to be seen.[15]

It should be noted that while the thrust of the executive order has been to *expand* OMB's authority, the order does limit the exercise of that authority in various ways. For example, OMB must observe various time limits if its comments on rules and regulatory impact analyses are to be considered by an agency. In addition, by providing that OMB comments along with the agency's response be included in the rulemaking file, there is a tacit acknowledgement that at least a portion of these interagency communications should be available to persons interested in the rule.

> ***The E.O. gives OMB influence over the substance and volume of agency regs.***

The executive order empowers OMB to designate currently effective rules to be reviewed in accordance with the provisions of the order. Thus, existing rules could be subject to a regulatory impact analysis. The OMB director may also establish schedules for reviews and analysis under the order.

These powers present many of the same questions raised above. Moreover, viewed in combination with OMB's other authority, it is clear that the office has cradle-to-grave powers concerning which regulations are analyzed and how agencies perform these analyses. Indeed, with its authority to order review of final (existing) rules, OMB can ensure that a regulation may never rest in peace.

Substantive Impact

The executive order gives OMB no direct authority over the substance of agency rules. Nor can OMB direct an agency never to publish a rule. But in times of shrinking agency budgets, the executive order gives OMB influence over the substance and volume of agency regulations. For example, if OMB designates a large number of a given agency's regulations as major, and therefore subject to a regulatory impact analysis, agency resources will be stretched; increased delay in issuing new regulations would be inevitable. In a manner not unlike the way OMB influences agency policy and priorities through the budget process, the new OMB management powers allow influence on general regulatory policy as well as particular rulemakings.

For persons affected by and interested in the regulatory process, OMB's new powers are obviously significant. Affected industries, labor unions, public interest groups and others are all likely to attempt to press OMB into their respective services. But OMB is not immune from governmental belt-tightening. While it will absorb

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U.S. Termination of Contracts: Few Practical Limits

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an aberration or the first case to establish a new limitation on the government's right to terminate for convenience. At the very least, government action which is tantamount to a debarment or suspension of a contractor will be invalidated unless the contractor has been afforded the procedural safeguards required by due process of law. If such action includes a termination for convenience, the termination will not be upheld unless there is "a factual basis in the record" to lend support to the government's determination.[15]

The case also brings into view the court's authority to recharacterize a termination as a *de facto* debarment. When viewed in isolation, the termination may withstand scrutiny; but, when the court recharacterizes the government's actions as a *de facto* debarment, a new set of procedures must be satisfied before the "termination" will be upheld. The court's attention to the substance of the government's actions rather than the form in which the actions are cast has been the subject of two recent cases[16] and probably illustrates the most powerful aspect of the *Art-Metal* case.

The Comptroller General has not confined himself to applying the standards used by the courts when reviewing allegedly improper awards which are subsequently terminated for convenience. The propriety of an award will be reviewed by the Comptroller General when the government's basis for terminating a contract for its convenience is improper. In such a case, the Comptroller has said that "we are not limited to a consideration of whether the termination was the result of bad faith. . . . [O]ur review . . . is for the purpose of determining whether the termination was justified given the facts of the original contract award."[17]

Remedies

Since the termination for convenience clause was designed to protect the government by eliminating the terminated contractor's recovery of anticipated profits, it stands to reason that a convenience termination which is held to be invalid will allow for the recovery of anticipated profits. The Court of Claims has said that "the effect of the constructive termination for convenience is to moot all breach claims and to limit recovery to costs which would have been allowed had the contracting officer actually invoked the clause . . . . [W]e need not consider the merits of any claim for breach of contract here."[18]

A more powerful remedy was adopted by the court in *Art-Metal*. An injunction was issued requiring the government to, *inter alia*, reinstate the wrongfully terminated contract.[19] Thus, depending upon the circumstances, a contractor may be able to appeal the wrongful termination to the cognizant board of contract appeals[20] or the Court of Claims and seek breach of contract damages, or, if the contractor can demonstrate that it is entitled to a preliminary injunction, seek such an order in a federal district court.

The government's right to terminate for convenience is subject to very few limitations, but in a recent case, the Court of Claims has implicitly recognized two restraints on the government's discretion: (1) where the termination is based on bad faith or constitutes an abuse of discretion; or (2) where the termination represented an attempt to improperly suspend or debar a contractor from government contracting.[21]

These "limitations" may be illusory as a practical matter. A contractor's burden to establish bad faith is nearly insurmountable. The contractor must overcome the heavy presumption of the conscientiousness of public officials in the discharge of their duties. This requires a showing of "well-nigh irrefragable proof" and has been equated with evidence of some specific intent to injure the plaintiff or actions motivated by malice.

The contractor's burden is eased slightly if the basis of the contractor's challenge is the contracting officer's abuse of discretion. While the contractor must still overcome the presumption in favor of the legality of a public official's actions, there need not be any showing of specific intent to injure the plaintiff.

The third limitation prevents the government from terminating a contract when this action is part of a regimen to oust the contractor from the procurement process. The termination is invalidated not because the government transcended its authority to terminate for convenience, rather because the pervasive action constituted a *de facto* debarment or suspension which is invalid unless due process has been afforded. It would seem that fact situations which fit the *Art-Metal* scenario would be few and far between and thus constrict the usefulness of this limitation on the government's right to terminate for convenience. For most practical purposes, the government still might be said to have unlimited rights to terminate its contracts.

It is unclear whether the Art-Metal case is an aberration or is the first to establish a new limitation on the government's right to terminate for convenience.

[1] DAR 8-701; FPR 1-8.700-2(a).

[2] Colonial Metals Co. v. U.S., 204 Ct. Cl. 320, 494 F.2d 1355 (1974); Ace Barber Shop, ASBCA No. 17292, 73-2 BCA ¶10,052.

[3] Colonial Metals Co. v. U.S., *supra*, note 2.

[4] John Reiner & Co. v. U.S., 325 F.2d 438 (Ct. Cl. 1963), *cert. denied*, 377 U.S. 931 (1964).

[5] Nolan Bros., Inc. v. U.S., 405 F.2d 1250 (Ct. Cl. 1969).

[6] Nesbitt v. U.S., 345 F.2d 583 (Ct. Cl. 1965), *cert. denied*, 383 U.S. 926 (1966).

[7] Kisco Co. v. U.S., 610 F.2d 742 (Ct. Cl. 1979).

[8] Kalvar Corp. v. U.S., 211 Ct. Cl. 192, 543 F.2d 1298 (1976).

[9] Allied Materials & Equipment Co. v. U.S., 215 Ct. Cl. 902 (1977).

[10] Kalvar Corp. v. U.S., *supra* note 8.

[11] National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971).

[12] Gould, Inc. v. Chafee, 450 F.2d 667 (D.C. Cir. 1971).

[13] Art-Metal-USA, Inc., v. Solomon, 473 F. Supp. 1 (D.D.C. 1978), permanent injunction granted, 25 CCF ¶82,962 (D.D.C. 1979), on appeal voluntarily dismissed by both parties, Civ. No. 79-1296 (D.C. Cir. 1979).

[14] 473 F. Supp. 1, *supra* at 6.

[15] *Id.*

[16] Old Dominion Dairy Products, Inc. v. Secretary of Defense, 631 F.2d 953 (D.C. Cir. 1980); Airco, Inc. v. Andrus, Civ. No. 78-1859 (D.D.C. 1979).

[17] Safemasters Co., B-192941, Jan. 22, 1979, 79-1 CPD ¶38 at 7.

[18] Kalvar Corp. v. U.S., *supra* note 8, at 204.

[19] Art-Metal-USA, Inc. v. Solomon, *supra* note 13.

[20] A breach of contract claim is within the jurisdiction of the agency boards of contract appeal if the claim is brought pursuant to the Contract Disputes Act of 1978.

[21] Kisco Co. v. U.S., *supra* note 7, at n. 5.

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some personnel from the Council on Wage Price Stability's Regulatory Analysis Review Group and the Commerce Department to help it with its functions, OMB still will have a relatively small staff to devote to regulatory matters. It is unclear whether this staff will be able to perform all of the new functions assigned to it.

The Reagan administration has bravely put OMB (and the White House) into the front lines of regulatory agency battles. Unlike the past, OMB cannot deflect the importunings of the myriad interests affected by regulation with a simple denial of responsibility. Thus, the pressures on OMB (and the White House) will be enormous. How OMB will respond to those pressures and use its new authority will vitally affect the regulatory process and all those whom that process touches.

[1] *See, e.g.*, S. 746, 97th Cong.

[2] The Delaney "anticancer" clause does not permit FDA to consider costs in deciding whether to allow the use of a carcinogenic food additive. 21 U.S.C. 409(c)(3). *See also*, EPA v. National Crushed Stone Assn., 101 S. Ct. 295 (1980).

[3] *See* §104 of S. 67, 97th Cong.

[4] Section 9.

[5] Section 1(b)(3). Note that this sentence considerably expands the definition of major rule contained in E.O. 12044.

[6] Section 3(h).

[7] The Task Force is composed of: Donald Regan, secretary of the treasury; William French Smith, attorney general; Malcolm Baldrige, secretary of commerce; Raymond Donovan, secretary of labor; David Stockman, director, OMB; Martin Anderson, assistant to the president for policy planning; and, Murray Weidenbaum, chairman, Council of Economic Advisers.

[8] The OMB's minimum time limits are as follows: 60 days—preliminary RIA, notice of proposed rulemaking for major rule, and final major rules and RIAs published without notice of proposed rulemaking; 30 days—final RIA and major rule; 10 days—notice of proposed rulemaking for final, non-major rules.

[9] *See, e.g.*, Memorandum by Acting Assistant Attorney General Larry L. Simms on the "Proposed Executive Order Entitled 'Federal Regulation,'" Feb. 13, 1981.

[10] Letter by James T. McIntyre, director, OMB, to Sen. Abraham Ribicoff (D-Conn.), chairman, Senate Committee on Governmental Affairs, Feb. 20, 1980.

[11] *See, e.g.*, U.S. Senate, Committee on Environment and Public Works, Subcommittee on Environmental Pollution, "Hearings on Executive Branch Review of Environmental Regulations," 96th Cong., 1st Sess.

[12] P.L. 96-511, 94 stat. 2812.

[13] *See*, 553(e); S. Rep. No. 930, 95th Cong. 2d Sess. 56 (1980).

[14] *See, e.g.*, Home Box Office v. FCC, 567 F.2d 9 (*per curiam*) *cert. denied*, 434 U.S. 829 (1977).

[15] It should be interesting to observe whether those persons who favor restrictions on *ex parte* contacts between agency commissioners and their staffs feel similarly about OMB-agency communications.

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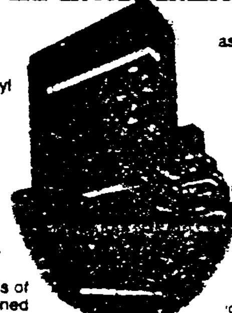

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