

FROM RED TAPE TO RESULTS

# CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS

Improving Regulatory Systems

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Accompanying  
Report of the National  
Performance Review

Vice President Al Gore

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# EXECUTIVE SUMMARY



**T**he rulemaking process is very complex. Not long ago, a federal agency found that it needed an 18-foot chart, with 373 boxes, to explain its rulemaking process. And this agency's process was not unusually complex. Despite this complicated process, regulations do not always achieve their intended benefits and can cause additional problems. Consider, for example, that:

- Chocolate makers had trouble determining how to comply with the Occupational Safety and Health Administration's noise standards without running afoul of the Food and Drug Administration's hygiene standards.
- The 1982 Surface Transportation Assistance Act required the Department of Transportation to force trucks to carry "splash and spray suppression devices"—that is, fancy mud flaps—to curtail the road spray on cars traveling nearby, although tests showed that the flaps did not improve car drivers' visibility and, thus, road safety.
- Only the intervention of senior Transportation Department officials prevented the National Highway Traffic Safety Administration (NHTSA) and the Federal Aviation Administration, both located within the department,

from imposing regulations that would have forced parents traveling by airplane to carry along two child seats—one for the plane ride, a second for car rides taken during the trip.

Federal regulations, of course, are not supposed to create problems like that for individuals, businesses, and state, local, and tribal governments. But such problems are not surprising, considering the number of regulations on the books. Nonetheless, although Americans dislike regulations in general, they support specific ones to promote health, safety, environmental, and other goals.

**The Effects of Regulation.** Regulations affect virtually every American citizen, household, business, institution, community, and level of government. They reduce the amounts of lead in the air we breathe; ensure that cars have seat belts, air bags, safety glass, and brakes that work; require content and nutrition labeling of foods; establish eligibility for agricultural, educational, and small business loans and grants; and define distinctions between legitimate and deceptive advertising, fair and unfair business practices.

And, in fact, regulatory programs have produced real results. The NHTSA's crash-worthiness and brake standards have saved at least 112,000 lives in the last 25 years, while the Consumer Product Safety Commission

helped to cut in half the annual number of electrocutions involving consumer products.

Nevertheless, the federal regulatory system is not working as well as it should. Many federal regulations impose too many constraints on individuals and businesses (such as by unnecessarily using command-and-control structures that tell regulated parties precisely what to do) while still failing to accomplish the goals for which they were imposed.

The task at hand is straightforward, but challenging. We need to give the public the protection and services it expects at a reasonable cost, while eliminating ineffective and avoiding unnecessarily burdensome regulations. And we must do so at a time when most agencies will face the dual, and seemingly contradictory, pressures of providing more services with fewer resources.

Generally speaking, regulators and Congress should employ regulations more selectively and sometimes use other approaches to accomplish their goals, such as providing more information to consumers. When opting for regulations, regulators should use market-based, performance-oriented or other innovative approaches, thus giving affected parties more freedom to meet the goals behind the rules. The government should better educate its regulators about possible tools at their disposal. And regulators should communicate more with the public and other interested parties and rely more heavily on scientific data.

**The Regulatory Process.** Regulations are directives, standards, or procedures, supported by penalties or other sanctions, that are designed to shape the behavior of individuals, businesses, and state, local, and tribal governments.<sup>1</sup> The federal government employs regulations for much of what it does—distributing grants, benefits, contracts, and other subsidies; protecting bank depositors and imposing other financial service requirements; and enforcing health, safety, and environmental laws.

The development of regulations involves four key players: (1) Congress passes legislation to authorize or require an agency to issue regulations; (2) the executive branch decides the form and extent of regulations; (3) interested parties may comment on proposed regulations or challenge final ones in court; and (4) federal courts, which review regulations that are challenged in lawsuits, sometimes order agencies to revise the challenged regulations.

The number of regulations that agencies issue varies dramatically. Agencies may issue just a few regulations a year or thousands. While the time that agencies devote to developing regulations also may vary widely, they will typically take 12-18 months to develop a proposed regulation after a statute is enacted, and another 12-18 months to issue a final regulation.

The process by which agencies issue regulations is governed by numerous statutes, executive orders, and internal agency policies and requirements. While the Administrative Procedure Act establishes a simple, straightforward process, also important are such laws as the Paperwork Reduction Act, Regulatory Flexibility Act, Federal Advisory Committee Act, Negotiated Rulemaking Act, and National Environmental Policy Act. In addition, such laws as the Clean Air Act and the General Education Provisions Act impose procedural requirements for certain specific regulations.

Agencies have developed their own lengthy review procedures, designed to ensure coordination among agency and department offices. The full review process—within the agency, department, and administration—normally is repeated twice, first when the regulation is proposed and then again when it is finalized.

Executive orders also play a major role in shaping regulations. Executive orders require agencies to conduct specific analysis (such as a cost-benefit analysis), establish centralized review by OMB of proposed and final regulations, and establish mechanisms to

coordinate and plan executive branch rulemaking activities.

**Improving the Regulatory Process.** The President, agencies, and Congress need to take a series of steps to improve the process to accomplish regulatory goals in a cost-effective manner.

First, to help agencies share information and coordinate their approaches to regulatory issues, the President should create an interagency regulatory coordinating group (RCG). This group should include political appointees or their designees from key domestic regulatory agencies and certain key White House advisors. This group should, within a year, oversee the development of a manual of regulatory approaches.

Second, the President should direct agency heads to use market-oriented and other innovative approaches to regulation whenever they are appropriate. For example, rather than order coal-fired power plants to install scrubbers (a type of pollution control equipment) the government might order such plants not to emit more than a given number of pounds of sulfur dioxide per million BTU (British thermal unit) and let them decide how to meet that requirement.

Third, in the hopes of encouraging consensus-based rulemaking, the President should encourage agencies to use negotiations to develop regulations—i.e., the “reg neg” process. This process allows representatives of an agency to work with affected interests in a cooperative effort to develop regulations.

Fourth, the President and agencies should take steps to enhance public awareness and participation both in developing and implementing regulatory programs. The President should encourage agencies to convene focus groups, hold more useful public hearings, and use other tools by which to involve those who are affected by their regulations. Agencies also should consider using information technology more aggressively.

Fifth, agencies will streamline their internal rulemaking processes, including

recommending whether legislative changes are needed. Agencies will begin to experiment with “direct final” rulemaking, which will sharply reduce the time needed to implement non-controversial regulations.

Sixth, in enforcing regulations, the President should strongly encourage agencies to use alternative means of dispute resolution—which refers to a collection of techniques that are designed to help disputing parties resolve conflicts in mutually agreeable ways. Such “ADR” techniques could help nourish more cooperative relations between regulators and regulated parties.

And finally, among its other recommendations, this report suggests that agencies concentrate their regulatory resources on the most serious environmental, health, and safety risks and engage in long-term regulatory planning; that the President order relevant agencies to create science advisory boards as tools to use scientific data more widely in agenda-setting and decision making; that agencies establish technical drafting services for congressional committees and subcommittees; and that the administration take steps to provide more training for agency heads and staff.

### Endnote

1. For this report, “regulation” is defined to exclude those regulations affecting how the government runs itself (e.g., personnel, budget, and procurement), which are addressed in other National Performance Review Accompanying Reports.

# INTRODUCTION



# INTRODUCTION



When our society decides government intervention is necessary to solve problems in fields such as transportation, banking, health, agriculture, education, housing, or the environment, the federal government often responds with regulations. Congress enacts legislation allowing or requiring an agency to come up with a solution, and then the agency issues regulations that detail how the solution will be implemented.<sup>1</sup>

Public opinion polls have shown that "while Americans dislike regulations as a general matter, when asked about specific programs, such as for health and safety, they respond favorably."<sup>2</sup> No one wants to return to the days when even minor accidents could be fatal or seriously disfiguring because cars were not required to have seat belts or windshields made of safety glass, or when unchecked water pollution caused dead lakes and burning rivers.

Regulatory programs have significantly improved our quality of life. For instance, the benefits of environmental regulation are illustrated by a comparison of our air and water quality to that of former Eastern bloc countries, which did not regulate pollution effectively. Another example: at least 112,000 lives have been saved in 25 years as a result of crashworthiness and brake standards issued by the National Highway Traffic Safety

Administration.<sup>3</sup> The Consumer Product Safety Commission helped cut in half the annual number of electrocutions involving consumer products.<sup>4</sup>

Nevertheless, too many businesses and individuals feel constrained by the cumulative burden of regulations issued by many diverse federal agencies—particularly by those regulations that are poorly conceived or duplicative. Everyone running a business has his or her own illustration of unnecessary regulation. The American public's desire to get government off its back is strong.

The challenge facing government is how to do both—provide the public, the government's ultimate customer, with the protection and services it expects at a reasonable cost, while getting rid of or avoiding unnecessary, burdensome regulations. Further complicating the picture is the reality that most agencies will be required to provide more services with fewer resources. Some regulatory agencies have already seen workloads skyrocket while resources decreased.<sup>5</sup> Given the budget deficit, most agencies will not have increased resources in the near future.

## WHAT ARE REGULATIONS?

Regulations are federal requirements, directives, standards, or procedures, backed by

the use of penalties or other sanctions, that are intended specifically to modify the behavior of state and local governments, private industry, businesses, and individuals.<sup>6</sup> Regulations are almost always required whenever the federal government acts. For example, regulations assist in:

- the distribution of grants, benefits, contracts and other subsidies;
- the protection of depositors in financial institutions; and
- the enforcement of health, safety and environmental laws.

When people think of regulation, they usually think of command-and-control regulations—i.e., where the government decides precisely what action regulated entities must take. A requirement that coal-fired power plants install a scrubber (a specific type of pollution control equipment) is an example of command-and-control regulation.

Some regulatory programs, however, leave more discretion with the regulated entity and take advantage of market forces to achieve the desired result. For example, performance standards might require power plants to emit no more than a given number of pounds of sulfur dioxide per million BTU (British thermal unit) produced. Individual plants then would decide how to meet the standard. Alternatively, an information disclosure program might require food processors to label their products for content and nutrition to permit consumers to make informed choices.

In addition to issuing binding regulations, agencies also rely on other methods to establish agency policy, such as policy statements, guidance documents, enforcement manuals, and memos to agency personnel. Although legally these policies cannot bind people outside the agency, as a practical matter, they may have that effect. (These other methods are not required to undergo the regulatory review procedures described below.)

### HOW ARE REGULATIONS DEVELOPED?

Four key actors are involved in developing regulations. Congress passes legislation that

authorizes or requires an agency to issue regulations. The executive branch (including independent regulatory agencies), working within the statutory limits imposed by Congress, decides the form and actual substance of regulation and issues individual rules through a rulemaking process. Interested members of the public may provide input to Congress, comment on regulations proposed by agencies, and challenge final regulations in court. Federal courts review rules when they are challenged in lawsuits brought against the government. The courts can order agencies to revise rules if they determine that rules are arbitrary and capricious or violate the Constitution or a statute.

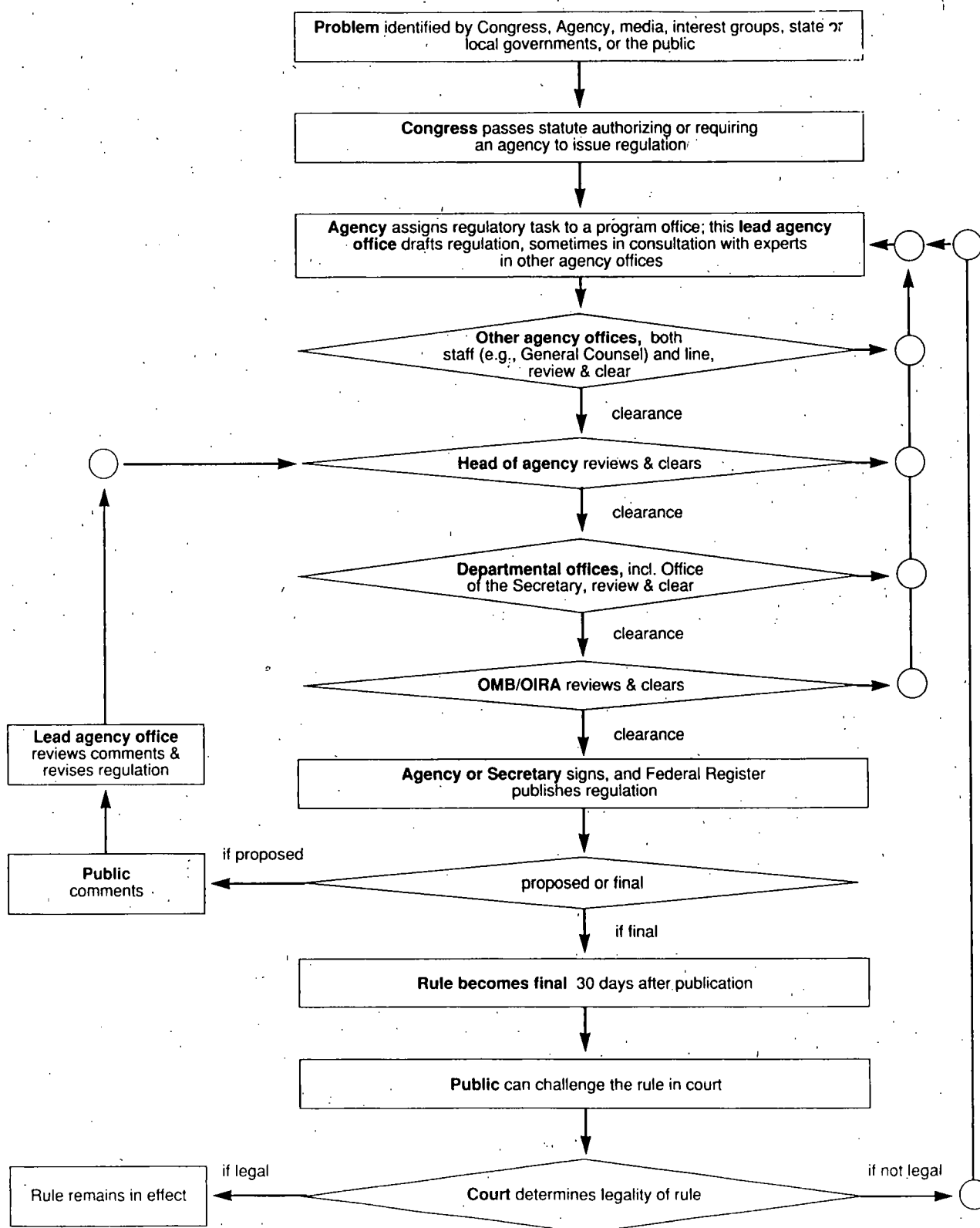
The process by which agencies issue rules is governed by numerous statutes, executive orders and internal agency policies and requirements. A simplified, typical version of the rulemaking process is described in the flow chart in Figure 1. In fact, the process is far more complicated, as is evidenced by flow charts of several agency processes that were reviewed.

The time devoted by agencies to develop rules varies dramatically.<sup>7</sup> In general, though, a relatively common time line is 12 to 18 months from enactment of the authorizing statute to issuance of a Notice of Proposed Rulemaking, and another 12 to 18 months between this notice and issuance of the final rule.

The number of regulations agencies issue also varies dramatically depending on the scope and nature of the agency's programs. Some agencies, like the National Telecommunication and Information Administration in the Department of Commerce, may issue only a handful of rules a year. Others, like the National Oceanic and Atmospheric Administration or the Federal Aviation Administration, may publish hundreds (or even thousands) of regulations a year.

**Basic Rulemaking Process.** The Administrative Procedure Act (APA) is the basic legal structure governing the rulemaking process.<sup>8</sup> It establishes a simple and straightforward process.<sup>9</sup> Under Section

FIGURE 1



553 of the APA, the agency generally must publish a notice of proposed rulemaking in the *Federal Register* that either sets forth the proposed rule or describes what the agency intends to do. The agency must allow the public to comment in writing on the proposed rule. (The Act does not specify a time period for comments, but agencies usually allow at least 30 days. Agencies sometimes also allow public comment at a hearing on the proposed rule.) The agency then is required to review the public comments, modify the rule as appropriate, and publish the final rule and a "statement of basis and purpose" in the *Federal Register*.

Over the years, a large number of other requirements have been layered on top of this simple process. Individually each requirement may serve a useful purpose.<sup>10</sup> Cumulatively they have made the rulemaking process increasingly burdensome and rigid.<sup>11</sup>

### ADDITIONAL STATUTES GOVERNING THE RULEMAKING PROCESS

Several other statutes govern the rulemaking process:

- The Paperwork Reduction Act requires the Office of Management and Budget (OMB) to review all regulations that require the public to submit information (or make it available) to the government.<sup>12</sup>
- The Regulatory Flexibility Act requires agencies to consider the special needs and concerns of small entities, particularly small businesses, and to prepare a "regulatory flexibility analysis" describing the rule's effect on these entities.<sup>13</sup>
- The Federal Advisory Committee Act governs the use and creation of committees that include non-federal employees to get advice or recommendations in the rule-making process.<sup>14</sup>
- The Negotiated Rulemaking Act provides guidelines for certain types of consensus-based rulemaking.<sup>15</sup>
- The National Environmental Policy

Act requires agencies to analyze the effect of the regulation on the environment and, in certain circumstances, to prepare an environmental impact statement.<sup>16</sup>

- Some specific substantive statutes (e.g., the Clean Air Act and the General Education Provisions Act) mandate additional procedural requirements for specific rules.<sup>17</sup>

**Executive Orders Governing the Rulemaking Process.** Requirements have also been added by executive orders. Presidents Nixon, Ford, and Carter each developed his own procedures for review of executive agency rules.<sup>18</sup> During the Reagan and Bush administrations, Executive Order 12291 (February 1981), required agencies to forward to the Office of Information and Regulatory Affairs (OIRA) in OMB all proposed and final rules for review before issuing them in the *Federal Register*.<sup>19</sup> OIRA's staff would review the rules for consistency with administration policy and consult with other offices within the Executive Office of the President and with other agencies. Conflicts or inconsistencies in policies or requirements, to the extent they were identified, were then resolved before OIRA would complete its review of the proposed or final rule. As a practical matter, rules were rarely issued without OIRA clearance.<sup>20</sup>

During the last half of the Bush administration, some controversial rules were also reviewed by the President's Council on Competitiveness. The Council, chaired by then-Vice President Quayle and nominally composed of key Cabinet officials, worked through a White House staff that wielded great power over agency rulemaking through its participation in the OMB review process. It was criticized for giving big business special back-door access to the rulemaking process.

During the Reagan and Bush administrations, coordination and regulatory planning were also covered by Executive Order 12498 (January 1985), which required each agency to submit annually to OMB a draft regulatory program. The

program was described as "a statement of [the agency's] regulatory policies, goals and objectives for the coming year and information concerning all significant regulatory actions underway or planned." OMB then reviewed the draft programs for consistency with administration principles and priorities and the planned actions of other agencies.<sup>21</sup> During this time, other executive orders also required agencies to analyze regulations for federalism implications, family values, regulatory takings, and litigation effects.<sup>22</sup>

The day after taking office, President Clinton announced the termination of the Council on Competitiveness. In addition, the Clinton administration is issuing a new executive order revoking and replacing Executive Orders 12291 and 12498. The Clinton administration's regulatory review process is designed to continue the concept of centralized review while avoiding pitfalls of the previous processes, such as review of too many regulations, delay, lack of adequate public participation, and lack of openness. The process will make planning more systematic, will eliminate the multiple impact statements, and will establish a triage system by which agencies and OIRA, working together, identify which upcoming rules are significant enough to warrant OMB review.

*Note: The Clinton administration regulatory review executive order was developed by a special working group within the White House. This working group focused on regulatory planning and executive review. NPR addressed broader issues, although there were many areas of overlap. The two groups worked closely with each other and their efforts are complementary.*

*NPR strongly supports the regulatory review process developed by the White House working group, which is described in Appendix A.*

**Agency Requirements Governing Rulemaking.** In addition to the requirements imposed by Congress through

statute and by the President through executive orders, most agencies that engage in substantial rulemaking activities have developed lengthy internal review procedures to ensure coordination among agency and department offices. These procedures allow rules to benefit from the full range of expertise and perspectives within the department. The office in charge of the rule often must obtain clearance from certain staff offices (e.g., general counsel's office) and sometimes from other program offices. For those agencies that are part of a cabinet department (such as the Federal Aviation Administration, which is part of the Department of Transportation), clearances frequently are required at the department level. The entire review process, within the agency, within the department, and within the administration, is normally repeated twice—first when the rule is proposed and again when the rule is finalized.<sup>23</sup>

## WHAT ARE THE PROBLEMS WITH THE CURRENT SYSTEM?

There are problems with both the substance of regulations and the process by which they are issued. Sometimes the problems are linked. These problems are addressed at length in the recommendations that follow; the most significant ones are summarized here.

One of the major problems is that regulatory programs rely too heavily on traditional command-and-control regulation rather than on more innovative, market-oriented mechanisms that allow regulated entities greater flexibility in meeting regulatory objectives. This over-reliance on command-and-control stems from a variety of causes, including:

- congressional and agency lack of knowledge about innovative regulatory design,
- congressional distrust of agencies, which makes Congress hesitant to grant agencies the flexibility to try new approaches,
- lack of information necessary to design

## IMPROVING REGULATORY SYSTEMS

- an innovative regulatory approach, and
- agency and congressional distrust of regulated entities.

Another major problem with the content of regulations is that society does not always get the maximum benefits from the amount it spends on regulation. This is partially due to Congress' and regulators' over-reliance on command-and-control regulations. It is also the result of insufficient planning and prioritization, which can lead to inefficient expenditures, including forcing society to spend more money to address small problems rather than major ones.

The multiple layers of review in the rulemaking process—exemplified by the 18-foot chart with 373 boxes one agency used to describe its process—are also a problem. While extensive review and coordination are appropriate for significant rules (the government should not impose regulations lightly), such an approach is inappropriate for simple or routine rules.

The long time it frequently takes agencies to issue rules also is a major problem because it delays resolution of the problem the rule is supposed to address and creates uncertainty. Some delay arises from the need to obtain public comments or additional scientific or other information. On the other hand, undue delay can be caused by inappropriately long agency and executive branch clearance processes.

Lack of information is another serious problem. To a certain extent, this stems from the adversarial nature of the rulemaking process; in many rulemakings, regulated entities, public interest groups, and other parties are more interested in protecting their own positions than in providing useful information to the agency or finding a solution to the problem. Incomplete scientific data and the pressures of time also require agencies to make decisions without as much information as would be ideal.

### WHAT SHOULD A RULEMAKING PROCESS ACCOMPLISH?

The rulemaking process has evolved over time to become a lengthy, complex process. To determine how to improve the regulatory system, it is necessary to identify its objectives. Ideally, the rulemaking process should produce a rule that:

- addresses an identifiable problem,
- implements the law faithfully,
- implements the President's policies,
- is in the public interest,
- is consistent with other rules and policies (federal, state, local, tribal, and international),
- is based on adequate information,
- is adequately and rationally justified,
- accomplishes goals in a cost-effective manner,
- can actually be implemented,
- is acceptable and enforceable,
- is easily understood, and
- stays in effect only as long as is necessary.

The process should:

- respond in a timely manner,
- be efficient, and
- be both fair and perceived as fair.

The rulemaking process requires agencies to balance these objectives because some of them are at odds with each other. For example, collecting adequate information takes time and may prevent an agency from responding in a timely manner. Circumstances or the state of scientific knowledge may have changed since legislation was passed so that a rule that implements the law faithfully may no longer address an identifiable problem. The easiest rule to enforce may not be the most effective or efficient. Thus, in designing a process, and in individual rulemakings, agencies must make trade-offs between the different goals of the regulatory process.

An improved regulatory process needs to produce regulations that achieve their goals more efficiently. To do this, regulators must have the flexibility to strike the proper balance among the objectives of the rulemaking process. The complexity of the rule, the level of agency expertise, the extent of public interest, the

presence of scientific issues, and other factors will determine the appropriate balance. Striking the right balance will ensure that regulators select the right regulatory tool to solve the problem.

## Endnotes

1. Although many statutes require agencies to issue regulations to implement and clarify the provisions, some statutes are self-implementing or detailed enough that regulations are unnecessary.
2. Adler, Robert, Stephen Klitzman, and Richard Mann, "Shaping Up Federal Agencies: A Basic Training Program for Regulators," *Journal of Law & Politics*, vol. VI, no. 2 (Winter 1990), p. 347.
3. National Highway Traffic Safety Administration and Federal Highway Administration, *Moving America More Safely: An Analysis of the Risks of Highway Travel and the Benefits of Federal Highway, Traffic, and Motor Vehicle Safety Programs* (September 1991), p. 48.
4. U.S. Consumer Product Safety Commission, *Report on Accomplishments and Planned Activities* (Washington, D.C., June 1993), p. 1.
5. The Carnegie Commission on Science, Technology, and Government reported that:  
 [B]etween 1980 and 1985, EPA's staff decreased by approximately 10 percent, even though the agency assumed responsibility for the substantial Comprehensive Environmental Response, Compensation, and Liability Act [Superfund] in 1980; Congress also reauthorized and significantly expanded three other acts in EPA's jurisdiction during this period. . . . [I]mports of substances under [FDA's] jurisdiction tripled from 500,000 entries in 1971 to more than 1.5 million in 1990. Between 1985 and 1990, R&D expenditures in the pharmaceutical industry doubled, leading to a sharp upturn in applications for new products submitted to FDA. In 1989, agency reviewers received 82 percent more applications than in 1980. From 1980 to 1988, FDA was required to implement 21 new laws and amendments, while its overall work force decreased by 11 percent.
6. Carnegie Commission on Science, Technology, and Government, *Risk and the Environment: Improving Regulatory Decision Making* (Washington, D.C., June 1993), pp. 33-34 (footnotes omitted).
7. For purposes of this report, "regulation" is defined to exclude regulations controlling how the federal government runs itself. Other National Performance Review reports are addressing these types of rules (e.g., personnel, budget, and procurement).
8. For example, when there is an emergency, the Federal Aviation Administration can issue an airworthiness directive modifying aircraft requirements within hours of an accident without undergoing notice-and-comment rulemaking. At the other extreme, the rule requiring passive restraint devices in cars took 15 years from initiation of development, through litigation, to implementation of a final rule.
9. Public Law 404 (June 11, 1946), codified in principle part at 5 U.S.C. §§ 551-559, 701-706 (1988).
10. Although the accompanying text describes the standard Administrative Procedure Act (APA) procedures, those procedures may not apply in certain circumstances because of special provisions in the APA. For a full description of the basic process and the exceptions contained in the APA, see Administrative Conference of the United States, *A Guide to Federal Agency Rulemaking*, 2nd ed. (1991).
11. Some commenters have argued that those opposed to regulation added such requirements purposefully to slow the rulemaking process. See authorities cited in Eisner, Neil R., "Agency Delay in Informal Rulemaking," *Administrative Law Journal*, vol. 3, no. 1 (Spring 1989), n. 24 and accompanying text.
12. Students of the regulatory process refer to this as the "ossification" of the rulemaking process. McGarity, Thomas O., "Some Thoughts on 'Deossifying' the Rulemaking Process," *Duke Law Journal*, vol. 41 (June 1992), pp. 1385-86.
13. 44 U.S.C. §§ 3501-3520 (1990).
14. 5 U.S.C. §§ 601-612 (1988).
15. 5 U.S.C. App. (1988).
16. 5 U.S.C.A. §§ 561-570 (1993 Supp.).
17. 42 U.S.C. §§ 4321-4347 (1988).
18. 42 U.S.C. § 7607 (1991 Supp.), and 20 U.S.C. § 1232 (1988).
19. Carnegie Commission, *Risk and the Environment*, p. 48.
20. Executive Order (EO) 12291 did not require independent agencies to clear regulations through the Office of Management and Budget (OMB). Certain categories of time-sensitive, technical, and noncontroversial rules did not have to be cleared by OMB pursuant to agreements OMB reached with some agencies. The executive order did not require OMB review of certain other categories of rules, including those relating to military or foreign affairs, or to agency organization, management, or personnel (EO 12291 § 1(a)). Technically, a rule could be published without OMB clearance in case of emergencies or if obtaining such clearance conflicted with statutory or court-ordered deadlines (EO 12291, § 8(a)). Nevertheless, for practical, political reasons, agency heads seldom chose to publish rules without OMB clearance, except when faced with true emergencies or court-ordered deadlines.
21. Although the head of an agency or department usually had legal authority to issue the rule, politically it was almost impossible to do so prior to clearance from OMB.
22. Darman, Richard G., Director of OMB, "Presidential Review of Agency Rulemaking," memorandum for the heads of departments and agencies, April 3, 1989, attachment.
23. E.O. 12612, 52 FR 41685 (1987); E.O. 12606, 52 FR 34188 (1987); E.O. 12130, 53 FR 8859 (1988); and E.O. 12778, 56 FR 55195 (1991).
24. For an interesting discussion of how the rulemaking process works in the context of a particular rule, see Elliott, Donald, "TQMing OMB: Or Why Regulatory Review Under Executive Order 12291 Works So Poorly and What President Clinton Can Do About It," draft, August 17, 1993, pp. 10-16, forthcoming in *Law and Contemporary Problems*, vol. 57 (1994).

# REG01: CREATE AN INTERAGENCY REGULATORY COORDINATING GROUP

## BACKGROUND

Federal regulatory agencies confront numerous overlapping and cross-cutting issues. One reason for the overlap is that the government must divide itself into organizational units—and the problems the government has to solve do not fit neatly into these divisions. Overlap also arises from science, economic, and policy issues that cut across a wide variety of problems and agencies.<sup>1</sup> Agencies also face similar cross-cutting concerns about how best to administer the regulatory process.

**Overlap Exists.** Some of the governmental divisions of responsibility may not make sense, but even those that are sensible create potential for conflicting or duplicative regulations. For instance, it is logical to have one agency in charge of workplace safety and another in charge of food safety. Such a division, however, can cause problems. For example, in the early 1980s chocolate manufacturers had difficulty deciding how to meet both noise standards imposed by the Occupational Safety and Health Administration (OSHA) and hygiene standards imposed by the Food and Drug Administration (FDA).<sup>2</sup> One problem was the concern that porous insulation that reduced noise from machinery could not be kept clean enough to meet FDA standards.

It is also common for agencies to have overlapping jurisdiction for the same or related problems. For example, at least three agencies regulate food safety: FDA (food items exclusive of meat and poultry), the Food Safety and Inspection Service in the Department of Agriculture (USDA) (meat and poultry), and the Environmental Protection Agency (EPA) (pesticide tolerances).<sup>3</sup> Housing is regulated by, among others, the Department of Housing and Urban Development (HUD), the Department of Veterans Affairs (through loan standards), and USDA (through Farmers Home Administration loan standards). Particular substances or chemicals also may be regulated by different agencies in different settings. Lead, for example, poses problems that fall within the jurisdiction of numerous agencies—representatives of approximately 15 different federal agencies are on the Interagency Task Force on Lead (including HUD, EPA, FDA, the Consumer Product Safety Commission (CPSC), the Department of Health and Human Services' Centers for Disease Control, and the Department of Defense).<sup>4</sup>

The potential for conflict also arises because individual industries are regulated by several agencies. For example, the auto industry has to meet vehicle safety and fuel economy standards issued by the National Highway Traffic Safety Administration

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(NHTSA), vehicle and plant emission standards issued by EPA, worker safety standards issued by OSHA, advertising requirements issued by the Federal Trade Commission, and securities regulations governed by the Securities and Exchange Commission, to name just a few.

### **Current Coordinating Mechanisms.**

Currently, interagency coordination early in the rulemaking process occurs on an ad hoc basis—e.g., when a specific complaint arises or as executive branch or congressional offices identify a particular problem. The Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) provides a backstop on a rule-by-rule basis through its executive order review.<sup>5</sup>

At times, agencies do coordinate with each other on specific problems. For example, FDA, USDA, and EPA recently announced joint efforts to address problems posed by pesticide residues in food.<sup>6</sup> EPA and the Departments of Transportation (DOT) and Energy coordinate on the corporate average fuel economy standards for automobiles. An interagency committee on migrant farmworkers, led by the Departments of Health and Human Services (HHS), Education, and Labor, addresses problems caused by overlapping jurisdiction on migrant farmworker issues.

A limited number of opportunities also exist to coordinate or exchange information about broader regulatory issues. General counsels from various agencies and chairs of independent regulatory commissions meet occasionally under the sponsorship of the Administrative Conference of the United States (ACUS), which serves as an advisory agency and a clearinghouse on administrative law procedure.<sup>7</sup> The Office of Science and Technology Policy (OSTP) and the Federal Coordinating Council for Science, Engineering and Technology also occasionally coordinate scientific issues, as when OSTP issued its carcinogen risk guidelines.<sup>8</sup>

Coordination, or at least exchange of information, also occurs at the staff level in

several informal forums. Scientists from different agencies researching in a particular field often communicate with each other about their research.<sup>9</sup> A small group of career staff regulators from various agencies have a brown-bag lunch once a month to exchange experiences and ideas about ways to improve the regulatory process. A larger group of regulatory professionals from different federal agencies and disciplines operate the Interagency Regulatory Colloquium, a monthly workshop to explore program-level problems and innovative practices within agencies, and to discuss issues of current concern.<sup>10</sup>

As mentioned above, OMB also serves as a backstop to identify and require resolution of conflicting regulations. For example, OMB found that the Mine Safety and Health Administration was proposing to issue a regulation requiring radon in mines to be vented to the outside to reduce mine workers' exposure. EPA, on the other hand, planned to issue a regulation prohibiting the venting of radon from mines so as to protect the surrounding communities. OMB brought the agencies together to resolve this obvious conflict.<sup>11</sup>

## NEED FOR CHANGE

Under the current ad hoc coordination process, coordination does not occur at the proper levels on a number of problems that could benefit from it.

OMB's rule-by-rule review process, although it does catch some problems and is an important method of executive oversight, is neither a comprehensive nor an efficient method for coordinating regulatory policy. By the time a rule gets to OMB, policy options are already limited and agencies are heavily invested in proceeding with their rules. Additionally, OMB's rule-by-rule review by itself tends to force policy development and coordination into the often overheated context of the development of a single rule or issue. This can result in reactive and fragmented policy development that inhibits the government's ability to

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coordinate broad-reaching regulatory policy issues effectively.

Lack of coordination creates numerous problems. First and foremost are problems of duplicative or conflicting regulations. Also, agency expertise is called into question when different agencies produce different decisions about, for example, a chemical's hazard. Lack of coordination also can waste agency money if it results in a series of reinventions rather than an exchange of experiences and information.

The existing division of responsibility within the government also causes less obvious problems. Grouping regulators by expertise (e.g., worker safety, product safety, environment) facilitates issuing regulations, but can interfere with compliance. For instance, regulations from different agencies are not usually coordinated in such a way that a process or product need only be changed once to take into account several regulatory changes. In fact, it is difficult to do this within one agency or department, much less between or among departments.

- It took the intervention of the Office of the Secretary of Transportation to get the Federal Aviation Administration (FAA) and NHTSA (both within DOT) to adopt regulations for child safety seats that could meet aircraft and car safety seat requirements. Otherwise, airplane trips would have required parents to bring along two child seats—one for the plane ride and one for the car trip.
- In a recent rulemaking for the pulp and paper industry, EPA addressed water and air pollution regulations simultaneously—an important improvement in the way the agency does business.<sup>12</sup> The fact that this is the exceptional way of regulating, rather than the norm, illustrates how far government agencies have to go in looking at the picture from the regulated entity's viewpoint.

Lack of coordination also results in less serious inefficiencies. Exchanging information on the rulemaking process could help agencies help each other. For

example, some offices in EPA have been using direct final rulemaking for 10 years as a way of streamlining procedures and reducing unnecessary paperwork for minor rules. When staffs from other agencies were told of this process, many expressed interest in using the idea or adapting it slightly as needed for their particular circumstances.

The Carnegie Commission on Science, Technology, and Government recently identified lack of coordination as a significant problem in our country's efforts to control environmental and other risk-related hazards. It noted that "[w]orse probably than the occasional high-profile mistake is the sum of the myriad inefficiencies and inconsistencies that result from lack of interagency communication, any one of which by itself might be considered minor."<sup>13</sup>

A systematic, but short-lived, attempt at comprehensively coordinating regulatory policy was made during the last two years of the Carter Administration. After a successful forum was created among EPA, OSHA, CPSC, and FDA (known as the Interagency Regulatory Liaison Group), President Carter created the United States Regulatory Council late in 1978 to coordinate and improve regulations.<sup>14</sup>

The Council had a variety of projects aimed at increasing the use of innovative approaches to regulation and at coordinating regulatory efforts among agencies. It started a calendar of federal regulations. It issued a set of pamphlets on innovative approaches to regulation.<sup>15</sup> Coordination was attempted in several ways. Several projects looked at how regulation and other government actions affected specific industries (e.g., the auto and coal industries). One project looked at a science policy issue that cut across several agencies. Another project looked at how government regulation was viewed by citizens in a small city, Janesville, Wisconsin. Although the Council's projects were not equally successful, and the Council was not in operation all that long, it was moving in the right direction. People involved with the Council liked the fact that the agencies set the agenda, and it was seen

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as a way for the agencies to help themselves improve regulation.<sup>16</sup> The Council was disbanded shortly after President Reagan took office.<sup>17</sup>

### ACTION

*1. Create an interagency Regulatory Coordinating Group to share information and coordinate approaches to regulatory issues. (2)*

The President should establish an interagency Regulatory Coordinating Group (RCG) to provide agencies with a mechanism to share information and coordinate approaches to regulatory issues. The regulatory review executive order should create such a group and name the Administrator of OIRA as the Chair. The Group should be composed of political appointees or their designees from the key domestic regulatory agencies and certain key White House advisors.

**Mission of the RCG.** The RCG's mission should be to provide a forum for agencies to discuss issues of common concern, to assist agencies in finding more innovative approaches to regulation and better methods of developing regulation, and to improve coordination of regulatory policies. Meetings of the RCG should allow high-level regulators to discuss specific problems they are confronting and seek advice from similarly situated peers.<sup>18</sup> The RCG should also decide what issues the Group should address and, as needed, establish task forces or working groups (including identifying a lead agency, designating which agencies and types of representatives should participate, and setting a goal for the group).

The RCG could also be used as a forum to identify areas requiring coordination of two or more agencies on program development (similar to the joint efforts now underway on lead and pesticides). However, the RCG should not necessarily oversee this coordination or resolve

substantive conflicts. Once the area and relevant agencies have been identified, the affected agencies should establish the proper structure for coordination and would not necessarily report back to the RCG.

**Structure of the RCG.** The RCG itself needs to be composed of political appointees or their designees. Without high level support and direction, agency staff would be unlikely to spend the necessary time on RCG projects. Only political appointees or their designees can speak authoritatively for each agency, decide on the issues to which the agencies will commit resources, reach consensus on policies coming from the working groups, and direct implementation of recommendations.

The RCG should accomplish most of its work by acting as an umbrella organization with task forces or working groups addressing specific issues. The task forces could be political appointees or career staff or both, depending on the goal of the task force. Representatives from different levels and disciplines within the agencies should be needed to address different tasks. For some issues, it might be best for working groups to present a consensus view. In other situations, the best result might be a full statement of opposing views with the points of contention highlighted.

The primary staff work for the RCG should be done by agency staffs in the task force or work group structure. This would allow agency experts who deal with a specific issue on a routine basis to compare notes with experts from other agencies. Resolution of scientific issues, for example, is done better by scientists who can critique each other's work. Similarly, improving agency/congressional relationships would probably best be handled by a task force of agency liaisons to Congress.

**Issues for the RCG.** The RCG's tasks should include the following:

- Actively encouraging the use of innovative approaches to regulation. It should oversee the development of the *Deskbook on Regulatory Design* and

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identify innovative regulators from the agencies who can serve as resources for other regulators to contact for assistance in developing innovative approaches.<sup>19</sup> An RCG group should also work with Congress to improve understanding of the merits and limits of innovative approaches.

- Considering substantive policy areas that are in need of coordination (e.g., risk prioritization, valuation of lives saved or injuries avoided, measurement of future costs or benefits, valuation of eco-systems, and cost-benefit analysis).
- Considering ways to improve the rulemaking process (e.g., increasing public participation, using information technology, removing procedural barriers, and improving agency/congressional relationships).
- Looking at ways for agencies to help people comply with regulations and to increase compliance through innovative means, such as sampling and auditing.<sup>20</sup>

### Cross-references to Other NPR Accompanying Reports

*Environmental Protection Agency*, EPA02: Streamline EPA's Permit Program.

*Department of Health and Human Services*, HHS03: Develop a National, Uniform Inspection System to Ensure a Safe Food Supply.

*National Science Foundation/Office of Science and Technology*, NSF01: Strengthen Coordination of Science Policy.

*Rethinking Program Design*, DES01: Activate Program Design as a Formal Discipline.

*Streamlining Management Control*, SMC04: Increase the Effectiveness of Offices of General Counsel.

### Endnotes

1. For example, different agencies implicitly use different values for life in determining the monetary benefits of a rule. Administrative Conference of the United States (ACUS), "Valuation of Human Life in Regulatory Decisionmaking," Recommendation 88-7, 1 C.F.R. § 305.88-7.
2. Mayer, Caroline E., "Chocolate Industry's Bittersweet Tale of Conflicting U.S. Rules," *Washington Star* (October 24, 1980); and U.S. Regulatory Council, internal memorandum, "Chocolate Manufacturers Association Complaint About Apparent Conflict Between FDA and OSHA Regulations," undated.
3. National Performance Review (NPR) is recommending

the creation of a single food safety agency. See NPR Accompanying Report, *Health and Human Services*, "HHS03: Develop a National, Uniform Inspection System to Ensure a Safe Food Supply."

4. Telephone interview with Ellis Goldman, Director, Division of Program Management, Office of Lead-Based Abatement and Poisoning Prevention, Department of Housing and Urban Development, August 18, 1993.

5. The planning required by Executive Order 12498 (see Introduction to this report) has proven less than useful. Discussions with regulatory officials from various agencies, convened at the Department of Transportation (May 13, 1993); and Elliott, Donald, "TQMing OMB: Or Why Regulatory Review Under Executive Order 12291 Works So Poorly and What President Clinton Can Do About It," draft, August 17, 1993, p. 24, forthcoming in *Law and Contemporary Problems*, vol. 57 (1994). Review by the Office of Management and Budget (OMB) as a means of executive oversight of rule development was not specifically addressed by NPR because a special working group in the Clinton administration was addressing this issue, as explained in the Introduction.

6. Kenworthy, Tom, and John Schwartz, "3 U.S. Agencies Announce Joint Commitment To Cut Pesticide Use," *Washington Post* (June 26, 1993), p. A5.

7. Since the 1960s, ACUS has served as the government's in-house advisory agency and clearinghouse on administrative procedure. Its membership of 101 government and private-sector procedural experts debate and adopt advisory recommendations to the executive branch and Congress on procedural reforms. See 5 U.S.C.A. §§ 591-596 (1993 Supp.).

8. Office of Science and Technology Policy, *Chemical Carcinogens: A Review of the Science and Its Associated Principles* (February, 1985), 50 Federal Register 10371-10442 (1985).

9. Scientists researching various aspects of the problems posed by lead shared information before any formal mechanism was established for interagency coordination on this issue. Telephone interview with Ronnie Levin, Chief, Water Team, Office of Science Planning and Regulatory Evaluation, Environmental Protection Agency, July 22, 1993.

10. Telephone interview with Dr. Paula Cohen, Senior Regulatory Analyst, Animal and Plant Health Inspection Service, Department of Agriculture, August 13, 1993.

11. Letter from S. Jay Plager, Administrator, Office of Information and Regulatory Affairs, to Jennifer Dorn, Assistant Secretary for Policy, Department of Labor, August 22, 1989.

12. Cleland-Hamner, Wendy, and Joe Retzer, "Crossing Agency Boundaries," *Environmental Forum*, vol. 10, no. 2 (March-April, 1993) p. 17.

13. Carnegie Commission on Science, Technology, and Government, *Risk and the Environment: Improving Regulatory Decision Making* (Washington, D.C., June 1993), p. 64.

14. The Regulatory Council, which was composed of 20 executive departments and 18 independent regulatory agencies, was directed "to identify and resolve conflicts in regulation, manage government-wide efforts to better measure and plan the effect of new regulations on different sectors, and to identify and eliminate barriers to more cost-effective and

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less burdensome regulation." United States Regulatory Council, *Report From the Director* (July 1980), p. 1.

The member departments and agencies of the Regulatory Council were: the Administrative Conference of the United States; the Departments of Agriculture, Commerce, Education, Energy, Health and Human Services, Housing and Urban Development, the Interior, Justice, Labor, Transportation, and the Treasury; the Environmental Protection Agency; the Equal Employment Opportunity Commission; the Federal Emergency Management Agency; the General Services Administration; the National Credit Union Administration; the Small Business Administration; the United States International Trade Commission; the Veterans Administration; the Civil Aeronautics Board; the Commodity Futures Trading Commission; the Consumer Product Safety Commission; the Federal Communications Commission; the Federal Deposit Insurance Corporation; the Federal Election Commission; the Federal Energy Regulatory Commission; the Federal Home Loan Bank Board; the Federal Maritime Commission; the Federal Mine Safety and Health Review Commission; the Federal Reserve System; the Federal Trade Commission; the Interstate Commerce Commission; the National Labor Relations Board; the Nuclear Regulatory Commission; the Occupational Safety and Health Review Commission; the Postal Rate Commission; and the Securities and Exchange Commission.

15. Project on Alternative Regulatory Approaches, *Guidebook Series on Alternative Regulatory Approaches*, Books 1-6 (Washington D.C., September 1981).

The series includes:

- *Overview*, Book 1;
- *Marketable Rights*, Book 2;
- *Performance Standards*, Book 3;
- *Monetary Incentives*, Book 4;
- *Information Disclosure*, Book 5; and
- *Tiering*, Book 6.

16. Interview with Doug Costle, former Chair, U.S. Regulatory Council, June 28, 1993.

17. Batten, Donna, ed., *Encyclopedia of Governmental Advisory Organizations, 1994-5*, ninth ed. (Washington, D.C.: Gale Research, Inc., 1993).

18. Members of the Regulatory Council reported that they found the Regulatory Council a very useful way to get advice from people in similar situations.

19. The Regulatory Coordinating Group (RCG) should coordinate with the Program Design Office recommended in the report *Rethinking Program Design*. (See "DES01: Activate Program Design as a Formal Discipline.")

20. One hindrance to compliance is that the government regulates and organizes its regulations by subject area (e.g., labor, equal employment opportunity, highway safety, environmental protection) rather than by industry sector (e.g., gas stations, chemical companies, auto companies). Currently, if a small business wants to find out what regulations govern its actions, it must review each of the substantive parts of the multivolume *Code of Federal Regulations* to determine its obligations (although there may be private services that compile this information more usefully). It would be easier for the small business if there were an industry-specific listing of what regulations apply. Compiling such a listing and making it useful may be a very complicated proposition. It might be easier to have an office that helps businesses wend their way through the regulatory maze. See, e.g., the NPR report *Environmental Protection Agency*, "EPA 02: Streamline EPA's Permit Program to Improve Agency Efficiency and Customer Service." The RCG should consider a pilot program to determine what is feasible.

The RCG should also look at other ways to coordinate regulation by looking at regulation from the regulated entity's perspective. RCG should consider whether it would be useful to compile planned regulations by industry sector, as the Regulatory Council did for the auto industry. Also, see "REG02: Encourage More Innovative Approaches To Regulation."

# REG02: ENCOURAGE MORE INNOVATIVE APPROACHES TO REGULATION



## BACKGROUND

One of the biggest challenges federal regulators face is choosing the best tool to solve the problem. In many cases, non-regulatory approaches may be the best solution. These include efforts to spur technological innovation, information disclosure, and consumer education. For example:

- To address the problem of airline delays, the Department of Consumer Affairs at the Department of Transportation (DOT) publishes the monthly Air Travel Consumer Report comparing actual and scheduled arrivals and departures.<sup>1</sup>
- For 8 years, the Department of Agriculture's Food Safety and Inspection Service has operated a toll-free food-safety hotline, to provide meat and poultry consumers with information regarding food-borne illnesses.<sup>2</sup>
- The Environmental Protection Agency (EPA) served as a catalyst in the creation of a "Golden Carrot" program—a private-sector initiative to spur development of a more energy-efficient and environmentally friendly refrigerator by providing monetary rebates to the manufacturer of a winning design.<sup>3</sup>
- Regulation by state or local

governments may also be an alternative to direct federal regulation.

If regulation is necessary, agencies must balance a number of considerations in selecting the best regulatory approach, including fairness, enforceability, and impact on regulated industries. One of the major factors regulators must consider in choosing among alternative approaches is the cost to the regulated industry and to the government.

**Reducing Cost of Regulation.** The government is obligated to see that the money spent to achieve health, safety, environmental, economic, and social objectives is spent wisely. Regulation to achieve these goals imposes significant costs on those being regulated.<sup>4</sup> For example, industries may be required to pay for installing equipment to reduce pollution, for investing in monitoring systems to meet worker health standards, and even for hiring additional personnel to maintain compliance records.

EPA estimates that the proportion of the gross national product (GNP) devoted to environmental protection alone will rise from 1.9 percent in 1990 to 2.7 percent in the year 2000, with the private sector bearing most of these costs.<sup>5</sup> The National Highway Traffic Safety Administration (NHTSA) and the Federal Highway

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Administration (FHWA) estimate that between 1966 and 1990 the federal and state governments and the automobile industry spent an average of \$6.5 billion annually on highway, traffic, and motor vehicle safety.<sup>6</sup>

Agencies have traditionally used command-and-control regulations. Under this approach, the agency dictates what individual firms must do to meet an established standard or goal and enforces those dictates. For example, environmental regulations may require the use of specific pollution control devices; inspection systems may require performance of specific procedures; or agency officials may themselves decide on allocation of rights to exploit natural resources. No doubt exists that a command-and-control approach is appropriate—and indeed necessary—in certain cases. For example, where risks that would result from noncompliance are high, as in the regulation of nuclear power, command-and-control may be the only feasible regulatory approach.

Experience has shown that in some situations, however, costs of meeting regulatory goals can be significantly reduced by choosing approaches that rely more on market mechanisms. Such mechanisms place more decisions in the hands of the private sector, provide greater flexibility to regulated industries, and encourage innovation. Market-oriented regulation decentralizes decisionmaking, allowing the market to find the most cost-effective solution to a particular regulatory goal. Unlike command-and-control, market-oriented regulation provides greater flexibility to regulated industries and encourages innovation.

### **Increasing Effectiveness of Regulation.**

Tapping the forces of the market can also produce more effective regulation. Deposit-refund systems for beverage containers ("bottle bills"), which have been mandated by a number of states, demonstrate how powerful economic incentives can be in influencing the behavior of large numbers of people. Heightened public awareness about

the problems which regulation attempts to address can also have an impact on the degree to which overall objectives are attained. For example, automakers are now competing to provide safety features, such as airbags and anti-lock brakes.

How a regulation is designed has implications for its enforceability, which is often critical to overall effectiveness. The deposit-refund system relies very little on traditional enforcement mechanisms. Effectiveness of command-and-control regulations, on the other hand, depends directly on enforcement. Lax enforcement is likely to lower compliance significantly. Because enforcement resources are limited, agencies should also consider innovative approaches to enforcement, such as use of auditors, to improve regulatory programs.<sup>7</sup>

### **Using Market-Oriented Approaches.**

Among the regulatory approaches that allow greater flexibility for the private sector and make use of market forces are:

- performance standards,
- marketable permits,
- monetary incentives, and
- information disclosure.<sup>8</sup>

*Performance standards* are generally preferable to prescriptive or design standards because they give the regulated industry the flexibility to determine the best technology to meet established standards. For example, a design standard for ladders might specify the materials and exact dimensions to be used, whereas a performance standard might simply require that the ladder support a minimum weight and provide a minimum degree of stability. The Occupational Safety and Health Administration (OSHA) has sometimes been criticized for prescriptive design standards for plants and equipment relating to worker safety.<sup>9</sup> In 1990, OSHA initiated rulemaking on ladders and scaffolding to convert to performance standards where possible. The proposal followed complaints by industry that current standards provided insufficient flexibility and inhibited technological developments.<sup>10</sup>

The EPA's "bubble" concept for limiting

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pollution emissions is a type of performance standard. Under the bubble concept, overall emission limits are established for a single facility or a group of facilities, rather than from each source in the facility. This allows companies greater flexibility in choosing which emissions source(s) to reduce to meet the overall limit for emissions from the bubble. EPA estimated that facilities under the 80 or so bubbles established prior to 1986 saved \$435 million in meeting emissions standards.<sup>11</sup>

*Marketable permits* allow the market, rather than the government, to distribute scarce resources. The 1990 Clean Air Act Amendments establish an allowance trading system for sulfur dioxide emissions from utilities, in an effort to reduce acid rain.<sup>12</sup> Utilities are allowed to trade initially allocated allowances, each representing one ton of emissions. This allows more of the reduction in emissions to be done by those plants that can reduce emissions at lower costs. EPA estimates that this system will save from \$700 million to \$1 billion per year.<sup>13</sup>

In 1985, DOT issued a rule allowing airlines to buy and sell airport takeoff and landing rights (slots) at four major airports.<sup>14</sup> Previously, these slots had been allocated by a committee, which frequently deadlocked. Under the new system, the value of the slots is determined by the market, which should allocate them most efficiently. Similarly, in 1990, the National Marine Fisheries Service implemented a transferable quota system for allocating fishery harvesting privileges in the New England and Mid-Atlantic regions.<sup>15</sup>

*Monetary incentives*, if correctly set, can be effective in influencing behavior. More than 100 communities now charge for garbage collection on the basis of volume. Because households have an incentive to reduce the amount of garbage generated, the effect has been to reduce tonnage collected and to increase recycling. Many states and counties also tax auto tires to pay for disposal. In a like manner, 10 states have implemented deposit-refund systems for lead batteries to ensure proper disposal.<sup>16</sup>

*Information disclosure* provides consumers with information they need to make informed choices.<sup>17</sup> Labels, routinely required on such products as over-the-counter drugs and pesticides, are probably the most common form of information disclosure. NHTSA provides information on tire safety to consumers by requiring manufacturers to grade and mark tires based on a testing protocol to measure traction, treadwear, and temperature resistance, factors relating to safety.<sup>18</sup>

Information disclosure requirements can also provide an incentive to industries to move toward regulatory objectives. For example, the Federal Trade Commission's introduction of standard test procedures for tar and nicotine content in cigarettes helped lead to the introduction of low-tar cigarettes.<sup>19</sup> The Emergency Planning and Community-Right-to-Know Act of 1986<sup>20</sup> requires companies to disclose information on the use and release of hazardous chemicals. EPA attributes a significant portion of the 31 percent decrease in air emissions of these hazardous chemicals to voluntary reductions brought about by increased industry and public awareness of emission levels.<sup>21</sup>

## NEED FOR CHANGE

Federal agencies, for a number of years, have been encouraged to use alternative approaches to regulation, including more market-oriented regulation. President Carter in a 1980 Presidential Memorandum directed the agencies to find areas where alternative techniques could be used in both existing and new programs. Carter's Regulatory Council created a short-lived Project on Alternative Regulatory Approaches, which published a series of guides describing alternative approaches.<sup>22</sup> Under his and later executive orders, agencies were required to include, in their regulatory analyses of all major rules, a discussion of alternative approaches considered. Presidents Reagan and Bush also supported use of market-oriented approaches.

## RECOMMENDATIONS AND ACTIONS

Despite more than a decade of high-level support, innovative approaches are not widely used by agencies. There are a number of constraints to more widespread use. Congress and agencies commonly respond to problems by pulling the familiar command-and-control tool out of the toolbox. It is always easier to model a new program after an old one, and most often, existing regulations are command-and-control. Lack of information and knowledge about when other tools should be used is a significant constraint to introduction of innovative techniques. Even where agency staffs have expertise in designing innovative regulation, their ideas may not be accepted without strong support from agency leadership. Agencies generally do not actively ask for ideas for regulatory approaches from the regulated industry or interest groups. On the other hand, regulated entities may prefer command-and-control regulations or prescriptive standards over performance standards because they provide more specific details on the requirements for compliance. Finally, statutes may not give agencies sufficient discretion in designing a regulatory approach.

### ACTIONS

#### *1. Establish use of innovative regulatory approaches as administration policy. (2)*

The President should direct agency heads to use innovative regulatory approaches whenever they are appropriate. This is consistent with the new regulatory review executive order. Wider use of such approaches to regulation can lower the costs of meeting regulatory goals by giving regulated entities more flexibility and increasing the economic efficiency of regulations. However, innovative approaches are not the best solutions in some circumstances. Agencies should analyze the strengths, weaknesses, and limits of particular approaches to match the best regulatory approach to the problem.

Redirecting the regulatory system from the command-and-control end of the regulatory spectrum toward more flexible and market-oriented approaches will require strong leadership. The President should also direct the Regulatory Coordinating Group to work with Congress and policy makers to incorporate more innovative approaches in legislation and regulation. A standing task force on innovative approaches could assist this effort, and would provide a good forum for communication among government regulators.

#### *2. Develop a Deskbook on Regulatory Design. (1)*

The Chair of the Regulatory Coordinating Group (RCG) should oversee the development of a *Deskbook on Regulatory Design* for legislative and regulatory staffs, which should be completed in less than one year. The *Deskbook* would improve understanding of the full range of alternative approaches by providing both policymakers and staff with ready information about the range of regulatory approaches. It would also identify resource people within agencies who could assist others in development of innovative approaches. Project staff should work closely with congressional regulatory specialists in developing the *Deskbook*.

The *Deskbook* should describe in detail the conditions under which each approach should be considered. Possible combinations of approaches should also be discussed. In this context, the *Deskbook* should highlight the strengths, weaknesses, and limitations of each approach. Market-oriented approaches, though they may be more economically efficient, can be difficult to design and are not appropriate in all circumstances.<sup>23</sup> In drafting the *Deskbook*, the RCG should consult on existing sources, such as the handbooks prepared by the Regulatory Council in the 1970s and the experience of Germany and other European countries.<sup>24</sup>

The *Deskbook* should also provide an in-depth survey of how innovative approaches have been used in both federal and state governments. Case studies should be used.

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for each approach. Case studies should look at not only the design of the regulation, but also the effectiveness of implementation.<sup>25</sup>

Attention should also be paid to other innovative features, including tiering, or tailoring regulatory requirements to match circumstances of the regulated entities. Agencies may, for example, use cut-offs (e.g., number of employees) in applying certain regulatory requirements or may make appropriate provisions for small businesses (e.g., short forms for reporting requirements).

The *Deskbook* should be designed in a format to accommodate new information, so that it can be regularly updated. In addition to printed versions, the *Deskbook* should be made available in electronic format to maximize its usefulness. An electronic format could be updated more frequently and could provide more extensive information, such as actual texts of regulations, as well as additional commentary on the development and monitoring of such regulations.

### Cross-references to Other NPR Accompanying Reports

*Department of Labor, DOL07: Redirect Mine Safety and Health Administration's Role in Mine Equipment Regulation; and DOL10: Refocus the Responsibility for Ensuring Workplace Safety and Health.*

*Department of Transportation, DOT02: Streamline the Enforcement Process.*

*Environmental Protection Agency, EPA01: Improve Environmental Protection through Increased Flexibility for Local Government; EPA04: Promote the Use of Economic and Market-based Approaches to Reduce Water Pollution; and EPA05: Increase Private Sector Partnerships to Accelerate the Development of Innovative Technologies.*

### Endnotes

1. Telephone interview with Norman A. Strickman, Chief, Consumer Affairs Division, Office of the Secretary of Transportation, August 13, 1993.
2. Telephone interview with Susan Conley, Manager, Meat and Poultry Hotline, Food Safety and Inspection Service, U.S. Department of Agriculture, August 17, 1993.
3. Telephone interview with Mike L'Ecuier, Environmental Protection Specialist, Environmental Protection Agency, August 2, 1993.
4. Estimates of the total cost to the private sector of complying with federal regulation range from \$430 billion to \$562 billion annually. See Office of Management and

Budget, *Budget of the United States Government Fiscal Year 1993* (Washington, D.C., 1992), p. 397 for a discussion based on Hopkins, Thomas D., *Cost of Regulation*, Public Policy Working Paper (Rochester Institute of Technology, December 1991).

5. Environmental Protection Agency, *Environmental Investments: The Cost of a Clean Environment*, Report of the Administrator of the Environmental Protection Agency to the Congress of the United States (Washington, D.C., November 1990).

6. National Highway Traffic Safety Administration and the Federal Highway Administration, *Moving America More Safely: An Analysis of the Risks of Highway Travel and the Benefits of Federal Highway, Traffic, and Motor Vehicle Safety Programs* (September 1991), p. 30. The agencies estimate that these programs produced benefits totaling \$380 billion due to averted injuries and deaths. All figures are 1990 dollars.

7. For example, it would be interesting to see whether, in the environmental, health, and safety areas, independent auditors could supplement or enhance existing enforcement efforts. Agencies could require high-risk firms or firms with a high violation rate to use an independent certified auditor to verify compliance with regulations, including reporting requirements. Auditors could also serve as consultants to firms to identify where further compliance efforts were needed and how to best correct problem areas. The Federal Aviation Administration currently designates private persons to act as representatives of the administrator in examining, inspecting, and testing persons and aircraft for the purpose of issuing airman and aircraft certificates. 14 C.F.R. Part 183.

8. For general discussions of economic incentives see Carlin, Alan, Environmental Protection Agency, *The United States Experience with Economic Incentives to Control Environmental Pollution* (Washington, D.C., July 1992); and Office of Management and Budget, *Regulatory Program of the United States Government, April 1, 1992 - March 31, 1993* (Washington, D.C., January 1993), pp. 11-19.

9. Nichols, Albert, and Richard Zeckhauser. "OSHA after a Decade: A Time for Reason," in Leonard W. Weiss and Michael W. Klass, eds., *Case Studies in Regulation. Revolution and Reform* (Boston: Little, Brown and Company, 1981).

10. Telephone interview with Terry Smith, Occupational Safety and Health Specialist, Occupational Safety and Health Administration, July 27, 1993. See 55 FR 13360 (April 10, 1990).

11. Creekmore, Andrew T., "Emission Trades for Sources of Volatile Organic Compounds," paper presented at a conference of the Air and Waste Management Association Annual Meeting, 1989. In Carlin, Chapter 3, note 8.

12. Title IV of the *Clean Air Act*, 42 U.S.C. §§ 7651-7651o (1991 Supp.).

13. 56 FR 63002-63351 (December 3, 1991).

14. 14 C.F.R. §§ 93.121-93.133, 93.211-93.227.

15. 50 C.F.R. Part 652.

16. Carlin, Chapter 3, note 8.

17. Project on Alternative Regulatory Approaches, *Information Disclosure* (Washington, D.C., September 1981).

18. 49 C.F.R. §575.104.

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19. Project on Alternative Regulatory Approaches, *Information Disclosure*, p. 17.

20. 42 U.S.C. §§11001-11050 (1988).

21. Environmental Protection Agency, *1991 Toxics Release Inventory* (Washington, D.C., May 1993), p. 6.

22. Publications under the Project on Alternative Regulatory Approaches include *Marketable Rights*, *Performance Standards*, *Monetary Incentives*, *Information Disclosure*, and *Tiering*. Copies may be obtained through the Administrative Conference of the United States (ACUS).

23. The impact of market-oriented approaches is sometimes more difficult to predict. For example, nationwide trading systems for pollution can result in heavier pollution emissions in some locations than would have occurred under a command-and-control approach. For example, a nationwide marketable permit system generally would not be appropriate for solving a local pollution problem.

24. See note 22. Also for foreign experience see

Organization for Economic Co-Operation and Development (OECD), *Economic Instruments for Environmental Protection* (Paris, 1989).

25. The effectiveness of traditional command-and-control regulation depends heavily on enforcement efforts. The *Deskbook* should examine effectiveness of regulation not only from the perspective of regulatory design, but also from the enforcement perspective. It should discuss innovative approaches to enforcement, including the use of private audits.

# REG03: ENCOURAGE CONSENSUS-BASED RULEMAKING

## BACKGROUND

The traditional model for rulemaking is that of agency experts deciding the best way to regulate, offering the public an opportunity to comment on the agency's proposed rule or to object to its adoption, and then issuing binding rules telling regulated entities what to do. Even if the agency experts choose wisely, the traditional model has very little buy-in from outside the agency, which undermines the rule's effectiveness. This traditional process encourages adversarial, uncooperative behavior on the part of private industry or others who might be affected by an agency's decisions, which frequently leads to protracted litigation. Agencies routinely find themselves under attack from various private parties who are unhappy with the rule. This has been particularly true in controversial areas such as environmental regulation or the health and safety of workers.

The traditional process rarely leads to cooperative efforts to resolve problems. On the contrary, a barrage of written critical comments followed by litigation in the federal courts is frequently inevitable, accompanied by long delays and excessive costs. These costs include the direct costs of pursuing or defending the court case and the cost to industry and society of long periods

of uncertainty about the final outcome. The expectation of litigation usually sharpens the divisions between parties during the rulemaking process and may eliminate any willingness to recognize others' legitimate views. The parties have little incentive to focus on finding constructive, creative solutions that address differing legitimate needs.<sup>1</sup>

## NEED FOR CHANGE

A small number of federal agencies have successfully pioneered a consensus-based approach to drafting regulations—negotiated rulemaking (sometimes called regulatory negotiation or “reg neg”). Reg neg brings together representatives of the agency and the various affected interests in a cooperative effort to develop regulations that not only meet statutory requirements, but also are accepted by the people who ultimately will have to live with the regulations.<sup>2</sup>

Since 1982, approximately 35 federal agency negotiated rulemakings have taken place or are currently under way. Almost half have been at the Environmental Protection Agency (EPA), which is the only federal agency with a small office assigned specifically to assist other parts of the agency in doing reg negs. Other users include the Departments of

Agriculture (Animal and Plant Health Inspection Service), Education (required in certain programs by statute), Labor (Occupational Safety and Health Administration), and Transportation (Office of the Secretary, Federal Aviation Administration, Federal Highway Administration, National Highway Traffic Safety Administration, Coast Guard), Farm Credit Administration, Federal Communications Commission, and Nuclear Regulatory Commission.<sup>3</sup> The Negotiated Rulemaking Act of 1990 establishes a statutory framework for agency use of reg neg.<sup>4</sup>

**How Does Reg Neg Work?** First, an agency would normally ask one or more "conveners"—either outside contractors or government employees who are not otherwise involved in the proceeding—to determine whether the rule is appropriate for reg neg. (As discussed below, reg neg is not appropriate for all rules.) If the convener recommends reg neg and if the agency head determines that use of reg neg is in the public interest, a reg neg committee would be chartered under the procedures of the Federal Advisory Committee Act.<sup>5</sup>

A reg neg committee must be composed of representatives of all affected interests. The agency and the convener must make reasonable efforts to ensure that all relevant interest groups and others affected by the rule are aware of the proceeding. The agency must also publish a notice explaining the proposed reg neg and offering the opportunity to apply for participation by interests not already adequately represented.<sup>6</sup>

Meetings of the negotiating committee are conducted by a mediator or facilitator (often the convener), who may be a government employee or an individual from the private sector. The agency should participate fully in the negotiations, making sure that at all times the participants are aware of what action the agency is likely to take if the committee does not reach an agreement.

The goal of the negotiators is to reach consensus on the text of a "proposed" regulation or rule through a process of

evaluating their own priorities and making trade-offs to achieve an acceptable result. In this way, the competing interests try to work out a practical solution to the problem necessitating regulatory action. Through the give-and-take of the negotiating process, participants try to obtain a favorable outcome on the issues of greatest importance to them, while recognizing and accommodating the legitimate needs of others. Throughout the process, the agency's function is to protect the public interest by implementing all applicable statutory and other legal requirements. The public may observe the procedure, and public comments are invited before, during, and after the negotiations.

If consensus is reached, the agency ordinarily would publish the consensus draft rule in a notice of proposed rulemaking. If consensus is not reached, the agency ordinarily publishes its own proposal for a rule, often making good use of the information it has obtained through the course of the negotiations.

### **Benefits of Negotiated Rulemaking.**

The long-term benefits of negotiated rulemaking include:

- more innovative approaches that may reduce compliance costs,
- less time, money, and effort spent on developing and enforcing rules,
- earlier implementation,
- higher compliance rates, and
- more cooperative relationships between the agency and other affected parties.<sup>7</sup>

These benefits flow from the broader participation of the parties, the opportunity for creative solutions to regulatory problems, and the potential for avoiding litigation.

If the parties reach consensus, the resulting rule is likely to be easier to implement and the probability of subsequent litigation is diminished. Negotiations that do not result in consensus on a draft rule can still be very useful to the agency by:

- narrowing the issues in dispute,
- identifying information necessary to resolve issues,

- ranking priorities,
- finding potentially acceptable solutions, and
- improving the agency's understanding of the real-world impact of alternative regulatory options.

Negotiation sessions provide all participants with an opportunity to have their assumptions and data questioned and tested by parties with other perspectives. The dynamic nature of negotiating forces each party to participate in crafting solutions to issues that are on the table for resolution. In short, the process fosters creative activity by a broad spectrum of interested persons, targeted at producing better, more acceptable rules.

In regulatory programs with a history of adversarial rulemaking, it is not unusual for parties to negotiate a settlement under the supervision of a court after the rule has been published. Particularly in such programs, negotiation of a rule prior to the agency's publication of a proposed rule can save the agency and other parties both time and resources. By avoiding litigation, programs become effective sooner and regulated businesses can plan capital expenditures or production changes earlier than if they faced years of litigation and uncertainty about the outcome. Moreover, at EPA (which is the most frequent user of the technique) regulatory negotiations, on average, take less time than other rulemakings.<sup>8</sup>

Time savings can translate into both monetary savings for industry and greater satisfaction all around. For example, because of a reg neg, EPA's wood-stove emission standards went into effect as much as two years earlier than expected. The participant from the Natural Resources Defense Council was quoted as expressing satisfaction on behalf of environmental interests that over 1.5 million wood-stoves sold during the 2-year period would be covered by the new regulation. Manufacturers were spared 2 years of uncertainty and could begin re-tooling for the new standards.<sup>9</sup>

There can also be important intangible benefits. Even in programs with no history of

adversarial rulemaking, the agency may obtain a better factual basis for the regulation and a better understanding of the practical consequences of different regulatory choices—whether or not consensus is attained. Regulatory negotiations can help enfranchise parties with important interests at stake, who may otherwise feel relatively powerless. Rules drafted with assistance of persons who must ultimately be governed by them are more likely to be practical, and therefore more acceptable.

**Limits on Reg Neg.** Negotiated rulemaking is not appropriate for all rules. Certain characteristics of rulemaking proceedings favor using reg neg.

- The number of distinct interests concerned with the proposed rule, including any relevant government agencies, must be small enough so that they can be fairly represented by not more than 20 to 25 negotiators.
- There should be a number of diverse issues that participants can rank according to their own priorities, so that there will be room for compromise on some of the issues as an agreement is sought.
- It is essential that the issues to be negotiated not require compromise of principles so fundamental to the parties that productive negotiations are unrealistic.
- Parties must be willing to negotiate in good faith, and no single interest should be able to dominate the negotiations.
- The parties cannot have an incentive to stall; therefore, they must believe that the agency itself will issue a rule if consensus is not reached. A statutory requirement that the agency issue some type of rule is often helpful.

In rulemakings where reg neg is inappropriate for these or other reasons, agencies should consider using policy discussion groups.

The most significant deterrent to using negotiated rulemaking is its up-front cost. The process can be resource-intensive in the

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short term for both the agency and the other participants. While there are likely to be considerable long-term savings in total resources required, the concentrated investment of effort and expense in the short term may be a serious obstacle. This is particularly true if the savings and the costs appear in the budgets of different operating components of the agency. Additional costs may include services of mediators and conveners, research conducted on behalf of the negotiating committee, administrative support for the committee, expenses of participation for some of the negotiators, and some training costs.

### ACTION

#### *Increase the use of negotiated rulemaking. (1)*

The President should encourage agencies to use reg neg. This is consistent with the new regulatory review executive order. Regulatory agencies that have not used reg neg since enactment of the Negotiated Rulemaking Act of 1990 should identify at least one candidate for using reg neg during the coming year or explain why it would not be feasible to do so.<sup>10</sup> The administration should facilitate efforts to use reg neg by identifying and removing any administrative barriers to its use.

Reg neg should rarely, if ever, be required by statute for particular rulemakings because its success depends on the voluntary participation of all participants, including the agency.<sup>11</sup> Moreover, Congress should recognize that short statutory deadlines to issue proposed or final rules, especially if they are shorter than two years, may preclude the use of negotiated rulemaking.

#### **Cross-references to other NPR Accompanying Reports**

*Department of Labor, DOL03: Expand Negotiated Rulemaking and Improve Up-front Teamwork on Regulations.*

*Department of Transportation, DOT03: Use a Consensus-Building Approach to Expedite Transportation and Environmental Decisionmaking.*

### Endnotes

1. See Harter, Philip J., "Negotiating Regulations: A Cure for Malaise," *Georgetown Law Journal*, vol. 71 (1982), p. 1.
2. Administrative Conference of the United States, Recommendations 82-4 and 85-5, "Procedures for Negotiating Proposed Regulations," 1 C.F.R. §§ 305.82-4 and 305.85-5 (1993); and Pritzker, David M., and Deborah S. Dalton, eds., ACUS, *Negotiated Rulemaking Sourcebook* (Washington, D.C., 1990).
3. Administrative Conference of the United States, "Federal Agency Experience with Negotiated Rulemaking," (March 1, 1993), staff paper updating Chapter 10 of Pritzker and Dalton, *Negotiated Rulemaking Sourcebook*.
4. 5 U.S.C.A. §§ 561-570 (1993 Supp.).
5. 5 U.S.C. App. (1988).
6. For a recent notice, see Environmental Protection Agency, *Notice of Wood Furniture Manufacturing Negotiated Rulemaking Committee*, 58 FR 34011 (June 23, 1993).
7. It is difficult to obtain reliable data about the costs of regulatory proceedings. However, some information is available that may give an indication of potential savings from using regulatory negotiations. Speaking in 1984, former EPA Administrator William Ruckelshaus estimated that more than 80 percent of EPA's major rules were challenged in court and that approximately 30 percent of the rules were changed significantly as a consequence. Ruckelshaus, W., "Environmental Negotiation: A New Way of Winning," address to the Conservation Foundation's Second National Conference on Environmental Dispute Resolution 3, October 1, 1984, cited in Susskind and McMahon, "The Theory and Practice of Negotiated Rulemaking," vol. 3, *Yale Journal on Regulation* (1985), p. 133. Ruckelshaus also estimated that the annual effort to handle this litigation took 50 person-years from EPA's Office of General Counsel, 75 person-years from EPA program offices, 25 person-years from the Department of Justice, and 175 person-years on the part of plaintiffs' counsel.
8. Administrator Lee Thomas, in a 1987 address to a colloquium of the Administrative Conference of the United States, pegged the level of litigation at more than 75 percent. Thomas, Lee, "The Successful Use of Regulatory Negotiations by EPA," vol. 13, *Admin Law News* (Fall, 1987), p. 1. By contrast, of the first 10 negotiated rulemaking proceedings brought to completion by EPA, only two were challenged in court, and both rules were essentially upheld. See *Safe Buildings Alliance v. EPA*, 846 F.2d 79 (D.C. Cir. 1988); and *Natural Resources Defense Council v. EPA*, 907 F.2d 1146 (D.C. Cir. 1990). Reduction of litigation rates from 75 percent to 20 percent obviously would produce great savings if this level of improvement were maintained.
9. Kerwin, Cornelius M. and Scott R. Furlong, "Time and Rulemaking: An Empirical Test of Theory," *Journal of Public Administration Research and Theory*, vol. 2 (1992), p. 124. In a study of 150 rules completed between October 1, 1986, and September 30, 1989, the rulemaking process (from development of the proposal to issuance of the final rule) took an average of 26 months for the four negotiated rulemakings in the sample and 37 months for all rules in the sample. The article does not contain sufficient

### REG03: ENCOURAGE CONSENSUS-BASED RULEMAKING

information to determine whether regulatory negotiations would be quicker for rules with similar resources, complexity and prioritization. Based on a sample of seven reg negs, EPA estimates a saving of 6 to 18 months as compared to the normal rulemaking process. Telephone interview with Chris Kirtz, Director, Consensus and Dispute Resolution Program, EPA, August 13, 1993.

9. McClintock, Mike, "Regulating Wood-Stove Emissions," *Washington Post* (September 25, 1986), Home Section, p.5.

10. In this and all other recommendations in this report, "regulatory agencies" are those agencies that are named to the Regulatory Coordinating Group (see REG01) and subagencies (or subdepartments) that are designated by

department or agency heads as engaging in significant regulatory activities. Generally, this should include those subagencies that are listed in the most recent *Unified Agenda of Federal Regulations* as having over 40 regulatory issuances. *The Negotiated Rulemaking Act of 1990*, Pub. L. No. 101-648 was enacted on November 29, 1990.

11. Three statutes have mandated that the Department of Education use reg neg for specific rulemakings and another statute required the Nuclear Regulatory Commission (NRC) to do so. All were subject to relatively short statutory deadlines and these deadlines constrained the negotiation process. In addition, the NRC was required to convene a regulatory negotiation on issues that most observers felt were non-negotiable.

# REG04: ENHANCE PUBLIC AWARENESS AND PARTICIPATION



## BACKGROUND

**U**nder the Administrative Procedure Act (APA), agencies are required to provide only a minimal opportunity for public comment before issuing regulations—generally, agencies must accept only written comments filed between issuance of the proposed and final rules. The agency then reviews these comments and responds to them when the rule is finalized. If affected interest groups or members of the public disagree with the rule, they can challenge it in court.

The traditional rulemaking model, particularly for controversial rules, can be very adversarial. For example, the Environmental Protection Agency (EPA) believes that 80 percent of its major rules are challenged in court.<sup>1</sup> A court challenge may delay or hinder implementation of a rule because, during the year or more that it takes to litigate a case, challengers may not comply with the rule or, if the effective date of the rule is not stayed, challengers may do only that which is minimally required. Court remand of a rule can set a program back several years more.

The adversarial nature of the rulemaking process also hinders development of a rule. Parties may raise a host of objections just to preserve issues for appeal, and they may be

unwilling to acknowledge the legitimacy of other parties' positions. Agencies may spend more time than is really beneficial preparing detailed rationales for rules and responses to comments to protect themselves in case of court challenges.

## NEED FOR CHANGE

**Public Participation During the Rulemaking Process.** Without exception, everyone from outside the government whom the National Performance Review (NPR) interviewed on the regulatory process—whether from industry or public interest groups—said they wanted earlier and more frequent opportunities to participate in the rulemaking process. Although granting this wish is not cost-free, there are many good reasons for agencies to do so. Earlier and more interactive public participation can help the agency develop innovative regulation and provides information otherwise unavailable to the agency. It can also build bridges among the agency and affected interest groups, and improve compliance with the rule by increasing acceptance, or lowering resistance, from some affected parties.

The traditional rulemaking model limits public participation in ways that dampen the type of interaction likely to lead to

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innovative solutions. First, by the time the agency proposes a rule, it has often committed much time, resources, and energy to the proposal. Therefore, although it may be open to changing the details of the approach, it may not be inclined to change direction significantly. (For example, if the agency has chosen a command-and-control approach, it is unlikely that the agency will shift to information disclosure or marketable permits.) This is particularly true if the agency is operating under a statutory or court-ordered deadline because, even if it had the inclination to change the approach, it is unlikely to have the time.

Second, public input under the traditional rulemaking model often does not include a real dialogue between the public and the agency or among different segments of the public. This makes it difficult to probe the reasons for a suggested change or to obtain comments if an approach is modified based on public comments. Solving problems, particularly with innovative approaches, is often an iterative process, i.e., a suggested approach elicits information, which causes a change in or clarification of the approach, which elicits additional information, and so on. A one-or-two shot opportunity for public comment is inconsistent with this type of process.

The traditional model tends to place the agency and affected interest groups in adversarial relationships. The possibility that a rule will be challenged in court may make interested parties hesitant to release information or recognize the validity of another party's point. Giving outside parties more meaningful opportunities for affecting the regulatory outcome can create more cooperative relationships among agencies and outside parties.

Agencies should improve regulatory programs by increasing public involvement in the rulemaking process and moving towards a more consensus-based model. However, there is no one method or level of public participation that is appropriate for all rules. Increasing the level of public participation can make it more difficult to

achieve some of the objectives of the rulemaking process—it may take additional staff time or increase costs (e.g., for obtaining hearing rooms or publishing additional notices), and may delay issuance of the rule. Regulators must balance these costs of increased public participation with the benefits when they choose from the various methods to craft appropriate opportunities for public participation for each rule.

Agencies have a wide variety of methods for increasing public participation, including:

- negotiated rulemaking,
- policy discussion groups,
- public meetings,
- focus groups,
- more useful and accessible public meetings and hearings, and
- early requests for input.

Negotiated rulemaking ("reg neg") is a structured way to increase public participation through the assembly of all affected interest groups. Agencies have also used less formal mechanisms to increase public participation. These mechanisms offer some of the benefits of reg neg. For example, affected parties can learn from each other, and the agency can test hypotheses and tentative conclusions.

An agency can form a "policy discussion group," with membership very similar to a reg neg committee, and then call the group in at various times for advice on such things as agency options papers, draft proposals, and specific issues. The Occupational Safety and Health Administration (OSHA) has found it helpful to have such committees write "majority" and "minority" reports on disputed issues.<sup>2</sup> A policy discussion group has some benefits over reg neg. The formal convening process is avoided and the quest for consensus need not drive the process. If the agency is seeking to use the group as a source of consensus advice or recommendations, the group must be chartered as a federal advisory committee and meetings must be open to the public.<sup>3</sup> EPA used such a group for assistance in developing the acid rain program

regulations.<sup>4</sup> The Department of Transportation (DOT) used such a group for assistance in developing regulations under the Americans with Disabilities Act.<sup>5</sup> A more formal use of outside policymaking bodies is required by the Magnuson Fishery Conservation and Management Act. Under the Act, regional fishery management councils are charged with developing regulations after extensive public input.<sup>6</sup>

An agency can hold "public meetings" after it has selected an approach but before the details are worked out, or at other stages of the rulemaking process. A description of the agency's preferred approach, draft rule proposals, or options papers usually should be made available prior to or at the meeting so the agency can get comments from the public and answer questions. Public meetings would not require a federal advisory committee charter. The National Park Service and the Forest Service recently convened several symposiums where rock climbing enthusiasts, environmentalists, and land managers gathered for several days to listen to speeches and discuss the issues arising from rock climbing in national parks and forests.<sup>7</sup>

Agencies can convene "focus groups" when they need quick, anecdotal information about how different approaches to or aspects of a regulation would work in practice. When used for that purpose, neither the Paperwork Reduction Act nor the Federal Advisory Committee Act should be triggered.<sup>8</sup>

Agencies should experiment with ways to make public meetings and hearings more useful and accessible. Possibilities include:

- Providing the public opportunities to ask questions of agency experts at public hearings or meetings about the proposed regulatory initiative. (DOT has made agency experts available for informal discussions one hour prior to the start of a hearing or meeting.)
- Arranging meetings by topic so that presenters will have to stay, listen to, and learn from others' presentations rather than present testimony and leave.

- Having roundtable discussions rather than formal presentations.
- Holding some hearings after working hours.
- Broadcasting proceedings or using teleconferencing.

Agencies can issue early requests for input or notices of impending agency action for rules, policy statements, or guidance documents. Agencies should use traditional means, such as publishing Notices of Inquiry or Advance Notices of Proposed Rulemaking in the *Federal Register*, or nontraditional means, such as using (or establishing) specialized computer bulletin boards to circulate requests for information or draft agency papers.<sup>9</sup> Early public participation may pave the way for an agency's subsequent use of "direct final" rulemaking.

Agencies should consider providing funding for participants in regulatory committees or policy discussion groups where such funding is needed to ensure representation of all affected interests or improve the quality of the information presented. Funding could be limited to reimbursement for travel and other expenses, rather than for labor or time. Such funding would be less than what the government is now required to pay in attorneys' fees when a person or group successfully challenges a rule in court.<sup>10</sup>

**Public Involvement During Implementation of a Rule.** Members of the public can be affected by the implementation of a rule either because they have to comply with it or because they are supposed to benefit from it. Agencies need to continue to communicate with the public after issuance of the rule to help people comply. At a minimum, agency policy statements, guidance documents, and other papers explaining how a program works must be made easily accessible to the public. This is not always the case now. As an example, in some program areas, EPA has numerous guidance documents that explain details of program implementation, but these documents are neither published nor collected in one place that is accessible to the public.

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Ombudsmen offices may also help implementation efforts. The IRS has established a high-level taxpayer ombudsman with a large and nationally dispersed Program Resolution Program Staff. The Food and Drug Administration (FDA) recently created an office of Chief Mediator and Ombudsmen, which has been lauded by the FDA Commissioner as "invaluable...an integral part of the agency."<sup>11</sup> The newly appointed Comptroller of the Currency announced in June that he would appoint an ombudsman and establish a toll-free telephone number to provide banks and consumers a new channel for challenging regulatory decisions.<sup>12</sup> Other agency ombudsmen have been created by the EPA (Hazardous Waste Ombudsman; Small Business/Asbestos Ombudsman) and Social Security Administration. The Administrative Conference of the United States has recommended the technique to other agencies and provided useful guidelines about the role and authority of the office.<sup>13</sup>

Developments in information technology provide useful new tools to assist compliance efforts. DOT developed an automated system that provides the opportunity to obtain information on demand, via touch-tone telephone or modem connection, to help implement drug testing requirements for transportation workers. For a modest fee, small trucking firms and others can call in, receive assistance to determine their obligations related to drug testing, order documents to be delivered by fax or modem download, or leave a question or comment. Support materials are provided at no cost.<sup>14</sup> EPA's Office of Air Quality Planning and Standards has set up a project to cover segments of clean air programs. It gives the public access to EPA databases and informs users of (and seeks comments on) upcoming policy statements and guidance documents. It is generally used as a means of providing information to EPA regional offices, the regulated community, state and local air quality authorities, and the general public.<sup>15</sup>

Agencies also need to seek public input after the rule has been issued to determine

how effective it is or what unintended problems it has caused. For example, when seat belt usage dropped to about 14 percent in 1979, the National Highway Traffic Safety Administration (NHTSA) conducted a public study asking drivers why they did not wear safety belts.<sup>16</sup> After public response showed the decline in usage resulted from inconvenient, uncomfortable belts and doubts about seatbelt effectiveness, NHTSA responded with automatic restraint requirements and public education programs.<sup>17</sup>

Seeking public input after a rule is issued is not common practice for agencies—in part because getting Office of Management and Budget (OMB) clearance for focus groups and customer surveys has been a barrier to seeking such information and because it is not viewed as a significant enough activity to warrant scarce resources.<sup>18</sup> The value of such information will continue to increase with the passage of the Government Performance and Results Act of 1993 and increasing emphasis in the government on total quality management principles.<sup>19</sup>

## ACTIONS

### *1. Increase public participation during the rulemaking process. (2)*

The President should direct agency heads to provide opportunities for early, frequent and interactive public participation in a way that is transparent and open to all interested parties. This is consistent with the new regulatory review executive order. The administration should facilitate agency efforts by identifying and removing any administrative barriers. The President should direct the Chair of the Regulatory Coordinating Group (RCG) to promote and exchange information to assist agencies in implementing this direction.

Regulators need to realize that they have a variety of tools for getting public comments on a rule and to learn when it is appropriate to use which tool. Information should be

exchanged on how to manage the process carefully to prevent abuses or perceived abuses. Although increased public participation is an important goal that should help improve the quality and acceptability of agency regulations, granting access behind closed doors to interest groups representing only one side of an issue creates major problems.<sup>20</sup> Care must be taken to allow access by a wide variety of interests and to ensure that all truly affected groups are represented in formal or informal negotiations. Docketing of agency contacts with outside parties should also be addressed.

Agencies should be encouraged to use the following methods of interacting with the public in the rulemaking process in addition to methods required by the APA:

- negotiated rulemaking,
- policy discussion groups,
- public meetings,
- focus groups,
- more useful and accessible public hearings and meetings, and
- early requests for input.

## 2. Enhance public awareness and evaluation of programs. (1)

Heads of regulatory agencies should require their staffs to check the effectiveness and workability of their programs periodically. In addition to measuring results (e.g., reduced fatalities from car accidents), agencies should consult with the people who have to comply with the regulations. This could be done through the use of focus groups or customer surveys. The Administrator of the Office of Information and Regulatory Affairs should work with agencies to define the conditions under which surveys of regulated entities by regulators can receive accelerated approval.<sup>21</sup>

Heads of regulatory agencies should provide assistance to entities that must comply with regulatory programs. Agencies should ensure that these entities are given the information necessary to comply. Informal guidance and policy statements

should be collected in one place and be accessible to the public. Electronic access also should be provided. Agencies also should consider establishing an ombudsman office to assist compliance efforts.

## 3. Increase use of information technology. (4)

The application of information technology in rule development and implementation should be explored by agencies individually, through the RCG, and in coordination with existing information resources management groups. At a minimum, agencies should explore computerization of rulemaking dockets. DOT found that the cost savings in storage space would exceed the costs of implementing such a program. It would also give the public easier and more meaningful access to rulemaking and policy guidance documents. Agencies also should consider establishing computer bulletin boards or automated systems that could be accessed by interested parties.

## Cross-references to Other NPR Accompanying Reports

*Department of Transportation*, DOT03: Use a Consensus-Building Approach to Expedite Transportation and Environmental Decisionmaking.

*Executive Office of the President*, EOP01: Delegate Routine Paperwork Review to the Agencies and Redeploy OMB's Resources More Effectively.

*Improving Customer Service*, ICS05: Streamline Ways to Collect Customer Satisfaction and Other Information from the Public.

*Reengineering Through Information Technology*, IT03: Develop Integrated Electronic Access to Government Information and Service.

## Endnotes

1. U.S. Environmental Protection Agency, "Important Characteristics of EPA Rulemaking," *Regulation Development in EPA* (1991 Training Materials), Chapter 1.
2. Memorandum for Lita Orefice, Special Assistant, Office of the Secretary of Labor, from David Zeigler, Acting Assistant Secretary, Occupational Safety and Health Administration, re: NPR Systems Paper, August 4, 1993.
3. *Federal Advisory Committee Act*, 5 U.S.C. App. (1988).
4. Telephone interview with Thomas L. Montgomery, Branch Chief for Permits and Evaluation, Acid Rain Division, Environmental Protection Agency, July 13, 1993.
5. Telephone interview with Robert Ashby, Deputy Assistant General Counsel, Regulation and Enforcement.

# REG05: STREAMLINE AGENCY RULEMAKING PROCEDURES



## BACKGROUND

In an effort to coordinate policies within each agency and within the executive branch, numerous layers of review and analyses have been added on top of the relatively simple notice-and-comment requirements of the Administrative Procedure Act (APA). Clearance is required by numerous offices within the agency (and again within the department if the agency is part of a department) and by the Office of Management and Budget (OMB). As has been previously noted, the entire process is repeated twice—first at the proposal stage, then again when the rule is finalized. After a several-month-long study by a contractor, one agency found that it took an 18-foot flow chart with 373 boxes to describe its then-current rulemaking process.<sup>1</sup>

Another reason for the extensive internal review is the fear of litigation challenging the rule. Agencies compile extensive records to defend themselves if rules are challenged in court—even for issues no one has raised during the public comment period. An agency can spend considerable resources developing a rule only to have it nullified in court because the rule was based on an impermissible statutory interpretation. If a successful challenge is brought after the rule is issued, an entire program may be thrown into a state of disarray.<sup>2</sup>

Some agencies have statutory provisions that help reduce the amount of litigation preparation needed during the rulemaking process. For example, some statutes prohibit litigants from challenging a rule on any basis other than ones raised during the public comment period and require challenges to be brought within 60 days of the day the rule is issued.<sup>3</sup>

The straightforward APA notice-and-comment rulemaking process has now become so formalized that its name—informal rulemaking—seems a misnomer. Some agencies, however, have additional statutory requirements that make their rulemaking process even more cumbersome. For example, the Federal Trade Commission is required to conduct trial-type hearings that allow cross-examination of witnesses.<sup>4</sup>

## NEED FOR CHANGE

Although different agencies have different internal rulemaking processes, within an agency too often the same review process is used and the same number of clearances are required regardless of the significance or complexity of a rule.<sup>5</sup> A process with numerous checks makes sense for significant rules (e.g., ones that announce a major policy, initiate a new regulatory program, have a significant effect on the economy, or

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are particularly controversial). However, a large number of the thousands of rules issued each year are not significant and do not warrant extensive review by numerous offices. Anecdotal evidence indicates that insignificant rules (which may be a clarification of an existing rule or a small change needed to undo an unintended consequence of an existing rule) often languish on reviewers' desks because the rules are not high priority and the reviewers are busy with other demands.<sup>6</sup> Even relatively minor changes to an existing program can easily take nine months or more.

The failure to establish a process that differentiates between significant and insignificant rules is costly. The current lengthy process precludes quick, minor adjustments to existing programs, wastes the time of numerous reviewers, and frustrates staff responsible for getting the rules out and keeping programs functioning. Evidence that the rulemaking process has become too cumbersome is provided by the frequency with which agency staff turn to other methods of establishing agency policy. Instead of issuing rules, agencies issue policy statements, guidance documents, and memos to agency personnel that are often not required to go through public comment, extensive internal agency clearance or OMB review.<sup>7</sup>

**Some Efforts at Streamlining.** The Clinton administration's regulatory review executive order is a major step in streamlining the regulatory process. It will streamline the review process by requiring the Office of Information and Regulatory Affairs (OIRA) to review only significant rules.

The Environmental Protection Agency (EPA) also has made efforts to streamline its process and avoid the "double" review process (i.e., all clearances required both at proposal and final rule stage) by issuing "direct final" rules for certain rules on which it believes the public will not comment. Although EPA issues many rules that are controversial and that benefit from public comment, a significant number of rules

receive no comments. These rules include:

- minor modifications of existing rules (such as directions about where to submit information or technical changes to testing standards that have been adopted by a professional association);
- federal approval of changes to a state plan implementing federal law affecting only one or a small group of companies (especially where the federal agency has very little discretion); and
- "significant new use" rules limited to specific chemicals.

In this direct final rulemaking approach, EPA publishes a notice in the *Federal Register* saying that a rule will become effective in 60 days unless, within 30 days, someone submits written notice of an intent to file an adverse or negative comment. If no such notice of intent is filed, the rule becomes final without going through a second round of intra- and inter-agency review. If even one person files such a notice, EPA withdraws the rule, republishes it as a proposed rule, and proceeds with normal notice-and-comment rulemaking and the second round of review. (Republishing the rule as a proposal serves two functions. First, it gives an opportunity to comment to people who may have kept silent because they wanted the rule to go into effect immediately. Second, it self-imposes a penalty—additional steps and further delay—which serves to prevent the agency from overreaching in the use of this technique.)

This approach avoids the second round of clearances and review, which otherwise delays rules, wastes time, and should be superfluous (especially if all reviewers are warned the first time that the rule might go final without further review). Theoretically, the second review ought to be very quick, but clearing any document through numerous government offices takes time. The paper shuffling also wastes the reviewers' time by requiring them to look at something twice when once would have sufficed.

EPA uses this process routinely in two

areas—approval of changes to state implementation plans and “significant new use” rules for chemicals.

- In a pilot project testing this procedure for EPA approval of changes to state implementation plans under the Clean Air Act, 90 rules were processed in an average of 181 days, which was considerably better than the 419 days it took to process 81 comparable rules prior to the use of the direct final process.<sup>8</sup> For the last 10 years, EPA has used the process nationwide to approve changes to state plans.
- In 1989, as a result of an informal rulemaking process with industry and environmental groups, EPA adopted the direct final rulemaking process for chemical-specific significant new use rules (SNURs) issued under the Toxic Substances Control Act.<sup>9</sup> SNURs for at least a hundred chemicals have been issued as direct final rules.<sup>10</sup>

EPA also uses direct final rules occasionally for other types of rules. The agency has rarely had to withdraw a rule because public comments were filed, and no one has ever challenged these rules for failure to comply with the APA.<sup>11</sup>

Some agencies have streamlined the process by issuing broad, generic rules to resolve common issues or to establish standards applicable to multiple industries instead of conducting separate rulemakings for each issue or industry. For example, the Social Security Administration and the Nuclear Regulatory Commission each have successfully issued rules concerning common problems arising in disability claims and applications for power plants, respectively. On the other hand, the Occupational Safety and Health Administration was not allowed by a court to use a generic, instead of a hazard-by-hazard, approach for permissible exposure levels for air contaminants.<sup>12</sup>

The National Marine Fisheries Service has established categories of rulemaking notices that appear in final form in the *Federal Register* after reduced review. For example, when a quota of fish previously

specified by regulation has been taken in a particular fishery, a notice closing that fishery is published in the final rule section of the *Federal Register*. Violators of these closure notices may be subject to a variety of civil enforcement proceedings. These notices are not reviewed by either the Department of Commerce or OIRA.<sup>13</sup>

Agencies also conserve agency resources by adopting voluntary national consensus standards rather than developing criteria in-house.<sup>14</sup>

## ACTIONS

### 1. Streamline internal agency rulemaking procedures. (1)

The President should direct heads of regulatory agencies to review and streamline their internal rulemaking processes. The Regulatory Coordinating Group (RCG), in consultation with the Administrative Conference of the United States (ACUS), should assist the process by providing a forum for agencies to exchange information and coordinate hiring of contractors (if any are necessary) to avoid duplicative efforts. A variety of principles should be adopted to streamline the process and reduce the cost of issuing rules, including:

- Agencies should differentiate between significant and insignificant rules and use a shorter process for insignificant rules. The new regulatory review executive order requires OIRA review only for significant rules. Agencies also should strive to group or tier rules and to adjust the process so that the number of steps in the clearance process varies with the significance or importance of the rule.
- Executive departments (such as the Department of Health and Human Services) should review their internal delegations to determine whether agencies headed by Presidential appointees (such as the Food and Drug Administration) can issue some insignificant rules without

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departmental review. It might be appropriate to develop a triage system similar to the one in the new regulatory review executive order.

- Agencies should determine whether there are continuing, unnecessary roadblocks in the process and then determine how to remove them.
- Agencies should get early input from top policymakers on the choice of regulatory approach to be taken so that agency resources are not wasted drafting regulations that are inconsistent with the desired policies.

### *2. Use "direct final" rulemaking to reduce needless double review of noncontroversial rules. (1)*

The head of each regulatory agency should use "direct final" rulemaking or a similar approach at least once in the next year (or explain why it cannot be done).<sup>16</sup> The direct final process should only be used for rules that the agency believes are so noncontroversial that no one would file adverse or negative comments on the proposal. Under this process, the agency would publish a direct final rule in the *Federal Register*. The *Federal Register* notice should explain that the rule would become effective in 60 (or some other appropriate number) days if, within 30 (or some other appropriate number) days, the agency did not receive notice from any person of the intention to file adverse or negative comments.<sup>17</sup> If the agency is notified that adverse comments would be filed, the agency would be required to withdraw the direct final rule, republish it as a proposed rule, and go through the usual notice-and-comment procedures.

### *3. Develop specifications for rulemaking petitions. (1)*

The heads of regulatory agencies should issue regulations specifying what must be in petitions for rulemaking and describing the process for filing them.<sup>18</sup> Such regulations

should explain that detailed petitions, complete with a text of a proposed rule and underlying analyses, may help the agency respond to the petition more quickly. Sufficiently detailed petitions may form a basis for a notice of proposed rulemaking. After a public comment period, the agency could then either withdraw the proposal or modify it as necessary and adopt it as a final rule.<sup>19</sup>

### *4. Evaluate and draft proposed legislative changes to speed the rulemaking process. (4)*

Heads of regulatory agencies, in coordination with the Regulatory Coordinating Group (RCG) and ACUS should:

- identify existing statutes that unnecessarily require cross-examination and other adjudicative fact-finding procedures in rulemakings and should recommend whether the administration should seek legislative changes;
- identify which, if any, statutes should be amended to limit the amount of time parties have to challenge a rule, or to limit the issues on judicial review to those that were raised during the public comment period, and should recommend whether the administration should seek legislative changes; and
- recommend whether the administration should seek amendments to ensure that regulatory statutes provide sufficient flexibility for agencies to issue "generic rules" that would settle, in one proceeding, issues that would otherwise recur in numerous separate rulemakings or enforcement proceedings.

The Chair of the RCG, in coordination with ACUS, should study whether:

- The administration should seek an amendment to the Federal Advisory Committee Act to exempt advisory committees that meet only once from its requirements.<sup>20</sup>
- It would be feasible, useful and constitutional for agencies to be able to

seek judicial resolution (similar to a declaratory judgment) by a court of difficult statutory interpretations that are important to resolve before an agency finalizes a rule and expends significant resources.<sup>21</sup> If the administration seeks legislation, the procedure to be established should ensure that affected interests are represented and that issues are not presented prematurely (*i.e.*, before the agency has definitively determined that there is an actual problem of statutory interpretation).

## Cross-references to Other NPR Accompanying Reports

*Department of Labor*, DOL03: Expand Negotiated Rulemaking and Improve Up-front Teamwork on Regulations.

*Department of Education*, ED05: Streamline and Improve the Department of Education's Grants Process.

*Department of Health and Human Services*, HHS02: Reengineer the HHS Process for Issuing Regulations. *Streamlining Management Control*, SMC08: Expand the Use of Waivers to Encourage Innovation.

## Endnotes

1. Although that agency has since modified its process, the process depicted on the chart is not atypical of rulemaking procedures throughout the government.
2. See *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th cir. 1991) (EPA's asbestos rule, 10 years in the making, remanded to agency for lack of substantial evidence).
3. See the *Clean Air Act*, 42 U.S.C. §§ 7607(b)(1) and (d)(7)(B) (1991 Supp.).
4. 15 U.S.C. § 57a (1988). The Securities and Exchange Commission has similar requirements in the *Securities Act Amendments*, 15 U.S.C. § 78f(e) (1988), as does the Environmental Protection Agency (EPA) in the *Toxic Substances Control Act*, 15 U.S.C. § 2605(c) (1988).
5. Some very minor or repetitive rules have an expedited process, but most agency processes fail to adequately match the thoroughness of the process with the complexity of the rule. The American Waterways Operators reports that a staff member from the Office of Information and Regulatory Affairs noted that "the Coast Guard's rigorous internal review process applies equally to rules of sweeping consequence and minor technical guidelines." The American Waterways Operators, "The Federal Regulatory Process: Opportunities for and Obstacles to Government/Industry Cooperation," May 1992, p. 17.
6. Interview with Richard Wilson, Director, Office of Mobile Sources, Environmental Protection Agency, May 14, 1993.
7. To a certain extent, the use of such other methods allows agencies to differentiate between significant and

insignificant rules and is a useful development. However, there are drawbacks to these methods — although technically these policies cannot bind people outside the agency, as a practical matter, they may have that effect. Unlike rules (which are published in the *Federal Register* and codified in the *Code of Federal Regulations*), less formal statements of agency policy are not necessarily compiled in one place and may not be accessible to the public. There is a general sense that agencies are turning to policy statements and guidance too frequently. See Emery, Fred, *Rulemaking as an Organizational Process* (1982), p. 46 (unpublished report to ACUS); Anthony, Robert, "Agency Efforts to Make Nonlegislative Documents Bind the Public," *Admin. Law Review*, Vol. 44 (1992), p. 31. An expanded version of the latter article will shortly appear as *Interpretive Rules, Policy Statements, Guidance, Manuals and the Like—Should Agencies Use Them to Bind the Public?*, 1992 Administrative Conference of the U.S. Recommendations and Reports.

8. Environmental Protection Agency, *Requirements for Preparation, Adoption, and Submittal of State Implementation Plans; New SIP Processing Procedures to Save Time and Resources*, 47 FR 27073, 27074 (June 23, 1982) (in this notice EPA uses the term "immediately final" rather than "direct final").

9. Interview with James Nelson, Associate General Counsel, Environmental Protection Agency (May 11, 1993). See 40 C.F.R. § 721.170(d)(4)(1).

10. See note 9 above.

11. Interviews with Alan Eckert, Associate General Counsel, Environmental Protection Agency, May 6, 1993; James Nelson, Associate General Counsel, EPA, May 11, 1993; and Howard Hoffman, Senior Attorney, EPA, May 10, 1993. In response to an informal request to all attorneys in Environmental Protection Agency's Office of the General Counsel, no direct final rule was identified as having been challenged in court for failure to comply with the Administrative Procedure Act (APA).

12. *AFL-CIO v. OSHA*, 965 F.2d 962 (11th Cir. 1992).

13. Memorandum to Jeffrey Lubbers, Team Leader, NPR Improving Regulatory Systems Team, from Glória Gutierrez, Acting Chief Financial Officer and Assistant Secretary for Administration, Department of Commerce, Aug. 5, 1993.

14. Administrative Conference of the United States, Recommendation 78-4, "Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulations," 1 C.F.R. § 305.78-4.

15. These principles should apply to all agencies even though agency processes vary significantly from agency to agency, depending, in part, on the agency's mission and culture.

16. Agencies can use direct final rules without new legislation, although the process does pose some litigation risk. Arguably, direct final rules meet the requirements of the APA. However, an argument could be made to the contrary. Agencies should determine when it is appropriate to take that risk after consultation with their general counsels. One factor that may make it easier for EPA to use the process is the special provisions in the *Clean Air Act* and the *Toxic Substances Control Act* that require anyone challenging a rule to bring the judicial challenge within 60 days after the rule is published in the *Federal Register*. 42

# REG06: ENCOURAGE ALTERNATIVE DISPUTE RESOLUTION WHEN ENFORCING REGULATIONS



## BACKGROUND

Disputes constantly arise when agencies enforce regulations. Enforcing regulations and encouraging compliance with regulatory requirements in the least costly, least adversarial, and most effective way are crucial to ensuring that the policies underlying regulations are implemented.

Enforcement of regulations often requires substantial litigation. Adjudication—the resolution of disputes before agency administrative law judges or in federal court—is often lengthy, expensive, and highly contentious.<sup>1</sup> Ultimate outcomes are frequently unsatisfactory and may undercut future efforts to ensure effective compliance by creating an atmosphere of antagonism and distrust. In the long run, encouraging compliance is likely to be more effective than litigating over enforcement.

Current enforcement dispute resolution systems tend to emphasize litigation, and there are times when this emphasis is proper. Regulated entities must understand that they must comply with regulations or face sanctions. Successful litigation by the government may serve as a deterrent to

future wrongdoing. Ensuring regulatory compliance is, after all, a federal law enforcement role.

However, the fact is that a high percentage of enforcement disputes are ultimately resolved not through litigation but through settlement negotiations.<sup>2</sup> There are a variety of reasons for this, including inadequate resources to pursue all cases through the full litigation process, and insufficient or questionable evidence in particular cases. Moreover, in some situations, the remedies available through the adjudicatory process (be it at the administrative level or in court) may not provide the optimal practical solutions. Negotiated settlements often occur, however, only after substantial adversarial maneuvering, or at the proverbial “courthouse steps.”

## NEED FOR CHANGE

Various alternatives to litigation and administrative adjudication can be useful in resolving a significant number of enforcement disputes earlier, with fewer resources, and with better results than might

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otherwise occur. Alternative means of dispute resolution (ADR) can be an alternative to litigation, and it can also serve as an improved way to handle negotiated resolutions. Because ADR processes are designed to develop consensual solutions to disputes, they should reduce contentiousness and may result in relationships between the regulators and the regulated that are more cooperative and more conducive to future voluntary compliance.

These alternatives encompass a collection of techniques designed to help disputing parties resolve their conflicts in mutually acceptable ways.<sup>3</sup> Although the scope of what constitutes ADR varies depending on who is using the term, it is generally considered to include dispute resolution systems where a neutral third party, or "neutral," helps parties resolve their dispute.

ADR has become increasingly popular as a way to help resolve the wide variety of disputes involving individuals, businesses, and governments. Although some variations of ADR have been around for centuries, in recent time, court backlogs have served as an impetus for wider consideration of ADR techniques. Courts (both federal and state) provide ADR programs to litigants.<sup>4</sup> For decades, labor and management have used ADR to resolve disputes. Private industry has begun to look to ADR as a way to prevent disputes from escalating and absorbing large amounts of resources.<sup>5</sup> Community-based programs and family mediation programs have used ADR processes to address interpersonal disputes. An increasing number of states have incorporated the use of ADR into courts and agencies. As President Clinton said (while Governor of Arkansas), "[One] thing we need, in every state, is an alternative dispute resolution mechanism that would encourage people to look for a way, short of litigation, to resolve their disputes."<sup>6</sup>

ADR comes in a variety of forms. Some, like mediation, are fairly well-known. Others, such as minitrials, are less familiar. The more common types of ADR include:

- mediation,
- early neutral evaluation,

- factfinding,
- settlement judges,
- minitrials, and
- arbitration.<sup>7</sup>

ADR is generally an appropriate dispute resolution mechanism when the dispute is one in which the parties might be willing to accept a negotiated settlement.<sup>8</sup> Because ADR processes are inherently flexible, and can be designed to meet the needs of the disputing parties, they should be considered in a wide variety of cases.

**The Administrative Dispute Resolution Act.** The Administrative Dispute Resolution Act of 1990 (ADR Act) governs agency use of ADR in non-rulemaking disputes.<sup>9</sup> It reflects Congress' interest in and recognition of the potential benefits of ADR, and it authorizes and encourages the innovative use of ADR by providing a flexible framework that agencies can adapt to their own needs.

The Act requires relatively little, but authorizes much. It requires each federal agency to develop a policy for using ADR. It directs agencies to review their types of disputes, how they are currently resolved, and whether ADR might be useful. The Act also requires that each agency appoint a senior official as a "dispute resolution specialist" to serve as the coordinator and point person for agency ADR activities. These requirements are aimed at ensuring that agencies make educated and thoughtful decisions about ADR.

The Act amended the Administrative Procedure Act to provide express authority to use ADR where the disputants agree to use it. It provides new authority for federal agencies to enter into binding arbitration, with some limitations. It provides statutory protection for confidentiality of ADR processes, and contains provisions relating to the acquisition of dispute resolution "neutrals."

Unfortunately, however, agency compliance with the ADR Act has been inconsistent. Despite clear success stories (see below), some agencies have vacancies in the dispute resolution specialist positions mandated by the Act or have not appointed to the post an official with sufficient rank.<sup>10</sup>

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**Federal Agency Use of ADR.** Over the last decade, some federal agencies have begun to give serious attention to the use of ADR. ADR has been used by several agencies in enforcement cases and other regulatory proceedings. Agencies have also used ADR in resolving contract, personnel and Equal Employment Opportunity disputes. A wide range of agencies—from the Environmental Protection Agency (EPA) and the Departments of Labor and Health and Human Services to the Federal Deposit Insurance Corporation (FDIC) and the Resolution Trust Corporation—have used ADR. Others—like the U.S. Air Force and the Internal Revenue Service—are in the planning stages for significant ADR programs.<sup>11</sup>

Some of the results of the use of ADR to date have been impressive. The Department of Labor last year ran a pilot program in one of its regional offices using mediation to resolve enforcement cases involving the workplace, including cases involving the Occupational Safety and Health Administration (OSHA) and wage and hour regulations. The Department's evaluation of the program demonstrated that both agency and industry parties were quite satisfied with the use of ADR, and that in many cases, the mediated resolution was quicker and better than either face-to-face negotiation or litigation.<sup>12</sup> The Department has recently decided to expand the program to all of its regions.<sup>13</sup> The Farmers Home Administration found that it saved millions of dollars using mediation to avoid foreclosures in farmer-lender disputes.<sup>14</sup> The FDIC saved over \$400,000 in litigation costs from a small pilot mediation program involving creditor claims arising from failed banks.<sup>15</sup> EPA has had significant successes using mediation to resolve Superfund hazardous waste cleanup proceedings.<sup>16</sup>

To maintain momentum, a new Presidential directive on ADR is needed. The only existing executive order on ADR, Executive Order 12778, is not specific enough to provide useful guidance to the agencies.<sup>17</sup> The directive should not only be linked to the ADR Act's provisions, but it

also should address other approaches to encouraging agency use of ADR, including increased budgetary incentives, personnel appraisal incentives, and streamlined procurement of outside neutrals.

**Budgetary Incentives.** Although the goals of ADR include the conservation of resources in the long run, it is important that the Office of Management and Budget (OMB) provide agencies with budgetary incentives to use ADR. This has at least two aspects: ensuring that the resources necessary to develop ADR systems are available, and ensuring that budget incentives over the long term do not undercut ADR use, but rather reward the consensual resolution of disputes and discourage the creation of large adjudicatory backlogs.

First, some resources are necessary to develop and implement an ADR program. While over the long run, ADR should provide savings to both the government and the private sector, seed money and personnel resources are often needed to get agency systems up and running. Thus, at least in the early implementation stages, some specific budget for ADR implementation may be necessary.

Second, the criteria for increasing agency budgets often provide skewed incentives. For example, providing additional resources to an agency with a large adjudicatory backlog might remove the incentive to reduce that backlog. Moreover, the savings from using ADR may not be felt by the same component of the agency to which the costs accrue.

**Personnel Incentives.** The ADR Act requires that the dispute resolution specialist and other agency personnel be provided training in ADR.<sup>18</sup> This is crucial. Although ADR concepts are not extremely complicated, those who would use ADR, as well as those deciding whether and when to use it, need to understand how to participate effectively in these processes, understand their benefits, and know when it is appropriate to use them.

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Performance evaluation criteria also must provide the appropriate incentives to encourage agency personnel to use ADR and resolve disputes consensually. For example, some agencies give credit in individual performance appraisals for the number of cases opened, but not for the number of cases resolved or the efficiency and effectiveness of resolution. This should be altered so that both types of numbers are important.

**Hiring of Neutrals.** Current contracting processes for obtaining a neutral can be extremely cumbersome. Neutrals are potentially available from a variety of sources. ACUS, for example, has a roster of neutrals from which agencies can select.<sup>19</sup>

However, getting a candidate from the roster does not obviate the need for a system to hire and arrange to pay (if necessary) for the neutral's services. Depending on the amount of money involved, a more or less complicated competitive bidding system may be required. This process is frequently incompatible with the short time frames that may be necessary to use ADR effectively.

It is important that agency personnel interested in using ADR have access to neutrals in a timely fashion. Depending on whether the neutral is someone from the same agency, a different agency, or outside the government, mechanisms (including ones for sharing of neutrals among agencies) should be established to ensure ready availability. Agencies also have been and should be encouraged to continue training their personnel in mediation and related ADR techniques, so that they can make use of neutrals from their own and other agencies to help resolve disputes more quickly and less expensively.

## ACTION

### *1. Increase use of alternative means of dispute resolution. (2)*

The President, through directive, should strongly encourage agencies to use ADR.<sup>20</sup> Governor Clinton recognized the need for

every state to use ADR processes to avoid needless litigation; President Clinton should take the opportunity to apply that dictum to every federal agency.<sup>21</sup>

Presidential support of ADR is necessary to avoid budget incentives that undercut ADR use, to train agency staff in ADR, to structure performance appraisals to reward proper use of ADR, and to make it easier to hire neutrals in a timely fashion. Such support would let agency personnel know that they should take the dictates of the ADR Act of 1990 seriously, without infringing on agencies' discretion to decide when to use ADR. Presidential leadership on this issue is a low-cost but highly effective way to engender long-term and widespread acceptance of the view that resolving disputes through ADR is not only appropriate, it is, in many cases, preferable.

## Cross-references to Other NPR Accompanying Reports.

*Department of Labor*, DOL04: Expand the Use of Alternative Dispute Resolution by the Department of Labor.

*Reinventing Human Resource Management*, HRM08: Improve Processes and Procedures Established to Provide Workplace Due Process for Employees.

## Endnotes

1. Agencies have varying enforcement authorities. Many enforcement statutes permit agencies to bring enforcement proceedings before agency "administrative law judges" (with judicial review on the administrative record in federal court). Other agencies must seek enforcement (with the aid of the Department of Justice) in federal district court. In either case, litigation costs and delays can be a concern.
2. See, for example, Edles and Nelson, *Federal Regulatory Process: Agency Practices and Procedures*, 2d ed. (Prentice Hall Law and Business looseleaf), p. 119. "The administrative process at most agencies could not operate if all cases had to be pursued to final, formal decisions."
3. See Administrative Conference of the U.S., Recommendation 86-3, "Agency Use of Alternative Means of Dispute Resolution," 1 C.F.R. §§ 305.86-3 (1993); Harter, Philip J., "Points on a Continuum: Dispute Resolution Procedures and the Administrative Process," *Administrative Law Journal*, Vol. 1, No. 1 (1986) p. 141.
4. For example, the United States District Court for the District of Columbia has an alternative means of dispute resolution (ADR) program at both the trial and appellate levels. Finkelstein and Stanley, "The Federal Angle," *Washington Lawyer* (May/June 1992) p. 33. State and local courts in many states, including California, New Jersey, and Florida have set up ADR programs. Telephone

# REG 07: RANK RISKS AND ENGAGE IN "ANTICIPATORY" REGULATORY PLANNING



## BACKGROUND

**A**gency planning tends to be short-range rather than long-range. There is almost always a new crisis demanding immediate attention. The budget cycle is annual. Top agency policymakers often are at the agency for only two years. All of this gives agencies incentives to develop short-term rather than long-term plans.

Nonetheless, long-term strategic planning is needed. Regulatory agencies have limited resources and limited demands they can make on the public. They share responsibility with Congress for ensuring that the nation gets the most for the money it spends on drug safety, the environment, and other matters. This requires agencies not only to set strategic goals, but also to determine whether those goals are being met.

This, in part, is the impetus behind the Government Performance and Results Act of 1993.<sup>1</sup> The Act's implementation should do much to advance strategic, performance-based planning by the agencies. But regulatory agencies should take additional steps to plan their future regulatory agendas (especially those relating to regulation of environmental, health, and safety risks). The potential targets of regulations are so many, the implications so large, and

regulatory resources so comparatively limited, that prioritization and long-range planning is imperative.

Regulatory agencies have begun to take some steps in this direction. Since 1985, executive agencies have been required to submit their planned significant regulatory actions to the Office of Management and Budget (OMB), which has published compilations annually as the *Regulatory Program of the United States*.<sup>2</sup> Unfortunately, however, this process was not used as a significant planning document within the agencies or within the administration as a whole.<sup>3</sup> Moreover, the *Program* was not published in a timely fashion; for example, the *Program* for 1992 was not distributed until February of 1993.<sup>4</sup> The new regulatory review executive order will place greater emphasis on planning and will make the annual regulatory planning process more meaningful and timely.

The Environmental Protection Agency (EPA) has begun a process that, although still in its early stages, can provide a model for the other 20 or so agencies that regulate environmental, health, or safety risks, including the Food and Drug Administration, the Occupational Safety and Health Administration (OSHA), the Consumer Product Safety Commission, and the Nuclear Regulatory Commission.<sup>5</sup> Its 1987 report, *Unfinished Business*, was based

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on an effort by 75 senior career managers to compare and rank the relative risks posed by 31 environmental problems regulated by the agency.<sup>6</sup> These rankings, while based on professional judgments, were limited by incomplete data and the infancy of risk comparison methodologies. But the effort was a landmark in that it crossed programmatic lines and also explicitly pointed out the disparity between the rankings and the resource allocation at EPA.<sup>7</sup> Interestingly, the EPA experts' rankings were almost the reverse of prevailing public opinion about risk.<sup>8</sup>

In 1990, EPA turned to its Science Advisory Board to evaluate *Unfinished Business* and the agency's response to it. The Board's special 39-member Relative Risk Reduction Strategies Committee produced a report, *Reducing Risk*, that contained a series of recommendations to the administrator on how to undertake risk prioritization so that EPA could "target its environmental protection efforts on the basis of opportunities for the greatest risk reduction."<sup>9</sup>

The Carnegie Commission has applauded *Unfinished Business* and *Reducing Risk* as a "groundbreaking enterprise."<sup>10</sup> It has specifically recommended that "other risk reduction agencies should attempt to incorporate into their own decisionmaking and institutional culture the global perspective on risk that these reports and their implementation embody."<sup>11</sup>

As a by-product of its recent focus on risk prioritization, EPA has devoted increasing attention to the identification of future risk. In 1988, the EPA Science Advisory Board produced a report, *Future Risk: Research Strategies for the 1990s*, that catalogued risk reduction strategies for the future.<sup>12</sup> Its first recommendation was that EPA should shift its regulatory strategy "from end-of-pipe controls to preventing the generation of pollution."<sup>13</sup> Administrator Carol Browner recently announced her intention to make "pollution prevention the guiding principle for all our programs at the [EPA]."<sup>14</sup>

EPA has also employed its Office of Policy Planning and Evaluation (OPPE) to plan for the future. OPPE's Office of

Strategic Planning and Environmental Data has a Futures Staff for this purpose.<sup>15</sup> The Office also has recently joined with the Science Advisory Board to sponsor a new Environmental Futures Committee at the behest of Administrator Browner.<sup>16</sup>

Another agency now engaged in risk prioritization is the Research and Special Programs Administration in the Department of Transportation, which regulates the safety of gas, offshore, and hazardous liquid pipelines. About 20 to 25 pipeline-related risks will be ranked as high, medium, or low as part of this initiative.<sup>17</sup>

## NEED FOR CHANGE

As the Carnegie Commission report declared, "the fundamental problem in regulatory decision making at the agency level, as at the presidential and interagency levels, is how to set priorities. It is a great challenge for science-based regulatory agencies to compare and rank individual risks and families of risks within the universe they regulate."<sup>18</sup>

The scope of agencies' regulatory mandates far exceeds their rulemaking resources. For example, OSHA, which must issue health and safety standards for thousands of chemicals, carcinogens, and other dangers in most of our nation's workplaces, only has sufficient resources to pursue 15 to 20 rulemaking efforts at any given time.<sup>19</sup> Hence the dire need for prioritization. Prioritization by agencies will also help inform Congress about agency resource needs and may help Congress reorder its own thinking while also informing regulated parties about the agency's likely future agenda.

Risk prioritization can help agencies distinguish between regulatory targets that demand immediate attention and those that allow for mid- or long-range corrections. But in this fast-changing technological world, regulatory agencies must also begin to anticipate future problems before it is too late or before an expensive regulatory scheme must be imposed.

For example, EPA is finding solutions

now to the potential problem posed by the lithium in batteries used to power electric motor vehicles.<sup>21</sup> OSHA, for another example, might have better anticipated the workplace stresses and injuries caused by the computerized office (e.g., non-ergonomic chairs, video display terminal exposure, and carpal tunnel syndrome).

It is a truism to say that tomorrow's regulatory problems will likely differ markedly from today's. Changes in risk prioritizing must be anticipated from numerous sources. New knowledge about the hazards of existing technologies (e.g., chlorofluorocarbons or CFCs) and exposures (e.g., radon) is always being developed. Solutions to one problem may cause another (e.g., increased indoor pollution in offices with improperly designed energy efficient programs). Changes in behavior (e.g., increased use of lawn-care pesticides), introduction of new technologies (e.g., biotechnology), side effects of government intervention (e.g., floodplain management), or changes in societal concerns (e.g., greater concern about costs or fairness of solutions) all bear on future risk regulation. These sorts of changes must be anticipated to the greatest feasible extent.<sup>22</sup>

In short, regulatory agencies cannot simply be reactive. They must develop ways of, and devote resources to, anticipating the need for new research or regulatory initiatives—and possibly for new or adjusted statutory mandates to forestall or remedy those problems.

## ACTIONS

### *1. Rank the seriousness of environmental, health, or safety risks. (1)*

Heads of regulatory agencies involved in the regulation of environmental, health, or safety risks should direct their agencies to rank the seriousness of those risks to permit better prioritization of their regulatory agendas. This is consistent with the new regulatory review executive order, which will require agencies to consider relative risks of different substances

or activities within their jurisdictions. How that prioritization can best be accomplished should be left to individual agencies.

EPA's initial use of its program managers with a review by outside experts assembled by its Science Advisory Board has worked well. An alternate approach was espoused by a recent study by the Administrative Conference of the U.S. The study, done at OSHA's request, urged that agency to establish a formal prioritization committee staffed by politically sensitive technical experts who would serve staggered terms and be eligible for reappointment.<sup>23</sup> Agencies should compare their own resource allocations with their internal risk rankings. Agencies should coordinate their development of risk prioritization processes and standards through the Regulatory Coordinating Group. Once risk lists are better developed and tested, they should be compared and possibly even coordinated across agency lines.

No one can pretend, however, that this will be an easy task. Analytical methodologies and basic data must be improved, and public perceptions of risk (which often differ markedly from that of scientists) must be factored into the equation.<sup>24</sup> Comparing various types of health risks with disparate impacts on different populations (or human health concerns with degradation of ecosystems) requires value judgments that may be impossible to quantify. Thus, precision in rankings may be unattainable. But ranking of risks into high, medium and low categories is realistic. The payoffs from such prioritization should far exceed the cost of the undertaking. It would inform the legislative process (since agency priorities are largely statute-driven), the budget process, the interagency coordination process, and ultimately, the public's understanding of risk.<sup>25</sup>

### *2. Develop long-range future plans and anticipatory approaches to regulatory problems. (1)*

The heads of regulatory agencies should develop long-range future plans and

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anticipatory approaches to regulatory problems within their jurisdiction. Because of the differences in organizational structures among agencies, it is not possible to dictate just how such anticipatory planning can best be built into agency decision-making. Agencies should consider creating a staff to address long-range planning. Agency officials who serve in such offices should also meet under the sponsorship of the Regulatory Coordinating Group to discuss approaches to the problem.

### Cross-references to Other NPR Accompanying Reports

- Department of Transportation*, DOT01: Measure Transportation Safety; and DOT11: Improve Intermodal Transportation Policy Coordination and Management.
- Environmental Protection Agency*, EPA03: Shift EPA's Emphasis Toward Pollution Prevention and Away from Pollution Control; and EPA07: Establish Measurable Goals, Performance Standards and Strategic Planning within EPA.
- Federal Emergency Management Agency*, FEMA02: Develop a More Anticipatory Customer-Driven Response to Catastrophic Disasters.
- Mission-Driven, Results-Oriented Budgeting*, BGT02: Effectively Implement the Government Performance and Results Act of 1993.
- Creating Quality Leadership and Management*, QUAL02: Improve Government Performance Through Strategic and Quality Management.

### Endnotes

1. Pub. L. 103-62 (1993). The Act authorizes 10 three-year pilot projects to test program performance measures and requires Congress to vote in 1997 on mandatory government-wide implementation of five-year strategic planning, annual program goal-setting, and annual program performance reporting beginning in fiscal year 1998.
2. E.O. No. 12498, *Federal Register* 1036 (1985).
3. Discussions with regulatory officials from various agencies convened at Department of Transportation, May 13, 1993, Elliott, Donald, "TQMing OMB: Or Why Regulatory Review under Executive Order 12291 Works So Poorly and What President Clinton Can Do About It," draft, August 17, 1993, p. 24, *Law and Contemporary Problems* (Durham, North Carolina: forthcoming 1994).
4. *Regulatory Program of the United States Government* (April 1, 1992-March 31, 1993), officially transmitted to Congress on January 15, 1993, but not available to agencies or to the public until February.
5. Other risk regulatory agencies include the Animal and Plant Health Inspection Service, the Food Safety and Inspection Service, and the Forest Service (Department of Agriculture); National Oceanic and Atmospheric Administration (Department of Commerce); Army Corps of Engineers (Department of Defense), Office of Surface Mining, and the Fish and Wildlife Service (Department of Interior); Mine Safety and Health Administration (Department of Labor); and Coast Guard, the Federal Aviation Administration, the National Highway Traffic Safety Administration, and the Research and Special Programs Administration (DOT).
6. Environmental Protection Agency, *Unfinished Business: A Comparative Assessment of Environmental Problems* (Washington, D.C., 1987).
7. Of course, to a large extent, EPA's budgetary priorities are set by legislation. See Environmental Protection Agency, *Reducing Risks* (Appendix B.4), SAB-EC-90-021B (Washington, D.C., 1990).
8. For example, while the public ranked nuclear accident radiation and industrial pollution of waterways as among the highest risks, EPA experts ranked them among the lowest. Conversely, the public was not very concerned about radon and indoor air pollution, which were ranked as high risks by the EPA experts. See Breyer, Stephen, *Breaking the Vicious Circle: Toward Effective Risk Regulation* (Harvard University Press 1993), Chart 7, "Rating Risks—How the Public and EPA Rate Health Risks Associated with Environmental Problems," derived from Russell, "What, Me Worry?" *American Health* 47 (June 1990). This problem may be affected by the media's perception of risk as well. See "Stories on Cancer's Causes Are Said to Be Misfocused: Media Overplay Minor Environmental Threats to Health, Experts Contend," *Washington Post* (July 27, 1993), p. A6.
9. Environmental Protection Agency, *Reducing Risks: Setting Priorities and Strategies for Environmental Protection*, SAB-EC-90-021 (Washington, DC, 1990), p. 6.
10. Carnegie Commission on Science, Technology and Government (Carnegie Commission), *Risk and the Environment: Improving Regulatory Decision Making* (Washington, D.C., 1993), p. 81.
11. See also the favorable review "Developing a Mindset for Risk Prioritization," *American Industrial Health Council Quarterly* (Fall 1990), p. 3.
12. Environmental Protection Agency, *Future Risk: Research Strategies for the 1990s*, SAB-EC-88-040 (Washington, D.C., 1988).
13. *Ibid.*, at pp. 5, 8-9.
14. Carol M. Browner, Administrator, Environmental Protection Agency, Memorandum to EPA employees, "Pollution Prevention Policy Statement: New Directions for Environmental Protections," June 15, 1993, p. 1.
15. Interview with David Rejelski, Futures Staff Chief, Office of Strategic Planning and Environmental Data, Office of Policy, Planning and Evaluation, EPA, June 24, 1993.
16. The Charter of the new committee will be to conduct a short-term (five-year horizon) and long-term (20-year horizon) "scan of future developments that will affect environmental quality and the Nation's ability to protect the environment." The final report is scheduled for September 1994. Interview with Donald G. Barnes, Director, Science Advisory Board, July 7, 1993; Environmental Protection Agency, *Draft Charter*, Science Advisory Board, Environmental Futures Project (undated).
17. Telephone interview with Judith S. Kaleta, Chief Counsel, Research and Special Programs Administration

# REG 08: IMPROVE REGULATORY SCIENCE



## BACKGROUND

**T**he new regulatory review executive order recognizes the importance of basing regulatory decisions on strong scientific data.

Many regulatory decisions made by federal agencies are founded on scientific judgments.<sup>1</sup> For example, rules concerning limitations on airline pilot working hours depend on physiological and behavioral science concerning human sleeping needs.<sup>2</sup> The "age-60" limitation for commercial pilots depends on scientific judgments about aging and health risks.<sup>3</sup> A myriad of Environmental Protection Agency (EPA), Occupation Safety and Health Administration (OSHA), and Food and Drug Administration (FDA) rules and enforcement actions depend on the adequacy of scientific judgments made by the agency.

To assist in making scientific judgments, agencies rely on both in-house scientific expertise and outside scientists. Agencies employ scientists both in staff advisory positions and in laboratories and research centers.<sup>4</sup> Agencies must nurture in-house scientific expertise and attract top-flight scientists as employees.<sup>5</sup> Regulatory agencies have also recognized that it is necessary to use outside scientific expertise—through the use of specialized scientific advisory

committees, referral to the National Academy of Sciences, or hiring of scientific research consultants.<sup>6</sup> In addition, the National Institute of Standards and Technology (in the Department of Commerce) provides scientific advice to other agencies through interagency coordination.<sup>7</sup> All of these approaches have their place, and agencies need to have the flexibility to use them.

Generally speaking, however, agency regulatory decisions are made by an agency head who is normally not a scientist, relying on the advice of program officials, administrative law judges, and agency general counsels. When decisions are challenged in court, they are reviewed by judges, who rarely have scientific training. This process is understandably regarded as deficient among scientists who follow the regulatory process.<sup>8</sup>

This is not a new problem. In the 1970s, proposals were advanced for a "science court" procedure to determine "the best available scientific judgment" for regulatory purposes.<sup>9</sup> The premise was that scientific and technical determinations could be separated from the political and social decisions entrusted by Congress to the federal regulatory agencies. If so, proponents argued, a panel of eminent "scientist-judges" would be better equipped to render a decision on the scientific merits than non-

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scientist government officials. Subsequently, those officials would deal solely with the socio-political choices, but in a scientifically informed manner.

Science court proposals have since withered on the vine, largely because it is doubtful that scientific and policy issues can be separated—in part because the process of defining the problem is often subjective and frequently laden with political considerations.<sup>10</sup> This is particularly true in connection with risk assessment decisions, which often arise in emotionally charged contexts such as food safety or occupational or environmental exposure to carcinogens, poisons, or radiation. Another approach to the problem has, however, been developed: the science advisory board.

**EPA's Science Advisory Board.** The EPA has developed the most sophisticated, wide-ranging science board among the agencies. The Science Advisory Board (SAB) in its present form was established in 1978 by statute, although predecessor bodies date back to the early 1970s.<sup>11</sup>

As a federal advisory committee, the SAB must comply with the Federal Advisory Committee Act and related regulations. Consequently, the Board has an approved charter and must hold public meetings.<sup>12</sup> The SAB charter provides a succinct statement of the Board's purpose: "The objective of the Board is to provide advice to EPA's Administrator on the scientific and technical aspects of environmental problems and issues."<sup>13</sup>

At present the SAB consists of an Executive Committee and 10 Committees made up of 80 members, plus 300 "consultants" who serve on an "as needed" basis.<sup>14</sup> The SAB operates within EPA as a staff office reporting directly to the administrator, directed by a career Senior Executive Service (SES) Executive Director and 16 other staff members. Its budget is approximately \$1.7 million.<sup>15</sup>

The Board's activities are quite varied. It takes on reviews of scientific issues relating to EPA's mandate at the request of Congress, the administrator, and program offices as

well as on its own initiative. In recent years, the Executive Director has issued an annual agency-wide solicitation of issues.<sup>16</sup> Most of the Board's work-product consists of reports—most often as a result of a requested peer review of an agency document which includes findings, recommendations, and answers to specific questions addressed to the Board. Perhaps the most influential and celebrated SAB report was *Reducing Risk*, produced in 1990 by a special Relative Risk Reduction Strategies Committee. Such reports typically carry a disclaimer which restates the Board's independence within the agency.<sup>17</sup>

Beyond its important role in furthering EPA's risk prioritization activities, the recent Board reports cover a mix of highly technical (e.g., Review of the Drinking Water Criteria Document for *Cryptosporidium*) and not-so-technical (e.g., Review of the draft revised *Homebuyer's and Seller's Guide to Radon*) reviews. They also show an increasing interest in forward-looking, strategic issues (e.g., Review of the Office of Research and Development's Bioremediation Research Program Strategy).<sup>18</sup> To channel this sort of constructive criticism, Administrator Carol Browner has requested that the Board help the agency anticipate future environmental problems. The Board has accepted this request and is organizing a new Committee, the Environmental Futures Committee, to undertake this effort.<sup>19</sup>

**The FDA Science Board.** FDA houses several national research centers (e.g., the Center for Biologics Evaluation, the Center for Drug Evaluation and Research, and the Center for Devices and Radiological Health). The agency has also historically relied on about 40 highly particularized advisory committees to assist these centers in looking at particularized products, such as over-the-counter drugs, blood products, or ophthalmic devices.<sup>20</sup> As Commissioner David Kessler told the National Performance Review, "Virtually every licensing decision of any significance in the agency is put before a scientific advisory committee."<sup>21</sup>

Because of the importance of science advisory committees in the agency, the Commissioner in June 1992 established the "Science Board to the Food and Drug Administration."<sup>22</sup> The Board consists of 12 distinguished members (eight from academia, three from corporations, and one from a foundation). Other temporary members or consultants may be called upon to serve when needed, and temporary subcommittees are authorized. The Board's Charter provides a broad mandate to provide advice on specific technical issues and emerging, evolutionary, research questions.<sup>23</sup>

In his remarks at the Board's first meeting, Commissioner Kessler restated his hope that the Board will tackle important cross-cutting scientific issues:

*FDA convenes a variety of advisory panels. But this one is different from most. For the work you do will go beyond one product or one crisis. You are being asked to influence the very foundation of this agency's work...for decades to come.*<sup>24</sup>

## NEED FOR CHANGE

As the Carnegie Commission study *Improving Regulatory Decision Making* states in commending the activities of the EPA and FDA boards, "External science advisory boards serve a critically important function in providing regulatory agencies with expert advice on a wide range of issues."<sup>25</sup> Yet, with a few other exceptions, most regulatory agencies have not organized science advisory boards.<sup>26</sup>

Creation of such science advisory boards not only should produce regulatory decisions and agenda setting that are founded on better science, they should also induce greater acceptance of those decisions by Congress, the courts, the general public and among scientists themselves.

Regulatory agencies need help in making decisions that must be made in a context of significant scientific or technical uncertainty. Recent hard-to-predict questions have arisen, for example, concerning the

permeability of different grades of latex to the AIDS virus or the possible risks posed by the sodium azide used in airbags when cars are junked. Given the difficulty in attracting top scientists into full-time government staff positions, the best way to tap into their expertise to answer these kinds of questions is to leverage the low costs of travel and government per-diem rates into formation of a part-time science advisory board.

## ACTION

### *Create science advisory boards. (1)*

The President should require that heads of regulatory agencies that conduct rulemaking or other proceedings that depend heavily on scientific information and judgments create a science advisory board or explain why such a board is not needed.

Agencies which face scientific issues in research and development rather than regulatory contexts may have other options such as the Federal Coordinating Council for Science, Engineering and Technology (FCCSET) (proposed for reconstitution as the National Science and Technology Council by NPR).<sup>27</sup> Furthermore, regulatory agencies all have differences that may lead to different approaches to considering or creating such a board. FDA's reliance on scientific advisory committees led to a small overarching board, while EPA has an 80-member board with 10 committees. But all agencies, especially those with regulatory mandates involving risk-related questions, should consider creating a board that meets their specific needs.<sup>28</sup>

Agencies with less frequent or less pressing scientific issues may wish to use established boards in other agencies. A fee-for-service program should be developed to foster this approach. Moreover, agency science boards should be linked to one another, perhaps under the sponsorship of the Regulatory Coordinating Group or the President's Office of Science and Technology Policy (OSTP).<sup>29</sup> Such a linkage will

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facilitate synergy among the boards and will help agencies identify cutting-edge and other issues that would benefit from review by a quasi-independent board of outside scientific experts.

Agencies that do create such boards need to pay attention to their staff support as well.<sup>30</sup> They need not be expensive propositions. Although EPA's mega-board has an annual budget of \$1.7 million, the charter for the FDA Board estimates the annual cost of travel, compensation, and staff support to be less than \$100,000. Both of these amounts seem like bargains, given the tremendous cost implications of EPA and FDA scientific decisions.

### Cross-references to other NPR Accompanying Reports

*Environmental Protection Agency*, EPA10: Promote Quality Science for Quality Decisions.

*National Science Foundation/Office of Science and Technology Policy*, NSF01: Strengthen Coordination of Science Policy.

### Endnotes

1. Nyhart, J.D., and Milton M. Carrow, *Law and Science in Collaboration — Resolving Regulatory Issues of Science and Technology* (Lexington, MA: Lexington Books, 1983).

2. 14 C.F.R. §§ 121.470-121.525; 14 C.F.R. §§ 135.261-135.271.

3. 14 C.F.R. § 121.383(c).

4. For example, the Environmental Protection Agency (EPA), where the Administrator and many of the Assistant Administrators have official science advisors, or the Food and Drug Administration (FDA), which employs scientists in its highly praised research centers. But see Mashaw, Jerry L., and David L. Harfst, *The Struggle for Auto Safety* (Harvard University Press 1990), p. 197, describing the National Highway Traffic Safety Administration's Ohio test facility as "NHTSA's version of Siberia."

5. See Carnegie Commission on Science, Technology and Government (Carnegie Commission), *Risk and the Environment: Improving Regulatory Decision Making* (Washington, D.C., June 1993), p. 91.

The quality of the research, development, and assessment at all regulatory agencies can be substantially improved. To do so, agencies must recruit and retain first-rate scientists and engineers, provide them with state-of-the-art facilities and equipment, and give them the resources necessary to carry on research of the highest quality. Where internal capabilities are weak, bridges should be built to allow access to the best scientists and engineers in academic and nongovernmental organizations.

6. See for example, *Food and Drug Administration Advisory*

*Committees*, Institute of Medicine (National Academy of Sciences, 1992). The Institute of Medicine found the existing FDA advisory committee system to be "fundamentally sound." *Id.* at vi.

7. The Department of Commerce cites the following examples of the National Institute of Standards and Technology (NIST) interagency projects:

- provided fire-endurance testing and analysis to help the Nuclear Regulatory Commission regulate fire barrier systems in nuclear power plants;
- developed, for EPA, a program to identify private laboratories with the capability needed to analyze asbestos fibers and give them technical support; and
- worked with FDA scientists, using the NIST research nuclear reactor, to research use of nuclear techniques to analyze and help regulate food content, such as chlorine in cooking oil and iodine in eggs.

Memorandum from Gloria Gutierrez, Acting Chief Financial Officer and Assistant Secretary for Administration, Department of Commerce, to Jeffrey Lubbers, August 5, 1993.

8. Dr. Sheila Jasanoff, Director of Cornell University's Program on Science, Technology, and Society, opines, "Over the past twenty years, federal regulatory agencies have developed a reputation for slipshod science." Jasanoff, *Scientific Review and Agency Decisionmaking*, issue paper prepared for the Carnegie Commission on Science, Technology and Government, *supra* note 5 (1989), p. 1.

9. Symposium, "Twenty-five Year Retrospective on the Science Court," *Risk*, vol. 4, no. 2 (Concord, N.H.: Franklin Pierce Law Center, Spring 1993).

10. Cranor, Carl F., "Science Courts, Evidentiary Procedures and Mixed Science-Policy Decisions," *Risk*, vol. 4, no. 2 (Spring 1993), p. 113.

11. *The Environmental Research, Development and Demonstration Authorization Act*, 43 U.S.C. § 4365 (1988).

12. 5 U.S.C. App. (1988).

13. Environmental Protection Agency, *Advisory Committee Charter for Science Advisory Board* (November 8, 1991), reprinted in Environmental Protection Agency, Science Advisory Board, *FY 1992 Staff Director's Annual Report*, "Getting Results," p. A-2. Elaborate Board guidelines provide criteria and procedures for selection of members and consultants, terms of appointment, assignment of topics to committees and subcommittees, and rules concerning conflicts-of-interest and public disclosure of members' and consultants' interest in assigned topics. "Guidelines on Service on the Science Advisory Board," *id.* at Appendix D.

14. The 10 committees cover the major environmental media (Clean Air Scientific Advisory Committee,\* Radiation Advisory Committee, Indoor Air Quality Committee,\* and Drinking Water Committee), environmental effects (Ecological Processes and Effects Committee and Environmental Health Committee), analytical issues (Environmental Engineering Committee, Research Strategies Advisory Committee, Clean Air Act Compliance Analysis Council,\* and Environmental Economics Advisory Committee). [Asterisked committees are mandated in separate statutes.] See *FY 1992 Staff Director's Final Report*, pp. 9-10.

15. *Ibid.*, p. 2 (Fiscal Year 1992 Budget).

# REG 09: IMPROVE AGENCY AND CONGRESSIONAL RELATIONSHIPS



## BACKGROUND

**M**uch of what an agency can or cannot do to solve a problem is dependent on the legislation that Congress passes requiring or authorizing an agency to take action. Agencies often complain that statutory constraints imposed by Congress are major impediments to more efficient, effective, and sensible regulation.

Legislation that is overly restrictive, too detailed, or poorly conceived or drafted leads to a number of problems. It can force agencies to spend resources on minor or nonexistent problems while major problems remain unaddressed. It is normally the agency that is blamed for issuing "bad" regulations—the agency's defense that Congress gave the agency no choice may not be heard.<sup>1</sup> "Bad" regulations gradually destroy the credibility of the agency and are likely to make even its good regulations less acceptable.

Problematic legislation comes in a variety of forms. First, legislation may require an agency to issue regulations that do not solve a problem and, therefore, do not benefit society at large. For example, the Surface Transportation Assistance Act of 1982 required the Secretary of Transportation to issue regulations requiring "splash and spray suppression devices" (fancy mud flaps) on

trucks to decrease the amount of spray from trucks that could hinder visibility for car drivers.<sup>2</sup> The Department of Transportation's (DOT) testing determined that the fancy mud flaps decreased the amount of spray on car windshields to such a slight degree that it did not improve the car driver's visibility and, thus, had no safety benefits. DOT, however, had no alternative other than requiring fancy mud flaps or seeking a statutory change.<sup>3</sup>

Second, overly restrictive legislation does not allow agencies to change regulations as circumstances change. For example, Congress may require a regulatory scheme based on a particular assumption of cause and effect. If further research shows that assumption to be false, the agency may not be allowed to change its approach accordingly and may impose unnecessary costs on the economy.

Third, legislation that requires command-and-control or overly detailed regulation may be preventing the agency from using or developing an innovative approach that would be more effective or efficient.

Fourth, legislation may impose unrealistic (if not outright impossible) deadlines, which either make the agency look bad when the deadlines are not met or may preclude the agency from doing the necessary background work for the rule.<sup>4</sup> In 1990, the General Accounting Office studied three

statutes that required the Department of Education to issue 83 regulations in 240 days. The sheer volume and complexity of the legal and policy issues involved made it virtually impossible for the Department to issue the regulations within the statutory timeframe.<sup>5</sup>

Fifth, legislation may have unintended consequences. For example, a statute might inadvertently preclude the most common device for meeting a statutory goal by setting requirements that the device cannot meet.

### NEED FOR CHANGE

Legislation that is overly restrictive, too detailed, or poorly conceived or drafted results from a variety of circumstances, some of which are not unique to the regulatory process—distrust between the executive and legislative branches, lack of congressional technical expertise, congressional failure to understand the difficulties in implementing a regulatory program, and lack of common understanding of complex issues between the legislative and executive branches. This general problem as it relates to regulatory problems is briefly discussed here. A more comprehensive discussion of relations between the executive and legislative branches and recommendations for improving them is contained in the National Performance Review Accompanying Report *Creating Quality Leadership and Management*.<sup>6</sup>

Distrust between executive and legislative branches is one of the major reasons for legislation that is overly restrictive, too detailed or poorly conceived or drafted. Some tension in the relationship between Congress and the executive branch is inherent in our system (especially when two branches are controlled by different political parties). Agencies should perceive Congress as an entity that imposes constraints on the executive. That is a result of the checks and balances established in the Constitution.

Nonetheless, the tension between the executive branch and Congress has risen too high.<sup>7</sup> A panel of the National Academy of

Public Administration recently concluded that, "[t]he outright confrontation and increasingly competitive relationship between the two branches has a high cost: a political system more and more unresponsive to national problems and unaccountable to the American people for addressing those problems."<sup>8</sup> It is time to find a better balance.

Congressional distrust of agencies affects legislation in a variety of ways. In the past decade, Congress was motivated to write overly prescriptive legislation because it feared that an administration that disagreed with congressional policies and goals would substitute administration policy for congressional policy when statutes were ambiguous or flexible.<sup>9</sup> Congressional concerns about agencies' inability to issue regulations in a timely fashion, exacerbated by the perception that the Office of Management and Budget (OMB) was holding up agency rules, resulted in Congress imposing statutory deadlines with "hammers" (like that for the food labeling rule) that would impose rigid statutory obligations on private parties if the deadlines were not met.<sup>10</sup>

Some problems in legislation also result from a lack of understanding about how agencies work, emerging issues, or the arcane details of existing programs. Very few Members or Hill staffers have worked in agencies or appreciate the complexities of implementing the statutes they write. Agencies have expertise that Congress lacks in specific fields and about the details of existing programs. Although many Members and Hill staffers become quite knowledgeable about programs they oversee, when new issues or scientific breakthroughs occur, Congress and the administration (as well as federal judges) often lack a common understanding of the problems and emerging issues (including an understanding of where the experts disagree).<sup>11</sup>

When the administration supports legislation, agency staff provide technical expertise and drafting advice to Congress. This help can be very useful to Congress and, thus, to the agency. It sometimes comes

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then be cleared by an appropriate senior agency official (or officials). Given the time-sensitive nature of the legislative process and the fact that policy clearance is not needed, the number of levels of clearance should be very limited.

- Requests for statutory language and responses containing such language will be in writing.
- Upon providing the response, the agency shall instruct the congressional committee to disclaim that technical drafting services indicate administration support.

### Cross-references to Other NPR Accompanying Reports

*Rethinking Program Design*, DES01: Activate Program Design as a Formal Discipline.

*Creating Quality Leadership and Management*, QUAL04: Improve Legislative-Executive Branch Relations.

### Endnotes

1. For example, President Bush faced a very difficult political problem in the summer and fall of 1992. The National Corn Growers Association and the ethanol industry claimed that a rule proposed by the Environmental Protection Agency (EPA) would preclude ethanol mixed with gasoline from meeting a federally ordered program requiring cleaner-burning reformulated gasoline. They wanted EPA to allow a special waiver for gasoline mixed with ethanol. The fact that the Clean Air Act did not allow EPA to grant the requested waiver did not stop this political pressure, nor did it stop a Sense of the Senate resolution [Congressional Record, Senate (September 8, 1992), p. S12893] that criticized the Bush Administration's proposed rule. Rosewicz, Barbara, "Big Ethanol Problem for Bush Prompts White House to Mull Special Concessions," *The Wall Street Journal* (September 8, 1992), p. A3; Babcock, Charles R., "Bush's Sidestep on Ethanol's Fueling Dispute," *The Washington Post* (September 28, 1992), p. A3.
2. § 414 of Pub.L. 97-424, 49 U.S.C. App. § 2314 (1988).
3. The Department of Transportation (DOT) eventually succeeded in getting this requirement modified (Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub.L. 100-1 § 205). Seeking repeal or modification of problematic statutory requirements can be a difficult task, particularly where the requirements are part of a statute that required a great deal of political compromise to pass initially.
4. Administrative Conference of the U.S., Recommendation 78-3, "Time Limits on Agency Actions," 1 C.F.R. §305.78-3.
5. U.S. General Accounting Office, *Education Regulations: Reasons for Delays in Issuance*, GAO/HRD-91-4BR

(Washington, D.C.: U.S. General Accounting Office, November 15, 1990), pp. 1-2.

6. See "QUAL04: Improve Legislative-Executive Branch Relations," NPR Accompanying Report, *Creating Quality Leadership and Management* (Washington, D.C.: U.S. Government Printing Office).

7. Broder, David S., "Hill's Micromanagement of Cabinet Blurs Separation of Powers," *Washington Post* (July 25, 1993), pp. A1, A16, A17.

8. A Panel of the National Academy of Public Administration, *Beyond Distrust: Building Bridges Between Congress and the Executive* (Washington, D.C., January 1992), pp. 2-3.

9. The motivation to grant agencies only very limited discretion may have been increased by the Supreme Court's decision in *Chevron USA, Inc. v. NRDC*, 467 U.S. 837 (1984), which said that a court would uphold an agency's reasonable interpretation of its statute if the statute was not clear on its face.

10. When Congress passed the *Nutritional Labeling and Education Act of 1990*, Pub. L. 101-535, it was "tired of what it regarded as the Food and Drug Administration (FDA) and White House foot-dragging on important regulations." Gladwell, Malcolm, "Interagency Fight Puts Overhaul of Food Label Rules on Bush's Plate," *Washington Post* (November 15, 1992), pp. A1, A24. The statute gave FDA one year to issue a proposed labeling rule and another year to finalize it. § 2(b)(1) of the Act. If the final rule deadline was missed, the "hammer" fell and FDA's proposed rule would become effective. § 2(b)(2) of the Act. When this occurred at the end of 1992, it caused confusion among the industry and the public, and even greater risk of litigation over the eventual final rule.

11. Carnegie Commission on Science, Technology, and Government, *Risk and the Environment: Improving Regulatory Decision Making* (Washington, D.C., June 1993), pp. 54-63.

12. Interview with House Government Affairs Committee Staff, June 8, 1993.

13. Telephone interview with James Michael Kelly, Associate General Counsel, Department of Agriculture, August 16, 1993.

14. Telephone interview with Owen Ambur, Chief, Office of Legislative Services, U.S. Fish and Wildlife Services, Department of the Interior, July 22, 1993; telephone interview with Stephen Shaffer, Chief, Congressional and Legislative Affairs, Minerals Management Services, Department of the Interior, July 22, 1993.

15. Telephone interviews with James Michael Kelly, Owen Ambur, and Stephen Shaffer, see *supra* notes 13 and 14.

# REG 10: PROVIDE BETTER TRAINING AND INCENTIVES FOR REGULATORS



## BACKGROUND

A regulatory system is only as good as the people implementing it. A well-trained and informed cadre of regulatory officials is crucial for an efficient, innovative regulatory system, that emphasizes choice of the appropriate regulatory approach. Inadequate training can result in errors, no matter how intelligent and well-meaning the officials may be. No current programs provide the training necessary to effect the needed major changes in the federal government's regulatory culture.<sup>1</sup> Proper training and performance incentives are needed to ensure that the agency officials involved in regulatory activities are as effective as possible.

As is well known, presidential appointees have widely diverse backgrounds and familiarity with the federal government. Many (but not all) are well-versed in their agency's substantive program, but few appointees can be expected to know, at the time of their appointment, the details of the arcane statutes and rules that govern the agency's rulemaking procedures.<sup>2</sup> Yet a lack of understanding of these rules can slow and possibly trip the most eager of new appointees. It is crucial that this blank slate be filled quickly since studies show that nearly half of all presidential appointees leave office within two years—hardly

enough time for them to develop a meaningful understanding on their own.<sup>3</sup>

There have been some attempts in the past to furnish training to presidential appointees. Based on a 1975 recommendation, the Administrative Conference of the U.S. (ACUS) provided a three-day seminar for commissioners of the independent regulatory agencies in 1977.<sup>4</sup> It covered a broad range of topics relating to regulation.<sup>5</sup> No such systematic programs have been held since. ACUS has also more recently provided shorter, day-long or half-day programs on various aspects of administrative law and procedure relevant to regulatory commissioners. A continuing, comprehensive approach is needed, however.

Some limited training opportunities do exist for career staff. The Legal Education Institute (LEI) within the Department of Justice's Office of Legal Education presents courses for government lawyers. The Federal Executive Institute provides management training for the Senior Executive Service (SES), and some federal officials have attended courses at the Kennedy School of Government at Harvard University. A few outside firms also provide training courses. These opportunities are limited, both in number and in scope, and fall short of ensuring that all relevant personnel are familiar with the pertinent laws and processes.

Career regulators and Hill staff often lack

## RECOMMENDATIONS AND ACTIONS

a broad perspective about the regulatory process because career paths are often confined to one agency. Rotational assignments among agencies in the executive branch and among the branches are not common. Although some programs accomplish some of these goals for entry level officials, such as the two-year Presidential Management Intern program, there are no established inter-agency or inter-branch career paths for regulatory professionals.<sup>6</sup> Such officials do not have any real incentive to seek rotational assignments, since it is the person's "home-base" agency that continues to conduct performance appraisals and absence is not likely to "make the heart grow fonder." Members of the SES also theoretically have this opportunity but they are often in such high-level positions that there is little incentive for them to seek or be permitted to accept rotational assignments.

### NEED FOR CHANGE

Despite the increasing complexity of the regulatory process, little or no relevant training is currently available for regulatory officials. High-level policymakers, particularly those who are Presidential appointees, are often provided no training or background in the laws and processes they must follow, and career staff have access only to limited, and often inadequate, training opportunities.

The lack of training for presidential appointees is all the more glaring given the availability of intensive orientation to members of Congress and the federal judges.<sup>7</sup> Indeed, a survey by the National Academy of Public Administration (NAPA) reported that 79 percent of presidential appointees received no orientation of any kind.<sup>8</sup> As NAPA has concluded:

*It is hard to imagine that anyone could regard this disinterest in the orientation of new presidential appointees as a sound way to run the federal government. We believe the historical absence of such programs is a matter of great concern, a*

*problem that should be permanently corrected."*

With respect to career regulatory staffs, the situation is only somewhat better. Training for non-lawyer career staff is hit-and-miss. The Legal Education Institute (LEI) does an excellent job of training agency lawyers on a variety of issues, a number of which relate to agency rulemaking and regulation. These courses have typically been one-day courses held in Washington, D.C. About 95 percent of the roughly 4,000 LEI attendees in 1991 were from Washington, D.C.<sup>10</sup> Rather than having its own paid teaching staff, the institute typically relies on professionals from throughout the government to volunteer to teach courses in their areas of expertise.

Unfortunately, recent Department of Justice appropriations legislation required the Institute to be moved to Columbia, South Carolina, as part of a move of the entire Office of Legal Education.<sup>11</sup> As a result, it is expected that either attendance by agency staff lawyers will drop significantly or training costs will rise significantly to cover the increased travel costs to send personnel to South Carolina (as opposed to across town).<sup>12</sup> Moreover, LEI's travel expenses for faculty would increase, since almost 95 percent of the faculty were from Washington, D.C., and it is unlikely that as much of the necessary administrative law and regulatory expertise would be locally available in South Carolina.

In addition to training, a broad outlook on regulatory issues and first-hand awareness of a variety of perspectives can be extremely useful in developing regulatory programs. Providing select mid-level career staff an opportunity to spend time at different agencies, on Capitol Hill, at the Office of Management and Budget (OMB), and/or in the judicial branch would provide those people and their agencies with extremely useful expertise for effective implementation of regulatory programs. They would discover how other agencies approach similar problems, what Congress' perspectives are, how the judiciary looks at

## REG 10: PROVIDE BETTER TRAINING AND INCENTIVES FOR REGULATORS

regulatory issues as they come before the courts, and how OMB approaches problems of regulation. In addition, the quality of communication and coordination among agencies, Congress, and OMB might be improved through increased and ongoing contact. Also, the Office of Information and Regulatory Affairs (OIRA), as a centralized locus for regulatory review, could be a place to train agency staff. Agency staff could learn not only what Presidential review entails and the technical skills involved in regulatory analysis, but also how other agencies address various regulatory problems.

The need for this type of rotation has been increasingly recognized. Judge Stephen Breyer, in his new book on improving risk regulation, called for a "circulating career path" for "(eventual) high level executives," modeled on France's Conseil d'Etat.<sup>13</sup> As Judge Breyer visualized it, an OMB "special group" could be created with a special civil service career path leading through agencies, congressional committee staffs, back to OMB, with possible presidential appointments for the most successful members. Such a concept would not only augment OMB (especially OIRA's capabilities), it would "seed" the government with experts in broader regulatory issues.

### ACTIONS

#### *1. Establish a basic training program for Presidential appointees to regulatory agencies. (2)*

The President should direct political appointees to regulatory agencies to attend a comprehensive training program on the issues and processes involved in regulatory development. The President should direct ACUS, which has expertise in the administrative adjudication and rulemaking processes and access to experts across the federal government and academia, to establish such an ongoing training program for presidential appointees. Among the topics that should be included in the

curriculum are:

- role and organizations of regulatory agencies,
- personnel management,
- alternative regulatory approaches,
- the budget process,
- program evaluation,
- policy formation and the rulemaking process,
- the Administrative Procedure Act and various other applicable statutes and executive orders,
- the relationship between agency rulemaking and settlement,
- the relationship between regulatory agencies, the White House and OMB,
- cost-benefit analysis use (but not abuse),
- judicial review,
- relationships with the public, the press, and the state and local governments,
- regulatory reform, and
- alternative dispute resolution.<sup>14</sup>

Faculty could include representatives from the White House, Congress, various federal agencies, the federal judiciary, OMB, academia, and industry. Training programs should ideally be held at a site outside of Washington and should last for at least three days. They should be organized on a periodic basis, most frequently in the first half of the administration as new appointees are nominated or confirmed.

#### *2. Move training programs for agency regulatory lawyers back to Washington, D.C., and expand to cover other career staff. (3)*

Legislation should be enacted to move the Legal Education Institute (LEI) back to Washington, D.C. LEI should be expanded to non-lawyer career staff. Moving LEI back would generate substantial cost savings, some of which could be used to expand the program.<sup>15</sup> Moreover, the administration should consider whether to incorporate LEI into ACUS, since a large portion of LEI's courses relate to various aspects of administrative law and process, which are ACUS's areas of expertise. In fact, ACUS

## RECOMMENDATIONS AND ACTIONS

currently coordinates several LEI courses. LEI's existing courses, supplemented with more focused ones on, for example, alternative dispute resolution techniques, could provide some of the necessary training for federal career regulatory officials.

### **3. Establish an "honors" rotation program for select mid-level career staffers. (1)**

As the Carnegie Commission recently recommended:

*The federal government should use its existing personnel authority to create opportunities for selected individuals to rotate in the early years of their career through environmental and risk-related regulatory agencies, Congress, the Executive Office of the President, and, in some instances, administrative offices of the Judiciary.*<sup>16</sup>

The Chair of the Regulatory Coordinating Group, in coordination with the Office of Personnel Management, should be charged by the President with developing an "honors" rotation program for select mid-level agency and congressional career staff involved in regulatory programs. In the meantime, key agencies with cross-government mandates like OIRA in OMB should develop, on their own, strategies for rotating and exchanging staff with regulatory agencies.

### **4. Reward innovative regulators. (1)**

The heads of regulatory agencies should ensure that achievements by federal officials in performing regulatory functions are rewarded, through performance appraisals, bonus systems, and awards. Performance appraisals and bonus systems within agencies should recognize achievements in innovative, consensus-based, and effective regulation.

### **Cross-references to Other NPR Accompanying Reports**

*Reinventing Human Resource Management*, HRM04:

Authorize Agencies to Develop Incentive Award and Bonus Systems to Improve Individual and Organizational Performance; and HRM11: Strengthen the Senior Executive Service so that It

Becomes a Key Element in the Governmentwide Culture Change Effort.

*Creating Quality Leadership and Management*, QUAL02: Improve Government Performance Through Strategic and Quality Management; and QUAL03: Strengthen the Corps of Senior Leaders.

*Streamlining Management Control*, SMC04: Increase the Effectiveness of Offices of General Counsel.

## Endnotes

1. See generally Adler, Robert S., Stephen H. Klitzman, and Richard A. Mann, "Shaping Up Federal Agencies: A Basic Training Program for Regulators," *Journal of Law & Politics*, vol. VI, no. 2 (Winter 1990) [hereinafter "Shaping Up Federal Agencies"].
2. For a description of 18 such statutes, see Administrative Conference of the U.S., *Federal Administrative Procedure Sourcebook*, 2nd ed. (Washington, D.C., 1992).
3. National Academy of Public Administration (NAPA), "Leadership in Jeopardy: The Fraying of the Presidential Appointment System," November 1985, pp. 4-5, as cited in "Shaping Up Federal Agencies," supra note 1, p. 351.
4. Administrative Conference of the U.S., "Statement on Strengthening Regulatory Agency Management Through Seminars For Agency Officials" (adopted June 5-6, 1975), 1 C.F.R. § 310.4 (1988 ed.).
5. Discussions with officials of ACUS. The program was discussed in "Shaping Up Federal Agencies," supra note 1, pp. 360-364.
6. See discussion in Carnegie Commission on Science, Technology, and Government (Carnegie Commission), *Risk and the Environment: Improving Regulatory Decision Making* (Washington, D.C., June 1993), pp. 94-95.
7. In this environment, regulatory appointees need and should be provided an orientation, as early as possible, in the basics of administrative law. Newly elected Congressmen are offered intensive orientation courses by the congressional leadership, by outside seminars at Harvard's John F. Kennedy School of Government or by other non-governmental organizations (NGOs). Newly appointed federal judges have similar offerings available to them at the National Judicial College (located at the University of Nevada - Reno) and by the Federal Judicial Center. Even career civil servants have at least some opportunities for intensive training (at OPM's Federal Executive Institute and the USDA Graduate School, or the Harvard JFK School). Presidential appointees, ironically, are the only major regulatory actors who do not receive orientation and basic training.
8. NAPA, p. 20, as cited by "Shaping up Federal Agencies," supra note 1, p. 364.
9. Ibid.
10. Information is provided in unpublished data sheet prepared by Legal Education Institute (LEI).
11. See H.R. 2608, 102d Cong., 1st Sess., p. 14. The Office consists of LEI and the much larger Attorney General's Advocacy Institute (AGAI) which trains assistant U.S. Attorneys drawn from all over the country. In 1991, LEI had 9 employees and an annual budget of \$1.5 million while AGAI had 14 employees and a budget of \$9 million. While an argument can be made for relocating AGAI, moving LEI was perhaps inadvertent. Because AGAI and



## Appendix A: DESCRIPTION OF THE EXECUTIVE ORDER ON REGULATORY REFORM

**O**n January 21, 1993, President Clinton abolished the Council on Competitiveness and soon thereafter asked the Vice President to prepare recommendations for a new process of regulatory review. The Vice President convened an informal working group to develop such recommendations. The President will soon issue a new executive order to implement the needed reforms recommended by the Vice President.

President Clinton's plan to reform the regulatory review process is firmly rooted in his commitment to make government more efficient and responsive, relieve businesses of unnecessary regulatory burdens, and end special access for special interests.

The executive order on regulatory planning and review will create a process that guarantees that government regulates only when necessary, and that when it does so, it regulates cost-effectively, openly, and fairly. It also will ensure that all agencies of the federal government participate in a reexamination, across agencies, of the overall regulatory scheme currently in place to eliminate any unnecessary regulatory burden.

### PUTTING PEOPLE FIRST

The President's plan provides a regulatory process that works for the American people,

not against them—one fundamentally dedicated to improving their health, safety, environment, and well-being while encouraging economic growth and job creation. It is aimed at producing regulations that are effective, consistent, and understandable.

### REGULATING ONLY WHEN NECESSARY

The process created by the executive order sets forth principles that ensure that agencies regulate only when necessary. It makes clear that alternatives, such as market incentives, are preferable to command-and-control regulations. A regulatory working group of representatives from agencies with major domestic regulatory responsibility will meet regularly to consider new, creative, and more effective alternatives and approaches to regulating.

When regulations are necessary, the order will ensure that they are designed and implemented in the most cost-effective manner, so as to maximize benefits to society and to place the smallest possible burden on those being regulated. This process imposes a sensible, balanced definition of costs and benefits to ensure a realistic assessment of impacts on the economy, the environment, and public health and safety.

## **SENSIBLE PLANNING**

The executive order creates an enhanced planning process that starts before rules are formally initiated. This process will provide early guidance about administration priorities, thus minimizing conflicts and inconsistent regulatory activities among agencies. Agencies will set priorities and assemble annual regulatory plans, thereby improving their own internal planning, and ensure that other agencies and the public are informed of their activities.

## **REVIEWING NEW REGULATIONS**

This executive order recognizes the primacy of agencies in the regulatory process. It also makes clear that the Office of Information and Regulatory Affairs (OIRA), within the Office of Management and Budget, will be the day-to-day entity responsible for necessary centralized review.

The centralized review process will be improved by selectively reviewing regulations. Under the review process, OIRA will review significant regulations—not every regulation. Its review will be more useful and realistic because it will be focused on the overall regulatory picture and will consider a broad definition of costs and benefits. And its review will be timely—driven by clear and appropriate time limits on review that will prevent interminable delays.

There also will be a clear process for resolving the rare regulatory disputes that develop between agencies or between OMB and an agency. Such disputes will be reviewed by the President only at the request of an agency head or the Office of Management and Budget. The Vice President, aided by appropriate White House policy advisors, will advise the President in resolving these disputes.

## **REVIEWING EXISTING REGULATIONS**

Too often, cumulative and unnecessary

regulatory burdens hamper economic growth and job creation. In order to ease such adverse effects on U.S. citizens and the economy, a process will be established to conduct an ongoing review of existing regulations or groups of regulations. Those regulations that are cumulative, obsolete, duplicative, or inconsistent will be identified for reconsideration and revision or elimination.

This process is carefully structured to be meaningful and to get results. The agencies will be asked to prepare a specific program for ongoing review of existing significant regulations and legislation that requires regulations that should be reviewed. In addition, the Vice President, in consultation with the White House advisors, will conduct reviews of existing regulations with a cross-agency perspective, and may identify regulations to the agency for review.

## **ENHANCED ACCOUNTABILITY**

The executive order also will enhance government accountability in a number of ways. It will clearly delineate the responsibilities of the various entities involved in the regulatory review process. The OIRA review process will be conducted in the “sunshine.”

The order requires public disclosure of OIRA meetings with, or information received from, outside parties. It also ensures that the public knows of the status of all pending regulations and changes made to regulations during the OIRA review process.

The process created by the new order also will end the “back door” special interest access to the review process. The order makes clear that the President’s and Vice President’s roles in the review process is limited to (1) providing leadership, (2) assisting in planning, and (3) resolving disputes. They will not act on behalf of, or be the conduit for, special interests or any private parties.

# Appendix B: SUMMARY OF ACTIONS BY IMPLEMENTATION CATEGORY



## (1) Agency heads can do alone:

- REG02.2 Develop a *Deskbook on Regulatory Design*.
- REG03.1 Increase use of negotiated rulemaking.
- REG04.2 Enhance public awareness and evaluation of programs.
- REG05.1 Streamline internal agency rulemaking procedures.
- REG05.2 Use "direct final" rulemaking to reduce needless double review of noncontroversial rules.
- REG05.3 Develop specifications for rulemaking petitions.
- REG07.1 Rank the seriousness of environmental, health, or safety risks.
- REG07.2 Develop long-range future plans and anticipatory approaches to regulatory problems.
- REG08.1 Create science advisory boards.
- REG09.1 Establish technical drafting services for congressional committees and subcommittees.
- REG10.3 Establish an "honors" rotation program for select mid-level career staffers.
- REG10.4 Reward innovative regulators.

## (2) President, Executive Office of the President, or the Office of Management and Budget can do:

- REG01.1 Create an interagency Regulatory Coordinating Group to share information and coordinate approaches to regulatory issues.
- REG02.1 Establish use of innovative approaches as administration policy.
- REG04.1 Increase public participation during the rulemaking process.
- REG06.1 Increase use of alternative means of dispute resolution.
- REG10.1 Establish a basic training program for Presidential appointees to regulatory agencies.

## (3) Requires legislative action:

- REG10.2 Move training programs for agency regulatory lawyers back to Washington, D.C., and expand to cover other career staff.

## (4) Good idea, but will require additional work, or may be better suited for future action:

- REG04.3 Increase use of information technology.
- REG05.4 Evaluate and draft proposed legislative changes to speed the rulemaking process.



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# **Regulatory Reinvention at the U.S. Department of Education**

*ED's Mission: To ensure equal  
access to education and to  
promote educational excellence  
throughout the nation.*

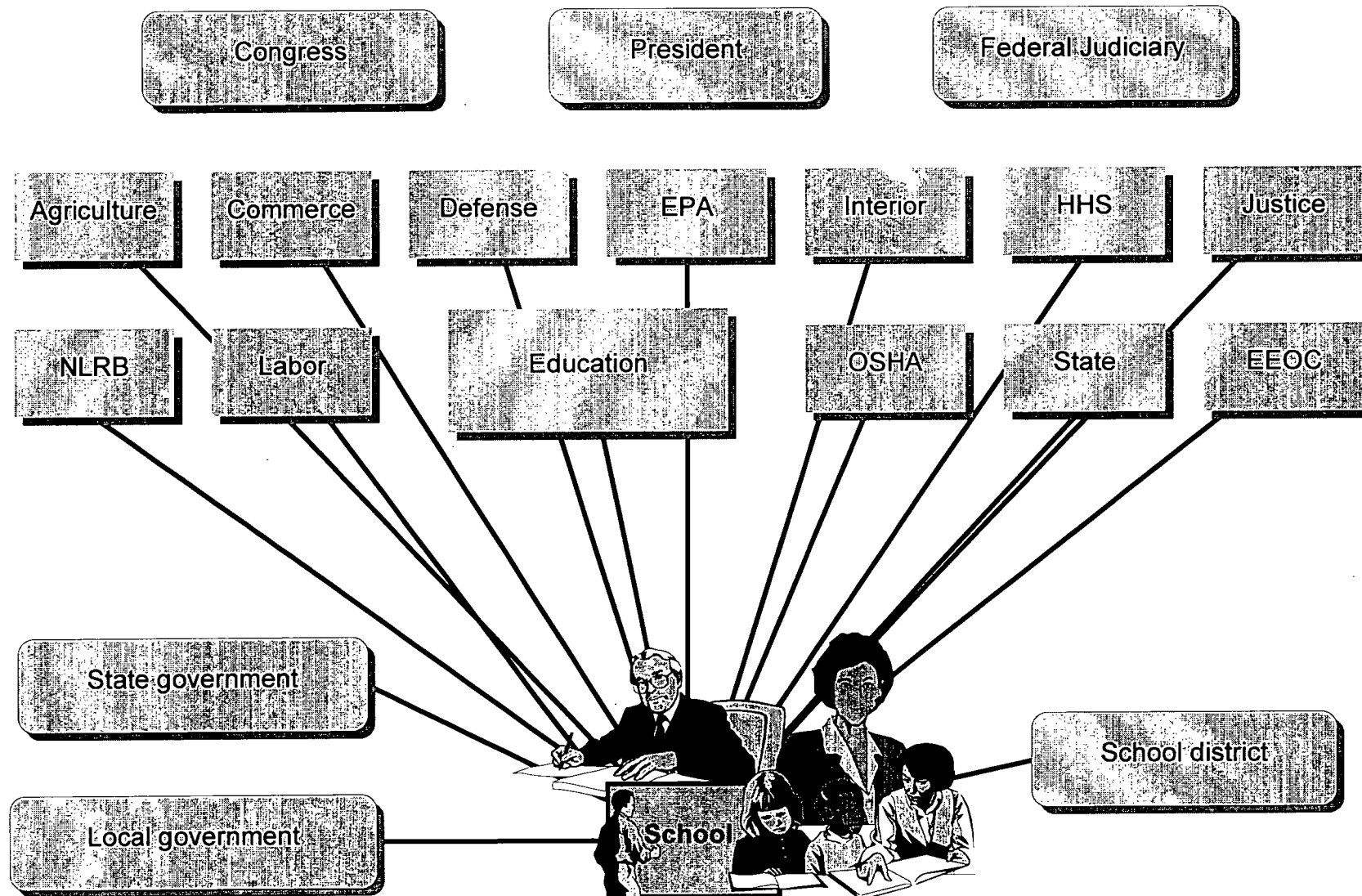


# Reinvention values for ED

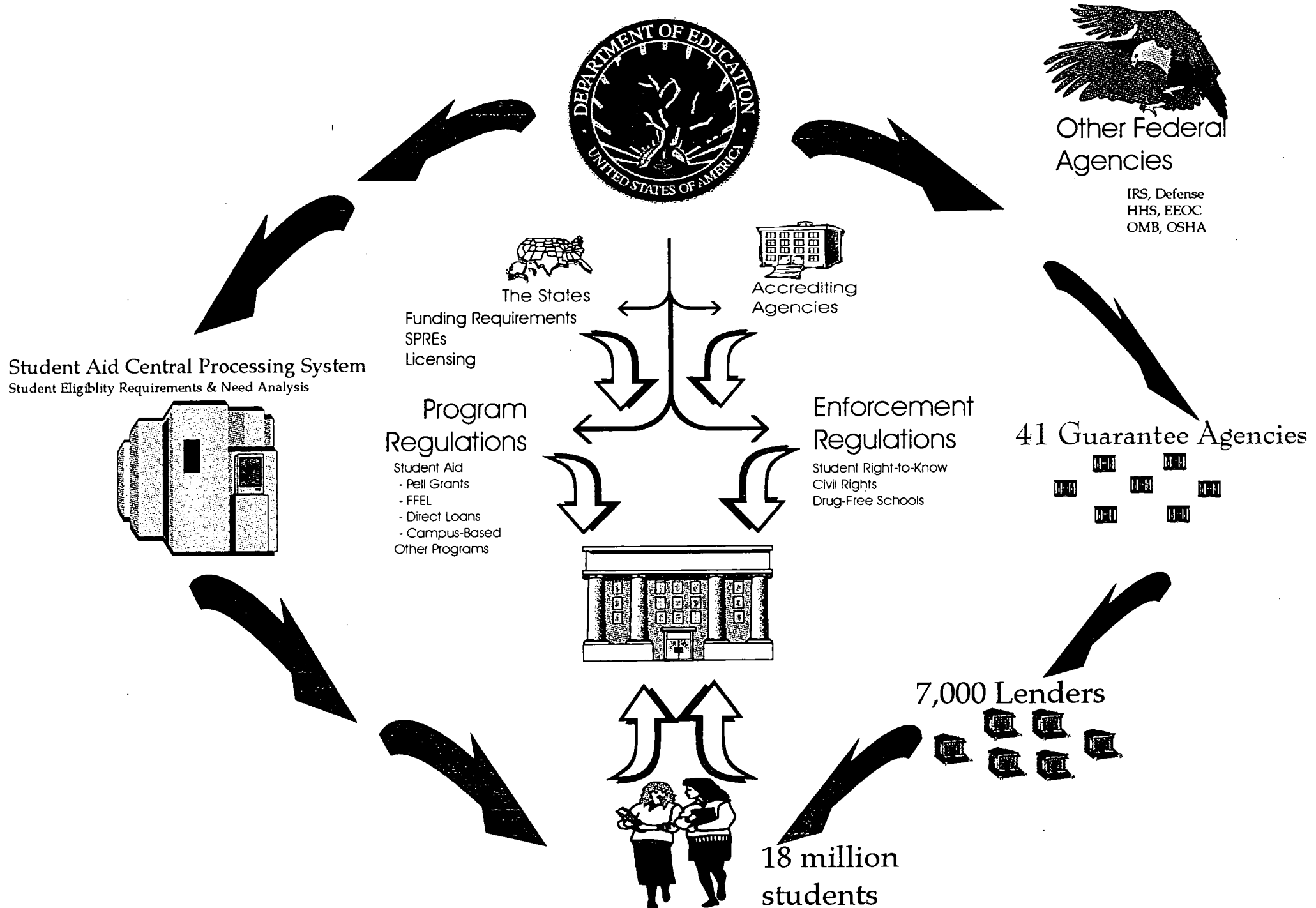
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- Partnership
- Flexibility
- Accountability
- Achievement of high standards

# The School's View of Regulatory Burden



# University View of Federal Regulations





# ED's principles for regulating

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***The Department of Education will regulate only when it improves the quality and equality of services to its customers—learners of all ages. ED will regulate only when absolutely necessary, and then in the most flexible, most equitable, and least burdensome way possible.***

## ***Whether to regulate:***

- When essential to promote quality and equality of opportunity in education.
- When a demonstrated problem exists and cannot be resolved without regulation.
- When entities or situations to be regulated are so diverse that a uniform approach does more harm than good.
- When necessary to provide legally binding interpretation to resolve ambiguity.

## ***How to regulate:***

- Regulate no more than necessary.
- Minimize burden and promote multiple approaches to meeting statutory requirements.
- Encourage federally-funded activities to be integrated with state and local reform activities.
- Ensure that benefits justify costs of regulation.
- Establish performance objectives rather than specify compliance behavior.
- Encourage flexibility so institutional forces and incentives achieve desired results.



# Making reinvention real

The Department of Education is:

1. **Eliminating obsolete and unnecessary regulations:**
  - a. Eliminating 25 percent of grant regulations in FY 1996.
  - b. Eliminating an additional 25 percent of grant regulations in FY 1997.
  - c. Reducing the number of discretionary grant priorities by 50 in FY 1996.
2. **"Scouring" regulations for excessive prescription and burden:**
  - a. Publishing popular burden reductions for families and schools. For example, in our fall 1994 student aid rules, we:
    - Used a performance-based approach tying schools' cash reserve requirement to refund track record.
    - Provided greater flexibility in cash management and award tolerance rules.
  - b. Scrutinizing regulations for Rehabilitation Services' relationships with state agencies, cash management rules, and all rules under Improving America's Schools Act.
3. **Improving ED's regulatory development process to make it customer responsive:**
  - a. Using Internet for comments on every proposed rule and for electronic dialogue on Direct Loan regulations.
  - b. Conducting voluntary and statutory "reg negs."
  - c. Holding numerous regional meetings on regulations (1994: elementary and secondary, bilingual, and special education, and student aid).
  - d. Secured statutory changes recommended by NPR-I to increase rulemaking flexibility and expedite grants to customers.
4. **Carrying reinvention into customer service and compliance:**
  - a. Providing Direct Loan schools with intensive customer support, training, and service.
  - b. Initiating the "Achieving Reform through Monitoring" (ARM) project integrating on-site reviews across programs to foster coordination and increase efficiency.
  - c. Considering a "one-step settlement" proposal for flexible handling of compliance findings under old programs to clear the slate, improve state/federal coordination, and streamline auditing.



# Need for regulation: "mini," "semi," "maxi"

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The amount of regulatory control necessary varies widely for ED statutes and programs, based on such factors as:

- duration of the federal role
- amount of federal funds at stake
- number of parties involved
- involvement of private organizations that are not accountable to the public
- the number of transactions likely
- potential for fraud or financial misdoing
- the program's focus
- appropriateness of other forms of oversight
- extent to which non-compliance by intermediate institutions would harm program beneficiaries
- the level of Congressional interest.

***"Mini" regulation:*** Goals 2000 and School to Work

***"Semi" regulation:*** Elementary and Secondary Education Act

***"Maxi" regulation:*** Student financial assistance gatekeeping



# A new framework for ED's reinvention

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## Two themes:

1. ***Flexibility***. Ensure that regulations and statutes provide maximum flexibility to support state and community education reform.
2. ***Performance incentives***. Support institutional performance, maintain the integrity of our programs for the benefit of the ultimate customer—the student, and use market principles rather than government controls.



## Flexibility under education statutes and regulations

- ***Waivers under Goals 2000, Improving America's Schools Act, and School to Work Opportunities Act***—Waivers are authorized for Elementary and Secondary Education Act and Carl D. Perkins Vocational and Applied Technology Act programs.
- ***Ed-Flex***—ED may delegate to six states (with approved Goals 2000 plans) the authority to grant waivers to themselves and school districts.
- ***Charter schools***—Waivers may be granted covering almost any statutory or regulatory requirement.
- ***Schoolwide programs under ESEA Title I***—No waiver is needed by qualifying local schools to combine most of their federal funds to support schoolwide reform and be free from most federal requirements.
- ***Consolidated plans for federal funds***—States and school districts may submit a single plan for most federal funds supporting elementary and secondary education programs. This consolidated plan eliminates the need for separate, overlapping plans.

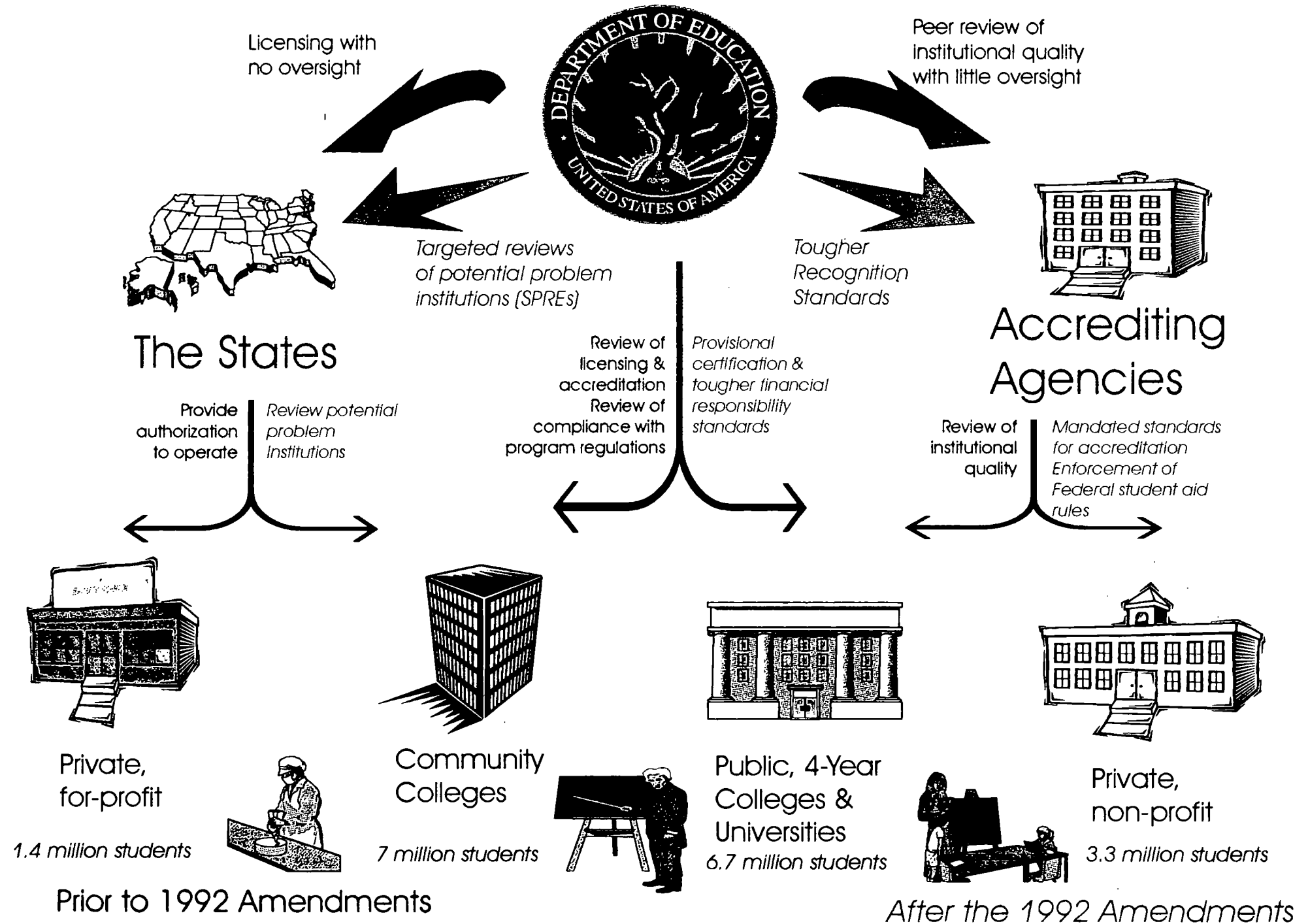


# New flexibility Initiatives

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1. Propose and develop plan to implement expansion of Ed-Flex statutory authority to all states.
2. Use Cabinet agency education group to coordinate and simplify state-level consolidated planning, funding applications, paperwork, and waivers across federal agencies.
3. Conduct customer-focused evaluations of ED flexibility initiatives and use results to improve and simplify statutory requirements.
4. Work with other federal, state, and private agencies and organizations to provide on-line electronic access to federal program information for education customers (e.g., superintendents).
5. Explore continuum leading to performance partnerships.

# Gatekeeping & Oversight of Postsecondary Institutions





# New performance incentives initiatives

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1. Eliminate rules and burdens whenever possible.
2. Where regulations are essential, design performance standards to replace "how to" rules and distinguish among institutions, with top performers relieved of requirements and committed to results.
3. Waive statutory or regulatory requirements for institutions or consortia that propose to try alternatives to existing rules and evaluate them, using statutory "experimental sites" authority.
4. Explore the potential for schools to collaborate to improve institutional performance, joining in groups (i.e., "bubbles") to develop, for example, monitoring systems, job placement projects, and student aid management training.

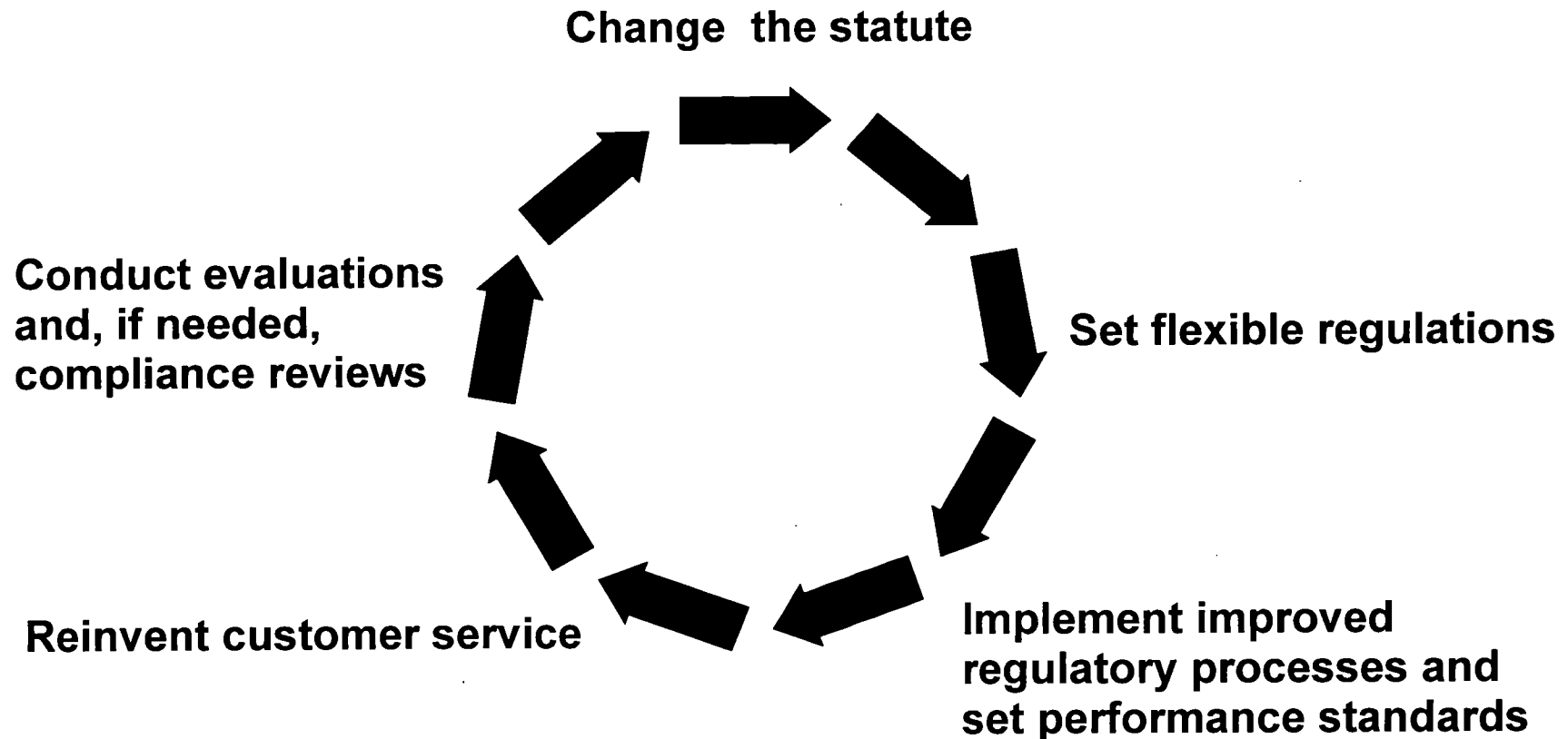


## Tensions and challenges in regulatory reinvention

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1. ***Flexibility/inertia bind.*** Flexibility can result in inertia—states and localities just do what they did before and don't take advantage of flexibility.
2. ***Outside oversight versus efficiency.*** Trying to respond to Congress' and the media's zero tolerance for error can cost more than accepting some error.
3. ***Equity/burden dilemma.*** Ensuring equity can conflict with reducing burdens of record-keeping, reporting, inspections, and other forms of oversight.
4. ***Trust but verify.*** But who trusts first—ED or its customers?
5. ***Standards in a situation of uncertainty.*** Setting performance indicators can be hard—education results are unpredictable.
6. ***Compliance versus turning off funds.*** Enforcing legal requirements with intermediate customers, such as states, can result in terminating services to innocent ultimate customers—students.
7. ***Participation and clarity versus words and pages.*** Involving customers in regulation development and making regulations and options clear may result in more words, not less.

# Transformation Cycle for Regulatory Reinvention



THE WHITE HOUSE

WASHINGTON

March 4, 1995

MEMORANDUM FOR HEADS OF DEPARTMENTS AND AGENCIES

SUBJECT: Regulatory Reinvention Initiative

Last week, I announced this Administration's plans for further reform of the Federal regulatory system. This is a central part of reinventing our Government. All Americans want the benefits of effective regulation: clean water, safe workplaces, wholesome food, sound financial institutions. But, too often the rules are drafted with such detailed lists of dos and don'ts that the objectives they seek to achieve are undermined. Clear goals and cooperation would work better. Too often, businesses, especially small ones, face a profusion of overlapping and sometimes conflicting rules.

We have already made real progress in reforming regulation. This memorandum will build on the regulatory philosophy set forth in Executive Order No. 12866 of September 30, 1993, "Regulatory Planning and Review," which is premised on the recognition of the legitimate role of government to govern, but to do so in a focused, tailored, and sensible way.

In the year and a half since that order was signed, we have opened the rulemaking process to the public, we have increased cooperation and coordination among the Federal agencies, and we have seen good processes produce good decisions.

However, not all agencies have taken the steps necessary to implement regulatory reform. To reaffirm and implement the principles of Executive Order No. 12866, regulatory reform must be a top priority.

Accordingly, I direct you to focus on the following four steps, which are an integral part of our ongoing Regulatory Reform Initiative.

FIRST: CUT OBSOLETE REGULATIONS

I direct you to conduct a page-by-page review of all of your agency regulations now in force and eliminate or revise those that are outdated or otherwise in need of reform. Your review should include careful consideration of at least the following issues:

- o Is this regulation obsolete?
- o Could its intended goal be achieved in more efficient, less intrusive ways?
- o Are there better private sector alternatives, such as market mechanisms, that can better achieve the public good envisioned by the regulation?
- o Could private business, setting its own standards and being subject to public accountability, do the job as well?
- o Could the States or local governments do the job, making Federal regulation unnecessary?

This review should build on the work already being done by your agencies under section 5 of Executive Order No. 12866.

Your regulatory review task force should be headed by one of your appointees who should be given your full support and should, to the extent practicable, be freed of other duties.

I further direct you to deliver to me by June 1 a list of regulations that you plan to eliminate or modify with a copy of the report sent to Sally Katzen, Administrator of the Office of Information and Regulatory Affairs (OIRA). The list should distinguish between the regulations that can be modified or eliminated administratively and those that require legislative authority for modification or elimination.

SECOND: REWARD RESULTS, NOT RED TAPE

I direct you to change the way you measure the performance of both your agency and your frontline regulators so as to focus on results, not process and punishment. For example, Occupational Safety and Health Administration (OSHA) inspectors should not be evaluated by the number of citations they write, nor should officials of the Consumer Product Safety Commission be judged by the number of boxes of consumer goods that are detained in shipment. This change in measurement should involve a two-step process.

First, you should identify appropriate performance measures and prepare a draft in clear, understandable terms, of the results you are seeking to achieve through your regulatory program. The draft should be circulated to frontline regulators for review and comment. This is the same work needed to meet the requirements of the Government Performance and Results Act of 1993.

Second, you should evaluate and reward employees based on the realization of those measures/goals.

By no later than June 1, I direct you to (a) eliminate all internal personnel performance measures based on process (number of visits made, etc.) and punishment (number of violations found, amount of fines levied, etc.), and (b) provide to the National Performance Review (NPR) staff a catalogue of the changes that you are making in existing internal performance evaluations to reward employees. You should also provide material describing shifts in resource allocation from enforcement to compliance.

#### THIRD: GET OUT OF WASHINGTON AND CREATE GRASSROOTS PARTNERSHIPS

I direct you to promptly convene groups consisting of frontline regulators and the people affected by their regulations. These conversations should take place around the country -- at our cleanup sites, our factories, our ports.

I further direct you to submit a schedule of your planned meetings to the NPR staff by March 30 and work with NPR in following through on those meetings.

#### FOURTH: NEGOTIATE, DON'T DICTATE

It is time to move from a process where lawyers and bureaucrats write volumes of regulations to one where people work in partnership to issue sensible regulations that impose the least burden without sacrificing rational and necessary protections. In September 1993, I asked each of you to identify at least one rule that could be conducted through negotiated rulemaking (or to explain why such could not be done) in order to promote consensual rulemaking as opposed to the more traditional rulemaking that has dominated the regulatory arena.

I now direct you to expand substantially your efforts to promote consensual rulemaking. To this end, you should submit to OIRA, no later than March 30, a list of upcoming rulemakings that can be converted into negotiated rulemakings. I have directed Sally Katzen to review your lists with a view toward making clear to the regulated community that we want to work together productively on even the most difficult subjects.

To facilitate our ability to learn from those affected by regulation, I will amend Executive Order No. 12838 (which requires agencies to reduce the number of advisory committees that they use and to limit the future use of such committees) to allow for advisory committees established for negotiated rulemakings.

I also intend to take additional steps to increase our ability to learn from those affected by regulation. While many laws and rules that limit the ability of regulators to talk with those being regulated were imposed to curb abuse, they now often serve as a barrier to meaningful communication between the regulators and the regulated. To address this problem, and to promote consensus building and a less adversarial environment, I direct you to review all of your administrative *ex parte* rules and eliminate any that restrict communication prior to the publication of a proposed rule -- other than rules requiring the simple disclosure of the time, place, purpose, and participants of meetings (as in Executive Order No. 12866). We will also begin drafting legislation that will carve out exemptions to the Federal Advisory Committee Act to promote a better understanding of the issues, such as exemptions for meetings with State/local/tribal governments and with scientific or technical advisors.

I also ask you to think about other ways to promote better communication, consensus building, and a less adversarial environment. Please send your ideas to the Office of the Vice President.

As I said on Tuesday, February 21, 1995, you are to make regulatory reform a top priority. Good government demands it and your full cooperation is crucial.

William J. Clinton

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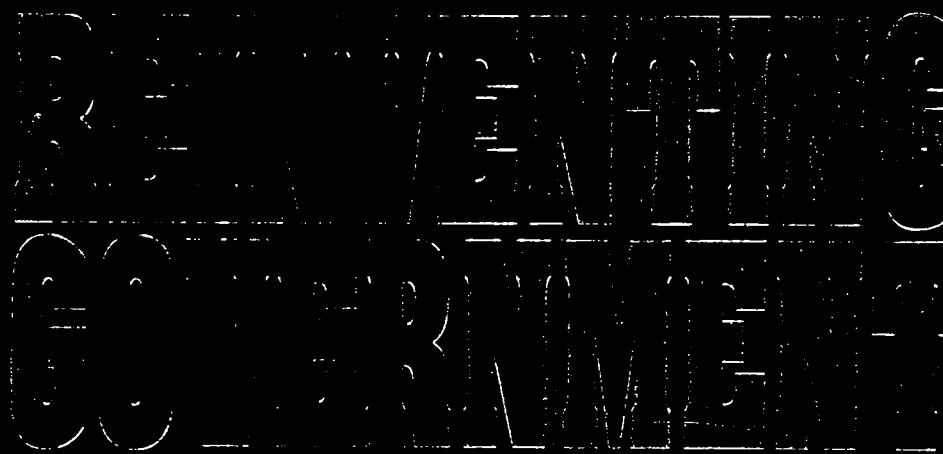


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REINVENTING GOVERNMENT



**HOW THE  
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 SPIRIT IS  
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variety of service delivery strategies in America's diverse and complex cities. Finally he announced, with great finality: "You cannot have each station master making up the railroad schedule! It's got to be centralized; somebody's got to control it."

In reality, of course, cities are not much like railroads. They don't have master schedules. They don't operate on one set of rails. They don't have one task. Cities are much more like markets: vast, complex aggregations of people and institutions, each constantly making decisions and each adjusting to the other's behavior based on the incentives and information available to them.

In a city, or state, or nation, managers cannot make up "the schedule" or "control" the decisions. They can manage administrative programs, which control specific activities. They could even manage a railroad. But to manage the entire polity, they must learn how to *steer*—as we stressed in chapter 1. And perhaps the most powerful method of steering is structuring the marketplace: creating incentives that move people in the direction the community wants to go, while letting them make most of the decisions themselves.

Think of the challenges facing our governments today: a health care system in crisis; an environment threatened as never before; a global economy in which American workers need dramatically better education and training throughout their careers; a changing family structure that makes quality child care virtually a necessity. Ask yourself if your governments have the capacity to solve these problems by raising taxes and spending more money. In today's fiscal and political climate, the answer is clear. Just as FDR's New Deal could not afford to build all the moderate-income housing Americans needed, our governments today cannot afford to supply all the health care, environmental protection, job training, and child care we need. The very thought is inconceivable.

If this is true, it means that government has no choice but to find a noncentralist approach. Our governments must consciously use their immense *leverage* to structure the market, so that millions of businesses and individuals have incentives to meet our health care, child care, job training, and environmen-

tal needs. Not surprisingly, this is precisely where they are heading:

- In health care, the debate about universal health care is really a debate about how to restructure the marketplace. No one recommends a British-style public health system, in which government administers the entire system and doctors and nurses are public employees.
- In environmental protection, the Clean Air Act of 1990 used a market mechanism known as emissions trading—a form of tax on pollution—to control acid rain. Environmental organizations have begun to advocate market-based regulatory strategies, such as "green taxes," and state governments have begun to pass them.
- In job training, several states are exploring variations of the Michigan Human Investment System. Rather than trying to fund more publicly administered job training programs, they are working to create functioning markets for job training, in which workers have the purchasing power and information they need.
- And in child care, when Congress passed its first major child-care bill, in 1990, the debate was between those who wanted Washington to fund day-care centers directly and those who wanted to use market mechanisms, like tax credits and vouchers, to give low-income families the power to make their own decisions. Needless to say, the latter view prevailed.

These trends have been spurred on by the collapse of communism in Eastern Europe, a development that has dramatized in living color the superiority of market systems over administrative systems. Since the fall of the Berlin Wall, market-oriented government seems almost to have been in the air. The trend has nothing to do with conservative calls to "leave it to the market," however. Structuring the market to achieve a public purpose is in fact the opposite of leaving matters to the "free market"—it is a form of *intervention* in the market.

(In reality, there is no such thing as a free market, if by that we mean a market free of government intervention. All legal markets are structured by rules, set down by governments. The only markets free of government regulation are black markets—and precisely because they operate outside government's authority, black markets are controlled through force and wracked by violence. Next time you hear someone condemn government and glorify the free market, ask him if he really means to hold the drug trade up as a model.)

Structuring the market is also the opposite of creating publicly administered bureaucracies to deliver services. It is a third way, an alternative to both the liberal call for administrative programs and the conservative call for government to stay out of the marketplace. It is a way of using public *leverage* to shape private decisions to achieve collective goals. It is a classic method of entrepreneurial governance: active government without bureaucratic government.

We are not saying that market mechanisms always work. Many collective goods provided by government, from parks to public safety, are not traded in markets. And many markets are deeply flawed. Government is often called on to act because a market has created severe social or economic problems. In the 1930s, government was called on because the market economy collapsed. Today government is called on because the market is moving us toward environmental catastrophe, while simultaneously leaving many of the poor and uneducated without jobs, homes, or hope. But as Franklin Roosevelt demonstrated 50 years ago, the most effective way to solve a problem generated by the market is often to *restructure* that market.

Market mechanisms have many advantages over administrative mechanisms. We have discussed some of them in previous chapters: markets are decentralized; they are (normally) competitive; they empower customers to make choices; and they link resources directly to results. Markets also respond quickly to rapid change. And as emphasized above, market restructuring allows government to achieve the *scale* necessary to solve serious problems. If a government can create incentives that affect millions of decisions made in the marketplace—rather

than affecting only those activities for which the government pays—it can multiply its impact a thousandfold.

The trend toward market-oriented government, like the collapse of communism in Eastern Europe, is a direct product of the information age. With information expanding at a geometric rate and change breathing down our necks, we need systems that process information quickly, that build in feedback loops, and that move information out to millions of individuals—in the form of price signals—so they can adjust as reality changes. A group of mandarins sitting atop a hierarchical empire can no longer make effective decisions for all of us; they simply cannot cope with the volume of information or decisions they must handle. But a market can.

Markets are to social and economic activity what computers are to information: using prices as their primary mechanism, they send and receive signals almost instantaneously, processing millions of inputs efficiently and allowing millions of people to make decisions for themselves. Consider our higher education system: millions of students (and their parents) sift through volumes of information, compare prices, and finally choose their preferred schools. The colleges and universities do the same with student records, references, and applications. And a match occurs. Would some kind of administrative mechanism—such as the assignment of students to the college nearest their home—work better?

## THE TROUBLE WITH GOVERNMENT BY PROGRAM

"When we think of 'government,' the word that automatically comes to mind is 'program,'" Philip Power and Jan Urban-Lurain wrote in Michigan's *Creating a Human Investment System*. "Ham and eggs: government and programs. We literally denominate government's workings in units of programs."

The word program of course covers much ground. Many "programs" are actually market mechanisms. But the vast majority are administrative mechanisms: monopolistic organizations,

normally of public employees, that spend appropriated money to deliver a service. When we speak of programs here, this is what we mean.

Unfortunately, administrative programs have a series of flaws, when compared to markets:

**Programs are driven by constituencies, not customers.** As Power and Urban-Lurain explain:

*Programs tend to be created in response to a constituency group-defined claim on resources, not in response to demand from individuals or labor markets. But mere membership in a constituency group does not entail one person's demand for something. As a result of this confusion, things—cash, goods, services—are regularly offered by programs to individuals who may not want or who are not prepared to use them effectively. The distribution of things provided by government responds to their supply, not to the demand for them by individuals.*

This is one reason why so many government programs, created with the best of intentions, fail so miserably to meet the real needs of those they are intended to help.

**Programs are driven by politics, not policy.** To create a program, political leaders must put together a coalition broad enough to pass a bill and fund an appropriation. Hence there is a constant pressure to make the program all things to all people. By the time a bill works its way through the legislative process, its original goals have often been watered down so far as to be meaningless, and it has often picked up a dozen other goals. Some may even be contradictory. One state development program had a goal of "new job creation" right alongside "the adoption of high technology means of production"—which often eliminates jobs.

**Programs create "turf," which public agencies then defend at all costs.** "We have all heard the cry of the bureaucratic jungle," says Philip Power: "My program; my money; my clients." Power and Urban-Lurain again hit the nail on the head:

*Agencies come to assume that if they are not sole service providers for a client population, they will lose program funding; if they lose their money, they lose staff positions; if they lose staff, they lose status; if they lose status, they lose future funding. Therefore, bureaucracies naturally tend to spend their time and attention building and defending turf, not in managing well.*

**Programs tend to create fragmented service delivery systems.**

As we explained in chapter 6, when legislatures add new programs year after year, each with its own perfectly logical rationale, the result is an unintended hodgepodge of old and new. People have to visit a dozen different offices and apply to a dozen different programs to get the services for which they qualify. Each one has its own rules, its own forms, its own hoops through which people must jump. The system is neither transparent, nor holistic, nor user friendly.

**Programs are not self-correcting.** When government programs fail, their managers are often the last people to know, because they don't measure results. Typically, they use numbers to promote their program, not to manage it. But markets are self-correcting. Institutions that sell goods or services in competitive markets know when they are failing, and their very survival depends on their ability to correct those failures. Since markets involve millions of independent decisions—and every participant is constantly reevaluating their decisions—markets tend to correct errors fairly rapidly.

**Programs rarely die.** Except in dire fiscal crisis, most programs keep chugging along, year after year. Many politicians and administrators have broken their picks trying to eliminate an obsolete program that still has a constituency. While the general public remains oblivious, the program's beneficiaries fight tooth and nail to protect it. The politicians win no friends but wind up with a determined group of enemies, who retaliate on election day.

**Programs rarely achieve the scale necessary to make a significant impact.** To get a program enacted, politicians often accept

appropriations they know are too low to do the job. Particularly if a program is successful, demand quickly outstrips funding. Head Start, long acclaimed as a success, still serves only a third of those eligible.

In a market, demand creates its own supply. Businesses selling in markets expand to meet whatever demand exists; government programs that receive appropriations through the political process do not. Few public organizations can grow by making money, so they ignore the search for new market niches, new services, and new customers. Even when they do get aggressive about meeting customer demand, they are often hamstrung by the legislative process. "If you've got a good new idea and the market for it is really large, you can't get to the market, because the political process controls your funding," says Peter Plastrik, former president of the Michigan Strategic Fund.

Plastrik and his colleagues in Michigan described administrative programs as "retailing," while they called market structuring "wholesaling." The Michigan Strategic Fund was designed to wholesale, by changing bank lending patterns and catalyzing the formation of new financial institutions. "Understanding that our \$100 million is peanuts if you look at just the \$16 billion of bank assets in the state alone," Plastrik said, "you quickly realize you can't buy success—you just can't do it. You don't have enough money." By wholesaling, the Strategic Fund leveraged success.

**Finally, programs normally use commands, not incentives.** Commands are sometimes necessary. But in today's world of knowledge workers and ever-expanding information, incentives are often more effective. This is particularly true when commands cannot be enforced, as is so often the case in public policy. Bureaucracies long ago refined the art of feigning compliance while ignoring commands they find disagreeable. Antony Jay and Jonathon Lynn captured this art brilliantly in their television satire for the British Broadcasting Company, "Yes, Minister." In one scene, a departmental minister tells his chief civil servant what he wants done, and the civil servant delivers an ambiguous answer. The minister presses, asking just what the civil servant meant:

Civil servant: *What I mean is that I am fully seized of your aims and, of course will do my utmost to see that they're put into practice. To that end, I recommend that we set up an interdepartmental committee with fairly broad terms of reference so that at the end of the day we'll be in a position to think through the various implications and arrive at a decision based on long-term considerations rather than rush prematurely into precipitate and possibly ill-conceived action which might well have unforeseen repercussions*

Departmental minister: *You mean no?*

Civil servant: *Yes.*

Harry Truman once made the same point while contemplating Dwight Eisenhower's ascension to the White House. Eisenhower had been commander of the Allied forces during World War II. He was accustomed to giving orders and having them obeyed. But now he would command a civilian bureaucracy. "He'll sit behind that big desk and say, 'Do this' and 'do that,'" Truman remarked. "And do you know what will happen? Nothing."

In 1961, President Kennedy ordered U.S. missiles out of Turkey. More than a year later, during the Cuban missile crisis, he was stunned by Khrushchev's offer to remove Soviet missiles from Cuba if we took our missiles out of Turkey. As it turned out, the State Department had undertaken leisurely consultations with our allies about the withdrawal, then finally put together a five-year plan for dismantling the missiles. In the military, this is known as the "slow roll."

The same thing happens constantly in education. When many states ordered their top-down reforms in the 1980s, most school districts quickly reported compliance. But reformers who went out in the field found a far different picture. Newly required courses were simply old courses relabeled; required "remedial" services were minimal; required tests were administered, but some teachers were virtually teaching the test before it was given. (Ralph Tyler, a professor of education at Stanford and a leader in his field for 50 years, says this happens all the time, all over the world.) To make matters worse, the commands

required teachers and principals to spend enormous amounts of time doing paperwork to document their supposed compliance. They created fierce resentment. As we saw in East Harlem and Minnesota, incentives work far better.

Even when commands can be enforced, they often create perverse side effects. When the courts ordered busing to desegregate the schools, for example, white families fled the urban public schools. Today school districts are increasingly using incentives, such as magnet schools and choice systems, to integrate their schools—with far greater success.

### HOW GOVERNMENTS ARE RESTRUCTURING THE MARKETPLACE

It may seem strange to argue that there are market-oriented alternatives to most administrative programs. But there are almost an infinite number of ways government can structure the market to achieve its ends. They are used all the time; many, like tax credits and user fees, are so common we barely notice them.

The six elements outlined in the box on the following page suggest six basic strategies to change the market. We have seen dozens of examples of virtually every one, already in use. Consider just a few of the highlights (for a discussion of market mechanisms not covered here, including procurement policy, public-private partnerships, loans, loan guarantees, and equity investments, see appendix A):

***Setting the Rules of the Marketplace.*** Governments have done this since the day government was invented. Zoning laws set the rules for real estate development. Securities laws set the rules for the stock markets. Even something as simple as the market for taxicabs is regulated by public laws.

Governments constantly change the rules of the marketplace to solve problems. Consider just one example: automobile insurance. As rates have pushed steadily upward, states have tried a variety of market reforms to hold them in check. Some, like Massachusetts, have used command-and-control mechanisms,

### WHAT IT TAKES TO MAKE A MARKET WORK

To critique programs is not to argue that markets are always better. Some markets are deeply flawed. When a small number of firms dominate a market, true competition often disappears. When customers do not have adequate information, they are often victimized. Profiteers have preyed upon the poor and uneducated throughout our history—from the days when snake oil salesmen sold bogus medicines to more recent scandals in which shady mortgage companies have taken advantage of poor homeowners.

To work effectively and fairly, markets require a number of elements, outlined below. When a government is considering a market mechanism to solve a problem, it should see if these six elements exist. When they do not, it is usually possible to restructure the market to provide the missing elements. If not, it may be better to stay with an administrative mechanism.

***Supply.*** There must be an adequate supply of the service—whether it is child care, home care for the elderly, low-income housing, or group homes for the mentally retarded. There should be enough suppliers to ensure competition.

***Demand.*** Customers must have enough purchasing power to buy the product or service, and they must have a desire to exercise that purchasing power. In the job training market, for instance, many individual customers cannot afford to buy training. Many corporations are not motivated to buy training, because they often lose their trained workers to competitors.

***Accessibility.*** Sellers must be easily accessible to buyers. Often this requires brokers, to carry out transactions. For example, buyers of stock do not meet sellers of stock; instead they use stockbrokers to make transactions. In services such as job training, brokers are rare. When they do exist, in the form of public programs, they are seldom visible or easily accessible to the public.

***Information.*** When consumers do not have adequate information about the price, quality, and risks of a product or service, their decisions will be flawed. They will end up paying too much

for an inferior product—or worse, losing their home to an unscrupulous mortgage company.

**Rules.** These are normally established through government.

**Policing.** As in any activity, those who would prey on the uninformed need to know they may be caught and punished.

regulating insurance companies and setting their rates. (Done in the name of the consumer, this ends up costing the consumer dearly, because it eliminates competition.) Other states, including New York and Florida, have driven premiums down by limiting the consumer's ability to sue. (This is known as tort reform.) Three states have driven rates down by adopting no-fault systems, in which those injured are automatically reimbursed by their own insurance companies—thus eliminating lawsuits to establish guilt. Eighteen others have opted for watered-down no-fault laws, which have backfired. This process of constant market restructuring will no doubt continue as long as people drive cars.

**Providing Information to Consumers.** If consumers are able to choose between competitive providers, government can force fundamental changes simply by publishing information about the quality of each provider. When the federal government began publishing the on-time records of airlines, it had a dramatic impact—far greater than any regulatory command could have achieved. When Arizona began to publish auto insurance, home insurance, and hospital rates, it forced providers to compete based on price. When California required companies to disclose all toxic substances until the state ruled them safe, it not only discouraged the use of toxics, but punished corporations for delaying the regulatory process.

Visalia used information to encourage energy efficiency. For a fee, people selling their homes can now get an energy inspection and a rating from the Board of Realtors. Sellers pay the fee to add value to their homes by proving they are energy efficient. Nearly a dozen states now operate similar systems. In San Fran-

cisco, such inspections are mandatory, and sellers are required to bring their homes or offices up to certain standards. The city's Public Utilities Commission estimates the measure saved \$5 million in energy costs in its first five years, even before it was extended to commercial real estate.

**Creating or Augmenting Demand.** Governments create or change markets all the time by stimulating demand: giving people resources with which to buy services; requiring people to buy certain services; or simply encouraging their use. State vouchers (and their equivalent) have helped stimulate the emergence of functioning markets for child care. The GI bill created great demand for higher education, after World War II. San Francisco's energy law created demand for energy inspections.

**Catalyzing Private Sector Suppliers.** Governments constantly make deals with private corporations to augment the supply of some product or service. In 1988, the St. Paul Department of Planning and Economic Development convinced the First Bank to commit \$94 million over five years to housing and economic development loans in poor communities. In 1990, the Federal Reserve Board pressured Massachusetts banks into promising \$1 billion in loans to poor communities.

Some cities have even incorporated such deal making into their zoning processes. To prevent the deterioration of its downtown, Scottsdale created a series of incentives for businesses to supply infrastructure amenities—like parking garages and street improvements. Those that do so can get permission to increase their buildings' density, height, and other factors. Seattle, San Diego, and Tampa have all developed their own versions of this approach, called incentive zoning.

**Creating Market Institutions to Fill Gaps in the Market.** Often private investors leave portions of the market untouched because profits are too small, investors are ignorant of the profits to be earned, or prejudice clouds their vision. Typical market gaps include loans to small businesses, minority-owned businesses, and businesses owned by women. Today many state and local governments catalyze the formation of private or quasi-public corporations to fill these gaps. This is hardly unprecedented: early in American history, state governments helped

organize and launch many private corporations. Many of Japan's largest businesses also began as government enterprises.

***Catalyzing the Formation of New Market Sectors.*** Sometimes governments help create not just one corporation to expand the supply of a service, but an entire market sector. Consider health maintenance organizations (HMOs). The first group practice prepayment plan—the precursor of the modern HMO—was created by the Los Angeles Department of Water and Power in 1929. Four decades later, HMOs were still rare. Enamored of their advantages, Congress in 1973 passed the Health Maintenance Organization Act, to stimulate their creation. It volunteered federal funding to help establish private HMOs and mandated that employers who paid for health insurance give their employees the option of joining an HMO, if one existed in their area. States have also worked to stimulate the growth of HMOs. Today, thanks in part to governmental efforts, HMOs serve a significant share of the market.

In the 1980s, several state governments pursued similar strategies in economic development. Pennsylvania catalyzed the formation of a seed capital industry, which provides early stage venture capital. Michigan catalyzed both a seed capital industry and a new financial sector made up of business and industrial development corporations (BIDCOs), which specialize in providing long-term loans to smaller manufacturing firms.

***Sharing the Risk of Expanding Supply with the Private Sector.*** Remember the story of Tampa's Community Redevelopment Agency, in chapter 1? It was a classic example of risk sharing. By guaranteeing bank loans for five years and subsidizing the labor of loan processing, Tampa convinced banks to make loans they would otherwise avoid. "We put the market together and presented it to the private lenders," says Community Redevelopment Director Fernando Noriega.

Risk-sharing is quite common. In the 1930s, the federal government shored up the banking system by providing insurance to depositors. The Small Business Administration has long guaranteed small-business and minority-business loans. The federal government virtually created a market for student loans by guaranteeing bank loans to college students.

And many cities have shared the risk of real estate deals with private developers.

***Changing Public Investment Policy.*** Most governments invest significant amounts of capital: their pension funds, cash balances, and reserve funds. By choosing where to invest, they can have a significant impact on the supply of capital in different markets. In 1982, when the Michigan Treasury Department was allowed to invest up to 5 percent of its then \$6 billion public pension fund in venture capital, it transformed Michigan from a state with virtually no venture capital to a state awash in venture capital. Other states quickly followed suit.

Dozens of state and local governments have also developed policies to put their cash balances in banks that pursue specific lending strategies. These are known as linked deposit programs, and they have been used for almost every purpose under the sun. Illinois used one to encourage minority-business loans, beginning in the late 1960s. Santa Monica, California, used one to encourage energy conservation loans a decade later. Ohio used one to encourage small-business loans during the difficult years of the early 1980s. And Boston announced one to encourage loans in minority communities in 1991.

Public money can be disinvested as well as invested. As South Africa discovered, divestiture can be a powerful tool. Public pension funds have created the Council of Institutional Investors, which discourages corporate activities such as "greenmail" and inflated management salaries by threatening divestiture.

***Acting as a Broker for Buyers and Sellers.*** As we noted above, markets in which buyers cannot easily find sellers require brokers. Sometimes the public sector can play this role. Michigan's Opportunity Card and Opportunity Stores were designed to act as accessible, user-friendly brokers between buyers and sellers of adult education and training. Massachusetts' Bay State Skills Corporation (now copied by at least a dozen states) acts as a broker between businesses that need trained workers and sellers of training. It uses the lure of start-up capital—typically 100 percent the first year, 50 percent the second, and a small portion the third—to get corporations and educational institutions to create new training programs. Because its primary role is to

bring together buyers and sellers, it funds training programs that buyers want—programs that respond to genuine market needs. As a result, those programs have extremely high job placement rates.

**Pricing Activities through the Tax Code.** The tax incentive is no doubt America's favorite method of leveraging change through the market. We use tax incentives to encourage people to buy houses and donate to charities, to encourage businesses to hire the poor and invest in research and development, and to encourage institutions to adopt not-for-profit status or employee stock ownership plans. Occasionally we even use taxes to discourage behavior that we are not ready to outlaw, such as smoking cigarettes and drinking alcohol. We could of course use the latter method far more widely. Think of all the things Americans would like to discourage but cannot bring themselves to ban: pornography, billboards, junk food, violence on television. A stiff tax might do the trick.

**Pricing Activities through Impact Fees.** An impact fee is a form of tax designed to impose the social cost generated by an activity, such as driving or building new subdivisions, directly on those who engage in the activity. The idea is simple: turn public costs into private costs, so people and institutions cannot shift the cost of their activities onto others. According to the Rand Corporation, cigarette taxes in America are now almost high enough to do this, but alcohol taxes are not.

Consider driving, which not only creates air pollution but requires expensive roads. Roads are a public as well as a private good—benefiting all Americans, whether they drive or not—so governments do not require motorists to pay their entire costs. Unfortunately, however, they barely require motorists to pay *any* of the costs. "One economist did a study that showed that for every new mile of freeway that's constructed in Los Angeles, the actual cost of construction if allocated only to those vehicles using that new freeway would be 13 cents per mile for the life of that freeway," said Norm King, manager of Moreno Valley, California, in a 1988 speech. "The amount being generated by the gas tax right now is about one cent per mile."

If a community built a new highway to ease commuter traffic, King pointed out, general taxpayers would subsidize more than 90 percent of the cost. "Now I wouldn't go out and ask any of you to pay for the gasoline I need to get to my work; but for some reason we have no qualms at all about asking our neighbors to pay for the cost of the freeway for us to get to work."

Impact fees have become common in high-growth areas like California, Florida, and the suburban counties around Washington, D.C. They are used to force developers to pay for the cost of roads, transit systems, sewers, water systems, and schools they make necessary when they build new developments. After Florida's 1985 Growth Management Act required that local governments have the money for all necessary infrastructure and services before approving new development, half of Florida's 67 counties adopted impact fees. By 1988, 58 percent of the communities that responded to a nationwide survey by the National Home Builders Association were using some form of impact fee—a number that had doubled in the previous five years.

**Managing Demand through User Fees.** A third variation on the pricing theme is the user fee, which can be used to manage demand for services. Traditional governments, which focus entirely on supplying services, have discovered that they can never outrun demand. They build new highways to fight congestion, and within years those highways are choked. They build new landfills, and within years they are filled.

"Our gut instinct is to provide more," says Norm King. "Our background has emphasized the supply side: how to build more freeways, how to build a bigger sewage treatment plant, how to build a new landfill." But with governments at every level stretched to their fiscal limits, this approach leads straight to bankruptcy. We have to "look at what we can do to manipulate the demand for that product downward so that we don't have to invest those funds in the first place."

To slow the use of landfills, governments now raise the price of garbage collection. To manage demand for highways, they raise tolls, develop special lanes for car pools, and give employers incentives to reduce rush-hour traffic by adopting flextime, car

pools, and van pools for employees. They are even beginning to use peak load pricing, in which they charge more during peak travel hours. (Our telephone companies have long used peak load pricing for long-distance calls, and the airlines do the same with airfares.) The Washington, D.C., subway system charges more during rush hour, and the California Department of Transportation has negotiated franchise agreements with four private companies to build toll highways that will use peak load pricing. Singapore, Norway, and the Netherlands all use peak load pricing already. According to economist Steven A. Morrison, several studies have estimated its potential benefits at roughly \$8 billion in the United States.

The principal objection raised against demand management is that user fees discriminate against the poor. But as we noted in chapter 7, that depends how the revenue generated by user fees is spent. If it were devoted to mass transit, it would benefit the poor. Another objection is the inefficiency and inconvenience of tollbooths. But the technology to charge drivers automatically, without tollbooths, is already in use in several places around the country. A laser system reads an electronic card installed in the cars of regular commuters and bills them according to the time of day.

**Building Community.** Changing the marketplace means more than restructuring the private, for-profit economy. It can also mean strengthening communities. For example, a handful of states award grants to community development corporations, which strengthen low-income communities by developing housing, creating jobs, enhancing public safety, and the like. Washington, D.C., has a condominium conversion law that gives tenants the right to buy their buildings when their landlords convert them to condominiums. Ft. Collins, Colorado, has created a zoning process in which developers must meet with and gain approval from community representatives before they get city approval for new developments. And of course the U.S. government funnels billions of dollars to churches and other community organizations every year, with its tax deduction for contributions to charitable organizations.

## APPLYING MARKET-ORIENTED THINKING TO GOVERNMENT'S OTHER JOB: REGULATION

Most of our argument to this point has focused on the superiority of market mechanisms over administrative mechanisms. But administrative mechanisms are used primarily for service delivery. Regulation is another matter entirely. In the regulatory arena, traditional governments use command-and-control mechanisms: they lay down rules and order people to comply.

Environmental protection offers a perfect example. Ever since it created the Environmental Protection Agency (EPA), the federal government has relied primarily on a command-and-control strategy. Washington has tried a few market mechanisms: tax credits for energy conservation; several emissions trading experiments; a small tax on gas guzzlers. But the EPA has primarily set standards and dragged businesses or local governments to court for violating them. Often it has gone so far as to dictate the technology the business or government must use to comply with its standards.

This strategy has yielded some positive results. Air quality in most metropolitan areas has improved. The Great Lakes are much cleaner than they were in 1970, and many rivers have been cleaned up. Bans on toxic substances like DDT and PCBs have limited our exposure sharply.

But the command-and-control strategy has hardly been an unqualified success. Cities such as New York, Los Angeles, Boston, and Houston routinely exceed EPA standards for air quality—Los Angeles by 140 days a year. Half of all Americans still live in counties whose air is rated unhealthy by the American Lung Association. The EPA has regulated less than 20 toxic air or water pollutants, out of hundreds. And the entire effort has been extremely expensive. According to the EPA itself, by 1990 American corporations, governments, and individuals spent \$115 billion a year to comply with federal environmental regulations. Studies suggest that other methods could have achieved the same results at 25 percent of the cost.

The command-and-control strategy has a number of drawbacks.

*First, it does not change the underlying economic incentives driving firms or individuals.* Because the EPA's commands run directly counter to economic incentives, businesses and firms often do their best to find some way around them, legal or illegal. A great deal of time and money goes into fighting and circumventing regulations, and illegal dumping increases.

*Second, the command-and-control strategy relies on the threat of penalties—but in a political environment, many of those penalties can never be assessed.* The original Clean Air Act, passed in 1970, ordered that air quality in cities meet EPA standards by 1987. By 1989, 96 cities still failed to comply. But what could the EPA do? Whenever it tried to impose penalties with real consequences, congressional representatives from the afflicted cities raised a storm.

*Third, command-and-control regulation is a very slow process.* It requires the EPA to establish unsafe levels of exposure to thousands of substances, with enough accuracy to stand up in court. EPA regulation tends to be an all-or-nothing matter. Since the consequences are so severe—requiring industry to scale back or eliminate its use of the substance in question—the stakes are very high. Hence industry drags virtually every decision through the courts, while often fighting in Congress as well. Not only does this take forever, it makes regulators extremely cautious about reaching their decisions, because they know they will be fiercely contested.

*Fourth, regulations that specify the exact technology industry must use to control pollution discourage technological innovation.* Most federal regulations require that industry adopt the "best available technology" when they install new plants and equipment. The EPA defines that technology, and businesses must use it. If they develop a better technology, they have to convince the EPA bureaucracy to redefine its standards—a costly, uncertain process at best. So, unlike competitive markets, EPA regulations discourage businesses from pursuing new technologies to solve their problems. They also discourage businesses from closing down their old, dirty plants and opening cleaner ones.

because the best available technology is required primarily in new facilities and industries. Even the EPA's own Advisory Committee on Technology Innovation and Economics recently concluded that the regulatory system discourages the development of innovative pollution-control technology.

*Fifth, because the command-and-control approach slaps the same requirements on industries all over the country, it is extremely expensive.* No matter what the cost, it requires everyone to use the same technology and meet the same standards. This one-size-fits-all approach is tremendously wasteful, because it requires clean businesses to make the same investments as dirty businesses, rural businesses to make the same investments as urban businesses.

*Sixth, the command-and-control approach forces EPA to focus primarily on large institutions, whether businesses or governments.* After 20 years of effort in that arena, some environmentalists believe greater returns may now be found by concentrating on individuals and small businesses. But that is very difficult to do with the command-and-control approach. It is politically dangerous to order individuals and small businesses around, and enforcement is a nightmare.

*Finally, command-and-control regulation has a tendency to focus on symptoms rather than causes.* Regulations require specific technologies on cars, but ignore how much people drive. The EPA requires scrubbers in the smokestacks of coal-fired plants, but ignores what kind of coal the plants burn.

### MARKET-BASED REGULATORY POLICY: INCENTIVES RATHER THAN COMMANDS

For 20 years, economists have been telling us there is a simple way around these problems. "When the EPA was created," James Q. Wilson writes, "economists who had studied the matter argued almost unanimously that the most efficient way to reduce pollution was to assess an effluent charge on polluters. The EPA ignored this advice and instead sued polluters in court."

As with other impact fees, the idea is to make sure that all of us, producers and consumers alike, face up to the full costs and consequences of our decisions—*when* we are making those decisions. This is done by building the cost imposed on society by the polluter into the cost of the product—whether gasoline, pesticides, electricity generated by burning coal, or products containing chlorofluorocarbons. When this is done, people have an incentive not to pollute. And businesses that don't spend money or time to reduce their pollution put themselves at a competitive disadvantage.

Economists refer to these social costs as "externalities." Peter Drucker points out that we have built externalities into the price of business before. "During the last century every developed country has converted industrial accidents from an externality into a direct cost of doing business," he says. "Every developed country has adopted workmen's compensation under which the employer pays an insurance premium based on its own accident experience, which makes the damage done by unsafe operations a direct cost of doing business."

Some substances are so harmful that they should simply be banned, Drucker adds. But this is not practical for every harmful activity. (Can you imagine a ban on driving, flying, dry cleaning, or barbecuing?) In such cases, impact fees, effluent fees, and other market incentives have many advantages. They create powerful economic incentives for everyone—businesses and individuals—to change their behavior, because they drive up the cost of activities that pollute. Consumers need no sophistication about which product is more environmentally damaging than another; they simply have to look at the price. If driving a heavily polluting car creates significant air pollution, it becomes expensive. If electricity from coal-fired plants creates acid rain, it becomes expensive. If disposing of plastic diapers fills up landfills, they become expensive.

Not only does this approach give everyone clear price signals about the cost of pollution, it lets them decide how best to respond. If they want to keep driving the dirty, gas-guzzling car, they can. But if they want to drive an energy-efficient, clean car, they will save money. If they want to stick with expensive elec-

tricity, they can. But if they want to put solar panels on their roof, they will save money.

If pollution became a significant expense, industries would do what they could to avoid it—developing cleaner technologies, changing the fuels they burned, recycling materials, and conserving energy. The profit motive is a powerful incentive to innovate. A system of "green taxes," as they are becoming known, would turn loose the creativity of corporate America to find cleaner ways to live, work, and produce.

Green taxes also encourage people to address the root cause of the problem, rather than dealing with its symptoms. In the past we forced coal-fired plants to install scrubbers. The price incentive would drive them to find the cleanest and least expensive way to produce—perhaps by switching to a cleaner fuel. In the past we forced auto manufacturers to install catalytic converters. Emission charges or green taxes on gasoline would drive everyone to find the cleanest form of transportation that was practical.

Green taxes might also avoid some of the drawn-out legal battles that come with all-or-nothing regulation, because the stakes would be lower. They would give governments more flexibility: by raising or lowering the fee, they could vary the pressure. They would be far cheaper, because they would achieve their goals more efficiently. And they would generate public revenue, which could be used both to clean up pollution and to invest in activities that prevent it, such as mass transit.

Market incentives appear to be the wave of the future. During the late 1980s, they finally began to attract significant attention. Watching Western Europe debate green taxes, several environmental organizations endorsed the idea. (European nations have always had very high gasoline taxes, which have helped limit their air pollution significantly. Now they are beginning to apply the same idea to other products.)

States and cities also began to experiment. Iowa, Minnesota, and Oregon taxed agricultural pesticides and fertilizers, then devoted some of the revenues to groundwater protection. Florida passed a tax on nonrecycled paper and a law requiring disposal fees on certain containers if 50 percent of them were not

recycled by October 1992. Oregon and New Jersey created investment tax credits for the purchase of recycling equipment. California's South Coast Air Quality Management District persuaded the EPA to exempt it from "best-available-technology" language so it could use new technologies as they developed. And Seattle got an enormous amount of attention by creating a voluntary recycling program that used price as its lever—charging \$14 for every garbage can not separated for recycling. By 1990, Seattle was recycling 37 percent of its trash, more than any other city in the nation.

In Washington, the Clean Air Act of 1990 stimulated interest in market-based strategies, because it included an emissions trading program to control acid rain. Emissions trading is a market mechanism that acts like a green tax: polluters can pay to pollute or innovate to save money. The EPA first tried it during the 1970s. It gave credits to firms that reduced air pollution below the level set by law, and allowed them to trade the credits between different sources of pollution within the firm or sell them to firms in the same general location. The idea was to encourage businesses to meet EPA's goals, but to let them figure out the most innovative and economical way to do so. If they could reduce one source of pollution economically, they could use the credits generated to offset others that were more expensive. This stimulated only a limited market in emissions trading, but is still estimated to have saved business between \$5 billion and \$12 billion.

In 1982, the EPA extended the idea to lead in gasoline. If refiners produced gasoline with lead content below EPA requirements, they earned credits, which they could sell to other refiners that were still above required levels. This produced a lively market in credits, partly because buyers and sellers had far greater access to one another in the relatively homogeneous refining industry. The EPA estimated that the trading program saved 20 percent of the cost of reducing lead in gasoline.

In 1990, acid rain was the most contentious environmental issue facing Congress. The Bush administration recommended and Congress passed an emissions trading system, in which coal-burning electric power plants essentially receive credits for

the amount of sulfur dioxide emissions they are allowed. They can use any means to reduce their emissions, and if they emit less than they are allowed, they can sell their credits to other plants. Paul Portney of Resources for the Future, a research organization that helped pioneer the concept of market incentives, estimates that this will reduce the cost of compliance from \$8 billion a year to \$4 billion.

By 1991, proponents of market-based environmental regulation found themselves suddenly in the mainstream. The press began writing about green taxes and other market incentives, members of Congress began introducing bills, and the environmental community swung cautiously behind the idea. In 1988, Harvard's Robert Stavins published a study, with Senators Timothy Wirth and John Heinz, which outlined 36 market-based approaches to environmental problems. In January 1991, he told *Fortune* magazine: "Two years ago, we were complaining that no one listened to us. Now it's almost as if night had turned to day."

## THE EMERGENCE OF SMARTER MARKETS

Market-based strategies like those just described are possible only because the information age has radically increased our ability to measure pollution and quantify its impact. Only in the past decade, for example, have we developed continuous emissions monitors that are capable of measuring the sulfur emissions from a power plant, or electronic systems that can record which car is passing and at what time, without a toll-booth. Businesses are even developing systems that can measure the exhaust pollution from cars as they pass. Technology like this makes it possible to use market mechanisms in ways we could barely dream of just a decade ago.

The Institute for Alternative Futures, led by futurist Clement Bezold, labels this trend the emergence of "smarter markets"—markets in which buyers and sellers have access to vastly more information than they previously did. One result, Bezold points

out, is that consumers are beginning to "consciously vote their values with their dollars." "Socially responsible" investment firms now invest their clients' money only in corporations that meet certain criteria. The Council on Economic Priorities has published a book that rates corporations and their products according to nine values. Environmentalist Denis Hayes, the originator of Earth Day, has launched an organization to certify products that are environmentally sound. It will sell an official Green Seal to companies, to display on those products. "Our objective is to help American consumers vote with their pocket-books on environmental issues," says Hayes. "We expect the Green Seal to become a catalyst for sweeping change in consumer purchasing habits."

Some products already come with stickers that indicate their energy efficiency: cars, hot water heaters, furnaces, refrigerators, and air conditioners. Nearly a dozen states have established voluntary energy rating systems for houses, as Visalia did. In the Washington, D.C., area, a sophisticated consumer organization rates the region's health plans according to customer satisfaction, price, and other factors, for public comparison in *The Washington Consumer Checkbook*. And health care researchers are beginning to develop further yardsticks with which to measure the quality of various health care providers.

With computer technology, it has become possible not only to develop such information, but to make it readily available to large numbers of people. Think of the Michigan Human Investment System and Opportunity Card: they were attempts to create a smarter market in job training, using "smart" credit cards, electronic information kiosks, and a computer system with data on the performance of every job training or adult education provider in the state. By facilitating the emergence of smarter markets such as this, governments can empower citizens to shape the marketplace according to their own needs and values.

### RESTRUCTURING MARKETS *WITHIN* THE PUBLIC SECTOR

Markets exist not only in the private sector; they also exist within the public sector. When they do, we normally call them

systems: the education system, the job training system, the mental health system. But they are markets, just as surely as the financial system, the banking system, and the health care system are markets. If we applied market-oriented thinking to our public systems, we could accomplish a great deal.

Unfortunately, few people think about government this way. Even business people drop their market mind-set when they work with government. Norm King tells a story about the Palm Springs City Council, whose business members could not understand the idea of lowering demand for water by raising its price:

*The irony is that our often conservative, local business people, whose very livelihood is dependent upon understanding the laws of supply and demand, do not understand how supply and demand concepts work in a government situation or could work in a government situation. So you have five people, all of them local business people, all of them depending upon supply and demand in their own occupations, resisting the idea that consumption would go down if the user was charged the full cost of water consumed. What we have is a very interesting dichotomy. As capitalists, we believe that the laws of supply and demand work well in the private sector but we disbelieve their validity in the public sector. This in spite of the fact that properly implemented pricing systems will promote the conservation of many government resources.*

Ted Kolderie describes a similar phenomenon in the education reform movement. He points out that institutions work when they create the right incentives. Yet business leaders rarely focus on the incentives built into the education system. Instead they create "partnerships" and sponsor projects. "Business's involvement today is roughly the equivalent of doing your daughter's homework," Kolderie says. "It is a kindness, but a misdirected kindness." It consists of:

*Donating computers. Giving science teachers summer training. Recognizing outstanding teachers. Motivating students to graduate by promising them a college education. Helping*

*pass a law extending the school year or toughening teachers' tests. It is hard to criticize such efforts. . . . [But] the test is always whether these efforts change the system. . . .*

*Business should be tougher. When approached for support, executives should ask the central question: "If these things are so important, why aren't they important enough for the system to do itself? Why are they done only when we finance them?" . . .*

*If business were thinking strategically, it would be helping to see that the schools get opportunities and incentives to innovate on their own.*

We have argued throughout this book that the key to reinventing government is changing the incentives that drive public institutions. This is simply another way of saying that the key is *changing the markets that operate within the public sector*. In education, this might mean moving to a competitive market in which customers have choices and key stakeholders (parents and teachers) have genuine control. In job training, it might mean injecting information about the quality of all training providers into the system, putting resources directly into customers' hands, providing them with accessible brokers, and empowering them to choose between competing providers. In unemployment insurance, it might mean creating a financial incentive for corporations to retrain employees rather than lay them off, or creating an incentive for those collecting unemployment to seek retraining—something that is still discouraged in many states.

The idea is to apply the same analysis one would to a private market: to ask, What's wrong with this market? What is missing? Demand? Information? Competition? What elements of the market need to be improved to make it work effectively? What other public systems have to change to make this possible? Budget systems? Personnel systems? Accounting systems? This is precisely the kind of thinking Philip Power and his colleagues in Michigan applied to job training, and Ted Kolderie and his colleagues in Minnesota applied to education.

Some would call this a systems approach. A few governments use such an approach. Those that embrace Total Quality Man-

agement, for instance, learn that 85 percent of the problems in a typical operation stem from the systems, only 15 percent from the people. But most public sector TQM projects focus on very minor systems, the ones that are easiest to change: the schedule for garbage truck drivers; the way the city's fleet is purchased. Changing these is important, but the real challenge is whether TQM can address the big systems: budget, personnel, and accounting, or education, job training, and unemployment insurance. Tom Mosgaller, Madison's TQM coordinator, believes TQM will run its course if it deals only with the micro systems. "It's valuable that you improve queuing [of garbage trucks] and back injuries," he says, "but it doesn't transform the culture. If you don't move it up into those fundamental infrastructures, after a while the unions and the employees will say, 'Come on guys, cut the crap.' "

## BALANCING MARKETS AND COMMUNITY

Much of what we have discussed in this book could be summed up under the rubric of market-oriented government: not only systems change, but competition, customer choice, accountability for results, and of course public enterprise. But market mechanisms are only half the equation. Markets are impersonal. Markets are unforgiving. Even the most carefully structured markets tend to create inequitable outcomes. That is why we have also stressed the other half of the equation: the empowerment of communities. To complement the efficiency and effectiveness of market mechanisms, we need the warmth and caring of families and neighborhoods and communities. As entrepreneurial governments move away from administrative bureaucracies, they need to embrace both markets *and* community.

In Washington, this would be called moving right and left at the same time. The political media are quick to label "conservative" those who embrace markets and "liberal" those who empower communities. But these ideas have little to do with traditional notions of liberalism or conservatism. They do not

address the goals of government; they address its methods. They can be used to implement any agenda. They can help a community or nation wage war on poverty, if that is its priority, or lower taxes and cut spending, if that is its priority. *Reinventing Government* addresses *how* governments work, not *what* governments do. And regardless of what we want them to do, don't we deserve governments that *work* again?

## —11—

### Putting It All Together

*[From 1875 through the 1930s social] innovation took the form of creating new public-service institutions. . . . The next twenty or thirty years will be very different. The need for social innovation may be even greater, but it will very largely have to be social innovation within the existing public-service institution. To build entrepreneurial management into the existing public-service institution may thus be the foremost political task of this generation.*

—Peter Drucker, *Innovation and Entrepreneurship*

Our map is complete. It is now yours to use. We hope that you find it a helpful guide in the process of changing *your* governments. Used almost as a checklist, the ten principles offer a powerful conceptual tool. One can run any public organization or system—or any of society's problems—through the list, and the process will suggest a radically different approach from that which government would traditionally take. This is the checklist's ultimate value: the power to unleash new ways of thinking—and acting.

To illustrate, let us offer a simple exercise. What would happen if we took three of the most intractable problems American society faces and ran them through the list? What would our health care, education, and criminal justice systems look like, organized according to the ten principles of entrepreneurial governance? We provide this exercise not to propose definitive solutions to these problems, for we are not experts in education, health care, or criminal justice. We simply intend to demonstrate the power of the ten principles when used as an analytic tool.

THE WHITE HOUSE

WASHINGTON

December 15, 1994

MEMORANDUM FOR FRANK HOLLEMAN

FROM: BILL GALSTON  
GAYNOR MCCOWN  
SUBJECT: REGULATORY REVIEW AND EDUCATION

The Vice President has asked that we take steps to develop, for the President, options for further reform in the regulatory area. We would like to invite department designees, deemed appropriate by Secretary Riley, to participate in the process of the regulatory review concerning Education. The goal is not to examine each regulation, but rather the statutes that are driving unnecessary and duplicative regulations. Through this series of "regulatory policy reviews," we want to explore innovative approaches to achieve regulatory objectives in a cost-effective and reasonable manner.

By looking at a variety of sectoral and cross-cutting issues over the next couple of months, we will be able to make well-considered recommendations to the President early next year. The core purpose of this exercise is to reform, to the maximum extent consistent with our statutory and administrative responsibilities. Nonetheless, we want to reduce regulatory burdens on individuals, the private sector, and state, local and tribal governments.

Please let Kim Ross (456-2999) know who will participate in this process by Monday, December 19. The first meeting of the working group on Education will be held next Thursday, December 22, at 11:00 a.m.

Many thanks for your cooperation.

# National Performance Review II

## Regulatory Reinvention at the U.S. Department of Education

### Agenda

March 2, 1995

#### **I. Context for reinventing the regulatory process at ED**

- A. *Overview*
- B. *Examples of why reform of the regulatory process and federal regulations is absolutely necessary*
- C. *Coordinating federal agencies—a proposal*

#### **II. Initial steps for regulatory reform and reinvention**

- A. *Concrete principles for when and how to regulate*
- B. *Making reinvention real*

#### **III. New themes for ED's regulatory reinvention**

- A. *"Mini"/"semi"/"maxi" regulation*
- B. *Creating a new framework for reinvention: flexibility and performance incentives*
- C. *Flexibility*
- D. *Performance incentives*
- E. *Tensions and challenges that affect regulatory reinvention*

#### **IV. Concluding comments**



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF THE GENERAL COUNSEL

NPR II REGULATORY REINVENTION MEETING  
MARCH 2, 1995  
3:15 p.m.  
274 OEOB

- SECRETARY RICHARD W. RILEY
- MARSHALL S. SMITH  
Under Secretary
- THOMAS W. PAYZANT  
Assistant Secretary, Elementary & Secondary Education
- DAVID A. LONGANECKER  
Assistant Secretary, Office of Postsecondary Education
- JUDITH A. WINSTON  
General Counsel
- FRANK S. HOLLEMAN  
Chief of Staff
- MICHELE CAVATAIO  
Chief of Staff, Office of the Deputy Secretary
- JAMIENNE S. STUDLEY  
Deputy General Counsel for Regulations & Legislation
- KENNETH TOLO  
Senior Advisor to the Under Secretary

## THE WHITE HOUSE

WASHINGTON

-1-

- How the departments enforce regulations
  - Development of new regulations
- 

- Other departments
- Broadening the sectors to the group that is influenced by education
- School lunch -
- education w/ respect to Family rights etc...
- ed. has gigantic regulatory volume geared to protecting individuals
- Ben will do a two page w. a scope
- Summary of the reg world
- What are the three - no - Doc reg's that have an impact?
- The administration is trying not to do "rules"

- 2-
- Goals 2000 - no rules
  - Student Act -> lots of rules
  - Equal Opportunity as it relates to education
  - Either the Civil Rights must deal w/ education  
or education has to deal w/ civil rights
  - If we are going to deal with civil rights --  
we should do it more broadly
  - Special Ed -- RSA (504 - Version 2 / Ed Act)
  - Regulations promulgated by the Department  
or regulations that have an impact  
on the education enterprise.
  - View from the typical School  
Principal Bottom-Up
    - > Start with a principal
    - > Start with the College President
    - > Elementary / Secondary / Post-Secondary
 

↓  
 Chief State School Officers

ACE

-3-

What is it that we expect to do with this?

Inventory -

Why is this happening?

Is there something in the way we are legislating that generates this?

"We legislate in order to dictate what needs to occur"

- Goals and accountability needs to match what we want to accomplish

- Alternative paradigm -

- Inventory with two parents Ed Reg / non-Ed Reg

↳ An inventory of regulations

major areas

names of things that we regulate

↳ education has developed a sub-group working on higher ed regulations

- Two areas: Title IV - Higher Ed

Title I - Elementary / Secondary

- Special Ed

Three sets of reg

Opportunity through regulation to take advantage of the law.

Looking at  
registered entities  
who are providing  
services —

THE WHITE HOUSE

WASHINGTON

-4-

- what we have checked to do -
- what we have found -
- to

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- There must be a logo

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