1-1-1980

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FEDERAL REGULATION: THE NEW REGIMEN

Joseph D. Alviani*

I. INTRODUCTION

On February 18, 1981, President Reagan addressed a joint session of Congress to announce his administration’s “Plan for Economic Recovery.” A great deal of publicity preceded the public announcement, much of it generated effectively by the White House public relations corps in an effort to harness early support for the planned budget and tax cutting measures. Also included in the plan, but subject to only brief mention in the formal announcement, was a change in direction for the federal regulatory process—the new administration’s method for “getting government off the back of business.” For one listening to the President, and with a cursory knowledge of Executive Order 12,044 and the Regulatory Flexibility Act, the outlined revision did not seem dramatic. The spoken word, however, did not fully disclose the magnitude of the change as codified in Ex-

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1. Exec. Order No. 12,044, 3 C.F.R. 152 (1978); extended by Presidential action, 45 Fed. Reg. 44,249 (1980). This was President Carter’s effort to create a review mechanism which would balance the potential costs of regulatory action against anticipated benefits. For a detailed discussion of Executive Order 12,044 see text at notes 7-15 infra. This Order was revoked by Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981).

2. The Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1165 (1980) (codified in 5 U.S.C. §§ 601-602), was Congress’ response to complaints from small businesses that some federal regulations were having a disproportionate cost impact on their operations. The Act requires publication of a regulatory flexibility analysis describing the impact of new regulations on small businesses.
The following is an effort to outline and provide initial analysis of the implications of the Reagan Executive Order on Federal Regulation. It cannot be precise or complete, because many items are still subject to further procedures to be issued by the Office of Management and Budget (OMB) and the Presidential Task Force on Regulatory Relief (Task Force), and to judicial interpretation of provisions which are unclear or subject to challenge. Given those reservations, however, an early analysis of the changes in practical procedures and philosophy is well worthwhile.

II. PHILOSOPHICAL AND STRUCTURAL CHANGES IN THE REGULATORY PROCESS

To appreciate fully the changes in the federal regulatory process occasioned by the publication of Executive Order 12,291, a brief history of its antecedents is helpful.

Federal efforts to streamline, improve, or reform the mechanisms for developing, reviewing, and promulgating federal regulations are not unique to the new administration. In fact, all three administrations preceding President Reagan's took steps with varying degrees of commitment and success to make the process more efficient.

Executive Order 11,821 was issued by President Ford in 1974 to assure that "all major legislative proposals, regulations, and rules emanating from the executive branch of the Government include a statement certifying that the inflationary impact of such actions on the Nation [has] been carefully considered." Responsibility for coordinating this endeavor was assigned to the Director of OMB, who
was to make every effort to link inflationary review with his budget preparation, legislative clearance, and management evaluation functions.

This approach built on the procedures established by President Nixon in which OMB was to serve as the general clearinghouse for executive department and agency initiatives. While both the Nixon and Ford measures enhanced the political authority of OMB, neither removed from agency heads the ultimate authority for the direction and final approval of regulations. These initiatives did, however, begin to introduce criteria intended to measure cost impact on consumers, businesses, markets, or federal, state, or local government; effects on productivity of wage earners, businesses, or governments at any level; effects on competition; and effects on supplies of important products or services.

Despite the noblest intentions, however, with the passage of time the Director of OMB became engaged in a variety of matters which diverted attention from the review process. It soon became apparent that many of the responsibilities imposed by Executive Order 11,821 on OMB would be delegated to the same agency heads who had thought it wise to originate the regulations in the first place. This resulted in continued criticism by industry representatives that the process of promulgating new regulations was unresponsive to business' costs of compliance.

President Carter assumed office in January, 1976 after a campaign which emphasized a return to "grass roots" democracy and a reduction of the intrusive role of the federal government on small business. However, by the time the new President shored up a disastrous start with the Congress and addressed higher priority domestic and foreign policy issues, it was March, 1978 before formal attention could be directed toward improving government regulations. Executive Order 12,044 was promulgated on March 23, 1978, and was intended to establish procedures which would insure clarity, prevent unnecessary burdens on the economy, individuals, or public and private entities, and allow for monitoring and evaluation of the regulatory reform effort.

The specific objectives of Executive Order 12,044 were to be achieved through a system which assured:

- the determination of a clear need for and purpose of the regulation,

7. For a review of the comments submitted in response to publication of the draft of Executive Order 12,044, see 43 Fed. Reg. 12,265 (1978).
• effective oversight by heads of agencies and policy officials,
• an opportunity for early participation and comment by other Federal agencies, State and local governments, businesses, organizations, and individual members of the public,
• analysis of alternative regulatory approaches prior to issuance,
• minimization of compliance costs, paperwork and other burdens on the public.\(^8\)

Agencies were required to revise their existing procedures to comply with the objectives of the Executive Order. At a very minimum these procedures were to include provisions for (1) publication of semiannual agendas of regulations (to give the public adequate notice of regulations under consideration, but soon to be published); (2) appropriate agency head oversight (to insure proper consideration of alternative approaches and costs); (3) opportunity for early and meaningful public participation (by publishing an advance notice of proposed rulemaking, holding open conferences or hearings, sending notices of proposed regulations to publications likely to be read by those affected, notifying interested parties directly); and (4) development of a system for approving “significant” regulations.\(^9\)

Resolution of two questions determined whether the regulatory analysis requirement\(^10\) of Executive Order 12,044 was activated. First, was the regulation “significant?” Second, if “significant,” were the economic consequences so major as to mandate a full regulatory analysis? To determine whether a regulation was significant, agencies were instructed to establish criteria which considered:

• the type and number of individuals, businesses, organizations, State and local governments affected,
• the compliance and reporting requirements likely to be involved,
• direct and indirect effects of the regulation including the effect on competition,
• the relationship of the regulation to those of other programs and agencies.\(^11\)

If after measuring a regulation by these criteria, an agency head determined that it was “significant,” a further review was to be undertaken to assess whether its economic consequences were so major that a regulatory analysis was required. Specifically, such

\(^8\) Exec. Order No. 12,044, § 1, 3 C.F.R. 152 (1978).
\(^10\) Id. § 3(a)(b), 3 C.F.R. 154-155. (See discussion in text at notes 12-13 infra).
\(^11\) Id. § 2(e), 3 C.F.R. 154 (1978).
analysis would be necessary for all regulations which resulted in: "(a) an annual effect on the economy of $100 million or more; or (b) a major increase in costs or prices for individual industries, levels of government or geographic regions."  

In a very general way, Executive Order 12,044 established guidelines for the content of the regulatory analysis, consisting of:

- a succinct statement of the problem,
- a general description of the major alternative ways of dealing with the problem that were considered by the agency,
- an analysis of the economic consequences of each alternative,
- a detailed explanation of the reason for choosing one alternative over the others.  

While in one sense this provision provided more specificity than required by any previous directive, it still placed primary responsibility for the process in agency heads. In addition, while a movement toward balancing economic costs with benefits could be discerned, broad discretion remained for continued regulation in areas where costs and benefits were neither quantifiable nor measurable. Finally, an "ethical" impetus toward regulation of certain areas of activity (e.g., workers' health and safety) regardless of costs was within the permissible scope of agency action.

In an effort to insure effective implementation of the procedures for improving the regulatory process Executive Order 12,044 delegated to OMB the power to review and approve the processes designed by agencies to comply with Executive Order provisions. Consequently, while OMB could affect the initial procedural response of agencies to the Executive Order and was accorded an ongoing oversight role of the process, it could not influence the content or effect of individual regulations on a continuing case-by-case basis.

To supplement the specific changes made in the regulatory review process by Executive Order 12,044, President Carter established the U.S. Regulatory Council later in 1978. The Council consisted of thirty-eight departments and agencies with major regulatory responsibilities. Its mandate was to improve coordination of federal regulatory activities and encourage more effective management of the regulatory process. During its two-year existence, the Regulatory Council made some headway in organizing interagency efforts to manage better the regulatory environment, improve regulatory

12. Id. § 3(a)(1), 3 C.F.R. 154.
13. Id. § 3(b)(1), 3 C.F.R. 154.
efforts such as economic analysis and evaluation, and encourage innovative, market-oriented approaches to regulation. Despite these achievements, however, critics believed that the Council merely served to reinforce the traditional regulatory philosophy of its members, and did nothing to reduce the burdensome costs of undue regulation on business.

Industry representatives, supported by leading supply side economists and conservative legislators, began promoting the need for a novel approach toward the federal regulatory process—one in which economic factors, reflected in terms such as "cost-benefit analysis," "net aggregate cost to society," and "regulatory budgeting," became prevalent. These advocates lobbied for a position which would require federal agencies to surmount rigorous burdens of economic proof prior to promulgating new regulations. They found a willing champion in Ronald Reagan. When he was elected President, it was clear that a change in the philosophical bases of federal regulation would ensue. Nine days after his inauguration, the President issued a Memorandum postponing for sixty days the effective date of all final rules.

The introductory paragraph of the Memorandum is instructive:

> Among my priorities as President is the establishment of a new regulatory oversight process that will lead to less burdensome and more rational federal regulation. I am now directing certain measures that will give this Administration, through the Task Force on Regulatory Relief, sufficient time to implement that process, and to subject to full and appropriate review many of the prior Administration's last-minute decisions that would increase rather than relieve the current burden of restrictive regulation. This review is especially necessary in the economic climate we have inherited.

Executive Order 12,291 embodied this new philosophy and reflects two major shifts in approach toward federal regulation:

First, a practical shift of ultimate oversight and monitoring authority from agency heads to the Director of OMB, with specific measures to insure OMB's policing role.

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16. Id.
Second, a less than subtle shift in the quantity and quality of evidence required to justify promulgation of new rules and regulations. This reflects a change in philosophy from emphasis on general humanistic and social goals, i.e., "doing good," "protecting workers," "insuring health and safety" to a more measurable "balancing test" heavily weighted toward considerations of economic costs and benefits, i.e., effects on productivity, competition, "is doing good in this manner worth the specific costs to society as a whole?"

This new approach toward federal regulation is entirely consistent with the general theory of the Reagan Administration that government over the last two decades has exceeded its responsibility by attempting to affect social change, and by tampering unduly with the economic system. This dogma permits governmental action only if it is clearly demonstrated that intervention is economically sound, and that the method of regulation is the least costly to the affected industry and society. It does not deny the obligation of government to provide for the general welfare, but it narrows the scope of those areas in which government has a responsibility to intrude, and imposes upon the government, once it has decided to intervene, the burden of substantiating that its approach is the most cost efficient. This is in stark contrast to the philosophy of the New Deal, New Frontier, and Great Society programs which imposed upon the federal government the duty to affect change in a wide variety of social and economic affairs with economic costs and benefits playing a minimal role in the decision to achieve the objective.

While Executive Order 12,044 began a gradual movement toward a recognition of costs, benefits, and economic impact in the regulation promulgation process, it nevertheless retained the traditional Democratic approach of broad federal regulatory intervention to protect perceived public interests. Executive Order 12,291, on the other hand, reverses this premise, compelling the government to be selective when it intervenes and then to adopt the regulatory alternative which is least costly regardless of the marginal losses to increased hazards, environmental deterioration, and a less than totally safe workplace. The bottom line of this notion is that people have a right to trade off health, safety, and environmental integrity for greater productivity and employment, and that government has no right to prohibit them to so choose.

With this understanding of the bases for the revision in mind, an examination of the specific provisions of the Executive Order demonstrates the practical consequences for the regulators and the regulated.
III. SECTION-BY-SECTION REVIEW OF EXECUTIVE ORDER 12,291

A. Definitions

As noted above in the discussion of Executive Order 12,044, the classification of a regulation as “significant” or “major” has the effect of activating the provisions mandating detailed regulatory analysis. This imposes on administrative agencies added costs for legal, economic, and clerical skills, injects OMB into the agency’s business, extends the time for comment, and consequently delays final publication and the effective date of the rule. While Executive Order 12,044 established minimal criteria for categorizing a rule as “significant,” not all “significant” rules required full regulatory analysis. Only “significant” rules which “would result” in the following had to undergo analysis: (1) an annual effect on the economy of $100 million or more; or (2) a major increase in costs or prices for individual industries, levels of government, or geographic regions.17

Reagan’s Executive Order substantially modifies this classification scheme. First, it alters the language introducing the definitional criterion by substituting a “likelihood of result” test for the certainty contained in Executive Order 12,044.18 Namely, a significant (or “major”) rule means any regulation that is likely to result in specific economic events, rather than a regulation which “would result” in those same events.

Second, while Executive Order 12,291 retains the two criteria of its predecessors, it adds another criterion which substantially broadens the definition, specifically: (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.19

Although we must await OMB’s interpretation and clarification of the operative word significant in the new criterion before making predictions of its impact, it is not ludicrous to suggest that few industries will have difficulty in establishing strong cases that new regulations will adversely affect their competitive position, productivity, investment, or market position vis-a-vis foreign competitors. It appears that this provision was designed specifically to envelope a wide range of new regulations into the process of regulatory analysis which would not have been included under Executive Order 12,044.

18. Id. § 1(b), 3 C.F.R. 152.
The total effect of these modifications is to expand the definition of major rule, thereby incorporating a greater number of regulations within the OMB review process, and limiting agency discretion. As will be observed below, these changes when combined with the authority of OMB to reverse an agency head's determination that a rule is non-major leave few rules free of the costs and burdens of the cumbersome review process.

The definition section of Executive Order 12,291 is also the first introduction to the Presidential Task Force on Regulatory Relief, which is expected to assume a coordinating role with OMB in monitoring compliance with the procedures set forth in the order. While the language of the Order actually implies a more prominent role for the Task Force, namely to review and approve of OMB activities pursuant to the Order, the likely result is that primary responsibility for enforcing compliance will reside in OMB. It is noteworthy that prominent members of the Task Force include Vice President George Bush, David Stockman, Director of OMB, and Murray Wiedenbaum, the Chairman of the Council on Economic Advisers, all of whom have long been critical of excess government regulation of business.

B. General Requirements

Further indications of the significant change presaged by the Executive Order appear in "Section 2. General Requirements." Both Executive Orders 12,044 and 12,291 arguably promote a systematic process for promulgating and reviewing proposed and existing regulations to alleviate unnecessary, expansive, and duplicative burdens. The new procedure, however, is more specifically directed toward quantifiable economic criteria for weighing "burdens." For example, Executive Order 12,044 set minimum standards to be included in an agency head's review of regulations, including need, direct and indirect effects, alternative approaches, choice of the least burdensome alternative, public comments, and estimates of new reporting burdens or recordkeeping requirements. The actual details of incorporating these factors into the process, and the importance attributed to each, however, remained within the domain of the agency head. As long as the review was undertaken within the framework established by these performance standards, agency heads could exercise relatively unfettered regulatory authority. Ex-

20. See text at notes 23-34 infra.
Executive Order 12,291, on the other hand, requires adherence to the following detailed considerations:

- administrative decisions shall be based on adequate information concerning the need for and consequences of proposed government action;
- regulatory action shall not be undertaken unless the potential benefits to society from the regulation outweigh the potential costs to society;
- regulatory objectives shall be chosen to maximize the net benefits to society;
- among alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen;
- agencies set regulatory priorities with the aim of maximizing the aggregate net benefits to society, taking into account the condition of the particular industries affected by regulations, the condition of the national economy, and other regulatory actions contemplated for the future.22

These revisions reflect more than semantic differences. Except for the first two considerations, there is little, if any, resemblance between these enumerated factors and those contained in Executive Order 12,044. Even where a similarity can be discovered, the utilization of more technical economic terminology discretely transforms the regulatory implications of the requirement. Although an argument may be made that agencies do, in fact, already consider these effects in undertaking their regulatory analysis, it is nevertheless certain that codification of these requirements in the Executive Order with mandatory standards and burdens of proof, creates a formal prerequisite that final promulgation of rules must be preceded by evidence sufficient to satisfy each of the standards. Industry no longer has to rely upon lobbying and negotiating skills to coax agencies into recognizing the effects of regulatory action upon competition, the economy, or their distinct operations. They can now publicly and perhaps judicially challenge agency action which fails to adequately consider these factors. In addition, at least two new sympathetic forums—OMB and the Task Force—are provided in which regulated industries may take their “appeals.” Simply stated, the need for economic and legal analysis will expand as agencies are compelled to respond to standards requiring evidence sufficient to

prove that it is more likely than not that proposed regulations will not have the claimed detrimental effect on competition, the economy, or the relative position of U.S.-based industry in foreign markets.

C. Regulatory Impact Analysis and Review

To implement the general requirements of section 2 of the Executive Order and to insure a primary role for OMB, a completely revised process for conducting regulatory impact analysis and review is proposed in section 3.

Generally speaking, the new approach requires initial agency determination whether a rule it intends to propose or to issue is a major rule, subject to the novel authority of OMB (1) to order that a rule not so initially determined be treated as a major rule,23 and (2) to require any set of related rules to be considered together as a major rule.24 Specific procedures and time frames for preparation and submission to OMB of a Regulatory Impact Analysis are also defined. The added power granted to OMB by the Executive Order reduces significantly the role of agency heads in final determination of what regulations will be proposed.25 It centralizes ultimate decision making in OMB, and may effectively curtail the number of regulations actually proposed or issued. This curtailment is a function of two factors—one practical, one political. Practically, given budget cuts, freezes on federal hiring and consulting contracts, agencies simply may not have sufficient personnel or technical expertise to meet the augmented requirements. Politically speaking, agency heads will only gamble on promulgation of major rules which clearly satisfy Executive Order standards so as to avoid a public and private “hand slapping,” by OMB acting for the President.

23. For a discussion of the implications of classifying a rule as a major rule, see text at notes 17-20 supra.
25. The reasons for centralizing responsibility for regulatory review in OMB may have originated in the historical use of OMB as a clearinghouse for executive branch proposals, or more logically because OMB has access to budgetary information of each agency and also has a head start in coordinating executive branch activity when it prepares the federal budget. It is probably more adept at tracking the relationships between regulatory schemes adopted by various agencies with overlapping substantive jurisdiction of regulated industries.
The specific procedures for Regulatory Impact Analysis (RIA) and Review prescribed by Executive Order 12,291 are as follows (see Figure 1):

1. Agencies shall prepare RIA’s for all major rules subject to the Executive Order and transmit them, along with all notices of proposed rulemaking and all final rules to the Director of OMB, in the following manner:
   (a) if no notice of proposed rulemaking is to be published for a proposed major rule (which is not an emergency rule), only a final RIA is to be prepared, and transmitted to OMB (with rule) at least 60 days prior to publication of the major rule as a final rule;
   (b) all other major rules require preparation of a preliminary RIA, and transmission, along with a notice of proposed rulemaking, to OMB at least 60 days prior to publication of a notice of proposed rulemaking; and a final RIA, transmitted to OMB (along with the final rule), at least 30 days prior to publication of the major rule as a final rule;
   (c) for all rules other than major rules, agencies shall submit to OMB, every notice of proposed rulemaking and final rule, at least 10 days prior to publication.

2. An RIA must contain:
   (a) a description of the potential benefits of the rule, including any beneficial effects that cannot be quantified in monetary terms, and the identification of those likely to receive the benefits;
   (b) a description of the potential costs of the rule, including any adverse effects that cannot be quantified in monetary terms, and the identification of those likely to bear the costs;
   (c) a determination of the potential net benefits of the rule, including an evaluation of effects that cannot be quantified in monetary terms;
   (d) a description of alternative approaches that could substantially achieve the same regulatory goal at lower cost, together with an analysis of the potential benefit and costs and a brief explanation of the legal reasons why such alternatives, if proposed, could not be adopted, and

26. A notice of proposed rulemaking is usually (except in those cases where agencies promulgate an advanced notice) the first public indication by an agency that it plans to follow the informal rulemaking procedure (promulgation of regulations in the Federal Register and solicitation of comments). This is distinct from formal rulemaking procedure which requires trial-like presentation of positions before an administrative tribunal with formal rules of evidence, etc.
28. Potential net benefits may be defined as the quantifiable, measurable or reasonably ex-
FIG. 1. TIMETABLE FOR REGULATORY REVIEW OF NEW RULES UNDER EO 12,291

**AGENCY ACTION**

<table>
<thead>
<tr>
<th>New Rules</th>
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<tbody>
<tr>
<td><strong>Notice of Proposed Rule-making Contemplated</strong></td>
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<tr>
<td><strong>Agency Determination of Major/Non-Major Status</strong></td>
</tr>
<tr>
<td><strong>Subject to OMB Redesignation as Major</strong></td>
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<tr>
<td><strong>60 DAYS PRIOR TO PUBLICATION</strong></td>
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<tr>
<td><strong>Prepare Preliminary RIA</strong></td>
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<tr>
<td><strong>Submit Preliminary RIA and Notice to OMB at Least 60 Days Prior to Publication of Notice</strong></td>
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<tr>
<td><strong>Submit Final RIA and Rule to OMB At Least 30 Days Prior to Publication of Rule as Final Rule</strong></td>
</tr>
<tr>
<td><strong>Submit Notice of Proposed Rulemaking and Final Rule to OMB at Least 10 Days Prior to Publication as Final Rule</strong></td>
</tr>
<tr>
<td><strong>Final RIA/Rule Promulgated</strong></td>
</tr>
<tr>
<td><strong>OMB Review: Review Deemed to be Completed Within 60 Days of Submission of Final RIA and Rule or 60 Days After Submission of Final Rule Where No Notice Contemplated. However, Final Publication May be Delayed by Requiring Consultation at Preliminary RIA Stage or by OMB Submitting Views on Final RIA Rule and Rule.</strong></td>
</tr>
<tr>
<td><strong>OMB Review: Completed Within 10 Days of Submission of Final RIA and Final Rule Unless Views Submitted, in Which Case Agency Must Respond, and Include in Rule File</strong></td>
</tr>
<tr>
<td><strong>Submit Final Rule to OMB at Least 10 Days Prior to Publication as Final Rule</strong></td>
</tr>
<tr>
<td><strong>(Action Initiated by Agency; Action Indicating OMB Approval)</strong></td>
</tr>
<tr>
<td><strong>(Action Within Review Process; OMB Review Required Prior to Publication)</strong></td>
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</tbody>
</table>

**No Notice of Proposed Rule-making Contemplated**

| **Agency Determination of Major/Non-Major Status** |
| **Submit Final RIA to OMB at Least 60 Days Prior to Publication of the Rule as Final Rule** |
| **Submit Final Rule to OMB at Least 10 Days Prior to Publication as Final Rule** |

**PUBLICATION OF FINAL RULE**
(e) unless covered by the description required [above], an explanation of any legal reasons why this rule cannot be based on the requirements set forth in Section 2 of the Order.29

These RIA content requirements lead to some interesting speculation. The emphasized language seems to refine the requirement in section 2 of the Executive Order relating to choice of the regulatory alternative involving the "least net cost to society." Since the phrase, "legal reasons" is used twice, it may be concluded that the only justifiable cause (other than the case of "emergency" rules) for not choosing the alternative involving the least net cost to society is a specific legal impediment which does not permit adoption of that alternative. This might take the form of a statutory or constitutional limitation, such as requirements of due process, or the prohibition on exercising authority beyond the agency's delegation of power by the Congress. Whatever the specific legal reason, these revisions seem to eliminate any consideration of practical feasibility, or reliance on any instinctive belief that one method will protect workers or insure safety or guarantee compliance better than a marginally less costly alternative. As a consequence, lawyers for regulated industries and regulating agencies will be pressed to exercise significant ingenuity in finding legal reasons to justify or condemn regulatory alternatives depending on their perspectives.

(3) The Director of OMB, subject to the direction of the Task Force, which is authorized to resolve any conflicts arising under Executive Order 12,291 or present them to the President, is empowered to review all preliminary or final RIA's, notices of proposed rulemaking, or final rules required by the new order.30

Agencies may assume that OMB has concluded its review unless they are advised to the contrary by OMB:

For major rules:

• within 60 days of a submission of a final RIA where no notice of proposed rulemaking is contemplated, or a submission of a preliminary RIA with a notice of proposed rulemaking;

• within 30 days of the submission of a final RIA and a final rule; and

The Director of OMB is empowered to require an agency to consult with OMB concerning the review of a preliminary RIA or notice of proposed rulemaking. During this period the agency is prohibited from formal publication of its preliminary RIA or notice of proposed rulemaking (subject to a conflict with deadlines imposed by statute or judicial order). Further, if an agency receives notice that the Director of OMB intends to submit views with respect to any final RIA or final rule, it must refrain from publishing its final RIA or final rule until it has (a) responded to OMB's views, and (b) incorporated those views and the agency's response in the rulemaking file. In effect, OMB may freeze preliminary RIA's and publication of notices of proposed rulemaking by demanding consultation, and may delay publication of final rules by submitting views.

Although Executive Order 12,291 suggests that application of these powerful controls over agencies is conditioned by the proviso that nothing in the subsection "shall be construed as displacing the agencies' responsibilities delegated by law," the likelihood is strong that these provisions along with the authority of OMB to reverse an agency head's determination whether a rule is major will be the subject of litigation.

The rules of law regarding congressional delegation of power to administrative agencies are complex and usually very narrowly interpreted. It is not unreasonable to argue that the Executive Order has bypassed Congress in usurping delegated agency powers and allotting them to OMB. On the other hand, defenders of the Executive Order can respond that it is merely an internal management tool, and nowhere is veto power over agency action granted to OMB.

Whatever the final resolution of this conflict, a few conclusions are inescapable. First, regardless of the letter of the Executive Order, agency heads will likely refrain from direct confrontation with OMB and the President over regulations which only minimally comply

32. It is unlikely that the prohibition on publication would preclude agencies which presently undertake "predraft" consultations with affected industries from continuing that process. In fact, the focus of the new Administration may be to encourage more informal industry participation in the regulatory process. It is safe to conclude that "publication" or "promulgation" when used in the Executive Order means publication or promulgation in the Federal Register.
34. Id. § 3, 46 Fed. Reg. 13,194-95.
with the new criteria. Second, the ability of OMB to freeze or substantially delay promulgation of rules is a powerful weapon for compelling agency heads to redefine or redirect the objectives of individual regulations. If neither of these results is technically a usurpation of delegated power, both will in actuality emasculate the authority of agency heads.

The remainder of section 3 addresses the content of notices of proposed rulemaking, the availability of preliminary and final RIA's to the public, and review of currently existing rules. A more detailed comment on the provisions concerning review of currently existing rules is appropriate, particularly since these revisions contribute to the enhancement of OMB's power at the expense of the authority of agency heads.

Agencies are required by Executive Order 12,291 to initiate reviews of currently effective rules and perform RIA's of existing major rules. To "assist" this activity, the Order authorizes OMB, subject to the direction of the Task Force, to designate currently effective rules for review and establish schedules for their review and analysis. This powerful tool is inserted into the Executive Order where it is unlikely to generate a great deal of attention. However, the implications are critical. OMB may designate for review (under the standards of the new Executive Order) currently existing rules which were appropriately approved pursuant to then effective requirements. Current rules must now surmount new burdens of cost/benefit justification, and to survive, must prove to be the least costly alternatives to achieve the regulatory objective. It would not be too speculative to conclude that many of the rules found to be most burdensome to industry will be selected by OMB for rejustification.

D. Regulatory Review

The increase in the nature and amount of substantiation required to sustain regulatory action is also evident in "Section 4, Regulatory Review." In two short paragraphs, the Executive Order creates what is in essence a "full employment act for lawyers." The section requires that:

Before approving any final major rule, each agency shall:

(a) Make a determination that the regulation is clearly within the authority delegated by law and consistent with congressional intent, and include in the Federal Register at the time

35. Id. § 3(i), 46 Fed. Reg. 13,195.
36. Id.
of promulgation a memorandum of law supporting that
determination.

(b) Make a determination that the factual conclusions upon
which the rule is based have substantial support in the agency
record, viewed as a whole, with full attention to public com-
ments in general and the comments of persons directly af-
fected by the rule in particular.37

These provisions certainly require more than the perfunctory atten-
tion given to legal authority in present rules. In addition, paragraph
(b) employs the technical legal standard for judicial approval of agen-
cy action on appeal, namely, that “factual conclusions have substan-
tial support in the agency record.”38 Although this standard pre-
serves the responsibility of reviewing courts to carefully scrutinize
the record to insure that conclusions drawn accurately reflect
evidence in the record, if the “substantial evidence” criterion is
satisfied the factual findings of agencies will normally be treated as
presumptively correct, limiting review to matters of law. Failure to
find such evidence, however, permits the court to review the facts ab
initio.39 Since it is assumed that most administrative agencies
presently take steps to insure that the record of agency action has
sufficient factual support for its conclusions, this requirement of the
Executive Order will not be overly burdensome. But, the questions
remain whether agencies must now have the kind of sufficient
evidence required by the Executive Order in its record to sustain its
judgment, what weight a reviewing court will accord the new proce-
dures, and whether the quality of evidence supported in the record
must be that described in the Executive Order to pass judicial
muster. Contributing to the confusion is the fact that the “substan-
tial evidence” standard is traditionally applied to formal adjudic-
catory rulemaking only, not informal rulemaking. Whether the Ex-
ecutive Order is presuming to establish a new standard, and whether
reviewing courts will heed that standard must await future judicial
decisionmaking. But certainly, it is uncontestable that the “substan-
tial evidence” criteria imposes a heavier burden on agency action,
even if only for internal administration purposes.

The remainder of the section proposes a guide for weighing factual
evidence: first, weight must be given to general public comments;

38. “Substantial evidence” is such evidence as a reasonable mind might accept as adequate
to support a conclusion.
39. Administrative Procedure Act, 5 U.S.C. § 706(2) (1976); Securities & Exchange Com-
and second, "special" weight is to be given to comments of persons directly affected by the rule. This modification in existing practice seems to require the allocation of added weight to economic concerns, industry, and social costs.

E. Regulatory Agendas

Section 5 of the new Executive Order continues the practice begun in Executive Order 12,044 that agendas of proposed regulations that agencies have issued or expect to issue, and currently effective rules that are under agency review, be published biannually in the Federal Register. The Executive Order also authorizes OMB to require agencies to provide additional information in an agenda, and publication of the agenda in a specified format.

F. The Task Force and Office of Management and Budget

Although the title of section 6 prominently mentions the Task Force, there is only one reference to the Task Force in the entire section, i.e., "the Director shall have authority, subject to the direction of the Task Force . . . ." The remainder of the section sets forth the specific authority of OMB, most of which has been discussed above. The Director is empowered to:

- designate any proposed or existing rule as a major rule,
- prepare and promulgate uniform standards for the identification of major rules and the development of RIA's,
- require an agency to evaluate any additional relevant data from any appropriate source,
- identify duplicative, overlapping and conflicting rules; existing or proposed, and existing proposed rules that are inconsistent with the policies underlying statutes governing agencies other than the issuing agencies or with the purpose of this order, and in each such case, require appropriate interagency consultation. [Emphasis supplied].
- develop procedures for estimating the annual benefits and costs of agency regulations, on both an aggregate and economic or industrial sector basis, for purposes of compiling a regulatory budget,
- in consultation with interested agencies, prepare for consideration by the President recommendations for changes in the agencies' statutes,

41. The new Executive Order does not delineate what additional information OMB may require in an agenda. Presumably, what is meant is further information describing the intent and effect of a regulation.
monitor agency compliance with the requirements of this Order and advise the President with respect to such compliance.\textsuperscript{42}

While some of the previously described provisions relating directly to the process for promulgating regulations provided a glimpse of the pervasiveness of the review process to be undertaken by OMB, section 6 discloses fully the plan for revamping regulatory procedures. Its ambition, however, will only be fulfilled with significant investments of time and energy. However, the locus of authority in OMB may be the new administration’s response to years of perceived futility at achieving regulatory reform. Further, the involvement of the Vice President, the Director of OMB, and the head of the Council of Economic Advisers as members of the Task Force may auger well for those critics who have attributed failure of regulatory reform to its lack of priority in former administrations.

\textbf{G. Pending Regulations}

The entirety of “Section 7, Pending Regulations” addresses the procedure for insuring reconsideration of every major rule promulgated by agencies in final form, but not yet effective (see Figure 2). It requires “suspension or postponement” of the effective dates of all pending major rules, except:

- major rules that cannot legally be postponed or suspended;
- major rules that, for good cause, ought to become effective as final rules without reconsideration.\textsuperscript{43}

The second of these exceptions presumably requires a written justification of “good cause,” with an ultimate review by OMB. It cannot yet be determined how this provision is to be reconciled with the President’s January 29, 1981 Memorandum, entitled, “Postponement of Pending Regulations,”\textsuperscript{44} except to say that that action is not superseded by the Executive Order, and that a cumulative postponement or suspension is likely.

The specific procedural requirements of the section are divided into procedures governing pending rules, interim rules, and final proposed rules as follows:

\textsuperscript{44} This memorandum postponed for 60 days the effective date of promulgation for both final rules and proposed final rules.
FIG. 2. PROCEDURES FOR RECONSIDERATION OF PENDING/PROPOSED RULES UNDER EO 12,291

AGENCY ACTION

Pending Rules (Promulgated in Final Form, Not Yet Effective) [Suspended or Postponed Pending Reconsideration]

Agency Determination of Rule Reconsideration

Reconsideration

At Least 15 Days Prior to Effective Date, Report to OMB Reasons for Exception

If Within 15 Days OMB Finds That Report is Not Adequate, Reconsideration Required

If Within 30 Days OMB Finds Legal Reasons Insufficient or Rule is Major, Reconsideration Required

(Provided That)

Agency Prepares Final RIA Pursuant to New Procedures; Submitted to OMB; Subject to OMB Authority to Require Consultation/Submit Views

OMB Reviews/Views/ Approval

Agency Prepares Final RIA Pursuant to New Procedures; Submitted to OMB; Subject to OMB Review/Views

OMB Reviews/Views/ Approval

Final Rule Published

Pending Reconsideration

Interim Rule Status

Interim Rule (Major Rules Promulgated in Final Form, Not Yet Effective; May Take Effect as Interim Rule While Being Reconsidered)

[Provided That]

At Least 15 Days Prior to Effective Date as Interim Rule, OMB Notified of Reasons Interim Status Appropriated

If Within 15 Days OMB Finds Agency Report on Interim Rule is Not in Compliance With EO, Formal Reconsideration Required Prior to Publication/ Effectiveness

(Provided That)

Agency Prepares Final RIA Pursuant to New Procedures; Submitted to OMB

Final Rule Promulgated

Proposed Final Rules (Not Yet Promulgated As Final Rule/Not Considered Under EO 12,291) [Suspended or Postponed Pending Reconsideration]

At Least 30 Days Prior to Promulgation as Final Rule, Notify OMB That

- Rule Cannot Be Reconsidered Under EO; Legal Reasons
- Rule Not Major/Submit Copy of Proposed Rule

If Within 30 Days OMB Finds Legal Reasons Insufficient or Rule is Major, Reconsideration Required

OMB Approves Report

OMB Approves Report

Final Rule Promulgated
1. Pending Rules: Not To Be Reconsidered

Agencies must report to OMB no later than fifteen days prior to the effective date of any rule that the agency has promulgated in final form as of the date of the Executive Order, and that has not yet become effective, and that will not be reconsidered:

• that the rule is excepted from reconsideration, and the reasons;
• that the rule is not a major rule.45

2. Director; Responsibilities Re: Pending Rules

The Director of OMB is authorized, to the extent permitted by law, to:

• require reconsideration of pending major rules;
• designate a rule that an agency has issued in final form but not yet become effective as a major rule.46

3. Interim Rules

Agencies may, in accordance with the Administrative Procedure Act, permit major rules that they have issued in final form, and that have not yet become effective, to take effect as interim rules, while they are being reconsidered, provided that, agencies shall report to OMB, no later than fifteen days before any such rule is proposed to take effect as an interim rule, that the rule should appropriately take effect as an interim rule while the rule is under reconsideration.47

4. Proposed Final Rules; Not Yet Promulgated As Final Rule

Agencies are required to report to OMB no later than thirty days prior to promulgating as a final rule any proposed rule that the agency has published or issued as of date of the Executive Order and that has not been considered under the terms of the Executive Order:

• that the rule cannot be legally considered in accordance with the Executive Order, and a brief explanation of the legal reasons;
• that the rule is not a major rule, in which cases the agency shall submit to OMB a copy of the proposed rule.48

46. Id. § 7(c)(1)-(2), 46 Fed. Reg. 13,197.
47. Id. § 7(d), 46 Fed. Reg. 13,197.
5. Director; Responsibilities Re: Proposed Final Rules

The Director of OMB is authorized to:

- require reconsideration; or
- designate a proposed rule that an agency has published or issued (not yet as final rule) as a major rule.49

6. Compliance

The Director of OMB shall be deemed to have found an agency’s report to OMB consistent with the purpose of the Executive Order, unless he advises the agency to the contrary:

- within 15 days of its report, in the case of any report relating to a published final rule not yet effective and any interim rule,
- within 30 days of its report, in the case of any report relating to a published or issued proposed rule not yet promulgated as a final rule.50

Section 7 of the Executive Order may be characterized as a safety net preventing any proposed or pending final rule from becoming effective until it complies with the requirements of the Executive Order. This section effectively recaptures for reconsideration rules that would have become effective after meeting the standards in existence prior to issuance of the new Order. It tracks the same procedure delineated for new regulations but with shorter time frames for agency reporting and OMB response. Similarly, legal prohibition appears to be the only real excuse for not reconsidering pending or proposed final rules under the procedures contained in the Executive Order.

H. Exemptions

As cited throughout this summary, only two exemptions to the procedures of the Executive Order apply to major rules. These exemptions include:

- any regulation that responds to an emergency situation,
- any regulation for which consideration or reconsideration under the terms of the Executive Order would conflict with deadlines imposed by statute or by judicial order.51

In both instances, however, the exemptions are applicable only if

49. Id. § 7(g)(1)-(2), 46 Fed. Reg. 13,197.
50. Id. § 7(h)(1)-(2), 46 Fed. Reg. 13,197.
the pertinent regulations are reported to OMB, and explanations of the conditions warranting exemption are published in the Federal Register. In the case of emergency regulations the added requirement of preparation and submission of the RIA is included. For regulations in which deadlines are imposed by statute or by judicial order, consultation with OMB is required to determine to what extent compliance with the Order may be achieved.

Another powerful authority vested in OMB is its ability, subject to the direction of the Task Force, to exempt any class or category of regulations from any or all requirements of the Executive Order. This assures a means of administrative flexibility so that favored regulations, which are not emergency rules or required by statute or judicial order, may be permitted to bypass the cumbersome review procedure.

I. Judicial Review

In an attempt to emphasize the internal managerial intent of the Executive Order and to minimize the likelihood of litigation challenging its diminution of agency authority; "Section 9, Judicial Review" contains the following disclaimer:

This Order is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person. The determinations made by agencies under Section 4 of this Order, and any Regulatory Impact Analyses for any rule, shall be made part of the whole record of agency action in connection with the rule.\textsuperscript{52}

The effect of such a disclaimer is questionable, since most courts will look beyond the stated intent of an act to its \textit{de facto} result. If, in practice, agency responsibilities have been usurped and redelegated without statutory authority, the Order must be invalidated. It seems certain, however, that litigation will follow.

IV. CONCLUSION

The long-term effects of the new Executive Order will have to await the judgment of time. The degree of enforcement by the Office of Management and Budget, guidelines interpreting ambivalent pro-

\textsuperscript{52} Id. § 9, 46 Fed. Reg. 13,198.
visions, individual agency responses to its terms, and potential litigation may have a decidedly larger impact than anything we can now discern from the Order’s technical terms. But what cannot be denied is that it significantly alters the approach toward government regulation of business. It operates from a foundation of laissez-faire economic activity. It demands that government prove by a preponderance of the evidence the value of its intervention.

What the Executive Order demonstrates is that balancing tests may be affected significantly by a variation in the weights assigned to the countervailing sides. The President has effectively adjusted the regulatory process to accommodate his economic and political philosophy of government regulation of business. He has done so by adding an increased burden to those who must substantiate government action, while simultaneously increasing the weight to be given to economic evidence and arguments opposing intervention.

Administrative agencies, therefore, are compelled to follow a two-staged preliminary decision-making process. First, they must determine that a clear legal authority to regulate an area which by all available evidence appears to necessitate government action is present. Second, they must choose a course from the alternatives available that is the least costly and provides an aggregate net benefit to society. The elements of proof required and the standards to be met are defined in the Executive Order. It sets a new course for the division of authority between federal agencies and OMB—a course set centrally at OMB.

Finally, future interpretation—either administratively or judicially—must address the following questions:

- Does the Executive Order inappropriately and illegally usurp agency (or congressional) authority?
- Who will have “standing” to challenge the validity of the Executive Order, particularly with respect to OMB power to reverse agency head determinations of whether rules are “major” or “non-major”?
- How will agencies with reductions in staff and cuts in budget prepare the quantity and quality of analyses required by the Order?
- Will OMB become an “appeals court” for industry?
- Will agencies revise methods for regulating certain conduct to insure that the least costly alternative is employed, or simply not regulate?
• Will agency heads over time develop an adversary role with OMB, and will the Task Force or President be the ultimate arbiter?

For the student and practitioner, the answers to these questions will make for an interesting future.