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REGULATORY REFORM

Comments on S. 981—The Regulatory Improvement Act of 1998

Statement for the Record of L. Nye Stevens
Director, Federal Management and Workforce Issues
General Government Division

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Regulatory Reform: Comments on S. 981—The Regulatory Improvement Act of 1998

Mr. Chairman and Members of the Committee:

I am pleased to assist in your consideration of S. 981, the "Regulatory Improvement Act of 1998." As I said in my testimony last September on an earlier version of S. 981, we believe that the bill thoughtfully addresses many issues in regulatory management that have long been the subject of controversy.[1] We have issued reports and have ongoing assignments on a number of those issues.

Based on our previous work, last September I commented on several specific provisions in the bill, two of which were reviews of existing rules and peer review. I will not repeat my testimony on these provisions other than to reaffirm that enactment of S. 981 can provide a sound statutory basis for periodic examinations of existing rules, and that systematic peer review can improve the quality of agencies' cost-benefit analyses.

My statement today focuses on our work since last September in four areas of relevance to the bill—agencies' implementation of (1) the transparency requirements in Executive Order 12866, (2) title II of the Unfunded Mandates Reform Act of 1995, (3) the public notification requirements in section 610 of the Regulatory Flexibility Act of 1980, and (4) OMB's "best practices" guide for economic analyses used in rulemaking.

Omb Comments on Transparency Recommendations Suggest Need for Congressional Specificity

Mr. Chairman, last month we issued a report that you and Senator Glenn requested assessing the implementation of the regulatory review transparency requirements in Executive Order 12866.[2] Those requirements, which are similar to the public disclosure requirements in section 643(b) of S. 981, state that agencies must identify for the public the substantive changes made during the period that rules are being reviewed by OMB's Office of Information and Regulatory Affairs (OIRA) as well as the changes made to rules at the suggestion or recommendation of OIRA. We reviewed four major rulemaking agencies' public dockets and concluded that it was usually very difficult to locate the documentation that the executive order required. In many cases, the dockets contained some evidence of changes made during or because of OIRA's review, but we could not be sure that all such changes had been documented. In other

[1]Regulatory Reform: Comments on S. 981—The Regulatory Improvement Act of 1997 (GAO/T-GGD/RCED-97-250, Sept. 12, 1997).

[2]Regulatory Reform: Changes Made to Agencies' Rules Are Not Always Clearly Documented (GAO/GGD-98-31, Jan. 8, 1998).

cases, the files contained no evidence of OIRA changes, and we could not tell if that meant that there had been no such changes to the rules or whether the changes were just not documented. Also, the information in the dockets for some of the rules was quite voluminous, and many did not have indexes to help the public find the required documents. Therefore, we recommended that the OIRA Administrator issue guidance to the agencies on how to implement the executive order's transparency requirements and how to organize their rulemaking dockets to best facilitate public access and disclosure.

The OIRA Administrator's comments in reaction to our recommendations appeared at odds with the requirements and intent of the executive order. Her comments may also signal a need for ongoing congressional oversight and, in some cases, greater specificity as Congress codifies agencies' public disclosure responsibilities and OIRA's role in the regulatory review process. For example, in response to our recommendation that OIRA issue guidance to agencies on how to improve the accessibility of rulemaking dockets, the Administrator said that "it is not the role of OMB to advise other agencies on general matters of administrative practice." However, section 2(b) of the executive order states that "[t]o the extent permitted by law, OMB shall provide guidance to agencies...," and that OIRA "is the repository of expertise concerning regulatory issues, including methodologies and procedures that affect more than one agency...." We believe that OIRA has a clear responsibility under the executive order to exercise leadership and provide the agencies with guidance on such crosscutting regulatory issues, so we retained our recommendation.

The OIRA Administrator also indicated in her comments that she believed the executive order did not require agencies to document changes made at OIRA's suggestion before a rule is formally submitted to OIRA. However, the Administrator also said that OIRA can become deeply involved in important agency rules well before they are submitted to OIRA for formal review. Therefore, adherence to her interpretation of the order would result in agencies' failing to document OIRA's early involvement in the rulemaking process. These transparency requirements were put in place because of earlier congressional concerns regarding how rules were changed during the regulatory review process. Congress was clearly interested in making OIRA's role in that process as transparent as possible. In response to the Administrator's comments, we retained our original recommendation but specified that OIRA's guidance should require agencies to document changes made at OIRA's suggestion whenever they occur.

Finally, the OIRA Administrator said that "an interested individual" could identify changes made to a draft rule by comparing drafts of the rule. This position seems to change the focus of responsibility in Executive Order 12866. The order requires agencies to identify for the public changes made to draft rules. It does not place the responsibility on the public to identify changes made to agency rules. Also, comparison of a draft rule submitted for review with the draft on which OIRA concluded review would not indicate which of the changes were made at OIRA's suggestion, which is a specific requirement of the order.

We believe that enactment of the public disclosure requirements in S. 981 would provide a statutory foundation for the public's right to regulatory review information. In particular, the bill's requirement that these rule changes be described in a single document would make it easier for the public to understand how rules change during the review process. We are also pleased to see that the new version of S. 981 requires agencies to document when no changes are suggested or recommended by OIRA. As I said earlier, the absence of documentation could indicate that either no changes were made to the rule or that the changes were not documented.

Additional refinements to the bill may be needed in light of the OIRA Administrator's comments responding to our report. For example, S. 981 may need to state more specifically that agencies must document the changes made to rules at the suggestion or recommendation of OIRA whenever they occur, not just the changes made during the period of OIRA's formal review. Similarly, if Congress wants OIRA to issue guidance on how agencies can structure rulemaking dockets to facilitate public access, S. 981 may need to specifically instruct the agency to do so.

Unfunded Mandates Reform Act Had Little Effect on Agencies' Rulemaking Actions

During last September's hearing on S. 981, one of the witnesses indicated that Congress should determine the effectiveness of previously enacted regulatory reforms before enacting additional reforms. We recently completed a broad review of one of the most recent such reform efforts—title II of the Unfunded Mandates Reform Act of 1995 (UMRA).[3] Title II of UMRA is similar to S. 981 in that it requires agencies to take a number of analytical and procedural steps during the rulemaking process. Therefore, analysis of UMRA's implementation may prove valuable in determining both the need for further reform and how agency requirements should be crafted.

[3]Unfunded Mandates: Reform Act Has Had Little Effect on Agencies' Rulemaking Actions (GAO/GGD-98-30, Feb. 4, 1998).

We concluded that UMRA's title II requirements had little effect on agencies' rulemaking actions because those requirements (1) did not apply to many large rulemaking actions, (2) permitted agencies not to take certain actions if the agencies determined they were duplicative or unfeasible, and (3) required agencies to take actions that they were already required to take.

For example, title II of UMRA requires agencies to prepare "written statements" containing information on regulatory costs, benefits, and other matters for any rule (1) for which a proposed rule was published, (2) that includes a federal mandate, and (3) that may result in the expenditure of $100 million or more in any 1 year by state, local, or tribal governments, in the aggregate, or the private sector. We examined the 110 economically significant rules that were promulgated during the first 2 years of UMRA (March 22, 1995, until March 22, 1997) by agencies covered by the Act and concluded that UMRA's written statement requirements did not apply to 78 of these 110 rules. Some of the rules had no associated proposed rule. Others were not technically "mandates"—i.e., "enforceable duties" unrelated to a voluntary program or federal financial assistance. Some rules were "economically significant" in that they would have a $100 million effect on the economy, but did not require "expenditures" by state, local, or tribal governments or the private sector of $100 million in any 1 year.

Certain sections of UMRA permitted agencies to decide what actions to take. For example, subsection 202(a)(3) says agencies' written statements must contain estimates of future compliance costs and any disproportionate budgetary effects "if and to the extent that the agency determines that accurate estimates are reasonably feasible." UMRA also permitted agencies to prepare the written statement as part of any other statement or analysis. Because the agencies' rules commonly contain the information required in the written statements (e.g., the provision of federal law under which the rule is being promulgated), the agencies only rarely prepared a separate UMRA written statement.

Other parts of UMRA repeated requirements that were already in place. For example, section 202 of the Act requires agencies to conduct cost-benefit analyses for all covered rules. However, Executive Order 12866 had required such analyses for more than a year before UMRA was enacted, and for a broader set of rules than UMRA covered. Section 204 of the Act requires agencies to develop an effective process to permit elected officers of state, local, and tribal governments to provide input in the

development of regulatory proposals containing significant federal intergovernmental mandates. However, Executive Order 12875 required almost exactly the same sort of process when it was issued in 1993.

Like UMRA, S. 981 contains some of the same requirements contained in Executive Orders 12866 and 12875, and in previous legislation. However, the requirements in the bill are also different from existing requirements in many respects. For example, S. 981 appears to cover all of the economically significant rules that UMRA did not cover, as well as rules by many independent regulatory agencies that were not covered by the executive orders. S. 981 would also address a number of topics that are not addressed by either UMRA or the executive orders, including risk assessments and peer review. These requirements could have the effect of improving the quality of the cost-benefit analyses that agencies are currently required to perform under Executive Order 12866.

Agencies' Section 610 Review Notices in Unified Agenda Often Did Not Satisfy Statutory Requirements

The new version of S. 981 contains one set of requirements that was not in the bill introduced last year—that agencies develop a plan for the periodic review of rules issued by the agency that have or will have a significant economic impact on a substantial number of small entities. Each agency is also required to publish in the Federal Register a list of rules that will be reviewed under the plan in the succeeding fiscal year.

In one sense, these requirements are not really "new." They are a refinement and underscoring of requirements originally put in place by section 610 of the Regulatory Flexibility Act (RFA) of 1980. Our recent work related to the RFA suggests that at least some of the RFA's requirements are not being properly implemented. In 1997, we reported that only three agencies identified regulations that they planned to review within the next year in the November 1996 edition of the Unified Agenda of Federal Regulatory and Deregulatory Action.[4] Of the 21 entries in that edition of the Unified Agenda that these 3 agencies listed, none met the requirements in the RFA. For example, although section 610 requires agencies to notify the public about an upcoming review of an existing rule to determine whether and, if so, what changes to make, many of the "section 610" entries in the Agenda announced regulatory actions that the agencies had taken or planned to take.

[4]Regulatory Flexibility Act: Agencies' Use of the November 1996 Unified Agenda Did Not Satisfy Notification Requirements (GAO/GGD/OGC-97-77R, Apr. 22, 1997).

Earlier this month we updated our 1997 report by reviewing agencies' use of the October 1997 Unified Agenda.[5] We reported that seven agencies had used the Agenda to identify regulations that they said they planned to review. However, of the 34 such entries in that edition of the Agenda, only 3 met the requirements of the statute.

Although the Unified Agenda is a convenient and efficient mechanism by which agencies can satisfy the notice requirements in section 610 of the RFA, agencies can print those notices in any part of the Federal Register. We did an electronic search of the 1997 Federal Register to determine whether it contained any other references to a "section 610 review." We found no such references.

There is no way to know with certainty how many regulations in the Code of Federal Regulations have a "significant economic impact on a substantial number of small entities," or how many of those regulations the issuing agencies have reviewed pursuant to section 610. Agencies differ in their interpretation of this phrase, and we have recommended that a governmentwide definition be developed.[6] Nevertheless, the relatively small number of section 610 notices in the Unified Agendas, combined with the fact that nearly all of those notices did not meet the requirements of the statute, suggests that agencies may not be conducting the required section 610 rule reviews. Although many federal agencies reviewed all of their regulations as part of the administration's "page-by-page review" effort to eliminate and revise regulations,[7] those reviews would not meet the requirements of section 610 unless the agencies utilized the steps delineated in that section of the RFA that were designed to allow the public to be part of the review process. Therefore, we believe that the reaffirmation and refinement of the section 610 rule review process in S. 981 can serve to underscore Congress' commitment to periodic review of agencies' rules and the public's involvement in that process.

[5]Regulatory Flexibility Act: Agencies' Use of the October 1997 Unified Agenda Often Did Not Satisfy Notification Requirements (GAO/GGD-97-61R, Feb. 12, 1998).

[6]Regulatory Flexibility Act: Status of Agencies' Compliance (GAO/GGD-94-105, Apr. 27, 1994).

[7]For an analysis of this effort, see Regulatory Reform: Agencies' Efforts to Eliminate and Revise Rules Yield Mixed Results (GAO/GGD-98-3, Oct. 2, 1997).

Regulatory Impact Analyses Do Not Always Adhere to "Best Practices"

Another critical element of S. 981 is its emphasis on cost-benefit analysis for major rules in the rulemaking process. Mr. Chairman, at your and Senator Glenn's request, we have been examining 20 economic analyses at 5 agencies to determine the extent to which those analyses contain the "best practices" elements recommended in OMB's January 1996 guidance for conducting cost-benefit analyses. We are also attempting to determine the extent to which the analyses are used in the agencies' decisionmaking processes. Although our review is continuing, we have some tentative results that are relevant to this Committee's consideration of S. 981.

The 20 economic analyses varied significantly in the extent to which they contained the elements that OMB recommended. For example, although the guidance encourages agencies to monetize the costs and benefits of a broad range of regulatory alternatives, about half of the analyses did not monetize the costs of all alternatives and about two-thirds did not monetize the benefits. Several of the analyses did not discuss any alternatives other than the proposed regulatory action. The OMB guidance also stresses the importance of explicitly presenting the assumptions, limitations, and uncertainties in economic analyses. However, the 20 analyses that we reviewed frequently did not explain why certain assumptions or values were used, such as the discount rates used to determine the present-value of costs and benefits and the values assigned to a human life. Also, about a third of the analyses did not address the uncertainties associated with the analyses.

For the most part, the analyses played a somewhat limited role in the agencies' decisionmaking process—examining the cost-effectiveness of various approaches an agency could use within a relatively narrow range of alternatives, or helping the agency define the regulations' coverage or implementation date. The analyses did not fundamentally affect agencies' decisions on whether or not to regulate, nor did they cause the agencies to select significantly different regulatory alternatives than the ones that had been originally considered.

Agency officials told us that the variations in the degree to which the economic analyses followed OMB guidance and the limited use of the economic analyses were primarily caused by the limited degree of discretion that the underlying statutes permitted. They said that authorizing statutes limited their ability to consider a large range of regulatory alternatives and limited the role of the analyses in the decisionmaking process. The agency officials also said that another factor that limited the analyses' adherence to the guidance and their use in

decisionmaking was the need to issue the regulations quickly due to emergencies, statutory deadlines, and court orders.

Enactment of the analytical transparency and executive summary requirements in S. 981 would extend and underscore Congress' previous statutory requirements that agencies identify how regulatory decisions are made. We believe that Congress and the public have a right to know what alternatives the agencies considered and what assumptions they made in deciding how to regulate. Although those assumptions may legitimately vary from one analysis to another, the agencies should explain those variations.

Conclusions

Mr. Chairman, S. 981 contains a number of provisions designed to improve regulatory management. These provisions strive to make the regulatory process more intelligible and accessible to the public, more effective, and better managed. Passage of S. 981 would provide a statutory foundation for such principles as openness, accountability, and sound science in rulemaking.

This Committee has been diligent in its oversight of the federal regulatory process. However, our reviews of current regulatory requirements suggest that, even if S. 981 is enacted into law, Congress will need to carefully oversee its implementation to ensure that the principles embodied in the bill are faithfully implemented.

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