I

105TH CONGRESS
2D SESSION

H. R. 4863

To ensure the incorporation of risk assessment and cost benefit analysis in the rulemaking process.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 20, 1998

Mr. CONDIT (for himself and Mr. JOHN) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Government Reform and Oversight, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To ensure the incorporation of risk assessment and cost benefit analysis in the rulemaking process.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Government Regulatory Improvement and Performance Act of 1998''.

SEC. 2. STATEMENT OF REGULATORY PHILOSOPHY AND PRINCIPLES.

(a) THE REGULATORY PHILOSOPHY.—Federal agencies (in this Act referred to as ''agencies'') should promul-

gate only such regulations as are required by law, are necessary to interpret the law, or are necessary to protect and promote or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages, distributive impacts, and equity), unless a statute requires another regulatory approach.

(b) THE PRINCIPLES OF REGULATION.—To ensure that the agencies' regulatory programs are consistent with the philosophy set out in subsection (a), agencies shall adhere to the following principles in promulgating any regulation, to the extent permitted by law and where applicable:

(1) Each agency shall identify the problem that it intends to address by the regulation (including,

where applicable, the failures of private markets or public institutions that warrant new agency action), assess the significance of that problem, and if possible conduct a risk analysis regarding the regulation.

(2) Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively.

(3) Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits or providing information upon which choices can be made by the public.

(4) In setting regulatory priorities, each agency shall consider, to the extent permitted by law, the degree and nature of the risks posed by various substances or activities within its jurisdiction.

(5) When an agency determines that a regulation is necessary, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall con-

sider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.

(6) Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.

(7) Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.

(8) Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.

(9) Wherever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities. Each agency shall assess the effects of Federal regulations on State, local, and tribal governments, in-

cluding specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives. In addition, as appropriate, agencies shall seek to harmonize Federal regulatory actions with related State, local, and tribal regulatory and other governmental functions.

(10) Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.

(11) Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.

(12) Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.

SEC. 3. ORGANIZATION.

(a) THE AGENCIES.—Because Federal agencies are the repositories of significant substantive expertise and experience, they are responsible for developing regulations and assuring that the regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Act.

(b) THE OFFICE OF MANAGEMENT AND BUDGET.—Coordinated review of agency rulemaking is necessary to ensure that regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Act, and that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency. The Office of Management and Budget (in this Act referred to as ''OMB'') shall carry out that review function. Within OMB, the Office of Information and Regulatory Affairs (in this Act referred as as ''OIRA'') is the repository of expertise concerning regulatory issues, including methodologies and procedures that affect more than one agency, this Act, and the President's regulatory policies. To the extent permitted by law, OMB shall provide guidance to agencies and assist the President, the Administrator of OIRA, and other regulatory policy advisers to the President in regulatory planning and shall be the entity that reviews individual regulations, as provided by this Act.

(c) THE ADMINISTRATOR OF OIRA.—The Administrator of OIRA shall coordinate the development and presentation of recommendations concerning, regulatory policy, planning, and review, as set forth in this Act. In fulfilling their responsibilities under this Act, the President and the Administrator of OIRA shall be assisted by the regulatory policy advisers within the Executive Office of the President and by such agency officials and personnel as the President and the Administrator of OIRA may, from time to time, consult.

SEC. 4. PLANNING MECHANISM.

(a) AGENCIES' POLICY MEETING.—Early in each year's planning cycle, the Administrator of OIRA shall convene a meeting of the Advisers and the heads of agencies to seek a common understanding of priorities and to coordinate regulatory efforts to be accomplished in the upcoming year.

(b) UNIFIED REGULATORY AGENDA.— Each agency shall prepare an agenda of all regulations under development or review, at a time and in a manner specified by the Administrator of OIRA. The description of each regulatory action shall contain, at a minimum, a regulation identifier number, a brief summary of the action, the legal authority for the action, any legal deadline for the action, and the name and telephone number of a knowledgeable

agency official. Agencies may incorporate the information required under section 602 of title 5, United States Code, into these agendas.

(c) THE REGULATORY PLAN.—

(1) As part of the Unified Regulatory Agenda, beginning in 1994, each agency shall prepare a Regulatory Plan (in this Act referred to as a ''Plan'') of the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter. The Plan shall be approved personally by the agency head and shall contain at a minimum—

(A) a statement of the agency's regulatory objectives and priorities and how they relate to the philosophy and principles set forth in sections 2(a) and 2(b), respectively;

(B) a summary of each planned significant regulatory action including, to the extent possible, alternatives to be considered and preliminary estimates of the anticipated costs and benefits;

(C) a summary of the legal basis for each such action, including whether any aspect of the action is required by statute or court order;

(D) a statement of the need for each such action and, if applicable, how the action will reduce risks to public health, safety, or the environment, as well as how the magnitude of the risk addressed by the action relates to other risks within the jurisdiction of the agency;

(E) the agency's schedule for action, including a statement of any applicable statutory or judicial deadlines; and

(F) the name, address, and telephone number of a person the public may contact for additional information about the planned regulatory action.

(3) The Plans developed by the issuing agency shall be published annually in the October publication of the Unified Regulatory Agenda. This publication shall be made available to the Congress; State, local, and tribal governments; and the public. Any views on any aspect of any agency Plan, including whether any planned regulatory action might conflict with any other planned or existing regulation, impose any unintended consequences on the public, or confer any unclaimed benefits on the public, should be directed to the issuing agency, with a copy to OIRA.

(d) REGULATORY WORKING GROUP.—Within 30 days after the date of the enactment of this Act, the Administrator of OIRA shall convene a Regulatory Working Group (''Working Group''), which shall consist of representatives of the heads of each agency that the Administrator determines to have significant domestic regulatory responsibility and the Advisers. The Administrator of OIRA shall chair the Working Group and shall periodically advise the President and the Congress on the activities of the Working Group. The Working Group shall serve as a forum to assist agencies in identifying and analyzing important regulatory issues (including, among others (1) the development of innovative regulatory techniques, (2) the methods, efficacy, and utility of comparative risk assessment in regulatory decision-making, and (3) the development of short forms and other streamlined regulatory approaches for small businesses and other entities). The Working Group shall meet at least quarterly and may meet as a whole or in subgroups of agencies with an interest in particular issues or subject areas. To inform its discussions, the Working Group may commission analytical studies and reports by OIRA, the Administrative Conference of the United States, or any other agency.

(e) CONFERENCES.—The Administrator of OIRA and the heads of agencies shall meet quarterly with representa-

tives of State, local, and tribal governments to identify both existing and proposed regulations that may uniquely or significantly affect those governmental entities. The Administrator of OIRA shall also convene, periodically conferences with representatives of businesses, nongovernmental organizations, and the public to discuss regulatory issues of common concern.

(f) DEFINITION.—For purposes of this section, the term ''agency'' includes independent regulatory agencies, as defined in section 3502(10) of title 44 United States Code.

SEC. 5. EXISTING REGULATIONS.

(a) OBJECTIVES.—The objectives of this section are to reduce the regulatory burden on the American people, their families, their communities, their State, local, and tribal governments, and their industries, to determine whether regulations promulgated by the executive branch of the Federal Government have become unjustified or unnecessary as a result of changed circumstances, to confirm that regulations are both compatible with each other and not duplicative or inappropriately burdensome in the aggregate, to ensure that all regulations are consistent with the President's priorities and the principles set forth in this Act, within applicable law, and to otherwise improve the effectiveness of existing regulations.

(b) PROGRAM FOR REVIEW.—Within 90 days after the date of the enactment of this Act, each agency shall submit to OIRA a program, consistent with its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified or eliminated so as to make the agency's regulatory program more effective in achieving the regulatory objectives, less burdensome, or in greater alignment with the President's priorities and the principles set forth in this Act. Any significant regulations selected for review shall be included in the agency's annual Plan. The agency shall also identify any legislative mandates that require the agency to promulgate or continue to impose regulations that the agency believes are unnecessary or outdated by reason of changed circumstances.

(c) FUNCTION OF ADMINISTRATOR OF OIRA.—The Administrator of OIRA shall work with the Regulatory Working Group and other interested entities to pursue the objectives of this section. State, local, and tribal governments are specifically encouraged to assist in the identification of regulations that impose significant or unique burdens on those governmental entities, and that result in the compliance costs that are not funded by the Federal

Government, appear to have outlived their justification, or are otherwise inconsistent with the public interest.

(d) OTHER REGULATIONS FOR REVIEW.—The Administrator of OIRA, in consultation with the Advisers, may identify for review by the appropriate agency or agencies other existing regulations of an agency or groups of regulations of more than one agency that affect a particular group, industry, or sector of the economy, or may identify legislative mandates that may be appropriate for reconsideration by the Congress.

SEC. 6. CENTRALIZED REVIEW OF REGULATIONS.

(a) APPLICATION.—The requirements set forth in this section shall apply to all regulatory actions (including both new and existing regulations) by agencies other than those agencies specifically exempted by the Administrator of OIRA.

(b) AGENCY RESPONSIBILITIES.—

(1) Each agency shall (consistent with its own rules, regulations, or procedures) provide the public with meaningful participation in the regulatory process. In particular, before issuing a notice of proposed rulemaking, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation (including, specifically,

State, local, and tribal officials). In addition, each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days. Each agency also is directed to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

(2) Within 60 days of the date of the enactment of this Act, each agency head shall designate a Regulatory Policy Officer who shall report to the agency head. The Regulatory Policy Officer shall be involved at each stage of the regulatory process to foster the development of effective, innovative, and least burdensome regulations and to further the principles set forth in this Act.

(3) In addition to adhering to its own rules and procedures and to the requirements of chapters 5, 6, and 7 of title 5, United States Code, the Paperwork Reduction Act of 1980, and other applicable law, each agency shall develop its regulatory actions in a timely fashion and adhere to the following procedures with respect to a regulatory action:

(A) Each agency shall provide OIRA, at such times and in the manner specified by the

Administrator of OIRA, with a list of its planned regulatory actions, indicating those which the agency believes are significant regulatory actions within the meaning of this Act. Absent a material change in the development of the planned regulatory action, those not designated as significant will not be subject to review under this section unless, within 10 working days of receipt of the list, the Administrator of OIRA notifies the agency that OIRA has determined that a planned regulation is a significant regulatory action within the meaning of this Act. The Administrator of OIRA may waive review of any planned regulatory action designated by the agency as significant, in which case the agency need not further comply with subparagraph (B) or (C).

(B) For each matter identified as, or determined by the Administrator of OIRA to be, a significant regulatory action, the issuing agency shall provide to OIRA—

(i) the text of the draft regulatory action, together with a reasonably detailed description of the need for the regulatory

action and an explanation of how the regulatory action will meet that need; and

(ii) an assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate and, to the extent permitted by law, promotes the philosophy and principles set forth in sections 2(a) and 2(b), respectively, and avoids undue interference with State, local, and tribal governments in the exercise of their governmental functions.

(C) For those actions identified as, or determined by the Administrator of OIRA to be, a significant regulatory action, the agency shall conduct an analysis that includes the following:

(i) An assessment, including the underlying analysis, of benefits anticipated from the regulatory action (including the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination

or bias) together with, to the extent feasible, a quantification of those benefits.

(ii) An assessment, including the underlying analysis, of costs anticipated from the regulatory action (including the direct cost to the Federal Government and State and local governments in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment), together with, to the extent feasible, a quantification of those costs.

(iii) An assessment, including the underlying analysis, comparing costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation and to the extent feasible a quantitative comparison of costs and benefits (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the

planned regulatory action is preferable to the identified potential alternatives.

(D) In emergency situations or when an agency is obligated by law to act more quickly than normal review procedures allow, the agency shall notify OIRA as soon as possible and, to the extent practicable, comply with subparagraphs (B) and (C). For those regulatory actions that are governed by a statutory or court-imposed deadline, the agency shall, to the extent practicable, schedule rulemaking proceedings so as to permit sufficient time for OIRA to conduct its review, as set forth in subsection (c)(2) through (4).

(E) After the regulatory action has been published in the Federal Register or otherwise issued to the public, the agency shall—

(i) make available to the public the information set forth in subparagraphs (B) and (C);

(ii) identify for the public, in a complete, clear, and simple manner, the substantive changes between the draft submitted to OIRA for review and the action subsequently announced; and

(iii) identify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA.

(F) All information provided to the public by the agency shall be in plain, understandable language.

(c) OIRA RESPONSIBILITIES.—The Administrator of OIRA shall provide meaningful guidance and oversight so that each agency's regulatory actions are consistent with applicable law and the philosophy and principles set forth in sections 2(a) and 2(b) and do not conflict with the policies or actions of another agency. OIRA shall, to the extent permitted by law, adhere to the following guidelines:

(1) OIRA may review only actions identified by the agency or by OIRA as significant regulatory actions under subsection (b)(3)(A).

(2) OIRA shall waive review or notify the agency in writing of the results of its review within the following time periods:

(A) For any notices of inquiry, advance notices of proposed rulemaking, or other preliminary regulatory actions prior to a notice of proposed rulemaking, within 10 calendar days after

the date of submission of the draft action to OIRA.

(B) For all other regulatory actions, within 90 calendar days after the date of submission of the information set forth in subparagraphs (B) and (C) of this section, except that if OIRA has previously reviewed this information and, since that review, there has been no material change in the facts and circumstances upon which the regulatory action is based, OIRA shall complete its review within 45 days after the date of submission of such information.

(C) The review process may be extended (i) once by no more than 30 calendar days upon the written approval of the Director, and (ii) at the request of the agency head.

(3) For each regulatory action that the Administrator of OIRA returns to an agency for further consideration of some or all of its provisions, the Administrator of OIRA shall provide the issuing agency a written explanation for such return, setting forth the pertinent provision of this Act on which OIRA is relying. If the agency head disagrees with some or all of the bases for the return, the agency head shall so inform the Administrator of OIRA in writing.

(4) Except as otherwise provided by law or required by a court, in order to ensure greater openness, accessibility, and accountability in the regulatory review process, OIRA shall be governed by the following disclosure requirements:

(A) All substantive communications between OIRA personnel and persons not employed by the executive branch of the Federal Government regarding a regulatory action under review shall be documented and governed by the following requirements:

(i) A representative from the issuing agency shall be invited to any meeting between OIRA personnel and such persons.

(ii) OIRA shall forward to the issuing agency, within 10 working days of receipt of the communications, all written communications, regardless of format, between OIRA personnel and any person who is not employed by the executive branch of the Federal Government, and the dates and names of individuals involved in all substantive oral communications (including meetings to which an agency representative was invited, but did not attend, and tele-

phone conversations between OIRA personnel and any such persons).

(iii) OIRA shall publicly disclose relevant information about such communications, as set forth in subparagraph (B).

(B) OIRA shall maintain a publicly available log that shall contain, at a minimum, the following information pertinent to regulatory actions under review:

(i) The status of all regulatory actions, including if (and if so, when and by whom) Vice Presidential and Presidential consideration was requested.

(ii) A notation of all written communications forwarded to an issuing agency under subparagraph (A)(ii).

(iii) The dates and names of individuals involved in all substantive oral communications, including meetings and telephone conversations, between OIRA personnel and any person not employed by the executive branch of the Federal Government, and the subject matter discussed during such communications.

(C) After the regulatory action has been published in the Federal Register or otherwise issued to the public, or after the agency has announced its decision not to publish or issue the regulatory action, OIRA shall make available to the public all documents exchanged between OIRA and the agency during the review by OIRA under this section.

(5) All information provided to the public by OIRA shall be in plain, understandable language.

SEC. 7. RESOLUTION OF CONFLICTS.

To the extent permitted by law, disagreements or conflicts between or among agency heads or between OMB and any agency that cannot be resolved by the Administrator of OIRA shall be resolved by the President or a designee of the President.

SEC. 8. PUBLICATION.

Except to the extent required by law, an agency shall not publish in the Federal Register or otherwise issue to the public any regulatory action that is subject to review under section 6 until—

(1) the Administrator of OIRA notifies the agency that OIRA has waived its review of the action or has completed its review without any requests for further consideration, or

(2) the applicable time period in section 6(b)(2) expires without OIRA having notified the agency that it is returning the regulatory action for further consideration under section 6(b)(3),

whichever occurs first. If the terms of the preceding sentence have not been satisfied and an agency wants to publish or otherwise issue a regulatory action, the head of that agency may request Presidential consideration through the Administrator of OIRA, as provided under section 8. Upon receipt of this request, the Administrator of OIRA shall notify the Advisers. The guidelines and time period set forth in section 8 shall apply to the publication of regulatory actions for which Presidential consideration has been sought.

SEC. 9. AGENCY AUTHORITY.

Nothing in this Act shall be construed as displacing the agencies' authority or responsibilities, as authorized by law.

SEC. 10. JUDICIAL REVIEW.

Nothing in this Act shall affect any otherwise available judicial review of agency action. This Act is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a

party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

SEC. 11. DEFINITIONS.

For purposes of this Act:

(1) The term ''Advisers'' refers to such regulatory policy advisers to the President as the President and the Administrator of OIRA may from time to time consult, including, among others—

(A) the Director of OMB;

(B) the Chair (or another member) of the Council of Economic Advisers;

(C) the Assistant to the President for Economic Policy;

(D) the Assistant to the President for Domestic Policy;

(E) the Assistant to the President for National Security Affairs;

(F) the Assistant to the President for Science and Technology;

(G) the Assistant to the President for Intergovernmental Affairs;

(H) the Assistant to the President and Staff Secretary;

(I) the Assistant to the President and Chief of Staff to the Administrator of OIRA;

(J) the Assistant to the President and Counsel to the President; and

(K) the Deputy Assistant to the President and Director of the White House Office on Environmental Policy.

(2) Except as provided in section 4(f), the term ''agency'' means any authority of the United States that is an ''agency'' under section 3502(1) of title 44, United States Code, other than those considered to be independent regulatory agencies, as defined in section 3502(10) of title 44, United States Code.

(3) The term ''Director'' means the Director of OMB.

(4) The term ''regulation'' or ''rule'' means an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency. It does not, however, include—

(A) regulations or rules issued in accordance with the formal rulemaking provisions of sections 556 and 557 of title 5, United States Code;

(B) regulations or rules that pertain to a military or foreign affairs function of the United States, other than procurement regulations and regulations involving the import or export of non-defense articles and services;

(C) regulations or rules that are limited to agency organization, management, or personnel matters; or

(D) any other category of regulations exempted by the Administrator of OIRA.

(5) The term ''regulatory action'' means any substantive action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking.

(6) The term ''significant regulatory action'' means any regulatory action that is likely to result in a rule that may—

(A) have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the

environment, public health or safety, or State, local, or tribal governments or communities;

(B) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(C) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(D) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Act.

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