Order Code IB95035

CRS Issue Brief for Congress
Received through the CRS Web

Federal Regulatory Reform: An Overview

Updated January 24, 2001

Rogelio Garcia
Government and Finance Division

CONTENTS

SUMMARY

MOST RECENT DEVELOPMENTS

BACKGROUND AND ANALYSIS

Current Issues
- Cost-benefit and Cost-effectiveness Analyses
- Risk Assessment Analysis
- Regulatory Budget
- Congressional Review of Regulations
- Judicial Review of Rulemaking
- Moratorium on Regulations
- Paperwork Reduction and Information Resources Management
- Private Property "Takings"
- Sunset of Regulations
- Unfunded Mandates

Efforts to Reform Regulatory Process and Procedures
- Executive Efforts to Reform the Process
- Congressional Efforts to Reform the Process
- Statutes Enacted Recently to Reform the Process

Current Regulatory Policy and Procedure

FOR ADDITIONAL READING
- CRS Issue Briefs
- CRS Reports

Federal Regulatory Reform: An Overview

SUMMARY

Reforming the federal regulatory process for developing and issuing regulations has been an ongoing project of Congress and the President for the past three decades. The significant increase during that period in the number and scope of federal regulations and regulatory programs dealing with health, safety, and the environment has stimulated the reform effort. These "social" regulations and regulatory programs, while providing substantial benefits, also impose significant costs.

Achieving a proper balance between costs, both in terms of dollars and of government intrusiveness, and benefits is at the heart of the debate over regulatory reform. Part of the problem, however, is the lack of consensus over the actual costs and benefits of regulations, and how best to attain such data. The difficulty is compounded by the fact that cost-benefit analysis–the best tool for assessing available data–relies on subjective assumptions, incomplete data, and other uncertainties.

The most significant step in the effort to control regulatory costs occurred in 1981, when President Reagan issued Executive Order 12291. For the first time, federal agencies were required to prepare a cost-benefit analysis when developing regulations, and to submit the regulations to the Office of Management and Budget for review and clearance. President Clinton revoked the order in 1993, and in its place issued Executive Order 12866, which incorporated, in slightly modified form, the cost-benefit analysis and centralized review and clearance provisions instituted by E.O. 12291.

Over the years, numerous comprehensive regulatory reform bills have been introduced in Congress. The bills have contained provisions requiring use of cost-benefit analysis and centralized review and clearance of regulations. Bill proponents have argued that such reform would assure that regulations would be issued only when needed and that they would be cost-effective. Opponents have succeeded in blocking the proposed reforms, primarily because they fear that existing social regulations would be weakened. They also felt that the new provisions would waste agency resources and make it more difficult to issue needed regulations.

While Congress has failed to pass a comprehensive regulatory reform bill, it has passed several other important measures, including the Paperwork Reduction Act (1980-), Regulatory Flexibility Act (1980), Unfunded Mandates Reform Act (1995), Congressional Review Act, which is part of the Small Business Regulatory Enforcement Fairness Act (1996), and Truth in Regulating Act (2000).

During the same period, Congress passed legislation deregulating various sectors of the economy, abolishing "economic" regulations affecting telecommunications, transportation, and other industries.

Comprehensive procedural regulatory reform bills likely will continue to be introduced and debated in Congress. Contending factions remain split, however, over the degree of risk a society should reasonably tolerate regarding health, safety, and environmental matters. They are also divided over how best to determine and evaluate such risk. Given the deep philosophical differences in Congress over the issue, the fate of comprehensive regulatory reform remains unclear.

MOST RECENT DEVELOPMENTS

On January 20, 2001, President George W. Bush instituted a regulatory review plan designed to review and possibly block regulations issued at the end of the Clinton Administration. The President directed the heads and acting heads of executive departments and agencies 1) to send no proposed or final regulation to the Office of the Federal Register (OFR) unless it is approved by an agency or department head that has been appointed by President Bush; 2) to withdraw regulations that have been sent to the OFR but have not yet been published, until they have been reviewed and approved; and 3) to postpone for 60 days the effective date of regulations that have been published in the Federal Register but have not yet taken effect. Regulations issued pursuant to legislative or judicial deadlines, or health and safety emergencies are excluded from the review. Independent regulatory boards and commissions are encouraged to participate voluntarily in the review.

BACKGROUND AND ANALYSIS

Federal agencies are authorized to issue regulations by their enabling statutes, statutes establishing new programs, and statutes amending and extending the duties and responsibilities of those agencies. Most regulations are issued informally, under the notice-and-comment procedure established by the Administrative Procedure Act (APA). Less commonly, some agencies must add such elements of adjudicatory proceedings as cross-examination and rebuttal witnesses to the notice-and-comment requirements when promulgating regulations. These agencies include the Federal Trade Commission, the Consumer Product Safety Commission, and the Occupational Safety and Health Administration. Very rarely, some agencies must conduct their rulemaking exercises in a formal adjudicatory proceeding.

Informal notice-and-comment rulemaking requires that an agency publish a notice of proposed rulemaking in the *Federal Register*; afford all interested persons an opportunity to participate in the proceeding through the submission of written comments or, at the discretion of the agency, by oral presentations; and, when consideration of the relevant matter presented is completed, incorporate in the final rule a detailed, comprehensive statement of its basis and purpose. A final rule must be published in the *Federal Register* "not less than 30 days before its effective date." Interested persons have the right to petition for the issuance, amendment, or repeal of a rule. (See 5 U.S.C. 553). The APA does not specify a minimum period for public comment. However, Executive Order 12866 requires a period of no less than 60 days. An agency may extend or reopen the period for public comment at any time. Agencies are also free to grant additional procedural rights to interested persons. Much of the bare bones rulemaking requirements in the APA have been fleshed out in detail by federal court rulings that have sought to make the rulemaking process more accessible to the interested public and to assure fair and meaningful public input.

Over one hundred federal agencies, including units within those agencies, issue regulations. Depending on their relationship to the President, the agencies may be divided into two categories, those subject to the President's direction and control (executive departments and independent agencies), and those relatively independent of such direction and control (independent regulatory agencies). The independent regulatory agencies,

including, among others, the Consumer Product Safety Commission, Federal Energy Regulatory Commission, Federal Reserve System, Federal Trade Commission, and Securities and Exchange Commission, are listed under 44 U.S.C. 3502(5).

Approximately 90% of all regulations are issued by agencies subject to Executive Order 12866, agencies over which the President exercises considerable oversight and supervision. These agencies are also the ones issuing the more costly social regulations. They include the Environmental Protection Agency, the Occupational Safety and Health Administration and the Mine Safety and Health Administration (both in the Department of Labor), the Food and Drug Administration (Department of Health and Human Services), the Department of Energy, Department of the Interior, Department of Agriculture, and Department of Transportation (especially the National Highway Safety Administration).

Regulatory reform has emerged as a major issue because of the significant increase over the last 30 years in the number and scope of federal regulatory programs and regulations dealing with health, safety, and the environment. These "social" regulatory programs and regulations, while providing substantial benefits, also impose significant costs. Proponents of comprehensive reform contend that many federal regulations are too costly and intrusive. They argue that the public and private resources needed to address problems in health, safety, and environmental areas are limited; that those resources must be allocated more efficiently to address the greatest needs of society in the most cost-effective manner, so that the costs of regulations do not exceed the benefits. Finally, they contend that the existing system tends to be overly risk conscious, and question what they perceive as the lack of stringent analytical guidelines in the methodology used to assess risk hazards as well as costs and benefits when developing regulations. These perceived shortcomings, they argue, result in unnecessary, costly, and intrusive rules that impede economic growth and development.

Opponents of comprehensive change believe that some of the reform efforts focus too much on costs and not enough on benefits. They argue that such efforts would hinder the ability of regulatory agencies to safeguard the public's health and safety, and to protect the environment. Given the uncertainty regarding some of the risks involved, they contend it is necessary to retain a relatively effective process that has helped to clean the environment and avoid unforseen consequences. They assert that the existing methodology is adequate to evaluate costs and benefits and that the proposed reforms would prevent or unnecessarily delay needed regulations and impose additional costs on the agencies.

Several factors make it difficult to resolve existing differences regarding the need for regulatory reform. First, the contending parties often disagree about the need for a particular regulation. Second, the data necessary for effective use of risk assessment, cost-benefit, and cost-effectiveness analyses — tools required for sound rulemaking — often are ambivalent and incomplete. Finally, the above tools depend largely on assumptions and other subjective factors, thereby exposing them to bias and manipulation. This issue brief describes specific regulatory reform issues under consideration, provides an overview of current regulatory processes, describes earlier efforts to reform the process, and lists major legislation designed to reform the process.

Current Issues

Efforts to reform the regulatory process have generally focused on the following ten areas: (1) use of cost-benefit analysis and cost-effectiveness analysis when developing regulations, especially regulations likely to impose costs of $100 million or more a year; (2) use of risk assessment analysis to determine the probability of certain hazards occurring and their adverse effects; (3) use of a regulatory budget to provide an overview of regulatory costs and set a cap on those costs; (4) subjecting new regulations to review and possible disapproval by Congress; (5) widening the scope of judicial review of regulatory actions; (6) imposing a moratorium on new regulations while agencies review their existing regulations to determine if they should be revised or abolished; (7) reducing and streamline the paperwork required by regulations; (8) establishing a fair procedure for compensation of property owners when all or some of their property is "taken" by a regulatory action; (9) establishing a sunset mechanism whereby regulations or regulatory programs are terminated unless Congress or the agency determines otherwise; and (10) restricting mandates imposed on state and local governments unless federal funds are provided to offset the costs of those mandates. Each of the areas is briefly discussed below.

Cost-benefit and Cost-effectiveness Analyses

The Unfunded Mandates Reform Act (2 U.S.C. 602 et. al.) contains a provision requiring agencies, except for independent regulatory boards and commissions, to prepare a cost-benefit analysis when developing a major regulation. Cost-benefit analysis involves a systematic identification of all costs and benefits associated with a project, regulation, or policy decision, including a full analysis of how those costs and benefits are distributed across different groups in society. A full analysis recognizes that the quantitative assessments of benefits and costs are necessarily uncertain and heavily dependent on numerous assumptions, thus requiring qualitative analysis. Particularly difficult to quantify are long-term or uncertain effects where suspected but subtle interactive effects are not well understood or directly measurable. A regulatory requirement is judged to pass the test if the sum of future benefits outweighs the sum of present and future costs in present value terms. The analysis is extremely controversial when it seeks to rationalize inherent value trade-offs. Used carefully and with adequate data, cost-benefit analysis can be an effective tool for assessing regulatory costs. Cost-effectiveness analysis seeks to determine how a given goal can be achieved at the least cost. In contrast to cost-benefit analysis, the concern is not with weighing the merits of the goal, but with analyzing the costs of alternatives to reach that goal. It is a better tool than cost-benefit analysis for uncovering those cases where large incremental costs result in minor gains. A disadvantage, however, is that misjudgments in determining the goal or the budget may go undetected.

Risk Assessment Analysis

Risk analysis is the systematic evaluation of the probability of certain hazards occurring and their adverse effects. There are many different methods of analyzing risks, some quantitative and some qualitative. The quality of the analysis depends on the adequacy of the underlying data and the validity of the methods. As with cost-effectiveness and cost-benefit analyses, risk analysis, carefully used and supported by adequate data, is a valuable management tool in directing regulatory programs. Advocates state that risk analysis may be

used as an objective, scientific basis for planning, identifying management strategies to provide "a bigger bang for the buck," or promoting risk comparisons to set priorities for threats and target expenditures to achieve greater risk reduction. Controversy focuses on how risk analysis should be used and the influence it should exert on health, safety, and environmental decisions. Critics argue that risk analysis is not pure science and not entirely objective, in part because of inadequate data regarding most chemicals, health effects, and ecological effects. They are concerned that risk analysis may oversimplify problems and is easily manipulated. Risk analyses often focus on relatively small risks to the population as a whole rather than larger risks to smaller groups. Cost-benefit analysis for environmental and health regulations may use quantitative estimates of risk to assess benefits (i.e., risk avoided), but quantitative analyses, critics claim, undervalue such benefits, especially when they are in the distant future and exaggerate costs. They further contend that *comparative* risk analysis is unscientific, and that priorities should not be based on risk alone.

Regulatory Budget

A regulatory budget is designed to improve regulatory accountability and control. Its purpose is to force agencies to determine their regulatory priorities by 1) imposing an analytical framework to provide an overview of the overall costs and benefits of regulations; and 2) using such a budget to limit the total volume of regulatory programs, expenditures, and compliance costs by setting a cap on the compliance costs each agency could impose on the regulated sectors, both private and public. The regulatory budget concept has significant bipartisan congressional support. There is disagreement, however, as to its appropriate scope, content, or objective. Implementing a regulatory budget presents many conceptual and empirical problems. These include the scope of regulation to be covered (almost all federal programs involve some degree of regulation, the amount depending to some extent upon one's definition of regulation); cost estimates (direct and indirect, including the impacts on firms, industries, and consumers, beyond compliance costs); benefit estimates (generally regarded as more difficult than estimating costs); and overlap with state and local regulation.

Congressional Review of Regulations

The Congressional Review Act of 1997 (5 U.S.C. 801-808) requires agencies to send their final regulations to Congress for review 60 days before they take effect. A regulation may be rejected within the review period if Congress passes a joint resolution of disapproval and the President signs it, or, if he vetoes the resolution Congress overrides the veto. Critics of congressional review argue that it encroaches on agency independence, delays unnecessarily the issuance of regulations, and requires an expertise that Congress does not have. Proponents respond, however, that it enables Congress to make the final decision on the need for specific regulations and makes agencies more sensitive to congressional intent. Since the law's enactment, seven joint resolutions of disapproval have been introduced, but none has been passed.

Judicial Review of Rulemaking

The Administrative Procedure Act (5 U.S.C. 701-710) subjects agency actions to judicial review except where a statute precludes such review or "where agency action is committed to agency discretion by law." Any person adversely affected or aggrieved by an agency action "within the meaning of the relevant statute" may challenge that action. Statutes containing

judicial review provisions applicable to rulemaking generally call for direct, pre-enforcement review in the courts of appeals and usually specify requirements as to venue, timing of review, and scope of review. Arguments over judicial review focus on two concerns: first, that lack of such review may make agencies unaccountable; and second that broadening such review may encourage frivolous challenges and perhaps undermine the rulemaking process because of inadvertent errors, inability to obtain hard data, and subjective evaluations of data by judges.

Moratorium on Regulations

Since 1981, there have been three moratoriums on regulations. Two of the moratoriums were issued by incoming Presidents (1981 and 2001) who wanted to review and possibly block regulations issued at the end of the outgoing administrations. All three moratoriums exempted regulations issued by independent regulatory boards and commissions, as well as regulations issued in response to emergency situations or statutory or judicial deadlines. Independent regulatory boards and commissions were exempted from the moratoriums, but were requested to participate in the review on a voluntary basis. Critics claim that moratoriums disrupt the regulatory process, delay needed regulations, and are ineffective. Supporters, on the other hand, assert that moratoriums help to block unneeded regulations and enable agencies to revise regulations that need to be revised and eliminate those that are no longer needed.

Paperwork Reduction and Information Resources Management

The growth in regulations has imposed significant paperwork burdens on individuals, businesses and organizations — both large and small — and state and local governments, and has resulted in the Paperwork Reduction Act, as amended (44 U.S.C. 3501-3520). All agree on the need to reduce the burden, which consumes an enormous amount of manpower and cost of those affected. Proponents of paperwork reduction stress the need to streamline and simplify the forms and reports that must be completed by those being regulated, and to consolidate those forms and reports to avoid unnecessary duplication when several agencies may be requiring similar information. The Office of Information and Regulatory Affairs in OMB is the focus of the paperwork reduction effort because of its control over the information collection activities of the executive agencies.

Private Property "Takings"

Much of the property rights debate focuses on two statutes: the Endangered Species Act and the wetlands protection program under the Clean Water Act. Property rights advocates adopt either of two principal approaches. One calls on federal agencies to establish a procedure for assessing if their proposed actions are likely to result in takings under the Fifth Amendment of the Constitution. President Reagan adopted this approach in 1988 when he issued Executive Order 12630. The other approach calls for a statutory threshold to stipulate when a federal agency must compensate a property owner as a result of agency action causing a loss in property value. Typically, the statutory approach is far more generous to the property owner than the Fifth Amendment threshold, which in most cases requires a severe diminution in property value before compensation is owed.

Sunset of Regulations

Sunset is a mechanism designed to force systematic review of existing regulations to determine if they are needed. The concept requires the periodic termination of regulations unless the agency decides that they are necessary. One variant of sunset provides for agency review to determine if a regulation should be terminated. Another requires automatic termination unless the agency decides otherwise. Sunset proponents believe that without an automatic review mechanism, regulations will continue long after they are needed. Critics agree that regulations should be reviewed periodically but contend that automatic termination is not feasible because of the enormous workload it would place on the agencies.

Unfunded Mandates

Unfunded mandates are responsibilities or duties imposed by the federal government on state and local governments without providing funding for the costs incurred. The issue touches upon the proper role of federalism–the responsibility of the federal government to establish priorities and national standards and the responsibility of local governments to determine their own priorities and standards. Advocates contend that mandates often are designed to address state and local problems found nationwide. They argue that regulations set uniform standards for all localities, and that requiring localities in violation of law to pay at least some of the costs will motivate them to cease such violations. State and local government officials, on the other hand, have expressed alarm at the increasing cost of complying with the mandates. The Unfunded Mandates Act (P.L. 104-2, 109 Stat. 48) seeks to address some of the issues raised by local officials.

Efforts to Reform Regulatory Process and Procedures

Since the early 1970s, Congress and the President have struggled to lessen the intrusiveness and control the cost of regulations. Much of the effort has centered on changing rulemaking procedures to assure that agencies issue regulations only when needed, and that regulations produce a net benefit and impose the least net cost to society. The struggle has been contentious because of the deep differences over the procedural changes proposed.

Executive Efforts to Reform the Process

Presidents Nixon, Ford, and Carter directed agencies to consider costs and various regulatory alternatives to reduce those costs when developing regulations. But it was President Reagan's Executive Order 12291 that dramatically changed the procedure under which agencies develop and issue regulations. E.O. 12291 directed agencies to employ cost-benefit analysis when developing regulations and established centralized review of rulemaking, two features that are now basic elements in the rulemaking process. It also directed agencies, to the extent permitted by law, to prepare cost-benefit analyses when developing major regulations and to issue only regulations whose benefits outweigh their costs. To assure compliance, agencies were required to submit their proposed and final regulations to OMB for review and clearance.

E.O. 12291 also directed agencies to continue publishing their semiannual agendas of proposed regulations, which had been started in the Carter Administration. Regulations

responding to emergency situations and regulations with statutory or judicial deadlines were exempted from the review and clearance procedures, although they had to be submitted to OMB after they were issued

Upon assuming office, President Reagan declared a 60 day moratorium on a group of so-called "midnight" regulations, not yet in effect, issued at the end of the Carter Administration. Agencies were directed to prepare cost-benefit analyses for major regulations in that group and to submit them to OMB for review and clearance.

In 1985, President Reagan issued Executive Order 12498 in an effort to improve the coordination of regulatory activities and the management of the regulatory process. Agencies were directed to prepare a yearly agenda containing all contemplated or planned regulatory actions for the coming year. Except for emergency situations, agencies were prohibited from taking any regulatory actions that had not been included in the agenda, unless those actions were approved by OMB.

In 1989, concern about the continuing increase in the cost of regulations led President Bush to establish the President's Council on Competitiveness to oversee regulatory issues. Chaired by Vice President Quayle, the Council focused on reducing the cost of new and existing regulations. In January 1992, President Bush imposed a 90-day moratorium on regulations and instructed the agencies to identify existing regulations and programs imposing unnecessary regulatory burdens and to develop programs to reduce or eliminate those burdens. Regulations issued in response to emergency situations, that had statutory or judicial deadlines, dealt with military or foreign affairs, or related to agency administrative matters, were exempted from the moratorium. The moratorium was extended, and remained in force until the end of the Bush Administration.

When President Clinton assumed office in 1993, he took several major steps to reform the regulatory process. In September 1993, the President issued Executive Order 12866, which revoked E.O. 12291 and E.O. 12498, but, with some modification, incorporated the major provisions of the two orders, in particular cost-benefit analysis and centralized review and clearance of regulations by OMB. Independent regulatory boards and commission again were exempted from the order.

President Clinton took several additional steps to address regulatory problems. Early in 1993, he established the National Performance Review (NPR), a task force headed by the Vice President, which generated several reports designed to improve the regulatory process. On March 4, 1995, the President instructed agencies to review their existing regulations and eliminate or revise those that were outdated or otherwise in need of reform. In April 1996, in a further effort to reduce regulatory costs to small businesses, President Clinton directed agency heads to use their enforcement discretion to waive all or a portion of a penalty for a regulatory violation that was corrected within a reasonable time, or when the amount waived was used to correct the violation.

Upon assuming office on January 20, 2001, President George W. Bush directed that no new or proposed regulations be published until reviewed and cleared by one of his appointees, that regulations sent to the Office of the Federal Register at the end of the Clinton Administration that had not yet been published be returned to the issuing agency for review and approval, and that the effective date of those regulations that had been published but not

yet taken effect be postponed for 60 days. Regulations issued by Independent regulatory boards and commissions were exempted from the moratorium, as were regulations issued in response to a health or safety emergency or legislative or judicial deadline.

Congressional Efforts to Reform the Process

In the late 1970s and early 1980s, Congress increasingly relied on the legislative veto to block final regulations. Statutes applicable to several agencies and some programs made their final regulations subject to either a one-house or two-house veto before they could be implemented. During the period, numerous bills were introduced to enact a generic legislative veto provision applicable to all regulations. Such efforts collapsed after the Supreme Court ruled the legislative veto unconstitutional, because it violated bicameralism and the "presentation" clause of the *Constitution*. (*INS v. Chadha*, 103 S.Ct. 2764. See also *Consumers Union, Inc., v. FTC* and *Consumer Energy Council of America v. FERC*, 103 S.Ct. 3556, reinforcing the earlier decision.)

Over the years, Congress has considered numerous proposals to reform the regulatory process. Major reform legislation contained provisions requiring agencies to prepare cost-benefit analysis for their major regulations and centralizing review and clearance of those regulations in OMB. Other provisions sought to establish regulatory budgets; sunset regulations, programs, and agencies; revise and expand judicial review of regulatory actions; and require federal reimbursement of state and local governments for costs incurred in complying with federal regulations. While none of the comprehensive reform proposals passed, several other important measures designed to reduce the cost and burden of regulations were enacted, including the Paperwork Reduction Act of 1980, and the Regulatory Flexibility Act of 1980.

The Paperwork Reduction Act, since amended, sought to minimize the cost and burden imposed by federal paperwork requirements and to maximize the usefulness of the information collected. It established the Office of Information and Regulatory Affairs (OIRA) in OMB, making it responsible for reviewing and clearing agency information collection requirements. OIRA also became the central clearing house for agency rulemaking actions.

The Regulatory Flexibility Act (5 U.S.C. 601-612), since amended, directed agencies to prepare analyses indicating how their regulations would impact on smaller entities, including businesses, organizations, and state and local governments. The Act encouraged agencies to tailor regulations so that they were less burdensome to smaller entities. Copies of the analyses were to be sent for review and comment to the Office of Advocacy in the Small Business Administration. The Act also required agencies to publish semiannual regulatory agendas describing regulatory actions they are developing. Amendments in 1996, discussed below, have strengthened the RFA.

Additional actions, begun in the 1970s, taken by Congress to reform the regulatory process resulted in several statutes deregulating certain sectors of the economy, including banking, telecommunications, and transportation. Economic deregulation has had a significant effect on the economy. The impact has been massive and widespread, affecting both the suppliers of those services and the consumers. Airline deregulation also resulted in the elimination of the Civil Aeronautics Board. Economic deregulation efforts continued in 1995, when the Interstate Commerce Commission was abolished.

Statutes Enacted Recently to Reform the Process

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 602) was one of several major regulatory reform measures passed by the 104th Congress. The act requires agencies to prepare a cost-benefit and other assessment before issuing (1) any general notice of proposed rulemaking likely to result in any rule that includes any Federal mandate likely to result in expenditures of $100,000,000 or more in any year, and (2) any final rule for which a general notice of proposed rulemaking was published. (The act exempts independent regulatory boards and commissions.) The assessment is to include the extent to which costs to state, local, and tribal governments may be paid with federal funds. When developing such regulations, agencies must consider reasonable alternatives and select the least costly, most cost-effective, or least burdensome of the alternatives, or explain why such alternatives were not chosen. The act also allows for judicial review, but only to redress agency failure to prepare written statements and analyses accompanying regulations.

A second important measure passed was the Small Business Regulatory Enforcement Fairness Act (SBREFA), (Title II, P.L. 104-121, 110 Stat. 847, 857-74), which incorporates several regulatory relief laws under five subtitles, four of which seek to ease regulatory costs and burdens on small entities. Subtitle A (110 Stat. 858) requires agencies issuing regulations and the Small Business Administration to assist small businesses in understanding and complying with those regulations. Subtitle B (110 Stat. 860) creates a Small Business and Agriculture Regulatory Enforcement Ombudsman and Regional Small Business Regulatory Fairness Boards to assist small businesses. In certain circumstances, it allows for reducing or waiving civil penalties for violations of statutory or regulatory requirements. Subtitle C (110 Stat. 862) amends the Equal Access to Justice Act by awarding attorney fees and court costs to private parties, including large entities, if a court finds that an agency's adversary adjudication in a hearing is substantially in excess of the decision of the adjudicative officer, as well as unreasonable when compared with such decision. The award is nullified, however, if the party has committed a willful violation of law or otherwise acted in bad faith, or if special circumstances make an award unjust.

Subtitle D (110 Stat. 864) amends the Regulatory Flexibility Act by removing the bar to judicial review of an agency's regulatory flexibility analysis. Federal courts may now order corrective action regarding such analysis, and defer enforcement of a rule if they find the analysis defective. Agencies also are required to send a proposed rule and copy of an initial regulatory flexibility analysis, or a determination that such analysis is not required, to the Small Business Administration for comment. In addition, a review panel consisting of officials from the issuing agency, the Office of Information and Regulatory Affairs, and the Chief Counsel for Advocacy in SBA are to consider the impact on small businesses of regulations issued by the Environmental Protection Agency and the Occupational Safety and Health Administration.

Subtitle E (110 Stat. 868), the Congressional Review Act, requires agencies to submit new regulations to the Congress and the General Accounting Office (GAO) before they can take effect. GAO is to prepare a report on each major rule, which it sends to Congress, to assure that the agency has complied with procedural requirements regarding cost-benefit analysis, regulatory flexibility analysis, and specified sections of the Unfunded Mandates Reform Act. Congress has 60 session days in which to block the regulation by passing a joint

resolution of disapproval, which must be signed by the President. The regulation goes into effect if the President vetoes the joint resolution and the veto is not overridden.

The Paperwork Reduction Act of 1995 (P.L. 104-13, 109 Stat. 163-85) provided for a 6-year authorization of appropriations for OIRA, and required a 10% paperwork reduction in FY1996 and FY1997, and requires a 5% reduction in each of the following four years. Agencies are required to created an office responsible for ensuring compliance with information policies and information resources management.

The Omnibus Consolidated Appropriations Act (P.L. 104-208, 110 Stat. 3009) Title II, Section 645, directed OMB to submit to Congress by September 30, 1997, a report estimating the cost and benefit of major regulations and of all federal regulatory programs. The report was to analyze the direct and indirect impact of regulations on the private sector, state and local governments, and the federal government, and to recommend regulations that should be revised or eliminated. Appropriation act riders over the last several years have required OMB to continue submitting an annual report on the cost and benefit of federal regulations, as well as to issue guidelines to agencies that would standardize measures of costs and benefits and the format of accounting statements.

Finally, the Truth in Regulating Act of 2000 (P.L. 106-312, 114 Stat. 1248-1250), requires the General Accounting Office (GAO) to independently evaluate the cost-benefit analysis prepared by agencies when they develop a regulation. When an agency publishes an economically significant rule, whether proposed or final (including an interim or direct final rule), a chairman or ranking member of a committee of jurisdiction of either House, may request the GAO to review and report on the rule within 180 days. An economically significant rule is defined as any rule having an annual effect on the economy of $100 million or more, or adversely affecting in a material way the economy, a sector of the economy, or other specified sectors. The report is to include an independent evaluation of the agency's analysis of potential benefits and costs, or other analysis required, any alternative approaches considered in the rulemaking, as well as a summary of the results and the implications of those results. GAO is to evaluate the agency's data, methodology, and assumptions used in developing the rule, and to explain how any strengths or weaknesses in those data, methodology, and assumptions support or detract from conclusions reached by the agency, and the implications of those strengths or weaknesses. Within three years, the Comptroller General is to recommend to Congress whether it should permanently authorize the act.

In 1995, the House of Representatives also took a unilateral step at regulatory reform by establishing a "Corrections Calendar" (H.Res. 168) designed to expedite the repeal of rules and regulations deemed excessive or "dumb." Bills reported favorably from committee may be placed on the Corrections Calendar on the second and fourth Tuesday of each month. A three-fifths vote is necessary to pass corrections legislation.

The above reforms have had mixed results. Two recent federal district court cases indicate that agencies may no longer be able to ignore the provisions in the Regulatory Flexibility Act that require them to consider the impact of their regulations on small entities. In *Northwest Mining Association v. Babbitt*, 5 F.Supp. 2nd 9 (D.D.C. 1998), the court overturned a regulation issued by the Bureau of Land Management because the BLM failed to consider the impact on a small business. In *Southern Fishing Association vs. Daley*, 995 F.Supp. 1411 (M.D. Fla. 1998), the court overturned a regulation issued by the National

Marine Fishery Service for the same reason. On the other hand, both the Congressional Review Act (CRA) and the Unfunded Mandates Reform Act (UMRA) have had limited impact. No major rules have been rejected under the CRA, and agencies have been able to issue major rules without preparing the cost-benefit analysis required by the UMRA. The reports issued by OMB estimating the costs and benefits of federal regulations have been incomplete, and its benefits estimates have been questioned. In a 1999 report, the General Accounting Office (GAO) concluded that Congress may have to look elsewhere if it "wants an independent assessment of executive agencies' regulatory costs and benefits . . ." Congress appears to have done that under the Truth in Regulating Act.

Current Regulatory Policy and Procedure

While agencies develop and issue their regulations under the general framework of the Administrative Procedure Act, except for independent regulatory boards and commissions, the more prescriptive provisions of E.O. 12866, require that—

- agencies regulate only upon reasoned determination that benefits justify costs;
- significant (major) regulations be submitted to OMB, but only *economically significant* regulations require OMB review; agencies choose regulatory objectives to address significant problems or compelling public needs; choose regulatory approaches that maximize net benefits and minimize burdens for society and that are designed in the most cost-effective manner;
- agencies include in their annual regulatory plans comments regarding risk analysis;
- agencies periodically submit to OMB a plan to review existing regulations;
- the Vice President play a more active, central role in the regulatory process;
- a newly created Regulatory Working Group serve as a forum to assist agencies in identifying and analyzing important regulatory issues; each agency designate a Regulatory Policy Officer who is to be involved in each stage of the regulatory process; and OIRA disclose communications with agencies and private citizens regarding rules submitted for review;
- regulations dealing with emergency situations, statutory and judicial deadlines, and regulations issued by independent regulatory boards and commissions be exempted from the order.

A significant regulation is defined as one that may—

- 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 or public health or safety, or state, local, or tribal governments or communities (regulations in this category are considered *economically significant*, requiring detailed cost-benefit analyses and OMB review);interfere with an action taken or planned by another agency;
- materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients; or raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles for regulatory planning and review specified in the order.

FOR ADDITIONAL READING

U.S. President (Clinton), "Regulatory Planning and Review," Executive Order 12866, *Federal Register*, vol. 58, September 30, 1993, p. 51735.

U.S. Executive Office of the President. Office of Management and Budget. *Report to Congress on the Costs and Benefits of Federal Regulations: 2000 Report*. At [http//www.whitehouse.gov/OMB/inforeg/index.html].

U.S. General Accounting Office. *Regulatory Accounting: Analysis of OMB's Reports on the Costs and Benefits of Federal Regulation.* April 1999. GAO/GGD-99-59. [Washington] 76 p.

CRS Issue Briefs

CRS Issue Brief IB10004. *Clean Air Act Issues in the 106th Congress.*

CRS Issue Brief IB10003. *Environmental Protection Legislation in the 106th Congress.*

CRS Issue Brief IB94036. *The Role of Risk Analysis and Risk Management in Environmental Protection.*

CRS Issue Brief IB89102. *Water Quality: Implementing the Clear Water Act.*

CRS Issue Brief IB97014. *Wetland Issues in the 105th Congress.*

CRS Reports

CRS Report RL30116. *Congressional Review of Agency Rulemaking: A Brief Overview and Assessment After Three Years.*

CRS Report RL30326. *Cost-Benefit Analysis of EPA Regulations: An Overview.*

CRS Report 95-760. *Cost-Benefit Analysis: Regulatory Issues.*

CRS Report 96-949. *Environmental Reauthorizations and Regulatory Reform: From the 104th Congress to the 106th.*

CRS Report RL30183. *Federal Regulations and the Federal Register: Statistical Measurements, 1976-1999.*

CRS Report RS20493. *Property Rights: House Judiciary Committee Reports H.R. 2372.*