Regulatory reform-legislation

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

THE DIRECTOR

MAR 6 1998

The Honorable Fred Thompson
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing to provide the Administration's views on S. 981, the Regulatory Improvement Act of 1998. The Administration commends the thoughtful effort by both you and Senator Levin to address numerous concerns raised by the Administration and by others about the bill as introduced.

The Administration believes strongly in responsible regulatory reform. President Clinton's issuance of Executive Order No. 12866 was predicated on his belief that government should do a better job of assessing risks and evaluating costs and benefits before issuing major rules. While we have been skeptical of the need for further comprehensive regulatory reform legislation at this time, we have sought to work with the Committee to ensure that any bill advances the President's regulatory reform principles without creating unwarranted costs to taxpayers or needless burdens on agencies acting to protect human health, safety, or the environment.

The substitute bill issued earlier this month contains significant improvements over last summer's draft. We very much appreciate this effort. While the substitute is responsive to many of our concerns, there are still serious issues remaining. One of the problems with comprehensive legislation is that so many different kinds of rulemaking are affected. We want to be sure that any new law meets a simple test: that it truly improves the regulatory system, and does not impair -- by creating more litigation, more red tape, and more delay -- the agencies' ability to do their jobs. We are interested in working with you to see if we can find the common ground.

After a full review of the substitute to S. 981, we have concluded that the bill does not yet meet the test we have articulated, and therefore the Administration would oppose the bill if it were to be adopted in its current form. Our concerns are briefly outlined below, and we have developed and enclosed for your consideration a set of modifications to the bill that would remedy these and other concerns while remaining faithful to the sponsors' intent. As you know from our past conversations, many of these are critical to achieving an acceptable result.

1. Judicial Review. The Administration remains concerned that the judicial review provisions would promote tactical litigation over errors that were not material to the outcome of a particular rulemaking. We know that this conflicts with the sponsors' intent, as reflected in earlier hearing discussions. To avoid additional litigation over major rules, the troubling ambiguity in the current version of the bill should be eliminated.

2. Implicit Supermandate. We have been pleased that the sponsors of S. 981 consistently have agreed with the view that regulatory reform legislation should not alter or modify the substantive reach of particular statutes designed to protect human health, safety, or the environment. We remain concerned that the current language of the bill would be construed to narrow the range of discretion available to agencies under their existing statutory mandates to protect human health, safety, or the environment. The range of discretion available to agencies under current law must be expressly preserved to avoid an implicit supermandate.

3. Risk Assessment. The Administration believes that, while there have been improvements in Section 624, this section needs to be revised still further to eliminate the imposition of burdensome requirements where those requirements will not enhance major rules. For example, section 624 includes in its sweep an unbounded category of agency actions that are not rulemakings, as well as major rules where Congress has not predicated regulatory standards on risk assessment. These should be excluded. In addition, the requirement for revision of risk assessments threatens an endless and costly analytical process, reopened with each new study, that would provide additional fodder for protracted litigation. We also remain concerned that certain provisions are too specifically tailored to analysis of cancer risks, and are thus ill-suited to other objectives, such as an evaluation of risks related to environmental and natural resource protection, worker safety, or airworthiness.

4. Peer Review. The Administration is very concerned about requiring peer review in contexts where the process would add significantly to costs and delays of the regulatory process without any foreseeable benefit. For example, the requirement that cost-benefit analyses be subject to peer review would add little to the review already performed by the Office of Management and Budget in our regulatory review process. In addition, the requirement that peer review be entirely independent of the regulating agency would displace well-established and credible peer review mechanisms, while making good peer review virtually impossible in highly specialized subject areas (e.g. nuclear safety). We also believe that the statute should require no more than one round of peer review for each major rule.

5. Review of Past Regulations. While the Committee responded to many of the Administration's earlier concerns about review of past regulations, the current version of the bill creates two different, uncoordinated and likely duplicative processes for the review of past regulations, imposing a major burden on agencies and needless expense on taxpayers. The second of these should be deleted, and the cycle of review in the first should be set at 10 years.

6. *Needless Burdens.* A number of the bill's requirements would impose substantial costs on agencies where there would be no conceivable benefit to the public or regulated entities. For example, the bill imposes its analytical requirements and review requirements even where the costs of compliance with the regulation have been incurred by the regulated community and no costs can be avoided by selecting a different regulatory option. Our proposed changes address other examples as well.

7. *Definitions and other issues.* There are several definitions and other provisions that need to be added or modified to ensure clarity, to discourage unwarranted litigation that would delay new safeguards, to protect the constitutional prerogatives of the President and the deliberative process within the Executive Branch, and to eliminate unwarranted burdens on agencies. While many of these changes appear minor, it would be difficult to overstate their importance to us in evaluating the cumulative effect of this bill.

In developing revisions to the bill that would address our concerns, we have sought to suggest changes that are consistent with our understanding of the sponsors' intent and with the spirit of our very constructive discussions with the Committee staff. We would welcome a further opportunity to work with you before the bill is reported by the Committee.

Sincerely,

Franklin D. Raines
Director

Enclosure

Identical Letter Sent to The Honorable Carl Levin

PROPOSED REVISIONS TO THE SUBSTITUTE S. 981

1. Judicial Review:

   a. Delete section 627(d) and substitute the Glenn-Chafee review language (modification in bold):

      "(d) In any proceeding involving judicial review under Section 706 or under the statute granting the rulemaking authority, the information contained in any cost-benefit analysis or risk assessment required under [sections 623,624,...] may be considered by the court as part of the administrative record as a whole solely for the purpose of determining **under the statute granting rulemaking authority** whether the final agency action is arbitrary, capricious, or an abuse of discretion, or unsupported by substantial evidence where that standard is otherwise provided by law. The adequacy of compliance or the failure to comply with [sections 623,624,...] shall not be grounds for remanding or invalidating a final agency action, unless the agency entirely failed to perform a required cost-benefit analysis or risk assessment."

   b. In 627(e), change "shall" to "may," delete reference to peer review, and add prejudicial error language (to ensure that only errors material to the regulatory outcome are a basis for remand).

   c. Provide that judicial review is not applicable to Subchapter III other than under section 706(1) of the APA.

   d. Clarify that section 627(b) is not subject to an interlocutory order.

2. Implicit Supermandate:

   a. Delete section 622(b) and replace as follows:

      "Nothing in this subchapter shall be construed to alter or modify the substantive standards otherwise applicable to a rulemaking under other statutes, or to limit the range of discretion available under, or in construing, other statutes."

3. Risk Assessment

   a. Delete section 624(a)(1)(A)(ii), which broadens the applicability of the risk assessment provisions beyond rulemaking.

   b. Delete section 624(c)(2) to prevent unending cycle of revision, or clarify that new

studies must only be considered if they are reasonably available before the agency prepares the initial risk assessment.

c. Delete the requirement in section 624(d) requiring public notice of intent to perform a risk assessment.

d. Exclude from the coverage of section 624 those major rules that are not premised on the outcome of a risk assessment (e.g. MACT, BACT).

4. Peer Review

a. Delete cost-benefit analysis from the coverage of requirements for peer review (section 625).

b. Modify section 625(b)(1)(A)(ii), so that peer review participants are independent of the "program office," rather than independent of the "agency."

c. Clarify that only one round of peer review is required, and that it should be performed at the NPRM stage.

5. Other

a. Narrow definitions, procedures and disclosure provisions to protect the constitutional prerogatives of the President and the deliberative process.

- Delete section 641.

- In section 642(a) after "Such process shall be . . ." add "determined by the President and shall be . . ."

- In section 643(a) after "subchapter" add "as determined by the President." Delete 643(a)(1) through 643(c).

b. Regarding "look back" reviews, delete section 644(b) (amending section 610 of title V), which duplicates the review of rules section, and delete other references to section 610 in the bill. In section 632(a)(1), change "5th" to "10th." In section 631(1), incorporate the definitions in 621 by reference (to capture rule exclusions) and limit to major rules.

c. Modify post-promulgation analysis requirements (section 623(f)(2)) by striking everything after ". . . unreasonable."

d. Delete section 628(c)(2) requiring OMB and OSTP to contract for research studies,

and delete section 629 risk based priorities study.

e. Add the following sentence at the end of 623(d)(1)(B): "Consistent with subsections 621(2) and 621(3), net benefits analysis shall not be construed to be limited to quantified values."

f. Definitions:

- substitution risk (section 621(11)): insert word "unavoidably" ("...to result **unavoidably** from...")

- modify section 621(10)(J) to exclude a rule: "that authorizes **or bars** the introduction into commerce, or recognizes **or cancels recognition of** the marketable status of, a product."

- add exemption from the definition of rule for rules related to international trade.