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Linda-Jo Schierow

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# Senator Johnston's Proposals for Regulatory Reform: New Cost-Benefit-Risk Analysis Requirements for EPA?\*

Linda-Jo Schierow\*\*

## Introduction

Every administration since President Nixon's in 1983 has, by executive order, required agencies to analyze the costs, benefits and risks of regulations prior to promulgation. President Clinton also supports cost-benefit and risk analysis, as demonstrated by his E.O. 12866 on Regulatory Planning and Review,<sup>1</sup> said to extend and build upon earlier orders. Yet, the Administration generally has opposed legislation to codify such requirements in law because, if a legislative mandate is too specific or prescriptive, it might halt the evolution of risk assessment methodologies and impinge on executive responsibilities. In any event, legislation requiring risk analysis of proposed regulations is unnecessary, the Administration contends, because it is required by executive order.

Some Representatives nonetheless believe legislation is desirable because executive orders may be altered or revoked as President Clinton revoked President Reagan's Executive Orders. Also, some members of Congress are skeptical about the details of E.O. 12866 and questioning whether it is indeed similar to those replaced.

The 103d Congress (1993-1994) was a turning point for environmental policy: It was the first in which virtually every Representative and Senator discussed environmental risk analysis, and many debated its utility for risk management. This arose from

\* The views expressed in this paper are the author's own and do not necessarily represent those of the Congressional Research Service.

\*\* Dr. Schierow is an Analyst in Environmental Policy in the Environment and Natural Resources Division of the Congressional Research Service, Library of Congress. She received her B.S. (Education), M.S. and Ph.D. (Land Resources) from the University of Wisconsin at Madison.

<sup>1</sup> Sept. 30, 1993, 58 F.R. 51735.

persistent demands by Senators Bennett Johnston (D-LA) and Daniel Patrick Moynihan (D-NY) and a loose coalition of Representatives, generally characterized by the media as relatively conservative Democrats and moderate Republicans.

The Senate acted first, adopting 95 to 3, an amendment offered by Senator Johnston to S. 171, a bill to raise the U.S. Environmental Protection Agency (EPA) to department (cabinet) status.<sup>2</sup> The lopsided vote on the amendment was attributed by some to the Senate popularity of any provision to force EPA to more carefully consider ways to reduce the burden on industry, states and local governments. Senate passage encouraged House proponents of environmental risk analysis who introduced similar bills. At least one enthusiastic supporter announced that no environmental bill would be enacted until there was open debate on the House floor and a vote on a mandate to EPA to publish a risk estimate for each regulation.

As discussed in an earlier article, several risk provisions were reported out of committees, and one was enacted in 1994.<sup>3</sup> The House Republican Contract with America promises that, within the first 100 days of the 104th Congress, risk legislation will be introduced, debated and voted upon. Title III of the "Job Creation and Wage Enhancement Act of 1995" (H.R. 9), introduced January 4, 1995, contains a slightly modified version of the original Johnston Amendment, with coverage expanded to include all federal agencies that promulgate health, safety and environmental regulations.

Also Title VII of H.R. 9 would codify most of President Reagan's E.O. 12291 and significantly expand the requirements for Regulatory Impact Analysis, while defining a "major" rule as affecting more than 100 persons or requiring any person to spend more than \$1M to comply. Senator Glenn reintroduced most of Senator Johnston's language in S. 100.

Thus, anyone interested in risk regulation should be interested in key provisions, particularly the original Johnston amendment, considered in the 103d Congress. This paper summarizes that and the

<sup>2</sup> Apr. 29, 1993.

<sup>3</sup> Linda-Jo Schierow, *Comparison of Environmental Risk Provisions in the 103d Congress*, 5 Risk 283 (1994).

revised Johnston amendment to S. 2019 which also passed the Senate and compares them to the provisions in several executive orders.

### Major Provisions Compared

Before summarizing similarities and differences for cost-benefit and risk analysis among requirements of the two Johnston amendments and executive orders of the Reagan and Clinton Administrations, it should be noted that none of these supersede statutory requirements, e.g., in the Clean Air Act, with regard to how EPA should weigh costs and risks in developing regulations. Executive orders never supersede statutes, and the amendments explicitly stated otherwise.

#### *Johnston Amendment to S. 171*

The original amendment would have required EPA, when promulgating any final regulation relating to human health and safety or the environment, to publish in the Federal Register:<sup>4</sup>

(1) an estimate of the risk to public health and safety addressed by the regulation and its effect on human health or the environment and the costs associated with implementation of, and compliance with, the regulation;

(2) a comparative analysis of the risk addressed by the regulation relative to other risks to which the public is exposed;

(3) the Secretary's certification that:

(A) the estimate and analysis are based upon a scientific evaluation of the risk and are supported by the best available scientific data;

(B) the regulation will substantially advance the purpose of protecting the human health and safety or the environment against the specified identified risk; and

(C) the regulation will produce benefits to human health and safety or the environment that will justify the implementation and compliance costs.

If the Secretary could not certify, a report to Congress would have been required as well as a statement of reasons in the final regulation. Also, the certification would not modify any statutes or be subject to judicial review. Finally, it was provided that "nothing in this section shall be construed to grant a cause of action to any person."

<sup>4</sup> Senate-passed S. 171 § 123.

Several undefined terms and phrases complicate evaluation and comparison. For example, S. 171, as passed, §123 called for “an estimate, performed with as much specificity as practicable.” Is that a single number, a range of numbers, a detailed quantitative description of the relationship between risks and costs or simply a judgment about the value of a regulation? Because the debate surrounding the amendment seemed to assume that it required quantitative analyses, a similar assumption is adopted here. Based on this interpretation, the original amendment’s requirement to estimate risks and costs of environmental regulations seems similar to requirements for analyses under President Reagan’s executive orders discussed below.<sup>5</sup> An important difference between the amendment to S. 171 and other documents discussed, however, is that the original amendment would have applied to every final EPA regulation, regardless of significance, whereas the revised amendment and the executive orders apply only to major or significant regulations.

*Johnston Amendment to S. 2019*

The amendment to S. 2019<sup>6</sup> would have required EPA, when promulgating any proposed or final major regulation relating to human health or the environment, to publish in the Federal Register a clear and concise statement that:

- (1) describes and, to the extent practicable, quantifies the risks to be addressed by the regulation, including risks to significant subpopulations who are disproportionately exposed or particularly sensitive;
- (2) compares the risks to be addressed to at least three other risks regulated by EPA or another Federal agency and at least three other risks not directly regulated by the Federal Government;
- (3) estimates the costs to the U.S. Government, State and local governments and the private sector of implementing and complying with the regulation and the benefits of the

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<sup>5</sup> For example, E.O. 12044, issued by President Carter in 1978 and revoked by President Reagan in 1981, required agencies to perform Regulatory Impact Assessments (RIAs) to consider the economic consequences of proposed regulations. The RIAs were to include a statement of the problem, a description of alternative ways of alleviating the problem, the economic costs of each alternative proposed, and the reason for selecting one of the options.

<sup>6</sup> Senate-passed S. 2019, § 18.

regulation, including quantifiable measures and qualitative measures that are difficult to quantify; and

(4) contains a certification by the Administrator that:

(A) the analyses are based on the best reasonably obtainable scientific information;

(B) the regulation is likely to significantly reduce the risks to be addressed;

(C) there is no regulatory alternative that is allowed by the statute that would achieve an equivalent reduction in risk in a more cost-effective manner; and

(D) the regulation is likely to produce benefits that will justify the costs.

A major regulation was defined as “a regulation that the Administrator determines may have an effect on the economy of \$100 million or more in any one year.” As in the original amendment, EPA was to report to Congress identifying major regulations for which complete certification could not be made and summarize reasons. The amendment to S. 2019 also contained a clause clarifying its effect on other statutes. This savings clause, however, is broader than the one in S. 171. S. 2019 stated that nothing in the section affected any other provision of Federal law, delayed action required to meet a deadline imposed by statute or a court or created any right to judicial or administrative review. Further, it provided that in the event that a regulation is subject to judicial or administrative review under another provision of law, any alleged failure to comply with this section may not be used as grounds for affecting or invalidating such regulation.

Compared to the amendment to S. 171, that to S. 2019 more clearly indicated the extent to which risks and benefits should be quantified. Risks would be quantified “to the extent practicable” while benefits would be estimated “including both quantifiable measures of costs and benefits, to the fullest extent that they can be estimated, and qualitative measures that are difficult to quantify.”

By requiring analyses of proposed as well as final rules, the revised Johnston amendment provided an opportunity for public comments before final regulations were to be promulgated, an opportunity not afforded by S. 171. Analysis of proposed rules in addition to final rules probably would not increase the burden on EPA (compared to the

requirements of S. 171), however, because the Johnston provisions in S. 2019 would have applied only to major regulations, and only about 3.6% of the 168 final rules promulgated and 5.9% of the 1,594 rules proposed by EPA between 1981 and 1992 were major.<sup>7</sup> Also, S. 2019 would have allowed EPA to publish a reference to the published statement for a proposed major rule in lieu of repeating the statement for a final major rule if substantially similar to the proposed rule.

S. 2019 would have required risks to be compared to at least six other risks, whereas the amendment to S. 171 did not specify how many comparisons would be appropriate. The Johnston amendment to S. 2019 required EPA to analyze risks to significant subpopulations in addition to risks to the population as a whole; this provision reflects concerns about relatively large risks to small groups with higher exposures or unusual sensitivity to environmental hazards.

Under S. 2019, the Administrator would have been required to certify that the regulations proposed or promulgated were the most cost-effective of the alternatives permitted by authorizing statutes. This allowed EPA to consider unquantifiable, e.g., ethical and environmental, benefits in addition to economic ones in establishing goals and standards for environmental quality and human health. In contrast, S. 171 might be interpreted to have required certification that costs be justified quantitatively by benefits, for example, by demonstrating that the regulation would have produced a net benefit.

#### *President Reagan's E.O.s 12291 and 12498*

Again, President Reagan's E.O. 12291 and E.O. 12498 have both been revoked. E.O. 12291 on Federal Regulation required all federal agencies to perform Regulatory Impact Analysis (RIA) for all proposed and final "major" rules.<sup>8</sup> It generally defined "major" rules to mean any regulation likely to have an effect on the national economy of \$100M or more. Rules with a smaller economic impact were also "major" if they were likely to result in: a major increase in costs or prices for consumers, individual industries, federal, state, or local government, or geographic regions; or a significant adverse effect on

<sup>7</sup> Ralph A. Luken & Arthur G. Fraas, *The U.S. Regulatory Analysis Framework: A Review*, 9 *Oxford Rev. Econ. Policy* 100, n. 4 (1993).

<sup>8</sup> 46 F.R. 13193 (1981).

competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The order reflected that administration's commitment to provide "regulatory relief," by providing that "to the extent permitted by law," "regulatory action shall not be undertaken unless the potential benefits to society from the regulation outweigh the potential costs." It required selection of regulatory objectives to maximize net benefits and of the least cost option for attaining objectives, unless existing laws prevented this approach. In general, under the Reagan and Bush Administrations, an RIA required an evaluation of all potential costs and benefits that would accompany implementation of a rule, including effects that could not be quantified monetarily. Agencies were required to compare the costs and benefits of proposed rules to the alternative of no regulation and other ways to achieve the same objective at lower cost.<sup>9</sup> The White House Office of Management and Budget (OMB) guidelines for agencies explicitly required analysis of all major alternatives to the proposed rule.<sup>10</sup>

A requirement for risk analysis was not explicit in the 1981 order but was implied by the mandate to assess net benefits of regulations. Most benefits are the risks avoided. In January 1985, a second executive order made the requirement for risk analysis explicit. President Reagan's E.O. 12498 on the Regulatory Planning Process<sup>11</sup> required agencies to adopt principles contained in an August 11, 1983 report by the President's Task Force for Regulatory Relief. One states that "regulations that seek to reduce health or safety risks should be based upon scientific risk-assessment procedures, and should address risks that are real and significant rather than hypothetical or remote."

#### *EPA's Response*

EPA published its interpretation of the first Reagan Executive Order in a 1983 report.<sup>12</sup> It describes how the Administration

<sup>9</sup> Net benefit is the difference obtained when total costs are subtracted from total benefits.

<sup>10</sup> U.S. Office of Management and Budget, Executive Office of the President (OMB), Interim Regulatory Impact Analysis Guidance (1981).

<sup>11</sup> 50 F.R. 1036.



expected directives applicable to all regulatory agencies to be applied in analyses of environmental regulations controlling individual pollutants or particular waste streams.<sup>13</sup> The introduction summarizes the requirements for RIA as follows:<sup>14</sup>

Benefits and costs should be quantified and monetized in the RIA to the extent possible. The RIA should discuss fully benefits and costs that cannot be quantified and should assess their importance relative to those that are quantified or monetized. When many benefits cannot easily be monetized, or when law requires a specific regulatory objective, cost-effectiveness analysis may be used to evaluate regulatory alternatives.

The introduction further states that:

The goal of regulatory impact analysis is to develop and organize information on benefits, costs, and economic impacts so as to clarify trade-offs among alternative regulatory options.

The Guidelines clearly indicate that compliance required risk analysis of health effects. They also permitted RIAs to vary by the level of detail, the extent to which costs and benefits were quantified and the level of precision of information assessed. They allowed variation to accommodate the nature and quantity of data, available analytic techniques, resource or time constraints — or the difficulty of analyzing some environmental problems or regulatory approaches.

<sup>12</sup> EPA, Office of Policy Analysis. Guidelines for Performing Regulatory Impact Analysis. EPA-230-01-84-003. (Dec. 1983).

<sup>13</sup> The introduction notes that the Guidelines “are not readily applicable to regulations for generic information gathering, testing, and procedural rules. In these situations, program offices should contact EPA’s Office of Policy, Planning, and Evaluation and OMB in the early stages about procedures, extent of detail, and degree of quantification appropriate for the RIA” (At M3).

<sup>14</sup> The cost-effectiveness of a regulation is generally defined as the annual cost divided by a measure of progress toward the objective. There is no single definition of the “most cost-effective regulation,” but an alternative usually is selected by:

1. choosing the most efficient (least cost) way of achieving the objective;
2. choosing the alternative that maximizes benefits for a particular cost; or
3. comparing the relationship between costs and benefits for increasingly stringent regulatory alternatives, and then choosing the regulation that, relative to more and less stringent regulations, provides a significant increase in benefits for a reasonable increase in costs. (This method does not point to a single best choice but can identify regulations that obtain relatively tiny increments of protection for human health or the environment at relatively high costs.) [*Id.* at M14.]

In quantifying potential health effects, EPA guidelines specified that chemical substances should be evaluated individually based on a weight-of-evidence scientific evaluation. In addition, the guidelines required discussion of particularly sensitive populations, the duration, reversibility, and nature of adverse effects and whether effects resulted from single or repeated exposures to the substance. They required estimation of the monetary value of illness avoided by a rule based on studies of willingness to pay to avoid illness or cost savings such as health care costs or lost earnings. Finally, they required the value of lives saved by a regulation to be estimated statistically for populations.<sup>15</sup>

The Reagan Administration also required some economic analysis for regulations that were not major rules, and all rules were sent to OMB for review. The Guidelines state, "sufficient analysis must be performed to demonstrate that the rule meets the objectives of the Executive Order. At a minimum, this should include costs and economic impact (distributional effects) analyses."<sup>16</sup> However, OMB routinely waived review of certain categories of rules. For example, they did not generally require cost-benefit analysis for regulations that revoked requirements (or otherwise "deregulated").<sup>17</sup>

Between 1981 and 1992, EPA issued 1,686 final rules and 1,594 proposed rules, including 60 major final rules (3.6%) and 92 major proposed rules (5.9%).<sup>18</sup> Formal cost-benefit analyses were prepared for approximately 80% of the major final rules. The number of cost-benefit analyses prepared for nonmajor final and all proposed rules is unknown. Several final major rules without comprehensive cost-benefit analyses had court-imposed deadlines for publication (which may have allowed too little time for a comprehensive analysis), and some other rules without analyses were withdrawn or returned to EPA by OMB for further analysis.<sup>19</sup>

<sup>15</sup> A more detailed discussion of these guidelines may be found in CRS Report 89-161 ENR, *Health Benefits of Air Pollution Control*, in the chapter by Morris A. (Bud) Ward, at 295.

<sup>16</sup> EPA, Guidelines, at M3.

<sup>17</sup> *Id.* (footnote).

<sup>18</sup> Luken & Fraas, *supra* note 7, at 102, n. 4; OMB, Regulatory Program of the U.S. Government. (various years).

<sup>19</sup> Arthur Fraas, *The Role of Economic Analysis in Shaping Environmental Policy*,

The quality of EPA's cost-benefit analyses for final, major rules was inconsistent according to reviews by its Office of Policy, Planning and Evaluation and by Arthur Fraas, an OMB career official. According to EPA, incomplete analyses were mostly due to inadequate or unavailable necessary scientific and/or economic data.<sup>20</sup> In other cases, reviewers have hypothesized that analysis may have suffered from constraints imposed by statutory and judicial deadlines, lack of resources to hire additional analysts, and the difficulty of quantifying such benefits as safe drinking water or clean air and of determining their worth in monetary terms.<sup>21</sup> Moreover, in February 1994, testimony before the Subcommittee on Environment, Energy, and Natural Resources of the House Committee on Government Operations, EPA's Assistant Administrator for Prevention, Pesticides and Toxic Substances testified that EPA has routinely adjusted the amount of analysis to the relative importance of the potential impact of a rule.<sup>22</sup>

Despite the uneven quality of EPA's analyses, its study concluded that "EPA's benefit-cost analyses have resulted in several cases of increased net benefits to society from environmental regulations" and "analyses yielded a return on investment of 1,000 to 1."<sup>23</sup> Between 1981 and 1986, EPA's investment (estimated cost of preparing a formal analysis for a major rule) ranged from \$210,000 to \$2,380,000 and averaged \$675,000.<sup>24</sup> No figures are available for more recent years or for the preparation of less comprehensive analyses for rules that were not "major" rules. In many cases, EPA performed cost-benefit analyses but statutory provisions limited their use. Between 1981 and 1986, "EPA was able to consider the full implications of its benefit-cost analyses when setting only 6 of the 15 regulations studied."<sup>25</sup>

in *Law and Contemporary Problems, Assessing the Environmental Protection Agency after Twenty Years: Law, Politics and Economics* 118 (1991).

<sup>20</sup> EPA, Economic Studies Branch, Office of Policy Analysis. *EPA's Use of Benefit-Cost Analysis 1981-1986* (1987).

<sup>21</sup> Fraas, *supra* note 19, at 120; OMB, Report on Executive Order No. 12866, 34, 46 (1994).

<sup>22</sup> Lynn Goldman, Statement before the Subcommittee on Environment, Energy and Natural Resources and the Subcommittee on Legislation and National Security Committee on Government Operations, House of Representatives, February 1, 1994.

<sup>23</sup> EPA, *EPA's Use of Benefit-Cost Analysis 1981-1986*, at 1 and 2.

<sup>24</sup> *Id.*, at 6-5.

*Regulatory Planning and Review in the Clinton Administration*

On September 30, 1993, President Clinton signed E.O. 12866 on Regulatory Planning and Review which revoked and replaced the Reagan Executive Orders. The new order is similar, but differences are likely to affect decisions where the Agency has discretion to consider cost-benefit and risk analyses.

The expressed purpose of President Clinton's order is to improve the development process for regulations, making it more visible to the public and more efficient, as well as to ensure the primacy of agencies in making decisions and the integrity and legitimacy of oversight. In remarks prior to signing, the President highlighted unprecedented provisions that, he said, open the regulatory process to scrutiny while limiting involvement by the President and Vice President. He directed agencies to confer with OMB and the public during early stages of deliberations about whether and how to regulate, to record the basis for regulatory decisions, and to make the records available to the public. Another stated goal of the Administration is to expedite action. The early involvement of OMB and others in regulatory planning is intended to serve this purpose. In contrast, the Reagan orders were intended to both improve the quality and reduce the number of regulations — and sought to ensure process oversight. The Johnston amendments did not disclose their purpose, but would have ensured that the public and Congress were informed about EPA's estimated risks, costs and benefits of regulations and that officials have thought about them. A key difference between the Johnston amendments and executive orders is that the former would have applied only to EPA, whereas orders apply to most agencies.

The new order directs agencies to promulgate regulations only when necessary due to "compelling public need" and after a reasoned determination that the benefits justify costs, or when required by law. The Reagan order, as mentioned, permitted regulation only when benefits exceeded costs, unless this approach was prevented by law. The Johnston amendments were silent on this question.

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25 *Id.* at 2.

The Clinton order directs agencies to conduct cost-benefit analysis for all “significant regulatory actions.” The definition of “significant regulatory action” is more inclusive than the “major rule” definition of E.O. 12291, indicating that more regulations may be subject to analysis under the Clinton order. However, OMB will not review rules not found significant and may not require cost assessments for such rules, as discussed below. Whether the Johnston amendment to S. 171 would have been even more inclusive is unclear. It required cost-benefit and risk analysis of all final regulations, regardless of significance, but did not address proposed rules, notices of proposed rule making or advanced notices of proposed rule making — all defined as regulatory actions under the Clinton order and as rules under the Reagan order (with the exception of advanced notices of proposed rule making, not included under the Reagan order). The revised Johnston amendment would have applied to proposed and final major rules.

President Clinton directs each agency to determine the significance of proposed regulatory activities initially but authorizes OMB to designate additional rules as significant (within ten days of receiving an agency’s list of planned actions). It can also waive review of significant regulatory actions. Under the two previous administrations, it had similar authority, i.e., to designate rules as major and to waive review of some major rules. The Johnston amendments did not provide OMB or EPA discretionary power but recognize that circumstances may prevent compliance. In such cases, they would have required EPA to report reasons for noncompliance in the Federal Register and to Congress.

President Clinton requires agencies to “consider the degree and nature of the risks posed by various substances or activities within its jurisdiction” in setting priorities. President Reagan required agencies instead to maximize net economic benefits. The Johnston amendments did not mention setting priorities, but EPA would have been required to publish risk estimates for comparison with the risks addressed.

The Presidential orders direct agencies to use different criteria in choosing regulatory objectives. Under Reagan, agencies were required to pursue regulatory objectives that would “maximize net benefits”, that is, achieve the greatest possible economic gain for society. Now, agencies will select regulatory objectives that address significant

problems or compelling public need. No weight is given to monetary considerations. The Johnston amendments were silent on the issue.

Having determined the targets of regulations, The Reagan Administration simply directed agencies to choose the alternative with the "least net cost." The Clinton Administration established three criteria for choosing an approach: maximize net benefits, minimize the overall regulatory burden for various segments of society, and design the most cost-effective regulation or alternative to achieve the objective. However, only one criterion is mentioned in the regulatory philosophy of its order which states:<sup>26</sup>

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.

Both the Clinton order and Guidelines for Reagan orders require consideration of alternatives to Federal regulation such as those that rely on negotiation or economic incentives. Again, the Johnston amendments did not address this issue.

The Reagan orders required analysis of potential benefits, costs, and net benefits of the proposed regulation and alternatives that cost less. Costs, benefits, and net benefits for each alternative were compared to those for the alternative of no regulation. The Clinton order similarly requires analysis of all costs and benefits of the proposed regulation and alternatives, including the alternative of no regulation. It also requires analysis of net benefits (in order to choose an approach that maximizes net benefits) and cost-effectiveness of regulatory alternatives. Thus, the Clinton order appears to have the most comprehensive set of analytic requirements. The Johnston amendments would require analysis of risks and relative risks addressed by EPA regulations and the costs and benefits of regulating. The Johnston amendment to S. 171 could be interpreted to require calculation of net benefits, whereas the Johnston amendment to S. 2019 would have required cost-effectiveness analysis of regulatory alternatives.

<sup>26</sup> Section 1(a).

More specifically, the Reagan orders required analysts to focus on economic, adverse impacts of regulations (that is, costs) for consumers, individual industries, federal, state, and local governments, and geographic regions. The orders required measurement of effects on competition, employment, investment, productivity, innovation, and international competitiveness. They also required consideration of the distribution of costs and benefits — i.e., who pays, and who gains. The Clinton order also requires analysis of the costs of enforcement and compliance to governments, regulated entities and the public; impacts on innovation; and consideration of who pays and who gains. In addition, the Clinton Administration specifically requires analysis of benefits to the environment and public health and safety. The consistency, predictability and flexibility of regulations must be considered too. Finally, the Clinton order requires consideration of whether the impacts are fair. The Johnston amendment to S. 171 would have required analysis of risk to individuals addressed by the regulation, the health and environmental effects of the regulation, and implementation and compliance costs. The Johnston amendment to S. 2019 would have required analysis of risks to human health or the environment to be addressed, including risks to significant subpopulations disproportionately exposed or particularly sensitive, the quantitative and qualitative benefits of the regulation, and the costs to the U.S. Government, State and local governments and the private sector of implementing and complying with a regulation.

The Clinton order directs agencies to prepare and submit to OMB an annual Regulatory Plan, in which they identify planned significant regulatory activities, including a description of how each will reduce risks. Agencies must compare the magnitude of the risk addressed by each to the magnitudes of other risks within their jurisdiction.

President Clinton's Order also established a Regulatory Working Group to serve as a forum for interagency discussions. Topics to be addressed include comparative risk assessment, innovative regulatory techniques, and streamlined approaches for small businesses and other entities to facilitate their compliance with regulations. Interagency groups also were established under previous administrations, often to

promote coordination of regulatory activity and harmonization of risk assessment practices. President Clinton's requirement for comparative risk analysis is similar to a provision in the Johnston amendments. No requirement existed in the Reagan orders to compare risks addressed by regulations, but it did require agencies to submit information about regulatory actions underway or planned.

The executive orders of Presidents Reagan and Clinton and the Johnston amendments all require analysis to be based on scientific information. In addition, the Clinton Administration and Johnston amendment to S. 2019 require agencies to use "the best reasonably obtainable technical, economic, and other information." President Reagan required analysis "based on adequate information" and risk assessment. The Johnston amendment to S. 171 required evaluation of risks and use of "the best available scientific data."

The Reagan orders prohibited federal agencies from preempting state laws or regulations except to protect civil rights or interstate commerce. The Clinton order requires OMB to meet four times per year with representatives of state, local and tribal governments to identify planned and existing regulatory activities with potentially significant impacts. Several such meetings already have taken place. Representatives of businesses, nongovernmental organizations, and the public also must be consulted about the significance of planned regulatory actions. OMB and the Small Business Administration sponsored a forum on regulatory reform in March 1994. A second conference was scheduled for late summer 1994. The Johnston amendments did not address the role of state, local, or tribal governments or the private sector in the development of regulations.

#### *EPA's Response to the Clinton Order*

EPA submitted its first plan for review of existing significant regulations on December 29, 1993. The plan describes a broad, bottom-up process by which Agency managers and the Administrator will receive nominations for regulations that should be reviewed and outlines the procedure the agency will follow to designate regulations for the final list to be included in the annual Regulatory Plan. According to EPA's plan, EPA program offices will be more directly



involved in planning with less intercession by the EPA Office of Policy, Planning and Evaluation than occurred during previous administrations. OMB issued guidance for agencies April 5, 1994, on how to develop the regulatory plan. Draft regulatory plans are due at OMB June 1 each year. The unified plan for the Federal Government will be issued each fall with the semi-annual regulatory agenda (the list of regulations agencies expect to issue in the next six months.) The 1994 agenda was issued November 4, 1994.<sup>27</sup>

An interagency analytical work group is developing principles of analysis for use by all agencies and OMB under E.O. 12866. This group will decide such technical issues as the rate that future costs and benefits will be discounted to estimate their present value.<sup>28</sup> Technical principles also were developed under the Reagan executive orders. Agencies also are developing implementation guidelines. The final draft of EPA's guidelines are expected soon. These internal EPA guidelines will be reviewed by EPA's SAB and revised, if necessary. The final report may be released in mid-1995.

OMB reported to the President on progress in implementing the order in May 1994 and indicated that it had completed reviews for 42 significant EPA rules in the first six months after the order was published. This included 21 proposed and 21 final rules. For comparison, between 1981 and 1992, EPA issued 60 major final rules (3.6 %) and 92 major proposed rules (5.9 %).



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<sup>27</sup> 59 F.R. 57003.

<sup>28</sup> The discount rate was 10% under President Reagan and 7% under President Bush. The discount rate is used to take account of the fact that monetary benefits or costs realized in the future are worth less than if realized in the present. For example, at a 10% discount rate, a dollar received one year from now would have a present value of about \$0.91, because if \$0.91 were invested now, due to interest earnings at 10%, it will be worth \$1.00 in one year.