12865 GGM 111578
Mr. Hutton

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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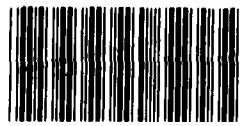
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The Honorable Edward M. Kennedy
Chairman, Committee on the
Judiciary
United States Senate

Dear Mr. Chairman: [Comments on 2500

S. 2147, the "Regulatory Flexibility and Administrative Reform Act of 1979" proposes to establish the Regulatory Policy Board, to provide for the regulatory analysis of proposed rules, to require the evaluation of existing regulations, to require the Congress and the President to review certain regulatory agencies, to increase competition in regulated industries, and to make other improvements in regulatory procedures.

The General Accounting Office (GAO) strongly supports the general thrust of this bill to reform the regulatory process with the objective of making government regulation less burdensome. We do, however, want to make a number of suggestions for improving this bill.

OVERSIGHT BY THE CONGRESS

Section 104 of S. 2147 requires the Director of the Congressional Budget Office (CBO) to monitor agency compliance with the requirements of subchapter III to perform regulatory analyses, the requirements of subchapter IV to promote regulatory flexibility, and to keep the Congress fully informed of any failures to comply or any problems arising in the implementation of the subchapters.

We believe that S. 2147 is correct in providing for an explicit congressional oversight process. However, we strongly recommend that the oversight role that the bill vests with the CBO should be assigned to the GAO. The essence of proposed section 104 is the review of compliance with legislative mandates on the part of executive and independent regulatory agencies, the evaluation of the performance of these agencies in discharging specific responsibilities, and the reporting to Congress the results of these

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REPORT

evaluations. These are oversight functions that Congress has already vested with the GAO by the Budget and Accounting Act of 1921, the Legislative Reorganization Act of 1970, and the Congressional Budget Act of 1974.

Assigning this oversight role to the CBO would duplicate GAO's responsibilities, would be wasteful, and would certainly prove confusing both to congressional committees and the agencies concerned.

GAO has extensive experience in reviewing agency compliance with legislative requirements, and we are increasing our capability in the area of program evaluation. Our work in that area, which includes a significant amount of economic analysis, constitutes approximately one-half of our work. We suggest, therefore, that in section 104 of the bill the Comptroller General of the United States be substituted for the Director of the CBO, thereby explicitly assigning the major oversight responsibilities of the bill to the GAO.

THE REGULATORY POLICY BOARD

The proposed chapter 6 of title 5, U.S. Code would establish the Regulatory Policy Board which would have a number of responsibilities assigned to it by the bill including publishing the Calendar of Federal Regulations, creating and maintaining a comprehensive index of agency rules, monitoring agency compliance with a number of provisions of the bill, reviewing regulatory analyses, and other tasks.

The creation of a new Federal agency, even when it is essentially a new structure that is given responsibility for currently performed functions, should be based on a demonstrated need for that agency. The statement of "Findings and Purposes" in the bill states in subsection 101(6) that a new board is necessary to conduct oversight and to coordinate agency actions to identify (and presumably prevent) overlapping, duplicative, conflicting, or unnecessarily burdensome rules promulgated by different agencies. While there are conflicting and overlapping regulations, it is not clear that a new agency is necessary. We have not seen evidence that the current coordination mechanisms of the Federal Government such as liaison groups and efforts of the Office of Management and Budget (OMB) are not sufficient to achieve the necessary coordination of regulatory programs. On the contrary, the very success of current efforts such as the issuance and implementation of Executive Order 12044 "Improving Government Regulation," and the considerable

oversight of the implementation exercised by the OMB argues against creating a new agency such as the Regulatory Policy Board. The various functions of the proposed Board can be assigned to those agencies which are currently performing them. New responsibilities, such as the index of agency rules, can be assigned as appropriate. The index might logically be given to the Office of the Federal Register.

Even if Congress decides to establish the Regulatory Policy Board and other oversight mechanisms in a statutory framework, it should be noted that the bill currently contains a great deal of duplication of functions assigned to various agencies. Thus, the Board is required to monitor agency compliance with proposed sections 621, 622, 633, and 635. These are also assigned for oversight to the CEO by the bill as currently written. As stated above, we believe that this is an appropriate function for GAO.

REGULATORY ANALYSIS

In testimony that I previously delivered before the Senate Committee on Governmental Affairs on May 23, 1979, (Enclosure I), I expressed our support for the concept of regulatory analysis while offering some specific suggestions for conducting such analyses. In brief, we noted that the $100 million "trigger" for analyses was unclear and perhaps unnecessary, and we cautioned against an excessive reliance on quantifiable benefits and costs.

The criteria for the initial and final regulatory analyses in proposed sections 622 and 623 are well formulated, and should provide an adequate consideration of most of the relevant effects of regulation that ought to be examined. We are concerned, however, by the additional analyses required by subchapters IV and V of proposed chapter 6, regulatory flexibility and a procompetitive standard for Federal regulation, respectively. As we indicated earlier (Enclosure I), we strongly support the consideration of the effects on small business and the competitive structure of industry. However, we believe it is unnecessary and undesirable to elevate the various elements of a regulatory analysis and the various impacts of regulation from elements of an analysis into a legislatively mandated separate requirement. Such a multiplicity of regulatory analyses would greatly burden the regulatory agencies and could delay needed regulations without necessarily offering any offsetting gain.

Subchapter V prohibits agencies from taking certain specified actions unless they have made a finding that the action is the "least anticompetitive alternative legally and practicably available..." Unfortunately, the characterization of what is anticompetitive is not always clear. For example, there has been a longstanding debate over whether the Robinson-Patman Act is pro or anticompetitive in its limitation on price competition in order to permit smaller firms to compete with larger firms. Similarly, the requirements of S. 2147 may also be in conflict. The alternative that is least competitive from the standpoint of price competition benefiting retail consumers may not be the preferred alternative for the purpose of promoting the interests of small business.

We urge the bill be simplified by eliminating the additional analysis requirements and standards. There should be a single regulatory analysis and it should include consideration of a proposed regulation's effects on small business and on the structure of industry. Our suggestions along these lines are also contained in my statement of May 23, 1979. (Enclosure I).

REVIEW OF THE EFFECTIVENESS OF AND CONTINUING NEED FOR GOVERNMENT REGULATION

Title III of the bill establishes procedures for the review and formulation of reform recommendations of 28 specified regulatory agencies. A committee of specified agency heads and other individuals appointed by the President evaluates agencies on a set schedule and makes recommendations to the President. The President, in turn, issues a report and recommended legislation to Congress, which is then required to consider the legislation under expedited procedures set by the bill.

While we favor oversight by systematic review of all major administrative agencies, we do not believe that it is necessary to enact a separate set of procedures for regulation or for any specified single area of public policy. Enacting a separate review procedure tends to lock Congress into a focus on one policy area despite changing circumstances. We favor instead a single systematic, yet flexible, process of oversight and program accountability. If Congress wants a special emphasis on regulatory reform, it would be preferable to do so in the context of a general oversight or sunset schedule. Our views on this issue are more fully set forth in testimony delivered before the House Rules Committee (Enclosure II). We recommend, therefore, that Title III be dropped from this bill.

If, however, Congress decides to enact a separate oversight process for regulatory agencies, it is imperative that it be coordinated with any general oversight or program accountability legislation that is enacted. Such coordination apparently has not yet been accomplished. Thus, the review schedule in S. 2147 is quite different from the review schedule in S. 2, the Sunset Act.

THE SELECTION AND EVALUATION OF ADMINISTRATIVE LAW JUDGES

Proposed chapter 8 of title 5, U.S. Code changes the process of selecting administrative law judges (ALJs). The legislation would vest with the Chairman of the Administrative Conference of the United States the authority to set qualifications for ALJs and to establish and implement a system to recruit, examine, and certify judges as qualified.

Our first major concern is that the ALJ recruitment, examination, qualification, classification, and compensation functions, as well as the administration of temporary ALJ reassignments, should remain in the Office of Personnel Management (OPM) rather than be assigned to the Administrative Conference. Similarly, logic would dictate that the OPM also should administer the proposed Administrative Law Judge Career Service which should closely parallel the Senior Executive Service. These points are covered in the enclosed statements of Mr. H. L. Krieger and myself on similar provisions in S. 262 and S. 755. (Enclosures I and III).

Secondly, and foremost among the concerns which we believe must be addressed in any regulatory reform measure are provisions for periodic evaluation of ALJ performance. Although the bill's "Findings and Purposes" in subsection 101(14) state that "personnel laws governing the selection and evaluation of administrative law judges should be changed to assure high quality work by those judges..." Title II is silent on the ALJ evaluation issue. We strongly believe provisions for ALJ performance evaluation similar to those in S. 262 and S. 755 should be incorporated.

The enclosed statements on S. 262 and S. 755 offer detailed comments on proposed ALJ performance evaluations. We would like to reemphasize here that both the agencies as employers and the OPM as policymaker and evaluator should retain roles in the judges' evaluation if the evaluation function is placed outside the agencies.

We note with approval that S. 2147 does not provide for ALJ terms of office. While we did not examine the issue of ALJ terms in our work on the management of the the administrative law process, our work proceeded on the premise, supported by precedent, that ALJs are agency employees. As such, personnel management practices for them should not differ significantly from management of other Federal employees. ALJ terms of office would be a major break with general civil service practice, which in our opinion would serve to reinforce the judicial nature of an adjudicative process criticized by the Senate Governmental Affairs Committee and by us as overly judicial already. Comparisons between ALJ term provisions and the limited tenure of Senior Executive Service members may be misleading. Senior Executive Service members, as a quid pro quo for limited job security, may receive pay bonuses.

We support the bill's amendment of title 5, section 2108(3) of the U.S. Code to exempt ALJs from Veterans Preference. This amendment eliminates an important impediment to the employment of minorities and women as ALJs.

Please call on us if we can be of any further assistance in assessing this legislation.

Sincerely yours,

Comptroller General
of the United States

Enclosures - 3