UNITED STATES
CLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

July 28, 1978

MEMORANDUM FOR: Chairman Hendrie
Commissioner Gilinsky
Commissioner Kennedy
Commissioner Bradford

FROM: Carlton R. Stoiber
Acting General Counsel

SUBJECT: LEGAL BASIS FOR NRC BUDGET REFERRAL TO OMB

This office has been requested to analyze the issue of whether NRC is obliged under existing federal law to submit its budget to Congress exclusively through OMB.

The question has two aspects. The first aspect is whether NRC must submit its budget request for OMB review. A second aspect is whether NRC is prohibited from making its unaltered budget request available to Congress.

Whether NRC must submit its request through OMB

31 U.S.C. § 23 states: "The head of each department and establishment shall submit his requests for appropriations to the Office of Management and Budget ..."

Section 2 of Title 31, "Definitions," provides that the term "department and establishment" means:

> "any executive department, independent commission, board, bureau, office, agency, or other establishment of the Government, including any regulatory commission or board, and the municipal government of the District of Columbia, but [does] not include the legislative branch of the Government or the Supreme Court of the United States." [Emphasis provided.]

It is beyond question therefore that NRC, along with other independent commissions, is included under the provisions of this title, and must submit budget requests to OMB.

Contact:
Marjorie S. Nordlinger, OGC
634-1465

Whether OMB may prohibit NRC from making an independent submission to Congress of its unaltered budget request when NRC has submitted or is concurrently submitting its request to OMB

Our response to this issue must be somewhat equivocal. The OMB requirement of confidentiality is set forth in OMB Circular A-10, paragraph 3. That paragraph prohibits agencies from making known to Congress their budget analyses requests before the Administration transmits its budget in final form.

Recent amendments to Title 31 of the United States Code provide for concurrent transmittal of budget estimates or requests by the Interstate Commerce Commission to Congress and to the President or OMB. 31 U.S.C. § 11(j) (1976). It is further provided that no offices shall in any way impair the free communication by the I.C.C. with Congress. The significance of this provision for NRC and other independent regulatory agencies derives from the familiar principle of legislative construction that to include one subject in the coverage of a statute is to exclude others of a similar type. The reasoning behind this principle is simple. By making this provision for I.C.C., Congress has shown an awareness of a problem and has given only the I.C.C. special treatment. Otherwise, Congress (which is obviously conscious of the existence of other independent regulatory agencies) would have also included them.

Further, the NRC has regarded itself as covered by directives of OMB budget circulars (see the attached NRC replies submitted in March 1976 to Congressman Moss's oversight inquiries), and has complied with the OMB directive.

On the other hand, various Members of Congress have articulated the strong policy argument that independent agencies possess a different character than agencies of the Executive Branch and that this special status makes it desirable for them to be free to communicate directly with Congress. Since budget appropriations will affect the very ability of an agency to implement programs, it would seem to be of the highest importance that agency views be available for Congressional consideration. If OMB or the Executive Branch were able to supply countervailing arguments why the executive required total confidentiality in preparing the overall

Federal Budget, which must include the budgets of independent regulatory commissions, those considerations would need to be weighed in the balance. This Office is not able to address the respective merits of such countervailing policy interests.

Attachments:
As stated

cc: OPE
OCA
SECY

V. INDEPENDENCE

QUESTION 21 List and briefly describe all outstanding Executive Orders and OMB circulars that are applicable or arguably applicable to your agency, noting both those with which you comply and those, if any, with which you have determined not to comply. For the latter cases, state your reasons for non-compliance.

ANSWER

The position of the NRC on the applicability of Executive Orders and OMB circulars was addressed by the General Counsel in response to an inquiry from Common Cause in 1976. In a letter dated December 22, 1976, the General Counsel stated that the NRC "view of Executive Orders has depended on the circumstances. The obvious issue is one of Congressional expectations." One obvious example of an applicable order is E.O. 11652, which established a uniform national regime for national security purposes. A copy of that letter is attached. On April 5, 1978, Senator Ribicoff addressed the applicability of Executive Orders to independent regulatory agencies and reflected some of the same concerns that NRC has on this issue. 124 Cong. Rec. No. 46, S 4862-64 (Daily ed. April 5, 1978).

Attachment 1 is a list of all Executive Orders issued since the inception of the NRC in January 1975, with which the NRC is in compliance or is presently evaluating the implementation of. The list is current as of April 11, 1978.

The NRC complies with all applicable OMB circulars. Attachment 2 contains that list and is current as of April 11, 1978.

The NRC complies with all applicable OMB bulletins. Attachment 3 contains that list and is current as of April 18, 1978.

December 22, 1976

Mr. Kenneth J. Guido, Jr.
General Counsel Common Cause
2030 M Street, N. W.
Washington, D. C. 20036

Dear Ken:

As you requested, I am writing to put on paper the material we discussed on the telephone last Wednesday, relative to your inquiry of November 17th seeking an analysis of the applicability of Executive Orders to the NRC. As I explained, this is not a setting in which we are able to give a formal opinion or full legal analysis. Indeed, you did not request that. I can, however, indicate to you what the agency practice has been.

Our view of Executive Orders has depended on the circumstances. The obvious issue is one of Congressional expectations. In creating "independent regulatory commissions" the Congress has made distinctions of uncertain extent, in terms of subjection to Presidential discipline and regulation, from the so-called Executive Branch agencies. How the intention to create an independent body bears on any given Executive Order depends upon an assessment of the particular facts and circumstances of that order.

On occasion Congress appears to understand Executive Orders as being appropriately pertinent to independent regulatory agencies. An example may be found in the national security area, where by practice or express Congressional statement executive orders apply to independent agencies. Orders such as Executive Order 11652, which established a uniform national regime for national security purposes (here, the classification of documents), substitute for legislation of general application, and are widely accepted as such. E.O. 11652 refers specifically to the Commission as subject to its provisions. Other Executive Orders are issued to implement

OFFICE➤	OGC					

a specific Congressional delegation of authority to the President, a delegation which fairly implies authority to bind the independent regulatory agencies--for example, the Federal Advisory Committee Act's provision for Presidential waiver of noticing requirements for national security reasons. We would tend to recognize an Executive Order issued on the authority of such a statute as binding upon us.

Other Executive Orders are clearly concerned with the affairs of the Executive Branch and do not fall within any express or implicit Congressional understanding of Executive control over the independent regulatory agencies. Executive Order 11821, to which you referred, is an example of such an order and specifically applies to Executive Branch agencies. Executive Order 11902, which provides a mechanism for the presentation of coordinated Executive Branch views to the NRC on export license applications, is another. Congress having given us independent authority to issue or deny export licenses on receipt of advice from the Executive Branch, it is difficult to imagine circumstances in which an Executive Order purporting to govern our behavior in the exercise of such authority would be regarded as binding.

Finally, there are some issues which I would characterize as unresolved questions of Congress/Executive Branch control, where the outcome is not at all clear. Take for example, the issue of Executive privilege. The independent regulatory agencies have an independence from the Congress much greater than GAO or the Library of Congress; if circumstances can be imagined in which an Executive Branch agency might properly claim Executive privilege before the Congress, then similar circumstances might also be presented for an independent regulatory commission. How is such a commission to make a claim of Executive privilege? Shall it follow the procedures established by Executive Order for Executive Branch agencies? I do not purport to answer the question, only to note that it is not a simple one.

I hope that this very informal response will prove useful to you. With best wishes for the holiday.

Cordially,

Peter L. Strauss
General Counsel

ENCLOSURE 3

Congressional Record

United States of America

PROCEEDINGS AND DEBATES OF THE 95th CONGRESS, SECOND SESSION

Vol. 124 WASHINGTON, FRIDAY, JUNE 23, 1978 No. 97

Senate

(Legislative day of Wednesday, May 17, 1978)

INDEPENDENT REGULATORY COMMISSION ACT

By Mr. GLENN (for himself, Mr. PERCY, and Mr. RIBICOFF):

S. 3240. A bill to improve the quality of Federal regulatory appointments, to clarify the independent status of the independent Commissions, to eliminate undue influence and conflicts of interest in Federal regulation, and for other purposes; to the Committee on Governmental Affairs.

INDEPENDENT REGULATORY COMMISSION ACT

Mr. GLENN. Mr. President, today we offer for the Senate's consideration legislation which will, in my opinion, significantly improve the quality and effectiveness of Federal regulation.

Like many people, I am concerned that Federal regulation may have become more of a burden than a benefit. It has certainly grown by leaps and bounds in recent times. What that has meant is more redtape, more rules, more gobbledygook, and more confusion for citizens who must deal with the regulatory agencies. The cost of those regulatory programs has, of course, also increased at an alarming rate. To a greater extent than ever before, Federal regulation is touching the daily lives of people. I am concerned, because the trend toward bigger Government shows little likelihood of being reversed in any fundamental way. People do expect more of Government and Government is doing more for people.

More agencies and more money are certainly not the best answers for regulatory problems. Instead, what can and should be done is to make what now exists more effective, and more responsive to public needs. And that is the underlying purpose of the legislation which Senator PERCY, Senator RIBICOFF and I introduce today.

A major portion of Federal regulatory programs is the responsibility of a class of agencies known as independent regulatory Commissions. Twelve such Commissions exist each with its own congressionally defined regulatory mission. To a significant extent, those agencies implement and enforce national policies regarding transportation, communications, banking, health and safety, energy, and commercial transactions as well as certain business practices, such as the antimonopoly law. Obviously, the actions of those independent Commissions have a very real and substantial impact on the economic wellbeing of this country.

I am pleased that President Carter has very recently indicated his support of the principles of agency independence. On March 23, 1978, before signing the new executive order on improving Federal regulations, the President stated that regulatory "independence should be preserved." For that reason, it was decided that the requirements of the executive order should not be applied unilaterally to those independent Commissions. President Carter instead requested that those agencies voluntarily comply with the terms of the order.

Mr. President, I fully agree that the independent status of the regulatory commissions should be preserved. These agencies are "independent" for a very important reason. Insulation from partisan [illegible]—a major justification for independent status. Congress intended that regulatory decisions of these Commissions should not be subject to control and supervision by the executive branch.

The Commissions are not completely independent; nor are they unaccountable. Congress adopted the laws that created the agencies and defined their mandate. Congress passes on their appropriations, and conducts regular oversight of their actions. The President reviews their budget requests and recommends an appropriation for each of those agencies. With the advice and consent of the Senate, the President appoints the Commission leadership. The President is also authorized to remove Commissioners from office for cause. In addition, the Commissions are accountable to the courts, which are responsible for judicial review of agency actions.

Over the years the proper independent status of the Commissions has been eroded—not through explicit congressional action, but instead by executive action sometimes not based on statute. Several provisions of the bill we introduce today concern executive oversight which has no statutory basis and which is instead a result of tradition or custom. For example, today some independent agency communications which are intended for Congress must first be reviewed and approved by the Office of Management and Budget. This procedure, which is not authorized by statute, creates delay by adding an additional layer of review and also tends to screen or censor agency opinions on pending legislation. Thus, Congress is deprived of a full and forthright exchange of opinion with the agencies on legislative matters. This bill is intended to restore independent status, in keeping with the congressional intent in creating these commissions.

A major problem addressed by this legislation, is the confusion, inconsistency and uncertainty that characterizes the present status of those bodies. In a patchwork, even haphazard fashion, certain independent regulatory commissions have been excepted, sometimes only for specific purposes, from certain requirements of central coordination.

Indeed, the situation is so confusing that it required a detailed study by the Governmental Affairs Committee to determine which agencies are subject to what requirements and to what extent. For example, some commissions submit their budget requests at the same time to both Congress and OMB, while others must make the submission only to OMB and, after OMB has revised that request, are required by law to support the OMB revision in subsequent testimony before Congress. The same situation prevails concerning clearance of legislative communications. Certain agencies are subject to the OMB clearance process, some are not, and still others may transmit the communication directly to Congress only if it is indicated that the viewpoints do not necessarily represent those of the administration. I submit that there is no logical justification for this variant treatment of the independent commissions. The bill we introduce today would require all commission budgetary requests which are submitted to OMB to be concurrently submitted to the Congress and would require other legislative recommendations and related material to be concurrently submitted if requested by any Member of committee of Congress.

Nowhere is the confusion regarding independent status more serious and apparent than in the area of litigating authority. The Governmental Affairs Committee recently reviewed the situation in that regard in volume V of its regulatory reform study. The OMB Reorganization Project also has concluded a similar review. What the committee found was that the ability to control and conduct court cases varied widely from agency to agency. A minority of the commissions have clear authority to initiate lawsuits, more than half may participate in appeals from agency descisions, but very few have the power to argue and conduct cases before the Supreme Court. To one degree or another, all of the agencies must rely on the Department of Justice to handle litigation. Once again, those distinctions do not appear to have any rational basis.

Litigating authority is very important, because it is closely related to an agency's regulatory mission as established by Congress. As our committee study concluded—

> Regulatory responsibility is necessarily diminished if an agency cannot, on its own initiative, seek court enforcement of its orders, or injunctions against violations of its statutes and rules. The same is true if a commission is precluded from full participation in judicial proceedings challenging agency actions or authority. In those situations the agency stands powerless to act awaiting the judgment and inclination of an entirely separate body; or looks on in an advisory capacity, while lawyers beyond its control manage the litigation—deciding what to do and when to do it.

Decisions made in the course of litigation do have an impact on the regulatory policy. As much as any other form of executive branch coordination, control of litigation may directly affect the development and implementation of specific regulatory policies.

For that reason, this legislation would authorize the agencies to conduct their own litigation in all cases other than those before the Supreme Court.

I believe the process provided by the bill would be a vast improvement over current Government litigation practices. Under the current system, much regulatory litigation now involves two sets of Federal Government lawyers, one set for the Justice Department and another for the individual agency. That situation, in my opinion, encourages duplication, increases paperwork, and fosters delay. Allowing the agency to go directly into court without involving the Justice Department can be expected to significantly reduce those problems. Under the bill, the Justice Department would not be prohibited from entering a case if it saw fit, but primary responsibility for the conduct of the case would rest with the agency which was the subject of that litigation.

This proposal can be expected to re[illegible] the Federal Government [illegible]

their additional litigation responsibilities, this increase should be more than offset by a reduction in Justice Department litigators. The reduction in sets of lawyers from 2 to 1 in a typical agency litigation is bound to reduce the total number of man-hours required and accordingly the need for Goverment-hired legal personnel.

This legislation is also concerned with agency independence from private interests subject to regulation. In the past, many people have felt that Federal regulators are too often selected for reasons other than ability, that they swing back and forth a "revolving door" between Government and industry, that they are unduly influenced by the private sector, and that they do not often act with vision in the public interest.

In those matters, there has been much progress in the past year or so. The high caliber of President Carter's appointments to the major independent regulatory commisisons have, in my opinion, made a very significant difference in the outlook and vitality of those agencies. The President has also made a serious commitment to eliminating conflicts of interest in Federal regulatory agencies. I commend those efforts.

This legislation supports the President's initiatives, by establishing standards for selection of regulatory Commissioners; by increasing their status in the Federal hierachy, so as to attract more qualified persons to appointment; by applying employment restrictions to those Commissioners who fail to complete the terms to which they were appointed; and by imposing a 1 year "cooling-off," no contact provision on subsequent activities by former regulators.

I am convinced that those provisions will not have the effect of discouraging outstanding persons from service in the Federal Government. It is noteworthy that the policy committee of the Business Roundtable, just several weeks ago, recommended that Congress establish qualification standards for appointment, increase the executive levels of Federal regulators, and impose a 1-year "cooling off" restriction—all of which are identical to the provisions in the bill. The Business Roundtable endorsement of the postemployment restriction is particularly significant because it indicates that the Roundtable does not believe that the proposal would have an adverse impact on attracting qualified persons to Federal service. I agree that the restriction is both necessary and reasonable.

Mr. President, it should be noted that during committee consideration conforming and technical amendments will be added to the bill to indicate the effect of those provisions on existing law.

In summary, Mr. President, I am convinced that the bill we introduce today will significantly improve an important segment of Federal regulation.

Mr. President, I ask unanimous consent that the text of the Independent Regulatory Commission Act be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 2240

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Independent Regulatory Commission Act".

FINDING AND PURPOSES

SEC. 2. The Congress finds and declares that—

(a) standards should be established to ensure the selection of outstanding men and women for membership on the independent regulatory commissions;

(b) the independent nature of the Federal regulatory commissions should be restored, in keeping with the intent of Congress;

(c) the independent [illegible] [illegible] the [illegible] and:

(d) [illegible] commissions should be insulated [illegible] influence by the Executive [illegible] private interests subject [illegible]

[illegible]

(3) the Commodity Futures Trading Commission;

(4) the Consumer Product Safety Commission;

(5) the Federal Communications Commission;

(6) the Federal Energy Regulatory Commission;

(7) the Federal Maritime Commission;

(8) the Federal Trade Commission;

(9) the Interstate Commerce Commission;

(10) National Labor Relations Board;

(11) the Nuclear Regulatory Commission; and

(12) the Securities and Exchange Commission.

(b) The term "member" means any individual who is appointed by the President, by and with the advice and consent of the Senate, to be a member of an independent regulatory commission.

QUALIFICATIONS AND BALANCE

SEC. 4. The President shall nominate for membership on an independent regulatory commission individuals who by reason of training, education, or experience are qualified to carry out the functions of such commission pursuant to law. In nominating individuals for membership on an independent regulatory commission, the President shall insure that commission membership is well balanced with a broad representation of various talents, backgrounds, occupations, and experience appropriate to the functions of such commission.

SENATE ADVICE AND CONSENT FOR COMMISSION CHAIRMEN

SEC. 5. (a) The chairman of an independent regulatory commission shall be appointed by the President, by and with the advice and consent of the Senate. An individual may be appointed a member of an independent regulatory commission at the same time as he is appointed as chairman.

(b) The chairman of an independent regulatory commission shall be its chief officer, and shall exercise executive and administrative functions of the commission with respect to—

(1) the appointment and employment of hearing examiners in accordance with the provisions of title 5, United States Code;

(2) the selection, appointment, and fixing of the compensation of such personnel as he deems necessary, including an executive director;

(3) the supervision of personnel employed by or assigned to the commission, except that each member of the commission may select and supervise personnel for his or her personal staff;

(4) the distribution of business among personnel and among administrative units of the commission; and

(5) the procurement of services of experts and consultants in accordance with section 3109 of title 5, United States Code.

CONDITIONS FOR REMOVAL

SEC. 6. A member of an independent regulatory commission may be removed from office by the President for inefficiency, neglect of duty, or malfeasance in office, but for no other cause.

CONCURRENT SUBMISSION OF BUDGET INFORMATION

SEC. 7. Whenever an independent regulatory commission submits any budget estimate, request, or information to the President or the Office of Management and Budget, it shall concurrently transmit a copy of such budget estimate, request, or information to the Congress; and the original budget requests of the commissions shall be set forth in the budget recommendations submitted to Congress by the President.

CONGRESSIONAL ACCESS TO COMMISSION RECOMMENDATIONS

SEC. 8. No officer or agency of the United States shall have any authority to require an independent regulatory commission, or any member thereof, to submit any legislative recommendations, or testimony, or comments on legislation to that officer or agency or any other officer or agency of the United States for approval, comments, or review, prior to submission of such recommendations, testimony, or comments to the Congress. Whenever an independent regulatory commission, or any member thereof, submits any written legislative recommendations, or testimony, or comments on legislation, intended for Congress, to an office or official of the Executive Branch, a copy thereof shall be concurrently transmitted to the Congress on the initiative of the commission or member as the case may be or on the request of any Member of Congress.

LITIGATION AUTHORITY

SEC. 9. (a) Notwithstanding any other provision of law and except as provided in subsection (b) of this section, attorneys designated by the chairman of an independent regulatory commission [illegible] for and represent such [illegible] [illegible]

[illegible]

not apply to litigation before the Supreme Court, as provided in section 518 of title 28, United States Code, except as it may be modified by section 2350 of title 28, United States Code.

NO EXECUTIVE BRANCH CLEARANCE FOR TOP COMMISSION STAFF

SEC. 10. The appointment or removal of any officer (other than a member) or employee of an independent regulatory commission shall not be subject, directly or indirectly, to review or approval by any officer or entity within the Executive Branch, except by the Civil Service Commission.

RESTRICTION ON EMPLOYMENT PRIOR TO COMPLETION OF TERM

SEC. 11. (a) A member of an independent regulatory commission who resigns before the expiration of his or her term of office shall not, during the remainder of the term to which such member was appointed, accept any employment or compensation, either directly or indirectly, from any firm, company or association (other than the United States) directly and significantly affected by regulation of such commission during his or her service as a member. This subsection shall not apply to any member—

(1) who serves for a total number of years equal to one full term for a member of such commission; or

(2) who resigns on account of ill-health.

(b) An independent regulatory commission shall prescribe rules or regulations to insure that a member who resigns prior to the expiration of his or her term of office reports any employment or compensation for the period during which, subsection (a) applies.

RESTRICTION ON POST-SERVICE ACTIVITIES

SEC. 12. No individual who is appointed as a member of an independent regulatory commission after the date of the enactment of this Act, and no officer or employee of any such commission holding a position classified as GS-16 or higher under chapter 51 of title 5, United States Code, shall, for a period of one year beginning on the last day of service as such member or employee—

(1) make any appearance before; or

(2) make any written or oral communication to such commission, or any member or employee thereof, on behalf of any person (other than the United States) on any matter which is before such commission. This section shall not apply to any matter of an exclusively personal and individual nature.

EFFECTIVE DATES

SEC. 13. (a) Except as provided in this section, the provisions of this Act shall take effect on the date of its enactment.

(b) Section 4 shall apply with respect to individuals nominated for membership on an independent regulatory commission after the date of the enactment of this Act.

(c) Subsection (a) of section 5 shall apply with respect to each independent regulatory commission on the day on which the first vacancy occurs after the date of the enactment of this Act in the chairmanship of such commission.

Mr. PERCY. Mr. President, I am pleased to be joining my distinguished colleagues, Senator JOHN GLENN and Senator ABE RIBICOFF, in introducing the Independent Regulatory Commission Act. This legislation is an important contribution to the area of regulatory reform. Its provisions address many of the problems cited in the comprehensive regulatory reform study conducting over the past 3 years, pursuant to Senate Resolution 71, by the Senate Committee on Governmental Affairs.

This bill is designed to clarify and restore the independent status of 11 commissions that regulate interstate commerce. These commissions are the Board of Governors of the Federal Reserve System, the Civil Aeronautics Board, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Maritime Commission, the Federal Energy Regulatory Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Nuclear Regulatory Commission, and the Securities and Exchange Commission.

The legislation provides for appropriate insulation of these commissions from undue influence by the executive branch or by private interests subject to regulation. When Congress established these commissions, they were intended to [illegible]

[illegible]

ENCLOSURE 4

COMMENTS - S. 3240
INDEPENDENT REGULATORY COMMISSION ACT

The stated purpose of the sponsors of S. 3240, the Independent Regulatory Commission Act, is to improve the quality of regulatory appointments, to assure the independent status of the independent commissions, and eliminate undue influence and conflicts of interest in the regulating process. The Nuclear Regulatory Commission (NRC) is one of twelve agencies specifically identified as subject to the legislation.

The Nuclear Regulatory Commission endorses the aims of the legislation. The importance of ensuring that regulatory commission members are intelligent, experienced, and diligent men or women of probity cannot be doubted. Further, it is beyond question that in order to fulfill the Congress's expectation of an independent decisionmaking process, these commissioners must operate without the pressures of special interest groups, without even the appearance of a conflict of interest and without unauthorized political pressure from any branch of government. Most particularly, independence from the executive branch must be protected in order to conform to the overall Congressional purpose in establishing such agencies.

These comments will discuss the legislation's provisions, focusing on any problem areas we have been able to identify with regard to the application of a provision to NRC.

Independence from the Executive Branch In Budget Requests and Legislative Recommendations (Sections 7 and 8)

S. 3240 provides that the executive branch shall not have authority to require an independent commission to submit budget requests (Section 7) or legislative recommendations (Section 8) or testimony (Section 8) for approval or review before the agency submits them to Congress. The proposed legislation calls for concurrent submission to the executive branch and to Congress.

The effect of the provision would permit independent commissions to make known their views directly to the Congress. Such legislation would enhance the independence of the commissions. Congress has already enacted a similar provision for the Interstate Commerce Commission with regard to its budget requests. See 31 U.S.C. § 11(j)(1976). Other agencies appear now to be bound to submit budget requests. See attached Analysis of Legal Basis for NRC's Submission of Budget to OMB.

Concerning the ability of independent agencies to make known their views on legislation, OMB's requirement that independent agencies submit bill comments exclusively through them is based on a legal footing that is less clear than the budget submission requirement. Nonetheless, NRC has generally complied with OMB requirements, not only because a legal case could be made for such compliance, but because it was a reasonable way of keeping the Commission informed about Administration policy so that, to the extent consistent with its regulatory mandate, the NRC would not inadvertently adopt a position inconsistent with government-wide policy. This history may have created sufficient precedent to warrant explicit legislative clarification, as set forth in S. 3240.

In addition to enabling the Congress to receive directly the independent agencies' views about their resource needs and their positions on pending legislation, such a provision could significantly expedite Congressional receipt of agency comments.

ENCLOSURE 5

Sec. 3. Section 9.6 of the Civil Service Rule IX (5 CFR 9.6) is amended by adding a new subsection (c) as follows:

"(c) The Commission shall include in its annual report a current listing, by agency, of all positions authorized to be filled by Limited Executive Assignment.".

Sec. 4. Section 9.20 of Civil Service Rule IX (5 CFR 9.20) is amended by adding a new subsection (f) as follows:

"(f) The Commission shall include in its annual report a current listing, by agency, of all positions authorized to be filled by Noncareer Executive Assignment.".

JIMMY CARTER

THE WHITE HOUSE,
March 7, 1978.

No. 12044

Mar. 23, 1978, 43 F.R. 12661

IMPROVING GOVERNMENT REGULATIONS

As President of the United States of America, I direct each Executive Agency to adopt procedures to improve existing and future regulations.

Section 1. Policy. Regulations shall be as simple and clear as possible. They shall achieve legislative goals effectively and efficiently. They shall not impose unnecessary burdens on the economy, on individuals, on public or private organizations, or on State and local governments.

To achieve these objectives, regulations shall be developed through a process which ensures that:

(a) the need for and purposes of the regulation are clearly established;

(b) heads of agencies and policy officials exercise effective oversight;

(c) opportunity exists for early participation and comment by other Federal agencies, State and local governments, businesses, organizations and individual members of the public;

(d) meaningful alternatives are considered and analyzed before the regulation is issued; and

(e) compliance costs, paperwork and other burdens on the public are minimized.

Sec. 2. Reform of the Process for Developing Significant Regulations. Agencies shall review and revise their procedures for developing regulations to be consistent with the policies of this Order and in a manner that minimizes paperwork.

Agencies' procedures should fit their own needs but, at a minimum, these procedures shall include the following:

(a) Semiannual Agenda of Regulations. To give the public adequate notice, agencies shall publish at least semiannually an agenda of significant regulations under development or review. On the first Monday in October, each agency shall publish in the FEDERAL REGISTER a schedule showing the times during the coming fiscal year when the agency's semiannual agenda will be published. Supplements to the agenda may be published at other times during the year if necessary, but the semiannual agendas shall be as complete as possible. The head of each agency shall approve the agenda before it is published.

At a minimum, each published agenda shall describe the regulations being considered by the agency, the need for and the

legal basis for the action being taken, and the status of regulations previously listed on the agenda.

Each item on the agenda shall also include the name and telephone number of a knowledgeable agency official and, if possible, state whether or not a regulatory analysis will be required. The agenda shall also include existing regulations scheduled to be reviewed in accordance with Section 4 of this Order.

(b) **Agency Head Oversight.** Before an agency proceeds to develop significant new regulations, the agency head shall have reviewed the issues to be considered, the alternative approaches to be explored, a tentative plan for obtaining public comment, and target dates for completion of steps in the development of the regulation.

(c) **Opportunity for Public Participation.** Agencies shall give the public an early and meaningful opportunity to participate in the development of agency regulations. They shall consider a variety of ways to provide this opportunity, including (1) publishing an advance notice of proposed rulemaking; (2) holding open conferences or public hearings; (3) sending notices of proposed regulations to publications likely to be read by those affected; and (4) notifying interested parties directly.

Agencies shall give the public at least 60 days to comment on proposed significant regulations. In the few instances where agencies determine this is not possible, the regulation shall be accompanied by a brief statement of the reasons for a shorter time period.

(d) **Approval of Significant Regulations.** The head of each agency, or the designated official with statutory responsibility, shall approve significant regulations before they are published for public comment in the FEDERAL REGISTER. At a minimum, this official should determine that:

(1) the proposed regulation is needed;

(2) the direct and indirect effects of the regulation have been adequately considered;

(3) alternative approaches have been considered and the least burdensome of the acceptable alternatives has been chosen;

(4) public comments have been considered and an adequate response has been prepared;

(5) the regulation is written in plain English and is understandable to those who must comply with it;

(6) an estimate has been made of the new reporting burdens or recordkeeping requirements necessary for compliance with the regulation;

(7) the name, address and telephone number of a knowledgeable agency official is included in the publication; and

(8) a plan for evaluating the regulation after its issuance has been developed.

(e) **Criteria for Determining Significant Regulations.** Agencies shall establish criteria for identifying which regulations are significant. Agencies shall consider among other things: (1) the type and number of individuals, businesses, organizations, State and local governments affected; (2) the compliance and reporting requirements likely to be involved; (3) direct and indirect effects of the regulation including the effect on competition; and (4) the relationship of the regulations to those of other programs and agencies. Regulations that do not meet an agency's criteria for determining significance shall be accompanied by a statement to that effect at the time the regulation is proposed.

Sec. 3. Regulatory Analysis. Some of the regulations identified as significant may have major economic consequences for the general economy, for individual industries, geographical regions or levels of government. For these regulations, agencies shall prepare a regulatory analysis. Such an analysis shall involve a careful examination of alternative approaches early in the decision-making process.

The following requirements shall govern the preparation of regulatory analyses:

(a) Criteria. Agency heads shall establish criteria for determining which regulations require regulatory analyses. The criteria established shall:

(1) ensure that regulatory analyses are performed for all regulations which will result in (a) an annual effect on the economy of $100 million or more; or (b) a major increase in costs or prices for individual industries, levels of government or geographic regions; and

(2) provide that in the agency head's discretion, regulatory analysis may be completed on any proposed regulation.

(b) Procedures. Agency heads shall establish procedures for developing the regulatory analysis and obtaining public comment.

(1) Each regulatory analysis shall contain a succinct statement of the problem; a description of the major alternative ways of dealing with the problems that were considered by the agency; an analysis of the economic consequences of each of these alternatives and a detailed explanation of the reasons for choosing one alternative over the others.

(2) Agencies shall include in their public notice of proposed rules an explanation of the regulatory approach that has been selected or is favored and a short description of the other alternatives considered. A statement of how the public may obtain a copy of the draft regulatory analysis shall also be included.

(3) Agencies shall prepare a final regulatory analysis to be made available when the final regulations are published.

Regulatory analyses shall not be required in rulemaking proceedings pending at the time this Order is issued if an Economic Impact Statement has already been prepared in accordance with Executive Orders 11821 and 11949.

Sec. 4. Review of Existing Regulations. Agencies shall periodically review their existing regulations to determine whether they are achieving the policy goals of this Order. This review will follow the same procedural steps outlined for the development of new regulations.

In selecting regulations to be reviewed, agencies shall consider such criteria as:

(a) the continued need for the regulation;

(b) the type and number of complaints or suggestions received;

(c) the burdens imposed on those directly or indirectly affected by the regulations;

(d) the need to simplify or clarify language;

(e) the need to eliminate overlapping and duplicative regulations; and

(f) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions or other factors have changed in the area affected by the regulation.

Agencies shall develop their selection criteria and a listing of possible regulations for initial review. The criteria and listing shall be published for comment as required in Section 5. Subsequently, regulations selected for review shall be included in the semiannual agency agendas.

Sec. 5. Implementation.

(a) Each agency shall review its existing process for developing regulations and revise it as needed to comply with this Order. Within 60 days after the issuance of the Order, each agency shall prepare a draft report outlining (1) a brief description of its process for developing regulations and the changes that have been made to comply with this Order; (2) its proposed criteria for defining significant agency regulations; (3) its proposed criteria for identifying which regulations require regulatory analysis; and (4) its proposed criteria for selecting existing regulations to be reviewed and a list of regulations that the agency will consider for its initial review. This report shall be published in the FEDERAL REGISTER for public comment. A copy of this report shall be sent to the Office of Management and Budget.

(b) After receiving public comment, agencies shall submit their revised report to the Office of Management and Budget for approval before final publication in the FEDERAL REGISTER.

(c) The Office of Management and Budget shall assure the effective implementation of this Order. OMB shall report at least semiannually to the President on the effectiveness of the Order and agency compliance with its provisions. By May 1, 1980, OMB shall recommend to the President whether or not there is a continued need for the Order and any further steps or actions necessary to achieve its purposes.

Sec. 6. Coverage.

(a) As used in this Order, the term regulation means both rules and regulations issued by agencies including those which establish conditions for financial assistance. Closely related sets of regulations shall be considered together.

(b) This Order does not apply to:

(1) regulations issued in accordance with the formal rulemaking provisions of the Administrative Procedure Act (5 U.S.C. 556, 557);

(2) regulations issued with respect to a military or foreign affairs function of the United States;

(3) matters related to agency management or personnel;

(4) regulations related to Federal Government procurement;

(5) regulations issued by the independent regulatory agencies; or

(6) regulations that are issued in response to an emergency or which are governed by short-term statutory or judicial deadlines. In these cases, the agency shall publish in the FEDERAL REGISTER a statement of the reasons why it is impracticable or contrary to the public interest for the agency to follow the procedures of this Order. Such a statement shall include the name of the policy official responsible for this determination.

Sec. 7. This Order is intended to improve the quality of Executive Agency regulatory practices. It is not intended to create delay in the process or provide new grounds for judicial review. Nothing in this Order shall be considered to supersede existing statutory obligations governing rulemaking.

Sec. 8. Unless extended, this Executive Order expires on June 30, 1980.

JIMMY CARTER

THE WHITE HOUSE,
March 23, 1978.

tion) to systematically review the semi-annual regulation agendas to be published in the FEDERAL REGISTER by each executive department and agency.

• Any of these national organizations should notify the appropriate executive department or agency if it believes that a regulation included on an agency regulation agenda would have major intergovernmental significance. Notification should be made through the senior intergovernmental officials whose names I announced in a FEDERAL REGISTER notice on September 20, 1977.

• Upon receipt of notification from any of the above named organizations, the agency shall develop a specific plan for consultation with State and local governments in the development of that regulation. Such consultation shall include the solicitation of comments from the above named groups, from other representative organizations and from individual State and local governments as appropriate.

Consistent with my memorandum to you of February 25, 1977, whenever major agency regulations identified as having major intergovernmental significance are submitted to the Office of Management and Budget for review or are published in the FEDERAL REGISTER, those proposed regulations shall be accompanied by a brief description of how State and local governments have been consulted, what the nature of the State and local comments was, and how the agency dealt with such comments.

As you implement the new Executive Order, I expect that you will include in your revised agency procedures, provisions which will institute intergovernmental consultation described in this memorandum.

Because the goals and procedures of the new Order duplicate those of the OMB circular now governing the consultation process, OMB has rescinded it. However, nothing in this memorandum shall be construed as in any way diminishing the affirmative obligation of the executive departments and agencies to actively seek out, encourage, and facilitate the submission of State and local comments in the development of Federal regulations in any other ways appropriate to the agency and the proposed regulation.

JIMMY CARTER

Improving Government Regulations

Letter to the Heads of Independent Regulatory Agencies. March 23, 1978

Today I issued an Executive Order to improve government regulations. This Order will open up new opportunities for public participation in the regulatory process, require regulations to be clearer and more understandable, and assure more effective oversight of the development of agency regulations.

I believe that this effort is one of the most important reform initiatives to be undertaken by my Administration. I have asked the members of the Cabinet and other agency heads to give personal priority and attention to implementing the Order. To be fully effective and achieve the full range of needed improvements, I believe that it would be useful for the independent regulatory commissions to initiate a voluntary effort to achieve similar procedural reforms.

As you know, public comment on whether or not to apply these procedures to independent regulatory agencies was specifically sought in the November 13, 1977 notice in the FEDERAL REGISTER. The overwhelming response was that these agencies should adopt the provisions of the Order. The public is seeking a change. They are encouraging us to seek new approaches to the way in which government regulates. They point out that if

regulations were simpler, less burdensome, and more clearly understandable, people would be better able to comply with them.

I believe that the new spirit of openness, simplicity and clarity advocated in this Executive Order responds to the public's concerns. I know that many important reforms are already underway in the independent agencies and I believe that the requirements of the Order complement these efforts. I am asking you as Chairman of your agency to initiate your own program to incorporate the provisions of the Order. In addition, it would be useful for you to report progress on your efforts to the Congress and to me by June 30, 1978. I look forward to reviewing these reports.

Sincerely,

JIMMY CARTER

NOTE: This is the text of identical letters addressed to the Chairmen of the Civil Aeronautics Board, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Election Commission, the Federal Energy Regulatory Commission, the Federal Home Loan Bank Board, the Federal Maritime Commission, the Board of Governors of the Federal Reserve System, the Federal Trade Commission, the Interstate Commerce Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Rate Commission, and the Securities and Exchange Commission.

ENCLOSURE 6