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STATEMENT OF

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BEFORE THE

SENATE SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE

AND PROCEDURE

COMMITTEE ON THE JUDICIARY

ON

THE REGULATORY REFORM ACT

Mr. Chairman and Members of the Committee:

We are pleased to appear today to discuss S. 1080, the Regulatory Reform Act. We support the bill's objectives to make regulations more cost-effective and to improve regulatory planning and management.

As in our previous testimony on H.R. 2327, the Regulatory Reform Act of 1983, we focus on the quality and usefulness of regulatory analysis and OMB's oversight requirements for such analysis. We rely on our earlier findings regarding the impact of E.O. 12291 and S. 1080 on the regulatory process contained in

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our 1982 report entitled "Improved Quality, Adequate Resources, and Consistent Oversight Needed if Regulatory Analysis is to Help Control Costs of Regulations".

GAO has supported and continues to support the use of regulatory analysis. This tool can contribute to more cost-effective regulation by systematically laying out the advantages and disadvantages of alternative regulatory approaches. Moreover, the availability of regulatory analyses can provide structure and focus for meaningful public debate. In reviewing a sample of 57 analyses, including 19 prepared under Executive Order 12291, however, we found that many of the analyses, (including several approved by OMB), did not provide adequate support for their conclusions. Most significantly, many failed to identify various costs or benefits or failed to compare the costs and benefits of different alternatives. We believe that if the quality of these and future regulatory analyses were improved, the potential of this tool for improving the decisionmaking process could be more fully achieved.

Since 1974, regulatory analyses have been required by executive orders for all major rules proposed by Executive agencies. Executive Order 12291, issued by President Reagan in February 1981, differs from previous executive orders and from S. 1080 in the stringency of its analytical requirements. It specifies that net benefits be maximized and that no action be taken unless the potential benefits are shown to outweigh the potential costs to

society. This requires that all costs and benefits be quantified and monetized to the maximum extent possible.

S. 1080, although requiring equally stringent standards of analysis, demonstrates greater sensitivity to the potential problems that can arise. First, S. 1080 requires that agencies describe the nature and extent of nonquantifiable benefits and costs of alternative rules in addition to estimating the quantifiable benefits and costs and specifies that agencies are not required to evaluate the relationship of benefits and costs "primarily on a mathematical or numerical basis." Second, S. 1080 promotes the appropriate use of information and thereby the quality of analyses by requiring agencies to describe the data, methodologies, studies, and other information they have relied on in performing their analyses, to identify the authors or sources of such information, and to calculate margins of error for all uncertain data. Given the importance of understanding the high degree of scientific and technological uncertainty that charcterizes many regulatory decisions, we think this provision is particularly appropriate.

In our report we found that the costs of performing regulatory analyses are high. We noted that S. 1080's provisions for hybrid rulemaking, which require agencies to provide an opportunity for cross examination during informal hearings, and for a stricter standard of judicial review can be expected to raise the average costs of analysis. Total costs of regulatory analysis

would also increase since more analyses will be done as a result of both the extension of analytical requirements to independent agencies and the elimination of executive discretion to waive the analytical requirement. We expressed concern that the quality of analyses may fail to improve if, in light of the budget austerity measures that Federal agencies are undergoing, agencies give analysis lower priority.

In our review of the progress of regulatory analysis under E.O. 12291, we noted that OMB's frequent use of its waiver authority for major rules has limited the impact of the regulatory analysis requirement. Although S. 1080's elimination of the waiver would have the beneficial effect of preventing its asymmetrical application to "deregulatory" initiatives, we are concerned that if application of the regulatory analysis requirement is unnecessarily broad, uneven allocation of agency resources may result in widely varying quality of analyses. We recommended that OMB establish written guidelines for waiving the analysis requirement so that the basis for such waivers would be more explicit and verifiable by the public.

I would like to turn at this point to the nature of Executive oversight, which we have also addressed in previous testimony.

Several important oversight functions can be performed by OMB which would promote improvements in the quality of regulatory analyses. First, it can play a supportive role by pressing for

more influence and adequate budgetary support for regulatory analysis in the agencies. Second, OMB could exercise the broad authority contemplated in Executive Order 12291 by taking advantage of its centralized position to promote consistent and coordinated use of analytical techniques, assumptions, and methodologies between different agencies. We found that OMB makes only modest attempts to perform these functions and thereby capitalize on its unique central position. We urge OMB to reallocate its resources, if necessary, to give these activities much higher priority.

Because the provisions of Executive Order 12291 require that agencies refrain from publishing rules until they receive and respond to OMB's formal comments, OMB has used its resources primarily for case-by-case reviews of rules. We found that it is very difficult to determine how adequately this oversight function is being performed. OMB's comments on agency analyses are almost entirely communicated via telephone or in staff level meetings. Without more written documentation of OMB's comments and critiques of individual analyses, there is little opportunity for review of the quality of oversight and it is difficult for the public to determine the analytical basis of decisions. We note that S. 1080 attempts to promote public visibility of executive oversight by requiring that a written explanation of significant changes made by an agency in response to comments from the President or his designee be included in the rulemaking

record. We believe that the bill could be strengthened by requiring OMB to put all its substantive comments related to the analysis in writing, to identify the sources of its information, and to submit these materials for the record.

The question of adequacy of oversight aside, there is some ambiguity in S. 1080 concerning the nature and role of Presidential oversight of the rulemaking process. In 1981, the last year for which we have data, OMB rejected and returned 45 rules to the agencies for major changes. None of OMB's proposed changes were appealed, so it clearly had a significant effect in these cases. The reports of both the Senate Judiciary and Governmental Affairs Committees as well as the floor debate on the bill during the last Congress make clear that the Senate expected White House oversight to be procedural in nature, certifying, for instance, that each agency prepared an analysis for each major rule and that analyses met minimum standards of quality. This procedural oversight, however, would stop short of a substantive judgment of whether the agency's choice of a particular alternative was correct. Further, Section 11 of S. 1080 emphasizes that the bill does not change the delegation of rulemaking responsibilities to the heads of agencies. At the same time, Section 624 may be interpreted by some as granting strong powers to the President to intervene in agency rulemaking particularly in directing the President or his designee to "ensure" compliance by agencies with the bill's requirements. We believe that the Congress could clarify its intent regarding the nature of Presidential oversight

authorized by S. 1080, especially with regard to the independent regulatory agencies.

Finally, we believe the potential exists for conflict to arise between executive oversight and legislative intent under both E.O. 12291 and S. 1080. Its source lies in a confusion in some cases as to whether statutory provisions preclude the use of regulatory analysis. Ultimate resolution of the matter would require the Congress to explicitly identify those statutes where use of cost-benefit analysis and related analytical tools are prohibited.

That concludes my prepared statement. I would be happy to respond to any questions you may have.