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Report to Sen. Abraham Ribicoff, Chairman; by Elmer B. Staats, Comptroller General.

Contact: Program Analysis Div.
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Authority: Regulatory Procedures Reform Act. Administrative Procedures Act. 5 U.S.C. 3105. S. 2490 (95th Cong.).

Title I of S. 2490, the Regulatory Procedures Reform Act, requires agencies with regulatory functions to: establish deadlines; monitor agency actions to assure promptness, compliance, and efficiency; and perform reviews and compile an annual report. These functions would be carried out by an Office of Planning and Management. Language in the legislation should avoid ambiguity about regulatory responsibilities. Complete consolidation of management and planning functions into a single staff unit may not be advisable. Title II would amend the Administrative Procedures Act to make formal, trial-type proceedings more closely resemble informal rulemakings. A suggested change was to have review boards established at one level to avoid the problems of multiple levels of agency review. Title III would amend provisions governing the appointment of administrative law judges. Provisions authorize agencies to appoint or promote to this position any qualified individual on the Civil Service register. Suggested safeguards to insure selection of the most qualified individuals were to require agencies to consider a certain number of individuals or to require the Civil Service Commission to provide no less than 5 and no more than 10 names to the agencies. (RTW)

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

MAR 30 1978

B-163628

The Honorable Abraham Ribicoff
Chairman
Governmental Affairs Committee
United States Senate

Dear Mr. Chairman:

This letter is in response to your request for our comments on S. 2490, the Regulatory Procedures Reform Act. Since GAO is not a regulatory agency, the procedures proposed in the bill are not directly relevant to our functions. We do, however, have comments to offer on Titles I, II, and III.

Title I of the proposed legislation requires agencies with regulatory functions to:

-- establish deadlines and assure compliance with such deadlines;

-- monitor agency actions to assure prompt action on regulatory matters;

-- establish and monitor compliance with priorities;

-- monitor regulatory activities to assure the agency proceeds in the most efficient manner possible; and

-- periodically review rules and regulations, and compile an annual report.

These functions would be carried out by an Office of Planning and Management.

These functions are important and necessary regulatory reforms for those agencies that have not already undertaken them. We are concerned, however, about possible ambiguity as to who is responsible for controlling the operations of the regulatory agency as a result of the wording of Section 101. Even though Section 101(a) states that the Office of Planning and Management will operate "under the direct guidance and supervision of the head of the agency," the

language may not be sufficiently clear, for example, as to who has final control over the establishment and monitoring of deadlines. We believe it should be made explicit that responsibility for the effective operations of the agency rests squarely with the head of the agency. If Congress determines that schedules, priorities and deadlines are necessary, they should be the responsibility of the head of the agency, not a subordinate official. Similarly, compliance should be the responsibility of the agency head.

An Office of Planning and Management could provide critically important staff support and advice in this connection but should have operational control responsibilities for the agency as a whole only to the extent that these are delegated by the head of the agency. To have such operational control responsibilities vested in the subordinate official by law could seriously diminish the authority and responsibility of the head of the agency, possibly to the point of defeating the objectives of the bill.

Additionally, we note that Section 101(a) provides that the office shall be headed by an individual "compensated at the rate of GS-18 or above." Stating the salary level in this manner is too indefinite since there is no ceiling, and the only salaries above the rate of GS-18 are at the executive levels. We suggest that the bill state that the office be headed by an individual compensated at a rate not to exceed a specified general schedule level.

We also caution against completely consolidating the management and planning functions into a single staff unit. As the Senate Governmental Affairs Committee's report on "Delay in the Regulatory Process" points out, lack of planning has long been a major source delay in agency proceedings. The Committee's report as well as earlier studies have called for specialized planning staffs that would have the responsibility to recommend agency priorities and plans.

Because the pressure of daily management tends to crowd out longer-term planning, those responsible for the planning function should be a step removed from the day-to-day operations of the agencies. At the same time, policy planning responsibilities should not be so removed from management that the planning becomes irrelevant. One way to reconcile this problem would be to amend Title I subsections (b)(4) and (b)(8) to specify that the tasks of recommending priorities and reviewing existing rules and regulations be conducted by a separate staff within the designated Office of Planning and Management. A legislative emphasis on the importance and specialized nature of tasks would indicate to the agencies the

importance of not subordinating planning to the daily pressures of management.

Title II amends the Administrative Procedure Act to make formal, trial-type proceedings, more closely resemble informal rulemakings. Agencies would be given greater flexibility in conducting such proceedings. Our comment on Title II concerns Section 204(c) which provides that, "Each agency may establish by rule one or more employee boards to review decisions of presiding employees..." We suggest this be changed to read, "Each agency may establish by rule one or more employee boards at one level to review decisions of presiding employees..."

In our study of Administrative Law Judges (ALJ), which will soon be completed and sent to you, we found that there were multiple levels of agency review of ALJ decisions for the cases we reviewed at the Department of Labor (DOL), Interstate Commerce Commission (ICC), and Occupational Safety and Health Review Commission (OSHRC). These situations illustrate the problems inherent in the current review process. For example, before the Assistant Secretary for Labor-Management Relations at DOL makes a final decision in a Federal Labor-Management Relations case an ALJ decided, that decision will have been reviewed by:

-- the Director, Division of Operations, Office of Federal Labor-Management Relations;

-- a GS-15 Supervisor in the Division of Operations;

-- a staff member in the Division;

-- the Agenda Committee consisting of the Director and Deputy Director of the Office Federal Labor-Management Relations, the Director, Division of Operations, and his three supervisors and the Director, Division of Regulations and Appeals; and

-- the Case Committee consisting of an Associate Solicitor or Deputy Associate Solicitor, Director or Deputy Director of the Office of Federal Labor-Management Relations, Director of the Division of Operations, and Director of the Division of Regulations and Appeals and sometimes a representative of the Assistant Secretary's Office.

An internal study at the ICC points out that Section 17 of the Interstate Commerce Act "mandates a cumbersome appellate process resulting in repetitious reviews."

With the exception of railroad cases, current procedures at the agency provide as many as four administrative appeals before an ALJ's decision becomes administratively final. The ICC has been unsuccessful in having Congress amend the legislation to generally allow only one administrative appeal of the ALJ's initial decision and a further appeal only if the Commission finds the case involves an issue of general transportation importance, new evidence, or changed circumstances.

Both DOL and OSHRC have indicated they are changing their processes to cut down on review time. However if the proposed S.2490 permits "One or more employee board," agencies may continue to have multi-layer or duplication in their review process. Thus we recommend S.2490 limit the review to only one level.

Title III of S. 2490 amends the provisions of Section 3105 of Title V of the United States Code governing the appointment of administrative law judges. Section 301(b) provides that "Subject to the provisions of subsection (c), each agency is authorized without regard to any provisions of this title governing appointments or promotions in the competitive service, to appoint as administrative law judges, or to promote to any position as administrative law judge, any individual listed on a register of qualified candidates prepared by the Civil Service Commission." We suggest that some safeguards be established, such as requiring the agency to consider a certain number of individuals or requiring the Commission to provide the names of the top 10 individuals on the register to the agencies.

The rationale for allowing agencies to appoint or promote from anywhere on the register is to eliminate the rule of three and increase the range of candidates from which all agencies may choose an administrative law judge. Currently agencies are using selective certification procedures to avoid the rule of three and select individuals on the list of qualified candidates even if they are not at the top of the list. Another reason is to avoid selecting an individual who made the top of the list through veterans preference points. This practice, however, results in the agency selecting individuals who already work at the agency as attorneys, because they are most apt to possess the special expertise needed to be considered under the selective certification procedures. While this process provides the agencies with a method to hire Administrative Law Judges with special talents and specifications and who can be immediately productive, it can also lead to doubts about the impartiality of the administrative adjudication process.

The proposal to open the register also can lead to these same doubts because the agencies are not prevented from still selecting their own attorneys. While these attorneys may be qualified, they may not be the best qualified. Since administrative law judges receive immediate, virtual life-time appointments, and tenure to an important position some safeguards should be provided that ensure the agencies select the best qualified to fill these positions. Thus we suggest the agencies should be required to consider a certain number of individuals or the Commission be required to provide no less than 5 and no more than 10 names to the agencies.

Sincerely yours,

Elmer B. Staats
Comptroller General
of the United States