



UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20518

9407

E-108805

OFFICE OF GENERAL COUNSEL

MAR 8 1979

The Honorable Elliott H. Levitas
House of Representatives

Dear Mr. Levitas:

Do not make available to public reading

This is in reply to your request for further explanation of my testimony on February 5 about the [authority of agencies to issue regulations]. I appreciate the opportunity to clarify my position.

It may be helpful to review what was said at the hearing. You asked if the Council on Wage and Price Stability has authority to issue regulations asking corporations with revenues over a certain amount to file reports with the Council. My reply was that I had not focused on that aspect of the program, but that the Council might have such authority because of its broad scale monitoring authority. I also said that agencies are authorized to issue regulations without a specific mandate to do so in the statute.

The question as framed in your letter suggests that my comments on the authority of the Council on Wage and Price Stability to issue a particular set of regulations are equivalent to saying that all agencies have an inherent authority to issue legislative regulations, even when their substance is unrelated to the agency's legislative authority. I don't believe my remarks should be construed as going that far. My comments as to the Council's authority to issue regulations were conditioned on an interpretation of the Council's statutory authority. If that was not so understood, I hope this letter will clarify the point.

The Administrative Procedure Act (5 U.S.C. § 551 (1976) et seq.) provides the broad framework within which agency rule or regulation-making must be viewed. Section 553 of the Administrative Procedure Act not only authorizes but requires agencies to publish certain types of rules, policies, and regulations. Paragraph (a)(1) of that section provides in pertinent part:

"(a) Each agency shall make available to the public information as follows:

"(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public --

504010

*Letter
M. J. [unclear]*

"(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

"(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

"(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

"(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

"(E) each amendment, revision, or repeal of the foregoing."

Subparagraph (D) quoted above refers to a class of regulation -- "substantive rules of general applicability" -- that are to be "adopted as authorized by law." These regulations are often referred to as "legislative." However, "statements of general policy or interpretations of general applicability" are also required to be published by subparagraph (D) even though there is no provision of law that specifically directs the agency to formulate such statements or interpretations. If an agency has a duty to carry out a certain program or task and, in its judgment, it cannot proceed efficiently without offering further guidance to the public, it not only may but should publish this guidance in the Federal Register.

Again, I do not suggest that agencies have inherent authority to issue any type of regulation concerning programs and activities for which they have no responsibility based on their authorizing legislation. For example, the General Services Administration has no authority to issue regulations concerning the availability of a certain drug to the public. Accordingly, all regulations must be measured in some degree against the statutory authority of the agency.

In the case of the Council, section 2(g)(1) of the Council on Wage and Price Stability Act (12 U. S. C. § 1004 note, as amended by

Pub. L. No. 95-131, 91 Stat. 1091), provides as follows:

"(g) The Council shall have the authority, for any purpose related to this Act, to--

"(1) require periodic reports for the submission of information maintained in the ordinary course of business * * *"

Without reaching any conclusion at this time about the extent of the Council's authority or the validity of its exercise in this particular case, it seems to me reasonable that the Council would need to issue regulations to implement the report provision quoted above. For example, the Council must establish the periods for reports it may require, define the contents of the reports, and specify those from whom it will require reports. Such a regulation may be considered a procedural rule -- an area where agencies are generally considered by most authorities to have broad implied powers to issue regulations. See for example, Kenneth Culp Davis in his Administrative Law Treatise (1958) § 8.03 who states at p. 216:

"But a legislative rule [regulation] may rest upon an implied or an unclear grant of power as well as upon an express and clear grant of power.

* * * * *

"Procedural rules [regulations] designed to govern the agency's own proceedings are usually considered to be legislative rules, whether or not specific power is granted to issue such rules."

I hope these comments have clarified my views. I would be happy to discuss this issue further with you if you wish.

Sincerely yours,

MILTON SOCCAR

Milton J. Soccar
General Counsel