

STATEMENT OF FRANK BERNDT, ACTING DEPUTY ADMINISTRATOR, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, DEPARTMENT OF TRANSPORTATION, BEFORE THE HOUSE SUBCOMMITTEE ON ADMINISTRATIVE LAW & GOVERNMENTAL RELATIONS, COMMITTEE ON THE JUDICIARY, JUNE 9, 1983

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to appear before this Subcommittee to discuss the regulatory process at the National Highway Traffic Safety Administration (NHTSA) and how this process would be affected by regulatory reform legislation such as H.R. 2327, the "Regulatory Reform Act of 1983". With me today are Barry Felrice, our Associate Administrator for Plans & Programs, and Steve Wood, our Assistant Chief Counsel for Rulemaking.

NHTSA is an operating administration of the Department of Transportation and much of our regulatory process is guided by the Office of the Secretary. The Office of the Secretary provides liaison with OMB. I will defer to the Departmental witness, who is scheduled to testify later this month, for a more complete depiction of the Department's regulatory process and related matters.

NHTSA'S REGULATORY PROCESS

At the statutory level, NHTSA's regulatory process is governed by the provisions of the National Traffic and Motor Vehicle Safety

Act of 1966, as amended, the Motor Vehicle Information and Cost Savings Act, and of course the informal rulemaking requirements of the Administrative Procedure Act.

Under the Safety Act, the Agency is required to establish appropriate Federal motor vehicle safety standards. Under Titles I, IV and V of the Information and Cost Savings Act, the Agency is respectively required to issue bumper performance requirements to "obtain the maximum feasible reduction of costs to the public and to the consumer" involving passenger car bumper systems; rules prohibiting odometer tampering and requiring documentation and disclosure of vehicle mileage information incident to the sale or transfer of motor vehicles; and automotive fuel economy standards.

NHTSA is subject to Executive Order 12291 issued by President Reagan on February 17, 1981, the objectives of which are to: reduce the unnecessary burdens of existing and future regulations; increase an Agency's accountability for regulatory action; provide for Presidential oversight of the regulatory process; minimize duplication and conflict of regulations; and ensure well-reasoned

regulations. Executive Order 12291 also emphasizes that attention be paid to the costs and benefits of rules which already exist.

In addition to these general objectives, Executive Order 12291 established several guidelines to be used in promulgating new regulations, reviewing existing regulations, and developing legislative proposals concerning regulation. These guidelines include provisions that regulatory actions not be taken unless the potential benefits to society outweigh the potential costs.

When major proposed regulations are considered, a Regulatory Impact Analysis (RIA) is required to be prepared. The RIA includes a description of the potential benefits and costs of the rule, a determination of the rule's potential net benefits, and a description of alternative approaches that could substantially achieve the same goal at lower cost.

Another major regulatory task required by Executive Order 12291 is the review of currently effective rules. Regulatory agencies are required to select existing regulations for review based on their own assessment, and on direction from the Office

of Management and Budget.

In describing NHTSA's experience in rulemaking, it is also critical to note that our rulemaking processes have been impacted by overall Department of Transportation policies, which were developed with NHTSA's participation. In February 1979, for example, DOT established policies and procedures for the simplification, analysis and review of regulations. These policies and and procedures were issued in the expectation that they

would result in fewer, simpler, more comprehensible and less burdensome regulations; improve the opportunity for effectiveness of public involvement, and generally increase the efficiency of the Department's regulatory programs by requiring periodic review of regulations to assure their continued need.

Since March 1979, NHTSA has been required to prepare a Regulatory Impact Analysis for each major rule, and a Regulatory Evaluation for its non-major rules. In fact, NHTSA conducted similar analyses even before these Departmental requirements took effect. The result of the DOT-established procedures has been a better developed and more objective analysis of regulatory alternatives, so that agency decisionmakers have the best

information available in making decisions which often have significant impact on motor vehicle safety.

There are two basic tenets in NHTSA's policy regarding its regulatory process. First, we believe it is extremely important that the bases for rulemaking decisions be made as clear as possible. NHTSA's regulatory process serves this objective by delineating the Agency's assessment of the problem, its potential solution as described in the requirements of the regulation and its consequences, and the alternative courses of action considered by the Agency and their expected consequences--in terms of benefits and costs. The analysis is intended to inform the general public, as well as the regulated industry, of our decisionmaking process. If there are any errors in our assumptions or data, then the availability of our analysis enhances discovery of these problems and their solution.

Second, since the regulatory analyses are decisionmaking documents, their preparation requires that the full, detailed consequences of the action be debated within the Agency. Although we will contract for pieces of information which may be used in

a regulatory analysis, such as the collection of accident data or the crash testing of an improved vehicle, we do not believe we should pay someone to do our thinking for us. When we do contract for information, we always insist that the contractor provide adequate documentation so that the information can be verified. The actual preparation of the regulatory analysis is always done by the Agency, and not by a contractor.

Our internal organization and rulemaking procedures reflect our commitment to a full airing of all consequences of our regulations. For example, instead of having the office which develops the regulation also prepare the regulatory analyses, these responsibilities are divided between two independent offices. Our Rulemaking Office develops proposed regulations and is accountable for an initial determination of costs and benefits. But it is the Planning Office that actually prepares the regulatory analysis.

The Agency's Legal, Research and Development, and Enforcement Offices also give advice and guidance in the development of our

regulations. We believe that this internal system not only produces the best possible data and analysis, but also provides the Administrator with the most independent and objective advice for arriving at the best possible rulemaking decisions.

H.R. 2327, THE "REGULATORY REFORM ACT OF 1983"

The regulatory reform bill we have been asked to discuss today, H.R. 2327, contains two titles. Title I is concerned with the planning and management of the process by which regulations are developed. In addition to the current APA requirements for informal rulemaking, the major provisions of this title would require each agency to:

1. Conduct thorough analyses for all major rules before they are proposed and again before they are issued in final form;
2. Provide oral hearings for all major rules, with an opportunity for cross-examination in certain limited circumstances;
3. Publish a semi-annual regulatory agenda of all rules the agency intends to propose or promulgate within the next 12 months; and
4. Conduct, during the next 10 years, a review of all major rules to determine whether these rules should be retained, modified, or rescinded.

We have only three brief comments to make about this title. First, the requirement that the opportunity for oral hearings be provided for all major rules is inflexible, burdensome, and potentially costly. In many rulemakings, an oral hearing is unnecessary, and the requirement to hold one would unnecessarily delay and hamper the rulemaking process in some instances. We believe that agency discretion on whether to hold such hearings should continue.

Second, under the requirements for a final regulatory analysis of a major rule, the bill requires that an agency must provide an explanation of the extent to which such a rule attains its objectives "...with lower economic costs than the other alternatives analyzed...". While the language of Executive Order 12291 does speak of minimizing the net cost to society, it does not specify that the alternative with the lowest economic costs must be chosen. The language in the bill could be read to imply that economic costs are the overriding consideration in a rulemaking decision. Since NHTSA's regulations typically involve non-quantifiable benefits such as deaths and

injuries avoided, the somewhat ambiguous language of this section needs to be clarified.

Third, while in principle we can agree to the periodic review of all major rules to determine their effectiveness, which is similar to that provided in section 3(i) of Executive Order 12291, we would like to note that this provision contains a number of technical problems. The information requirements, public comment period, and action requirements for this provision should be associated with the publication of a notice describing the preliminary results of the review instead of the notice announcing the initiation of the review. At the initiation stage, it is unlikely that this information will be available.

Title II would amend the "informal rulemaking" procedures of the APA to: (a) revise the list of exemptions to, among other things, no longer exempt grants from notice and comment rulemaking procedures; (b) revise the content requirements of an NPRM; (c) provide minimum 60-day public comment period for an NPRM; (d) provide for expanded opportunity for public access to

documents relied on for rulemaking; and (e) provide for the maintenance of a rulemaking file to which the public has access. In addition, it would provide a procedure for legislative veto of major rules through the passage of a joint resolution of disapproval.

Title II would also modify the judicial review provisions of the APA to emphasize that courts are required to take an independent look at the legal issues presented for review and to reach their own judgment regarding those issues. The courts would be directed, in deciding if a rule should be set aside as arbitrary or capricious, to consider if there is substantial support in the rulemaking file for the factual determinations upon which the rule is based.

The proposal to require a minimum 60-day public comment period on all NPRMs would slow the Agency's response to requests for relief and is an unnecessarily rigid requirement. Since safety rules often require a much faster turnaround, this provision should be revised to include an expedited comment procedure that provides for a suitable comment period.

The legislative veto provision would add to regulatory delay and would induce agencies to conclude that their rules were not major rules in order to avoid this bottleneck. However, we defer to the Department of Justice on the appropriateness of the legislative veto provision.

Finally, we are very concerned about the provision to alter the scope of judicial review accorded agency rules. The most troublesome portion of this provision is that portion which requires a reviewing court to "consider whether there is substantial support in the rulemaking file, viewed as a whole," for agency factfinding in connection with informal rulemaking.

The result of the requirement for substantial support for factual claims in a rulemaking file would be to overformalize the informal rulemaking process. This would cause agencies to become excessively cautious and to develop excessively detailed records of their proceedings. Delay of regulatory actions and an unnecessary expenditure of resources would of course follow.

In addition, we are concerned that this provision will increase the likelihood that reviewing courts will substitute their judgment for that of the Agency in matters of policy under the guise of taking a "hard look" at agency factfinding. This may be a problem particularly in health and safety rulemaking on complex technical and medical issues where agencies are often unable to base their rulemaking decisions on factfinding per se, but instead must rely on policy judgments about risks to health and safety and on predictions about events likely to occur under a future regulatory scheme in the absence of empirical data on which to base such predictions. In such cases, a provision which is nearly equivalent to the "substantial evidence" test, currently applicable to formal rulemaking or quasi adjudicative agency actions, may create a serious impediment to any amendment to existing regulatory schemes.

Thus, the adoption of the proposed judicial review provision may have the effect of not only promoting closer examination of agency factfinding, but also of limiting the ability of health and

safety agencies to make the judgments and predictions they must make to implement their statutory mandates for reducing or eliminating risks to health and safety. We believe this result would be unfortunate and undesirable.

CONCLUSION

I would like to conclude, Mr. Chairman, by emphasizing that we believe the President's program for Federal regulations, which includes provisions similar to those in this bill, has been working well and should be given the opportunity to continue and to be further refined. The advantage of doing this is quite clear: an Executive Order simply can be more easily revised as our experience in these matters continues to develop. Obtaining statutory changes is always more difficult. We believe that our current process, policies and procedures adequately demonstrate NHTSA's and the Department of Transportation's ability to improve our regulatory processes without the need for new binding legislative mandates. We do, however, defer to the OMB for the Administration's views on this legislation.

This completes my prepared statement. We would be pleased to answer any questions you may have.

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