EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

March 31, 1995

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY AFFAIRS

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Sally Katze
Administrator, Office of
Information and Regulatory Affairs

SUBJECT: Guidance for Implementing Title II of S. 1.

The President signed S.1, the "Unfunded Mandates Reform Act of 1995, on March 22, 1995. Title II of this statute (P.L. 104-4) directs agencies to take a number of specific steps to assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector. This memorandum summarizes the statutory requirements of Title II, and our role in overseeing agency compliance with it. This memorandum does not discuss Title I of the Act, which concerns mandates in legislation.

1. **Coverage**.

Title II applies to all Federal agencies, with the exception of the independent regulatory agencies (Sec. 3(l); Sec. 101(a), adding Sec. 421 (1)).

Title II takes legal effect on the date of enactment, March 22, 1995 (Sec. 209).

2. **Judicial - Review.**

Agency activities under Title II are subject to judicial review, as described in Section 401. The judicial review provisions "shall take effect on October 1, 1995, and shall apply only to any agency rule for which a general notice of proposed rulemaking is promulgated on or after such date" (Sec. 401 (a) (6)).

An agency action can be challenged for failure to provide a statement required under Section 202 and a written plan required under Section 203(a), although the court will not have the

authority to adjudge the adequacy of the analysis (Sec. 401(a)(2)). The court can compel an agency to prepare a required statement, but the absence or inadequacy of a statement cannot be used under any other Federal law as the basis for invalidating the rule (Sec. 401(a)(3).

These statements will be considered part of the record of judicial review conducted under other provisions of Federal law (Sec. 401 (a)(4)) . The time for filing a petition for judicial review is the time set under other Federal law or 180 days after the final rule is promulgated, whichever is sooner (Sec. 401(a)(5).

3. Section 201, "Regulatory Process."

Title II directs each agency, "unless otherwise prohibited by law, (to] assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law)."

4. Section 202, "Statements to Accompany Significant Regulatory Actions."

A. Required Written Statement. This section requires agencies to prepare a written statement before promulgating certain rules. This requirement builds an the assessment required by Section 6(a)(3)(C) of E.O. 12866.

Agencies are to include in the preamble to the published rulemaking "a summary of the information, contained in the statement" (Sec. 202(b)).

In addition, OMB is to "collect from agencies the statements prepared under section 202," and "periodically forward copies" of these to the Congressional Budget Office "on a reasonably timely basis after promulgation" of the proposed or final rule (Sec. 206). We ask that you provide two copies of these statements to us as part of your submission under E.O. 12866 -- one, for our review and files; one, for transmission to CBO.

(1) Types of Rulemaking Covered. Section 202 applies to "any general notice of proposed rulemaking" or "any final rule

for which a general notice of proposed rulemaking was published,[1] " that includes any Federal mandate that may result

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[1] As the Conference Report states, "[i]t is the intent of the conferees that the rulemaking process shall follow the requirements of section 553 of title 5, United States Code, and shall be subject to the exceptions stated therein. When a general notice of proposed rulemaking is promulgated, such notice shall be accompanied by the written statement required by section 202. When an agency promulgates a final rule following the earlier promulgation of a proposed rule, the rule shall be accompanied by an updated written statement. In all cases, the exceptions stated in section 553 shall apply, including for good cause."

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in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year ... "

(2) Exemptions. As a general limitation, Section 202 requires preparation of an estimate or analysis, "[u]nless otherwise prohibited by law". The Conference Report states that Section 202 "does not require the preparation of any estimate or analysis if the agency is prohibited by law from considering the estimate or analysis in adopting the rule."

Section 202 also does not apply to interim final rules or non-notice rules issued under the "good cause" exemption in 5 U.S.C. 553(b)(B). Nor does it apply to situations. in which the agency has, under 5 U.S.C. 553(a), claimed an exemption. At the same time, if an agency waived the exemption and follows the informal rulemaking procedures in 5 U.S.C. S53, Section 202 would appear to apply.

Moreover, Section 202 is limited to what is defined in the Act as a "Federal mandate." As a general matter, a Federal mandate includes Federal regulations that impose enforceable duties on State, local, and tribal governments, or on the private sector, but excludes those related to certain kinds of Federal assistance and financial entitlements. [2]

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[2] "Federal mandate", is a precisely defined term (Sec. 3(;1) Sec. 101(a), adding Sec. 421(6)) that includes a "Federal intergovernmental mandate" (Sec. 421(5)) and a "Federal private sector mandate" (Sec. 421(7)).

"Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or tribal governmental with two exceptions. It excludes "a condition of Federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or replace caps upon, or otherwise decrease the Federal Government's responsibility to provide funding" in a situation in which the State, local, or tribal governments "lack authority" to adjust accordingly.

"Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program."

B. Content of Required Statement. For regulations covered by Section 202, each agency is to prepare a written statement and include it in the rulemaking record. This statement may be prepared "in conjunction with or as part of any other statement or analysis" carried out by the agency, as long as it "satisfies the provisions" of Section 202(a) (Sec. 202(c)).

(1) Authorizing Legislation. The agency is to identify the "provision of Federal law under which the rule is being promulgated" (Sec 202(a)(1)). As a general matter, if the rule is being issued pursuant to a statutory or judicial deadline, the agency should so state.

(2) Cost-Benefit Analysis. The agency is to provide a "qualitative and quantitative assessment of the anticipated costs and benefits of the Federal mandate, including the costs and benefits to State, local and tribal governments or the private sector" (Sec. 202 (a)(2)). This assessment is to include "the effect of the Federal mandate on health, safety, and the natural

environment". This builds on the assessment required under Section 6 (a)(3)(C) of E.0. 12866.

To the extent an agency determines that "accurate estimates are reasonably feasible," the assessment is also to include estimates of "future compliance costs of the Federal mandate" (Sec 202 (a)(3)(A)) . For intergovernmental mandates, the assessment is to include an analysis of the extent to which the costs "may be paid with Federal financial assistance (or otherwise paid for by the Federal Government)" and "the extent to which there are available Federal resources to carry out the intergovernmental mandate" (Sec. 202(a)(2)(A) &(B)).

(3) Macro-economic Effects. The agency is also to estimate "the effect" of the regulation "on the national economy, such as the effect on productivity, economic growth, full employment, creation of productive jobs, and international competitiveness of United States goods and services, if and to the extent that the agency in its sole discretion determines that accurate estimates are reasonably feasible and that such effect is relevant and material" (Sec. 202(a) (4)).

We would note that such macro-economic effects tend to be measurable, in nation-wide econometric models, only if the economic impact of the regulation reaches 0.25 percent to 0.5 percent of Gross Domestic Product (in the range of $ 1.5 billion to $3 billion). A regulation with a smaller aggregate effect is highly unlikely to have any measurable impact in macro-economic terms unless it is highly focused on a particular geographic region or economic sector.

(4) Summary of State, Local, and Tribal Government Input. The agency is to describe the "extent of the agency's prior consultation with elected representatives" under Section 204, summarize their comments and concerns, and summarize its evaluation of these comments and concerns (Sec. 202(a)(5)). Section 204, which in essence codifies Section 1 of E.O. 12875, is discussed below.

(5) "Least Burdensome Option or Explanation Required." For those regulations for which an agency prepares a statement under Section 202, "the agency shall [l] identify and consider a reasonable number of regulatory alternatives and [2] from those

alternatives select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule" (Sec. 205(a)). This builds on the assessment of feasible alternatives required in Section 6(a)(3)(C)(iii) of E.O. 12866.

This selection of the "least costly, most cost-effective or least burdensome alternative" is to be done "for State, local, and tribal governments, in the case of a rule-containing a Federal intergovernmental mandate" and for "the private sector, in the case of a rule containing a Federal Private sector mandate" (Sec. 205 (a)(1) - (2)).

If the agency does not select the least burdensome option, the agency head needs to publish "with the final rule an explanation of why the least costly, most cost-effective or least burdensome method of achieving the objectives of the rule was not adopted" (Sec. 205(b)(1)).

The agency need not comply with Section 205(a) if its provisions "are inconsistent with [the] law" under which the agency is issuing the rule (Sec 205 (b)(2). We would also note that, while an agency's identification and selection of the least burdensome option in compliance with Section 205, may -- for purposes of presentation and clarity -- be included as part of the statement required under Section 202, this identification and selection is not subject to judicial review (Sec. 401).

5. Section 203, "Small Government Agency Plan."

Section 203 builds upon the policy objectives of the Regulatory Flexibility Act. It provides that "[b]efore establishing any regulatory requirements that might significantly or uniquely affect small governments, agencies shall have developed a plan under which the agency shall—

> "(1) provide notice of the requirement to potentially affected small governments, if any;
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> "(2) enable officials of affected small governments to provide meaningful and timely input [therein); and
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> "(3) inform, educate, and advise small governments on compliance with [such regulatory] requirements.

We have two suggestions. First, the “notice" to affected small governments should involve a more targeted effort than formal publication in the Federal Register.

Second, an outreach effort to enhance “meaningful ... input" and to “advise small governments on compliance” can further agency efforts to carry out Section 204. You may wish to consult with the Chief Counsel for Advocacy, in the Small Business Administration. In cooperation with a number of agencies, he has been working to improve outreach efforts, and will be able to share the pluses and minuses of various approaches.

6. Section 204. "State, Local, and Tribal Government Input."

Agencies are, “to the extent permitted in law, [to] develop an effective process to permit elected officers of State, local, and tribal governments ... to provide meaningful and timely input in the development of regulatory proposals containing significant Federal intergovernmental mandates” (Sec.204 (a)). Under this process, meetings are exempt from the Federal Advisory Committee Act (Sec. 204 (b).

The President is to issue guidelines for appropriate implementation of this section no later than six months from the date of enactment (Sec. 204 (c)). Until that time, I suggest that you review the procedures you have developed to comply with E.O. 12875 and the Guidance for Implementing E.O. 12875, Section 1, that we sent you on January 11, 1994.

That Guidance suggests that intergovernmental consultations should take place as early as possible, and be integrated into the ongoing rulemaking process. It suggests that agencies should consult with the heads of governments, program and financial, officials, and Washington representatives and elected officials. To facilitate these consultations, the Guidance suggests that agencies should estimate the direct costs to be incurred by the affected governments, and make reasonable efforts to disaggregate these cost estimates.

7. Section 207. "Pilot Program on Small Government Flexibility.

OMB, "in consultation with Federal agencies,” is to

establish pilot programs in at least two agencies “to test innovative, and more flexible regulatory approaches that (1) reduce reporting and compliance burdens on small governments; and (2) meet overall statutory goals and objectives” (Sec. 207 (a)).

Those of you who would like to undertake such a pilot program should contact us to discuss your projects. You may already be considering such an effort in the context of replying to the President's March 4 Memorandum, entitled "Regulatory Reinvention Initiative," or as part of your efforts to improve regulations as part of the Reinventing Government process.

8. OMB Reports.

OMB is to submit certain reports to Congress. Within one year, OMB is to “certify to Congress, with a written explanation, agency compliance with [Section 205] and include in that certification agencies and rulemakings that fail to adequately comply with [Section 205]" (Sec. 205(c)). More generally, every year, OMB is to provide to Congress a written report “detailing compliance by each agency during the preceding reporting period with the requirements of this title” (Sec.208).

We will be reviewing your Section 202 statements during our reviews conducted under E.O. 12866. We will supplement this information with requests to you to learn about compliance with other provisions in Title II.

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If you have any questions, please let us know. We will, of course, provide additional guidance as experience and need dictate.