

DOT Guidance
E.O. 12778 - "Civil Justice Reform"
Regulatory Requirements

January 23, 1992

BACKGROUND

On January 21, 1992, Executive Order (E.O.) 12778 ("Civil Justice Reform") went into effect. One of the basic objectives of the executive order is "to improve ... regulatory drafting to reduce needless litigation," and it contains a number of substantive requirements in section 2 that pertain to rulemaking documents.

It requires that, "[w]ithin current budgetary constraints and existing executive branch coordination mechanisms and procedures," agencies' regulations shall:

1. be reviewed "to eliminate drafting errors and needless ambiguity,"
2. be drafted so as to "minimize needless litigation," and
3. "provide a clear and certain legal standard for affected conduct rather than a general standard, and shall promote simplification and burden reduction."

It conducting these reviews, each agency "shall make every reasonable effort to ensure ... that the regulation--"

1. "Specifies in clear language"
 - a. "the preemptive effect, if any, to be given to the regulation,"
 - b. "the effect on existing Federal law or regulation, if any, including all provisions repealed or modified," and
 - c. "the retroactive effect, if any, to be given to the regulation;"
2. "Provides a clear and certain legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction;"
3. "Specifies whether administrative proceedings are to be required before parties may file suite in court and, if so,

describes those proceedings and requires the exhaustion of administrative remedies;"

4. "Defines key terms, either explicitly or by reference to other regulations or statutes that explicitly define those items;"
5. "Addresses other important issues affecting clarity and general draftsmanship of regulations set forth by the Attorney General...."

The executive order also requires that, when an agency transmits rulemaking documents to the Office of Management and Budget (OMB) for review under E.O. 12291 ("Federal Regulation"), the agency must certify that it has reviewed the regulation in light of the E.O. 12278 requirements and that it either meets the applicable standards or that it is unreasonable to require it to meet one or more of those standards. If the regulation does not meet those standards, the agency certification must explain the reasons for this.

IMPLEMENTATION

Many of the objectives contained in the executive order are also contained in the Department of Transportation's "Regulatory Policies and Procedures," and we should already be complying with them. However, to ensure full compliance, we should take the following steps:

1. Staff Training. The head of each office initiating rulemaking (generally an Administrator, the Commandant, or a Secretarial Officer) should review the capabilities of those on your staff who draft rulemaking documents to ensure that, where necessary, they receive additional training to enable them to meet the objectives of the executive order (e.g., the need for clear and unambiguous drafting). In this regard, please note that, when there is sufficient interest within the Department, we can offer our "Regulatory Process Course," which is taught by an outside contractor and has been well received by those who have taken it. In addition, there are many other highly-regarded courses offered through such organizations as the Department of Justice's Legal Education Institute.

2. Litigation or Enforcement Attorney Review. When there are potential litigation or enforcement problems, and especially where there have been such problems involving rulemakings on the same subject in the past, the rulemaking documents should be reviewed by the initiating office's litigation or enforcement attorneys. In the past, it has been the practice of the General Counsel's office to send rulemakings involving such issues as maritime construction differential subsidy, automobile automatic occupant protection, and disadvantaged business enterprises to our litigation office for review because of their litigation history. The General Counsel's office will continue to send such documents to that office in the future.
3. Initiating Office Head Review. The head of the office initiating the rulemaking is currently responsible for reviewing rulemaking documents to ensure that they meet the objectives of DOT's "Regulatory Policies and Procedures." As part of this review, the head of the initiating office should also ensure that each rulemaking document meets the objectives of E.O. 12778.
4. Office of General Counsel Review. When rulemaking documents are submitted to the Office of the General Counsel for review and/or concurrence prior to submission to OMB, they will now also be reviewed for compliance with E.O. 12778.
5. Policy Level Oversight. For any rulemakings for which a briefing, status report, or work plan is required in accordance with the Secretary's December 3, 1991, memorandum on "Earlier Policy Level Involvement In Rulemaking," those briefings or documents should highlight any issues raised under E.O. 12778.
6. Certification. The General Counsel's office met with OMB and other Federal agencies to develop an acceptable approach for the certification process. In response to that meeting, the Acting Administrator of OMB's Office of Information and Regulatory Affairs (OIRA) sent the attached, January 9, 1992, memorandum on the executive order.
 - a. Process. OMB would permit one of two alternatives. The first alternative is preferable and should be used for DOT rulemakings. Under the first alternative, the certification is attached to the SF-83, "Request for OMB Review," used to transmit a rulemaking document to OMB for E.O. 12291

review. This certification is signed by an attorney. The alternative is to insert a statement in the rulemaking preamble, with the certifying attorney signing the SF-83. Because E.O. 12778 is primarily intended to require government action to reduce needless litigation rather than to provide an issue for public comment (such as we seek on costs and benefits, small business effect, or environmental impacts), the General Counsel's office believes that it is not necessary to place this certification in the rulemaking document. It also believes that requiring that the actual certification be signed rather than having it inserted in the preamble and having the attorney sign a separate, pre-existing form may cause more attention to be focused on the requirements of E.O. 12778. Therefore, for any DOT submissions to OMB, the certifications should be attached to the SF-83 rather than contained in the rulemaking preamble.

- b. Language. The memorandum from the Acting OIRA Administrator also attached draft certification language for attachment to the SF-83. Attachment 1 would be used when all the applicable standards are met. Attachment 2 would be used when it was "unreasonable to require...[the] particular regulations to meet one or more of the standards." Each standard not met would have to be identified and an explanation for not meeting the standard would have to be provided on the form.

If, for some reason, it is necessary to use different language or another process to certify compliance, please let the General Counsel's Office of Regulation and Enforcement know so that they may discuss the matter with DOT's OIRA desk officer.

7. Effective Date. Since the executive order went into effect on January 21, 1992, these procedures should be implemented as soon as possible. Rulemakings currently in the latest stages of coordination need not be taken back for E.O. 12778 review and certification, but, where the review and certification can be completed without undue delay, it should be done.
8. Information Dissemination. Finally, the head of each initiating office should ensure that copies of Executive Order 12778, the OMB/OIRA memorandum, and this "Guidance" are distributed to

all of those on your staff who prepare or review rulemaking documents.

For your information, a copy of this memorandum will be sent to OIRA in response to its request for a copy of DOT's internal procedures for ensuring that DOT regulatory staff will implement E.O. 12778 as part of its rulemaking process. If (with respect to rulemaking matters) there are any questions about this guidance, the executive order, or the OMB/OIRA memorandum, please do not hesitate to contact the Assistant General Counsel for Regulation and Enforcement, Neil Eisner.

Attachments

E.O. 12778

OMB/OIRA Memorandum on "Agency Compliance with the Regulatory Provisions in Executive Order No. 12788"



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503
JAN 9 1992

MEMORANDUM FOR AGENCY REGULATORY CONTACTS

FROM: JAMES B. MacRAE, JR. *JBM*
Acting Administrator
and Deputy Administrator
Office of Information and
Regulatory Affairs

SUBJECT: Agency Compliance with the Regulatory Provisions
in Executive Order No. 12778

Executive Order No. 12778 ("Civil Justice Reform," 56 Fed. Reg. 55195, October 25, 1991) takes effect on January 21, 1992. This Executive Order contains provisions designed to reduce litigation caused by poorly drafted Federal regulations. Agencies are to review regulations against a checklist of specific legal issues that historically have led to needless litigation, and to certify compliance with this checklist to the Office of Management and Budget.

Agencies have asked us for guidance on how to implement this Order consistent with the rulemaking coordination mechanisms established by Executive Order No. 12291 ("Federal Regulation," 46 Fed. Reg. 13193, January 19, 1981).

Background: Section 2 of E.O. 12778 instructs each agency subject to E.O. 12291, to adhere to certain requirements in promulgating new regulations and reviewing existing regulations. These requirements, set forth in Sections 2(a) and (b)(2), include eliminating drafting errors and needless ambiguity, drafting the regulation to minimize litigation, providing clear and certain legal standards (whether they be engineering or performance standards), and promoting simplification and burden reduction. Agencies are also instructed to make every reasonable effort to ensure that the regulation: specifies clearly any preemptive effect, effect on existing Federal law or regulation, and retroactive effect; describes any administrative proceedings to be available prior to judicial review and any provisions for the exhaustion of such administrative proceedings; and defines key terms.

Section 2(c) instructs each agency, when transmitting a draft regulation to the Office of Management and Budget for review under E.O. 12291, to certify that it has reviewed the regulation in light of the applicable standards provided in Sections 2(a) and (b)(2). Recommendations and cost-benefit

analyses concerning "One-Way Fee Provisions" required under Section 2(d) are to be included with this agency certification.

Guidance: Section 2 of E.O. 12778 is intended to improve the legal quality of agency regulations. Such improvement will occur after the agency regulatory staff, and the attorneys who review draft regulations, become familiar with the regulatory checklist in E.O. 12778; implement it as part of the regulatory drafting process; and then certify such implementation to OMB.

We have several requests.

1. Each agency should send the Office of Information and Regulatory Affairs (OIRA) a copy of its internal procedures for assuring that their regulatory staff, and the attorneys who review draft regulations, will implement E.O. 12778 as part of the agency rulemaking process. These should be submitted as close to January 21, 1992, as practicable.

2. There are at least two ways that an agency may certify compliance to OMB as part of the E.O. 12291 regulatory review process. An agency may attach a certification of compliance with E.O. 12778 to the SF-83, "Request for OMB Review," that transmits a draft regulation to OMB for E.O. 12291 review; this certification should be signed by an attorney.

Or, an agency may insert a statement of such certification in the preamble to the draft rule itself. In this case, the attorney making this certification should write in a reference to E.O. 12778 as part of the "Certification for Regulatory Submissions" at the bottom of the front of SF-83s (i.e., insert "and E.O. 12778" after "E.O. 12291"), and sign his/her name in one of the signature blocks.

I have attached draft certifications for attachment to the SF-83, or for inclusion in a regulatory preamble. Depending on agency preference and legal practice, you are welcome to use either approach. If you wish to use different language for the certification or another way to certify compliance, please discuss your preferred language or means with the OIRA Desk Officer responsible for your agency.

3. If you have any questions concerning compliance with the regulatory provisions of E.O. 12778, please contact me or the responsible OIRA Desk Officer.

Attachments

**CERTIFICATION OF COMPLIANCE WITH E.O. 12778
ATTACHMENT TO SF-83, "Request for OMB Review."**

Responsible Department/agency and Bureau/office:

Title of Rulemaking:

CERTIFICATION: I have reviewed this draft regulation in light of Section 2 of E.O. 12778 and certify for my agency that this regulation meets the applicable standards provided in Sections 2(a) and 2(b)(2) of that Order. Where applicable, the recommendations and analyses required under Section 2(d) of this Order are attached to this certification.

Name: _____ Date: _____

Telephone Number: _____

CERTIFICATION OF COMPLIANCE WITH E.O. 12778
ATTACHMENT TO SF-83, "Request for OMB Review."

Responsible Department/agency and Bureau/office:

Title of Rulemaking:

CERTIFICATION: I have reviewed this draft regulation in light of Section 2 of E.O. 12778 and certify for my agency that this regulation meets the applicable standards provided in Sections 2(a) and 2(b)(2) of that Order, except that it is unreasonable to require this particular regulation to meet one or more of the standards, as identified and explained below. Where applicable, the recommendations and analyses required under Section 2(d) of this Order are attached to this certification.

Name: _____ Date: _____

Telephone Number: _____

IDENTIFY STANDARD/S NOT MET:

EXPLANATION FOR NOT DOING SO:

[Possible Additions to Rulemaking Preamble]

Executive Order No. 12778

The _____ [title of individual responsible for issuing this regulation] _____ has certified to the Office of Management and Budget that these [proposed/final] regulations meet the applicable standards provided in Sections 2(a) and 2(b)(2) of Executive Order No. 12778.

Executive Order No. 12778

The _____ [title of individual responsible for issuing this regulation] _____ has certified to the Office of Management and Budget that these [proposed/final] regulations meet the applicable standards provided in Sections 2(a) and 2(b)(2) of Executive Order No. 12778, except that it was unreasonable to require this particular regulation to meet [identify the standard/s not met]. The reasons it was unreasonable to meet [the designated] standard is [give brief explanation for each standard not met].