BE IT RESOLVED, that the American Bar Association recommends that federal agencies, in order to better inform the public and reduce unnecessary publication, should comply with the following guidelines concerning rulemaking analyses (hereinafter "analyses") required by Executive Orders 12291, 12606, 12612, 12630, the Paperwork Reduction Act, the Regulatory Flexibility Act, the National Environmental Policy Act and other statutes or executive orders requiring the preparation of similar impact or assessment analyses. For each proposed and final rule, the agency adopting or proposing the rule in the Federal Register should:

(1) include information relating to analyses in explanatory preambles under a separate heading of "Rulemaking Analyses."

(2) in cases where a particular analysis has not been prepared, provide a succinct explanation of the reasons why the rule was exempt from such analysis or assessment requirement or why such requirement was deemed otherwise inapplicable, except in cases where the inapplicability would be obvious to readers;

(3) in cases where an analysis is prepared:

(i) publish sufficient information to indicate clearly and succinctly the agency's conclusions resulting from the analysis, but omit publication of the full text or a lengthy
summary, unless such publication is necessary to inform readers adequately or is otherwise required by law; and

(ii) state how interested readers may obtain copies of the analysis from the agency or its contractors.
Starting with the enactment in 1969 of the National Environmental Policy Act, various statutes and Executive orders have required federal agencies to consider in their decision-making certain factors which might not otherwise be sufficiently taken into account. Specifically, agencies have been directed to assess: the impacts of their actions on the natural environment; the economic consequences for small businesses in particular; the cost/benefit ramifications of federal regulation for American society in general; the effects on "family formation, maintenance, and general well-being"; the "takings" implications of proposed actions; and the consequences of regulatory initiatives for various "fundamental federalism principles." Agencies engaged in rulemaking must comply with these mandates by preparing formal analyses or otherwise indicating how they have taken these factors into account in their actions. With the exception of NEPA and the Regulatory Flexibility Act, it is the Office of Management and Budget that has the overall responsibility for monitoring compliance with these requirements.

Detailed descriptions of these impact and assessment mandates and their operation in practice are contained in a

voluminous literature. However, this report focuses on the methods used by federal agencies to inform the public in the Federal Register about their compliance with these statutes and Executive Orders. There is a need to clarify presentations relating to impact and assessment analyses in those instances where information regarding them is published as part of the rulemaking material as well as to insure that the public is adequately informed regarding the results of these analyses where they have been performed. At the same time, unnecessary (and expensive) publication in the Federal Register should be avoided.

Sample of NPRs

A sample of Notices of Proposed Rulemaking (NPR) from one week of Federal Registers from each of three months (February, July and November of 1989) was reviewed to determine how agencies inform the public about the outcome of rulemaking analyses. The sample is on file with Sidney A. Shapiro, Chair, Committee on Federal Register, Reports, and Paperwork. Examples drawn from this sample were provided to the Section Council prior to its adoption of this report and recommendation.

Agencies determined for most of the NPRs sampled that none of the analysis requirements applied. Some agencies briefly explained why those requirements did not apply using a separate paragraph with a heading for each requirement. The headings were, however, not uniform. These NPRs made it easy for the reader to locate and understand the agency's decisions, although some agencies combined more than one subject under a general or misleading heading making it marginally more difficult to find information related to specific analyses requirements. The Department of Transportation, for example, reported under a heading of "Executive Order 12291" that a proposed action "does not require an environmental impact statement under the National Environmental Policy Act." 54 Fed. Reg. 47459 (1989). The Department of Agriculture reported under a heading of "Classification" that a proposed rule was exempted from Executive Order 12,291 and from the Regulatory Flexibility Act. Id. at 47306.

Other agencies located their explanations of why analysis requirements did not apply under "Supplementary Information" in

the text of the preamble. Although the explanations typically occurred at the end of the supplemental information, the lack of a heading makes it difficult to locate the agency's explanation except by reading the entire section.

Agencies also varied in the extent of the explanation offered. Some were no more than a conclusion that a reporting requirement did not apply. For example, the Department of Commerce reported:

This proposed amendment does not meet the criteria of a major rule as set forth in action 1(b) of Executive Order 12291; therefore, no Regulatory Impact Analysis is required. This proposed rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612. Pursuant to the Provisions of the Regulatory Flexibility Act of 1980 (Pub. L. 96-354), the General Counsel of the Department of Commerce certified to the Small Business Administration that the proposed regulation, if promulgated, will not have a significant economic effect on a substantial number of small entities because it raises the exemption level thereby reducing the reporting requirements of smaller entities. This imposes no additional burden on the public thus satisfying the requirements of the Paperwork Reduction Act of 1980 (Pub. L. 96-511).

Four of the NPRs included summaries of required analyses. In some cases, the summaries are clearly labeled and easy to find and in others they are not labeled and are more difficult to find. Two summaries were lengthy totaling over two pages in one case and one and one-quarter pages in another. One other totaled about one-third of a page.

Federal Register Study

After receiving a draft of this report, Martha Girard, Director of the Federal Register, conducted her own study of the presentation and content of agency statements concerning rulemaking analyses. A copy of the results can be found in Appendix A.

The Federal Register study confirmed the results of the ABA survey. It found that "[a]lthough agencies used many different terms in headings, most were reasonably informative and accurate." Nevertheless, it found that three documents contained headings that were "patently misleading" and that other headings, "such as 'Regulatory Development' or 'Procedural Matters,' while
not obviously misleading, are not particularly helpful to the reader, since these terms could apply to many other aspects of rulemaking." Moreover, "[o]f the 209 reporting statements analyzed, 99 were judged to be entirely conclusionary, or purely generic statements of compliance." In addition, "[o]f the 103 statements rated as offering a particularized explanation of any agency's response to reporting requirements, some contained significant economic analysis or thoughtfully related aspects of the rules to reporting requirements. However, a substantial number showed extensive use of standardized language." The report concluded, "Federal agencies current practice of publishing rulemaking analysis statements under many different headings and using formalistic language creates confusion and makes poor use of valuable page space."

**Public Notification**

The resolution recommends that in cases where a particular analysis has not been prepared the agency responsible for a proposed or final rule should provide a succinct explanation of the reasons why the rule was exempt from such analysis or assessment requirements or why such requirement was deemed inapplicable, except in cases where the inapplicability would be obvious to readers. Some of the NPRs analyzed by the survey and the Federal Register study comply with this recommendation, but others are not. Analyses requirements are purportedly intended "only to improve the internal management of the federal government" and not "to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States."10 But individuals and groups who are concerned with the factors that the analyses requirements make relevant to federal decisionmaking should be told the reasons why a requirement is not applicable or has not been performed unless the inapplicability is obvious. The existence of analyses requirements is presumably rooted in the perception that there are public constituencies who favor the inclusion of additional substantive factors in an agency's decisionmaking calculus.

The resolution also recommends that agencies indicate how readers can obtain analyses which were completed from it or its contractor. This recommendation reflects the fact that where analyses requirements apply, there may a problem of both too little and too much information. Summaries of analyses may be superfluous for people who need to know the results only, and a summary may be too cursory for people who are interested in the analysis itself. In part, this problem results from statutory or other mandates for publication of all or a summary of an

analyses. In other instances, neither statute nor executive order appears to require such publication, although they sometimes suggest that some discussion may be appropriate in notices of proposed rulemaking.

For both those opposed to a particular regulatory initiative and those who favor it, what is often of principal interest is the extent to which the proposed or final regulation was in fact shaped by the agency's consideration of the required impact analyses. Moreover, courts reviewing administrative action are interested in what factors led to an agency's decision. Explanatory preambles should, therefore, contain clear discussions, in plain English if possible, and as succinct as feasible in the circumstances, explaining how mandated impact analysis determined the configuration of rules (if it did). Agency responses to significant public comments filed as part of the informal rulemaking process and directed to those analyses and the agency conclusions flowing from those should, however, should appear in explanatory preambles.

Beyond this, agency explanations in the Federal Register of proposed and final rules should not devote substantial space to a discussion of impact analyses unless these serve a valuable informative purpose. The resolution recommends therefore that an agency should publish sufficient information to indicate clearly and succinctly the agency's conclusions resulting from analyses, but omit publication of the full text or a lengthy summary, unless such publication is necessary to inform readers adequately or is otherwise required by law. Thus, those statutes and executive orders which require more should be reconsidered in this regard. The interests of those who wish to delve more deeply into these matters can be adequately served by publication in the preamble of the name, address and telephone number of the agency official(s) who can supply copies of the analyses.

11. See e.g., Regulatory Flexibility Act, supra note 3, at §603(a).
12. E.g., Exec. Order 12,612, supra note 8, at §7(b).
15. See supra note 10 & accompanying text.
Decreasing the amount of space required for the full text or summaries of analyses would save $375 per page, the current charge to agencies by the Government Printing Office. A benefit to the agencies, over and above the savings on printing costs, would be their ability to measure reader interest in any analyses. Agencies may get a reading on the interest levels of proposed rulemaking from the degree to which complete analyses are requested by interested persons. If the interest in a particular report were great enough, the agency might consider a departure from the routine by publishing the entire analyses when the rule is promulgated.

The resolution recommends that information related to analyses should be located in a section marked "Rulemaking Analyses." If all agencies used the same heading, readers would be assisted in finding the agency's discussion of analyses requirements. In both the survey and Federal Register Study, agencies used various headings in the NPRs. In addition, using one heading would save space, especially if some enumeration, such as parenthetical numbering, were used to separate the discussion of different analyses requirements.

A letter from Ms. Girard, Director of the Federal Register indicates the potential for additional clarity and economy generated by this recommendation. Her office rewrote two Federal Register notices to conform to the recommendations. The redrafted notices can be found in Appendix G. Both save substantial space while presenting the same information in a manner that is more accessible to readers.

Judicial review of these analyses has already been considered by other commentators and the courts. It is not

expected that the courts would be any more or less willing to consider analyses as either reviewable or not reviewable. They would, however, be part of the administrative record.

Respectfully submitted

Paul Verkuil
Chair, Section of Administrative Law and Regulatory Practice

August 1990
Appendix A
April 9, 1990

Sidney A. Shapiro
Rounds Professor of Law
University of Kansas
School of Law
Lawrence, Kansas 66045-2380

Dear Sid:

Per our conversation, enclosed is the analysis of rules and proposed rules published in the Federal Register for the week of March 19. It was prepared by Michael White, a Federal Register staff attorney. If you have any questions, please call Michael on 202-523-4534.

I'll let you know what I hear from OMB.

Sincerely,

MARTHA L. GIRARD
Director of the Federal Register

Enclosure
Survey of Rulemaking Analyses Statements

Introduction and Explanation

This study examines the presentation and content of Federal agencies' rulemaking analyses published in rules and proposed rules (NPRMs) in the Federal Register during the week of March 19, 1990. The aim of this exercise is to determine whether headings currently in use are too variant and misleading, and to explore the feasibility of shortening and simplifying statements of compliance with reporting requirements by using a short form notation system similar to a "box score" entry (see "Rulemaking Analyses" section of prototype developed by the Office of the Federal Register).

Compiling information on the contents of rulemaking analyses is not intended to serve as a comment on the quality of Federal agency compliance with reporting requirements. Rather, it is designed to supplement information on the format of agency documents collected by the American Bar Association Section of Administrative Law and Regulatory Practice with a view to improving the usefulness of the Federal Register.

A chart has been devised to indicate the various types of headings agencies have used to organize and identify rulemaking analyses, and the statements themselves are categorized in terms of their content. Agency documents published in series which have the same characteristics are grouped together.

Headings are denoted as follows:

- S - separate paragraphs used for analyses;
- SS - separate subheadings used for analyses;
- C - analyses are combined under one heading;
- P - no separate heading, analyses are located in the text of the "Supplementary Information" section of the preamble;
- M - heading used is patently misleading.

Where appropriate, more than one designation is used to indicate multiple applications and mixed cases.
The contents of agencies' statements are denoted as follows:

- **B** - use of boilerplate language;
- **E** - explanation or justification provided;
- **DE** - detailed explanation provided;
- **X** - cross reference to another Federal Register document.

"B" or boilerplate language is defined as a conclusory statement to the effect that no analysis is required or that the document qualifies for exemption without any explanation as to why the particular rule or NPRM merits this treatment. This includes analyses containing, in some cases, lengthy restatements of the requirements of executive orders or statutes followed by conclusory statements.

"E" or explanation, is defined as instances in which the agency has justified the exempt status of the document or explained how it has complied with regulatory requirements with at least some reference as to how the subject matter of the rule or NPRM relates to the reporting requirement.

"DE" is defined as a detailed explanation which would amount to the equivalent of about a Federal Register column or more.

"X" is displayed where the agency's statement references a previously published Federal Register document that addresses reporting requirements.

The distinction between the "B" and "E" categories does not turn on the length of the explanation, rather it goes to the question of whether the analysis contains only generic statements of compliance, as opposed to a particularized rationale.

It should be noted that, in some cases, the distinction between "B" and "E" category statements is marginal. In this survey, agencies are credited with having provided an explanation, despite the use of boilerplate language, if they have tied just one aspect of the particular rule or NPRM to the reporting requirements at issue. For example, the particularized rationale for a statement of exemption may consist of a very brief reference to the procedural nature of the rules or an explanation that 5 U.S.C. 553 does not apply to the type of document under discussion.
Since Paperwork Reduction Act compliance statements typically consist of a simple statement as to whether information collection requirements apply or a statement of applicable control numbers, nearly all are categorized as "boilerplate," indicating that this type of information could easily be summarized in a shortened format. Those which go into greater explanation that could not be completely reduced to a "box score" type of entry are designated as "D" or "DE" as appropriate.
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**Explanation:**

- **SBA**: Small Business Administration
- **FAA**: Federal Aviation Administration
- **FDA**: Food and Drug Administration
- **MARITIME COMM.**: Maritime Administration
- **NOAA**: National Oceanic and Atmospheric Administration
- **DOD**: Department of Defense
- **OTS**: Office of the Secretary
- **HCFA**: Health Care Financing Administration
- **NEPA**: National Environmental Policy Act
- **REG FLEX**: Regulatory Flexibility Act
- **PRA**: Paperwork Reduction Act
- **12291**: Regulatory action number
- **12612**: Other regulatory action number
- **C, E, B, S**: Indicators for different types of actions

**Legend:**

- **C**: New rule
- **E**: Effect
- **B**: Burden
- **S**: Submit

**Note:** The table represents the number of documents and the types of actions taken by each agency.
### MARCH 21, 1990 FEDERAL REGISTER

#### RULES

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### Proposed Rules

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  - DOD: S B B B
  - FDA: S B E B

### PROPOSED RULES

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- AMS: P B E B
- GRAIN INSPECT.
  - AMS: P B DE
- COAST GUARD
  - HCFA: C DE DE E
KEY

Headings are denoted as follows:

S - separate paragraphs used for analyses;
SS - separate subheadings used for analyses;
C - analyses are combined under one heading;
P - no separate heading, analyses are located in the text of the "Supplementary Information" section of the preamble;
M - heading used is patently misleading.

Where appropriate, more than one designation is used to indicate multiple applications and mixed cases.

The contents of agencies' rulemaking analyses statements are denoted as follows:

B - use of boilerplate language;
E - explanation or justification provided;
DE - detailed explanation provided;
X - cross reference to another Federal Register document.
Observations and Conclusions

This survey encompassed 52 rule documents and 26 NPRMs containing 209 statements on reporting requirements. In 14 instances agencies used separate headings to address each reporting requirement individually. In 4 cases agencies used separate subheadings within in a separate section to organize reporting statements. In 12 documents the reports were separated from rest of the "Supplementary Information" section of the preamble, but were combined within the same section. 39 documents contained discussion of reporting requirements within the "Supplementary Information" section of the preamble. Finally, there were 5 instances in which agencies used more than one of these approaches in various combinations within the same document.

Although agencies used many different terms in headings, most were reasonably informative and accurate. Because judging a heading for accuracy is a somewhat subjective exercise, the "M," or misleading category, was defined very narrowly. Only three documents were cited as "patently misleading" for using the vague terms "Classification" and "Codification." Other headings, such as "Regulatory Development" or "Procedural Matters," while not obviously misleading, are not particularly helpful to the reader, since these terms could apply to many other aspects of rulemaking.

Of the 209 reporting statements analyzed, 99 were judged to be entirely conclusory, or purely generic statements of compliance.

Of the 103 statements rated as offering a particularized explanation of an agency's response to reporting requirements, some contained significant economic analysis or thoughtfully related aspects of the rules to reporting requirements. However, a substantial number showed extensive use of standardized language. For example, many FAA reporting statements were rated as meeting "E" category criteria. But these statements generally consisted of no more than a paragraph of economic impact figures followed by conclusory statements as to the inapplicability of E.O. 12291 and the Regulatory Flexibility Act.
Other agencies, such as EPA, simply inserted a reference to a document, previously published in the Federal Register, announcing an agency decision or OMB waiver affecting reporting requirements for an entire class of documents. Others merely alluded to the procedural or emergency nature of a rule to justify waiving reporting requirements.

Only 7 rulemaking analyses statements were rated as "DE," detailed explanations which required about a column of space or more.

This survey has demonstrated that nearly half of the reporting statements published during the week of March 19, 1990 contained no useful information as to how the particular rulemaking action related to the applicable reporting requirements. Those which did provide some particularized rationale displayed a tendency to mechanically plug-in useful information into sometimes lengthy restatements of reporting requirements and other recitations of boilerplate language.

In those instances in which the agency made a thorough analysis of the economic implications of a rulemaking action, the explanatory information provided was not so intertwined with reporting requirements as to make it impractical or redundant to contemplate use of a short form notation system. In many instances, the useful, explanatory information already appeared to be a discrete set of paragraphs grafted onto a summation of regulatory boilerplate.

In conclusion, Federal agencies current practice of publishing rulemaking analysis statements under many different headings and using formalistic language creates confusion and makes poor use of valuable page space. A revised format for publishing responses to reporting requirements would be useful to the reader and would be practical for the agencies and the Office of the Federal Register to implement.

This could be accomplished by creating a shortened format for noting compliance with reporting requirements, carrying additional information in a follow-on "Reports and Certifications" section, and reserving in-depth discussion for the "Supplementary Information" section of the preamble.
Appendix B
March 21, 1990

Sidney A. Shapiro
Rounds Professor of Law
University of Kansas
School of Law
Lawrence, Kansas 66045-2380

Dear Sid:

Enclosed is a "mark up" of what I think could be an alternative to the box score. I used one document from the Federal Register of March 19. Obviously, a point of consideration is that some agencies would not feel that the abbreviated "Non major" or similar statement was adequate. However, in reading these statements, most agencies have boilerplate language that, in one long paragraph, says the same thing as in the proposed abbreviated format.

This proposed format is based on my long held theory that for information in the Federal Register to be easily located, it must be in an easy, standardized format. For the Regulatory Analyses, I am proposing that it always appear as the last item in the preamble's Supplementary Information, before the List of Subjects category. This would enable the reader to do a quick check as to what analyses were made by the agency. Where a detailed narrative is necessary or an address is provided to send for a copy of a report, that information would follow under the category Reports and Certifications. Please look this material over, and let me know your reaction.

Sincerely,

MARTHA L. GIRARD
Director of the Federal Register

Enclosure
Rulemaking Analyses
EO 12291: Non Major.
REGULATORY FLEXIBILITY ACT: No significant impact.
PAPERWORK REDUCTION ACT: Control Numbers 1910-0400 and 1910-1400.
NATIONAL ENVIRONMENTAL POLICY ACT: Exempt.
EO 12372: See Reports and Certifications, below.
EO 12612: No substantial direct effect.

Reports and Certifications: This program is generally not subject to the intergovernmental review requirements of EO 12372 as implemented by 10 CFR 1005. However, certain grant applications may be.

All applications from governmental or non-governmental entities which involve research, development or demonstration activities when such activities: (1) Have a unique geographic focus and are directly relevant to the governmental responsibilities of a State or local government within the geographic area; (2) necessitate the preparation of an Environmental Impact Statement under NEPA; or (3) are to be initiated at a particular site or location and require unusual measures to limit the possibility of adverse exposure or hazed to the general public are subject to the provisions of the Executive Order and 10 CFR part 1005. Those planning to submit covered applications should immediately contact OER for further information.

F4701
This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1516. The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF ENERGY
Office of Energy Research
10 CFR Part 605
Special Research Grants Program
AGENCY: Office of Energy Research, DOE.
ACTION: Final rule.

SUMMARY: The final rule being issued today by the Department of Energy’s (DOE) Office of Energy Research (OER) amends the existing regulation 10 CFR Part 605 (the Special Research Grant Program) in order to improve or streamline the receipt, review, evaluation, and pre- and post-award administration requirements yet continue to provide reasonable and workable research grant policies and procedures. This revision, in its entirety, supersedes all previous editions.

EFFECTIVE DATE: This final rule is effective March 19, 1990.


SUPPLEMENTARY INFORMATION:

Table of Contents
I. Discussion of Comments on Proposed Rule
II. Review Under Executive Order 12812
III. Review Under Executive Order 12912
IV. Review Under the Regulatory Flexibility Act
V. Review under the Paperwork Reduction Act
VI. Intergovernmental Review
VII. Review Under Executive Order 12332

I. Discussion of Comments on Proposed Rule

The OER of DOE issued a proposed rule in the Federal Register on May 31, 1989 (54 FR 22319) to amend existing regulation 10 CFR part 605 to clarify, improve, update, and streamline certain policy and procedural requirements such as receipt of applications, review and evaluation processes, and pre- and post-award administration. Comments were requested through June 30, 1989. In response to the Federal Register publication of May 31, 1989, DOE received written comments from two university research administration offices and one response from a DOE Operations Field Office.

One commenter requested that proposed section 605.6 be modified to require that applications be accepted based on postmark deadlines. Under the existing rule, the current practice, in regard to a special Notice of Availability, is to require receipt of applications by close of business on a certain date. The stated rationale for this request was a combination of alleged DOE indifference to the kind of deadline and of avoidance of special delivery costs incurred as a result of the tendency "to take up to the last minute to work on tasks for which a deadline is set." DOE decided not to modify proposed § 605.6 for several reasons. First, the requested modification would be inconsistent with the policy of accepting an application for a grant awarded at any time. Second, even if the requested modification were limited to deadlines set forth in a special Notice of Availability, it would conflict with the flexibility needed to plan a review and award cycle for such a notice. Typically, a special Notice of Availability provides an adequate time period to submit an application, and often, there are many applications and a limited time for processing which must be adequately scheduled. The requested modification would make it impossible to know precisely when a review and award cycle could begin in those circumstances when tight scheduling makes such precision a necessity. Given that DOE will accept applications at any time and needs flexibility to establish a deadline date for receipt of applications, it is not appropriate to amend the rule as suggested.

Another commenter opposed proposed section 605.9 (b) and (i) which revised the submission date on renewal or continuation applications. The commenter argued that, at six months, reporting on significant accomplishments, as well as on projected changes to the work plan and estimates of major deviations from the budget, may be difficult. OER is aware of the difficulty of reporting on such subjects in § 605.9 in a manner that takes such difficulty into account in processing renewal or continuation applications. However, the additional two months is necessary for adequate merit or technical review. Therefore, the proposed addition of two months review time will remain as part of the amended regulations.

In one of the public comments, it was suggested that OER consider deleting the requirement of the annual Financial Status Report under § 805.19(b)(5). At this time, OER is participating in the Federal Demonstration Project (FDP) which is currently establishing a task group to design and implement streamlining techniques in financial reporting areas. OER will be participating in the tests under the FDP and will not amend any reporting requirements until the tests have been completed and deemed successful for OER purposes.

The DOE commenter requested clarification on required formats, forms and certifications that pertain to the Special Research Grant Program. Clarification and further grant administration instructions are to be included in the revised OER Application Kit and Guide to be issued in the very near future. In addition, OER has made some minor editorial changes and has corrected typographic or printing errors.

II. Review Under Executive Order 12812

This rule has been reviewed byOMB under Executive Order 12291 (46 FR 31092, February 17, 1981). Prior to publication of the final rule, DOE concluded that the rule is not a "major rule" because its promulgation will not result in (1) an annual effect on the economy of $100 million or more, (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local government.
III. Review Under Regulatory Flexibility Act

This final rule was reviewed under the Regulatory Flexibility Act of 1980 (Pub. L. 96-354, 94 Stat. 1356), which requires preparation of a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities, i.e., small business, small organizations, and small governmental jurisdictions. DOE concluded that this proposed rule would only affect small entities as they apply for and receive grants and does not create additional economic impacts on small entities. Accordingly, DOE certifies that this final rule will not have a significant economic impact on a substantial number of small entities and, therefore, no regulatory flexibility analysis has been prepared.

IV. Review Under the Paperwork Reduction Act

The collection of information requirements contained in this rule have been approved by OMB under control numbers 1020-0000 and 1020-0001.

V. Review Under the National Environmental Policy Act

DOE has concluded that promulgation of these final procedural rules clearly would not represent a major Federal action having significant impact on the human environment under the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 et seq.) (1978), the Council on Environmental Quality Regulations (40 CFR Parts 1500-1508), and the DOE guidelines (10 CFR Part 1022) and, therefore, does not require an environmental impact statement pursuant to NEPA.

VI. Intergovernmental Review

This program is generally not subject to the intergovernmental review requirements of EO 12372 as implemented by 10 CFR 100. However, certain grant applications may be.

All applications from governmental or non-governmental entities which involve research, development or demonstration activities when such activities (1) Have a unique geographic focus and are directly relevant to the governmental responsibilities of a State or local government within the geographic area (2) Necessitate the preparation of an Environmental Impact Statement under NEPA or (3) Are to be initiated at a particular site or location and require unusual measures to limit the possibility of adverse exposure or hazard to the general public are subject to the provisions of the Executive Order and 10 CFR part 1005. Those planning to submit covered applications should immediately contact OER for further information.

VII. Review Under Executive Order 12812

Executive Order 12812 requires that regulations be reviewed for any significant adverse effects on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among various levels of government. Today's final regulations will amend existing regulations for a financial assistance program to eliminate unnecessary and undeveloped activities and, therefore, will not have any significant adverse effects on States.

List of Subjects

10 CFR Part 605


This final rule was reviewed under Executive Order 12612 required that all actions taken by this part, the award and administration of special research grants by the DOE Office of Energy Research for basic and applied research and related conference attendance activities, and related conference attendance activities, be guided by strict control. Part 605 is amended by revising part 605 as set forth below.

Issued in Washington, DC on August 11, 1989.

James F. Decker, Deputy Director, Office of Energy Research.

Chapter II of title 10, Code of Federal Regulations is amended by revising part 605 to read as follows:

PART 605—SPECIAL RESEARCH GRANTS PROGRAM

§ 605.1 Purpose and scope.

§ 605.2 Applicability.

§ 605.3 Definitions.

§ 605.4 Deviations.

§ 605.5 Special research grants.

§ 605.6 Eligibility.

§ 605.7 Solicitation.

§ 605.8 Applications.

§ 605.9 Application evaluation and selection.

§ 605.10 Additional requirements.

§ 605.11 Funding.

§ 605.12 Certification.

§ 605.13 Cost sharing.
DEPARTMENT OF ENERGY
Office of Energy Research
10 CFR Part 605
Special Research Grants Program
AGENCY: Office of Energy Research, DOE.
ACTION: Final rule.
SUMMARY: The final rule being issued today by the Department of Energy's (DOE) Office of Energy Research (OER) amends the existing regulation 10 CFR Part 605 (the Special Research Grant Program) in order to improve or streamline the receipt, review, evaluation, and pre- and post-award administration requirements yet continue to provide reasonable and workable research grant policies and procedures. This revision, in its entirety, supersedes all previous editions.


SUPPLEMENTARY INFORMATION:
Table of Contents
I. Discussion of Comments on Proposed Rule
II. Review Under Executive Order 12291
III. Review Under the Regulatory Flexibility Act
IV. Review under the Paperwork Reduction Act
V. Review Under the National Environmental Policy Act
VI. Intergovernmental Review
VII. Review under Executive Order 12612
I. Discussion of Comments on Proposed Rule
The OER of DOE issued a proposed rule in the Federal Register on May 31, 1989, (54 FR 23219) to amend existing regulation 10 CFR part 605 to clarify, improve, update, and streamline certain policy and procedural requirements such as receipt of applications, review and evaluation processes, and pre- and post-award administration. Comments were requested through June 30, 1989. In response to the Federal Register publication of May 31, 1989, DOE received written comments from two university research administration offices and one response from a DOE Operations Field Office.

One commenter requested that proposed section 605.8 be modified to require that applications be accepted based on postmark deadlines. Under the existing rule, the current practice, in regard to a special Notice of Availability, is to require receipt of applications by close of business on a certain date. The stated rationale for this request was a combination of alleged DOE indifference to the kind of deadline and of avoidance of special delivery costs incurred as a result of the tendency "to take up to the last minute to work on tasks for which a deadline is set." DOE decided not to modify proposed § 605.8 for several reasons. First, the requested modification would be inconsistent with the policy of accepting an application for a grant award at any time. Second, even if the requested modification were limited to deadlines set forth in a special Notice of Availability, it would conflict with the flexibility needed to plan a review and award cycle for such a notice. Typically, a special Notice of Availability provides an adequate time period to submit an application, and often, there are many applications and a limited time for processing which must be tightly scheduled. The requested modification would make it impossible to know precisely when a review and award cycle could begin in those circumstances when tight scheduling makes such precision a necessity. Given that DOE will accept applications at any time and needs flexibility to establish a deadline date for receipt of applications, it is not appropriate to amend the rule as suggested.

Another commenter opposed proposed section 605.9 (b) and (i) which revised the submission date on renewal and continuation applications from four to six months prior to the terminations of the current budget period. The commenter argued that, at six months, reporting on significant accomplishments, as well as any projected changes to the work plan and estimates of major deviations from the budget, may be difficult. OER is aware of the difficulty of reporting on such subjects in the first year and will take such difficulty into account in processing renewal or continuation applications. However, the additional two months is necessary for adequate merit or technical review. Therefore, the proposed addition of two months review time will remain as part of the amended regulations.

In one of the public comments, it was suggested that DOE consider deleting the requirement of the annual Financial Status Report under § 605.10(a)(5). At this time, OER is participating in the Federal Administration Project (FDP) which is currently establishing a task group to design and implement streamlining techniques in financial reporting areas. OER will be participating in the tests under the FDP and will not amend any reporting requirements until the tests have been completed and deemed successful for OER purposes.

The DOE commenter requested clarification on required forms; formats and calculations that pertain to the Special Research Grant Program. Clarification on further grant administrative requirements are to be included in the revised OER Application Kit and Guide to be issued in the very near future.

Another commenter opposed proposed section 605.9 (b) and (i) which revised the submission date on renewal and continuation applications from four to six months prior to the termination of the current budget period. The commenter argued that, at six months, reporting on significant accomplishments, as well as any projected changes to the work plan and estimates of major deviations from the budget, may be difficult. OER is aware of the difficulty of reporting on such subjects in the first year and will take such difficulty into account in processing renewal or continuation

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The DOE commenter requested clarification on required forms, formats and certifications that pertain to the Special Research Grant Program. Clarification and further grant administration instructions are to be included in the revised OER Application Kit and Guide to be issued in the very near future.

In addition, OER has made some minor editorial changes and has corrected typographic or printing errors.

Rulemaking Analyses

EO 12291: Non Major.
REGULATORY FLEXIBILITY ACT: No significant impact.
PAPERWORK REDUCTION ACT: Control Numbers 1910-0400 and 1910-1400.
NATIONAL ENVIRONMENTAL POLICY ACT: Exempt.
EO 12372: See Reports and Certifications, below.
EO 12872: No substantial direct effect.
Reports and Certifications. This program is generally not subject to the intergovernmental review requirements of EO 12372 as implemented by 10 CFR 1005. However, certain grant applications may be.

All applications from governmental or non-governmental entities which involve research, development or demonstration activities when such activities: (1) Have a unique geographic focus and are directly relevant to the governmental responsibilities of a State or local government within the geographic area; (2) necessitate the preparation of an Environmental Impact Statement under NEPA; or (3) are to be initiated at a particular site or location and require unusual measures to limit the possibility of adverse exposure or hazard to the general public are subject to the provisions of the Executive Order and 10 CFR part 1005. Those planning to submit covered applications should immediately contact OER for further information.

List of Subjects in 10 CFR Part 605
Administrative practice and procedure, Applications, Copyright, Educational institutions, Eligibility, Energy, Financial assistance, For-profit organizations, Grant programs—energy, Grant programs, science and technology, Individuals, Inventions and patents—nonprofit organizations, Reporting and recordkeeping requirements, Research, Solicitations, Science and technology, State—local and Indian tribal governments.

In consideration of the foregoing, chapter II of title 10 of Code of Federal Regulations is amended by revising part 605 as set forth below.

Issued in Washington, DC on August 11, 1989.
James F. Decker,
Deputy Director, Office of Energy Research.
GENERAL INFORMATION FORM

Submitting Entity: Section of Administrative Law and Regulatory Practice
Submitted by: Paul Verkuil, Chair

1. Summary of Recommendation.

The resolution recommends that federal agencies change the method by which they inform the public in the Federal Register about rulemaking impact analyses.

2. Approval By Submitting Entity

Approved at a regularly scheduled meeting of the Section Council on April 29, 1990.

3. Previous submission to the House or relevant Association position.

None.

4. Need for Action at This Meeting.

Action is desirable at this meeting.


None

6. Cost to the Association. (Both direct and indirect costs.)

None


None.

8. Referrals.

A copy of the Report with Recommendation was circulated to all Section and Division Chairs in June 1990.
9. **Contract Person.** (Prior to meeting.)

Sidney A. Shapiro, Chair, Committee on Federal Register, Reports, and Paperwork
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University of Kansas School of Law
Lawrence, KS 66045
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Paul Verkuil, Chair, Section of Administrative Law and Regulatory Practice
College of William and Mary
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10. **Contact Person.** (Who will present the report to the House.)

Richard H. Keatinge, Section Delegate
700 South Flower Street
Suite 600
Los Angeles, CA 90017