Recommendation 87-10

Regulation by the Occupational Safety and Health Administration

(Adopted December 18, 1987)

This is the second of two recommendations adopted by the Administrative Conference this year on Occupational Safety and Health Administration (OSHA) regulation. In its first recommendation,[1] the Conference recommended that OSHA make specific changes in its management of rulemaking and its process for establishing regulatory priorities. At that time, the Conference accepted OSHA's request that it continue to study possible broader changes to its regulatory process, including alternatives to the traditional hazard-by-hazard[2] regulation.

Having completed this study, the Conference recommends more extensive procedural changes to assist OSHA in fulfilling its statutory mandate of assuring adequate safeguards for American workers. OSHA has promulgated a small number of safety and health standards each year using the traditional hazard-by-hazard approach.[3] But the task before the agency is overwhelming existing processes. OSHA is responsible for regulating dangerous chemicals included in the tens of thousands of chemicals in the nation's workplaces, to which approximately one thousand new chemicals are added each year. OSHA also is charged with enforcing safety standards in American workplaces.

The Conference, therefore, recommends that OSHA undertake rulemaking to develop generic or class standards, including updating the 1971 national consensus standards, where appropriate. In addition, the Conference recommends a regulatory planning process and use of other procedures to supplement its traditional rulemaking process. It is important to add, however, that the Conference has found no alternative regulatory approach that is always appropriate or better than the traditional regulation. Rather, this recommendation identifies factors or conditions that favor the use of the various alternative regulatory approaches.

[1] ACUS Recommendation 87-1, Priority Setting and Management of Rulemaking by the Occupational Safety and Health Administration, 52 FR 23629 (1987).

[2] As used in this recommendation, the term "hazard" without further modification refers to both safety hazards and health hazards (*e.g.,* exposure to toxic substances).

[3] During its first sixteen years, OSHA promulgated eighteen new health standards (setting permissible exposure limitations for 23 substances) and 26 safety standards.

One uncertainty clouding OSHA's use of generic or class rulemaking is whether OSHA can obtain the information it needs to meet the burden of proof required by the Occupational Safety and Health Act ("Act") for safety and health standards. As interpreted by the courts, OSHA is required to show that a hazard poses a "significant risk" to workers and, if so, to set the standard at a level that assures "to the extent feasible" that no employee will suffer "material impairment of health or functional capacity." If OSHA is unable to obtain the information needed for its risk and feasibility determinations, the use of generic rulemaking, as well as other internal reforms, is not likely to lead to a more efficient regulatory process.

Experience with generic or class rulemaking may show that statutory changes are required to enable OSHA to adopt this procedure. The Conference, therefore, recommends amendments of the Occupational Safety and Health Act that Congress should consider if OSHA's administrative efforts to promulgate generic standards are not successful. One recommendation is that Congress provide an expedited procedure for updating the 1971 Table Z national consensus standards. The Conference also recommends that Congress reconsider the Act's regulatory standard in light of its judicial construction and agency experience. Specifically, Congress should consider giving OSHA greater flexibility in fashioning remedies to correspond to the level of workplace risks. Congress, for example, could allow OSHA to regulate some hazards to a level of "best available technology," as the Environmental Protection Agency is allowed to do under various statutes. The Conference also recommends that the Act's rigid statutory deadlines and detailed restrictions on advisory committees be removed. A final recommendation is that Congress replace the Act's "substantial evidence" judicial review standard with a standard that reflects the nature of rulemaking decisions.

Recommendation

1. *Updating the 1971 Consensus Standards*. The Occupational Safety and Health Administration, as an interim step, should continue to update the Table Z national consensus standards adopted in 1971 if updating can be accomplished by an expedited rulemaking procedure (*e.g.,* including more concise preambles) appropriate to the nature of the revised Table. OSHA should update the 1971 standards on a generic basis (*i.e.,* include multiple standards in one proceeding) when consensus recommendations are available, which are generally accepted by employers and workers in the affected industries, and when the new standards can be evaluated on the basis of risk and feasibility information reasonably available

to the agency. This interim step should not interfere with OSHA's continuing responsibility to promulgate and modify safety and health standards.

2. *Rulemaking to Develop Generic or Class Standards.* OSHA should expand its use of generic or class standards regulating multiple health and safety hazards where appropriate and consistent with its legal mandate.

a. *Industry-wide standards*. OSHA should consider the following criteria when deciding if industry-wide generic standards will be more efficient and effective than hazard-by-hazard regulation: (1) Whether hazards are in an industry that can be discretely defined, (2) whether most of the hazards to be regulated are unique to the industry to be regulated, (3) whether the hazards in the industry are relatively static over time, and (4) whether industry-wide rulemaking will impose lower aggregate compliance costs on the regulated industry than rulemaking on a hazard-by-hazard basis.

b. *Multi-hazard standards*. OSHA should consider adopting multi-hazard standards whenever scientific knowledge and policy judgment make it possible to use the same or a similar risk assessment for a group of included hazards and the feasibility analysis can be simplified or expedited because standard abatement techniques are available.

c. *Generic work-practice standards.* OSHA should consider adopting work-practice standards (*e.g.,* training, worker protective devices, and engineering controls) applicable to multiple industries when the following factors are present: (1) A similar hazard exists in the industries that can be regulated by one rule, (2) the same or a similar work-practice requirement would be effective in all such industries, and (3) generic risk and feasibility findings are appropriate.

3. *Regulatory Alternatives and Procedures*. In addition to generic or class rulemaking, OSHA should adopt the following rulemaking alternatives and procedures as appropriate:

a. *Performance standards*. OSHA should generally use performance standards (*i.e.,* standards that prescribe the regulatory result to be achieved) whenever they will provide equivalent protection as that provided by design standards (*i.e.,* standards that prescribe a specific technology or precise procedure for compliance). In deciding which type of standard to employ, OSHA also should consider whether the standard can be readily understood and monitored and whether it may lower industry compliance costs.

b. *Information disclosure*. OSHA should continue to approve information disclosure requirements as a complement to regulatory standards.

c. *Negotiated rulemaking*. OSHA should continue to experiment with negotiated rulemaking procedures;[4] in so doing it should develop methods (such as specific deadlines for termination of any negotiation) to assure that the negotiated rulemaking procedure is discontinued in a timely manner if it is not working.

d. *Advisory committees*. OSHA should reactivate rulemaking advisory committees for difficult scientific and technological questions. The scientific orientation in such committees should be assured by including a high proportion of independent and government scientists on committees. In addition, questions assigned to such committees should be limited so that current statutory deadlines can be met. (*See also* section 5.c. below.) OSHA also should require its advisory committees to submit written reports which include the committee's evaluation of relevant data.

e. *Advance notice of proposed rulemaking*. OSHA should not routinely use advance notices of proposed rulemaking as an information-gathering technique; it should use an advance notice when information that is not available through other vehicles is likely to be forthcoming in response to such notice.

f. *Interagency coordination*. OSHA should continue to cooperate with other health and safety agencies and OMB to coordinate where possible the testing, evaluation, and regulation of potential health hazards.[5]

4. *Developing a Regulatory Plan*. OSHA should periodically develop and review regulatory plans which specify how the agency intends to regulate hazards on its priority lists, including identification of potential candidates for generic rulemaking, negotiated rulemaking, use of advisory committees and other regulatory approaches or techniques. To avoid duplication, OSHA should coordinate its regulatory plans with any submission required by the Office of Management and Budget.

a. *Regulatory planning committee*. OSHA should assign the initial responsibility for developing regulatory plans to an internal regulatory planning committee that includes representatives from all appropriate department and agency offices.

[4] The Conference has previously provided guidance to agencies on the use of negotiated rulemaking, *see* ACUS Recommendations 82-4 and 85-5, Procedures for Negotiating Proposed Regulations, 1 CFR 305.82-4, 85-5 (1987).
[5] The need for interagency coordination of federal regulation of cancer-causing chemicals is addressed in Part II of ACUS Recommendation 82-5, 1 CFR 305.82-5 (1987).

b. *Public availability*. OSHA should make a synopsis of the results of regulatory planning committee meetings available to the public after the Assistant Secretary has had an opportunity to review any proposed committee recommendations. In addition, OSHA should periodically provide an opportunity for public comment on its regulatory plan.

5. *Statutory Change*. OSHA should include in its periodic reports to Congress the status of its implementation of the administrative changes recommended in paragraphs 1 through 4 above. If statutory impediments or judicial decisions inhibit efficient and effective regulation, Congress should consider amendments of the Occupational Safety and Health Act, including the following:

a. *Consensus standards update*. Congress should amend the Act to provide an expedited procedure for the generic updating of the permissible exposure levels in Table Z, incorporated into OSHA standards at 29 CFR 1910.1000. This procedure, while not including all the steps specified in 29 U.S.C. 655(b) as construed by the courts, should afford an opportunity for public comment.

b. *Regulatory standard*. Congress should amend the Act to give OSHA greater flexibility in regulating workplace hazards. Following its experience in environmental regulation,[6] Congress should consider establishing a classification scheme that would vary OSHA's burden of justification for safety and health standards to correspond to the degree of risk posed by a hazard and the level of control to be required by the OSHA standard.

c. *Rulemaking deadlines*. Congress should amend the Act to replace the existing statutory deadlines for various stages of rulemaking with a provision requiring OSHA to set timetables or deadlines for each rulemaking proceeding.[7]

d. *Advisory committees*. Congress should amend 29 U.S.C. 656(b) to replace the detailed restrictions on standard-setting advisory committee membership with a general provision authorizing use of advisory committees subject only to the Federal Advisory Committee Act, 5 U.S.C. App.

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[6] Under the Federal Water Pollution Control Act, 33 U.S.C. 1251-1376 (1982), and the Clean Air Act, 42 U.S.C. 7401-7642 (1982), Congress has authorized different classes of regulation, specified an initial designation, established a lower burden of proof for regulation that is less strict, and has indicated that the agency is to receive deference for its final choice of which class of regulation to apply. A similar approach is used for Food and Drug Administration regulation under the Medical Devices Amendments to the Food, Drug, and Cosmetic Act, 21 U.S.C. 360c-360k (1982).

[7] *See* ACUS Recommendation 78-3, Time Limits on Agency Actions, 1 CFR 305.78-3 (1987).

e. *Judicial review standard*. Congress should amend the standard of judicial review for OSHA safety and health standards, 29 U.S.C. 655(f), so that agency policy judgments are subject to the traditional standard of "arbitrariness" and the factual premises on which they are based are subject to a standard of "substantial support in the administrative record viewed as a whole."[8]

Citations:

52 FR 49147 (December 30, 1987)

__ FR _____ (2012)

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[8] The recommended standard follows ACUS Recommendation 74-4, 1 CFR 305.74-4, ¶¶ 3, 4 (1987). It is also consistent with the Restatement of the Scope of Review Doctrine adopted by the Administrative Law Section of the American Bar Association.