RESPONSIVE REGULATION IN CANADA

THE GOVERNMENT REPLY TO
THE SUB-COMMITTEE ON REGULATIONS
AND COMPETITIVENESS

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A SUMMARY VERSION OF THE *REPLY* IS AVAILABLE UNDER SEPARATE COVER BY CALLING TREASURY BOARD SECRETARIAT, REGULATORY AFFAIRS DIVISION (613) 952-3459.

INTRODUCTION

The February 1992 Budget asked the House of Commons' Standing Committee on Finance to review federal regulation to determine how it affects Canadian competitiveness. The committee was also asked to suggest ways to improve regulation, regulatory processes, and intergovernmental collaboration. At the same time, the Government directed departments and agencies to undertake a thorough review and publicly rejustify their particular regulatory programs. This review was to begin with Agriculture Canada, Consumer and Corporate Affairs Canada and Transport Canada.

Subsequently, the President of the Treasury Board, who is also Minister responsible for Regulatory Affairs, wrote a letter to outline critical issues the committee might wish to assess. In that letter, and in later presentations to the committee, the President stressed the importance to all Canadians, of health, safety and environmental regulatory objectives. He promised these objectives would not be compromised. He also suggested these goals can often be met in ways that do not inhibit, or may even promote, Canada's competitiveness.

The Government was pleased, therefore, to receive the committee's report *Regulations and Competitiveness*, which was supported by committee members of all parties. The report addresses the issues in a forthright and comprehensive manner, and identifies many important improvements that can be made.

In its report, the committee captured the essence of the problem:

> ... we regulate in order to improve public welfare. Yet, ironically, regulations -- if ill-considered or poorly designed -- may set our welfare back, by making it much more difficult for business to generate the productivity improvements on which improvements in our standard of living ultimately depend.
>
> Our point is not that regulation is bad, but that we can have bad regulation. And when regulation is as pervasive in our economy as it now is, bad regulation is something we cannot afford.

The committee highlighted the following key challenges that face Canada and its present regulatory system:

- a marketplace that is increasingly global. Timeliness and quality are becoming ever more critical to business survival;
- the difficult fiscal situation facing all governments;
- increasing concerns about internal trade barriers;

- an ever greater pace of change in technology;

- a public that is very aware of health and environment issues;

- more sophisticated business and labour communities.

The report recognized that important improvements were achieved as a result of the 1986 Regulatory Reform Strategy. In that strategy, the emphasis was on "regulating smarter". This meant having a regulatory process based on dialogue with affected parties and the public -- a dialogue characterized by openness, transparency, accountability, and solid analysis of the impacts of regulatory proposals. The 1992 Treasury Board Regulatory Policy incorporated these principles but introduced a new focus on managing regulatory programs.

Taken as a whole, the committee's report supports the directions taken by the Government over the past seven years. But the report clearly argues that we should go further and faster.

TOWARDS MORE RESPONSIVE AND RESPONSIBLE REGULATION

A picture of an ideal federal regulatory system can be drawn from the committee's report. In that vision, Parliament and the Government would establish a regime of "responsive regulation" to cope with the increasingly rapid changes facing the Canadian economy.

A responsive regulatory regime would be one that is even more accountable through Parliament to the Canadian public. It would be consistent with the health, safety and environmental objectives of Canadians. And consequently, it would be responsive to the changing demands of consumers, to continuously improving health care technologies, to the development of safer products, to new knowledge of environmental impacts, as well as the changing global economic environment faced by Canada's businesses.

The movement to more responsive regulation need not be dramatic. Using approaches that have already been found effective in existing regulatory programs, it is possible to reduce delays in introducing safer school bus doors, approving pesticides that are less toxic, getting automobiles to market that are more environmentally friendly, allowing healthier substitutes for existing food additives, or making fishing vessels safer. This, in the committee's view is merely applying good common sense.

But moving to more responsive regulation requires action on many fronts. Action will have to be taken in the following areas if the Government is to achieve, in the new environment, goals Parliament established when it legislated its regulatory programs.

(a) Law flexible enough to cope with change. A responsive regulatory regime would be characterized by:

- a reliance on alternatives other than regulation, where possible. If that is neither feasible nor appropriate, the Government could require regulatees themselves to specify how they would achieve performance objectives set out by legislation or regulation. The Government would approve regulatees' plans and management systems and then audit performance. Experience around the world has shown these techniques are often more effective in achieving parliamentary goals for regulatory programs than the "command and control" approach, where all details are spelled out. Nevertheless, in many circumstances command and control is the only feasible strategy;

  legislation that establishes regulatory programs should be designed to allow different strategies to be adopted, depending on their effectiveness in achieving Parliament's

objectives in any given circumstance; and

any increase in Government discretionary powers must be balanced by greater accountability to Parliament;

- the law formulated in a manner that is user-friendly.

  The most important factors in ensuring that regulatees will comply with regulatory requirements are that the regulatees understand and accept them;

- regulatory requirements that can be changed quickly in response to new circumstances;

  the regulatory process must be as streamlined as possible, consistent with openness, transparency and accountability to Parliament and the Canadian public; and

- cooperation among Governments to create an environment where regulatees are not caught by surprise (as to changing requirements) and where overlap and duplication are minimized both in the law and its administration.

  The authority to enter into "equivalency agreements" (one government's rules would be deemed equivalent to another's) should be a common feature of regulatory programs. "Operational agreements" (administration of a program by one government for another) could be treated likewise.

(b) Administration flexible enough to cope with changing behaviour in compliance. Characteristics of a responsive regulatory regime follow:

- regulatees would be encouraged to comply with regulatory requirements of their own will.

  Programs should be based on the principle of graduated deterrence. Penalties would be designed to be just high enough to achieve compliance, and to ensure it is never in the interest of individuals or organizations not to comply;

- the Government would have at its disposal a range of escalating sanctions.

  Managers should have a full range of enforcement options to consider. Examples would be persuasion, warnings, administrative process and penalties, and recommendations for prosecution and prohibition;[1]

- **an underlying assumption of most regulatory program enforcement should be that regulatees want and are willing to comply with the law. But non-compliance will be punished swiftly and proportionately;**

  program managers and personnel would be sufficiently trained to handle more responsive regulatory regimes; and

- the principles of total quality management would be applied to regulatory programs.

  Managers should be closely involved with their clients (the beneficiaries of their programs and those who are regulated), seek to continuously improve their programs, and let clients and the general public know what they can expect from the program.

Recently, the Government has undertaken a number of initiatives in the direction of more responsive regulation. To extend these initiatives to other existing regulatory programs, the Government intends to move systematically, where sensible, to remake federal regulatory programs into more responsive ones.

There are many avenues the Government can follow to achieve structural reform across the regulatory system to make it more responsive. Omnibus approaches, including model legislation, may be appropriate. The Treasury Board and the Department of Justice, working with departments and agencies, will determine the best direction. The Government is committed to moving on this issue and the President of the Treasury Board and Minister responsible for Regulatory Affairs will report progress back to the Standing Committee on Finance at least once a year.

The Government intends to ensure regulatory programs meet the committee's expectations for responsiveness by moving towards the following goals:

- expanding the range of non-criminal measures available to ensure compliance with regulatory legislation. This would include provision for enforceable negotiated solutions to non-compliance or civil monetary penalties, among other measures;

- introducing a broader range of escalating criminal or quasi-criminal sanctions, where appropriate, for dealing with serious or persistent incidents of non-compliance on a consistent basis across programs;

- increasing administrative responsiveness where this makes good sense and is consistent with parliamentary goals. This would include the ability to accept a range of "proof-of-compliance" from regulatees and to incorporate by reference standards as amended from time to time. In some instances this would include authority to use technical standards that have been developed by government departments themselves;

- requiring regulatees to establish internal control systems to ensure regulatory requirements are met; and

- generally enabling government departments to enter into equivalency and operational agreements with other levels of government.

RESPONSE TO SPECIFIC RECOMMENDATIONS

The Government believes that innovation and responsiveness are key to improving our regulatory systems. In responding to the specific recommendations of the committee, the Government is guided by the vision of a responsive regulatory regime that emerges from the report. By developing such themes, and by building on the Government's regulatory policy and process, the report provides a solid basis for further improvements to the regulatory environment in Canada. These changes must not compromise the Government's economic, social, health, safety, and environmental regulatory objectives; they should help achieve them in a more cost-effective and responsive manner.

> ... we also learned that Canadians everywhere share a similar vision of a prosperous Canada. It is a vision of a country where all can enjoy a higher standard of living and no Canadian is denied an opportunity to achieve it. It is a vision based on pride in Canada and its magnificent natural heritage, achievements and potential. It is a vision rooted in commitment to community, in which prosperity includes fairness, equity and social responsibility, and respect for all Canadians and the diversity of their backgrounds[2].

Regulations and Competitiveness

3.1 All the costs and benefits should be estimated for major proposed regulations.

3.2 Where feasible, regulations should be expressed as functional outcome or performance objectives rather than detailed specification of the means of compliance.

The Prosperity Steering Group consulted widely across Canada to find out the attitudes towards prosperity of Canadians:

Addressing issues of costs and benefits is a serious and difficult business, requiring a broad perspective. Health, safety and sustainable development objectives are critical to preserving the living standards Canadians have become accustomed to. Providing one operates within this broad perspective, the Government agrees with the committee's view that if the benefits of a regulation exceed its costs, this will lead to a more prosperous Canada.

The federal Regulatory Policy approved in February 1992 states that departments and agencies must demonstrate that the benefits of all regulatory activity outweigh the costs.

It can sometimes be difficult to demonstrate this in areas of health, safety and the environment because of lack of data on benefits -- data that cannot be acquired in a timely or cost-effective manner. The Government believes all benefits, whether quantified or not, are real and must be fully taken into account in a transparent way. Decisions must be and must be seen to be responsible; they must be defensible before a sceptical public and before the affected parties.

The Government also agrees that, where possible, regulatory responsibilities should be expressed in terms of functional outcomes or performance objectives. This inhibits technological development less, while achieving desirable objectives. Such simple guidelines, if they are followed, can help improve Canada's regulatory programs. Regulators face a difficult challenge in developing and implementing effective, efficient, innovative and adaptive regulatory programs. Last October, the Treasury Board Secretariat (TBS) issued a more comprehensive set of guidelines (Appendix A) to help regulators meet this challenge.

Since 1991, TBS has followed a strategy of minimizing central review of regulatory proposals. The objective that the major regulatory departments and agencies internalize the responsibility for implementing, and managing the implementation of, the Regulatory Policy. Key factors to the success of this strategy are providing departments and agencies with the right tools and the right training, ensuring departments and agencies have the right management systems in place, and holding them accountable for performance.

The Treasury Board Secretariat is committed to working more closely in the future with departments in planning their approach to analysis and consultation for major regulatory proposals. The Secretariat will produce a new cost-benefit guidebook to assist those carrying out the regulatory impact analysis of initiatives that have a small or intermediate impact. Designed for situations which do not require a rigorous economic cost-benefit analysis, it will help those who are not professional economists in determining the effect of proposals on consumers, on the environment, and on citizens in general. The new guide will complement the existing cost-benefit guide for more complete regulatory impact analyses.

A key ingredient -- but only one -- of regulatory impact analysis is the effect on Canadian business. The Secretariat has been working with Industry, Science and Technology Canada (ISTC) and the Canadian Manufacturers' Association to make available in mid-1993 a "competitiveness test" for assessing regulation[3]. These initiatives will be supported with relevant training, similar to the recently initiated course on writing Regulatory Impact Analysis Statements (RIASs).

The business "competitiveness test" is particularly noteworthy. While the careful analysis of <u>all</u> costs and benefits is critical, in the past finding a way to assess the impact of regulation on a "dynamic" economy has been a major challenge. This can be remedied

by a better understanding of how business works as well as improved data. The test is expected to:

- sensitize regulators to the various impacts of their proposals on the economy;
- help identify where further analysis is required; and
- provide a survey mechanism of firms (this, in turn, will lead to a more structured and efficient consultation process).

As indicated in the December 1992 Economic Statement of the Minister of Finance, regulators bringing forward proposals which could seriously affect business will be expected to use the business competitiveness test as part of their cost-benefit analysis. The test will be a significant addition to regulators' analytical toolkit which can be refined and improved upon over time as experience with it is gained.

Federal Regulatory Process

4.1 The Treasury Board Secretariat should be required to develop a set of standardized consultation processes adapted to fit different types and scales of proposed regulations. These would be guidelines for departments.

Over the past few years, as part of the Public Service 2000 initiative, considerable effort has been made to identify the most effective consultation mechanisms, and much experience has been gained. Based on that, TBS will work with other departments to develop an appropriate range of best practice models to help regulators.

It should also be noted that the departmental regulatory reviews that were mandated by the February 1992 Budget have resulted in broad based consultations that have heightened interest in and attention to regulatory issues.

4.2 All intermediate and major proposed regulations should be reported in at least the previous year's Federal Regulatory Plan before they can be sent to the Special Committee of Council.

4.14 The President of the Treasury Board should have the power to delay proposed major or intermediate regulations which have not previously been reported in the annual Federal Regulatory Plan, except where the regulation is in response to an emergency arising since the deadline for submissions to the last plan.

The Government agrees that as a matter of policy,
major regulations that have not appeared in the annual *Federal Regulatory Plan* should not be promulgated. Nevertheless, cases will arise where, for one reason or another, it is important to the public interest to go ahead with the regulation. A system will be established similar to that now in place for requests for exemption from prepublication. Currently, all regulations must be prepublished unless they have

been exempted by the Special Committee of Council. In making this decision, ministers consider the proposal in light of a number of criteria (Appendix B describes these). This same system will work for an exemption to the requirement that a major regulation appear in the *Plan* (Appendix C describes the criteria proposed).

4.3 Departments should be required to report in the RIAS a brief summary of views received during the consultation process and reasons for accepting or rejecting them.

The Government agrees that a brief summary of comments should be included in the RIAS. The *RIAS Writer's Guide* that was recently released makes this obligation clear. In addition, departments and agencies are expected to respond in appropriate detail directly to individuals who raised serious concerns during consultation.

4.4 The annual Federal Regulatory Plan should be changed as follows:

- **The department or agency must provide a preliminary classification of the scale of the planned regulations in terms of their estimated costs to society: small/technical, intermediate, and major.**

- **The department or agency must indicate the method of the planned consultation process. (This is linked to 4.1 above).**

- **Each proposed regulation must be given an identification number which will be used throughout the regulation-making process (that is for the estimated costs of federal regulations to be tabled with the Estimates, as proposed below, and when the draft regulation and RIAS are "pre-published" in the Canada Gazette, Part I).**

The Government agrees that the *Plan* should be changed in a number of ways.

- We listened to concerns that too many entries repeat from year to year. There are many reasons why this situation has arisen, including the desire of regulators to ensure that affected parties are aware of possible initiatives as far in advance as possible.

  Beginning with the *Plan* for 1994, entries will no longer be restricted to only those likely to be promulgated in 1994. Departments and agencies will be allowed to include items that are planned for later years. Entry write-ups for these items for future years will focus on alternatives to solving the underlying problem. Write-ups for those targeted for the coming year will have to provide preliminary cost-benefit information, classifying the proposed regulation as small-technical, intermediate, or major.

- The committee recommended entries include a reference to the

models emerging from recommendation 4.1. It will not be possible to incorporate this information any earlier than the 1995 *Plan*. In the meantime, *Plan* entries contain the name and phone number of a contact person. Interested parties can now find out about the consultation plans of regulating departments and agencies.

- Regarding the recommendation to have a single identification number, the Government will investigate alternatives before responding. It should be noted that *Plan* entries already cross-reference earlier years, RIASs contain the *Plan* number, and each annual edition reports on progress made on items that appeared in the previous year's *Plan*.

4.5 The President of the Treasury Board should be required to compile the "Estimated Costs and Benefits of Federal Regulations" (ECBFR) annually, to be tabled in the House of Commons with the Estimates. (This would require that departments and agencies submit to the Regulatory Affairs Directorate the following information: (a) the estimated costs and benefits of every proposed major regulation expected to be made in the next fiscal year (or the following two years); (b) the number of "intermediate" proposed regulations for the next fiscal year; and (c) for major proposed regulations, the estimated costs and benefits should be categorized by government administrative costs and by private sector compliance costs, broken down by major industry sector.

4.7 The President of the Treasury Board should be required to prepare and publish an "Annual Report on the State of Federal Regulation" with a view to increasing public awareness of the growth, scope, and costs of federal regulations. The report would include review of the policies and experience of other countries, notably those with which Canadian firms compete and into whose markets they export.

In the fall of 1992, the private sector Prosperity Steering Group released its report, *Inventing Our Future: An Action Plan for Canada's Prosperity*. The group had spent months consulting with the Canadian public. That report also proposed that the federal government develop a better appreciation of the aggregate costs of regulation.

The Government agrees with the observed need to better determine the aggregate costs of regulation. The first priority is to get, through the annual planning process, a better understanding of the impact of regulations on government administrative costs, private sector

compliance costs, consumers and the public.

The committee recommended the Government produce two reports. Before responding, the Government wants to ensure it can collect reasonably good quality cost-benefit data at an earlier stage in the development of regulatory proposals. A decision will be taken in the spring of 1994 whether more can be done in the 1995 Planning cycle. A factor in this decision will be the level of available resources that can be devoted to this function.

While it is not proposed that a report on aggregate impact would be prepared based on the 1994 *Plan*, the President of the Treasury Board will be prepared to discuss the implications of the *Plan* with the Standing Committee on Finance.

4.6 For proposed major regulations where the estimated costs measured outweigh the benefits measured, departments should be required to summarize in the RIAS the reasons why the regulation should nevertheless be adopted.

The Government agrees. Meeting the objective of better quantifying costs and benefits can be particularly difficult in the case of regulations whose chief benefits are enhanced health, safety, security or environmental quality. As noted above, such benefits are often difficult to quantify because of a lack of timely, cost-effective data for Canada. In many cases, American regulators will have undertaken studies whose results can be applied to Canada with some qualification. Examples abound with respect to environmental hazards, hazardous products, transportation safety standards, energy efficiency standards and the like. The task facing the proposing regulator is to be able to demonstrate to a sceptical public that, despite measurement problems, benefits really do exceed costs, as required by the Regulatory Policy.

The Treasury Board Secretariat is committed to working together with interested departments to develop methodologies that may be needed to improve the process of determining benefits of regulatory initiatives, just as it is doing now with assessing the impact on business competitiveness.

4.8 Clear definitions of major, small/technical and intermediate categories of regulation should be developed. The proposed threshold for "major" is $100 million in total costs to society measured in present value terms. The threshold would also include a measure in terms of the costs relative to the output of the sector(s) likely to be most affected by the proposed regulation.

The Government agrees that a clear categorization of impacts is desirable for the purposes of providing better information on impact in the annual *Plan* and for streamlining the regulatory process.

But in arriving at the best categories, it is important to consider the decision-making context. The committee has proposed a threshold for "major" regulations of $100 million in present value terms and a threshold of $50 million for "intermediate" regulations. In lieu of two categories, the Government believes that, for the purposes of changes in the federal regulatory process, a definition of "major" should encompass both the categories recommended by the committee. That is, there would be one class only -- major -- based on the lower threshold of $50 million present value. This would be suitably modified in cases of especially severe impact on smaller sectors (see Appendix D for details).

4.9 For intermediate and major regulations, the RIAS should indicate the planned process of monitoring and evaluation of the proposed regulation.

The fundamental issue is how to keep regulatory programs current, and how to keep interested parties apprised of the Government's intentions. The Government believes it should apply total quality management principles to regulatory programs. Part of that thrust will be to get managers to continuously improve their programs, and this requires ongoing evaluation and continual consultation with affected parties.

If a proper cost-benefit analysis has been performed, then much of the work required for a good evaluation will be already have been completed. The focus needs to be on the design of good monitoring and management information systems to keep data on the effectiveness of the regulatory programs. To help with this, TBS and the Office of the Comptroller General (OCG) will work to bring regulators and evaluators closer together. For instance, TBS will contribute to OCG's training of evaluators and vice versa.

The Government agrees with the spirit of the committee's proposal to incorporate evaluation and monitoring information into RIASs. An effective approach will be to encourage departments to include such information when it is important (for example, highly dynamic situations with high regulatory costs). In cases of regulatory initiatives that have a very high impact, OCG and TBS will work with the department concerned to help it plan for the evaluation at the time the proposal is brought forward initially.

4.10 The RIAS requirement for the deletion of regulations should be simplified.

The Government agrees that it would be desirable to have a simplified process to handle initiatives reducing regulatory requirements. In particular, the standards of impact analysis can be somewhat relaxed.

The Government introduced the practice of twice a year using omnibus regulations for housekeeping changes and changes in response to the Standing Joint Committee for the Scrutiny of Regulations. This has speeded up the process for many initiatives and has allowed attention to be focused on more important issues.

Departments will be encouraged to adopt a similar sort of process for non-

major initiatives that lessen regulatory requirements. That is, once or twice a year, departments will be able to group revocations together, describe all proposals in simple terms, say why they are being undertaken, and give affected parties reasonable time to argue for their retention. Such "clean-up" exercises should make it easier to keep regulations current.

This recommendation of the committee aimed to make the regulatory process as efficient as possible to respond to the concerns it heard. The Government also heard the same concerns expressed about situations other than those addressed in recommendation 4.10. To address these other concerns, the Government will undertake a number of additional initiatives, described in Appendix E.

4.11 The RIAS should disclose the set of alternatives that were considered by the department and rejected, with a brief explanation why the alternative chosen is superior.

The Government agrees that this should be done when alternatives are really available. This is made clear in the *RIAS Writer's Guide* that was recently released. In addition, based on work by the Department of Justice, TBS will be releasing this spring a guide on alternatives to and alternative forms of regulation that should help departments.

A key factor to getting alternatives considered seriously, however, are changes in the way departments manage problem areas. For instance, environmental problems and possible solutions are often extremely complex, cut across jurisdictions, and require action by many parties. Environment Canada has found it important to have all stakeholders -- industry, provinces, environmental groups, and interested citizens -- collectively develop the right tools to solve problems.

4.12 The RIAS should include an assessment of the proposed regulation's impact on firm competitiveness in the sectors where the majority of the compliance costs are expected to occur.

The appropriate focus is on those most adversely affected, be they consumers, governments, or business, not just on the sector that will have the greatest direct compliance costs. Often, the business sector most affected is not the one with the greatest direct costs, narrowly defined. For instance, a regulation affecting the availability of an imported product may do more damage to the user of those products than to the importing agent.

As noted in the response to recommendations 3.1 and 3.2, those bringing forward regulatory initiatives that have potentially important impacts on business competitiveness will be expected to explicitly address this issue.

4.13 The Statutory Instruments Act (SIA) should be amended to provide that RAD must certify that (1) the methodology employed in preparing the cost-benefit analysis accompanying each proposed

major regulation meets professional standards, and (2) that all proposed regulations are properly classified in terms of their impact as small/technical, intermediate, or major. This would be closely analogous to the requirement that the Clerk of the Privy Council certify that proposed regulations are legally correct in form and not ultra vires.

The Department of Justice will look at updating the SIA in order to reduce ambiguities and reflect procedural innovations. However, the Government does not wish to introduce new procedural bottlenecks. This would thwart efforts to streamline the regulatory process. Even in the United States, which has had the most rigorous central oversight and review function among OECD countries, the Office of Management and Budget cannot keep up with the pace of regulatory proposals. Improved internal management of department regulatory processes is key. We need to stop poorly conceived regulation, but not at the expense of delaying worthwhile,
cost-effective proposals. This is especially important in the health, safety, and environment areas.

During preparations for the annual *Federal Regulatory Plan*, TBS will work more closely with departments on the proposed plans for consultation, analysis and evaluation for major regulatory proposals. As mentioned earlier, a key to improving regulatory impact analysis is to provide departments and agencies with good analytic tools and training.

Role of Parliament

5.1 Every bill containing an enabling clause should be accompanied by a memorandum setting out precisely why the particular delegated law-making power contained in the clause is sought, and the form the sponsoring Minister sees the delegated law taking.

The Government agrees it is important that Parliamentarians be aware of the reasons the Government is asking for the power to make regulations. The Government will review whether current mechanisms are the most appropriate means of accomplishing this. The Government is committed to ensuring that those who review Bills have the information they need.

A closely related issue is the nature of the draft legislation itself. The Government will ensure that those working on draft legislation are aware of and address the requirements of a responsive regulatory framework.

5.2 Consideration of major proposed regulations by standing committees as to merits, and by the Standing Joint Committee for the Scrutiny of Regulations as to legality and propriety, should be encouraged and undertaken. As a necessary sanction, the requirements of an affirmative

resolution for the coming into force of regulations should be imbedded in the grant of enabling powers, where the exercise of those powers may:

- **substantially affect the provisions of the enabling or any other statute,**
- **lay down a policy not clearly identifiable in the enabling Act or make a new departure in policy, or**
- **involve considerations of special importance.**

The Standing Orders should be amended to make the affirmative-resolution procedures of the Interpretation Act operable, and to ensure that a vote on the resolution to affirm any regulations is not taken until the standing committee and the Standing Joint Committee have reported on it or have allowed a reasonable time period to elapse without report.

5.3 Provide each subject-area standing committee with an opportunity to review the proposed regulations after pre-publication in *Canada Gazette*, Part I. The committee's report would be tabled in the House, but its primary role would be to provide advice to the Special Committee of Council. PCO could notify each committee in respect to every proposed regulation (classified by size of economic impact). The committee would then have 30 days to decide which ones it would review and another 60 days in which to conduct its review.

The Government agrees that it would be helpful to have Parliament's input into decisions delegated to the Government. The Assistant Clerk of the Privy Council will notify the clerk of the relevant standing committee when a major regulatory proposal is being prepublished in the *Canada Gazette*, Part I. If the committee then wishes to intervene, it may do so. Discussions will be held with the Standing Joint Committee on the Scrutiny of Regulations as to whether it can have more input at the prepublication stage to reduce the likelihood of problems arising after the fact.

With respect to the issue of affirmative resolution, it should be recalled that in both the *Official Languages Act* and the *Gun Control* legislation, it was and is a requirement that regulations under the Acts be tabled in the House. Neither Act requires an affirmative resolution, yet they seem to have worked well in ensuring Government accountability. The most appropriate arrangements will have to be determined on a case-by-case basis.

5.4 The present disallowance procedure under S.O.'s 123-128 should be replaced by a statutory procedure covering all statutory instruments (and any part of a

statutory instrument) not subject to affirmative-resolution procedure. The deemed disallowance feature of the present procedure when a resolution is not disposed of should be retained and given statutory force.

We do not believe that it is necessary for Parliament to have a statute to govern the way it functions. Standing Orders appear to have worked satisfactorily when the Standing Joint Committee for the Scrutiny on Regulations has used them.

5.5 The Standing Committee on Finance should review the "Estimated Costs and Benefits of Federal Regulations" tabled with the Estimates.

As noted in the response to recommendation 4.5, this Standing Committee is an appropriate venue for discussing the issues of the broad impact of the Government's planned regulatory initiatives.

5.6 Standing committees in each subject area should be encouraged to undertake periodic evaluations of regulatory programs in order to hold the Government accountable for the performance of such programs. The periodic evaluation or assessment might be triggered by (a) an indication by the OCG that a regulatory program has been evaluated pursuant to the program evaluation policy 01-01-92 in the Treasury Board Manual; (b) publication of an evaluation by the Auditor General, or (c) information received by the committee suggesting that an evaluation should be conducted.

The Government agrees that standing committees can provide valuable feedback on the efficacy of regulatory programs and should be encouraged to do so when they
think it is appropriate -- no matter what source triggered their interest. The OCG will make lists of completed evaluations available to Library of Parliament staff. They will then be able to bring studies of relevance to the attention of the various standing committees they support.

Standards

The Federal Government strongly supports the National Standards System (NSS) and the member organizations. The Government supports the development and use of national standards through the NSS in order:

- **to enhance industrial competitiveness**. Using the National standards reduces business costs, promotes product quality, facilitates technology diffusion, lowers barriers to trade, and opens up trading opportunities through participation in international standards writing bodies; and

- **to improve public protection and regulatory effectiveness**. Getting all parties to participate in developing and accepting standards, leads to lower costs of administration and promotes compliance. Organizations that are part of the NSS can certify and test, develop consensus standards, and promote use of international standards. All orders of government can build on NSS work, leading to fewer differences in standards across Canada.

In the changing global economy, a strong NSS, thoroughly plugged into the world standards community, is an important ingredient in Canada's future economic development.

6.1 When legislated standards are deemed necessary, Governments should increase their effort to coordinate standard requirements and activities by mandating more extensive use of reference to standards (particularly undated reference) developed within the National Standard System (NSS). Specifically, when identifying and assessing alternatives in the regulatory process, regulatory authorities should review the available listings of existing standards (Canadian, international and foreign standards) to ascertain what may be suitable. If an acceptable standard exists, then reference to it should be made when drafting the regulation. If no acceptable standard exists, regulatory authorities should arrange for the development of a standard through either the Standards Council of Canada's (SCC) National Standardization Branch or the NSS's member standard writing organizations.

Standards can be based on consensus or not. And they can be voluntary or mandatory. Regarding the issue of mandatory versus voluntary standards, the Regulatory Policy is clear -- use voluntary mechanisms unless there is a very good reason to do otherwise. Similarly, consensus standards are clearly preferred to non-consensus standards.

The Government agrees that regulators should use standards based on consensus wherever these are available and appropriate. Departments and agencies will be asked to consult the listings of available standards held by the Information Services Division of the Standards Council of Canada. In addition, departments proposing mandatory standards will have to show why they have not adopted available standards.

Furthermore, to the extent possible, the standards required by Government regulators should be international standards. However, even where international standards exist, regulators must still show that adopting these is optimal for Canada. The primary benefits provided by international standards are potentially greater buyer choice and reduced transaction costs

for Canadian manufacturers seeking to market their product on global markets.

Although third-party standards can be incorporated by reference in some situations, clear statutory authority does not always exist to incorporate documents "as amended from time to time". Moreover, existing legislation seldom permits departments to incorporate by reference technical standards that they have developed themselves. The need for this flexibility will be an important question whenever draft legislation is being prepared. It may be necessary, as well, to adjust the regulatory process and the *Statutory Instruments Act* to allow for full use of this technique of incorporating by reference.

The Treasury Board Secretariat will work with the Department of Justice and other departments and agencies on this matter. Together they will determine how best to insert provisions into existing statutes, where this is appropriate, to allow undated standards, including departmental technical standards, to be incorporated by reference. This feature is particularly important in many regulatory programs dealing with health, safety and environmental issues where a quick response is often needed to changing circumstances.

Further, the Government agrees to ask regulators to consider more often employing standards writing organizations when standards are not already available and have to be formulated. The SWO would need ongoing involvement of the proposing department; in most cases this would have to include support funding because SWOs are cost-recovery organizations. The output should be a "national standard of Canada". Among other things, this means that it would be available in both official languages.

Recognizing that SWOs normally take considerable time to prepare standards, the Standards Council will be encouraged to create an atmosphere of competition among the SWOs.

In summary, regulators will be given the following guidelines:

- be prudent about putting mandatory standards in place -- a careful cost-benefit analysis is needed;

- if standards are needed, consider using standards that are already available, if appropriate. Where possible, generally accepted international standards should be turned into Canadian national standards. If that is not possible, use existing national standards that are based on consensus. Consult the Standards Council of Canada on available standards;

- if mandatory or voluntary standards are needed and are not available, use the NSS to develop them, where this is cost-effective. Participate as a member of the standards writing team convened by the SWO; and

- participate in international standards development as much as possible when it is to Canada's advantage.

6.2 Government should be reticent about promulgating standards outside the health, safety and environmental area. Furthermore, a program should be established, and a person accountable for achievement by a specified target date should be designated, to review existing government promulgated standards with this principle in mind.

The Government agrees with the committee that standards are an important tool in promoting health, safety, and environmental quality.

Standards in any area can be highly beneficial, but care must be taken in their promulgation. Special care needs to taken, particularly outside the areas of the health, safety, or environmental protection,[4] to avoid benefitting individual firms at the expense of other firms, or locking in old technology to the detriment of consumers. The current Regulatory Policy and process discourages the promulgation of inappropriate mandatory standards.

There are many instances where standards are very desirable to protect consumers or to promote technology diffusion or innovation. And the Government firmly believes that standards have a significant role to play in industrial and trade development.

The committee recommended that a person be made responsible for reviewing the thousands of government-promulgated standards. The Government prefers to ensure such standards are included in periodic and ongoing departmental regulatory reviews.

6.3 Wherever possible, government-promulgated standards must specify to system standards and, where applicable, to performance (output) standards. Specifying to design (input) standards should be avoided and decisions about the details delegated to regulated enterprises.

Furthermore:

- **Where performance standards are not possible, government-promulgated standards should be required to outline broad essential requirements that products must meet. If standards writing organizations are retained to write more detailed standards that meet these requirements, industry should be allowed to choose whether to follow the SWOs standards or meet the Government directive using another approach.**

- **The program mentioned in recommendation 6.2 should also review existing government-promulgated standards with the foregoing drafting principles in mind. Where adjustments are necessary, regulatory authorities should arrange for**

the rewriting of the standard through either the Standards Council of Canada's National Standardization Branch or the National Standards System's member SWOs.

The Government believes it is important to the competitiveness of the economy to minimize "bureaucratic" involvement in business, especially in a time of escalating change in technology and markets. Therefore, where it is necessary to regulate, careful consideration will be given to the standard to be used. Standards for quality management systems will often prove to be the most cost-effective way to achieve Parliament's objectives. It has long been recognized that performance standards are almost always to be preferred to detailed technical or design standards. The latter are unambiguously better only when it is not possible to specify measurable performance standards.

The second part of the committee's recommendation focuses on the desirability of regulatory programs that allow firms the flexibility to demonstrate that their products meet the basic objectives of the regulation without meeting the details of the regulation. This is now possible only for regulatory programs that have the statutory authority to put into place "approval systems" as well as standards. The Government agrees that in many cases it is desirable to have programs that can respond quickly to improvements in technology -- Canadians as a whole would benefit.
The Treasury Board Secretariat and the Department of Justice will work with line departments and agencies to determine where it may be appropriate to seek new powers for existing programs.

The Government assures the committee that it will take the above issues into account in implementing initiatives resulting from the current departmental Regulatory Reviews.

6.4 Development of any standards that are effectively binding (either by legislative reference or Government threat of such) should be subjected to the key features of the regulatory process. Accordingly, all government-promulgated standards should be disclosed to Parliament through the Government's annual regulatory plan, and the following policies of the National Standards System should be made mandatory: review of costs versus benefits and independent review of these assessments, and review of standards on a continuing basis to assess their current need and conformity with other jurisdictions.

In modifying its Regulatory Policy in 1992, the Government extended application of the policy to all aspects of regulatory programs including standards, internal manuals or moral suasion. The NSS principles of cost-benefit review, consultation, regular review, and conformity with other jurisdictions are all part of that policy.

However, while the policy applies to all aspects, the regulatory process does not -- voluntary standards are not incorporated into the annual *Federal Regulatory Plan*. The Government supports a wide range of voluntary standards, for example, the National Building Code or the standards the Government uses as a purchaser of goods. We do not believe, therefore, that it would be feasible to include these in the *Plan*.

Where departments or agencies have incorporated by reference mandatory standards that are contained in internal documents, departments will be encouraged to identify upcoming significant changes in the annual *Federal Regulatory Plan* when that is possible. As such modifications are often undertaken to address changes in technology or other circumstances, at the request of the regulated industry, they generally will not be foreseen in time to be included in the *Plan*. Also, not being formal regulations, they will remain outside the formal regulatory process.

6.5 Financial priority should be given to Canadian participation in relevant international standards development activities and to incentives for standards writing organizations (SWOs) if they make their standards international standards. Perhaps funding can be achieved for the incentive program by levying fees across the board to member SWOs and then using these levies to reward harmonization successes, thereby partially compensating for potential sales revenue losses.

It is clear that Canadian participation in the development of international standards is critical. Equally critical is that Canadian NSS members be accredited to test and to certify that a product meets international standards. The Standards Council of Canada has, in fact, made these areas priority.

Government support, however, has to be tempered by financial constraint. Moreover, voluntary standardization is by definition a market-driven exercise.

International collaboration is a high priority for this Government. Through the Canada-United States Free Trade Agreement and through the new agreement for North America, we have committed ourselves to work towards harmonizing standards.

Discussions are also currently underway with the European Community (EC) to determine whether we can enter into a mutual recognition agreement covering the certification and testing of compliance with standards. If successful, organizations named by the federal government (those accredited by the SCC) would be able to certify products as being in compliance with European standards. Conversely, EC organizations would be able to certify to Canadian standards. The benefits for Canadian industry are clear.

Through greater international collaboration in all aspects of managing regulatory programs, we can provide

better and cheaper protection for citizens. For instance, in programs regulating potentially hazardous products, it is possible to:

- work with other Governments (either formally or informally at the scientist-to-scientist level);
- agree to testing protocols to allow data to be accepted;
- adopt mutually acceptable submission formats between Governments;
- share summary submission data;
- mutually recognize conclusions of shared work; and
- share databases.

Made-in-Canada solutions and processes are appropriate in only a few instances. Through working collaboratively with colleagues in other countries -- instead of each duplicating the other's work -- everyone will benefit. Consumers should have a wider range of products or services to choose from, technologies that are safer or more environmentally benign can be introduced more quickly, and industries subject to regulation should save money. In particular, Canadian taxpayers should benefit from more cost-effective programs.

With respect to the proposal to levy fees on SWOs to support others who accept international standards, the Government does not believe that such government-forced cross-subsidies are desirable. Moreover, many SWOs depend on their testing and certification work for their revenue and should not require special incentives to accept international standards.

6.6 The reporting mechanism to Parliament of the Standards Council of Canada should be reviewed in light of the importance of standards to Canada's ability to trade competitively.

Standards play a number of roles in the economy and society. As discussed above, the Government's goals in using standards are to enhance economic performance on the one hand, and to improve public protection and regulatory effectiveness on the other. Depending on the balance between these two objectives, one can argue persuasively that the Standards Council of Canada could report to Parliament either through the Minister of Consumer and Corporate Affairs or through the Minister of Industry, Science and Technology, who is also Minister for International Trade. The Government will review the question within the context of a broader review of standards policy.

Implementation and Enforcement

7.1 Quality service principles should be used in the regulatory process. However, an approach such as a modified TQM should be fully implemented only if the necessary commitment of resources to such a program is made and continued. If the

commitment is made, a supporting structure must be in place before full implementation of the approach is attempted, including training for the required new skills, recognition and rewards systems to effectively reinforce desired behaviour, and measurement systems to quantify results.

The Government agrees that quality service principles should be used in managing federal regulatory programs. This requires an ongoing commitment of time and resources on the part of program managers. There is a significant potential pay-off in terms of better service (greater protection for beneficiaries and fewer problems for regulatees) and reduced cost.

The Government's view is that its Regulatory Policy and associated guides already reflect quality management principles through their emphasis on consultation with the affected parties, continuous improvement, and ongoing internal control.

As recognized by committee members, TBS has moved towards helping departments and agencies to internalize "regulating smarter". The Secretariat has issued a guide on developing management frameworks based on the ISO 9004-2 Quality Management System Guidelines. Further work will be done through the Canadian General Standards Board to develop more detailed guidelines to apply to federal programs. The focus for the coming year will be for interested departments and agencies to work cooperatively; pilot projects will be undertaken before new guidelines are fully adopted.

The major regulating departments (Agriculture Canada, Consumer and Corporate Affairs Canada, Transport Canada, Fisheries and Oceans Canada, Environment Canada, Revenue Canada, and Health and Welfare Canada) are all currently examining their internal regulatory processes to determine where improvements can be made.

It will take time to put quality management systems in place. And it is not something that can be imposed by Treasury Board fiat -- individual managers must be fully supportive and dedicated to implementation.

7.2 In conjunction with stakeholders, a policy manual for implementing regulations should be developed by each department, subject to continuous change and improvement as experience accumulates and consistent with the over-riding policies and guidelines set out in the Treasury Board and Department of Justice recently produced management and compliance frameworks. The manual should be accessible to all interested parties and include:

- **consultation strategy, policy and procedures consistent with Treasury Board**

guidelines developed along the lines proposed under the Committee's recommendation 4.1;

- **guidelines for frequency and extent of regulatory reviews; and**

- **compliance strategy, policy and procedures considering the objectives of the regulatory program, the rules and design of the program, the roles and functions of key authorities, the regulated group, potential allies, the factors that affect compliance and the compliance profile. It should outline inspection procedures, criteria for undertaking prosecutions and other enforcement actions, and permissible deviations from legislative and regulatory standards, including discretionary action related to inspections, decisions to prosecute, persuasion and negotiation activities.**

The Government agrees that such manuals are desirable. They may do more good at the "program" level than at the "departmental" level however. TBS will discuss with departments how best they will be able to implement the spirit of this recommendation as part of their action plans coming out of their Regulatory Reviews.

Departments have been developing compliance strategies as required by the Regulatory Policy. For instance, in conjunction with the development of the *Canadian Environmental Protection Act*, a compliance and enforcement policy was developed for the application of all associated regulations. As well, the Attorney General of Canada has guidelines on the decision to prosecute that help departments when they consider whether to request prosecution.

Furthermore, the Government's coordinating group for enforcement (the FLEUR Secretariat) has started work on a set of model enforcement procedures in a number of areas[5]. This initiative should foster consistent, fair and effective procedures among federal regulatory agencies.

As well, as the Standing Committee noted in its report, the Justice-led Regulatory Compliance Project recently developed a guide establishing basic principles and a step-by-step approach for putting effective compliance mechanisms in place. The Department of Justice and TBS will encourage departments to adopt the guide since, as the Standing Committee also noted, it should help address many of the deficiencies in compliance and enforcement that witnesses pointed out.

7.3 A policy should be adopted and communicated stating that, if a regulated company is certified to show that it is a total quality management company meeting ISO quality management standards, inspection and monitoring by government officials will be decreased so long as the regulated company provides

proof of periodic audits verifying that the quality system is in place and is operating.

The ISO 9000 standards are used in all European countries. In many instances, Canadian and United States companies wishing to export to European countries have to adopt these practices. These standards are popular among major procurers (e.g. the federal Department of Supply and Services) because such standards substantially reduce the costs of checking purchases and of returning defective goods. The end result is that more and more Canadian firms are becoming registered as meeting an ISO 9000 standard.

While registration to one of the ISO 9000 series quality management system standards cannot replace all regulation relating to product, process, or service requirements, there are many instances where registration could provide a cost-effective basis for ensuring firms meet relevant specific regulatory requirements[6].

The attraction is clear. If a firm were already registered to ISO standards, as growing numbers are, both the compliance costs of regulatees and the enforcement costs of regulators might be able to be reduced.

In rough terms, here is how it would work. A third party (in Canada, an organization that is accredited by the Standards Council of Canada to perform ISO 9000 registrations) audits the documented performance of the firm's internal control system in meeting its stated quality objectives. In many instances, regulators could build monitoring and enforcement functions around the control and audit systems required for ISO purposes. By working directly with the regulated firms and accredited registration organizations, regulators may be able to ensure that the firm's quality objectives and the registration organization's audit criteria adequately represented adherence to relevant specific regulatory requirements. Government monitoring would be reduced, where the system was working well, to a periodic audit of performance. Scarce enforcement resources could be focused more clearly on problem areas, and on firms that do not meet ISO quality management system standards.

In some instances a cost-effective approach may be to require that firms become registered to quality management system standards as part of regulatory requirements. The Treasury Board Secretariat will investigate, along with Justice and other departments, circumstances where this might be desirable.

The TQM approach of focusing on the adequacy of the internal control processes of regulated firms, instead of on outcomes, may be prove to be cost-effective strategy for regulators in many circumstances.

The Government will, therefore, ask departments to consider:

- quality management system standards when developing and implementing compliance and enforcement strategies;

- the use of third-party registration as an element of their regulatory framework, as well as third-party product certification;

- requiring regulatees to set up internal control and audit mechanisms to ensure compliance with regulatory requirements; and

- where appropriate, requiring regulatees to become registered to the ISO 9000 series.

Since such initiatives may require regulatory or even statutory changes, TBS will work with the Department of Justice to develop "model" provisions for statutes and regulations that could be used. Moreover, they will work with line departments and agencies to determine where it would be appropriate to change current programs. In determining whether to extend self-regulation or self-certification techniques, or to modify enforcement practices to treat TQM companies differently, the Government will take care to ensure that its enforcement responsibilities are discharged effectively.

7.4 The regulated parties be allowed options to prove conformance to regulations, including the options of:

- **submitting their products to testing by an independent certified laboratory or consulting technicians able to determine non-conformity with standards and recommend improvements; and**

- **declaring conformity and demonstrating conformance in reports after testing and certifying their products themselves (that is, self-certification) where the degree of hazard presented by the product is minimal and the company is certified as having met service standards stated in recommendation 7.3).**

To encourage the use of private sector certification and testing (especially the accredited organizations in the NSS), or self-certification, consideration should be given to charging for public sector inspection and monitoring this as a cost of doing business.

The Government is committed to searching for the most cost-effective way to pursue public-interest goals, particularly when Canadians' health, safety or environment will improve as a result. In this regard, the committee's recommendations are very positive.

Where it is possible (e.g. where there are certified testing laboratories and the risk of fraud is minimal), departments and agencies should seriously consider the strategies set out in the recommendation. Clearly the bottom-line is to maintain high standards of consumer and environmental protection.

With respect to the recommendation that departments and agencies should

be charging for public sector inspection and monitoring, the Government agrees this should be an important feature of many regulatory programs, whether in the economic or health-safety-environment area. But the decision on cost recovery will have to be taken on a case-by-case basis because of the complexity and diversity of situations facing regulated industries. The Treasury Board Secretariat will remind departments and agencies that where they are not now on full cost recovery, they must consider charging fees.

7.5 Treasury Board should study the feasibility and practicality of establishing both:

- **a rapid, inexpensive and informal mechanism to deal with complaints from regulatees. It would complement existing means of resolving complaints by providing regulatees with a body independent of the regulator to which they could bring unresolved concerns. The regulatee, in initiating its complaint, should include evidence that an unsuccessful attempt has been made to resolve the disagreement with the regulatory department or agency. The appeal procedure could be designed to be similar to the one existing in the National Standards System or the regulatory complaints settlement and process outlined in Appendix V;**
- **a special advocacy to assist small business in simplifying compliance, and understanding procedures, and to guide them through the appeal process.**

The Government agrees that the proposal outlined in Appendix V of the *Report* to establish departmental regulatory complaints officers with independent regulatory arbitrators (when required) is appealing. In the Government's view, however, a key principle -- a principle consistent with the quality management systems discussed in recommendation 7.1 -- is that the ministers and departments concerned must retain the responsibility to solve problems.

TBS will review the proposal in cooperation with departments, agencies and the private sector. There may well be simpler ways to achieve the desired end. It should be noted that the FLEUR Secretariat is now working on guidelines for public complaints and redress mechanisms within the law enforcement function.

7.6 Wherever possible, stakeholders should be brought together at problem-definition stage of regulation development to reach a consensus on goals, priorities, and allocation of resources for achieving them. Consultation at this stage should be most effective.

The Government agrees. The Treasury Board Secretariat has been emphasizing the need for early

consultation in communications with departments and agencies. Moreover, the changes being introduced to the *Plan* should facilitate earlier consultation. This approach to consultation on the part of departments and agencies will allow them to follow the Total Quality Management principles discussed above for recommendation 7.1.

7.7 Those instructing the drafters of the regulations (both program people and legal advisors) should review legislated offenses and associated penalties for their adequacy and appropriateness in light of: the Charter, other available compliance instruments; the increased sentencing options which are now available, and information arising from public consultations. Increased emphasis should be put on the use of civil sanctions or monetary penalties, and civil penalty or administrative tribunal mechanisms, wherever possible.

The Government agrees that regulatory programs have relied too heavily on using criminal prosecution as the basis of their enforcement programs. The Government will systematically consider the use of non-criminal measures, such as administratively imposed monetary penalties, where that appears appropriate.

The *Contraventions Act*, which received Royal Assent in 1992, can be used for small penalties. Where it makes sense, the use of the *Act*'s ticketing procedures will be expanded.

7.8 Wherever possible, reliance should be placed on educational strategies to enhance regulatory compliance.

7.9 Regulations should be written in language understandable by those affected.

The Government agrees. Full understanding and acceptance by regulatees is by far the most important element of any compliance and enforcement strategy. Plain language in the law is an important ingredient in promoting understanding and has been a long-standing concern of the Department of Justice, which is committed to language that is user-friendly.

To address this issue, the Department of Justice in consultation with client departments and TBS will review current practices and procedures to determine what can continue to be done in this area.

7.10 The data base being developed by the Privy Council Office of the Department of Justice (PCO-J), and to be operational by December 1993, should be made affordably accessible to all interested parties.

The Government agrees to make the database of fully consolidated law -- the

On-line Access to Regulations and Statutes system (OARS) -- available to the public on a cost-recovered basis. As the consolidated version should never be more than two weeks out of date, it will prove valuable to regulators and regulatees alike.

7.11 Enforcement of regulations at the border should be strengthened to ensure that imports do not escape requirements imposed on domestic products.

The Government recognizes the importance of ensuring that our domestic businesses have a level playing field in international trade. It agrees, therefore, that regulating departments should continue to give this complex issue attention. Indeed, the need to cope with this problem figured prominently in Agriculture Canada's Regulatory Review.

7.12 The Government should redouble efforts to streamline and coordinate regulatory activities within the federal sector. Specifically, it should consider making Treasury Board responsible for:

- **identifying and assessing opportunities for the consolidation of regulations pertaining to common elements of federal responsibility;**
- **working with departments to achieve the same interpretation of federal regulations and standards across the country;**
- **ensuring federal departments develop administrative agreements to share enforcement so as to minimize imposition of unnecessary costs on regulatees; and**
- **ensuring that agreements with provinces to administer federal regulations lead to consistent interpretation across the country and minimizes duplication (e.g. of measurement and inspection).**

The Government welcomes the committee's observations on the need for streamlining and coordinating federal regulatory activity. The Government believes the solution must be found in the regulating departments and agencies. Departments are expected, as part of their Regulatory Reviews to identify and act upon such problems.

It is important to mention that the Government has a number of initiatives underway that should result in greater coordination. For instance, the FLEUR project that was identified earlier is responsible for bringing greater effectiveness, efficiency, uniformity and consistency to the federal law enforcement function through coordinating and eliminating duplication. The FLEUR Secretariat is working on developing a Best Practices framework for Memoranda of Understanding between federal

departments with overlapping or closely related responsibilities. The framework will be of use in any federal interdepartmental agreements involving enforcement resources, information or intelligence. A good example of such an agreement is the 1986 accord among deputy ministers in the food area (Health and Welfare, Agriculture, Consumer and Corporate Affairs, Fisheries and Oceans, Treasury Board) to ensure that program activities do not overlap in law or in the field, and to address consumer or industry concerns.

As well, the Department of Justice, under its federal regulatory compliance project, has undertaken studies to support a common approach to developing and implementing compliance and enforcement policies. The work of this group helps improve consistency across regulatory programs.

Overlap between different orders of Government

8.1 Identification of areas of overlap and incompatibility between federal and provincial regulations should be included among the main objectives of the departmental Regulatory Reviews that are currently underway.

The Government agrees. The Regulatory Policy that was approved in February 1992 requires departments, through cooperation with other governments, to minimize the regulatory burden on Canadians. Moreover, at its March 1993 meeting, the intergovernmental Committee of Ministers of Internal Trade agreed on behalf of Canadian governments to pursue comprehensive negotiations to, among other things, work towards harmonizing regulations and administrative procedures. We are hopeful that these negotiations will lead to a major reduction in the internal trade barriers that have lowered Canadian economic growth.

One step that would help minimize overlap and duplication would be to systematically modify existing statutes, where appropriate, to allow ministers to enter into equivalency and operational agreements with their provincial and territorial counterparts. An example is Environment Canada which has been able to enter a number of general administrative and equivalency agreements with provinces.

8.2 The Online Access to Regulations and Statutes (OARS) system currently under development should be expanded to include information on regulations of all governments in Canada.

The Government will consider how provinces and territories could "buy into" the OARS system. The provinces and territories would have the responsibility of keeping their part of the system up-to-date, so they would have to contribute the major portion of the effort required to implement this recommendation. The Government has not yet discussed this with them. The Department of Justice will explore this further.

8.3 Government departments and regulatory agencies should be required to notify provincial governments of proposed regulatory initiatives and provide them with adequate opportunity for comment.

The Government agrees. The Regulatory Policy requires departments and agencies to consult all affected parties, which of course includes provincial and territorial governments. Moreover, departments and agencies are to take into account the programs of other governments in designing their own regulatory programs. It should be noted that provinces and territories already have guaranteed access through both *Canada Gazette* Part I, and the annual *Federal Regulatory Plan*.

8.4 The RIAS should include a statement concerning how the proposed regulation relates to provincial government intervention in the same or closely-related areas.

The Government agrees that the RIAS should contain such a statement, where applicable. However, it is noteworthy that problems can arise because of the application of provincial or territorial law to the same regulatees, but in quite distinct regulatory areas (e.g. provincial transportation safety versus federal animal health, or federal meat inspection versus provincial occupational safety requirements). Departments are expected to identify and address such issues.

8.5 The federal and provincial governments should adopt mutual recognition of product standards as a general principle of interprovincial trade.

The Government believes the ideal would be for all orders of government to work together in adopting national standards developed through the NSS. However, we agree mutual recognition is an expeditious way to eliminate unnecessary internal trade barriers. This issue will be raised with provinces during the comprehensive negotiations to be undertaken by the Committee of Ministers on Internal Trade.

Departmental Reviews

9.1 A review calendar should be established which would require each department to conduct an extensive policy and regulatory review, including extensive public consultation, every seven years. Moreover, the Committee further recommends that these efforts be coordinated so that every policy and regulation affecting each subject area be covered.

9.2 The departmental reviews should be undertaken under the authority of legislation, not just administrative practice, and that the departments report to Parliament as well as the Government.

Evaluation is certainly an important element in maintaining relevant and cost-effective regulatory programs. But the best way to achieve this is through a focus on continuous improvement and through introducing other TQM principles into day-to-day managing.

In the response to recommendation 4.9, TBS, OCG and other departments will undertake a number of initiatives. The Government believes this approach will prove to be more effective in ensuring that there is adequate review of regulatory programs.

APPENDIX A

COMPETITIVENESS AND THE DESIGN OF REGULATIONS

The following list of design principles should prove useful to regulators in the search for efficient, innovative, adaptive, and effective programs.

A. In pursuit of an efficient private sector

- Where feasible, regulatory programs should make use of market mechanisms to achieve their objectives.

- Regulatory requirements should be designed so that program objectives are pursued at minimum cost to the Government, regulated parties, and Canadian consumers. All costs should be taken into account, including direct compliance costs, inefficiencies in resource allocation, lost business opportunities, paper-burden, the reduced capacity to innovate and management time.

- Regulations should never offer to regulated firms a benefit that is not available to existing and potential suppliers of the same product or service. A firm's success should be due to its performance, not to regulations on which it comes to depend.

- Regulatory programs should not place unnecessary restrictions on the availability of factors of production (labour, primary and intermediate goods, business services). Unless the regulator can demonstrate the need convincingly, firms should not be prevented from changing their mix of factors to respond to market signals.

- Unnecessary controls on factor prices should be avoided. To the greatest extent possible, factor price distortions in comparison with competing world markets should be minimized.

- If market entry must be restricted, managed competition is preferable to monopoly. More than one firm should be granted entry.

- Price regulation, if required at all, should be restricted to markets that are monopolistic.

- Regulators should avoid substituting bureaucratic judgment for business judgment, except where there exists a manifest market failure and where the cost of government intervention is less than non-intervention.

B. In pursuit of an innovative private sector

- Regulations should not lock in obsolete technology.

Consequently, product standards (be they design-based or performance-based) in areas of rapid technological change should be avoided, if possible.

- The use of "good manufacturing practice standards" should be considered as an alternative to product standards. Under this regime, the focus is on how the product is designed, produced, and serviced, not on the technical details.

- Alternatively, regulatory approval systems can be used in place of product standards. The focus of these systems should be whether the introduction of the new product would improve upon current practice.

- For industries with fairly stable technology, product standards are a viable alternative to quality production standards. Standards should always be developed in close consultation with industry. The use of voluntary standards should be considered if they are created primarily to aid industry, i.e., in the absence of health and safety concerns.

- If product standards must be employed, they should focus on measurable performance and not on design. When performance standards are used, they should be reviewed frequently to ensure that they do not impede the introduction of better products.

- In the absence of social objectives that require Government action, producers, and not government, should be responsible for the quality of their products.

- To allow for flexibility and quick responses to changing conditions, departments should seek legislative authority for administrative discretion. Legislation should not prevent the quick development of regulatory responses to recognized problems or opportunities.

- Regulatory standards equivalent to those of Canada's major trading partners is the most risk averse approach to promoting competitiveness. This approach makes it easier for firms in Canada to produce for multiple markets, and decreases the time it takes to introduce new products wanted by Canadian consumers and businesses.

- Standards that are higher than what is typical in other countries may be desirable in some circumstances, since they may sometimes push industry to innovate, invest and position itself better for the future. However, this approach should only be used if there is a demonstrated reason why Government is better able to identify future needs. In most circumstances, firms are better positioned than Governments to anticipate changes in demand.

C. In pursuit of clarity

- World or North American product mandates can be obtained for Canada if investors believe that the country is a good place to do

business. For industry, this frequently means a predictable future without sudden shifts in the regulatory intentions or actions of Government. Government should not give up its right to develop regulations to respond to legitimate social problems, but it should regulate in a way that minimizes the uncertainty associated with private investment decisions.

- Consultation with industry should be used throughout the regulatory process, from the definition of the problem through to the development of the administrative details. Both direct and indirect compliance and enforcement costs can frequently be substantially reduced without harming the effectiveness of the regulatory program if Government works closely with industry.

- Realistic compliance and enforcement policies should be articulated that are clear to regulators, regulated parties, program beneficiaries and the Canadian public.

- For all regulatory programs, enforcement policy and practice should be consistent across the country and over time.

D. In pursuit of efficient and effective Government

- Departments should collaborate with other governments -- provinces and other countries -- beginning at an early stage in the regulatory process. Intergovernmental collaboration can make it easier and less expensive for regulated parties to comply by reducing overlap and duplication. It also allows innovative and effective approaches to regulation developed elsewhere to be identified. In addition, such collaboration can often assist the Government in identifying emerging technologies so that regulations that might inhibit their assimilation can be reviewed and possibly revised at an early stage.

- Regulators have an obligation to regulated parties, to program beneficiaries and to Canadian taxpayers to manage their programs in a cost-effective manner, where resources are focused where they offer the greatest benefit to Canadians. Regulators should themselves consider meeting the International Organization for Standardization (ISO) standard for quality management in service organizations.

APPENDIX B

CRITERIA THAT ARE CURRENTLY APPLIED FOR EXEMPTION FROM PRE-PUBLICATION

The following types of regulations may be exempted from the requirement to be prepublished in *Canada Gazette*:[7]

- omnibus regulations covering: housekeeping changes (e.g. typographical errors, inconsistency between English and French versions, renumbering); non-contentious regulatory responses to concerns of the Standing Joint Committee for the Scrutiny of Regulations; and spent regulations;
- regulations that deal solely with internal government management (e.g. Public Service Commission Exclusion Orders);
- regulations in response to emergencies (e.g. major risks to life or health);
- regulations where the costs of prepublication are likely to outweigh the benefits;
- enabling regulations that are not inherently regulatory in nature (e.g. immigration lists, remission orders, authorizing orders);
- amendments to regulations that give formal recognition to Budget measures already implemented (e.g. amendment to Income Tax Regulations);
- minor amendments to cost-recovery regulations (e.g. increases at or below the CPI);
- revocation of regulations that have not been enforced for a considerable period of time; and
- regulations that are economically or politically sensitive, where prepublication would result in demonstrable adverse effects or undermine the intent of the regulation (e.g. subsidy changes or interest rate changes).

APPENDIX C

CRITERIA FOR EXEMPTION FROM PUBLICATION IN THE *FEDERAL REGULATORY PLAN*

The following are the proposed criteria for allowing major regulations to be exempt from the requirement that they appear in the *Plan* before they are promulgated:

- regulations in response to emergencies (e.g. major risks to life, health or security);

- amendments to regulations that give formal recognition to Budget measures that have already been implemented (e.g. amendments to Income Tax Regulations) or to other legislation (e.g. those which essentially duplicate the basic statutory authority);

- enabling regulations not inherently regulatory in nature (e.g. immigration lists, remission orders affecting individuals, and authorizing orders);

- regulations that are economically or politically sensitive, where prepublication would result in demonstrable adverse effects or undermine the intent of the regulation (e.g. subsidy changes or interest rate changes); and

- regulations that have already received adequate and widespread publicity with sufficient time for affected parties to intervene (e.g. those which have been vetted by Parliament).

APPENDIX D

CATEGORIZATION OF REGULATIONS

Regulations should be classified according to their:

- o economic impact:
  - impact negligible;
  - present value of costs[8] less than $50 M; and
  - present value of costs greater than $50 M;
- o degree of acceptance:
  - are there significant policy concerns such as international trade, sustainable development, or fairness issues?
  - are there public acceptability questions due to particular social/regional/sectoral sensitivities?

The classification scheme adopted for purposes of the federal regulatory process will be:

1. **minor regulations (small/technical regulations)** include those with negligible impact (in general, those exempt from prepublication per Appendix B);

2. **intermediate regulations** include those with a present value of costs less than $50 M and a high degree of acceptance; and

3. **major regulations** include those with a present value of costs less than $50 M and a low degree of acceptance, or those with a present value of costs greater than $50 M.

APPENDIX E

INITIATIVES TO STREAMLINE THE REGULATORY PROCESS

To respond to the need for a more efficient process, the Government will make a number of other changes to the regulatory process that go beyond the committee's recommendations:

- over the coming few months, central agencies will greatly reduce "paper" requirements at the early stages in the formal approval process, moving to electronic mail;

- planning is also under way to have all regulations drafted and transmitted through the OARS system (On-line Access to Regulations and Statutes), starting no later than December 1994;

- TBS is clarifying the criteria for exemption from prepublication, and publicizing among departments the flexible arrangements that already exist;

- procedures for the *Canada Gazette* are being changed to make Parts I and II compatible. This will ease the paperburden on regulators and others;

- the Government is committing itself to pursuing total quality management principles in its regulatory programs. It will develop criteria that will be applied to the management of departmental consultation processes. Consideration will be given to relieving departments that meet such criteria from the need to prepublish regulations[9]; and

- the Department of Justice will work with client departments, especially the major regulators, to streamline the drafting and examination functions. The goal will be to eliminate duplication and reduce the time and effort required to prepare formal regulations. The most effective modality will depend on departmental needs and capabilities.

1. Prohibition refers to possible penalties such as revoking a licence or ministerial or court orders to cease and desist. The effect is to totally prevent the regulatee from violating the regulatory requirements.

2. Prosperity Steering Group, *Inventing our Future: an Action Plan for Canada's Prosperity*, October 1992, Ottawa.

3. The business competitiveness test is consistent with, but goes beyond, the test developed by the Agri-Food Competitiveness Council. The latter test was used successfully in Agriculture Canada's regulatory review. Council members participated in developing the expanded version.

4. This covers a wide range of areas such as electromagnetic noise pollution of the radio spectrum to effluent control.

5. The Federal Law Enforcement Under Review (FLEUR) Secretariat is headquartered in the Ministry of the Solicitor General and is funded through contributions from departments and agencies that have enforcement responsibilities.

6. ISO 9002 is the relevant standard for organizations making products while ISO 9001 adds the designing phase and servicing. Which ISO quality system standard is appropriate will depend on the regulatory program and what business the company is in.

7. For lengthy regulations, departments may now prepublish the RIAS only and make the regulations available through other distribution systems. To allow for the distribution of regulations to interested parties, the period between prepublication and the submission for final approval should be extended.

8. Present value of costs to any group in society. For instance, a regulation transferring resources from some individuals to others would be classified according to the aggregate cost to those bearing the costs.

9. Any changes in prepublication would be done only if it could be demonstrated that openness and transparency, which are of paramount concern to the government, would be enhanced. Statutory and international obligations could not be affected.