file President's
Interagency
Council on
Women

IACW- HHS Memos

# United States Department of State
## Office of the Legal Adviser

**FACSIMILE COVER SHEET**

**DATE:** November 22, 1995
**PAGES TRANSMITTED: 7**

***TRANSMITTED TO:***

***NAME:*** Steve Neuwirth
***ORGANIZATION:*** White House Counsel's Office

***FAX NUMBER:*** 202-456-1647
***TELEPHONE:*** 202-456-6229

***TRANSMITTED FROM:***

| | | |
|---|---|---|
| Richard Lahne | Fax Number: | (202) 647-6794 |
| Department of State | Telephone: | (202) 647-5154 |
| L/LM - Room 5425, M.S. | | |

***COMMENTS:***

Attached for your comments is the proposed memorandum on the Interagency Women's Council.

MEMORANDUM

TO: M/WHL - Ms. Cousin

FROM: L - James H. Thessin

SUBJECT: Interagency Women's Council

This responds to your request for our views on whether five State Department persons may be be provided to work with the Interagency Women's Council.

Facts

We understand that the Interagency Women's Council will coordinate implementation of the Platform for Action adopted at Beijing, including the U.S. commitments announced at the Conference. The Council will also develop related initiatives to further women's progress and engage in outreach and public education to support the successful implementation of the Conference agreements. The Council will be located in offices in the New Executive Office Building (NEOB). It will be Chaired by Donna Shalala, whose agency, Health and Human Services (HHS), will provide funding, professional staff support and administrative support. The First Lady will serve as Honorary Chair.

In addition to Secretary Shalala's involvement, HHS will make available several high-level professionals to support the work of the Council. As the Council over time increasingly turns its focus to domestic implementation, HHS will add people to the team, including a contract employee who will coordinate speaking and other public events. Other agencies, such as Justice and Labor, are also designating personnel to work with the council as "agency representatives."

The Department is being asked to make available five Department of State persons to work with the Council as "agency representatives," performing State Department work at the Council headquarters in the NEOB. Two of these persons (Kathleen Hendrix and Theresa Loar) will work on follow-up basically full-time for fiscal year 1996; two (Marjorie Margolies Mezvinsky and Lycia Sibilla) will work only from October 1, 1995 to December 31, 1995; and one (Jeffrey Meer) will work full-time from October 1, 1995 to December 31, 1995 and part-time thereafter. In addition, a sixth person, Gracia

Hillman, will work on implementation of international issues here in the Department, and will attend meetings of the Council, as appropriate.

We understand that the Women's Council will coordinate activities implementing the Beijing Conference in five major categories:

(1) Working women -- the Department of Labor will be the lead agency on job security, work and family responsibilities, and valuing of women's work;

(2) Domestic violence -- Justice will be the lead agency with regard to programs to increase awareness and address the problem of domestic violence;

(3) Women and microenterprise -- the Treasury Department will announce an initiative and USAID will continue an existing program;

(4) Health -- the Department of Health and Human Services will take action on a range of problems of concern to women through the life cycle;

(5) International development -- AID is planning for two mutually-reinforcing initiatives concerning women's political participation and legal rights.

The work of the Interagency Council will include a program of public speaking designed for these purposes. In addition to implementation of programs in each of these categories, the United States has committed, as part of the Beijing Platform documents, to inform and educate the American public concerning the Conference. The Department has also been deluged with requests for persons to speak about the Conference.

Legal Issues

Two legal issues are raised by this request. The first is whether State Department employees may perform the requested functions for the Council under applicable principles of federal appropriations law. The second is whether participation of State personnel in the Interagency Council's proposed program of public outreach is consistent with restrictions on "publicity and propaganda" and the Department's political activities restrictions.

Federal Appropriations Law Issues. The Department has been asked to have the six Departmental employees perform State Department work for the Council as "agency representatives."

Under principles of federal appropriations law, agencies may spend appropriated funds only for the purposes for which those funds have been appropriated, 31 U.S.C. § 1301(a). Federal appropriations law also prevents augmentation of agency appropriations unless authorized by law, II Principles of Federal Appropriations Law 6-103. While the GAO has held that, absent statutory authority, nonreimbursable interagency details generally are improper as a violation of the Anti-Deficiency Act for the sending agency and an augmentation of appropriations for the receiving agency, see Letter to Mr. Rensbarger, Inspector General, Library of Congress, B-247348 (June 22, 1992), it has held that employees of one agency may work at another consistent with federal appropriations principles in limited circumstances. One of these is where the work performed by the employees involves matters similar or related to matters ordinarily handled by the loaning agency and where the work will aid the loaning agency in accomplishing a purpose for which its appropriations are provided, see 64 Comp. Gen. 370, 380.

To ensure that the proposed arrangement is consistent with applicable appropriations law, the work handled by the State employees on the Interagency Women's Council must be work that would ordinarily be done by the Department, i.e., work that will aid the Department in accomplishing a purpose for which its appropriations are provided. As the above description indicates, the Council is designed to coordinate the implementation of the Platform for Action adopted at Beijing. Some of the specific items on this agenda are international in scope; others are essentially domestic and will be handled by other agencies charged with domestic programs (e.g., Labor, HHS). However, ensuring implementation of the Platform for Action is a valid foreign policy goal. Although the Platform is not a legally binding document, the United States Government joined consensus and expressed its intention to implement the document and follow-up on the Conference. As the United Nations, through the Commission on the Status of Women, the Economic and Social Council (ECOSOC) and the General Assembly, continue to review and assess the progress made since the Beijing Conference, the Department of State will have the responsibility of reporting to the UN on progress in the United States.

Moreover, there is precedent for the Department to provide significant staff resources for implementation of the arrangements agreed at such international conferences. After the 1975 World Conference on Women, President Ford appointed a National Commission on the Observance of International Women's Year and set up an Interagency Task force, with two representatives of each agency, to prepare for and implement the plans. The Department designated the presiding officer of the Task Force and the Commission functioned under its auspices. The coordination role the Department's personnel are asked to perform to initiate the implementation process in this case is also similar to the coordinating role played by the Department in putting together the United States position prior to the Beijing Conference.

In view of the above, we believe it would appropriate for the State Department employees at the Council to initiate the process of coordinating and implementing the commitments made in Platform of Action -- a process which will later shift more to the action of other agencies. It is also appropriate for State employees to take charge of cooperation and coordination with other governments on the outcome of the Conference, and to assist with specific issues that must be implemented in the international sphere. Finally, it is appropriate for State Department personnel to participate in public education and outreach activities designed to inform and educate the American public about the Conference and the Platform of Action, to the extent that such public outreach furthers the foreign policy goal of implementation of the Platform (see further discussion below).

We do not believe, however, that State Department personnel should handle implementation of essentially domestic elements of the Platform. Although State personnel may be involved in overall coordination, which may include domestic issues, they should not work on the specific programs undertaken to implement the Platform in the domestic arena. We understand that State's involvement will decrease over time as the focus of the Council turns more heavily to the types of domestic programs that will be handled by other agencies. ?

Finally, federal law prohibits interagency financing of boards, commissions, councils, committees, or similar groups which do not have a prior and specific statutory approval to receive financial support from more than one agency or instrumentality, P.L. 103-329, §613. On the other hand, appropriations of an executive agency may be used to provide staff resources for participation in an interagency group as agency representatives, see 31 U.S.C. § 1346; GAO Report on Schedule C and Other Details to the Executive Office of the President, B-249063, at p. 14 (November 6, 1992). In this case, the Interagency Council is being funded by HHS, which is also chairing the Council. HHS has a strong Departmental interest in implementation of many of the programs in the Platform, is providing substantial staff resources to the Council and will provide increased staff resources as the focus of implementation turns more toward domestic programs. In view of the Department's separate interest in ensuring, from an international standpoint, that the commitments made at Beijing are properly interpreted and translated into domestic action, we believe the Department may, consistent with the purposes for which its appropriations are provided, contribute staff resources for overall coordination of the Council's activities, with its most substantial involvement in the beginning months of the Council's work.

Publicity and Propaganda. The other legal issue arises from the restrictions on use of appropriated funds for publicity and propaganda. The Department's appropriations act each year contains a prohibition on use of appropriated funds for "publicity and propaganda purposes not authorized by the Congress," see § 601, P.L. 103-317 (FY 95) (applicable to current expenditures under the provisions of the Continuing Resolution). A similar provision exists in permanent law, see § 109, Foreign Relations Authorization Act, Fiscal Years 1988-89, P.L. 100-204. The GAO has held that such language prohibits the use of federal funds for two distinct types of publicity and propaganda activities, 66 Comp. Gen. 707 (September 30, 1987). First, it prohibits "self-aggrandizement" activities on the part of a federal agency. Second, it prohibits covert propaganda activities.

The GAO also suggests that, although every agency has a legitimate interest in informing the public about its programs and activities, how far an agency can go depends upon the breadth of the agency's statutory authority, I Principles of Federal Appropriations Law, 4-162, 185 (1991). Because the Department has no explicit authority for public affairs functions, the proposal to do public outreach must be reviewed carefully.

Although the Department has a longstanding practice of distributing information to the public, providing regular press briefings and undertaking public speaking engagements, such strategies are normally part of and incidental to the carrying out of foreign policy, rather than programs exclusively focussed on public outreach. Thus, while public outreach is appropriate as part of the implementation of the Platform, any outreach program is most defensible as part of and necessary to the implementation program, rather than as a program solely designed for public outreach. Such a program must be structured of course to avoid questions concerning "self-aggrandizement" and covert information. We therefore suggest that the participation of the State personnel in any public outreach program developed for the Council be presented to and cleared with the Public Affairs Bureau (PA) in the Department to make certain that it is structured appropriately for a Department activity. Each speaking engagement or event should also be cleared with PA.

Federal criminal law, 18 U.S.C. § 1913, and federal appropriations law, see e.g., § 109, P.L. 100-204, also prohibits use of appropriated funds for lobbying activities. This provision has been interpreted to apply to funds spent in grass roots lobbying efforts, where an attempt is made to induce members of the public to communicate with their representatives in Congress to persuade them either to support or oppose pending legislation. While we doubt that lobbying issues will arise, State personnel should be aware of these restrictions and should consult with L if questions arise.

Finally, State Department personnel are also subject to Department guidance and to the Hatch Act's restrictions on political activity, see, e.g., Department Notice, October 31, 1994. Under those restrictions, for example, employees may not engage in political activity while on duty. These restrictions also include knowing solicitation, acceptance or receipt of political contributions, including by allowing the employee's name to be listed on a fundraising invitation as a point of contact for the fundraiser or as part of a host committee for a fundraiser. When authorized, however, employees may debate or defend current Administration foreign policy in appropriate fora. Employees also may provide foreign policy briefings to candidates and political groups on a non-partisan basis. To ensure that questions are not raised under the political activity guidelines, public outreach activities should not be undertaken at political events, except as specifically authorized by PA and L.

Drafted: L/LM:MBWest
SELM 5223 11/95
Cleared: L:ETHICS:CKrass
L:JThessin
WHCounsel:SNeuwirth

THE WHITE HOUSE

WASHINGTON

October 3, 1995

MEMORANDUM FOR SECRETARY DONNA SHALALA
DEPARTMENT OF HEALTH AND HUMAN SERVICES

FROM: MELANNE VERVEER
DEPUTY ASSISTANT TO THE PRESIDENT AND
DEPUTY CHIEF OF STAFF TO THE FIRST LADY

RE: INTERAGENCY WOMEN'S COUNCIL

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On August 26, 1995, prior to the opening of the UN Fourth World Conference on Women, President Clinton announced the formation of an interagency "Women's Council." This inter-governmental body is charged with implementing the U.S. commitments announced at the Beijing Conference and with developing related initiatives to further women's progress. The President said:

> "The [Women's] Conference is going to talk about education and domestic violence and grass-roots economics, employment, health care, political participation. ...And we don't intend to walk away from it when it's over. I'm going to establish an interagency council on women to make sure that all the effort and the good ideas actually get implemented when we come back home."

Public education and outreach to organizations through briefings, conferences and mailings will also be a major undertaking of the Council.

The inter-departmental Council will be composed of officials from agencies, including the Department of Health and Human Services, who have been involved in the work of the Women's Conference.

The Council should commence its work as soon as possible. The Council will use office space either in the New Executive Office Building or in the Jackson Place offices of the White House Office on Women's Outreach and Initiatives.

As you may be aware, appropriations statutes require that administrative support and funding for any interagency initiative of this type be provided by only one agency. As we have previously discussed, we are seeking such administrative support and funding from Department of Health and Human Services. The attached draft budget represents a minimum budget -- we anticipate that printing and mailing costs, as well as costs for convenings, given the interest in the Conference, may exceed the budget.

Foundations, corporations and others who are interested in "bringing the work of the conference home" have indicated an interest in helping to financially support, as allowable, the work of the Council. To this end, we understand that the Department of Commerce would need to determine whether it has authority to accept such gifts, which could then be used to support Council activities.

Finally, if the Department of Health and Human Services can provide administrative support and funding, our Administrative and Council's Offices will need to work with appropriate HHS officials to handle necessary paperwork, contracts, etc.

ADMINISTRATIVELY SENSITIVE

DRAFT

**FY '96 - BUDGET ESTIMATE**
**INTERAGENCY GROUP ON WOMEN'S POLICY PLATFORM IMPLEMENTATION**

| | | |
|---|---|---|
| Travel of Persons (21.0) | $45,000 | |
| Subtotal | | $45,000 |
| Trans. of Things (22.0) | $200 | |
| Subtotal Trans. of Things | | $200 |
| Rent, Comm., Util. (23.0) | | |
| Rent to GSA (900 sq. ft) | $28,683 | |
| Phone System (Line costs; 6 lines) | $547 | |
| Phone Equipment Leases (5 phones) | $294 | |
| Non-contract phone services | $100 | |
| FTS and International Calls | $200 | |
| Postage | $110,000 | |
| Subtotal Rent, Comm, Util. | | $139,824 |
| Printing (24.0) | | |
| DPS (OEOB Print Shop) | $20,000 | |
| GPO | $25,000 | |
| Stationery | $2,000 | |
| Subtotal Printing | | $47,000 |
| Other Services (25.0) | | |
| Copier/FAX Maintenance | $2,160 | |
| Subtotal Other Services | | $2,160 |
| Supplies (26.0) | | |
| Office Supplies | $2,550 | |
| Subtotal Supplies | | $2,550 |
| Furn/Equipment (31.0) | | |
| FAX machine | $1,500 | |
| Copier Lease | $4,320 | |
| Note: PCs and printers would be provided by supporting agency. | | |
| | | $1,500 |
| TOTAL | $238,824 | $238,824 |

Melanne V.

**THE WHITE HOUSE**

WASHINGTON

October 11, 1995

MEMORANDUM FOR JODIE R. TORKELSON
ASSISTANT TO THE PRESIDENT
FOR MANAGEMENT AND ADMINISTRATION

FROM: ANDREA S. RUTLEDGE
DIRECTOR, ADMINISTRATIVE OFFICE

SUBJECT: Memorandum of Understanding with the Department of Health and Human Services for Support of the Interagency Women's Council

Attached for review and signature is a FAX copy of the Memorandum of Understanding (MOU) between the White House Office (WHO) and the Department of Health and Human Services for support of the Interagency Women's Council. A memorandum from Melanne Verveer to the Secretary of HHS describing the formation of the group and requesting financial support is attached as background. HHS has already signed the agreement.

Because this is a Presidential initiative, and the White House Office is likely to be the primary Executive Office of the President participant, the Council will be an reimbursable activity of the White House Office.

The terms and conditions of the MOU are similar to those used in previous agreements. The budget for FY 1996 is estimated at $239,000.

Recommendation: That you sign the MOU.

Approve ok JRT Disapprove ________ Date 10-16-95

Comments ________

Attachments

MEMORANDUM OF UNDERSTANDING

Between

THE WHITE HOUSE OFFICE

and

THE DEPARTMENT OF HEALTH AND HUMAN SERVICES

## I. BACKGROUND:

On August 26, 1995, the President announced formation of an interagency "Women's Council." This intergovernmental body is charged with implementing the United States' commitments announced at the Beijing conference and with developing related initiatives to further women's progress. Public education and outreach to organizations through briefings, conferences, and mailings will also be a major undertaking of the Council. This interdepartmental group is now referred to as the Women's Council (the Council).

The Department of Health and Human Services (HHS) will be actively involved in this interdepartmental effort and has a substantial stake in the success of the Council's work. HHS is solely responsible for funding the administrative-support of the group. The White House Office (WHO), Executive Office of the President, will provide administrative services to the group for HHS.

## II. AUTHORITY:

This agreement is entered into under the authority of 31 U.S.C; § 1346(b); § 601 of the Economy Act of 1932, as amended, 31 U.S.C. § 1535 and 1536; and the authorizing legislation of the two agencies.

## III. GOODS/SERVICES TO BE PERFORMED:

Under this interagency agreement, the WHO agrees to provide administrative support, financed by HHS to the Council. The cost of such support shall not exceed $239,000. HHS agrees to reimburse the WHO for its expenditures for providing such support. Administrative services include but are not limited to: requisitioning of goods and services, funds management, and liaison with other agencies in the Executive Office of the President.

HHS will be represented on the Council by the Secretary of the Department or such persons as she may designate.

## IV. PERIOD OF AGREEMENT:

This agreement commences October 1, 1995 and shall remain in effect until September 30, 1996, subject to the availability of funds. The paragraphs herein memorialize the understandings, terms, and agreements pursuant to which each involved organization shall act. This agreement may be modified or extended with the advance written consent of both parties.

## V. NOTICE:

All acquisitions made under this agreement shall comply with all applicable procurement law.

All capitalized equipment (equipment with a per item value in excess of $1,000 and a useful life exceeding one year), including computer hardware, telefax machines, and other equipment purchased for this project with HHS funds will be returned to HHS at the end of this agreement unless the parties enter into a follow-on agreement that provides otherwise.

No portion of these funds will be used to support publicity or propaganda activities prohibited by The Treasury, Postal Service, and General Government Appropriations Act, 1994, or subsequent legislation; by-the Anti-Lobbying Act, 18 U.S.C. § 1913; or by any other applicable law.

Funds may not be used for representation activities.

## VI. PROGRAM/TECHNICAL LIAISON OFFICERS:

FUNDING AGENCY
John J. Callahan
Department of Health & Human Services
200 Independence Avenue
Washington, DC 20201
(202) 690-6396

SERVICING AGENCY
Andrea S. Rutledge
White House Office
Room 1, OEOB
Washington, DC 20500
(202) 456-2500

## VII. FINANCIAL PROVISIONS:

At the beginning of FY 1996, the WHO will bill HHS for an advance of funds not to exceed $239,000 via the Online Payment and Collection System (OPAC). Such requests will cite the number of this agreement, appropriation symbol and other accounting identification codes.

Each quarter, the WHO will provide HHS with itemized charges to support the use of the advances. The total amount of expenditures and in-kind goods and services under this agreement shall not exceed $239,000. Upon submission of the end-of-year report of itemized charges under this agreement, the WHO will provide to HHS a final reconciliation of the advances to the actual costs. The WHO will then refund via OPAC any resulting outstanding balance.

The maximum reimbursement available under this agreement during the period of any applicable Continuing Resolution will be based on the same apportionment limits applicable to the General Departmental Management appropriation. Under the current CR, the reimbursement would be limited to 12 percent of the annual rate.

VIII. APPROVALS:

CUSTOMER AGENCY:

Department of Health & Human Services
200 Independence Avenue
Washington, DC 20201
(202) 690-6396
ALC: 75010099
Appropriation Symbol: 7560120
Common Account Number: 1990350

APPROVAL:

John J. Callahan 10/10/95
John J. Callahan Date
Assistant Secretary for
Management and Budget

SERVICING AGENCY:

The White House Office
Room 1, OEOB
Washington, DC 20500
(202) 256-2500
ALC: 11010001
Appropriations Symbol:1160110
Index Code: B115E

APPROVAL:

Andrea S. Rutledge 10/17/95
Andrea S. Rutledge Date

Jodie R. Torkelson 10-16-95
Jodie R. Torkelson Date

**FY 1996 FY 1996 -- Budget Estimate**
**Interagency Women's Council**

| | | |
|---|---|---|
| Travel of Persons (21.0) | $45,000 | |
| *Subtotal* | | *$45,000* |
| | | |
| Trans, of Things (22.0) | $200 | |
| *Subtotal, Trans. of Things* | | *$200* |
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| Non-contract phone services | $100 | |
| FTS and International Calls | $200 | |
| Postage | $110,000 | |
| *Subtotal, Rent, Comm, Util* | | *$139,825* |
| | | |
| Printing (24.0) | | |
| DPS (OEOB Print Shop) | $20,000 | |
| GPO | $25,000 | |
| Stationary | $2,000 | |
| *Subtotal, Printing* | | *$47,000* |
| | | |
| Other Services (25.0) | | |
| Copier/FAX Maintenance | $2,160 | |
| *Subtotal, Other Services* | | *$2,160* |
| | | |
| Supplies (26.0) | | |
| Office Supplies | $2,550 | |
| *Subtotal, Supplies* | | *$2,550* |
| | | |
| Furn/Equipment (31.0) | | |
| FAX machine | $1,500 | |
| Copier Lease | $4,320 | |
| NOTE: *PCs and printers would be provided by supporting agency.* | | |
| | | *$1,500* |
| | | |
| TOTAL | $238,235 | $238,235 |

**DEPARTMENT OF HEALTH & HUMAN SERVICES**

Office of the Secretary

Washington, D.C. 20201

OCT 12 1995

# NOTE TO ANDREA S. RUTLEDGE

Per our conversation, attached is the original of the Memorandum of Agreement that was faxed to you on October 11th.

Please forward a copy when you have obtain all of the signatures.

If there are any questions, please call me on (202) 690-6345.

Joseph Cook

Attachment

1995 OCT 12 PM 3:14

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Washington, D.C. 20201

OCT 11 1995

MEMORANDUM

TO: Kevin Thurm
Chief of Staff

FROM: John J. Callahan
Assistant Secretary for
Management and Budget

John J. Callahan

SUBJECT: Memorandum of Agreement with the White House for Support to the Women's Council

Attached is the memorandum of agreement (MOA) to transfer $239,000 to the White House for administrative support to the Women's Council. With this agreement we are transferring $28,680, or 12% of the annual rate, pursuant to the terms and conditions of the Continuing Resolution. This MOA is essentially identical in its technical language to the MOA which was recently signed for support to the Community Empowerment Board. We have charged the GDM-wide overhead account that is centrally administered by ASMB on behalf of the Office of Women's Health. We will make adjustments in subsequent allotments to the Office of Women's Health upon resolution of annual appropriation amounts for FY 1996.

If you have any questions, please do not hesitate to call me.

Attachment

ADMINISTRATIVELY SENSITIVE

DRAFT

**FY '96 - BUDGET ESTIMATE**
**INTERAGENCY GROUP ON WOMEN'S POLICY PLATFORM IMPLEMENTATION**

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| Postage | $110,000 | |
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| Printing (24.0) | | |
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| Note: PCs and printers would be provided by supporting agency. | | |
| | | $1,500 |
| TOTAL | $238,824 | $238,824 |

DRAFT

Agency Representatives

"Individuals who, as a part of the regular responsibilities of their agency position are assigned to represent their employing agency as a member of an interagency task force, board, council or committee."

Rules:

Because agency representatives are not WHO or EOP employees and are permitted on the White House Complex to perform only limited roles, it is important that the following rules be followed:

1) The interagency group must be formally constituted. The "interagency task force, board, council or committee" must have some formal identity -- memorialized in an executive order, directive, memorandum of understanding, mission statement from an agency head or other higher official, or similar document.

2) The interagency group must be properly funded. Because of appropriations restrictions, interagency groups must generally be supported financially by only one agency. Although agencies may contribute the time of the agency representatives, they may not jointly contribute money or equipment to support the work of the group.

3) Agency representatives may not hold themselves out to be EOP employees. Agency representatives do not count for EOP personnel matters, and remain the employees of their home agencies for all purposes:

a) Supervision An agency representative shall continue to report to and be supervised by his or her home agency. An agency representative may also report to and supervise other members of the interagency group. Under no circumstances may an agency representative report to or supervise EOP employees who are not members of the interagency group.

b) Title An agency representatives may only use the following titles:

i) home agency title
ii) task force title
iii) "agency representative"

Under no circumstances may an agency representative be given a title that suggests that he or she is an EOP employee or staff member. Nor may an agency representative hold him or herself out to be an EOP employee.

DRAFT

c) Stationery Agency representatives shall not use EOP stationery for letters or memos prepared for their signature, unless the stationery is imprinted with the name of the interagency group or the representative's affiliation with the interagency group is otherwise prominently displayed. This also applies to business cards.

d) Passes Agency representatives shall be issued "OGA" passes -- blue or brown according to the access required.

As you may be aware, appropriations statutes require that administrative support and funding for any interagency initiative of this type be provided by only one agency. As we have previously discussed, we are seeking such administrative support and funding from the Department of Commerce. The attached draft budget represents a minimum budget -- we anticipate that printing and mailing costs, as well as costs for convenings, given the interest in the Conference, may exceed the budget.

Foundations, corporations and others who are interested in "bringing the work of the conference home" have indicated an interest in helping to financially support, as allowable, the work of the Council. To this end, we understand that the Department of Commerce would need to determine whether it has authority to accept such gifts, which could then be used to support Council activities.

Finally, if the Department of Commerce can provide administrative support and funding, our Administrative and Council's Offices will need to work with appropriate Commerce officials to handle necessary paperwork, contracts, etc.

**DEPARTMENT OF HEALTH & HUMAN SERVICES**

Office of the Secretary

Office of the General Counsel
Washington, D.C. 20201

# FACSIMILE TRANSMISSION

*TO:* Melanne Verveer
Sarah Kovner

*FAX NUMBER:* 456 - 6244

*FROM:* Nan D. Hunter
Deputy General Counsel

*Facsimile Phone number - 202-690-7998*

*Telephone Number - 202-690-7780*

*ADDRESS:* 700-E H.H. Humphrey Building
200 Independence Avenue, S.W.
Washington, D. C. 20201

*COMMENTS:*

*Total number of pages* 12

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Office of the General Counsel
Washington, D.C. 20201
(202) 690-7780
Fax: 690-7998

**MEMORANDUM**

To: Melanne Verveer
Sarah Kovner

From: Nan D. Hunter ndh

Date: 2 November 1995

Re: Gift authority - follow-up

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

Following are documents explaining more of the details related to the PHS gift authority.

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary
Office of the General Counsel

Public Health Division
Room 4A-53 Parklawn Bldg.
5600 Fishers Lane
Rockville, Maryland 20857
(301) 443-2644

October 30, 1995

NOTE TO NAN HUNTER
Deputy General Counsel

Re: Procedures for Making a Gift

We are responding to the follow-up questions which you sent by E-mail on October 26.

If potential donors express an interest in contributing money to support the work of the women's task force, there are no constraints on advising them how to effectuate their wish. Accordingly, they may be advised of the existence of the PHS Gift Fund as well as the manner in which they should describe the gift so as to assure its use for intended purposes. As we pointed out in our earlier Note, any donation made must be to support some health related activity of the task force (the PHS gift authority relates to carrying out the functions of the Public Health Service). Attached is a document dated May 18, 1987, which sets forth, among other things, the PHS procedures on gift administration. Notwithstanding the reorganization of OASH and revisions in delegations, we think the procedures contained in this document still pertain. Section VI sets out the PHS procedures for administering monetary gifts.

With respect to your second inquiry, funds donated and accepted under gift authority are not merged with appropriated funds, but the checks are deposited for collection and credited to a separate gift fund account in the U.S. Treasury where the funds remain available to be drawn down as needed by the agency official having the proper delegated authority. Section VI.c. contains the agency procedures for monitoring monetary gifts.

Joel M. Mangel

Joel M. Mangel

Attachment

DEPARTMENT OF HEALTH & HUMAN SERVICES Public Health Service

# Memorandum

Date MAY 18 1987

From Acting Director
Office of Resource Management, OM

Subject Establishment of the Office of the Assistant Secretary for Health's Policy and Procedures on Gift Administration

To Deputy Assistant Secretary for Health Operations and Director, Office of Management

The attached policy and procedures statement on gift administration was developed by the Internal Control Branch, DFM for your approval. The statement incorporates comments received from the Office of the General Counsel; Division of Fiscal Services, HRSA; Administrative Services Center, OM; Office of International Health; and the Division of Health Facilities Planning, ORM. The approved statement will be issued by my office as an OASH supplement to a new chapter on gift administration in the PHS Financial Management Manual.

Additionally, copies of the statement will be provided to each major OASH component and the components of the Office of Management.

John C West
John C. West

Attachment

Approved: Wayne B Tolleson Date: 5/18/87

Disapproved: ______________ Date: ________

Office of the Assistant Secretary for Health
Statement of Policy and Procedures for
Gift Administration

I. Scope and Applicability

This issuance states the policy of the Office of the Assistant Secretary for Health (OASH) for the administration of gifts. The acceptance, acknowledgement, and administration of monetary and nonmonetary gifts, including bequests, devises of real property, and legacies are incorporated. This policy is intended to be all inclusive and incorporate all rules and regulations prescribed that are applicable to OASH gifts. Under no circumstances will there be any deviation from the requirements of this policy without written approval from the Director, Office of Management.

II. Authority and Regulations

1. Section 2301 of the Public Health Service Act, as amended (42 U.S.C. 300aa).

2. U.S. Treasury Fiscal Requirements Manual Part 5, Chapter 4000 - Making Deposits.

3. December 9, 1982 memorandum, Delegation of Authority from the Secretary of Health and Human Services to the Assistant Secretary for Health (43 F.R. 9067 (3/3/83)).

4. July 6, 1983 memorandum, Delegation of Authority from the Assistant Secretary for Health to the Director, Office of Management, OASH.

III. Policy

It is the policy of OASH to accept all gifts subject to any limitations imposed by law, and by the Secretary or delegates. Gifts may not be accepted if conditions imposed by the donor are illegal, contrary to public policy, unreasonable to administer or are contrary to generally accepted public standards. Offerors should be advised that the acceptance of a gift does not constitute an endorsement. Gifts will not be accepted where they are given for the purpose of securing an endorsement.

An employee may not request or encourage the offer of a gift. An employee shall not solicit anything of monetary value.

1. Monetary Gifts

a. It is the policy of OASH to request the Secretary of the Treasury to invest monetary gift funds, excess to current OASH needs, in interest bearing obligations as provided for in Section 2301(b) and (c) of the PHS Act. At least annually, the OASH Financial Management Branch will determine any amount of gift funds excess to the immediate needs of the OASH program plans and will report to the Director, Office of Management with a recommendation to invest the excess funds.

b. It is the policy of OASH to accept monetary gifts in lieu of gifts in kind when feasible. Thus, where a bequest or legacy is of all or a portion of the general estate, OASH shall request the Executor to liquidate the assets and make distribution in cash, as authorized under the applicable probate or other law.

2. Nonmonetary Gifts

The Assistant Secretary for Health has authority to accept gifts of real property (land, buildings, mineral rights, crops, etc.), except for real property subject to a reverter clause. Acceptance of property subject to a reverter clause is reserved to the Secretary.

a. Except as provided in paragraph 1.b. above, it is the policy of OASH to accept nonmonetary gifts where they can be of use to OASH, except that offers of property shall not be accepted if the total costs associated with acceptance are expected to exceed the cost of purchasing a similar item and the cost of normal care and maintenance.

b. The PHS Act, Section 2301(d), authorizes the lease or hire of property received as gifts. Any income from lease or hire is to be transferred immediately upon receipt to the HRSA Division of Fiscal Services for deposit. These funds will be available for expenditure by OASH and its components toward their operation and the performance of any of their functions which are consistent with the purposes of the gift, including maintenance, preservation, repair and insurance of the property, as authorized by Section 2301(b) and (d) of the PHS Act. Similarly, proceeds from the liquidation of property under the PHS Act, Section 2301(d), are to be transferred immediately to the HRSA Division of Fiscal Services for deposit in OASH accounts with Treasury.

c. Valuation of gifts is the responsibility of the donor. OASH will accept the valuation placed on the gift by a donor unless in the judgement of the Director, Office of Management, the v. uation is clearly unreasonable. Although the determination of tax consequences is a matter between the donor and the IRS, it is noted that under Sections 170, 2055 and 2522 of the Internal Revenue Code of 1986, as amended, donations to the United States for exclusively public purposes are deductible for income, gift, and estate tax purposes.

d. Responsibility for the administration of nonmonetary gifts rests with the OASH Division of Property Management; therefore, that office must be advised of the proposed acceptance of all nonmonetary gifts, except for real property outside the Washington, D.C. area.

IV. Responsibilities

1. The Secretary of Health and Human Services

The Secretary of Health and Human Services reserves authority to accept gifts of real property subject to a reverter clause.

2. The Assistant Secretary for Health

The Assistant Secretary for Health has authority to accept gifts of real property not subject to a reverter clause.

3. Director, Office of Management, OASH

The Director, Office of Management, OASH has authority, except for real property, to accept all other gifts within OASH. The determination as to whether a gift is conditional or unconditional shall be made by the Director, Office of Management, OASH. The Director, Office of Management, OASH must approve the proposed utilization of unconditional gift funds.

4. OASH Financial Management Branch

The OASH Financial Management Branch is responsible for development of the OASH gift fund plan, arranging required CAN's and issuing allotments/allowances related to the gift funds, and general administration of gift funds on behalf of the Director, Office of Management.

5. OASH General Counsel

The Chief Counsel, Public Health Service, is responsible for providing advice and assistance in complying with the legal requirements necessary to accept gifts.

6. OASH Division of Health Facilities Planning

The OASH Division of Health Facilities Planning is responsible for developing procedures for the acceptance of real property donated to OASH both within and outside t Washington, D.C. area.

7. OASH Division of Property Management

The OASH Division of Property Management has responsibility for the administration of nonmonetary gifts except for real property outside the Washington, D.C. area. Its activities are to be coordinated with those of the OASH Financial Management Branch.

8. HRSA Division of Fiscal Services

   a. The HRSA Division of Fiscal Services will authorize and administer investments requested by OASH through the Treasury Department.

   b. The HRSA Debt Management Branch is responsible for depositing funds to the proper gift fund accounts.

   c. The HRSA Reports & Accounts Control Branch will prepare monthly reports on the status of the gift fund accounts and submit them to the OASH Financial Management Branch.

   d. The HRSA Accounting and Finance Branch will be responsible for making changes in the status of property reported to them by assuring that general ledger accounts reflect the current value of property.

V. Limitations

1. Gifts of Real Property - Under the Delegations of Authority under Section 2301 of the PHS Act, acceptance of gifts of real property subject to a reverter clause is reserved to the Secretary. Authority to accept all other gifts of real property is delegated to the Assistant Secretary for Health.

2. Conditional Gifts - A conditional gift is one in which the donor imposes some condition or restriction upon the donee in the use of the gift or as a condition to be met in order to obtain the gift. In the case of a conditional monetary gift the donor must agree in writing to the condition that, upon completion of the donor's conditions of the gift, any excess funds shall be credited to the OASH unconditional gift fund and may be expended for any OASH function.

3. Unconditional Gifts - An unconditional gift of funds is a gift given by a donor solely for the benefit of the Office of the Assistant Secretary for Health or for carrying out any of its functions, with no further specifications by the donor as to the purpose of the gift or the manner of its use.

4. Gifts That May Not be Accepted - The Secretary's Delegation of Authority provides: "Offers of property shall not be accepted if the total costs associated with acceptance are expected to exceed the cost of purchasing a similar item and the cost of normal care and maintenance."

   Section 2301 of the PHS Act stipulates that gifts containing conditions that would require expenditures for activities not approved by an Act of Congress cannot be accepted, unless the activity can be totally funded from the gift or income from the gift.

5. Investment of Gifts - Gift funds which are invested and income from these investments retain the same limitations as the original gifts. Upon liquidation of investments the monies must be returned to the gift fund to be used for the benefit of OASH within the limits and restrictions of the original gift or gifts.

6. Expenditure of Gift Funds - Gift funds are available for expenditure in the same manner as regularly appropriated funds and are subject to the same controls as other funds. Gift funds are "no year" monies, and as such are available until expended. Gift funds may be expended for any authorized purpose in the performance of OASH functions, subject to any restrictions or limitations imposed by donors. Gift fund expenditures are subject to the same examination and audit as is provided for appropriated funds.

VI. Procedures

1. Monetary Gifts

a. Except in extraordinary circumstances, employees who receive gifts will forward them for deposit or safekeeping to the HRSA Division of Fiscal Services that same work day. The HRSA Division of Fiscal Services will deposit the gifts in a suspense account pending determination of the acceptability. It is not necessary to determine at this point either (a) that the gift is to be accepted or rejected, or (b) that the gift is "conditional" or "unconditional." The monetary gift, normally a check, is to be accompanied by a brief memorandum of transmittal from the receiving employee and a copy of the letter accompanying the gift.

b. Concurrently with action in paragraph VI. 1.a., the employee receiving the gift will forward immediately to the Director, Office of Management and the OASH Financial Management Branch, notification of receipt of the gift and recommend either acceptance or rejection of the gift. Also, the receiving employee should acknowledge receipt of the gift, thank the offeror and advise that the offer will have to be considered and a determination made as to acceptance by the Assistant Secretary for Health or the Director, Office of Management.

If the gift is accepted, the HRSA Division of Fiscal Services is to be directed to deposit the money to the appropriate gift account, either "conditional" or "unconditional." The letter of acceptance should say only that the gift is being deposited to the "OASH Gift Fund Account" and state the purpose for which the funds will be utilized. The acceptance or rejection letter will be prepared by the OASH Financial Management Branch for the Director, Office of Management or the Assistant Secretary for Health, as appropriate. The Office of the Chief Counsel, Public Health Service, is available to provide advice on acceptance or rejection letters.

If the gift is not accepted or the donor refuses to accept OASH terms, any undeposited checks tendered by the donor shall be promptly returned to the donor. If the donor's check has already been deposited, the HRSA Divsion of Fiscal Services is to be directed to draw a refund check from the Treasury to the donor.

c. Fund Control - Gift funds will be controlled by the allotment /allowance procedure used for appropriated funds. The HRSA Divison of Fiscal Services will advise the OASH Financial Management Branch of the amount of funds available for the next quarter. The OASH Financial Management Branch will issue an Advice of Allotment/Allowance reflecting the current availability of each gift for obligation of the funds.

Gifts must be used for the purpose for which they were given and accepted. To insure that this is done, the allowance will serve as the control. Conditional gifts will have an allowance established for each set of unique conditions. Unconditional gifts will be controlled at the allowance level. The OASH Financial Management Branch will include accepted gift amounts in the budget plan and issue allotments/allowances for the agreed purposes of the gifts. The OASH Financial Management Branch must obtain approval of the planned uses of funds from the Director, Office of Management, OASH.

d. Annual Plan - The OASH Financial Management Branch will prepare a consolidated annual plan for the use of gift fund monies. The annual plan must be approved by the Director, Office of Management.

e. Investment of Gift Fund Monies - The OASH Financial Management Branch will determine, at least annually, if there are excess funds which will not be used within a twelve-month period, usually the fiscal year. If it is determined that there are excess funds, the OASH Financial Management Branch will prepare a memorandum from the Director, Office of Management, OASH to the Director, Division of Fiscal Services, Health Resources and Services Administration, requesting investment of excess funds. The Director's memorandum must include the amount of funds to be invested, the source of funds, the specific Treasury bill, note or bond to be purchased and the date of purchase. The signed memorandum will be the authorization for the HRSA Division of Fiscal Services to invest the excess gift funds. The HRSA Division of Fiscal Services will advise the OASH Financial Management Branch when the transaction has been completed.

2. Nonmonetary Gifts

a. Offers of nonmonetary gifts should be acknowledged by the receiving employee within 2 days. The offeror should be thanked and advised that the offer will have to be considered and that the offeror will be advised later by the Director, Office of Management or the Assistant Secretary for Health, as appropriate.

b. Concurrently with action in paragraph VI. 2.a., the receiving employee will forward to the Director, Office of Management and the OASH Financial Management Branch, notification of the offer of the nonmonetary gift. Additionally, if the nonmonetary gift involves real property the Division of Health Facilities Planning in the Office of Resource Management, OM will be notified.

c. Real Property - Real property will be considered in accordance with procedures developed by the Division of Health Facilities Planning.

d. Personal Property

1. The OASH Financial Management Branch will consult with the OASH Division of Property Management, to see that general property management requirements are met. The OASH Division of Property Management will evaluate the offer from a property management perspective and assess compliance with the conditions in the PHS Delegation of Authority which provides that "[o]ffers of property shall not be accepted if the total costs associated with acceptance are expected to exceed the cost of purchasing a similar item and the cost of normal care and maintenance."

(b)(3)

2. Property accepted as a gift will be included in the OASH property records. The same degree of custody and control will be exercised over this property as is required of all Government-owned property. The acceptance or rejection letter will be prepared by the OASH Division of Property Management for the Director, Office of Management or the Assistant Secretary for Health, as appropriate. The OASH Financial Management Branch should clear the proposed letter. The Office of the Chief Counsel, Public Health Service, is available to provide advice on acceptance or rejection letters.

3. As with other forms of personal property, it will be the responsibility of the OASH Division of Property Management to notify the HRSA Division of Fiscal Services of changes in the status of property that should be reflected in the General Ledger.

VII. Wills and Trusts

Copies of wills and trusts naming OASH as beneficiary and letters of transmittal will be forwarded to the Office of the Chief Counsel, PHS, and to the HRSA Division of Fiscal Services. The receiving employee will be responsible for acknowledging receipt of the will or trust within 2 days and informing the Director, Office of Management and the OASH Financial Management Branch. Since any interest OASH might receive may be contingent or subject to prior interests, or could be revoked during the life of the person making the bequest, no entry will be made in the accounts. Proceeds from either wills or trusts, either revocable or irrevocable, will not be entered in the accounts until realized.

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Office of the General Counsel
Washington, D.C. 20201

23 October 1995

**MEMORANDUM**

**TO:** Steve Neuwirth

**FROM:** Nan D. Hunter ndh
Deputy General Counsel

**SUBJECT:** Gift Authority

This is in response to your inquiry concerning the authority of the Department to accept gifts. Specifically, you are interested in the authority to accept contributions to support the work of the inter-agency task force on women's issues. The task force, which is a follow-up to the Beijing Conference, will be operated out of the PHS Office on Women's Health.

**GIFT AUTHORITY**

As a general rule, Federal agencies must operate within the limits of appropriated funds and they may not augment those appropriations with funds from other sources without specific statutory authority. Such statutory authority is most often in the form of authorization to accept gifts.

Pursuant to section 231 of the Public Health Service Act (42 USC 238), the Secretary is authorized to accept on behalf of the United States, conditional and unconditional gifts made "for the benefit of the Public Health Service or for the carrying out of any of its functions. Thus, gifts to the PHS for carrying out functions relating to women's health could be accepted and used by the PHS or the office charged with these functions. Donated funds may be used for any authorized function of PHS, including sponsoring conferences relating to health and travel to such conferences by conference participants.

With respect to the issue of accepting donations to carry out a PHS function, the principal constraint is the exercise of caution regarding accepting gifts from a (1) "prohibited source", i.e., an entity that does business or seeks to do business with any HHS agency or is regulated by such an agency 1/ or, (2)

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1/ While we are not legally precluded from doing so, it may not be prudent for HHS to accept a donation from, for example, a drug company or from a prospective grantee or contractor.

other entities whose goals or purposes may be antithetical to HHS or Administration policies, e.g. tobacco companies.

In addition to the statutory authorities to accept gifts, an agency will often supplement appropriated funds by coordinating its activities with activities of private entities interested in cooperating with the agency toward a common goal. Typically in these cooperative arrangements, the Federal agency provides the necessary expertise and the private partner provides, in addition to some expertise, the financial resources. The OGC Ethics Division has issued criteria for conducting these activities in a memorandum entitled "Co-Sponsorship Guidance," dated March 20, 1995.

**SOLICITATION**

On April 3, 1995, the Comptroller General issued a decision (a copy of which is attached), in response to an inquiry from our Ethics Division, declaring that the PHS gift acceptance statute authorizes NIH to accept grants from outside organizations and that NIH can use appropriated funds to apply for such grants. Under this decision, PHS staff would be able to apply for and accept grants from non-government sources to support the work of the task force.

However, it has been the position of the General Counsel that solicitation of gifts is prohibited unless the statutory gift authority provides explicitly for solicitation, as the PHS gift authority does not. I have attached an April 18, 1991 memorandum from the HHS General Counsel and an April 29, 1992 memorandum from the Special Counsel for Ethics which discuss this issue in some detail. In my view, the Comptroller General's decision should be read as excepting the grants application process from the policy against solicitation, but the anti-solicitation policy should continue with regard to individuals or entities outside of an already established grantmaking process. In other words, overtures to an individual for a donation should not occur; applying to a foundation which has established procedures for awarding grants would be permitted.

I would also note that there appears to be no disagreement that it would be entirely appropriate, in response to an expressed desire to support follow-up activities to the Beijing conference, to advise persons of the availability of the gift fund and of the procedures for effectuating gifts.

You have also asked whether others, outside the Department, may solicit gifts to the Department. The limits on solicitation discussed above have not been applied to solicitations from non-HHS employees unless it appears from the facts that the solicitation is being done at the behest of HHS officials and is therefore an improper avoidance of the general prohibition. I have requested that Jack Kress, the Special Counsel for Ethics, address the issue of whether additional considerations apply to employees of other Federal offices.

Attachments

cc: Harriet Rabb
Jack Kress
Sarah Kovner
Melanne Verveer

HW

Comptroller General
of the United States

Washington, D.C. 20548

# Decision

**Matter of:** Department of Health and Human Services - Public Health Service Gift Acceptance Statute as Authority for Application for Grant Funds

**File:** B-255474

**Date:** April 3, 1995

## DIGEST

Because the National Institutes of Health, pursuant to 42 U.S.C. § 300aaa(a), may accept grants as conditional gifts, it may use its appropriated funds to cover any cost incurred in applying for such grants.

## DECISION

The Department of Health and Human Services (HHS) has requested our opinion on whether, pursuant to the Public Health Service's (PHS) gift acceptance statute, 42 U.S.C. § 300aaa(a), the National Institutes of Health (NIH), a component of PHS, may use its appropriated funds to apply for grants from non-government sources. The grant funds would be used to support scientific research in furtherance of NIH's mission. For reasons set forth below, we conclude that NIH may use its appropriations to cover costs incurred in applying for grants.

HHS's request raises, in effect, two questions: (1) would NIH's acceptance of grant funds constitute an improper augmentation of its appropriations? and (2) if NIH may accept grant funds, may it use its appropriated funds to apply for grants?

As a general rule, an agency may not augment its appropriations from outside sources without specific statutory authority. 36 Comp. Gen. 268, 269 (1956). The PHS gift acceptance statute cited by HHS provides NIH the specific authority to supplement, or "augment", its appropriations with gifts. 42 U.S.C. § 300aaa(a). The PHS gift acceptance statute reads, in part, as follows:

> "The Secretary of Health and Human Services is authorized to accept on behalf of the United States gifts made unconditionally by will or otherwise for the benefit of the Service or for the carrying out of any of its functions. Conditional gifts may be so accepted if recommended by the Surgeon General, and the principal of and income from any such conditional gift shall be held, invested, reinvested, and used in accordance with its conditions, but no gift shall be accepted which is conditioned upon any expenditure not to be met therefrom or from the income thereof unless such expenditure has been approved by an Act of Congress."

Consequently, NIH may accept grant funds only if a grant constitutes a gift under the PHS gift acceptance statute. Although we have viewed grants in other contexts as sharing certain aspects of contractual undertakings, see, e.g., 42 Comp. Gen. 289 (1962), for purposes of the PHS statute, we think that grants will typically qualify a conditional gifts. In ordinary usage, "grant" means "a gift, usually for a particular purpose." Webster's New International Dictionary 989 (3d ed. 1966). See also Black's Law Dictionary 699 (6th ed. 1990) ("to bestow or confer . . . a gift"). So lon as the requirements the statute imposes on the acceptance of conditional gifts are otherwise met, and so long as the grant funds are used in furtherance of NIH's mission, we have no objection to NIH's acceptance of grants.

NIH appropriations may be used to apply for grants to further NIH's mission. Grants are often awarded competitively, with the grantor requiring potential grantees to apply for and justify their grant requests. If the Surgeon General determines that particular grants will facilitate the accomplishment of NIH's mission, NIH may consider the costs incurred in the preparation of the grant application a necessary expense of NIH's appropriations. See 6 Comp. Gen. 619, 621 (1927).

for James F. Hinchman

Comptroller General
of the United States

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

The General Counsel
Washington, D.C. 20201

APR 18 1991

**MEMORANDUM**

**TO** : Wilmer Mizell
Executive Director
PCPFS

**FROM** : Michael J. Astrue
General Counsel

**SUBJECT** : Funding of Activities of the President's Council on Physical Fitness and Sports

You have requested legal guidance on available sources for funding the activities of the President's Council on Physical Fitness and Sports, specifically the acceptance and use of gifts to support those activities. As a general rule, Federal agencies must operate within the limits of appropriated funds and may not supplement such funds from other sources, except as specifically authorized by Congress. The principal exception which is here relevant is the PHS statutory authority to accept and expend gifts to support PHS activities, which we discuss below.

With regard to the administrative expenses of the Council, section 4.(d) of Executive Order 12345 requires the Secretary to furnish the Council with "necessary staff, supplies, facilities, and other administrative services." The section further provides that these expenses "shall be paid from funds available to the Secretary." This clearly directs the use of funds appropriated to the Department intended to support the functions of the Council. According to the House and Conference Report, funds appropriated under Public Law 101-517 to the Office of the Assistant Secretary for Health for carrying out Titles III, XVII, XX, and XXI of the Public Health Service Act, include an amount, under health initiatives, for physical fitness and sports. The sum recommended in the House Conference Report at page 75 was $1,463,000, which may have been further adjusted at a later stage in the budget process. In this connection, it is interesting to note that the House contemplates an active role for the Council, including "enlist[ing] the active support and assistance of individuals, civic groups, professional associations, sport groups, and others to promote and improve the health of all Americans through regular participation in physical fitness and sports." (H.R. Rep. 101-591 at 173)

With regard to the use of gift funds, the Council has no direct authority to accept or use gifts. However, to the extent that the Council is functionally within OASH or otherwise carries out functions vested in OASH (Title XVII relating to health promotion, for example), the PHS Gift Fund could be utilized if not otherwise restricted by conditions on use. Under section 2601 of the PHS Act, unconditional gifts accepted by the Secretary to support the functions of the PHS "shall be available for expenditure in the operation of the Service and the performance of its function" (Subsec. (b)). Moreover, the Comptroller General has sanctioned what he calls the rule of "maximum flexibility" in the use of gift funds held by Federal agencies, which holds that "[t]he only restriction generally imposed is that the gift must be used for the good of the agency or to further agency goals." (B-198730, Enc. I, 3-4 (9/24/80)) Accordingly, we believe that gifts made to the PHS Gift Fund could properly be utilized to fund activities and programs of the Council (1) which the Council carries out as a representative of or on behalf of OASH in performance of the health promotional activities delegated to OASH under Title XVII, or (2) which are in furtherance of the Department's health related goals under that title. There is no reasonable question that programs relating to physical fitness, physical activity, and exercise fall within the permissive ambit of Title XVII. Sports activities of the Council could also be funded under the same principles, assuming there is a nexus between the sports program in question and health promotion, which is a scientific/medical judgment.

This brings us to the more difficult question of the extent to which agencies or their employees may encourage or otherwise solicit donations to the gift fund. In April, 1983, the General Counsel advised the Secretary that, as a general rule, the solicitation of donations to the gift fund was legally inappropriate. However, in that same memorandum, the General Counsel acknowledged that the Public Health Service Act specifically authorized the Secretary to encourage others to support various health promotion and health education programs. From the context, it is clear that he was making reference to Title XVII of the PHS Act. The question therefore is - may the "encouragement" authorized under Title XVII include requests for contributions to the PHS gift fund (in other words a "solicitation"). Although this matter is not entirely free from doubt, 1/ we continue to believe that it is inappropriate to actively and specifically solicit contributions to the gift fund. We reach this conclusion based largely on our view that the gift provisions are a limited exception to the general rule that agencies may not supplement their appropriations with funds from other sources, 16 Comp. Gen. 911. At the same time, we are not unmindful of the fact that Title XVII does authorize the

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1/ See GC Memo, "Strategic Plans for Elimination of Lead Poisoning - Solicitation of Funds from Private Sources," General Counsel to the Secretary, 2/20/91

Secretary to "encourage others" to support the health promotional activities of PHS and therefore provides some latitude in this regard. For example, we think it would be appropriate, in response to an expressed desire to support Council activities, to advise a party of the availability of the gift fund and of the procedures for effectuating gifts. We recognize that we are articulating some esoteric distinctions which may be difficult to apply in specific situations, but the development of any hard and fast rule would likely be unnecessarily restrictive. 2/ As we stated in a previous memorandum, "[s]uch [gift] decisions may have to be reviewed on a case-by-case basis, and we would be happy to discuss them further as they arise." 3/ This may include consultation, as necessary, with the Office of the Special Counsel for Ethics. Naturally, this authority must be exercised with due deference to laws and policies which apply to conflicts or appearances of conflicts of interest. OASH should be particularly sensitive, for example, prior to accepting any donations from firms, such as drug companies, which are regulated or awarded funds by the Department (in another context sometimes referred to as "prohibited sources").

With respect to encouraging concomitant and complementary activities by outside groups, considerably more latitude is available, because in this scenario the private organizations would be spending their own funds to perform their own separate, consistent activity, or to fund, jointly with OASH, an activity sponsored by the Council (e.g., renting a community meeting hall). Nevertheless, there are some general constraints which must be observed in this regard, and we are enclosing for your review a copy of guidelines adopted by HUD and applicable to that agency's participation in cosponsored events. We understand that these guidelines have been cleared by the Office of Government Ethics and, although they are not in all details relevant to HHS activities, they are being informally followed within this Department until more specific guidance is received by HHS from the Office of Government Ethics.

Michael J. Astrue

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2/ See GC Memo, "Obtaining Private Funds for NIH Research-Legal Considerations" General Counsel to the Secretary, 4/4/83.

3/ *Supra*, n. 1.

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Office of the General Counsel
Washington, D.C. 20201

April 29, 1992

MEMORANDUM

TO : Deputy Ethics Counselors

FROM : Jack M. Kress Jack M Kress
Special Counsel for Ethics

SUBJECT: Ethical Considerations Regarding the Use of Agency Gift Acceptance Authority

This Office recently has had occasion to address several questions pertaining to the solicitation and/or acceptance of gifts by various components of HHS. Clearly, the Department's acceptance of gifts from outside sources can raise significant concerns about potential conflicts of interest or appearances of conflicts. Moreover, these ethical concerns are heightened when such gifts are solicited by the Department. The Standards of Ethical Conduct address the ethics issues related to the acceptance of personal gifts by agency employees, but do not expressly address issues related to the official acceptance of gifts to the agency. The purpose of this memorandum is to set forth this Office's general policy regarding the use of statutory gift acceptance authority.

We recognize that there may be important distinctions among the different components of HHS with regard to the propriety of exercising gift acceptance authority under certain circumstances. Nevertheless, this memorandum should provide a generally applicable framework for analyzing the conflict of interest issues that are raised by the acceptance of gifts by any component of HHS. Please feel free to contact this Office for further guidance when you are confronted with a difficult question concerning the application of these general guidelines to a specific situation involving your operating component.

A. General Background on Gift Acceptance Authority

As a general rule, Federal agencies must operate within the limits of appropriated funds and may not supplement their appropriations with funds from other sources. However, where Congress has specifically granted gift acceptance authority to an agency, that agency may accept funds or "in kind" gifts from outside sources. Several statutes allow various components of HHS to accept gifts for various purposes. Some of these statutes apply only to a specific component of HHS.[1] Other statutes apply to the entire agency.[2] Many of these statutes allow acceptance of gifts for only very limited purposes.[3]

Gift acceptance statutes may also vary with respect to the authority to solicit gifts. Generally, it is inappropriate for an agency actively to solicit contributions to a gift fund, unless Congress has clearly expressed its intention, in the language of the gift acceptance statute or its legislative history, to allow solicitation. Where an agency does have statutory authority to solicit gifts, the ethical concerns that accompany any exercise of gift acceptance authority may be even greater, as discussed below.

Once it is determined that a component of HHS has statutory gift acceptance authority for a particular purpose, the conflict of interest analysis outlined below should be performed to determine whether the exercise of that authority is appropriate in any given case. Much of the analysis depends on whether the source of the gift is a "prohibited source." Although the subject of prohibited sources is usually treated in the context of personal gifts to an individual employee, we think that similar ethical considerations are raised by gifts from the same kinds of sources to the agency.[4] Therefore, the following section explains the term "prohibited source," as it relates to our policy respecting use of

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[1] E.g., 42 U.S.C. § 300aaa (authority to accept gifts offered for the benefit of the Public Health Service or for carrying out any of its functions).

[2] E.g., 42 U.S.C. § 3506 (HHS given authority to accept cash or in kind services for travel and subsistence expenses in connection with performance of advisory services).

[3] E.g., Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1992, Pub. L. 102-139 (Office of Consumer Affairs given temporary authority to accept gifts for purpose of defraying costs of printing, publishing, and distributing consumer information and educational materials).

[4] Certain offers of gifts to individual employees should actually be treated as potential gifts to the agency. For example, where an outside entity offers to pay the travel and subsistence expenses of an employee in connection with the employee's performance of official advisory services, the proposed gift is actually to the agency. See 42 U.S.C. § 3506. However, as discussed below in Section C(3)(Steps a & b), the propriety of accepting the gift may depend on whether it is the agency or the individual employee who really receives the majority of the benefits of the gift.

gift acceptance authority.

B. Definition of "Prohibited Source"

For purposes of the policy on agency gift acceptance authority, we employ the same definition of "prohibited source" that is used in the context of solicitation or acceptance of personal gifts by individual employees. The Department's Standards of Conduct describe a "prohibited source" as an entity which has or is seeking to obtain contractual or other business or financial relations with an employee's principal operating component or with respect to which an employee has official duties, conducts operations or activities that are regulated by an employee's principal operating component, or which has interests that may be substantially affected by the performance or non-performance of the employee's official duties.[5] 45 C.F.R. § 73.735-501.

The Office of Government Ethics has recently proposed Standards of Ethical Conduct for Employees of the Executive Branch. When the Standards are finalized--probably in late spring or early summer of this year--the definition of prohibited source will likely be expanded. The proposed definition includes not only the above-mentioned categories, but also any organization (for example, a trade association) in which the majority of members fall within the above-mentioned categories. 56 Fed. Reg. 33795 (July 23, 1991), proposed 5 C.F.R. § 2635.203(d)(5).

C. Acceptance of Gifts

Any statutory authority to accept gifts must be exercised with due deference to the law and policies which apply either to actual conflicts or to appearances of conflicts of interest. We have developed the following framework of analysis for components to use when deciding whether the acceptance of a gift (whether solicited or unsolicited) is appropriate.

1. Statutory Gift Acceptance Authority

In any case involving the acceptance of a gift, including a solicited gift, the first issue to consider is whether the

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[5]You may also be familiar with the term "conflicting non-Federal sources," which is used in the Departmental Policy for Acceptance of Cash or In Kind Services Pursuant to Section 1353, October 7, 1991. Conflicting non-Federal sources are included within the broader category of "prohibited sources." The narrower term "conflicting non-federal source" is defined as any person or entity "which has interests that may be substantially affected by the performance or nonperformance of the employee's duties." 56 Fed. Reg. 9878, 9879 (March 8, 1991).

component that was offered the gift has statutory gift acceptance authority. This step would include a consideration of any explicit statutory restrictions, legislative history, and any prior interpretations of the statute.

The statutory language, legislative history, and prior interpretations may not distinguish between the appropriateness of accepting gifts from prohibited and non-prohibited sources. In such cases, the acceptance of a gift from either source would not violate the literal language of the statute. However, we believe that the analysis must go beyond the language of the statute to determine whether acceptance of the gift would compromise or appear to compromise the integrity of the agency or any of its employees.

2. Prohibited v. Non-Prohibited Sources

Once a component has determined that it has the statutory authority to accept a gift, the component must determine whether the potential donor is a prohibited or non-prohibited source. (See Section B above for definition of "Prohibited Source.") In either case, the balancing test set forth below in Section C(3) should be performed. We note that, in the case of a gift from a prohibited source, the agency must be especially aware of the increased probability that an actual or apparent conflict of interest may exist.

3. Acceptance of Gifts: The Balancing Test

The next step would be for the agency to determine whether its interest in accepting the gift outweighs the concern that acceptance of the gift would reflect unfavorably upon the ability of the agency or any employee to carry out its responsibilities or official duties in a fair and objective manner, or would compromise the integrity of or the appearance of the integrity of a government program or of any official involved in that program.[6] In our view,

[6]We note that, with respect to any proposed new legislation authorizing gift acceptance, the policy of the Office of Government Ethics is to include language requiring the agency head to "establish guidelines setting forth the criteria [the agency head] will use in determining whether the acceptance of such funds or services would reflect unfavorably upon the ability of the [agency] or any employee to carry out its responsibilities or official duties in a fair and objective manner, or would compromise the integrity of or the appearance of the integrity of a government program or of any official involved in that program." Although such language may not be explicitly included in gift acceptance statutes used by components of HHS, we believe that these considerations are implicit in any gift acceptance authority, and so we make them explicit here.

this involves a three-step analytical process:

Step a: Ascertain clearly what the agency's interest is in accepting the gift; or, put another way, what is the value of the gift to the agency?

Step b: Determine whether acceptance of the gift would reflect unfavorably on the ability of the agency or any employee to carry out its responsibilities or official duties in a fair and objective manner. Would acceptance of the gift compromise the integrity of or the appearance of the integrity of a governmental program or of any official involved in that program? Is there an actual or apparent conflict of interest?

Step c: Weigh the agency's interest in accepting the gift (Step a) against any actual or apparent conflicts of interest (Step b).

Step a: To determine the value of the gift to the agency, the following factors should be considered:

• What is the extent to which the gift is related to or will enable the agency to accomplish its mission? What is the practical effect of the gift within the agency or component? Remember that an agency's mission, for purposes of gift acceptance, is limited to those specific purposes for which Congress has authorized the agency to accept gifts.

• If an individual employee is actually receiving the gift, how much of the benefit is retained by the agency?

• Are there adequate alternatives? For example, if an employee is invited, on official duty, to attend a free course which would satisfy continuing education credits required by the employee's profession, you should ask whether there are other courses the employee could attend which would satisfy the education requirement, and whether such alternative courses would be offered at little or no cost.

Step b: Would acceptance of the gift reflect unfavorably on the ability of the agency (or any employee) to carry out its responsibilities or official duties in a fair and objective manner, or would acceptance of the gift compromise the integrity of or the appearance of the integrity of a government program or of any official involved in that program? (I.e., is there an actual or apparent conflict of interest?) These considerations would include the following:

• Is the donor a prohibited or non-prohibited source?

• Is the operating component a regulatory agency? Regulatory agencies (e.g., FDA or HCFA) will generally have more prohibited sources. Moreover, the question of whether a regulatory agency should accept a gift from a prohibited source that is subject to the agency's regulation requires a higher degree of scrutiny.

• What is the nature and sensitivity of any matter pending before the agency that would affect the interests of the donor? If the gift is actually to an individual employee, what is the significance of the employee's role in any such pending matter?

• Is this actually a gift to an individual employee, or is the agency actually receiving the majority of the gift's benefits?

• What is the effect of accepting the gift on entities which are outside the agency or component? For example, would any identifiable class of persons or entities be benefitted or disadvantaged by the acceptance of the gift by the agency or component? If so, to what extent?

• Would the size or the nature of the gift alone raise a significant appearance concern?

• Why is the gift being offered to the agency or operating component? We do not here refer to imaginative speculation, but rather to specifically known or ascertainable reasons which may raise or diminish appearance concerns.

Step c: The agency's interest in accepting the gift (Step a) must then be weighed against the concern that acceptance of the gift would reflect unfavorably upon the ability of the agency or any employee to carry out its responsibilities or official duties in a fair and objective manner, or would compromise the integrity of or the appearance of the integrity of a government program or of any official involved in that program (Step b). If the agency's interest in accepting the gift clearly outweighs any actual conflicts or potential appearance problems, the agency may accept the gift. Generally, however, if the agency's interest in accepting the gift does not clearly outweigh the conflicts concerns, the gift should not be accepted.

We stress that a gift from a prohibited source should undergo particularly careful and thorough scrutiny in order to avoid even the appearance of a conflict of interest. Please feel free to confer with our Office when your agency is presented with an opportunity to receive a gift from a prohibited source.

D. Solicitation of Gifts

In order to solicit gifts from an outside source, an agency must determine, first, that it has statutory gift acceptance authority for a given purpose, and second, that Congress expressly intended the agency to have the additional authority to solicit gifts for that purpose. Once the agency has determined that it has authority to solicit gifts, it must exercise that authority with caution and in a manner that avoids all appearances of impropriety. To that end, the agency must apply the analysis in Section C above before soliciting any gifts. Furthermore, we believe that solicitation, particularly solicitation from prohibited sources, raises even greater ethical concerns than mere acceptance of gifts. Therefore, the following additional considerations must be taken into account to determine the appropriateness of soliciting a gift.

1. <u>No Solicitation of Gifts from Prohibited Sources</u>

In order to avoid any actual or apparent conflicts of interest, we believe that the authority to solicit gifts should be limited to solicitation of gifts from non-prohibited sources only. Without question, we believe it would be inappropriate to request a donation from an outside entity that would be considered a prohibited source.

Where, however, a prohibited source has expressed an unsolicited interest in supporting an agency's activities, we do think it would be appropriate to advise the prohibited source of the availability of a gift fund and of the procedures for effectuating gifts. We realize that, on occasions, there may be a fine line between activities that acquaint potential donors with the existence of a gift fund (permissible), and, alternatively, activities that are active solicitations (not permissible). We recognize as well that it may be difficult at times to apply these relatively esoteric distinctions in specific situations. However, rather than asserting here a hard and fast rule which might be unnecessarily restrictive, we would prefer to offer guidance on such activities on a case-by-case basis.

2. <u>Solicitation of Gifts from Non-Prohibited Sources</u>

Solicitation of gifts from non-prohibited sources is permissible where consistent with the conflict of interest analysis outlined in Section C above. Given the range of forms that gift solicitations may take, it would be virtually impossible for us to list all appropriate forms of gift solicitation. However, one example of an appropriate solicitation would be to send form letters requesting donations from charitable organizations that are not prohibited sources. Should your component choose to engage in other forms of gift solicitation, our Office would be happy to assist you in determining whether or not such a form would be appropriate.

E. Conclusion

The analysis outlined above constitutes our Office's general approach to the ethical issues raised by the exercise of gift acceptance and solicitation authority. This analysis should be undertaken by operating components whenever they are considering the use of such authority. We want to emphasize again that you are encouraged to bring to the attention of this Office any unique or difficult situations you may encounter when you are applying these general guidelines to specific facts.

If you have further concerns or questions, please feel free to call me at (FTS or 202) 245-7258.