THE WHITE HOUSE

WASHINGTON

Beth Nolan
Counsel
6229
Ethics questions

SUMMARY

STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE EXECUTIVE BRANCH 5 CFR PART 2635

GENERAL PROVISIONS - SUBPART A

Subpart A establishes the framework for the rest of the regulation. It includes definitions, provides authority for supplementation of the regulation when necessary by individual agencies and encourages employees to seek advice from agency ethics officials. It also:

- Restates the 14 principles of ethical conduct and instructs employees to apply them when considering situations not specifically addressed by the regulation; and

- For situations that involve appearances of conflicts, provides that the circumstances will be judged from the perspective of a reasonable person with knowledge of the relevant facts.

GIFTS FROM OUTSIDE SOURCES-SUBPART B

Subpart B prohibits employees from soliciting or accepting gifts from prohibited sources or gifts given because of their official position. The term "prohibited source" includes anyone seeking business with or official action by an employee's agency and anyone substantially affected by the performance of an employee's official duties. For example, a company bidding for an agency contract or a person seeking an agency grant would be a prohibited source of gifts to employees of that agency.

The term "gift" is defined to include nearly anything of monetary value. However, it does not include items that clearly are not gifts, such as publicly available discounts and commercial loans and it does not include certain inconsequential items, such as coffee, donuts, greeting cards and certificates.

Additional information or a copy of the standards may be obtained from your supervisor. Inquiries about the content of the standards should be directed to the Office of Counsel to the President staff at #(202) 456-6229.

There are several exceptions to the prohibitions against gifts from outside sources. For example, with some limitations, employees may accept:

- Unsolicited gifts with a market value of $20 or less per occasion, aggregating no more than $50 in a calendar year from any single source;
- Gifts motivated by a family relationship or personal friendship;
- Free attendance at certain widely-attended gatherings, such as conferences and receptions, when the cost of attendance is borne by the sponsor of the event; and
- Food, refreshments and entertainment at certain meetings or events while on duty in a foreign country.

The subpart also contains guidance on returning or paying for gifts that cannot be accepted.

GIFTS BETWEEN EMPLOYEES-SUBPART C

Subpart C prohibits employees from:

- Giving or soliciting a gift for another employee who is an official superior; or
- Accepting a gift from a lower-paid employee, unless the two employees are personal friends who are not in a superior-subordinate relationship.

The following are among the exceptions to these prohibitions:

- On an occasional basis, employees may give and accept items aggregating $10 or less per occasion, food and refreshments shared in the office, or personal hospitality at a residence. This exception can be used for birthdays and those holidays when gifts are traditionally exchanged.
- On infrequent occasions of personal significance, such as marriage, and on occasions that terminate the superior-subordinate relationship, such as retirement, employees may give and accept gifts appropriate to the occasion and they may make or solicit voluntary contributions of nominal amounts for group gifts.

* See attached memorandum of March 1, 1993 from Bernard Nussbaum to White House staff.

CONFLICTING FINANCIAL INTERESTS-SUBPART D

Subpart D contains two provisions designed to deal with financial interests that conflict with employees' official duties.

The first provision entitled "Disqualifying financial interests" prohibits an employee from participating in an official government capacity in a matter in which he or she has a financial interest or in which his or her spouse, minor child, employer or any one of several other specified persons has a financial interest. For example, an agency purchasing agent could not place an agency order for computer software with a company owned by his or her spouse. The provision includes alternatives to nonparticipation, which may involve selling or giving up the conflicting interest or obtaining a statutory waiver that will permit the employee to continue to perform specific official duties.

The second provision, entitled "Prohibited financial interests," contains authority by which agencies may prohibit employees from acquiring or retaining certain financial interests.

Employees required by Subchapter D to sell financial interests may be eligible to defer the tax consequences of that divestiture.

IMPARTIALITY IN PERFORMING OFFICIAL DUTIES-SUBPART E

There may be circumstances other than those covered by Subpart D in which employees should not perform official duties in order to avoid an appearance of loss of impartiality. Subpart E contains two disqualification provisions addressing those appearance issues.

The first provision, entitled "Personal and business relationships," states that employees should obtain specific authorization before participating in certain government matters where their impartiality is likely to be questioned. The matters specifically covered by this standard include those:

- Involving specific matters, such as contracts, grants or investigations, that are likely to affect the financial interests of members of employees' households; or

- In which persons with whom employees have specific relationship are parties or represent parties. This would include, for example, matters involving employers of spouses or minor children, or anyone with whom employees have or seek a business or financial relationship.

There are procedures by which employees may be authorized to participate in such matters when it serves the employing agency's interests. The process set forth in Subpart E should be used to address any matter in which an employee's impartiality is likely to be questioned.

The second provision, entitled "Extraordinary payments from former employers," restricts employees' participation in certain matters involving former employers. If a former employer gave an employee an "extraordinary payment" in excess of $10,000 prior to entering Federal service, it bars the employee from participating for two years in matters in which that former employer is or represents a party. A $25,000 payment voted on an ad hoc basis by a board of directors would be an "extraordinary payment." A routine severance payment made under an established employee benefit plan would not.

SEEKING OTHER EMPLOYMENT-SUBPART F

Subpart F prohibits employees from participating in their official capacities in particular matters that have a direct and predictable effect on the financial interests of persons with whom they are "seeking employment" or with whom they have an arrangement concerning future employment.

The term "seeking employment" encompasses actual employment negotiations as well as more preliminary efforts to obtain employment, such as sending an unsolicited resume. It does not include:

- Sending an unsolicited resume, for example, to someone only affected by the employee's work on general rulemaking; or

- Requesting a job application or rejecting an unsolicited employment overture.

An employee generally continues to be "seeking employment" until he or she or the prospective employer rejects the possibility of employment and all discussions end. However, an employee is no longer "seeking employment" with the recipient of an unsolicited resume after two months have passed with no response.

MISUSE OF POSITION-SUBPART G

Subpart G contains four provisions designed to ensure that employees do not misuse their official positions. These include:

- A prohibition against employees using public office for their own private gain or for the private gain of friends, relatives or persons with whom they are affiliated in a nongovernment capacity, or for the endorsement of any product, service or enterprise.

- A prohibition against engaging in financial transactions using nonpublic information, or allowing the improper use of nonpublic information to further private interests;

- An affirmative duty to protect and conserve Government property and to use Government property only for authorized purposes; and

- A prohibition against using official time other than in an honest effort to perform official duties and a prohibition against encouraging or requesting a subordinate to use official time to perform unauthorized activities.

OUTSIDE ACTIVITIES-SUBPART H

Subpart H contains provisions governing employees' involvement in outside activities, including outside employment. These provisions are in addition to the provisions set forth in other subparts of the regulation. The provisions in Subpart H include:

- Synopses of statutes and a constitutional provision that may limit certain outside activities;

- A prohibition against engaging in outside activities that conflict with employees' official duties;

- Authority by which individual agencies may require employees to obtain approval before engaging in outside activities;

- Limitations on outside earned income applicable to certain Presidential appointees and certain noncareer employees;

- A prohibition against serving as an expert witness, other than on behalf of the United States, in certain proceedings in which the United States is a party or has a direct and substantial interest;

- A prohibition against receiving compensation for teaching, speaking or writing related to their official duties, which is in addition to the honorarium prohibition imposed by statute;

- Limitations on fundraising in a personal capacity; and

- A requirement that employees satisfy their just financial obligations.

Subpart H reserves the section which, in the proposed rule, had set forth standards for participation in the activities of professional associations.

RELATED STATUTORY AUTHORITIES-SUBPART I

Subpart I provides references to other statutes which relate to employee conduct.

THE WHITE HOUSE

WASHINGTON

March 1, 1993

MEMORANDUM FOR WHITE HOUSE OFFICE STAFF

FROM: BERNARD NUSSBAUM
COUNSEL TO THE PRESIDENT

CHERYL MILLS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Meals, Receptions, Dinners, and Events

This memorandum provides general guidance on the propriety of accepting meals and invitations to receptions, dinners and other events from outside domestic sources. The rules governing the Standards of Conduct for Executive Branch Employees are contained in 5 C.F.R. Part 2635, which were issued by the Office of Government Ethics ("OGE"). These rules are provided at every ethics briefing for White House Office employees. Additional copies of the rules are available from Counsel's Office (OEOB, Room 128).

Under the ethics rules, White House employees may not accept a gift in return for being influenced in the performance of an official act nor may he or she solicit or coerce the offering of a gift. Moreover, White House employees may not solicit or accept a gift:

1. from a prohibited source; or

2. given because of the employee's official position.

A gift includes "any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. It includes services as well as gifts of training, transportation, local travel, lodgings and meals." 5 C.F.R. § 2635.203.

A prohibited source includes anyone who:

1. is seeking official action by the White House Office;

2. does business or seeks to do business with the White House Office;

3. conducts activities regulated by the White House Office;

4. has interests that may be substantially affected by the performance or nonperformance of your official duties; or

5. is an organization composed of members who can be described by the criteria set forth immediately above.

Under this policy, we generally are prohibited from accepting meals (dinners, tickets to events) from virtually all sources -- including, among others, contractors, regulated business groups, and litigating parties.

With regard to the press, a 1987 OGE opinion determined that reporters seeking information from, or an interview or ongoing working relationship with, a government employee because of the employee's official position are prohibited sources for the official. Thus, members of the press are prohibited sources. As a general rule, the 1987 OGE opinion stated that any individual or organization that offers free food or refreshments to a government employee simply because of the employee's official position is considered a prohibited source.

Exceptions

There are exceptions under which gifts of meals or entertainment --invitations to events, dinners, receptions and parties -- may be accepted from a prohibited source, provided that doing so does not otherwise create an appearance of impropriety. These exceptions are summarized below:

a) Gifts of $20 or Less. You may accept an unsolicited gift (other than cash or its equivalent) valued at $20 or less per occasion. Typically, a two-hour Washington reception for which no attendance fee is charged will meet this exception. Although, you may accept a meal, book, or other item valued at $20 or less, you may not go to dinner and pay for the amount by which the dinner exceeds the $20 limitation. You also may not keep any other type of gift valued over $20 by paying the difference between the gift's market value and the $20 limitation. Moreover, you may not accept more than an aggregate amount of $50 in gifts under this exception from any single person in a calendar year.

b) Gift Based on a Personal Relationship. You may accept an unsolicited gift from a prohibited source where it is clear that the gift is motivated by a family relationship or close personal friendship rather than your official position. In assessing whether a gift meets this exception, the history of your relationship (does it predate your government service?) and the source of payment are important factors.

c) Gifts Based on Outside Business or Employment Relationships. You may accept meals, lodging, transportation and other benefits from a prohibited source that results from the business or employment relationships of a spouse, provided it is clear that the gift has not been enhanced because of your official status. Thus, you can attend the opera with your spouse (or significant other) where his or her employer provides him or her with tickets to attend. You also may accept such gifts that result from your own outside business or employment activities provided it is clear that such gifts also have not been offered or enhanced because of your official position. Note, however, that all full-time White House officials paid above $27,789 are prohibited from receiving income from any outside employment activities.

d) Employment-Related Speaking Engagements. When you are speaking or presenting information on behalf of the White House Office in your official capacity, you may accept meals and the offer of free attendance at a conference, meeting or event on the day of your speech or presentation when provided by the sponsor of the event.

e) Widely-Attended-Gatherings. You may accept free attendance and meals offered by the sponsor of a widely-attended-gathering of mutual interest to a number of parties, provided Counsel's Office has determined it is in the interest of the White House Office that you attend. Therefore, where the sponsor of a dinner (e.g., the Gridiron Association) offers you free attendance, you can attend if Counsel Office's determines it is in the White House's interest that you attend. You cannot attend this dinner as the guest of another organization that has paid for your ticket.

f) Gifts from a Political Organization. Those White House officials who are exempt from the Hatch Act may accept meals, lodgings, transportation and other benefits, including free attendance at events, when provided by a political organization pursuant to 26 U.S.C. § 527(e) (e.g., the Democratic National Committee, campaign committees for state, local and federal candidates).

g) Social Invitations from Non-Prohibited Sources. You can accept food and entertainment at a social event attended by several persons where the person is not a prohibited source and no fee is charged to any in attendance.

Assuming that the event, dinner or reception you would like to attend does meet one of the above exceptions, you always should consider whether your attendance at the event nevertheless would lead a reasonable person to question your impartiality in official matters affecting the host, attendees, etc. Where such an appearance question could be raised, you should consider foregoing the event.

Finally, please remember that if you are required to file a public financial disclosure form, all gifts (including meals that are not received as personal hospitality) valued over $250 from any one source (aggregating gifts over $100) must be reported annually on your public disclosure form.

To summarize, except in limited circumstances, it generally is prudent for White House Office staff to avoid accepting a free meal or refreshments from any donor with government business. If the meal, event, dinner or reception proffered by a prohibited source does not meet any of the above exceptions, you may not attend the event consistent with the Standards of Ethical Conduct. You should perform your own analysis of an event you wish to attend prior to contacting Counsel's Office to seek advice. If, after careful evaluation in light of this memorandum, you have difficulty judging a particular situation, please contact Counsel's Office.

THE WHITE HOUSE

WASHINGTON

June 7, 1993

MEMORANDUM FOR ALL MEMBERS OF THE CABINET
SENIOR WHITE HOUSE STAFF (ASSISTANTS, DEPUTY ASSISTANTS AND SPECIAL ASSISTANTS TO THE PRESIDENT)
WHITE HOUSE OFFICE STAFF
OFFICE OF THE VICE PRESIDENT STAFF
OFFICE OF POLICY DEVELOPMENT STAFF

FROM: PATSY THOMASSON
SPECIAL ASSISTANT TO THE PRESIDENT FOR MANAGEMENT AND ADMINISTRATION AND DIRECTOR OF THE OFFICE OF ADMINISTRATION

SUBJECT: Policies and Procedures for the Use of the White House Tennis and Basket Ball Courts

TENNIS COURTS

Now that the season has begun for more outdoor activities, we have developed the attached procedures for using the White House tennis and basketball courts.

When the tennis court is not in use by the First Family or their guests, the President has asked that it be made available to the following except, as herein outlined:

- Cabinet Secretaries,
- Members of Congress,
- Senior White House Staff,
- White House Office, Office of the Vice President and Office of Policy Development staffs.

- **Guests of the First Family have priority use of the court.**

  Although some bumping may occur, we will make every attempt to minimize it; we know you will understand if there are times when you cannot be accommodated. Your court time will be confirmed when you call and you will be notified at least four hours in advance if necessary to reschedule.

- Weather permitting, the court is open during the daylight hours, seven days a week, except when there are events on the South Lawn, including Presidential arrivals and departures.

- Court time will be one hour for singles and an hour and a half for doubles.

- Players must provide their own equipment and supplies. There are **no** changing rooms available.

- Appropriate shoes (white soles) and attire are expected.

SECURITY AND ACCESS

- Access to the tennis courts is always through the Southwest Gate (B-4) and Gate B-3.

  All scheduled tennis players, both pass holders and non-pass holders, must first check in through the Southwest Gate. When the entire tennis party has been checked through the Southwest Gate, the Uniformed Officers will direct the party though Gate B-3. The Uniformed Officers will have a tennis schedule which will include names and birth dates of all players who have been cleared.

  Guests will only be allowed into the tennis court area when accompanied by a Cabinet Secretary, a Member of Congress or a pass holder; access does not extend to the South Lawn.

PARKING

Parking for Cabinet Secretaries and Members of Congress will be through normal procedures.

WHITE HOUSE OFFICE STAFF, OFFICE OF THE VICE PRESIDENT STAFF AND STAFF OF THE OFFICE OF POLICY DEVELOPMENT

The tennis court will be available to the staffs of the White House Office, Office of the Vice President and Office of Policy Development through a lottery.

- o The time allowed for the White House Office Staff, Office of the Vice President Staff and Staff of the Office of Policy Development will be on Saturday and Sunday from 10:00 a.m. until 1:00 p.m.

- o Staffs of the above Offices will only be able to schedule doubles so that more people can participate.

A lottery will be held each Wednesday to randomly select names for the following Saturday and Sunday. Please see the attached policy for specific information regarding submitting your name and your guests names for the lottery.

Let me encourage you to invite other staff to play with you so that the facilities can be made available to a larger number of staff. However, if you schedule to play with non-pass holders, review the attached policy for the method of submitting names.

We will clear your guests through WAVES. Remember that guests will only be allowed into the tennis court area with a pass holder escort.

BASKETBALL COURT

The half court basketball court is located near the tennis court. It may be used Monday through Friday from 5:00 p.m. until dark and Saturday and Sunday from 8:00 a.m. until 1:00 p.m.

As with the tennis court, the court is unavailable when activities are scheduled on the South Lawn or during Presidential arrivals and departures.

Guests are allowed to use the basketball court when they are accompanied by a White House pass holder.

If you have any questions about the tennis and basketball court policies, please do not hesitate to contact our office at 456-2861.

Attachments

PROCEDURES FOR WHITE HOUSE STAFF, OFFICE OF THE VICE PRESIDENT AND STAFF OF THE OFFICE OF POLICY DEVELOPMENT

RESERVATIONS AND ACCESS:

- o Staff can only schedule time for doubles. The times on Saturday and Sunday are as follows:

  10:00 a.m. to 11:30 a.m. and
  11:30 a.m. to 1:00 p.m.

- o Please submit a 3 X 5 card with your name, office, room and phone number and the day you wish to play (one card for each day). Also, include the names of the other members of your foursome on the back of the card.

- o Cards should be submitted by close of business on the Wednesday preceding the Saturday or Sunday on which you are requesting a time.

- o You will be contacted no later than Friday morning preceding your Saturday or Sunday game if your name was selected in the lottery.

- o If you plan to play with non-pass holders, you must submit the names and birth dates of your guests on the back of the card.

- o The Office of Management and Administration will clear your guests through WAVES.

- o Non-pass holders should be instructed to bring a picture ID with the exact name on which it was submitted on the back of the 3 X 5 card for admission on the day of the match.

- o All tennis players (staff and guests) shall enter the tennis court area through the Southwest Gate (B-4). Pass holders shall go through the usual clearance process.

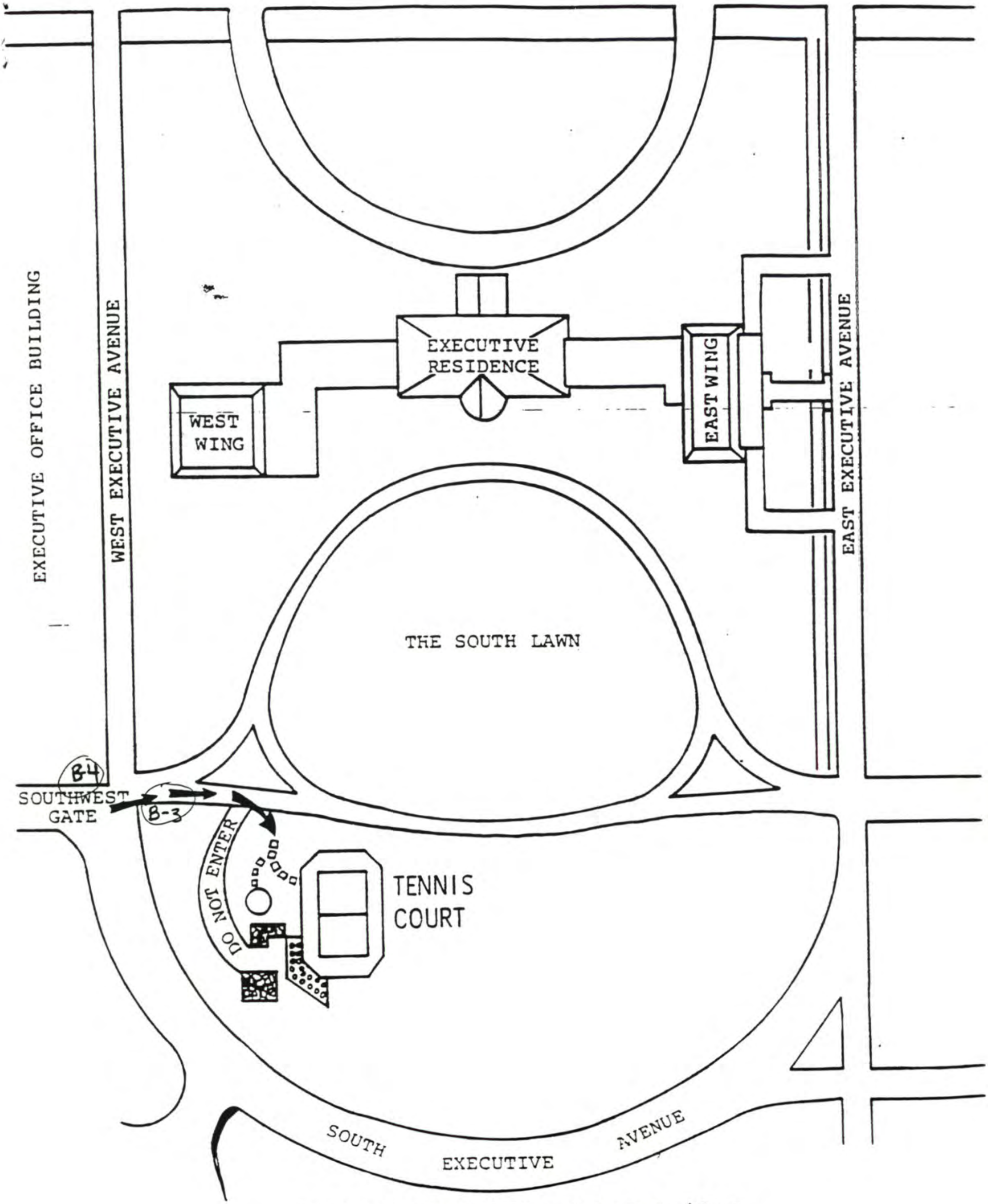
- o Non-pass holders will go through the usual appointment procedure.

- o Any abuse of the access policy will result in revocation of your tennis court privileges.

- o When all members of the tennis party have arrived, the Officer will provide access to Gate B-3. (See attached map.)

- o Parking is **unavailable** for your guests using the tennis courts.

PLEASE REMEMBER TO CALL 456-2861 BETWEEN 8:30 A.M. AND 6:00 P.M. MONDAY THROUGH FRIDAY TO MAKE YOUR RESERVATIONS.



THE WHITE HOUSE

THE WHITE HOUSE

WASHINGTON

November 10, 1993

MEMORANDUM FOR ALL WHITE HOUSE STAFF

FROM: OFFICE OF MANAGEMENT AND ADMINISTRATION

SUBJECT: White House Staff Manual

Accompanying this memorandum is your copy of the just-published White House Staff Manual from the Office of Management and Administration. We feel the Manual will prove helpful in your day to day activities here at the White House, and for that reason, we hope you will take a few moments to review it now. We expect that once you become familiar with the Manual, you will refer to it regularly.

Should you or your office have any suggested changes to the Manual, please submit them in writing to the White House Administrative Office (OEOB, Room 1).

LYN UTRECHT
ATTORNEY AT LAW

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Summary of Rules Governing Political and Campaign Activity by Senior Administration Officials

This summary provides in outline form some of the basic rules governing political and campaign activity by senior Administration officials.[1]

I. Permissible Political and Campaign Activities by Senior Officials

Provided that the following activities are undertaken without expenditure of government funds, senior Administration officials:

A. May take an active part in or manage a political campaign:

1. While on official duty
2. In a room or building occupied in the discharge of official duties
3. While wearing a uniform or official insignia identifying the individual's office or position
4. Using a vehicle owned or leased by the Government.

B. May attend and speak at political fundraisers.

C. May publicly endorse candidates.

D. May travel to campaign and political events.

II. Use of Government Facilities and Personnel

No government funds may be expended in connection with any campaign activity. No de minimus use standard exists. Political committees must reimburse the government even for incidental costs, where feasible.

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[1] Senior Administration officials are those who are not covered by the Hatch Act, those who are appointed by the President with the advice and consent of the Senate.

A. Use of Office Space and Supplies

1. Senior Administration officials may hold meetings with campaign staff or to discuss campaign matters in government offices. Such meetings should be occasional, and federal employees covered by the Hatch Act ("Hatched" employees) should not attend unless the meetings are before or after duty hours or on lunch break.

2. Government offices may not be used to house day-to-day operations of a campaign. Nor may senior Administration officials hold campaign events in government offices unless the facility is generally available to the public and the activity is paid for by a political entity, including payment for the use of space and overhead.

3. A campaign must reimburse the government for any expenses incurred in connection with campaign activity in government office (including overhead).

4. A campaign must reimburse the government for use of any office supplies, such as photocopying or phone expenses.

5. No campaign-related printed communication can bear official letterhead, the Great Seal, or terms such as "official business."

6. No government publication, or other government printed matter, may contain any campaign endorsements or advertisements.

B. Use of Personnel Covered by Hatch Act

1. Senior Administration officials should avoid having assistants or other staff make calls and set up appointments related to campaign activity during duty hours. Persons not covered by the Hatch Act should be only ones involved in campaign-related activity.

2. Hatched employees may only participate in political activity during off-duty hours. No de minimus standard exists for use of hatched employees' time. Phone calls or other activities should be performed during lunch hour or before or after agency hours.

3. Political committees cannot reimburse the government for use of on-duty employee time. Employees who work for the government may work for and be paid by a campaign or political committee during off-duty hours. However, such employees must be granted permission by the agency for outside employment.

4. A scheduler can perform minimal routine administrative tasks related to a senior official's travel, such as scheduling meetings, or answering questions about availability. Any significant work or arrangements with a political committee or any assistance to a political committee regarding setting up or organizing an event itself must be performed on off-duty hours.

5. A speechwriter may write political speeches during lunch hour or after work. Speeches originally written for official business purposes may be used for political purposes, but such speeches should be modified for political use during off-duty hours.

6. Employees whose official duty requires travel with senior Administration officials must be off-duty in order to accompany senior Administration officials to a political event. If such an event takes place during the employee's duty hours, s/he must take annual leave for the time spent at the event.

C. Use of Government Cars

1. Senior Administration officials may engage in political activity using a vehicle owned or leased by the Federal government. A campaign must reimburse the government for related costs (i.e., gas, breakdown of lease cost, etc.)

2. If campaign activity comprises one stop on government trip, a campaign must reimburse the government for the portion of costs related to that leg of the trip.

III. Travel Expenses

A. Political and campaign travel must be paid by a candidate's campaign committee or by the party. Travel for the following purposes is considered "political":

1. Any event or appearance at which contributions to a candidate or to the party are solicited

2. Any event or appearance at which the election or defeat of a candidate or party is advocated

3. Party-sponsored events such as conventions and mid-term meetings[2].

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[2] The party may sponsor issue-only conferences which will probably be considered political even if not partisan. No party event should be considered official.

B. Travel must be allocated on a "hard-time" basis, i.e., the total activity time is calculated by adding time on official activity to time spent on political activity. The allocation required is the percentage of total activity time allocated respectively to political and official activity.

C. Official funds may not be used to pay political travel costs. The following methods of paying for political travel on a mixed official/political trip may be used:

1. The individual may pay the entire cost out of personal funds and be reimbursed by the appropriate entities.

2. The individual may estimate in advance the correct allocation and receive a travel advance from the government for the official share of expenses. The travel advance would be used to defray the official portion and the political committee would pay its share of expenses by check or credit card to the vendor.

3. The political committee may pay the costs of the trip and receive reimbursement for the official share of the trip.

D. If an individual pays political travel expenses personally and receives reimbursement, FEC rules require that the reimbursement be submitted promptly and be received from the political committee within 60 days of the date on which they were incurred if the expenses were charged to a credit card and within 30 days if paid by any other method such as a check. These time guidelines are being strictly enforced. Do not assume that the political committee will promptly reimburse without follow-up from you.

E. If travelling on behalf of a candidate for state or local office, state or local laws may apply and should be checked.

IV. Prohibition on Solicitation

A. Senior Administration officials are prohibited from soliciting, accepting, or receiving any political contributions.

B. Senior Administration officials can allow their names to be used on invitations to political fundraising events as long as the reference does not suggest that the senior Administration official is personally soliciting a contribution.

C. Senior Administration officials are prohibited from encouraging or asking individuals or groups to volunteer for political campaigns.

D. Senior Administration officials are prohibited from soliciting, paying, collecting, or receiving contributions at or in a Federal workplace from any employee for any partisan purposes.

E. No one may solicit or receive contributions in any Federal office or building.

Legal References:

Federal Election Campaign Act, 2 U.S.C. § 431 et seq; 11 C.F.R. § 100.1 et seq.
Hatch Act, 5 U.S.C. § 7321 et seq.
OGE Regulations, 5 C.F.R. Part 2635
18 U.S.C. Sections 597-607, 641, 713
5 U.S.C. § 7353
31 U.S.C. § 1302

***This outline is intended only as a general guideline and not a legal opinion. Any specific questions should be directed to the Agency's counsel or outside legal counsel.

THE WHITE HOUSE

WASHINGTON

February 17, 1994

MEMORANDUM FOR THE CABINET

FROM: BERNARD W. NUSSBAUM
COUNSEL TO THE PRESIDENT

SUBJECT: Guidelines for Allocating Travel Expenses of Senior Administration Officials

This memorandum provides advice with respect to the payment of travel expenses incurred by "senior Administration officials."[1] Such travel will sometimes include both official functions where the individual participates in an official role as a spokesperson for Administration policy, and purely political events, which are organized for partisan purposes in order to advance the interests of the Democratic party or its candidates for office. The discussion below focuses on the legal principles that govern the allocation and payment of costs associated with such mixed official and political travel.

General Legal Principles

For non-Presidential election campaign events (e.g., State, local and Congressional campaigns), applicable laws and regulations do not provide a specific method for allocating the costs of mixed official and political travel by individuals other than candidates.[2] There also is no precise test for distinguishing between "official" and "political" events. As a result, the guidelines set forth below are based on general legal principles, guidance from Office of Legal Counsel opinions, and policies established over a period of years by previous administrations.

When considering payment of expenses associated with travel by senior officials, two major principles governing the use of appropriated funds must be kept in mind. First, appropriated funds may be spent only for the purposes for which they have been appropriated. 31 U.S.C. § 1302; 52 Comp. Gen. 504 (1973); 50 Comp. Gen. 534 (1971). Thus, funds appropriated for the official functions of agencies in the Executive Office of the President

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[1] "Senior Administration officials" for the purposes of this memorandum are those federal officials appointed by the President with the advice and consent of the Senate.

[2] Where an individual, other than a candidate, conducts campaign-related activities on a trip, the portion of the trip attributed to each candidate shall be allocated on a reasonable basis. 11 C.F.C. § 106.3(c)(1).

("EOP") and federal departments or agencies may be used for travel expenses only if the travel is reasonably related to an official purpose. If, however, there is no reasonable connection between the expense incurred and the official purposes to be served by an appropriation -- as, generally, there would not be when an expense is incurred purely for partisan political purposes -- official funds may not be used to pay the expense.

The second basic principle is that, in general, official activities should be paid for only from funds appropriated for such purposes, unless Congress has authorized the support of such activities by other means. Stated another way, although appropriated funds should not be used for non-official purposes, it is equally true that outside sources of funding may not be used to pay for official activities. This latter principle, which prevents the unauthorized augmentation of appropriations, has been memorialized in a number of Comptroller General opinions.[3]

Defining Political and Official Travel

The cost of travel in conjunction with wholly official activity must be paid from appropriated funds; expenses for travel in conjunction with wholly political activity must be paid from sources other than appropriated funds (e.g., Democratic National Committee or a candidate's campaign committee). In those instances where the same travel costs are incurred in conjunction with official and political activity, there should be a proration of expenses.

It is important at the outset to attempt to identify what is meant by "political" -- as opposed to "official" -- activities of government officials. As previously stated, there is no single litmus test for making such judgments. Whether an expense is official or political in nature must be determined on a case-by-case basis. Many events properly could be characterized as either political or official. Therefore, in making this determination, the persons most familiar with the facts of a particular trip will have to assess all of the circumstances involved and apply a large measure of common sense. There are, however, two major variables concerning the source of the expense to keep in mind:

1) the nature of the event involved, and

2) the nature of the individuals involved.

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[3] See, e.g., 46 Comp. Gen. 689 (1967); 23 Comp. Gen. 694 (1944); 17 Comp. Dec. (1911); 9 Comp. Dec. 174 (1902).

Either, or both, of these indicia may be useful in a particular case in determining whether a particular expense should be considered official or political.

Political Travel

As a general rule, travel by senior Administration officials should be considered "political" if its primary purpose involves their positions as leaders of their political party. Appearing at party functions, fundraising, and campaigning for specific candidates are prime examples of travel that should be considered political.[4]

Official Travel

The President cannot perform his official duties effectively without the understanding, confidence, and support of the public. Travel and appearances by senior Administration officials to present, explain, and secure public support for the Administration's measures are therefore an inherent part of the senior official's duties. Thus, addresses and the like ordinarily should not be considered "political" events though they may have partisan consequences or concern questions on which opinion is politically divided.

You should be aware, however, that a substantially partisan political speech at an event which otherwise might be considered "official," such as a Chamber of Commerce event, may necessitate

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[4] Expenses paid by the Democratic National Committee ("DNC") for travel by an individual in support of specific identifiable federal candidates are in-kind contributions to, or coordinated expenditures for, the candidates and apply against the DNC's contribution and expenditure limitations for those federal candidates. If a trip, or a portion thereof, is on behalf of a specific identifiable federal candidate, the estimated share of such expenses that are reasonably allocable to a particular campaign must be paid by check or similar draft in advance by the appropriate campaign committee to insure that appropriated funds are not used for political purposes and that the DNC does not inadvertently violate contribution or expenditure limitations for individual candidates. Because of these restrictions, the DNC cannot and should not assume financial responsibility for political trips of which it has not had advance notice and an opportunity to coordinate and to organize appropriate expense payments. Political or mixed official/political travel which contains even a single candidate-related event must be closely coordinated with the DNC well in advance of the scheduled trip. These rules also apply to the Democratic Congressional Campaign Committee and the Democratic Senatorial Campaign Committee.

applicable expenses to be paid from sources other than appropriated funds. In determining whether activity is official or political, all relevant factors should be considered, including, but not limited to: the sponsor of the event, the group or organization being addressed, other participants, and whether the speech being delivered is partisan and political in nature or whether it is a factual presentation or defense of the Administrations's positions on the issues.

A speech before a non-partisan group such as the Chamber of Commerce is not partisan or political in nature if it contains no express advocacy of the election or defeat of candidates for public office and no direction that a particular political party's candidates should be supported in an election campaign.

There clearly is much room for discretion in determining whether an event giving rise to an expense is political or official. In the final analysis, the question is a factual one that only can be answered by those persons most familiar with the particular facts of a given situation. Nonetheless, generally, if the purpose of an event during a trip is to promote the partisan aims of the Democratic party or candidates of that party, then expenses incurred in performing the event generally would be political in nature.

Nature of the Individual Generating Expense

An additional variable that may, in some circumstances, determine the character of a particular expense incurred on a trip is the nature of the individual whose activity generates the expense. There are some individuals who, in certain situations, are on a trip for inherently official purposes. Expenses incurred by them generally should be viewed as official. For instance, there are some persons whose official duties require them to be with the Cabinet member, whether or not the Cabinet member is on official business. This group may include security agents responsible for the Cabinet member's protection, the chief of staff or an executive assistant. Expenses incurred by this group of individuals during travel with a Cabinet member should be considered official, regardless of the character of the event that may be involved in a given trip. Accordingly, I strongly recommend that the number of department or agency personnel accompanying a senior Administration official on a purely political trip be limited to one or two individuals whose services are essential to the performance of the senior official's duties.

If a trip, or portion thereof, by a senior Administration official is for "personal" reasons -- i.e., neither "official" nor "political" -- any expenses incurred must be paid from other than appropriated funds. If an individual or entity other than the Administration official is planning to pay the official's personal travel expenses, applicable conflict of interest laws and regulations must be consulted to determine whether such payment is sanctioned. See, e.g., 5 C.F.R. § 2635.

Allocation of Expenses

In our view, the following approach, known as the "hard-time formula," reflects a good faith apportionment of the costs of a trip based on the time spent on political activities and the time spent on official activities. You should always remember, however, that allocation is appropriate only with respect to travel expenses of individuals whose official roles permit them to perform political functions and only when such individuals are on a trip that itself is not entirely political or wholly official in nature.

Prorating the cost of air travel for mixed trips under the "hard-time" formula involves first determining the "total activity times," i.e., the amount of time actually spent by the Administration spokesperson in meetings, receptions, rallies and similar activity. Time spent in actual travel, private study, or rest and recreation is not included in the computation of the "total activity time". The proration of the cost of air travel then is determined based on how the "total activity time" was spent. The formula is as follows:

Time spent in official meetings, receptions, etc.	+	Time spent in political meetings, receptions, rallies	=	Total activity time

$$\frac{\text{Time spent in official activity}}{\text{Total activity time}} = \text{Percentage of trip that is official}$$

$$\frac{\text{Time spent in political activity}}{\text{Total activity time}} = \text{Percentage of trip that is political}$$

The percentage figure that represents the political portion of the trip is then multiplied by the amount that would be reimbursed to the government if all of the travel was political. The product of that calculation represents the amount to be paid by the political entity or a campaign committee.

In the event that a minor, clearly "incidental" percentage of the activity of a mixed trip is devoted to either official or political activity (e.g., less than 3%), the entire trip should be treated as if it was wholly of the type represented by the substantial figure. The balance should be treated as de minimis and need not be reimbursed as political or charged as official.

Normally, the allocation formula is applied to all of the relevant costs of a mixed trip. However, as previously noted, there may be occasions when application of the formula to all costs of a total trip may not be equitable to the government. For example, if an Administration official spent the first four days of a five day trip attending only political campaign-related events and on the fifth day attended only official events, it would not be equitable for the government to pay a percentage of each hotel bill or air fare if there was no inordinate amount of travel during the first four days.

Each trip must be analyzed based on the circumstances of that trip, and while the goal is an equitable allocation, you must avoid the situation in which the government pays a disproportionately large share of the cost of a particular trip as a result of the political activity. Any questions should be decided in favor of charging the government less and the political event or campaign committee more.

Expenses that are associated specifically with a political activity and not with any official activity must be treated as political, and expenses associated specifically with an official activity and not with any political activity must be treated as official. For example, there should be no allocation between official and political funds for a sound system rented for a single event.

In allocating the costs of travel other than air travel, the allocation formula should be applied to any government maximum for that type of expenditure. For example, if on a mixed trip (50% official and 50% political) a government employee is only entitled to $26 per diem for food on a wholly official trip, the government share would be 50% of $26, not 50% of the actual amount spent.

Payment for Travel Costs for Senior Administration Officials

The cost of air travel on a mixed trip for senior Administration officials travelling separately from the President or Vice President may be paid for in one of several ways. First, if the political sponsor provided the ticket for the entire trip, it may be accepted and used by the official. Then, upon completion of the travel and settlement of the official's travel claim, the political sponsor must be immediately reimbursed for the official portion of the trip. In no case should the government ever pay more for official travel than the official government rate. Second, based on an estimated advance allocation of the trip, the agency or department could issue a Government Travel Request or a travel advance in cash covering that portion of the trip that pertains to its official business. The balance of the air fare would be paid for in advance by the political sponsor by a check issued to the air carrier. Third, the travelling official may purchase the tickets with personal funds or credit cards and subsequently collect the properly allocated reimbursement from the agency or department and the group sponsoring the political event.

Where the scheduling is such that it is functionally impossible for travel expenses of a particular trip to be readily segregated -- i.e., where there are numerous political and official events in a given city -- a figure which represents the total amount of allocable expenses may be paid by the government either by reimbursing the political sponsor or by issuing a ticket or tickets, the total value of which would equal the government's allocable share. In any event, it is essential that the details of the mixed trip be worked out well in advance by the travelling official with the appropriate department or agency staff, the DNC and/or political sponsor. It is imperative that detailed records of the trip be kept. See Attachment A (sample travel records).

Hatch Act Restrictions

As you may be aware, the Hatch Act places limits on the political activities of federal employees. On February 3, 1994, the recent amendments to the Hatch Act became effective. To date, the Office of Personnel Management ("OPM") has not promulgated regulations interpreting the Hatch Act Reform Amendments of 1993; consequently, a number of issues will remain unclear for the next few months. Your General Counsels may therefore wish to seek an advisory opinion from the Office of Special Counsel, the enforcement agency, prior to authorizing action in instances where it is unclear under the Act whether the action is permissible. Two memoranda by the Office of Special Counsel which clarify a few issues are attached. See Attachment B. Once OPM promulgates regulations, you should consult them to ensure your actions are consistent with the rules.

In determining whether a federal employee may or may not perform activities during a trip or during advance work for a trip, the first question to ask is whether the activity is official or political.[5] If it is official, then it is necessary to ask whether the activity is within the scope of the employee's official duties. If so, then the employee may perform the activity and get paid from appropriated funds. As previously stated, there is a group of persons whose activities always are official regardless of the type of trip involved (e.g., the Secret Service).

On the other hand, if an activity to be performed on a trip or during advance work is political in nature, then it is necessary to ask whether the employee is authorized to perform such

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[5] This inquiry is governed by the tests set forth earlier in this memorandum for determining when a trip or activity is political or official.

activity. Under the Hatch Act amendments, a federal employee is prohibited from engaging in political activity during normal duty hours. 5 U.S.C. § 7324, as amended. There only are two exceptions to this rule: 1) employees paid from an appropriation for the EOP whose duties and responsibilities continue outside normal agency duty hours and while away from their duty post, or 2) persons who are appointed by the President with the advice and consent of the Senate. Id. It follows that during normal duty hours, federal employees who do not meet either exception only may engage in official activities that are part of the employees' official responsibilities. In such a case, the employee's expenses cannot be paid for with political funds.

As stated previously, any employee of the government may provide to a Cabinet or sub-Cabinet member those services that are essential to his or her official functions, whether the trip is official or political. Those services would ordinarily include full provision for the effectiveness and safety of the party: e.g., communication; clerical, logistical, and administrative support; and assistance in the management of paperwork and records of decisions.

White House staff members who are paid from an appropriation for the EOP, as well as heads or assistant heads of Executive or military departments, may engage in political activity during normal duty hours, provided that the costs associated with the political activity are not paid from money derived from the Treasury of the United States. Persons detailed to the White House from other agencies remain subject to all the restrictions on political activity that they are subject to at their home agency; therefore, they may not engage in political activity during their agency's normal duty hours while detailed to the White House. Consultants, experts, and others employed on an intermittent basis by these agencies are subject to the same restrictions on political activity during normal duty hours on days on which they receive compensation from these agencies.

Under the Hatch Act, federal employees always have been able to engage in the following activities: register and vote; make a financial contribution to a party or candidate's campaign committee; express an opinion on political subjects; be a member of a political party or organization; attend (but not as a delegate) a political convention; attend a fundraiser or campaign event; or sign a nominating petition.

Under the amendments to Hatch Act, federal employees -- except those prohibited by statute[6] -- provided it is outside of normal

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[6] Employees and individuals employed at agencies delineated in 5 U.S.C. § 7323, as amended, may not engage in political activity -- on or off duty.

duty hours,[7] now may engage in the following activities: take an active part in the political management of a political campaign; hold office in political clubs, parties, organizations, and campaigns; organize or actively participate in the activities of a political convention; attend and be active at political rallies and meetings; solicit votes and campaign for or against candidates in partisan elections; make campaign speeches for candidates in partisan elections; endorse or oppose a candidate in a political advertisement, broadcast, or campaign literature; circulate a candidate nominating petition; assist in voter registration drives; and drive voters to the polls for a candidate or party.

The amendments prohibit all federal employees -- including those individuals paid from EOP appropriations and those individuals appointed by the President with the advice and consent of the Senate -- from engaging in the following activities: soliciting or collecting political contributions from the general public, including federal employees[8]; using their official authority to influence or interfere with an election; knowingly soliciting or discouraging the political activity of any person who has business before their agency; political activity while in any government office or building[9]; political activity while wearing an official uniform; political activity while using a government vehicle; being a candidate for public office in partisan

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[7] Those federal employees who are specifically authorized (e.g., those who meet either of the two exceptions affecting certain EOP employees and those appointed by the President with the advice and consent of the Senate, 5 U.S.C. § 7324 as amended) may engage in political activity during normal duty hours. However, as stated previously, the costs for such activity cannot be paid from federal dollars. 5 U.S.C. § 7324, as amended.

[8] The only exception to the solicitation rule is if both employees are members of the same federal labor or employee organization and the one solicited is not a subordinate employee. The solicitation must be for a contribution to the multicandidate political committee of the federal labor or employee organization. See 5 U.S.C. § 7237(a)(2), as amended.

[9] Employees, paid from an EOP appropriation, whose duties continue outside normal duty hours and while away from their normal duty station and those employees appointed by the President with the advice and consent of the Senate are not subject to the prohibition on political activity: in federal offices or buildings used for federal business, while in uniform, or in a government vehicle. However, such employees should keep political activity (e.g., setting up meetings, discussions related solely to advancing the partisan goals of the Democratic Party, etc.) to a minimum in federal spaces.

elections; and for most federal employees[10], political activity during normal duty hours.

The prohibition on soliciting or accepting political contributions, 5 U.S.C. § 7323, as amended, is new. Under this provision, a federal employee (including a Presidential appointee with Senate confirmation and EOP employees) may not personally request, make direct appeals for, nor accept a contribution on behalf of a candidate for office. A contribution is likely, under the new regulations, to be defined as encompassing donations of cash <u>and</u> services (<u>e.g.</u>, volunteer time).[11] However, this prohibition does not prevent a federal employee from speaking at a fundraiser or having his or her name on an invitation or literature publicizing a fundraiser.[12]

All federal employees may write briefing materials during normal duty hours on official Administration activities for use by Administration officials, even when such materials will be included in partisan political statements; <u>however</u>, such employees may not write or prepare any materials in a federal office during normal duty hours that will be used solely for political purposes (<u>e.g.</u>, materials for the platform of the Democratic Party) nor may they prepare materials containing statements of political advocacy.

This memorandum does not cover every conceivable issue relating to travel by senior Administration officials. As specific questions arise, more detailed guidance on the amendments to the Hatch Act and political activities should be sought from counsel at your respective departments and agencies.

Attachment

cc: All Department General Counsels

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[10] <u>See</u> note 6.

[11] <u>See</u> Attachment B (Letter to Dennis Foreman, Deputy General Counsel, Department of Treasury, from William E. Reukauf, Associate Special Counsel for Prosecution, Office of Special Counsel (February 4, 1994)).

[12] <u>Id</u>. at note 10.

Travel Record

Political or Mixed Travel
(Political/Official)

1. Date(s) of Travel ______________________________

2. Destination(s) 1) ______________________________

   2) ______________________________

   3) ______________________________

3. Purpose ______________________________

____

____

4. __________ Trip is entirely political.

   __________ Trip is partially political. Attach and complete Pre-Event Worksheet. **Advance** Office of General Counsel approval required.

   __________ Trip includes personal travel. **Advance** Office of General Counsel approval required.

5. Method of Travel

   __________ Contract-carrier

   __________ *Non-contract carrier -- **Advance** Executive Office approval required. Attach justification.

   __________ *Non-government aircraft. **Advance** Office of General Counsel and Chief of Staff approval required. Attach justification. See also, eight below.

   __________ Other -- privately-owned vehicle, rental car, etc.

6. Travel Class

   __________ Coach class

   __________ First-class -- **Advance** Office of General Counsel approval required. Attach justification.

7. Lodging/Expenses Reimbursement Method

   __________ Per Diem

   __________ Actual Subsistence. **Advance** approval of the Office of General Counsel required if actual subsistence is to be provided. Attach justification.

8. Travel benefits provided by non-federal source (excluding political organizations).

_________ No

_________ Yes -- **Advance** Office of General Counsel Office approval required.

9. Other person(s) traveling with or in advance of Agency/Department Head:

Name	Purpose	Costs Covered	Date(s)

10. Other/Comments

____

____

____

____

11. Attach itinerary and special approvals.

____ _______________
Trip Coordinator or Scheduler   Telephone No.   Date

____ _______________
Office of General Counsel   Date

____ _______________
Executive Office   Date

ATTACHMENT A

EVENT WORKSHEET

TRIP OF: **DATE:** **TO:**

DATE	LOCATION	EVENT	OFF.	POL.	ARR.	DEP.	EVENT TIME

*Do not write below this line -- FOR ADMINISTRATIVE USE ONLY

MINUTES

Official: ________
Political: ________
Total: ________

PERCENTAGES

Official: ________%
Political: ________%
Total: 100%

EXPENSES

Travel: $________
Hotel: $________
Incidentals: $________

TOTAL: $________
Official: $________
Political: $________

Political Entities:	Mins	%	Costs
1)			
2)			
3)			
4)			

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

FEB - 4 1994

Cheryl D. Mills, Esquire
Associate Counsel to the President
The White House
Washington, DC

Re: OSC File No. AD-94-0067

Dear Ms. Mills:

This letter responds to your request for an advisory opinion regarding application of the Hatch Act Reform Amendments of 1993 ("the Amendments") which became effective on February 3, 1994. In your letter you ask a series of questions which we will address below.

The Hatch Act (5 U.S.C. §§7324 - 7328), before its recent amendment, generally prohibited federal employees from actively participating in partisan political management and partisan political campaigns. A partisan election is one in which any candidate represents, for example, the Republican or Democratic party. On October 6, 1993, the Act was substantially amended to permit most federal employees to take an active part in partisan political management and partisan political campaigns.

As you are aware, the issue of which agency is properly authorized to issue regulations under the Amendments was referred to the Office of Legal Counsel (OLC), Department of Justice for determination. On February 2, 1994, OLC issued its opinion that this authority resides in the Office of Personnel Management. At this writing no implementing regulations have been issued. Without regulations, many terms and provisions in the Amendments are not fully defined and clarified. Thus, the advisory opinions contained herein should be considered preliminary, pending the issuance of definitive implementing regulations.

You have asked for advisory opinions concerning the activities of employees who were appointed by the President with the advice and consent of the Senate (PAS) and employees in the Executive Office of the President (EOP). Historically, such employees have been free to engage in political management and political campaigns including fund raising and personally soliciting political contributions. Under the Amendments to the Act, although employees in these positions may continue to take an active part in partisan politics, both on and off duty, they will now be restricted from soliciting, accepting or receiving a political contribution from any person.

In the Amendments, section 7322(3), "political contribution" has been defined as:

> "a gift, subscription, loan, advance, or deposit of money or anything of value, made for any political purpose; a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make a contribution for any political purpose; any payment by any person, other than a candidate or a political party or affiliated organization, of compensation for the personal services of another person which are rendered to any candidate or political party or affiliated organization without charge for any political purpose; and the provision of personal services for any political purpose."

The Amendments make no exception for PAS or EOP employees regarding soliciting, accepting or receiving a political contribution. We believe that these Amendments were designed to make it clear that PAS and EOP employees may not personally solicit or request that political contributions be made and may not be the recipient of such contributions. Webster's II 1106 (2d ed. 1988) defines "solicit" as "to try to obtain by entreaty, persuasion or formal application." Thus, a PAS or EOP employee may attend and speak at fund raisers, but to use your phrase, may not make direct appeals for donations of money or services for partisan political purposes.

As mentioned above, PAS and EOP employees remain able to participate in political activity both on and off duty, but the costs associated with this activity may not be paid by money derived from the U.S. Treasury. See § 7324(b)(1). We believe that the Amendments contemplate the reimbursement of such costs (e.g. travel and lodging) from the political campaign or other non-governmental sources. Therefore, we do not believe that such reimbursement will be considered the acceptance of a political contribution in violation of the Act.

Moreover, PAS and EOP employees may hold meetings with employees and members of partisan groups in their offices. Sections 7324(b)(1)-(2) of the Amendments state that PAS and EOP employees may engage in political activity while on duty in a federal building, again, if the costs associated with the activity are not paid for by money derived from the Treasury of the United States. Thus, they may, in your example, hold an afternoon reception for members of the Democratic National Committee. In this regard, even incidental costs such as rent and administrative overhead should be calculated and reimbursed, where feasible.

In addition, you asked whether an employee who accompanies an agency head on an official duty trip may be politically active after duty hours. The answer is yes, but care must be taken to adhere to established, routine tours of duty and duty hours applicable to that employee, including unusual tours of duty such as flextime and the like. The establishment of tours of duty and duty hours are regulated by 5 C.F.R. Part 610. Accordingly, an employee in travel status may not attend a breakfast political event during routine duty hours established for that employee. The same employee would, however, be permitted to attend an evening dinner political event, after routine duty hours.

Please call Karen Dalheim at (202) 653-8944 if you have any questions.

Sincerely,

William E. Reukauf

William E. Reukauf
Associate Special Counsel
for Prosecution

WER:RBE:KLD/kd

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

FEB - 1994

Dennis I. Foreman, Esquire
Deputy General Counsel
Department of the Treasury
1500 Pennsylvania Ave., NW
Room 3000
Washington, DC 20220

Dear Mr. Foreman:

This is in response to your request for an advisory opinion under the Hatch Act Reform Amendments of 1993 ("the Amendments"). You have posed several questions, but your immediate concern has to do with a planned event to be attended by the Treasury Secretary on February 6, 1994. You describe this event as a gala to be attended by the President and the Secretary; the purpose of the event is "to raise contributions to the President's campaign for re-election." You further represent that the Secretary will be speaking on economic issues and will not personally be requesting or suggesting that attendees make political contributions.

As you are aware, the issue of which agency is properly authorized to issue regulations under the Amendments was referred to the Office of Legal Counsel (OLC), Department of Justice for determination. On February 2, 1994, OLC issued its opinion that this authority resides in the Office of Personnel Management. At this writing no implementing regulations have been issued. Without regulations, many terms and provisions in the Amendments are not fully defined and clarified. Thus, the advisory opinions contained herein should be considered preliminary, pending the issuance of definitive implementing regulations.

You are correct that historically employees who were appointed by the President with the advice and consent of the Senate have been permitted to engage in political management and political campaigns including fund raising and personally soliciting political contributions. Under the Amendments to the Act, although employees in these positions may continue to take an active part in partisan politics, both on and off duty, they will now be restricted from soliciting, accepting or receiving a political contribution from any person.

In the amendments, section 7322(3), "political contribution" has been defined as:

> "a gift, subscription, loan, advance, or deposit of money or anything of value, made for any political purpose; a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make a contribution for any political purpose; any payment by any person, other than a candidate or a political party or affiliated organization, of compensation for the personal services of another person which are rendered to any candidate or political party or affiliated organization without charge for any political purpose; and the provision of personal services for any political purpose."

The language of the bill makes no exception for PAS employees regarding soliciting, accepting or receiving a political contribution. We believe that these Amendments were designed to make it clear that PAS employees may not personally solicit or request that political contributions be made and may not be the recipient of such contributions. Webster's II 1106 (2d ed. 1988) defines "solicit" as "to try to obtain by entreaty, persuasion or formal application." Thus, a PAS employee may attend and speak at fund raisers, but may not make direct appeals for donations of money or services for partisan political purposes.

As mentioned above, PAS employees remain able to participate in political activity both on and off duty, but the costs associated with this activity may not be paid by money derived from the U.S. Treasury. See § 7324(b)(1). We believe that the Amendments contemplate the reimbursement of such costs (e.g. travel and lodging) from the political campaign or other non-governmental sources. Therefore, we do not believe that such reimbursement will be considered the acceptance of a political contribution in violation of the Act.

You ask four additional questions regarding the Amendments. Your questions and our answers follow:

(1) Does the term "solicit" cover every express request to another to pay an amount to be used for the purposes of a campaign or campaigns for political office?

Yes.

(2) Would it constitute "solicit[ation]" for a government official to permit reference to his name in invitations to a political fund raising event where the reference in no way suggests that the official solicits or encourages contributions?

This would not constitute a solicitation.

(3) Would it constitute "solicit[ation]" for an official to merely endorse a candidate in remarks given at a political fund raiser?

This would not constitute a solicitation.

(4) Would it constitute "solicit[ation]" for an official to suggest to or ask an individual or a group to volunteer to work for a political campaign?

Yes.

Please call me at (202) 653-8970 if you have any further questions.

Sincerely,

William E. Reukauf

William E. Reukauf
Associate Special Counsel
for Prosecution

WER:RBE:KLD/kd

3/12

Hatch Act

- PAS + ECP can do everything on duty if not drawn on Treasury
- others can't while on duty

- no one can personally solicit goods, $, services

Cat 5 ~~Staff~~ - off duty
- can attend fundraiser, can speak, can have name
- can appear on invite - but can't solicit

When Principal on Pol-Travel
may be accompanied by Cat 5 - ok - if ~~acting~~ participating
in your official capacity (communicating back w/ office, etc.)
if your boss on travel at a fundraiser, you can attend
the fundraiser but have to be in your official
capacity, can't strategize

THE WHITE HOUSE
WASHINGTON

March 4, 1995

MEMORANDUM FOR HEADS OF DEPARTMENTS AND AGENCIES
SUBJECT: Regulatory Reinvention Initiative

Last week, I announced this Administration's plans for further reform of the Federal regulatory system. This is a central part of reinventing our Government. All Americans want the benefits of effective regulation: clean water, safe workplaces, whole-some food, sound financial institutions. But,too often the rules are drafted with such detailed lists of dos and don'ts that the objectives they seek to achieve are undermined. Clear goals and cooperation would work better. Too often, businesses, especially small ones, face a profusion of overlapping and sometimes conflicting rules.

We have already made real progress in reforming regulation. This memorandum will build on the regulatory philosophy set forth in Executive Order No. 12866 of September 30, 1993, "Regulatory Planning and Review," which is premised on the recognition of the legitimate role of government to govern, but to do so in a focused, tailored, and sensible way.

In the year and a half since that order was signed, we have opened the rulemaking process to the public, we have increased cooperation and coordination among the Federal agencies, and we have seen good processes produce good decisions.

However, not all agencies have taken the steps necessary to implement regulatory reform. To reaffirm and implement the principles of Executive Order No. 12866, regulatory reform must be a top priority.

Accordingly, I direct you to focus on the following four steps, which are an integral part of our ongoing Regulatory Reform Initiative.

FIRST: CUT OBSOLETE REGULATIONS

I direct you to conduct a page-by-page review of all of your agency regulations now in force and eliminate or revise those that are outdated or otherwise in need of reform. Your review should include careful consideration of at least the following issues:

- Is this regulation obsolete?
- Could its intended goal be achieved in more efficient, less intrusive ways?
- Are there better private sector alternatives, such as market mechanisms, that can better achieve the public good envisioned by the regulation?
- Could private business, setting its own standards and being subject to public accountability, do the job as well?
- Could the States or local governments do the job, making Federal regulation unnecessary?

This review should build on the work already being done by your agencies under section 5 of Executive Order No. 12866.

Your regulatory review task force should be headed by one of your appointees who should be given your full support and should, to the extent practicable, be freed of other duties.

I further direct you to deliver to me by June 1 a list of regulations that you plan to eliminate or modify with a copy of the report sent to Sally Katzen, Administrator of the Office of Information and Regulatory Affairs (OIRA). The list should distinguish between the regulations that can be modified or eliminated administratively and those that require legislative authority for modification or elimination.

SECOND: REWARD RESULTS, NOT RED TAPE

I direct you to change the way you measure the performance of both your agency and your frontline regulators so as to focus on results, not process and punishment. For example, Occupational Safety and Health Administration (OSHA) inspectors should not be evaluated by the number of citations they write, nor should officials of the Consumer Product Safety Commission be judged by the number of boxes of consumer goods that are detained in shipment. This change in measurement should involve a two-step process.

First, you should identify appropriate performance measures and prepare a draft in clear, understandable terms, of the results you are seeking to achieve through your regulatory program. The draft should be circulated to frontline regulators for review and comment. This is the same work needed to meet the requirements of the Government Performance and Results Act of 1993.

Second, you should evaluate and reward employees based on the realization of those measures/goals.

By no later than June 1, I direct you to (a) eliminate all internal personnel performance measures based on process (number of visits made, etc.) and punishment (number of violations found, amount of fines levied, etc.), and (b) provide to the National Performance Review (NPR) staff a catalogue of the changes that you are making in existing internal performance evaluations to reward employees. You should also provide material describing shifts in resource allocation from enforcement to compliance.

THIRD: GET OUT OF WASHINGTON AND CREATE GRASSROOTS PARTNERSHIPS

I direct you to promptly convene groups consisting of front line regulators and the people affected by their regulations. These conversations should take place around the country -- at our cleanup sites, our factories, our ports.

I further direct you to submit a schedule of your planned meetings to the NPR staff by March 30 and work with NPR in following through on those meetings.

FOURTH: NEGOTIATE. DON'T DICTATE

It is time to move from a process where lawyers and bureaucrats write volumes of regulations to one where people work in partnership to issue sensible regulations that impose the least burden without sacrificing rational and necessary protections. In September 1993, I asked each of you to identify at least one rule that could be conducted through negotiated rulemaking (or to explain why such could not be done) in order to promote consensual rulemaking as opposed to the more traditional rulemaking that has dominated the regulatory arena.

I now direct you to expand substantially your efforts to promote consensual rulemaking. To this end, you should submit to OIRA, no later than March 30, a list of upcoming rulemakings that can be converted into negotiated rulemakings. I have directed Sally Katzen to review your lists with a view toward making clear to the regulated community that we want to work together productively on even the most difficult subjects.

To facilitate our ability to learn from those affected by regulation, I will amend Executive Order No. 12838 (which requires agencies to reduce the number of advisory committees that they use and to limit the future use of such committees) to allow for advisory committees established for negotiated rulemakings.

I also intend to take additional steps to increase our ability to learn from those affected by regulation. While many laws and rules that limit the ability of regulators to talk with those being regulated were imposed to curb abuse, they now often serve as a barrier to meaningful communication between the regulators and the regulated. To address this problem, and to promote consensus building and a less adversarial environment, I direct you to review all of your administrative ex parte rules and eliminate any that restrict communication prior to the publication of a proposed rule -- other than rules requiring the simple disclosure of the time, place, purpose, and participants of meetings (as in Executive Order No. 12866). We will also begin drafting legislation that will carve out exemptions to the Federal Advisory Committee Act to promote a better understanding of the issues, such as exemptions for meetings with State/local/tribal governments and with scientific or technical advisors.

I also ask you to think about other ways to promote better communication, consensus building, and a less adversarial environment. Please send your ideas to the Office of the Vice President.

As I said on Tuesday, February 21, 1995, you are to make regulatory reform a top priority. Good government demands it and your full cooperation is crucial.

/s/
William Clinton

THE WHITE HOUSE

WASHINGTON

November 10, 1994

MEMORANDUM FOR WHITE HOUSE STAFF

FROM: ABNER J. MIKVA
COUNSEL TO THE PRESIDENT

JOEL I. KLEIN JIK
DEPUTY COUNSEL TO THE PRESIDENT

SUBJECT: CONTACTS WITH AGENCIES ON RULEMAKING MATTERS

This memorandum sets forth the policies on contacts by White House staff with executive branch departments and agencies on pending rulemaking matters.

The courts have consistently recognized the President's constitutional authority to supervise and guide rulemaking by Executive Branch departments and agencies. In 1993, President Clinton signed Executive Order 12866, "Regulatory Planning and Review," as part of this Administration's efforts to reform the regulatory review process. Consistent with this Executive Order, White House staff should adhere to the following guidelines:

1. White House staff may contact executive branch departments and agencies regarding a pending rulemaking matter if the purpose of the communication is not to influence the outcome of a pending rulemaking proceeding (*e.g.*, a status inquiry). In such cases, White House staff should immediately state that their purpose is not to influence the outcome of the proceeding.

2. If the purpose of a contact is to influence the outcome of a pending rulemaking, White House staff members should, prior to making the contact, (a) obtain approval from the Assistant or Deputy Assistant to the President who is their principal supervisor, and (b) coordinate the contact with the Administrator of OIRA, who will advise on the appropriateness of the contact.

3. If a member of the public (that is, a person not employed by the Executive Branch, Congress or the federal judiciary) approaches the White House and asks to have a position or information considered in a pending rulemaking proceeding, White House staff members should inform the person that input from the public must be submitted in writing if it is to be incorporated into the rulemaking process. **Non-written comments from the public should not be communicated by White House staff to departments, agencies, OIRA or anyone else involved in the rulemaking or review process.**

4. Any written communications from members of the public on pending rulemaking matters are to be forwarded by the recipient to the relevant department or agency for inclusion in the public docket. These rules apply to all pending rulemaking matters, including matters under review by the President, Vice President, or any other regulatory policy advisor.

Counsel   Phil/JO/DH

THE WHITE HOUSE

WASHINGTON

March 11, 1994

MEMORANDUM FOR ALL WHITE HOUSE STAFF

FROM: JACK QUINN
ASSISTANT TO THE PRESIDENT AND
CHIEF OF STAFF TO THE VICE PRESIDENT

JOEL I. KLEIN
DEPUTY COUNSEL TO THE PRESIDENT

RE: Prohibited Contacts on Rulemaking Matters

By memorandum dated May 4, 1993, we reiterated our policies governing communications by members of White House staff with independent agencies, executive branch agencies, and their components. We also noted that the President was considering certain changes to the regulatory review process and that further guidance regarding communications on regulatory and rulemaking matters would be forthcoming.

In the Fall, the President issued Executive Order No. 12866, "Regulatory Planning and Review." Consistent with the intent of that Order, White House staff members are directed to adhere to the following guidelines with respect to communications with executive branch agencies regarding rulemaking matters:

I. Contacts with Agencies

A. Members of the White House staff may contact executive branch agencies with respect to pending rulemaking matters if the purpose of the communication is not to influence the outcome of the pending proceeding (including, specifically, contacts regarding the status of the matter or general policy, budgetary, or administrative issues).

B. When the purpose of the contact is to influence the outcome of a pending rulemaking proceeding, the staff member should, prior to making the contact:

1. obtain approval from his or her principal or departmental supervisor; and

2. coordinate the contact with the Administrator of OIRA, who will advise the staff member on the appropriateness of the contact.

II. Contacts with Members of the Public

A. Members of the public (that is, persons not employed by the executive, legislative, an judicial branches of the federal government) often approach members of the White House staff and ask to have a position or information considered in a rulemaking proceeding at an executive branch agency. When this occurs, White House staff should inform the person that positions or information provided by members of the public must be submitted in writing if they are to be incorporated into the rulemaking process. All such written communications received from members of the public are to be forwarded by the recipient to the affected agency(ies) for inclusion in the public docket.

Please be reminded that under Executive Order No. 12866, this provision applies to contacts with the public regarding pending rulemaking proceedings under review by the President, Vice President, or any regulatory policy advisor.

B. Consistent with the policies reflected in Executive Order No. 12866, White House staff members should not communicate non-written comments from members of the public on pending rulemaking matters to agencies, OIRA, or anyone else involved in the rulemaking or the review process.

* * *

Please cooperate in observing the guidelines discussed above and continue to refer to prior memoranda issued by the White House Counsel's Office on contacts regarding investigative and adjudicative matters and, more generally, contacts with independent agencies. If you have any questions regarding any of these procedures, please contact the White House Counsel's Office.

Thank you for your continuing assistance and cooperation in this area.

J.M.Q.
JIK

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

October 12, 1993

THE DIRECTOR

M-94-3

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, AND INDEPENDENT REGULATORY AGENCIES

FROM: Leon E. Panetta
Director

SUBJECT: Guidance for Implementing E.O. 12866

The President issued Executive Order No. 12866, "Regulatory Planning and Review," on September 30, 1993. This Order directs the Office of Management and Budget (OMB) to carry out the centralized review of significant regulatory actions under development at regulatory agencies.

Within OMB, the Office of Information and Regulatory Affairs (OIRA) has the primary responsibility under the Executive Order for a number of the specific regulatory review and planning functions. Sally Katzen, the OIRA Administrator, has prepared a memorandum setting forth initial steps to implement the Order. Among other things, each agency must promptly designate a Regulatory Policy Officer and begin discussions with OIRA concerning those regulations that warrant centralized review.

I urge you to send Administrator Katzen's memorandum (attached) to the appropriate officials for their immediate attention.

Attachment

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

October 12, 1993

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, AND INDEPENDENT REGULATORY AGENCIES

FROM: Sally Katzen SKatzen
Administrator, Office of Information and Regulatory Affairs

SUBJECT: Guidance for Implementing E.O. 12866

The President issued Executive Order No. 12866, "Regulatory Planning and Review," on September 30, 1993 (58 Fed.Reg. 51735 (October 4, 1993)).[1] It calls upon Federal agencies and the Office of Information and Regulatory Affairs (OIRA) to carry out specific actions designed to streamline and make more efficient the regulatory process. This memorandum provides guidance on a number of the provisions of the new Order. Undoubtedly, with experience, additional questions will be raised, and we will attempt to respond promptly as they arise.

1. Coverage

The Order as a whole applies to all Federal agencies, with the exception of the independent regulatory agencies (Sec. 3(b)). The independent regulatory agencies <u>are</u> included in provisions concerning the "Unified Regulatory Agenda" (Sec. 4(b)) and "The Regulatory Plan" (Sec. 4(c)). However, while the President's "Statement of Regulatory Philosophy and Principles" (Sec. 1) applies by its terms only to those agencies that are not independent, the independent regulatory agencies are requested on a voluntary basis to adhere to the provisions that may be pertinent to their activities.

In addition, the Order states that the OIRA Administrator may exempt agencies otherwise covered by the Order. Appendix A is a first cut of those agencies that have few, if any, significant rulemaking proceedings each year; effective immediately, these agencies are exempt from the scope of the

[1] This Order replaces E.O. 12291 and E.O. 12498.

Order.[2] Like the independent agencies, those agencies listed in Appendix A are requested to adhere voluntarily to the relevant provisions of the Order, particularly the President's "Statement of Regulatory Philosophy and Principles" (Sec. 1).

2. Designation of Regulatory Policy Officer.

The Order directs each agency head to designate a Regulatory Policy Officer "who shall report to the agency head" (Sec. 6(a)(2)). This Regulatory Policy Officer is to be involved at each stage of the regulatory process to foster the development of effective, innovative, and least burdensome regulations. Because the Regulatory Policy Officer will in most circumstances serve as the agency representative to the Regulatory Working Group (see below), please provide us with the name, mailing address, and telephone and fax numbers of your designeee as soon as possible.

3. Regulatory Working Group.

The Order directs the OIRA Administrator to convene a Regulatory Working Group consisting, in part, of the representatives of the heads of each agency having significant domestic regulatory responsibility (Sec. 4(d)).

Again, we have made a first cut of a list of those agencies which should be members of the Regulatory Working Group, which is attached as Appendix B. Some of the Departments that have separate regulatory components may qualify for multiple representatives. Please notify us if you believe that your Department should have more than one representative. In suggesting additional representatives, please identify these persons and provide us with their mailing addresses, and telephone and fax numbers.

The Administrator is to convene the first meeting of the Regulatory Working Group within 30 days. It is therefore essential that we have your response as soon as possible.

4. Regulatory Planning Mechanism.

The Order emphasizes planning as a way of identifying significant issues early in the process so that whatever coordination or collaboration is appropriate can be achieved at

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[2] To assure that the purposes of the Executive Order are carried out, we may ask these agencies to review particular significant regulatory actions of which we become aware. These Agencies should advise OIRA if they believe that a particular rule warrants centralized review.

the beginning of the regulatory development process rather than at the end (Sec. 4).

There are two specific planning documents discussed in the Order. The first, the semiannual Unified Regulatory Agenda (Sec. 4(b)), is on schedule and will be published before the end of October. Traditionally, all agencies participate, describing briefly the regulations under development. The Order does not call for any change in either the scope or format of this document.

The second planning document is the annual Regulatory Plan (Sec. 4(c)), which is to be published in October as part of the Unified Regulatory Agenda. The Regulatory Plan seeks to capture the most important significant regulations. In advance of agencies drafting their Regulatory Plans, the Vice President will meet with agency heads to seek a common understanding of regulatory priorities and to coordinate regulatory efforts to be accomplished in the upcoming year (Sec. 4(a)). The Vice President will convene the first meeting in early 1994. Following that meeting, we will provide appropriate guidance on the scope and structure of the submissions for the 1994 Regulatory Plan.

As you may recall, OMB had asked in OMB Bulletin No. 93-13 (May 13, 1993) that certain agencies prepare a draft 1993 Regulatory Program under the then applicable Executive Order No. 12498. Many agencies sent in some or all of their proposed programs. Other agencies informed us that they wanted to wait for the confirmation of political appointees or the issuance of the new Executive Order. While there is now insufficient time for all of the steps necessary to prepare a formal regulatory plan for this year, the materials we have received will be useful in preparing for the meeting with the Vice President and our other coordination efforts. Those agencies that have already drafted but not submitted materials, as well as those who wish to augment what we have already received, are encouraged to send these materials to OIRA.

5. Review of Existing Regulations.

The Order directs each agency to create a program under which it will periodically review its existing significant regulations to determine whether any should be modified or eliminated to make the agency's regulatory program more effective, less burdensome, and in greater alignment with the President's priorities and regulatory principles (Sec. 5). Specifically, within 90 days, agencies are to submit to the OIRA Administrator a program establishing, consistent with the agency's resources and regulatory priorities, the procedures for carrying out a periodic review of existing significant regulations and identifying any legislative mandates that may merit enactment, amendment, or rescission (Sec. 5(a)).

We are aware that past Administrations have required agencies to undertake similar review efforts. Some of these have been so broad in scope that necessary analytic focus has been diffused, or needed follow-up has not occurred. This current effort should be more productive because it focuses only on significant regulations and the legislation that mandates them, and because we will be looking at groups of regulations across agencies with the help of the Vice President and the White House Regulatory Advisers, as well as the public.

Pursuant to the Order, we are asking each agency to send to the OIRA Administrator within 90 days a work-plan which identifies who and which office within the agency will be responsible for assuring that periodic reviews take place; the criteria to be used for selecting targets of review; the kinds of public involvement, data collection, economic and other analysis, and follow-up evaluation that are planned; the timetables to be applied; and, to the extent then known, the targets selected. As the program is implemented and an agency selects specific targets for review, please identify the specific programs, regulations, and legislation involved. To the extent they are relevant, we will share with you the review efforts of other agencies.

6. Centralized Review of Regulations.

One of the themes in the Order is greater selectivity in the regulations reviewed by OIRA, so that we can free up our resources to focus on the important regulatory actions and expedite the issuance of those that are less important. Another theme is that we are to determine early in the process which regulations are important (the term in the Order is - "significant"). Among other things, this will permit agencies to conduct the needed analyses for these regulations as part of the development process, not as an after-the-fact exercise (Sec. 6(a)(3)(B)).

The Order defines "significant" regulatory actions as those likely to lead to a rule (1) having an annual effect on the economy of $100 million or more or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impact of entitlements, grants, user fees, or loan programs; or

(4) raising novel legal or policy issues (Sec. 3(f)).[3] This definition is not wholly susceptible to mechanical application; rather, in many instances, it will require the exercise of judgment. We will work with the agencies to come to a consensus on the meaning of this term in the context of the specific programs and characteristics of each agency.

To begin, we ask the appropriate personnel at each agency to work with the OIRA desk officer(s) to develop an appropriate list of rulemakings that are under development for submission to OIRA. For each rulemaking, please use the format below:

> DEPARTMENT/REGULATORY COMPONENT. Title ([Indicate significance[4]]; Upcoming Action: [Identify][5]) Planned Submission/Publication: [date]; RIN: [number[6]]. Statutory/Judicial Deadline: [date, if any].
>
> [Describe briefly what the agency is intending to do and why, including whether the program is new or

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[3] The Order is intended to cover any policy document of general applicability and future effect, which the agency intends to have the force and effect of law, such as guidances, funding notices, manuals, implementation strategies, or other public announcements, designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency. Such documents are normally published in the Federal Register, but can also be made available to the affected public directly.

[4] State one of the following: "Not Significant", "Significant", or "Economically Significant". A designation as "Economically Significant" means that the regulatory action is likely to result in the effects listed in the first subsection -- namely, i.e., "have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities." A regulatory action that is considered "Economically Significant" must ultimately be supported by the analyses set forth in Section 6(a)(3)(C).

[5] Indicate whether the upcoming regulatory action is a "Notice of Inquiry", "Funding Notice", "ANPRM", "NPRM", "Interim Final Rule", "Final Rule", or what other action it may be.

[6] "RIN" is the Regulation Identifier Number published in the Unified Regulatory Agenda. If a RIN has not been assigned, the agency should obtain one through the normal process by contacting the Regulatory Information Service Center.

continuing and, if continuing, the significant changes in program operations or award criteria. Briefly describe issues associated with the rulemaking, as appropriate, e.g., impacts (both benefits and costs), interagency and intergovernmental (State and local) effects, budgetary effects (e.g., outlays, number of years and awards, administrative overhead), time pressures, and why the regulatory action is important, sensitive, controversial or precedential. For final regulatory actions, include a brief statement of the nature and extent of public comment, and the nature and extent of changes made in response to the public comments.] ([Name and telephone number of program official who can answer detailed questions])

We are not looking for a lengthy or detailed description of the issues listed above. All we need is information sufficient to confirm the characterization of "significant" or "not significant". Similarly, for final regulatory actions, the description of the public comments and changes is simply to enable us to decide whether we can expedite or waive our review of the final rule where, for example, there are few or no public comments and little or no substantive change from the previously reviewed NPRM.

Under the Executive Order, within 10 working days after OIRA receives this list, we will meet with or call your office to discuss whether or not listed regulatory actions should be submitted for centralized review (Sec. 6(a)(3)(A)). The purpose of this meeting is to confirm the characterization of the proposal as "significant" or "not significant", the characterization is important because, absent a material change in the development of the rule, those characterized as "not significant" need <u>not</u> be submitted for OIRA review before publication.

OIRA will also want to discuss the timing for updates that would identify any new regulatory actions under development. OIRA implemented this procedure with several agencies on a pilot basis while the Order was being drafted. We are most pleased by the results. It has in some instances taken one or two tries to develop a process that works for a particular agency. In most instances, submission of a list once a month has proven sufficient for our purposes.

Once it is clear that a rulemaking warrants review by OIRA, the process will be facilitated by your advising the OIRA staff as soon as possible on the basic concept, direction, and scope of the rulemaking. This will enable us to identify early the issues that we are concerned about and to inform agency personnel of the type of analyses that OIRA will look for when it reviews the regulatory action. All of this is designed to make the review process more efficient and avoid last minute problems.

When an agency submits a significant regulatory action for review, the Order sets forth certain information that each agency should provide a description of the need for the regulatory action, how the regulation will meet that need, and an assessment of the potential costs and benefits of the regulatory action, together with an explanation of how it is consistent with a statutory mandate, promotes the President's priorities, and avoids undue interference with State, local, and tribal governments. This should not impose additional burden on the agency. All of the information should have been prepared as part of the agency's deliberative process; and much, if not all, of this information should already be set forth in the preamble of the proposal so as to allow more informed public comment.

If the regulatory action is economically significant (as defined in Sec. 3(f)(1)),[7] the Order sets forth additional information that an agency must provide -- an assessment of benefits, costs, and of potentially effective and reasonably feasible alternatives to the planned regulatory action (Sec. 6(a)(3(C)). We recognize that this material may take different forms for different agencies. We are reviewing our current guidance to see what changes, if any, are appropriate. Pending the conclusion of this review, agencies should continue to adhere to the existing OMB guidance on how to estimate benefits and costs.

In order to assure that the public is aware of our review under the Order and the possible effects that this review may have had, agencies should indicate in the preamble to the regulatory action whether or not the regulatory action was subject to review under E.O. 12866. On the other hand, there is no requirement that an agency document (in the preamble or in its submissions to OIRA) compliance with each principle of regulation set forth in the beginning of the Executive Order (Sec. 1(b)); we do, however, expect agencies to adhere to these principles and to respond to any questions that may be raised about how a regulatory action is consistent with these provisions of the Order.

The OIRA Administrator was given the authority to exempt any category of agency regulations from centralized review (Sec. 3(d)(4)). To begin with, we have decided that the previously granted exemptions should be kept in effect, except as the Order

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[7] See footnote 4.

specifically includes them.[8] Several additional exemptions have been added as a result of our ongoing discussions with agencies. A list of current exemptions is set forth in Appendix C. We will add to this list as experience warrants. We urge you to contact the Administrator, or have your staff contact your OIRA desk officer, to discuss those categories you believe may be suitable for exemption.

7. Openness and Public Accountability.

To assure greater openness and accountability in the regulatory review process, the Order sets forth certain responsibilities for OIRA (Sec. 6(b)(4)). Among other things, OIRA is placing in its public reading room a list of all agency regulatory actions currently undergoing review. This list is updated daily, and identifies each regulatory action by agency, title, date received, and date review is completed.

The reading room also contains a list of all meetings and telephone conversations with the public and Congress to discuss the substance of draft regulations that OIRA is reviewing. Within OIRA, only the Administrator (or an individual specifically designated by the Administrator -- generally the Deputy Administrator) may receive such oral communications.

When these meetings are scheduled, we are asking those outside the Executive branch to have communicated their concerns and supporting facts to the issuing agency before the meeting with OIRA. To assure that the matters discussed are known to the agency, we are inviting policy-level officials from the issuing agency to each such meeting.

In addition, written materials received from those outside the Executive branch will be logged in the reading room and forwarded to the issuing agency within 10 working days. It will be up to each agency to put these in its rulemaking docket.

After the regulation is published, OIRA is making available to the public the documents exchanged between OIRA and the issuing agency. These materials will also be made public even if the agency decides not to publish the regulatory action in the Federal Register. In addition, the Order directs that, after a

[8] Section 3(d)(2) includes within the definition of "regulation" or "rule" those pertaining to "procurement" and the "import or export of non-defense articles and services." The OIRA Administrator interprets the latter to include within the scope of the Order the regulations of the Bureau of Export Administration, and to exclude State Department regulations involving the Munitions List.

regulatory action has been published in the Federal Register or otherwise released, each agency is to make available to the public the text submitted for review, and the required assessments and analyses (Sec. 6(a)(3)(E)). In addition, after the regulatory action has been published in the Federal Register or otherwise issued to the public, each agency is to identify for the public, in a complete, clear, and simple manner, the substantive changes that it made to the regulatory action between the time the draft was submitted to OIRA for review and the action was subsequently publicly announced, indicating those changes that were made at the suggestion or recommendation of OIRA (Sec. 6(a)(3)(E)(ii) & (iii)). Should you have any questions about these matters, please call the Administrator or one of your OIRA Desk Officers.

8. Time Limits for OIRA Review.

The Order sets forth strict time limits for OIRA review of regulatory actions. For any notices of inquiry, advance notice of proposed rulemaking, or other preliminary regulatory action, OIRA is to complete review within 10 working days (Sec. 6(b)(2)(A)). For all other regulatory actions, OIRA has 90 calendar days, unless OIRA has previously reviewed it and there has been no material change in the facts and circumstances upon which the regulatory action is based, in which case there is a limit of 45 days (Sec. 6(b)(2)(B)). Because of these tight time limits, we must work closely together to ensure that requests for clarification or information are responded to promptly. Upon receipt of a regulatory action, we plan to take a quick look and make certain that whatever analyses should be included are included, and to get back promptly to the agency to ask for whatever is missing.

In some instances, a reason for OIRA review will be the potential effect of a regulation on other agencies. In these circumstances, OIRA will attempt to provide the affected agencies with copies of the draft regulatory action as soon as possible. If you are aware that another an agency has an interest in the draft regulatory action, please let us know quickly.

We also want to stress the provision in the Order that calls upon each agency, in emergency situations or when the agency is obligated by law to act more quickly than normal review procedures allow, to notify OIRA as soon as possible and to schedule the rulemaking proceedings so as to permit sufficient time for OIRA to conduct an adequate review (Sec. 6(a)(3)(D)).

9. Regulation Identifier Number (RIN).

We ask that each agency include a Regulation Identifier Number in the heading of each regulatory action published in the

Federal Register.[9] This will make it easier for the public and agency officials to track the publication history of regulatory actions throughout their life cycles and to link documents in the Federal Register with corresponding entries in the Unified Agenda of Federal Regulations (Sec. 4(b)) and the Regulatory Plan (Sec. 4(c)).

* * * * *

We look forward to working with you to implement this Executive Order. If you have any questions, please let us know. We will, of course, provide additional guidance as experience and need dictate.

[9] The Office of the Federal Register has issued guidance to agencies on the placement of the RIN number in their documents. See Document Drafting Handbook, 1991 ed., p. 9.

APPENDIX A

AGENCIES EXEMPT FROM E.O. 12866

Advisory Council on Historic Preservation
African Development Foundation
Alaska Natural Gas Transportation System,
Office of the Federal Inspector
American Battle Monuments Commission
Arms Control and Disarmament Agency
Board for International Broadcasting
Central Intelligence Agency
Commission of Fine Arts
Committee for Purchase from the Blind
and Severely Handicapped
Export-Import Bank of the United States
Farm Credit System Assistance Board
Federal Financial Institutions Examination Council
Federal Mediation and Conciliation Service
Harry S. Truman Scholarship Foundation
Institute of Museum Services
Inter-American Foundation
International Development Corporation Agency
James Madison Memorial Fellowship Foundation
Merit Systems Protection Board
Navajo Hopi Indian Relocation Commission
National Capital Planning Commission
Office of Special Counsel
Overseas Private Investment Corporation
Panama Canal Commission
Pennsylvania Avenue Development Corporation
Peace Corps
Selective Service System
Tennessee Valley Authority
United States Metric Board
United States Information Agency
United States International Development Cooperation Agency

APPENDIX B

MEMBERS OF THE REGULATORY WORKING GROUP

Department of Agriculture
Department of Commerce
Department of Defense
Department of Education
Department of Energy
Department of Health and Human Services
Department of Housing and Urban Development
Department of the Interior
Department of Justice
Department of Labor
Department of Transportation
Department of the Treasury
Department of Veterans Affairs
Environmental Protection Agency
Small Business Administration
General Services Administration
Equal Employment Opportunity Commission

APPENDIX C

REGULATORY ACTIONS EXEMPTED FROM CENTRALIZED REGULATORY REVIEW

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service--Special Nutrition program notices that revise reimbursement rates and eligibility criteria for the School Lunch, Child Care Food, and other nutrition programs.

Food and Nutrition Service--Food Stamp program notices that set eligibility criteria and deduction policies.

Agricultural Marketing Service--Regulations that establish voluntary standards for grading the quality of food.

Animal and Plant Health Inspection Service--Rules and notices concerning quarantine actions and related measures to prevent the spread of animal and plant pests and diseases.

Animal and Plant Health Inspection Service--Rules affirming actions taken on an emergency basis if no adverse comments were received.

Rural Electrification Administration--Rules concerning standards and specifications for construction and materials.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration--Certain time-sensitive preseason and in season Fishery Management Plan regulatory actions that set restrictions on fishing seasons, catch size, and fishing gear.

DEPARTMENT OF EDUCATION

Certain Final Rules Based on Proposed Rules--Final regulations based on proposed regulations that OMB previously reviewed where: (1) OMB had not previously identified issues for review in at final regulation stage; (2) Education received no substantive public comment; and (3) the proposed regulation is not substantively revised in the final regulation.

Rules Directly Implementing Statute--Final regulations that only incorporate statutory language with no interpretation.

Notices of Final Funding Priorities--Notices of final funding priorities for which OMB has previously reviewed the proposed priority.

DEPARTMENT OF ENERGY

Power Marketing Administrations--Regulations issued by various power administrations relating to the sale of electrical power that they produce or market.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration--Agency notices of funds availability.

Food and Drug Adminstration--Medical device reclassifications to less stringent categories.

Food and Drug Adminstration--OTC monographs, unless they may be precedent-setting or have large adverse impacts on consumers.

Food and Drug Administration--Final rules for which no comments were received and which do not differ from the NPRM.

DEPARTMENT OF THE INTERIOR

Office of Surface Mining--Actions to approve, or conditionally approve, State regulatory mining actions or amendments to such actions.

Office of Surface Mining--Approval of State mining reclamation plans or amendments.

Office of Surface Mining--Cooperative agreements between OSM and States.

United States Fish and Wildlife Service--Certain parts of the annual migratory bird hunting regulations.

DEPARTMENT OF TRANSPORTATION

All Office of DOT--Amendments that postpone the compliance dates of regulations already in effect.

Coast Guard--Regatta regulations, safety zone regulations, and security zone regulations.

Coast Guard--Anchorage, drawbridge operations, and inland waterways navigation regulations.

Coast Guard--Regulations specifying amount of separation required between cargoes containing incompatible chemicals.

Federal Aviation Administration--Standard instrument approach procedure regulations, en route altitude regulations, routine air space actions, and airworthiness directives.

National Highway Traffic Safety Administration--Federal Motor Vehicle Safety Standard 109 table of tire sizes.

DEPARTMENT OF THE TREASURY

Internal Revenue Service, Bureau of Alcohol, Tobacco, and Firearms, and Customs Service--Revenue rulings and procedures, Customs decisions, legal determinations, and other similar ruling documents. Major legislative regulations are covered fully.

ENVIRONMENTAL PROTECTION AGENCY

Office of Pesticides and Toxic Substances--Actions regarding pesticide tolerances, temporary tolerances, tolerance exemptions, and food additives regulations, except those that make an existing tolerance more stringent.

Office of Pesticides and Toxic Substances--Unconditional approvals of TSCA section 5 test marketing exemptions, and of experimental use permits under FIFRA.

Office of Pesticides and Toxic Substances--Decision documents defining and establishing registration standards; decision documents and termination decisions for the RPAR process; and data call-in requests made under section 3(c)(2)(B) of FIFRA.

Office of Air, Noise, and Radiation--Rules that unconditionally approve revisions to State Implementation Plans.

Office of Air, Noise, and Radiation--Unconditional approvals of equivalent methods for ambient air quality monitoring and of NSPS, NESHAPS, and PSD delegations to States; approvals of carbon monoxide and nitrogen oxide waivers; area designations of air quality planning purposes; and deletions from the NSPS source categories list.

Office of Water--Unconditional approvals of State Water Standards.

Office of Water--Unconditional approval of State underground injection control programs, delegations of NPDES authority to States; deletions from the 307(a) list of toxic pollutants; and suspension of Toxic Testing Requirements under NPDES.

Office of Solid Water and Emergency Response--Unconditional approvals of State authorization under RCRA of State solid waste management plans and of hazardous waste delisting petitions under RCRA.

PENSION BENEFIT GUARANTY CORPORATION

Interest Rates--Changes in interest rates on later premium payments and delinquent employer liability payments under sections 6601 and 6621 of the Internal Revenue Code as amended by the Tax Equity and Fiscal Responsibility Act of 1982.

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release September 30, 1993

EXECUTIVE ORDER

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REGULATORY PLANNING AND REVIEW

The American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and private markets are the best engine for economic growth; regulatory approaches that respect the role of State, local, and tribal governments; and regulations that are effective, consistent, sensible, and understandable. We do not have such a regulatory system today.

With this Executive order, the Federal Government begins a program to reform and make more efficient the regulatory process. The objectives of this Executive order are to enhance planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of Federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public. In pursuing these objectives, the regulatory process shall be conducted so as to meet applicable statutory requirements and with due regard to the discretion that has been entrusted to the Federal agencies.

Accordingly, by the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Statement of Regulatory Philosophy and Principles. (a) The Regulatory Philosophy. Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

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(b) <u>The Principles of Regulation.</u> To ensure that the agencies' regulatory programs are consistent with the philosophy set forth above, agencies should adhere to the following principles, to the extent permitted by law and where applicable:

(1) Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.

(2) Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively.

(3) Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

(4) In setting regulatory priorities, each agency shall consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction.

(5) When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.

(6) Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.

(7) Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.

(8) Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.

(9) Wherever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities. Each agency shall assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives. In addition, as appropriate, agencies shall seek to harmonize Federal regulatory actions with related State, local, and tribal regulatory and other governmental functions.

(10) Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.

(11) Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.

(12) Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.

Sec. 2. Organization. An efficient regulatory planning and review process is vital to ensure that the Federal Government's regulatory system best serves the American people. (a) The Agencies. Because Federal agencies are the repositories of significant substantive expertise and experience, they are responsible for developing regulations and assuring that the regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order.

(b) The Office of Management and Budget. Coordinated review of agency rulemaking is necessary to ensure that regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order, and that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency. The Office of Management and Budget (OMB) shall carry out that review function. Within OMB, the Office of Information and Regulatory Affairs (OIRA) is the repository of expertise concerning regulatory issues, including methodologies and procedures that affect more than one agency, this Executive order, and the President's regulatory policies. To the extent permitted by law, OMB shall provide guidance to agencies and assist the President, the Vice President, and other regulatory policy advisors to the President in regulatory planning and shall be the entity that reviews individual regulations, as provided by this Executive order.

(c) The Vice President. The Vice President is the principal advisor to the President on, and shall coordinate the development and presentation of recommendations concerning, regulatory policy, planning, and review, as set forth in this Executive order. In fulfilling their responsibilities under this Executive order, the President and the Vice President shall be assisted by the regulatory policy advisors within the Executive Office of the President and by such agency officials and personnel as the President and the Vice President may, from time to time, consult.

Sec. 3. Definitions. For purposes of this Executive order: (a) "Advisors" refers to such regulatory policy advisors to the President as the President and Vice President may from time to time consult, including, among others: (1) the Director of OMB; (2) the Chair (or another member) of the Council of Economic Advisers; (3) the Assistant to the President for Economic Policy; (4) the Assistant to the President for Domestic Policy; (5) the Assistant to the President for National Security Affairs; (6) the Assistant to the President for Science and Technology; (7) the Assistant to the President for

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Intergovernmental Affairs; (8) the Assistant to the President and Staff Secretary; (9) the Assistant to the President and Chief of Staff to the Vice President; (10) the Assistant to the President and Counsel to the President; (11) the Deputy Assistant to the President and Director of the White House Office on Environmental Policy; and (12) the Administrator of OIRA, who also shall coordinate communications relating to this Executive order among the agencies, OMB, the other Advisors, and the Office of the Vice President.

(b) "Agency," unless otherwise indicated, means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10).

(c) "Director" means the Director of OMB.

(d) "Regulation" or "rule" means an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency. It does not, however, include:

(1) Regulations or rules issued in accordance with the formal rulemaking provisions of 5 U.S.C. 556, 557;

(2) Regulations or rules that pertain to a military or foreign affairs function of the United States, other than procurement regulations and regulations involving the import or export of non-defense articles and services;

(3) Regulations or rules that are limited to agency organization, management, or personnel matters; or

(4) Any other category of regulations exempted by the Administrator of OIRA.

(e) "Regulatory action" means any substantive action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking.

(f) "Significant regulatory action" means any regulatory action that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

Sec. 4. Planning Mechanism. In order to have an effective regulatory program, to provide for coordination of regulations, to maximize consultation and the resolution of potential conflicts at an early stage, to involve the public and its State, local, and tribal officials in regulatory planning, and to ensure that new or revised regulations promote the President's priorities and the principles set forth in this Executive order, these procedures shall be followed, to the extent permitted by law: (a) Agencies' Policy Meeting. Early in each year's planning cycle, the Vice President shall convene a meeting of the Advisors and the heads of agencies to seek a common understanding of priorities and to coordinate regulatory efforts to be accomplished in the upcoming year.

(b) Unified Regulatory Agenda. For purposes of this subsection, the term "agency" or "agencies" shall also include those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10). Each agency shall prepare an agenda of all regulations under development or review, at a time and in a manner specified by the Administrator of OIRA. The description of each regulatory action shall contain, at a minimum, a regulation identifier number, a brief summary of the action, the legal authority for the action, any legal deadline for the action, and the name and telephone number of a knowledgeable agency official. Agencies may incorporate the information required under 5 U.S.C. 602 and 41 U.S.C. 402 into these agendas.

(c) The Regulatory Plan. For purposes of this subsection, the term "agency" or "agencies" shall also include those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10). (1) As part of the Unified Regulatory Agenda, beginning in 1994, each agency shall prepare a Regulatory Plan (Plan) of the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter. The Plan shall be approved personally by the agency head and shall contain at a minimum:

(A) A statement of the agency's regulatory objectives and priorities and how they relate to the President's priorities;

(B) A summary of each planned significant regulatory action including, to the extent possible, alternatives to be considered and preliminary estimates of the anticipated costs and benefits;

(C) A summary of the legal basis for each such action, including whether any aspect of the action is required by statute or court order;

(D) A statement of the need for each such action and, if applicable, how the action will reduce risks to public health, safety, or the environment, as well as how the magnitude of the risk addressed by the action relates to other risks within the jurisdiction of the agency;

(E) The agency's schedule for action, including a statement of any applicable statutory or judicial deadlines; and

(F) The name, address, and telephone number of a person the public may contact for additional information about the planned regulatory action.

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(2) Each agency shall forward its Plan to OIRA by June 1st of each year.

(3) Within 10 calendar days after OIRA has received an agency's Plan, OIRA shall circulate it to other affected agencies, the Advisors, and the Vice President.

(4) An agency head who believes that a planned regulatory action of another agency may conflict with its own policy or action taken or planned shall promptly notify, in writing, the Administrator of OIRA, who shall forward that communication to the issuing agency, the Advisors, and the Vice President.

(5) If the Administrator of OIRA believes that a planned regulatory action of an agency may be inconsistent with the President's priorities or the principles set forth in this Executive order or may be in conflict with any policy or action taken or planned by another agency, the Administrator of OIRA shall promptly notify, in writing, the affected agencies, the Advisors, and the Vice President.

(6) The Vice President, with the Advisors' assistance, may consult with the heads of agencies with respect to their Plans and, in appropriate instances, request further consideration or inter-agency coordination.

(7) The Plans developed by the issuing agency shall be published annually in the October publication of the Unified Regulatory Agenda. This publication shall be made available to the Congress; State, local, and tribal governments; and the public. Any views on any aspect of any agency Plan, including whether any planned regulatory action might conflict with any other planned or existing regulation, impose any unintended consequences on the public, or confer any unclaimed benefits on the public, should be directed to the issuing agency, with a copy to OIRA.

(d) Regulatory Working Group. Within 30 days of the date of this Executive order, the Administrator of OIRA shall convene a Regulatory Working Group ("Working Group"), which shall consist of representatives of the heads of each agency that the Administrator determines to have significant domestic regulatory responsibility, the Advisors, and the Vice President. The Administrator of OIRA shall chair the Working Group and shall periodically advise the Vice President on the activities of the Working Group. The Working Group shall serve as a forum to assist agencies in identifying and analyzing important regulatory issues (including, among others (1) the development of innovative regulatory techniques, (2) the methods, efficacy, and utility of comparative risk assessment in regulatory decision-making, and (3) the development of short forms and other streamlined regulatory approaches for small businesses and other entities). The Working Group shall meet at least quarterly and may meet as a whole or in subgroups of agencies with an interest in particular issues or subject areas. To inform its discussions, the Working Group may commission analytical studies and reports by OIRA, the Administrative Conference of the United States, or any other agency.

(e) Conferences. The Administrator of OIRA shall meet quarterly with representatives of State, local, and tribal governments to identify both existing and proposed regulations that may uniquely or significantly affect those governmental entities. The Administrator of OIRA shall also convene, from time to time, conferences with representatives of businesses, nongovernmental organizations, and the public to discuss regulatory issues of common concern.

Sec. 5. Existing Regulations. In order to reduce the regulatory burden on the American people, their families, their communities, their State, local, and tribal governments, and their industries; to determine whether regulations promulgated by the executive branch of the Federal Government have become unjustified or unnecessary as a result of changed circumstances; to confirm that regulations are both compatible with each other and not duplicative or inappropriately burdensome in the aggregate; to ensure that all regulations are consistent with the President's priorities and the principles set forth in this Executive order, within applicable law; and to otherwise improve the effectiveness of existing regulations: (a) Within 90 days of the date of this Executive order, each agency shall submit to OIRA a program, consistent with its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified or eliminated so as to make the agency's regulatory program more effective in achieving the regulatory objectives, less burdensome, or in greater alignment with the President's priorities and the principles set forth in this Executive order. Any significant regulations selected for review shall be included in the agency's annual Plan. The agency shall also identify any legislative mandates that require the agency to promulgate or continue to impose regulations that the agency believes are unnecessary or outdated by reason of changed circumstances.

(b) The Administrator of OIRA shall work with the Regulatory Working Group and other interested entities to pursue the objectives of this section. State, local, and tribal governments are specifically encouraged to assist in the identification of regulations that impose significant or unique burdens on those governmental entities and that appear to have outlived their justification or be otherwise inconsistent with the public interest.

(c) The Vice President, in consultation with the Advisors, may identify for review by the appropriate agency or agencies other existing regulations of an agency or groups of regulations of more than one agency that affect a particular group, industry, or sector of the economy, or may identify legislative mandates that may be appropriate for reconsideration by the Congress.

Sec. 6. Centralized Review of Regulations. The guidelines set forth below shall apply to all regulatory actions, for both new and existing regulations, by agencies other than those agencies specifically exempted by the Administrator of OIRA:

(a) Agency Responsibilities. (1) Each agency shall (consistent with its own rules, regulations, or procedures) provide the public with meaningful participation in the regulatory process. In particular, before issuing a notice of proposed rulemaking, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation (including, specifically, State, local, and tribal officials). In addition, each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days. Each agency also is directed to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

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(2) Within 60 days of the date of this Executive order, each agency head shall designate a Regulatory Policy Officer who shall report to the agency head. The Regulatory Policy Officer shall be involved at each stage of the regulatory process to foster the development of effective, innovative, and least burdensome regulations and to further the principles set forth in this Executive order.

(3) In addition to adhering to its own rules and procedures and to the requirements of the Administrative Procedure Act, the Regulatory Flexibility Act, the Paperwork Reduction Act, and other applicable law, each agency shall develop its regulatory actions in a timely fashion and adhere to the following procedures with respect to a regulatory action:

(A) Each agency shall provide OIRA, at such times and in the manner specified by the Administrator of OIRA, with a list of its planned regulatory actions, indicating those which the agency believes are significant regulatory actions within the meaning of this Executive order. Absent a material change in the development of the planned regulatory action, those not designated as significant will not be subject to review under this section unless, within 10 working days of receipt of the list, the Administrator of OIRA notifies the agency that OIRA has determined that a planned regulation is a significant regulatory action within the meaning of this Executive order. The Administrator of OIRA may waive review of any planned regulatory action designated by the agency as significant, in which case the agency need not further comply with subsection (a)(3)(B) or subsection (a)(3)(C) of this section.

(B) For each matter identified as, or determined by the Administrator of OIRA to be, a significant regulatory action, the issuing agency shall provide to OIRA:

(i) The text of the draft regulatory action, together with a reasonably detailed description of the need for the regulatory action and an explanation of how the regulatory action will meet that need; and

(ii) An assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate and, to the extent permitted by law, promotes the President's priorities and avoids undue interference with State, local, and tribal governments in the exercise of their governmental functions.

(C) For those matters identified as, or determined by the Administrator of OIRA to be, a significant regulatory action within the scope of section 3(f)(1), the agency shall also provide to OIRA the following additional information developed as part of the agency's decision-making process (unless prohibited by law):

(i) An assessment, including the underlying analysis, of benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias) together with, to the extent feasible, a quantification of those benefits;

(ii) An assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment), together with, to the extent feasible, a quantification of those costs; and

(iii) An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.

(D) In emergency situations or when an agency is obligated by law to act more quickly than normal review procedures allow, the agency shall notify OIRA as soon as possible and, to the extent practicable, comply with subsections (a)(3)(B) and (C) of this section. For those regulatory actions that are governed by a statutory or court-imposed deadline, the agency shall, to the extent practicable, schedule rulemaking proceedings so as to permit sufficient time for OIRA to conduct its review, as set forth below in subsection (b)(2) through (4) of this section.

(E) After the regulatory action has been published in the Federal Register or otherwise issued to the public, the agency shall:

(i) Make available to the public the information set forth in subsections (a)(3)(B) and (C);

(ii) Identify for the public, in a complete, clear, and simple manner, the substantive changes between the draft submitted to OIRA for review and the action subsequently announced; and

(iii) Identify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA.

(F) All information provided to the public by the agency shall be in plain, understandable language.

(b) OIRA Responsibilities. The Administrator of OIRA shall provide meaningful guidance and oversight so that each agency's regulatory actions are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order and do not conflict with the policies or actions of another agency. OIRA shall, to the extent permitted by law, adhere to the following guidelines:

(1) OIRA may review only actions identified by the agency or by OIRA as significant regulatory actions under subsection (a)(3)(A) of this section.

(2) OIRA shall waive review or notify the agency in writing of the results of its review within the following time periods:

(A) For any notices of inquiry, advance notices of proposed rulemaking, or other preliminary regulatory actions prior to a Notice of Proposed Rulemaking, within 10 working days after the date of submission of the draft action to OIRA;

(B) For all other regulatory actions, within 90 calendar days after the date of submission of the information set forth in subsections (a)(3)(B) and (C) of this section, unless OIRA has previously reviewed this information and, since that review, there has been no material change in the facts and circumstances upon which the regulatory action is based, in which case, OIRA shall complete its review within 45 days; and

(C) The review process may be extended (1) once by no more than 30 calendar days upon the written approval of the Director and (2) at the request of the agency head.

(3) For each regulatory action that the Administrator of OIRA returns to an agency for further consideration of some or all of its provisions, the Administrator of OIRA shall provide the issuing agency a written explanation for such return, setting forth the pertinent provision of this Executive order on which OIRA is relying. If the agency head disagrees with some or all of the bases for the return, the agency head shall so inform the Administrator of OIRA in writing.

(4) Except as otherwise provided by law or required by a Court, in order to ensure greater openness, accessibility, and accountability in the regulatory review process, OIRA shall be governed by the following disclosure requirements:

(A) Only the Administrator of OIRA (or a particular designee) shall receive oral communications initiated by persons not employed by the executive branch of the Federal Government regarding the substance of a regulatory action under OIRA review;

(B) All substantive communications between OIRA personnel and persons not employed by the executive branch of the Federal Government regarding a regulatory action under review shall be governed by the following guidelines: (i) A representative from the issuing agency shall be invited to any meeting between OIRA personnel and such person(s);

(ii) OIRA shall forward to the issuing agency, within 10 working days of receipt of the communication(s), all written communications, regardless of format, between OIRA personnel and any person who is not employed by the executive branch of the Federal Government, and the dates and names of individuals involved in all substantive oral communications (including meetings to which an agency representative was invited, but did not attend, and telephone conversations between OIRA personnel and any such persons); and

(iii) OIRA shall publicly disclose relevant information about such communication(s), as set forth below in subsection (b)(4)(C) of this section.

(C) OIRA shall maintain a publicly available log that shall contain, at a minimum, the following information pertinent to regulatory actions under review:

(i) The status of all regulatory actions, including if (and if so, when and by whom) Vice Presidential and Presidential consideration was requested;

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(ii) A notation of all written communications forwarded to an issuing agency under subsection (b)(4)(B)(ii) of this section; and

(iii) The dates and names of individuals involved in all substantive oral communications, including meetings and telephone conversations, between OIRA personnel and any person not employed by the executive branch of the Federal Government, and the subject matter discussed during such communications.

(D) After the regulatory action has been published in the Federal Register or otherwise issued to the public, or after the agency has announced its decision not to publish or issue the regulatory action, OIRA shall make available to the public all documents exchanged between OIRA and the agency during the review by OIRA under this section.

(5) All information provided to the public by OIRA shall be in plain, understandable language.

Sec. 7. Resolution of Conflicts. To the extent permitted by law, disagreements or conflicts between or among agency heads or between OMB and any agency that cannot be resolved by the Administrator of OIRA shall be resolved by the President, or by the Vice President acting at the request of the President, with the relevant agency head (and, as appropriate, other interested government officials). Vice Presidential and Presidential consideration of such disagreements may be initiated only by the Director, by the head of the issuing agency, or by the head of an agency that has a significant interest in the regulatory action at issue. Such review will not be undertaken at the request of other persons, entities, or their agents.

Resolution of such conflicts shall be informed by recommendations developed by the Vice President, after consultation with the Advisors (and other executive branch officials or personnel whose responsibilities to the President include the subject matter at issue). The development of these recommendations shall be concluded within 60 days after review has been requested.

During the Vice Presidential and Presidential review period, communications with any person not employed by the Federal Government relating to the substance of the regulatory action under review and directed to the Advisors or their staffs or to the staff of the Vice President shall be in writing and shall be forwarded by the recipient to the affected agency(ies) for inclusion in the public docket(s). When the communication is not in writing, such Advisors or staff members shall inform the outside party that the matter is under review and that any comments should be submitted in writing.

At the end of this review process, the President, or the Vice President acting at the request of the President, shall notify the affected agency and the Administrator of OIRA of the President's decision with respect to the matter.

Sec. 8. Publication. Except to the extent required by law, an agency shall not publish in the Federal Register or otherwise issue to the public any regulatory action that is subject to review under section 6 of this Executive order until (1) the Administrator of OIRA notifies the agency that OIRA has waived its review of the action or has completed its review without any requests for further consideration, or (2) the applicable time period in section 6(b)(2) expires without OIRA having notified the agency that it is returning the regulatory action for further consideration under section 6(b)(3), whichever occurs first. If the terms of the preceding sentence have not been satisfied and an agency wants to publish or otherwise issue a regulatory action, the head of that agency may request Presidential consideration through the Vice President, as provided under section 7 of this order. Upon receipt of this request, the Vice President shall notify OIRA and the Advisors. The guidelines and time period set forth in section 7 shall apply to the publication of regulatory actions for which Presidential consideration has been sought.

Sec. 9. Agency Authority. Nothing in this order shall be construed as displacing the agencies' authority or responsibilities, as authorized by law.

Sec. 10. Judicial Review. Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Sec. 11. Revocations. Executive Orders Nos. 12291 and 12498; all amendments to those Executive orders; all guidelines issued under those orders; and any exemptions from those orders heretofore granted for any category of rule are revoked.

WILLIAM J. CLINTON

THE WHITE HOUSE,
September 30, 1993.

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