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Divider Title: _____

ANTITRUST INDEX

- 1. International Competitiveness**
- 2. International Antitrust Enforcement Program**
- 3. Health Care**
- 4. Defense Industry Downsizing**
- 5. McCarran Ferguson Reform**
- 6. Newspaper Preservation Act**
- 7. Vertical Price Fixing**
- 8. Criminal Program**
- 9. Antitrust Division FY 1995 Budget**
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Additional Antitrust Background Material

- 1. Civil Enforcement Program**
- 2. Telecommunications**
- 3. Intellectual Property**
- 4. Merger Program**

ANTITRUST AND INTERNATIONAL COMPETITIVENESS

1. **ISSUE STATEMENT:** There is a view that with the increasing globalization of competition, antitrust enforcement authorities can and should relax their efforts in order to allow large firms to grow even larger and to take advantage of economies of scale. Consistent with this view, Congress in 1984 gave relaxed antitrust treatment to cooperative R&D ventures; in 1993, this treatment was extended to joint production ventures (legislation that the Administration supported).

2. **STATUS:** There are no major legislative initiatives in this area now. However, there is strong interest in the Division's announced policy of making its civil antitrust enforcement program more aggressive and this may raise concerns among some Committee members (especially its Chairman) that such a program could be inconsistent with promoting the international competitiveness of U.S. firms.

3. **DEPARTMENT POSITION:** AAG Anne Bingaman has squarely rejected any alleged inconsistency between strong antitrust enforcement and promoting innovation and competition. She has noted that:

--Vigorous competition, which antitrust enforcement ensures, promotes innovation rather than retards it. For example, only after AT&T was dismantled and was forced to face competition in the long-distance telephone market did AT&T begin laying fiber optic cables, which both MCI and Sprint did first. Similarly, it was not IBM which invented the personal computer and spawned the PC revolution, but the much smaller Apple Computer. Other industries have similar stories.

--Recently, the Division has defined "innovation" as a separate market in which to assess possibly anticompetitive effects of mergers. This was true in the case of the proposed sale by GM of its heavy-duty automatic transmission division to a German company (the two firms involved control almost 90% of the world market in such equipment). After DOJ brought suit, the parties abandoned their merger, which would have chilled incentives for further innovation by GM (and the German firm).

AAG Bingaman has made clear that she wants to use strong antitrust enforcement as a powerful tool for opening foreign markets that are closed to U.S. firms by collusive behavior by foreign actors. Thus, where the Division finds such activity taking place abroad that causes "direct, substantial and reasonably foreseeable" harm to U.S. exports, and where those who engage in such activity also have a business presence here, the Division will seek to enjoin the activity in American courts.

In fact, the Division is now actively looking into a number of situations that could result in enforcement actions against foreign conduct that restricts U.S. exports. In addition, the Division supports legislation (now pending before OMB) that would allow both the Division and the FTC to share confidential information on a reciprocal basis with foreign antitrust authorities, and therefore would entitle the enforcement agencies

to receive foreign-located confidential information. Such legislation would follow a pattern set by a 1988 Securities and Exchange Commission (SEC) statute that has been successful.

4. **JUDICIARY COMMITTEE MEMBER INTERESTS/POSITIONS:** Chairman Biden has voiced concerns in the past that U.S. antitrust standards may have to be changed to accommodate global competition. Senator Metzenbaum does not feel that U.S. antitrust laws impede international competitiveness. He has expressed interest, however, in the enforcement assistance legislation.

5. **REFERENCE MATERIALS:** None.

ATR contact: Diane Wood (4-2404)

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Divider Title: _____

INTERNATIONAL ANTITRUST ENFORCEMENT

1. **ISSUE STATEMENT:** As markets have become international in scope, the Antitrust Division has needed to increase its efforts to conduct investigations and to bring cases that involve foreign conduct and parties. The Division acts to ensure both that U.S. domestic markets are not harmed by international price-fixing conspiracies, and that U.S. exporters are not excluded from foreign markets by anticompetitive conduct targeted at them. It has done so by increasing the resources devoted to international investigations, by undertaking a project to revise the outdated 1988 Antitrust Enforcement Guidelines for International Operations, and by proposing legislation that would materially assist in the acquisition of evidence located outside the United States. The international enforcement efforts are also supported by regular contacts with our counterpart agencies in other countries, through fora such as the Organization for Economic Co-operation and Development. For developing countries and economies in transition, the Division works with the Federal Trade Commission to provide technical assistance under programs funded by the Agency for International Development. Finally, the Division participates in the work of the National Economic Council (NEC) and the Trade Policy Review Group (TPRG), both as the general Department of Justice representative and as the advocate of competition policy.

2. **STATUS:** International cases and investigations in a number of industries are on-going. The project to revise the International Guidelines is scheduled for completion within the Division by mid to late June 1994. After that, the draft will be reviewed by other concerned agencies, and it will then be released to the public for comment. The legislation referred to above is expected to be introduced in both the House (by Representative Brooks) and the Senate (by Senator Metzenbaum) in the very near future (perhaps by May 27).

3. **DEPARTMENT POSITION:** AAG Bingaman has stated that enactment of the international enforcement assistance legislation is of vital importance to our enforcement efforts. In this era of global, multinational markets, it is easy for witnesses and documents to hide behind the protection of foreign sovereignty. Without this legislation, the Division will not be able to find the key facts. With it, we will have the tools to obtain the information we need, and we will be authorized to help foreign authorities in return. However, we will offer assistance ourselves only when we are certain that the recipient will protect the confidentiality of the information. The Department's proposal is modelled on 1988 SEC legislation, which has proven to be a great success.

4. **JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS:** Senator Metzenbaum is expected to introduce the international enforcement assistance legislation. Senator Biden has also expressed strong interest in this initiative.

5. REFERENCE MATERIALS: None.

ATR contact: Diane Wood (4-2404)

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Divider Title: _____

HEALTH CARE ANTITRUST

1. **ISSUE STATEMENT:** Some health care providers argue that the fear of antitrust enforcement is impeding cost-cutting mergers and joint ventures. The Department has traditionally opposed efforts to confer antitrust immunity on health care providers and hospitals. Immunity is unnecessary and likely to harm consumers by allowing conduct that is anticompetitive.

The Administration's proposed Health Security Act includes a provision (Section 1322(c)) that allows providers to jointly negotiate with Health Alliances on the fee schedule for fee-for-service plans. Another provision would repeal the antitrust exemption provided by the McCarran-Ferguson Act for the business of health insurance.

2. **STATUS:** Many pending bills contain proposals for antitrust immunity in the health care area, including one introduced by Senator Hatch (S. 1658).

3. **DEPARTMENT POSITION:** To address uncertainty regarding antitrust enforcement and promote efficiency, the Department issued six Statements of its Antitrust Enforcement Policy in the Health Care Area on September 15, 1993, and actively is considering issuing further guidance. The Antitrust Division also has agreed to an expedited review of proposed health care activities under its antitrust Business Review procedure.

The Department and the Administration consider the antitrust provision in the Health Security Act (Section 1322(c)) not as new antitrust exemption, but instead a provision which merely confirms that the long-standing antitrust doctrines of "state action" (federal antitrust law does not apply to conduct undertaken pursuant to a clearly articulated and affirmatively expressed state policy to displace competition) and Noerr-Pennington (joint petitioning of government is protected conduct and not subject to challenge under the antitrust laws) will apply to the Alliances established pursuant to legislation and to providers, respectively. The Department has opposed the new antitrust exemptions that would be provided by Senator Hatch's bill.

4. **JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS:** Senator Metzenbaum strongly opposes any antitrust exemptions. He believes that the Department's issuance of the Statements of Antitrust Enforcement Policy in the Health Care Area was the correct action by the Department. Senator Hatch (along with Senator Thurmond) has introduced the Health Care Antitrust Improvements Act (S.1658), which would establish a certification/immunity scheme, a notification/partial immunity scheme, and would codify certain specific antitrust exemptions.

5. REFERENCE MATERIALS: A. Sections 1321 and 1322 of the Health Security Act. B. Letter to Senator Metzenbaum, dated April 14, 1994, containing the Department's objections to S. 1658. C. Statements of Antitrust Enforcement Policy in the Health Care Area.

ATR contact: Robert Potter (6-0964)

1 uals shall be enrolled in other applicable health plans
2 effective on such date.

3 (e) NOTICE TO BOARD.—If an election with respect
4 to a corporate alliance is terminated pursuant to sub-
5 section (a) or subsection (b), the Secretary of Labor shall
6 notify the National Health Board of the termination of
7 the election.

8 **PART 2—GENERAL RESPONSIBILITIES AND**
9 **AUTHORITIES OF REGIONAL ALLIANCES**

10 **SEC. 1321. CONTRACTS WITH HEALTH PLANS.**

11 (a) CONTRACTS WITH PLANS.—

12 (1) IN GENERAL.—In order to assure the avail-
13 ability of the comprehensive benefit package to eligi-
14 ble individuals residing in the alliance area in a cost-
15 effective manner, except as provided in this section,
16 each regional alliance shall negotiate with any will-
17 ing State-certified health plan to enter into a con-
18 tract with the alliance for the enrollment under the
19 plan of eligible individuals in the alliance area. Sub-
20 ject to paragraph (2), a regional alliance shall not
21 enter into any such contract with a health plan that
22 is not a State-certified health plan.

23 (2) TREATMENT OF CERTAIN PLANS.—Each re-
24 gional alliance shall enter into a contract under this
25 section with any veterans health plan of the Depart-

1 ment of Veterans Affairs and with a Uniformed
2 Services Health Plan of the Department of Defense,
3 that offers the comprehensive benefit package to eli-
4 gible individuals residing in the alliance area if the
5 appropriate official requests to enter into such a
6 contract.

7 (b) GENERAL CONDITIONS FOR DENIAL OF CON-
8 TRACT BY A REGIONAL ALLIANCE.—A regional alliance
9 is not required under this section to offer a contract with
10 a health plan if—

11 (1) the alliance finds that the proposed bid ex-
12 ceeds 120 percent of the regional alliance per capita
13 premium target (as determined under section
14 6003); or

15 (2) the plan has failed to comply with require-
16 ments under prior contracts with the alliance, in-
17 cluding failing to offer coverage for all the services
18 in the comprehensive benefit package in the entire
19 service area of the plan.

20 **SEC. 1322. OFFERING CHOICE OF HEALTH PLANS FOR EN-**
21 **ROLLMENT; ESTABLISHMENT OF FEE-FOR-**
22 **SERVICE SCHEDULE.**

23 (a) IN GENERAL.—Each regional alliance must pro-
24 vide to each eligible enrollee (as defined in section
25 1902(14)) with respect to the alliance a choice of health

1 plans among the plans which have contracts in effect with
2 the alliance under section 1321 (in the case of a regional
3 alliance) or section 1341 (in the case of a corporate alli-
4 ance).

5 (b) OFFERING OF PLANS BY REGIONAL ALLI-
6 ANCES.—

7 (1) IN GENERAL.—Each regional alliance shall
8 include among its health plan offerings at least one
9 fee-for-service plan (as defined in paragraph (2)).

10 (2) FEE-FOR-SERVICE PLAN DEFINED.—

11 (A) IN GENERAL.—For purposes of this
12 Act, the term “fee-for-service plan” means a
13 health plan that—

14 (i) provides coverage for all items and
15 services included in the comprehensive ben-
16 efit package that are furnished by any law-
17 ful health care provider of the enrollee’s
18 choice, subject to reasonable restrictions
19 (described in subparagraph (B)), and

20 (ii) makes payment to such a provider
21 without regard to whether or not there is
22 a contractual arrangement between the
23 plan and the provider.

24 (B) REASONABLE RESTRICTIONS DE-
25 SCRIBED.—The reasonable restrictions on cov-

1 erage permitted under a fee-for-service plan (as
2 specified by the National Health Board) are as
3 follows:

4 (i) Utilization review.

5 (ii) Prior approval for specified serv-
6 ices.

7 (iii) Exclusion of providers on the
8 basis of poor quality of care, based on evi-
9 dence obtainable by the plan.

10 Clause (ii) shall not be construed as permitting
11 a plan to require prior approval for non-pri-
12 mary health care services through a gatekeeper
13 or other process.

14 (c) ESTABLISHMENT OF FEE-FOR-SERVICE SCHED-

15 ULE.—

16 (1) IN GENERAL.—Except in the case of re-
17 gional alliances of a State that has established a
18 Statewide fee schedule under paragraph (3), each re-
19 gional alliance shall establish a fee schedule setting
20 forth the payment rates applicable to services fur-
21 nished during a year to individuals enrolled in fee-
22 for-service plans (or to services furnished under the
23 fee-for-service component of any regional alliance
24 health plan) for use by regional alliance health plans
25 under section 1406(c) and corporate alliance health

1 plans providing services subject to the schedule in
2 the regional alliance area.

3 (2) NEGOTIATION WITH PROVIDERS.—The fee
4 schedule under paragraph (1) shall be established
5 after negotiations with providers, and (subject to
6 paragraphs (5) and (6)) providers may collectively
7 negotiate the fee schedule with the regional alliance.

8 (3) USE OF STATEWIDE SCHEDULE.—At the
9 option of a State, the State may establish its own
10 statewide fee schedule which shall apply to all fee-
11 for-service plans offered by regional alliances and
12 corporate alliances in the State instead of alliance-
13 specific schedules established under paragraph (1).

14 (4) ANNUAL REVISION.—A regional alliance or
15 State (as the case may be) shall annually update the
16 payment rates provided under the fee schedule es-
17 tablished pursuant to paragraph (1) or paragraph
18 (3).

19 (5) ACTIVITIES TREATED AS STATE ACTION OR
20 EFFORTS INTENDED TO INFLUENCE GOVERNMENT
21 ACTION.—The establishment of a fee schedule under
22 this subsection by a regional alliance of a State shall
23 be considered to be pursuant to a clearly articulated
24 and affirmatively expressed State policy to displace
25 competition and to be actively supervised by the

1 State, and conduct by providers respecting the es-
2 tablishment of the fee schedule, including collective
3 negotiations by providers with the regional alliance
4 (or the State) pursuant to paragraph (2), shall be
5 considered as efforts intended to influence govern-
6 mental action.

7 (6) NO BOYCOTT PERMITTED.—Nothing in this
8 subsection shall be construed to permit providers to
9 threaten or engage in any boycott.

10 (7) NEGOTIATIONS DEFINED.—In this sub-
11 section, “negotiations” are the process by which pro-
12 viders collectively and jointly meet, confer, consult,
13 discuss, share information, among and between
14 themselves in order to agree on information to be
15 provided, presentations to be made, and other such
16 activities with respect to regional alliances (or
17 States) relating to the establishment of the fee
18 schedule (but not including any activity that con-
19 stitutes engaging in or threatening to engage in a
20 boycott), as well as any and all collective and joint
21 meetings, discussions, presentations, conferences,
22 and consultations between or among providers and
23 any regional alliance (or State) for the purpose of
24 establishing the fee schedule described in this sub-
25 section.

1 (d) PROSPECTIVE BUDGETING OF FEE-FOR-SERV-
2 ICE.—

3 (1) IN GENERAL.—The fee schedule established
4 by a regional alliance or a State under subsection (c)
5 may be based on prospective budgeting described in
6 paragraph (2).

7 (2) PROSPECTIVE BUDGETING DESCRIBED.—
8 Under prospective budgeting—

9 (A) the regional alliance or State (as the
10 case may be) shall negotiate with health provid-
11 ers annually to develop a budget for the des-
12 ignated fee-for-service plan;

13 (B) the negotiated budget shall establish
14 spending targets for each sector of health ex-
15 penditures made by the plan; and

16 (C) if the regional alliance or State (as the
17 case may be) determines that the utilization of
18 services under the plan is at a level that will re-
19 sult in expenditures under the plan exceeding
20 the negotiated budget, the plan shall reduce the
21 amount of payments otherwise made to provid-
22 ers (through a withhold or delay in payments or
23 adjustments) in such a manner and by such
24 amounts as necessary to assure that expendi-
25 tures will not exceed the budget.

1 (3) USE OF PROSPECTIVE BUDGETING EXCLU-
2 SIVE.—If a regional alliance or State establishes the
3 fee schedule for fee-for-service plans on the basis of
4 prospective budgeting under this subsection, pay-
5 ment for all services provided by fee-for-service plans
6 in the alliance or State shall be determined on such
7 basis.

8 **SEC. 1323. ENROLLMENT RULES AND PROCEDURES.**

9 (a) IN GENERAL.—Each regional alliance shall as-
10 sure that each regional alliance eligible individual who re-
11 sides in the alliance area is enrolled in a regional alliance
12 health plan and shall establish and maintain methods and
13 procedures, consistent with this section, sufficient to as-
14 sure such enrollment. Such methods and procedures shall
15 assure the enrollment of alliance eligible individuals at the
16 time they first become eligible enrollees in the alliance
17 area, including individuals at the time of birth, at the time
18 they move into the alliance area, and at the time of reach-
19 ing the age of individual eligibility as an eligible enrollee
20 (and not merely as a family member). Each regional alli-
21 ance shall establish procedures, consistent with subtitle A,
22 for the selection of a single health plan in which all mem-
23 bers of a family are enrolled.

24 (b) POINT OF SERVICE ENROLLMENT MECHA-
25 NISM.—



U.S. Department of Justice

Antitrust Division

Office of the Assistant Attorney General

Washington, D.C. 20530

APR 14 1994

The Honorable Howard W. Metzenbaum
Chairman
Subcommittee on Antitrust, Monopolies,
and Business Rights
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Mr. Chairman:

I am writing in response to your letter of March 22, 1994, also signed by Chairman Brooks, requesting the views of the Department of Justice on S. 1658 and its companion bill, H.R. 3486, the "Health Care Antitrust Improvements Act of 1993." These bills would create special new broad based statutory immunities from the antitrust laws for a wide range of health care activities.

The Department is committed to reasonable and responsible application of the antitrust laws in the health care area to promote new competition in evolving markets. We have established as a priority the issuance of antitrust enforcement policy statements in the health care area designed to bring down health care costs to consumers while providing effective quality health care services. Six such statements have already been issued and others will be considered. We are committed to ongoing review and supplementation of these statements.

Effective antitrust laws have for over a century been the principal guarantor of competition in the American system and have time and again proved far superior to pervasive government review, regulation, and oversight of collective activities that may have competitive consequences. Health reform should build on a commitment to competition in health care markets. Consequently, the Department of Justice opposes the broad new statutory antitrust immunities contained in these bills.

The antitrust laws are enforced so as to take fully into account increased efficiency, lower administrative and other costs, improvements in quality, and other factors that are important to the cost-effective delivery of health care services. Neither the Justice Department nor the Federal Trade Commission has ever challenged a joint venture among hospitals to purchase, operate and market high-technology or other expensive medical equipment. And of the more than 250 hospital mergers since 1987,

only 11 have been found by the Department or the FTC to have likely anticompetitive effects that warranted antitrust challenge. Only those combinations that will harm the American consumer by raising prices, decreasing quality or availability of services, or discouraging innovation face antitrust challenge.

The Department and the FTC have recognized that uncertainty over the application of the antitrust laws in the health care area should be addressed, and have issued specific antitrust guidance to the health care industry. In September 1993, the agencies issued several joint Statements of Antitrust Enforcement Policy in the Health Care Area. Moreover, recognizing that issues and circumstances may change over time, the agencies have committed to providing additional general guidance, and also developed an expedited process whereby health care providers can obtain the views of the Department or the FTC on specific proposed activities.

Private remedies have been an integral part of antitrust enforcement for over 100 years. Moreover, the "private" antitrust remedies are used by State attorneys general to protect consumers in their states from localized anticompetitive activity. Such actions are an important adjunct to federal enforcement: Our enforcement resources are limited, and cannot uncover or move against every anticompetitive practice that may be harming consumers. At the same time, however, there is no reason to expect that health care providers will face a multitude of baseless private antitrust suits. Private parties are unlikely to institute meritless lawsuits and even less likely to be successful in pursuing them. This is especially the case with regard to health care matters, where it can be expected that courts will take into account the views of the government, including those expressed in the DOJ-FTC Statements of Antitrust Enforcement Policy, in private antitrust actions. This will help ensure sound and reasoned decisions in private litigation.

S. 1658 and H.R. 3486

S. 1658 and H.R. 3486¹ provide several types of broad immunities from the operation of the antitrust laws to the health care industry. Briefly, Section 2 of each bill provides antitrust immunity for any health care activity that:

- (1) falls within one of the "safe harbors" described in Section 3 of the bill;
- (2) falls within an additional safe harbor established by the Attorney General, after seeking public suggestions for

¹The two bills are nearly identical. The Department objects equally to both S. 1658 and H.R. 3486.

further safe harbors via Federal Register notice under Section 4 of the bill; or

(3) is covered by a "certificate of review" issued by the Attorney General with the concurrence of the Secretary of Health and Human Services ("the Secretary") under Section 5 of the bill.

Additionally, Section 6 of each bill provides special antitrust protections in the form of guaranteed rule-of-reason treatment and the "detrubling" of any antitrust damages for a health care cooperative venture, if notice of the venture is provided to the Attorney General.

The broad new statutory antitrust immunities accorded by S. 1658 and H.R. 3486 are unnecessary and potentially harmful. The certificate of review immunity scheme in the bills, covering any activity relating to the provision of health care services, would create pervasive and continuing Federal government regulation of the competitive and other dimensions of an unknown and potentially vast number of health care provider activities. This task could well overwhelm the Justice Department, seriously impeding its ability to focus on any activities that actually would have anticompetitive effects. It likely would result in a massive new bureaucracy within the Department of Justice to administer such a program. Moreover, regulatory attempts to guard against anticompetitive behavior have consistently proved to be no substitute for the standard operation of the antitrust laws. The notification-based antitrust protections in the bills, broadly covering any collective activity among health care providers, could undercut sound antitrust substantive standards and skew the balance of antitrust remedies that has served so well for over a century. And the "safe harbor" immunities in the bills, based as they would be on hard-to-amend statutory or regulatory language and legislative or regulatory history, could have unintended anticompetitive effects, whereas enforcement policy statements based on common sense, basic competitive principles, would not.

Having summarized the Department's views on S. 1658 and H.R. 3486, I will address below our concerns with each aspect of the bills in more detail.

CERTIFICATE OF REVIEW PROVISIONS OF S.1658 AND H.R. 3486

The most comprehensive and complex new antitrust immunity scheme provided by S. 1658 and H.R. 3486 is the certificate of review process set out in Section 5 of each bill. This section provides complete antitrust immunity to successful applicants for a certificate of review that may cover any activity relating to the provision of health care services. In deciding whether to issue a certificate, the Attorney General and the Secretary are to take into account the extent to which a particular activity will:

- A) lead to an increase in access to health care services;
- B) enhance the quality of health care services;
- C) establish cost efficiencies that will be passed on to consumers, including economies of scale and reduced transaction and administrative costs;
- D) increase the ability of health care facilities to provide services in medically underserved areas or to medically underserved populations; and
- E) improve the utilization of health care resources or reduce inefficient duplication of such resources.

They must also consider whether:

- A) the activity will help health plans and other health care insurers, consumers of health care services, and health care providers to better negotiate payment and service arrangements that will reduce costs to consumers;
- B) taking into consideration the characteristics of the particular purchasers and providers involved, competition will not be unduly restricted;
- C) equally efficient and less restrictive alternatives do not exist to meet the criteria described above; and
- D) the activity will not unreasonably foreclose competition by denying competitors a necessary element of competition.

Section 5 requires the Attorney General, in consultation with the Secretary and the Chair of the FTC, to establish procedures to be used in applying for and approving certificates. It also requires published notice of each application in the Federal Register within 10 days of receipt, and action by the Attorney General and the Secretary within 90 days. If an

application for a certificate has not been denied within 90 days, it is deemed approved. There is also provision for expedited action if an applicant "indicates a special need for prompt disposition."

Further provisions in Section 5 deal with denial of applications, requests for reconsideration, fraudulent procurement, amendment and revocation of certificates, requests for compliance information, investigative authority, review of certification determinations in federal court, the effect of rejected applications, publication of decisions, annual reports, restrictions on disclosure of information, and prohibition against use of information to support or answer claims under the antitrust laws. In short, section 5 replaces the normal operation of the antitrust laws with ongoing government review and regulation of certificated activities under the comprehensive standards set out above.

Objections to the Certificate of Review Provisions

Antitrust immunity for any and all activities relating to the provision of health care services pursuant to the complex certificate of review process contained in S. 1658 and H.R. 3486 is unnecessary and potentially harmful. There is no evidence that establishment of such a pervasive regulatory scheme or such a substantial departure from the antitrust standards and procedures applicable in virtually all other sectors of the economy is necessary to foster the innovative health care delivery systems envisioned by the Health Security Act and most of the other reform proposals currently before the Congress. Justice Department and FTC policy and practice have accorded favorable treatment to the vast majority of cooperative activities in the health care area. Nor does the ability of health care providers, consumers or third party payers to seek redress of antitrust grievances through private litigation warrant the substitution of continuing government oversight of health care activities for the discriminating application of sound antitrust law.

The dangers of a comprehensive certification/antitrust immunity scheme are manifest. First, such a scheme would place the entire responsibility of initially and prospectively detecting anticompetitive threats and continually monitoring approved health care activities on the Departments of Justice and HHS. In light of the breadth of the scheme, analyzing and processing certification applications could be overwhelming, impeding the Justice Department's ability to screen proposed activities for anticompetitive effects, and diverting its staff from their primary mission--the detection and prosecution of antitrust violations and the prevention of anticompetitive mergers and joint ventures. Competitive harm in such circumstances is entirely predictable.

The certification scheme provided by S. 1658 and H.R. 3486 also would require unwarranted and continuing government oversight of an unknown and potentially vast number of day-to-day activities of health care providers. Government agencies would have the ability to approve a wide range of individual or collaborative activities, perhaps on condition that they be altered in a particular way. In addition, the agencies would have the power, and indeed the obligation, after certification to intervene in a regulatory manner whenever they determined that the complex and judgmental criteria in the bill were no longer met. Constant monitoring of existing certificate holders would be required to determine whether a certificate should be amended or revoked. To effectively administer such a scheme would require a massive new bureaucracy within the Department of Justice. Finally, the certification scheme in the bills likely would impose increased costs on the health care industry as providers spent substantial sums preparing and filing requests for certificates for activities that typically raise no colorable antitrust issues.

NOTIFICATION PROVISIONS OF S. 1658 AND H.R. 3486

Section 6 of each bill would create a notification procedure whereby any "health care cooperative venture" would be guaranteed a "rule-of-reason" antitrust analysis if challenged under the antitrust laws, and any antitrust relief granted against such a venture would be limited to actual rather than treble damages. Parties could obtain such protection by affirmatively notifying the Attorney General of their activities, but in addition many types of ventures would be "deemed" to have submitted such a notification. These include any ventures that have applied for a certificate of review under Section 5, and any health care cooperative ventures of a certain size² among non-institutional providers who share risks.³

Objections to the Notification Provisions

As with certification schemes, rule-of-reason/single damage protection via notification for unknown and potentially broad

²For a nonexclusive network, any group including 50 percent or fewer of the providers in a relevant market and 50 percent or fewer of the members of any one specialty within that group; for an exclusive network, any group including 35 percent or fewer of the providers or specialists in a relevant market.

³H.R. 3486 deems either ventures below the size limits in Note 2 supra or ventures wherein providers share risks to have been notified; S. 1658 imposes both size limits and risk sharing before ventures will be deemed to have been notified. H.R. 3486 also omits the "non-institutional" qualifier.

categories of collaborative health care activities is unnecessary and potentially harmful. There is no indication, in light of the sound enforcement policies applied to health care activities, that cost-saving or otherwise efficient joint ventures in the health care area are unusually vulnerable to antitrust attack. In fact, quite the opposite is clear from the record. There is no sound reason to extend antitrust protection to joint ventures that present no anticompetitive risks and that would not be in danger of challenge in the first place. Moreover, such a provision could actually increase costs in the health care industry as the costs of notifications were passed on to consumers.

A notification scheme such as that set out in S. 1658 and H.R. 3486 could be harmful to competition and consumers by providing unwarranted rule-of-reason or single damage protection to potentially anticompetitive activities. There is no indication that procompetitive joint activity in the health care area is being placed at unusual or undue antitrust risk. Moreover, there is no legitimate distinction between health care and other industries such that potential treble damages should not produce the same salutary compensatory and deterrent effects in the health care area that they do generally.

Absent clear and convincing evidence of aberrations or abuse, antitrust standards and remedies should not be abrogated by special industry-specific protection for broad ranges of activities. Blanket, automatic protection for any "health care cooperative venture," which is defined in the two bills as "any activities, including attempts to enter into or perform a contract or agreement, carried out by two or more persons for the purpose of providing health care services," and for broad categories of activities that without any notice at all would be "deemed" to have filed a notification, would significantly constrain appropriate antitrust enforcement and deterrence. The rationale behind notification schemes is to give the government an opportunity to step in and stop potentially harmful activities, and the trade-off is that parties who notify are given rule-of-reason and single damages protection if they come forward. In light of the thousands of ventures that could potentially be presented to the Department under a notification scheme, there is a very real danger that potentially harmful arrangements would be granted a degree of protection that they do not deserve, and that could result in substantial harm to consumers.

CODIFICATION OF SAFE HARBORS

Section 3 of each bill would create several categories of statutory health care antitrust immunities that are in part patterned on the safety zones described in the six Department of Justice/FTC Statements of Antitrust Enforcement Policy in the

Health Care Area issued in September 1993. The "safe harbor" immunities in S. 1658 and H.R. 3486, however, are broader, and there are seven categories of exemptions instead of six. Section 4 of each bill would create a process whereby the public could submit suggestions for additional safe harbors to be established by the Attorney General, in consultation with the Secretary and the Chair of the FTC.

Objections to Codification of Safe Harbors

Statutory "safe harbors" from antitrust scrutiny for health care providers would be both unnecessary and potentially harmful. Such protections are unnecessary because the Department and the FTC have already set out significant safety zones in their joint Statements of Antitrust Enforcement Policy in the Health Care Area that inform health care providers of activities that are clearly lawful. We have committed to continuing review and supplementation of these Statements, and have complemented them with an expedited process through which health care providers may obtain the views of the Department or FTC on specific proposed health care activities, whether or not they are covered by the existing policy statements.

The harm that the Department foresees from codification of health care antitrust safety zones is that it could have unforeseen consequences and needlessly encumber law enforcement and development in areas that may require fine tuning for some time to come. Consumers, health care providers and enforcement officials all need leeway to adjust to changes in relevant markets as health care systems evolve and competition and efficiencies in health care delivery become better understood. Statutory antitrust immunities are not easily amended, and their intended effects can be distorted by interpretations of both statutory language and legislative history. On the other hand, the articulation of safety zones in flexible, competition-oriented enforcement policy statements such as those set out by the agencies last September is a process much more geared to an optimal outcome for both providers and consumers. What looks like a perfectly reasonable activity today could have unforeseen anticompetitive ramifications in the future and, similarly, what appears to be a problematic activity today may be perfectly reasonable in the future. Although it is extraordinary for one particular industry to have a set of specific guidelines put forth for its benefit, the Department and the FTC have done so for the health care industry. It would be totally unprecedented for such guidelines to be codified.⁴

⁴We would also note that some of the particular safe harbors defined in the two bills are substantially broader than the safety zones in the DOJ/FTC Statements of Enforcement Policy, and

(continued...)

* * *

In sum, the Department of Justice opposes S. 1658 and H.R. 3486. I appreciate very much your interest in the importance of sound antitrust enforcement and the preservation of competitive health care markets. The Department is committed to reasonable and responsible application of the antitrust laws in the health care area and will continue to work to promote a fair and competitive health care marketplace; however the broad new statutory antitrust immunities in these bills could be detrimental to the goals of health care reform.

This Department has been advised by the Office of Management and Budget that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,



Anne K. Bingaman
Assistant Attorney General

⁴(...continued)
may protect anticompetitive conduct that significantly harms consumers.

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Divider Title: _____

ANTITRUST AND DEFENSE INDUSTRY DOWNSIZING

1. **ISSUE:** The expected 2/3 cut in defense procurement over the next several years is expected to trigger a substantial increase in mergers in the defense industry. In September 1993, DOD's Defense Sciences Board created a task force to advise DOD on how it can best assist the Division and the FTC carry out their merger enforcement responsibilities. The creation of that Task Force initially prompted concern by Senator Metzenbaum that DOD was attempting to duplicate the functions of the antitrust agencies. That concern was quieted when it was agreed that DOD would not officially adopt the views of the Task Force unless both the Division and the FTC agreed with the Task Force's report.

2. **STATUS:** The Task Force report was issued in April and was generally well received in the media.

3. **DEPARTMENT POSITION:** The Division (through DAAG Robert Litan) actively participated in the deliberations of the Task Force and in the writing of its Report. The Division enthusiastically supported the final report. In particular:

- The report makes clear that final decision-making responsibility for all defense mergers remains with the antitrust authorities.

- At the same time, the report recommends various ways in which DOD can help the authorities, by providing its expert judgment as to the scope of the relevant market; the number and quality of the various entrants; the financial condition of the firms in the market; the nature and size of future procurements; and the effect, if any, of the merger on national security. The report makes clear that the stronger the documentation of these points, the greater weight the authorities should give them.

- Finally, the report provides a number of recommendations to improve cooperation between the enforcement authorities and DOD (relating to information exchange).

The Task Force report should help usher in a new age of cooperation between DOD and the enforcement agencies. There is evidence that that new age has already arrived: In January, the Department announced a consent decree prohibiting the teaming arrangement by Alliant and Aerojet on a DOD contract for cluster bombs. This initiative grew out of the close cooperation between DOD and DOJ and has saved DOD approximately \$12 million. DOD and the Division are cooperating on other investigative matters, as well.

4. **JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS:** Senator Metzenbaum has displayed the strongest interest in defense and antitrust issues. It is also conceivable that Senator Specter may have an interest, given his well-publicized concerns about base closings in his state.

5. REFERENCE MATERIALS: None.

ATR contacts: Robert Litan (4-2410) and Steve Sunshine (4-1157)

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Divider Title: _____

MCCARRAN FERGUSON REFORM

1. **ISSUE STATEMENT:** The McCarran-Ferguson Act currently provides a broad antitrust exemption for the business of insurance to the extent such business is regulated by state law. Legislation to repeal or reform this exemption has been considered for some time and is currently under consideration by the House Subcommittee on Economic and Commercial law. Chairman Brooks is a principal supporter of this legislation.

A principal issue is whether small insurers can survive without the collective gathering of loss and other data to enable them to set their prices. Other collective activities, such as policy form development and insurance pools, are also said to be in jeopardy if the exemption is repealed. These problems could, in the Department's view, be dealt with by carefully crafted "safe harbors."

2. **STATUS:** Hearings on H.R. 9, the Brooks bill, were held by the House Subcommittee during the 1st session of the current Congress. No legislation has been taken up by the Senate thus far. The next likely step if the legislation can be moved is House Subcommittee mark-up.

3. **DEPARTMENT POSITION:** AAG Anne Bingaman testified in support of narrowing the current broad exemption to carefully crafted "safe harbors" that would protect specific collective activities, such as the sharing of historical loss data. She did not go into great detail, and the Department continues to consider the particulars.

4. **JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS:** Senator Metzenbaum has in the past introduced bills to repeal or narrow the current McCarran-Ferguson exemption.

5. **REFERENCE MATERIALS:** Statement of Anne K. Bingaman before the House Subcommittee on Economic and Commercial Law on July 29, 1993.

ATR contact: Neil E. Roberts (4-2512)



Department of Justice

STATEMENT OF

ANNE K. BINGAMAN
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

BEFORE THE

SUBCOMMITTEE ON ECONOMIC AND COMMERCIAL LAW
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

CONCERNING

LEGISLATION TO AMEND THE ANTITRUST EXEMPTION
PROVIDED BY THE McCARRAN-FERGUSON ACT

PRESENTED ON

JULY 29, 1993

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to present the views of the Department of Justice on proposals to amend the McCarran-Ferguson Act so as to narrow the scope of the antitrust immunity that it affords to the business of insurance. The Department believes that the time has come to act on such legislation, and supports the objectives of the Subcommittee in this regard.

Prior to 1944, regulation of the business of insurance was seen as the exclusive province of the states. In that year, the Supreme Court held in United States v. South-Eastern Underwriters Association ^{1/} that the insurance business was within the regulatory power of Congress under the Commerce Clause and thus was subject to the antitrust laws. This decision was perceived to threaten state authority to regulate and tax the business of insurance. The McCarran-Ferguson Act was designed to return the legal climate to that which existed prior to South-Eastern Underwriters by specifically delegating to the states the authority to continue to regulate and tax the business of insurance. It also created a broad antitrust exemption based on state regulation. This antitrust exemption applies where three basic requirements are met: (1) the

^{1/} 322 U.S. 533.

challenged activity must be part of the "business of insurance"; (2) that business must be regulated by state law; and (3) the activity must not constitute boycott, coercion, or intimidation.

Repeal or reform of the broad antitrust exemption currently enjoyed by the business of insurance has been a perennial subject of interest. In 1977, a Justice Department study concluded that the insurance industry could function competitively without the protection of the McCarran-Ferguson Act. The National Commission for the Review of Antitrust Laws and Procedures recommended in 1979 that the broad exemption in the Act be replaced by narrowly drawn legislation adopted to affirm the lawfulness of a limited number of collective activities under the antitrust laws. The 1989 report of the American Bar Association Commission to Improve the Liability Insurance System contained a generally similar recommendation. This Subcommittee and other bodies of Congress have held several hearings on the McCarran-Ferguson exemption over the years, and during the last session the full Committee reported favorably legislation that would replace the current exemption with a narrower one affording continued protection to certain procompetitive activities. The pros and cons, as well as the particulars, of legislative reform of the McCarran-Ferguson antitrust exemption have thus been thoroughly and carefully debated. The Department believes that the time has come to enact such legislation.

The Department is generally opposed to exemptions from the antitrust laws, whether they be industry-specific or general, in the absence of a strong showing of compelling need. The antitrust laws protect and promote the nation's fundamental national policy of competition. Exceptions from that policy should be and fortunately are relatively rare. Those who advocate the creation of a new antitrust exemption, or the preservation of a longstanding exemption such as that contained in the McCarran-Ferguson Act, rightfully bear a heavy burden in justifying the exemption.

In considering any alleged need for an antitrust exemption, the flexible nature of the antitrust laws as interpreted in such recent cases as General Dynamics, 2/ GTE Sylvania, 3/ Broadcast Music, 4/ and Northwest Wholesale Stationers, 5/ must be recognized. Allegations that particular procompetitive behavior would violate the antitrust laws and thus should be exempted from their application can fail to take account of the

2/ United States v. General Dynamics Corp., 415 U.S. 486 (1974).

3/ Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

4/ Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979).

5/ Northwest Wholesale Stationers, Inc. v. Pacific Stationary and Printing Co., 472 U.S. 284 (1985).

economically sound competitive analysis that is used today to carefully circumscribe per se rules and fully analyze other conduct under the rule of reason. Congress has occasionally recognized a need for clarification of a proper antitrust standard or adjustment of antitrust remedies, as it did earlier this year in passing the National Cooperative Production Amendments of 1993, but the flexibility of the antitrust laws and their crucial importance to the economy argue strongly against antitrust exemptions that are not clearly and convincingly justified.

There are strong indications that possible justifications for the broad insurance antitrust exemption in the McCarran-Ferguson Act when it was enacted in 1945 are no longer valid today. To the extent that the exemption was designed to enable the states to continue to regulate the business of insurance, it is no longer necessary. The "state action" defense, which had been announced by the Supreme Court in Parker v. Brown ^{6/} in 1943 but was undeveloped in 1945 when the McCarran-Ferguson Act was enacted, has now been the subject of many Supreme Court opinions. This defense allows a state effectively to immunize what the antitrust laws otherwise may proscribe by clearly articulating and affirmatively expressing

^{6/} 317 U.S. 341.

a policy to displace competition and by actively supervising any private conduct that might be involved.

Moreover, the application of the antitrust laws to potentially procompetitive collective activity has become far more sophisticated during the nearly 50 years since the McCarran-Ferguson Act was enacted. Some forms of joint activity that might have been prohibited under earlier, more restrictive doctrines are now clearly permissible, or at very least analyzed under a rule of reason that takes appropriate account of the circumstances and efficient operation of a particular industry. Thus, there is far less reason for concern that overly restrictive antitrust rulings would impair the insurance industry's efficiency. And, as I will discuss in more detail in a moment, to the extent that a case can be made that uncertainty as to the application of the antitrust laws may deter particular procompetitive activity even if, in the long run, such conduct would be vindicated, legislation could be enacted that would afford continued protection to carefully defined conduct that is considered necessary or appropriate to the operation of the insurance industry.

Against what I believe to be less than convincing justifications for continuance of the current broad antitrust exemption for the business of insurance are some significant potential benefits from legislation that would narrow it. First, reform of this exemption is consistent with the normal

presumption that an industry functions more efficiently and in the interests of consumers without antitrust exemptions that permit potentially anticompetitive conduct. State regulation of collective insurer conduct that affects rates or terms of coverage is simply not a good substitute for the disciplines of a competitive marketplace. This may be particularly true where states are forced to devote more of their limited regulatory resources to guarding against discrimination or protecting solvency than to ensuring competitively priced options for consumers. Second, some regulatory goals, such as guarding against discrimination or protecting solvency, appear to be obtainable without the broad antitrust exemption that is currently in place. If convincing arguments are made that a particular regulatory goal cannot be furthered without collective conduct that is or might be considered unlawful under the antitrust laws, such conduct could be protected by a special exception in legislation that narrowed the current broad exemption.

The matter of antitrust uncertainty that I discussed above and possible arguments regarding the need for certain collective conduct to promote state regulatory goals go more, I believe, to the form and precise content of legislation to reform the current antitrust exemption for the business of insurance than to its overall desirability. I see no reason why these concerns could not be accommodated by the legislative process.

It may be argued that the development of antitrust law takes time and occasionally may take a wrong turn. Uncertainty as to how collective insurer conduct will fare under the antitrust laws is thus argued potentially to inhibit procompetitive activities. I give some credence to this argument, but believe that legislation that contains carefully drawn safe harbors would be an adequate and appropriate response. I would, however, caution against accepting the uncertainty argument too willingly and safe harboring activities that may be anticompetitive, at least in some contexts. First, the courts are in my view capable of making and likely to make the right decisions regarding any conduct in the business of insurance that is subjected to antitrust challenge. Second, the current antitrust exemption in the McCarran-Ferguson Act has proven to be highly resistant to change, and I suspect that the decisions Congress makes on what will continue to be protected by the Act will be in effect for a long time. Thus, I believe that there should be a high degree of confidence in the worthiness of any specific antitrust protection that Congress decides to continue. And, with respect to promoting state regulatory goals, we should recognize that those goals may vary from state to state and can also be promoted through the exercise of state action to exempt particular conduct from antitrust scrutiny.

In sum, the Department supports replacement of the current broad exemption for the business of insurance with more carefully crafted protection for activities that are demonstrably potentially procompetitive and efficiency-enhancing. Such legislation must, of course, be consistent with the Administration's forthcoming health care reform proposal. We believe that McCarran-Ferguson reform legislation can accommodate the interests of those who support such reform--including the Department--as well as those who have expressed concern that reform would have to permit insurance companies large and small to engage in activities that would both benefit consumers and allow the industry to prosper.

Mr. Chairman, this concludes my prepared statement. I would be happy to address any questions that you or the other members of the Subcommittee may have.

NEWSPAPER PRESERVATION ACT

1. **ISSUE STATEMENT:** The Newspaper Preservation Act (sometimes referred to as the "failing newspaper" Act) provides a limited antitrust exemption for certain newspaper joint operating arrangements (JOA's). The stated purpose of the Act is to preserve editorially and reportorially independent newspapers. JOA's typically provide for joint printing, joint pricing and profit pooling among the participating papers, largely eliminating commercial competition between them. However, the editorial and reportorial functions of the participating newspapers must remain independent. JOA's entered into before July 24, 1970, are afforded this antitrust exemption by the Act; other JOA's receive this exemption if filed with and approved by the Attorney General, who must determine that not more than one of the publications involved in the JOA is other than a failing newspaper (defined as a publication in probable danger of financial failure.)

Under the Act (15 U.S.C. 1803(c)), the antitrust exemption provided by the Act does not extend to "any predatory pricing, any predatory practice, or any other conduct . . . which would be unlawful if engaged in by a single entity." Thus, where predatory practices by the JOA are alleged, the question presented is whether those practices would be unlawful under the antitrust laws if engaged in by a single publication.

2. **STATUS:** The publisher of a daily newspaper in Macomb County, Michigan has complained to the Antitrust Division that the Detroit News Agency, a JOA between the Detroit Free Press and The Detroit News that was approved in 1988, was engaging in the predatory pricing of advertising in an attempt to drive his paper out of business. Members of the Michigan Congressional delegation have made inquiries about the matter. The Division has recently opened a preliminary inquiry into this matter, and plans to contact affected suburban newspapers.

3. **DEPARTMENT POSITION:** A preliminary inquiry has been opened.

4. **JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS:** Unknown.

5. **REFERENCE MATERIALS:** None.

ATR contact: Neil E. Roberts (4-2512)

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Divider Title: _____

VERTICAL PRICE FIXING

1. **ISSUE STATEMENT:** Congress has for several sessions considered whether to amend the antitrust laws as they apply in cases alleging unlawful resale price maintenance agreements by creating an inference of unlawful conspiracy--or, alternatively, permitting the trier of fact to consider whether there was a conspiracy--in certain cases involving dealer terminations. The right of firms to decide with whom they will deal has long been a complex issue in antitrust law and policy. In the Dr. Miles case (1911), the Supreme Court held that a manufacturer may not agree with its dealers on minimum resale prices. In United States v. Colgate & Co. (1919), however, the Court made clear that only resale price maintenance agreements violate the Sherman Act, and that a manufacturer acting unilaterally may set resale prices and enforce adherence by terminating non-complying dealers. Recently, in the Monsanto case (1984), the Supreme Court concluded that it was improper generally to infer a resale price maintenance agreement from the fact that a manufacturer learned of a dealer's unacceptable pricing policy from another dealer and subsequently terminated the complained-of dealer. In Bus. Elec. Corp. v. Sharp (1988), the Court held that a manufacturer's understanding with one dealer to terminate another dealer over pricing practices is not necessarily equivalent to an agreement to fix resale prices. Discount retailers contend these rulings and subsequent lower court decisions have made it hard for plaintiffs to survive summary judgment motions in resale price-fixing cases. In the 102nd Congress, both Houses passed bills to establish evidentiary and substantive standards in antitrust cases alleging resale price maintenance conspiracies. However, the legislation died when the House rejected the conference report.

2. **STATUS:** Legislation has not yet been taken up in the current session.

3. **DEPARTMENT POSITION:** Some members of Congress questioned the Reagan/Bush Department's commitment to enforcing the law against vertical price fixing. This administration has stated its strong support for enforcement of the law. In a recent letter to Senator Metzenbaum, AAG Anthony stated that "the Department's policy will be one of strict enforcement of the per se rule against such conduct," and that "the Department looks forward to working with the Committee on the on the important issues raised by the ... legislation."

4. **JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS:** Since Monsanto and Sharp, Senator Metzenbaum has been a strong supporter of legislation to facilitate recovery in resale price maintenance cases.

5. **REFERENCE MATERIALS:** Letter from Sheila F. Anthony to Howard M. Metzenbaum, February 15, 1994.

ATR contact: Neil E. Roberts (4-2512)



Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

15 FEB 1994

Honorable Howard M. Metzenbaum
Chairman
Subcommittee on Antitrust, Monopolies
and Business Rights
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your letter of October 1, 1993, also signed by Chairman Brooks, bringing to the Department's attention your legislative effort to restore the vitality of the per se prohibition against vertical price fixing, or resale price maintenance. Enclosed with your letter were the differing versions of resale price maintenance legislation passed by the House and Senate during the 102d Congress, as well as the House and Senate committee reports. Our respective staffs have discussed this matter since receipt of your letter, and I know you are aware of the Department's interest in it.

Your letter cites in particular the Supreme Court's decisions in Monsanto v. Spray-Rite Corp. and Business Electronics Corp. v. Sharp Electronics Corp. as having increased the difficulty of victims of vertical price fixing to move beyond the summary judgment stage let alone prevail at trial on the merits. You indicate your intent to press forward with legislation in this area, and note that the Department's support will be crucial to finally achieving success.

The Department shares your view that effective antitrust enforcement against vertical price fixing agreements is vital to consumers and others that may be adversely affected by such conspiracies, and the Department's policy will be one of strict enforcement of the per se rule against such conduct. It is, of course, vital to the Department's efforts, as well as to those of private plaintiffs with meritorious vertical price fixing

claims, that substantive law in this area be sound. As suggested in your letter, the Department looks forward to working with the Committee on the important issues raised by resale price maintenance legislation.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the submission of this report.

Sincerely,

Sheila Anthony

Sheila F. Anthony
Assistant Attorney General

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Divider Title: _____

DEBT COLLECTION

The Tax Division has intensified greatly its debt collection efforts, resulting in a five-fold increase in direct debt collection over the last three years. The Division collects approximately four times its entire budget cost from this activity alone.

1. ISSUE STATEMENT

The Tax Division has intensified its efforts to collect amounts owed to the United States. We have revised our debt collection procedures and conducted mandatory training on debt collection for all attorneys and paralegals. During the past two fiscal years our attorneys collected over \$430 million, returning to the Federal Treasury approximately \$30 for each dollar we expended on debt collection. Indeed, the total amount collected was approximately four times the Division's entire budget for those years.

That is only a part of our success story. By virtue of favorable precedents established by the Tax Division in the Supreme Court, the courts of appeals, and the district courts, the IRS has been able to collect billions of dollars of additional revenue. For example, the IRS has estimated that approximately \$5 billion in revenue will be collected as the result of the Government's victory in the Supreme Court in Hill v. United States, an alternative minimum tax case.

2. STATUS

There is still much work to be done. The IRS intends to devote increased efforts to reduce its accounts receivable inventory, of which it is estimated that \$29 billion is realistically collectible. Because the Service has hired 1,000 additional revenue officers as part of its ambitious debt collection program, we expect to receive an increasing number of collection cases. We are hopeful that funds from the new Debt Collection Account in the Department's Working Capital Fund will soon be made available to support enhanced collection activity.

3. DEPARTMENT POSITION

"We are quite proud of our tax collection efforts. The Tax Division has had a five-fold increase in direct debt collections over the last three years. We return to the Federal Treasury approximately \$30 for every dollar that we spend on debt collection."

Remarks of Assistant Attorney General Loretta C. Argrett to the National Legal Center for the Public Interest on April 5, 1994.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

We are not aware of any position taken with respect to this issue by a Judiciary Committee member.

5. REFERENCE MATERIALS

None.

6. COMPONENT CONTACT

Michael L. Paup, 202/514-5109.

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Divider Title: _____

BANKRUPTCY LITIGATION

The Tax Division's bankruptcy docket has quadrupled over the last four years. During this past year, the Division has worked on approximately 40,000 bankruptcies involving billions of dollars in tax claims.

1. ISSUE STATEMENT

Collections in the bankruptcy courts are assuming greater importance, as the Tax Division's bankruptcy docket continues to skyrocket. The Tax Division received 26,187 bankruptcy cases in FY 1991, more than four times the level of FY 1987. In FY 1993, we received approximately 40,000 bankruptcy cases.

2. STATUS

An increasing number of these cases involve large corporations and enormous tax claims. The Tax Division is currently handling or has handled recently tax claims totalling over \$10 billion in the bankruptcies of companies such as Drexel, Burnham, Lambert; Campeau (Federated Department Stores); Financial Corporation of America; Revco; Trans World Airlines; Continental Airlines; Southland; Imperial Bank; Windsor Properties; Lone Star Steel; and Greyhound Lines. In FY 1993, the Tax Division expended over 133,000 hours on bankruptcy litigation, or almost 52,000 more hours than was spent on such litigation in FY 1990.

Our Criminal Enforcement Sections are beginning to focus on the related problem of bankruptcy tax fraud. There is ample evidence that fraud in bankruptcy courts has risen sharply in recent years. As a creditor in one-third of the bankruptcies filed each year, the IRS is a major victim of this fraud. One indication of the magnitude of this problem is that VISA and Mastercard estimate that they lose over a billion dollars annually to bankruptcy fraud. IRS losses are at least in this range.

In conjunction with the U.S. Trustees, the U.S. Attorneys, and the IRS, we are in the process of developing a coordinated initiative to prosecute these violators. We are participating already in tax cases arising out of Bankruptcy Fraud Task Forces that have been organized in various districts around the country.

3. DEPARTMENT POSITION

One of the Tax Division's "major objectives" is to "defend the Government in the tens of thousands of bankruptcy proceedings filed each year in which the Government has a tax claim." Civil tax litigation attorneys litigate suits filed by and against taxpayers involving the "validity and priority of Federal tax

claims and the feasibility of plans of reorganization." See Tax Division Fiscal Year 1995 Budget Request submitted to Congress.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

We are not aware of any position taken with respect to this issue by a Judiciary Committee member.

5. REFERENCE MATERIALS

None.

6. COMPONENT CONTACT

Michael L. Paup, 202/514-5109.

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Divider Title: _____

UNITARY TAX LITIGATION

In cases involving Barclays Bank and Colgate-Palmolive, the United States Supreme Court is reviewing whether California's former unitary tax system, as applied to a consolidated group with foreign members -- the parent in the case of Barclays; subsidiaries in the case of Colgate-Palmolive -- violates the Foreign Commerce Clause of the Constitution.

1. ISSUE STATEMENT

The Supreme Court currently has under submission two cases presenting the question whether California's former unitary tax system was incompatible with the Foreign Commerce Clause. The United Kingdom and Canada urged the Department to support petitioners' attack on the unitary tax system. The State of California, on the other hand, urged the Department to support the constitutionality of the state tax measure. The Department's brief urged the Court to uphold the tax.

2. STATUS

On March 28, 1994, the Solicitor General presented oral argument in the Supreme Court on behalf of the United States in Barclays Bank v. Franchise Tax Board of California and Colgate-Palmolive Company, Inc. v. Franchise Tax Board of California. These cases test the constitutionality of California's worldwide combined unitary tax system that was in effect during the 1970's. Under that system, California used a multi-factor formula to determine how much of the total worldwide income earned by corporate parents, subsidiaries, and affiliates was taxable in California. In an amicus brief filed in support of California, the United States urges that this unitary tax system did not violate the United States Constitution and should be upheld. In Barclays, the United States argues that California's unitary tax system, as applied to groups of corporations with foreign parents, did not interfere with the Federal Government's power to regulate foreign commerce and foreign affairs, because it was not incompatible with federal policy at the time the tax in question was levied. In Colgate-Palmolive, the United States again argues that California's tax system did not violate the Constitution because no federal policy existed during the relevant time period that precluded the state's application of the worldwide unitary tax system to domestic taxpayers with foreign and domestic subsidiaries.

3. DEPARTMENT POSITION

See above.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

We are not aware of any position taken with respect to this issue by a Judiciary Committee member, although Sen. Dianne Feinstein (D-Ca.), is undoubtedly aware of the issue.

5. REFERENCE MATERIALS

None.

6. COMPONENT CONTACT

Gary R. Allen, 202/514-3361.

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Divider Title: _____

MOTOR FUEL EXCISE TAX EVASION

The Tax Division, the IRS, and the FBI are moving against schemes in which organized crime figures and otherwise legitimate businesses have evaded over \$1 billion in motor fuel taxes.

1. ISSUE STATEMENT

Investigations conducted jointly by the Tax Division, the Fraud Section of the Criminal Division, the FBI, and the Criminal Investigation Division of the IRS have uncovered widespread evasion of motor fuel taxes. Estimates place revenue losses at over \$1 billion annually.

The perpetrators often use forged invoices and thinly-capitalized shell corporations to create a false appearance that fuel excise taxes have been paid or rely upon false IRS exemption forms. Other schemes involve smuggled fuel or are perpetrated by "splash blenders" or "cocktailers," who dilute diesel fuel with substances like mineral oil or flammable toxic waste, and then sell the increased volume of diluted fuel without paying the applicable taxes.

Evidence indicates that the Columbo, Luchese, Genovese, and Gambino organized crime families, as well as elements of Russian-emigre organized crime, are involved in this activity. Otherwise legitimate businesses have also been drawn into these schemes, as demonstrated by recent convictions in the Eastern District of Pennsylvania of several businessmen involved in a conspiracy that evaded over \$15 million in taxes owed on the sale of 51 million gallons of diesel fuel.

2. STATUS

Nationwide, the motor fuel excise tax enforcement initiative involves over 130 investigations in 18 cities. The recent increase in the motor fuel tax is expected to spur further criminal activity by making evasion of the tax more lucrative. The Tax Division is also monitoring this activity for new schemes that will probably arise in response to a change in the law on January 1, 1994, that modified the taxation system for motor fuels.

3. DEPARTMENT POSITION

The Tax Division has mounted a vigorous enforcement effort and has secured 71 convictions over the last three years, including Marat Balagula, reputed to be the former head of Russian organized crime in the New York metropolitan area.

This past year, grand juries returned indictments in the two largest motor fuel tax evasion cases in U.S. history: (1) a New Jersey grand jury indicted alleged members of Russian-emigre organized crime and the Gambino family in connection with a scheme to evade \$60 million in gasoline and diesel fuel excise taxes on the sale of more than 650 million gallons of motor fuel; (2) in Brooklyn, seven individuals were charged with evading approximately \$85 million in excise taxes owing on the sale of about one billion gallons of gasoline. Both indictments were preceded by seizures that resulted in forfeiture of millions of dollars of property.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

We are not aware of any position taken with respect to this issue by any members of the Judiciary Committee.

5. REFERENCE MATERIALS

None.

6. COMPONENT CONTACT

E. Ralph Pierce, 202/514-0003.

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92

Divider Title: _____

**SHIFT OF RESOURCES FROM FINANCIAL INSTITUTION
LITIGATION TO HEALTH CARE FRAUD**

During the past year, the Tax Division has worked on tax investigations and prosecutions arising out of the Dallas, Boston, and San Diego Bank Fraud Task Forces. Division attorneys also became involved in new investigations in Florida. The Division has agreed that, if asked, it could shift a portion of the resources it receives in this area to a new initiative to combat health care fraud.

1. ISSUE STATEMENT

Tax Division attorneys, working with attorneys from the Fraud Section of the Criminal Division and United States Attorneys from around the country, investigate and prosecute cases arising from the savings and loan crisis and participate in the Department's Financial Institution Reform, Recovery, and Enforcement Act (FIRREA) initiative. Overall, participation by the Tax Division in financial institution fraud prosecutions has so far yielded 51 tax-related convictions and 35 additional indictments.

2. STATUS

The Tax Division has been engaged in discussions within the Department about ways in which criminal tax charges could be used to prosecute individuals and entities in connection with health care fraud. Fraud schemes detected to date reveal numerous potential tax prosecutions, and our attorneys are working with the IRS to determine where tax prosecutions are the most effective and efficient enforcement mechanism. The Division has indicated that it could shift some of the resources it receives in connection with Financial Institution Fraud (FIF) litigation to work on Health Care Fraud without undermining its FIF litigation efforts.

3. DEPARTMENT POSITION

In January, 1994, the Department proposed reprogramming 25 percent of the resources devoted by the Tax Division and other components from FIF to health care fraud litigation. No action has been taken on the proposal.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

We are not aware of any position taken by a Judiciary Committee member with respect to Tax Division's role in the prosecution of FIF cases, or in the Division's agreement to shift resources to a health care fraud initiative.

5. REFERENCE MATERIALS

None.

6. COMPONENT CONTACT

J. Randy Maney, 202/514-4334.

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93

Divider Title: _____

INCREASED ELECTRONIC TAX RETURN FILING FRAUD

The IRS has instituted an electronic filing program which permits the filing of tax returns by computer. The Tax Division is working with the IRS to investigate and prosecute those guilty of abusing this new program. Recently, the IRS has been criticized by members of Congress alleging that the program is flawed in a way that has permitted the Government to be defrauded of billions of dollars in false refunds. In response, in April, 1994, the Treasury Department announced the formation of a special task force to review the matter. The Tax Division has agreed to participate.

1. ISSUE STATEMENT

The electronic filing of tax returns (ELF) offers great benefits both to taxpayers and to the IRS in the form of rapid and less costly processing. In the 1993 filing season, over 13 million ELF returns were filed. The IRS anticipates that this number will double in the next two years.

With increases in the number of electronically filed returns has come an increase in fraudulent ELF schemes. Each of these schemes may involve hundreds of false individual returns and several million dollars in stolen funds. In the largest case to date, 24 individuals were indicted on December 4, 1991, in Houston, Texas, for orchestrating a fraudulent electronic refund scheme involving approximately 750 ineligible individuals, many of whom were unemployed residents of low-income housing projects. Attorneys from the Tax Division's Criminal Enforcement Sections have obtained tax convictions of most of these defendants, who have received sentences ranging between 18 and 52 months in prison.

2. STATUS

ELF schemes must be detected and punished as quickly as possible in order to prevent continuing losses and further deterioration in the public's confidence in the tax system. The IRS and the Tax Division have responded by streamlining and expediting referrals of electronic filing fraud cases for grand jury investigations, and for arrests and prosecution. With increased Service attention being devoted to ELF, the upcoming filing season promises to pose even greater challenges.

3. DEPARTMENT POSITION

In April, 1994, the Tax Division provided "Dateline NBC" with the following information:

"In 1991, the Tax Division initiated over 20 grand jury investigations, from which indictments of 66 individuals were approved,

in cases involving almost \$4.1 million in electronically filed false refund claims. During 1992, the Tax Division authorized over 140 grand jury investigations. As a result of those investigations, the prosecution of almost 500 individuals has been authorized, in cases involving in excess of \$14 million in false claims. During 1993, the Tax Division approved over 140 grand jury investigations that, to date, have resulted in authorizations to prosecute over 300 individuals. Many of these investigations are continuing. Those cases involve in excess of \$15 million in false claims.

"During the first quarter of 1994, the IRS has identified over 1,100 ELF schemes in which over 8,800 returns have been filed claiming in excess of \$16 million in bogus refunds. The IRS received over 13 million electronically filed returns in 1993 and projects that over 25,000,000 taxpayers will file electronically by 1996."

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

We are not aware of any position taken by a Senate Judiciary Committee member with respect to the ELF program or the Tax Division's prosecution of ELF schemes. The Congressional members urging creation of the special task force to investigate fraud in the ELF program include House Ways and Means Committee Chairman Dan Rostenkowski (D-Ill.), J.J. Pickle (D-Tex.), Chairman of the Ways and Means Oversight Subcommittee, and their Republican counterparts, Bill Archer (R-Tex.) and Amo Houghton (R-N.Y.).

5. REFERENCE MATERIALS

None.

6. COMPONENT CONTACT

Anthony Whitley, 202/514-2832.

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94

Divider Title: _____

CASH FEE REPORTING BY ATTORNEYS

The Tax Division has supported the IRS's effort to enforce the Internal Revenue Code Section 6050I cash reporting requirements against lawyers. The courts have uniformly held that attorneys are subject to these requirements.

1. ISSUE STATEMENT

Under Section 6050I of the Internal Revenue Code, all persons engaged in a trade or business who receive more than \$10,000 in cash payments in a single transaction or related transactions must file an information return identifying the payor and the amount of cash received. A number of attorneys and segments of the organized bar (primarily the National Association of Criminal Defense Lawyers) have sought to resist application of these rules to attorneys on the ground that information relating to the identity of clients and payment of fees is privileged.

2. STATUS

Over the last three years, IRS has issued summonses to many lawyers who filed incomplete cash reporting forms (Form 8300). If the attorney persists in refusing to comply with the statute or respond to the summons, the Tax Division has brought summons enforcement actions. Although three circuits have held that attorneys must provide the summonsed information, criminal defense lawyers are continuing to litigate the issue in several district courts. The Tax Division is also pursuing several criminal cases involving attorneys who willfully failed to file any cash reporting form whatsoever.

No civil penalty or criminal action has been brought against a lawyer who filed an incomplete Form 8300 with the IRS that reported the amount and date of receipt of cash legal fees but withheld -- on privilege or related grounds -- client identifying information. However, the Service has recently threatened to impose substantial penalties (\$25,000 to \$100,000 per violation) on lawyers who fail to file or filed incomplete forms without a reasonable basis for asserting a privilege. To date, no penalty assessments have been made.

3. DEPARTMENT POSITION

The Department has informed bar association groups that it will consider "special circumstances" presented to the IRS by lawyers in determining whether to seek judicial enforcement of a summons. As yet, we have seen no case warranting this exemption. Under our current procedures, all enforcement actions are carefully reviewed and are approved for filing by the Assistant Attorney General (Tax). It is our practice to coordinate all such actions with the Criminal Division before filing.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

We are not aware of any position taken by a Senate Judiciary Committee member with respect to cash fee reporting by attorneys.

5. REFERENCE MATERIALS

None.

6. COMPONENT CONTACT

Michael L. Paup, 202/514-5109.

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95

Divider Title: _____

NEW FOIA OPENNESS POLICY

1. **Statement:** In October 1993, both President Clinton and Attorney General Reno issued major FOIA policy memoranda to the heads of all federal departments and agencies that established a new course of government openness and new standards of disclosure under the Act. The President's FOIA Memorandum emphasized the importance of openness in government to government accountability and, inter alia, called upon all agencies to enhance the effectiveness of FOIA disclosure in accordance with new FOIA standards set forth by the Attorney General. (See President Clinton's October 4, 1993 FOIA Memorandum attached.)

Attorney General Reno's FOIA Memorandum explicitly rescinded the Department's 1981 "substantial legal basis" standard for determining whether it will defend any agency withholding of information under an exemption in FOIA litigation. It replaced that standard with new standards designed to achieve greater government openness through maximum responsible FOIA disclosure. The essential elements of this new policy are:

- An overall "presumption of disclosure" to be applied in FOIA decisionmaking.
- A specific "foreseeable harm" standard governing the Department's decision on whether to defend any assertion of FOIA exemption applicability in court.
- An accompanying emphasis on making "discretionary disclosures" of exempt records or information whenever possible under the Act.

The Attorney General ordered a litigation review of the merits of all pending FOIA cases (handled by the Civil Division, the Tax Division and the United States Attorneys' Offices) according to the new foreseeable harm standard. This standard, together with its discretionary disclosure corollary, is being applied both to pending and prospective FOIA litigation cases and to FOIA exemption decisions made by agencies at the administrative level as well. The Department has advised all federal agencies to undertake a more particularized review of all requested records in determining whether there actually exists foreseeable harm from disclosure before using any FOIA exemption and to disclose as much information as is possible without such harm.

This new substantive FOIA-disclosure policy is part of the Department's overall "Openness in Government Initiative," which includes: (1) ongoing reviews of the Department's FOIA forms, procedures and regulations; (2) a National Performance Review (NPR) laboratory aimed at improving FOIA processes through such mechanisms as automation and customer surveys (see NPR memorandum attached); (3) attention to existing FOIA backlogs and possible means of backlog reduction; and (4) affirmative disclosure of the results of certain disciplinary investigations by the Office of Professional Responsibility, in coordination with the Deputy

Attorney General's Office and OIP, under a new public interest disclosure standard (see OPR memorandum attached).

Additionally, the Department has established a new FOIA policy that now provides for the granting of "expedited access" under the Act, as a matter of administrative discretion, whenever a media-related FOIA request is found by the Director of Public Affairs to meet two standards: (1) the existence of widespread and exceptional media interest in the requested information; and (2) the involvement of possible questions about the government's integrity which affect public confidence. Such expedition was granted in the case of requests for the FBI's report of its investigation into the circumstances surrounding the death of former Deputy White House Counsel Vincent Foster. (See OIP memorandum attached.)

2. Status: The Department's review of pending FOIA cases under the foreseeable harm standard has resulted in the disclosure of much information previously withheld as exempt under the Act and has led to the complete resolution of several FOIA lawsuits. In some instances--for example, a suit seeking a series of draft documents withheld under the deliberative process privilege by INS--the agency made a complete disclosure of all records at issue in the case. In other instances--for example, a suit seeking the files of a closed prosecution that had been withheld under the attorney work-product privilege by the Criminal Division--the agency made a discretionary disclosure of so much of the files that the requester dropped the suit as to the remainder. The most noteworthy such example is the case of Mapother v. Department of Justice, 3 F.3d 1533 (D.C. Cir. 1993), involving a report prepared for the Attorney General during the 1980's recommending the exclusion from the United States of former U.N. Secretary-General Kurt Waldheim; although the D.C. Circuit had held the report exempt last September, it was reviewed under the foreseeable harm standard and disclosed in its entirety by the Department this year as a matter of administrative discretion.

3. Department Position: The Department is continuing its efforts to promote greater openness throughout the government and to encourage all agencies to work cooperatively with the FOIA-requester community on matters of FOIA administration.

4. Judiciary Committee Member Interest/Positions: No member of the Judiciary Committee is known to have expressed an interest or concern on any particular aspect of the Department's new FOIA policy. The Judiciary Committee member most interested in FOIA administration is Senator Leahy, chairman of the subcommittee with jurisdiction over the Act.

5. Reference Materials: (a) President Clinton's October 4, 1993 FOIA Memorandum; (b) Attorney General Reno's October 4, 1993 FOIA Memorandum; (c) Attorney General's April 11, 1994 memorandum on NPR FOIA laboratory; (d) Deputy Attorney General's December 13, 1993 memorandum on OPR disclosure; (e) OIP February 1, 1994 memorandum on expedited access for media-related FOIA requests.

THE WHITE HOUSE

WASHINGTON

October 4, 1993

MEMORANDUM FOR HEADS OF DEPARTMENTS AND AGENCIES

SUBJECT: The Freedom of Information Act

I am writing to call your attention to a subject that is of great importance to the American public and to all Federal departments and agencies -- the administration of the Freedom of Information Act, as amended (the "Act"). The Act is a vital part of the participatory system of government. I am committed to enhancing its effectiveness in my Administration.

For more than a quarter century now, the Freedom of Information Act has played a unique role in strengthening our democratic form of government. The statute was enacted based upon the fundamental principle that an informed citizenry is essential to the democratic process and that the more the American people know about their government the better they will be governed. Openness in government is essential to accountability and the Act has become an integral part of that process.

The Freedom of Information Act, moreover, has been one of the primary means by which members of the public inform themselves about their government. As Vice President Gore made clear in the National Performance Review, the American people are the Federal Government's customers. Federal departments and agencies should handle requests for information in a customer-friendly manner. The use of the Act by ordinary citizens is not complicated, nor should it be. The existence of unnecessary bureaucratic hurdles has no place in its implementation.

I therefore call upon all Federal departments and agencies to renew their commitment to the Freedom of Information Act, to its underlying principles of government openness, and to its sound administration. This is an appropriate time for all agencies to take a fresh look at their administration of the Act, to reduce backlogs of Freedom of Information Act requests, and to conform agency practice to the new litigation guidance issued by the Attorney General, which is attached.

Further, I remind agencies that our commitment to openness requires more than merely responding to requests from the public. Each agency has a responsibility to distribute information on its own initiative, and to enhance public access through the use of electronic information systems. Taking these steps will ensure compliance with both the letter and spirit of the Act.

William J. Clinton



Office of the Attorney General
Washington, D. C. 20530

October 4, 1993

MEMORANDUM FOR HEADS OF DEPARTMENTS AND AGENCIES

SUBJECT: The Freedom of Information Act

President Clinton has asked each Federal department and agency to take steps to ensure it is in compliance with both the letter and the spirit of the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The Department of Justice is fully committed to this directive and stands ready to assist all agencies as we implement this new policy.

First and foremost, we must ensure that the principle of openness in government is applied in each and every disclosure and nondisclosure decision that is required under the Act. Therefore, I hereby rescind the Department of Justice's 1981 guidelines for the defense of agency action in Freedom of Information Act litigation. The Department will no longer defend an agency's withholding of information merely because there is a "substantial legal basis" for doing so. Rather, in determining whether or not to defend a nondisclosure decision, we will apply a presumption of disclosure.

To be sure, the Act accommodates, through its exemption structure, the countervailing interests that can exist in both disclosure and nondisclosure of government information. Yet while the Act's exemptions are designed to guard against harm to governmental and private interests, I firmly believe that these exemptions are best applied with specific reference to such harm, and only after consideration of the reasonably expected consequences of disclosure in each particular case.

In short, it shall be the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption. Where an item of information might technically or arguably fall within an exemption, it ought not to be withheld from a FOIA requester unless it need be.

It is my belief that this change in policy serves the public interest by achieving the Act's primary objective -- maximum responsible disclosure of government information -- while preserving essential confidentiality. Accordingly, I strongly encourage your FOIA officers to make "discretionary disclosures"

whenever possible under the Act. Such disclosures are possible under a number of FOIA exemptions, especially when only a governmental interest would be affected. The exemptions and opportunities for "discretionary disclosures" are discussed in the Discretionary Disclosure and Waiver section of the "Justice Department Guide to the Freedom of Information Act." As that discussion points out, agencies can make discretionary FOIA disclosures as a matter of good public policy without concern for future "waiver consequences" for similar information. Such disclosures can also readily satisfy an agency's "reasonable segregation" obligation under the Act in connection with marginally exempt information, see 5 U.S.C. § 552(b), and can lessen an agency's administrative burden at all levels of the administrative process and in litigation. I note that this policy is not intended to create any substantive or procedural rights enforceable at law.

In connection with the repeal of the 1981 guidelines, I am requesting that the Assistant Attorneys General for the Department's Civil and Tax Divisions, as well as the United States Attorneys, undertake a review of the merits of all pending FOIA cases handled by them, according to the standards set forth above. The Department's litigating attorneys will strive to work closely with your general counsels and their litigation staffs to implement this new policy on a case-by-case basis. The Department's Office of Information and Privacy can also be called upon for assistance in this process, as well as for policy guidance to agency FOIA officers.

In addition, at the Department of Justice we are undertaking a complete review and revision of our regulations implementing the FOIA, all related regulations pertaining to the Privacy Act of 1974, 5 U.S.C. § 552a, as well as the Department's disclosure policies generally. We are also planning to conduct a Department-wide "FOIA Form Review." Envisioned is a comprehensive review of all standard FOIA forms and correspondence utilized by the Justice Department's various components. These items will be reviewed for their correctness, completeness, consistency, and particularly for their use of clear language. As we conduct this review, we will be especially mindful that FOIA requesters are users of a government service, participants in an administrative process, and constituents of our democratic society. I encourage you to do likewise at your departments and agencies.

Finally, I would like to take this opportunity to raise with you the longstanding problem of administrative backlogs under the Freedom of Information Act. Many Federal departments and agencies are often unable to meet the Act's ten-day time limit for processing FOIA requests, and some agencies -- especially

those dealing with high-volume demands for particularly sensitive records -- maintain large FOIA backlogs greatly exceeding the mandated time period. The reasons for this may vary, but principally it appears to be a problem of too few resources in the face of too heavy a workload. This is a serious problem -- one of growing concern and frustration to both FOIA requesters and Congress, and to agency FOIA officers as well.

It is my hope that we can work constructively together, with Congress and the FOIA-requester community, to reduce backlogs during the coming year. To ensure that we have a clear and current understanding of the situation, I am requesting that each of you send to the Department's Office of Information and Privacy a copy of your agency's Annual FOIA Report to Congress for 1992. Please include with this report a letter describing the extent of any present FOIA backlog, FOIA staffing difficulties and any other observations in this regard that you believe would be helpful.

In closing, I want to reemphasize the importance of our cooperative efforts in this area. The American public's understanding of the workings of its government is a cornerstone of our democracy. The Department of Justice stands prepared to assist all Federal agencies as we make government throughout the executive branch more open, more responsive, and more accountable.





Office of the Attorney General

Washington, D. C. 20530

April 11, 1994

MEMORANDUM FOR THOMAS A. CONSTANTINE
Administrator
Drug Enforcement Administration

LOUIS J. FREEH
Director
Federal Bureau of Investigation

EDUARDO GONZALEZ
Director
United States Marshals Service

KATHLEEN M. HAWK
Director
Bureau of Prisons

DORIS MEISSNER
Commissioner
Immigration and Naturalization Service

ANTHONY C. MOSCATO
Director
Executive Office For United States Attorneys

STEPHEN R. COLGATE
Assistant Attorney General
for Administration

JO ANN HARRIS
Assistant Attorney General
Criminal Division

FRANK W. HUNGER
Assistant Attorney General
Civil Division

FROM: THE ATTORNEY GENERAL

SUBJECT: Freedom of Information and Privacy Acts (FOIPA)
Laboratory

The purpose of this memorandum is to announce that I have selected the Freedom of Information and Privacy Acts (FOIPA) Project as one of the Department's program laboratories under the Vice President's National Performance Review (NPR) and to request your full support and assistance with all phases of this project.

As a service to the public, President Clinton has encouraged the Federal government to handle FOIPA requests as efficiently as possible; the FOIPA mission explicitly underscores an important National Performance Review central theme - to improve direct service to the public.

I have encouraged both Departmental compliance with the Freedom of Information and Privacy Acts and discretionary disclosure of information where release of such information would not cause foreseeable harm.

Historically, FOIPA requests have been processed manually. For some Department of Justice (DOJ) components and other Federal agencies, the lack of adequate resources to respond to the high volume of requests has resulted in FOIPA backlogs beyond the time requirements set forth in both Acts. The Justice Management Division (JMD) has been encouraging the use of automation as one way to address this problem.

In view of the management changes taking place in this area, it now appears to be an opportune time to explore the application of technology to the FOIPA process and to evaluate current FOIPA procedures on a department-wide basis through a National Performance Review laboratory.

The FOIPA Project will provide us with an excellent opportunity for creating an environment for redesigning the FOIPA process. Such a laboratory could result in the elimination of unnecessary or redundant procedures and enhance cooperation and information sharing among DOJ and other agencies. A laboratory also could reveal other potential benefits: more efficient search and retrieval procedures; reduced processing time; electronic records transfer; standard architectures; reduced risk of accidental dissemination because of electronic redaction (or excision); more responsiveness to the courts in litigation matters, and possibly, reduced litigation; a product with an improved professional appearance; and an enhanced Departmental image to the public. A lab would not only have benefits for the Department, but could produce benefits for other Federal and local agencies, and the American public.

At the core of the Project will be a department-wide FOIPA laboratory working group. Initial steps to be taken for the Project by the working group will include:

- ♦ Defining the mission, scope and objectives of the FOIPA initiative and establishing the roles, responsibilities and facilitator of the Group.
- ♦ Establishing the requirements of a new FOIPA process that can be reengineered.
- ♦ Selecting test site(s) where Department components have access to applied technology and where new FOIPA related procedures can be tested.

All components will be afforded the opportunity to improve their FOIPA processing ability, whether or not they can (or choose to) actively participate in the laboratory. The lab will give us the opportunity to explore many possibilities for short term improvements and long term solutions to FOIPA backlogs.

FOIPA employees from several DOJ components, and project coordinating staff from JMD, Office of Information and Privacy, and the Justice Performance Review team have held four preliminary meetings in which they discussed major requirements and obstacles in the FOIPA process. A list of primary participants in these meetings is attached.

I am asking each of you to officially designate one or two representatives to serve on the FOIPA laboratory work group. It is imperative that your representative possess an excellent understanding of FOIPA program and policy issues and be able to articulate your needs and those of your senior management. JMD may need to designate two or more representatives, if necessary, to provide systems policy, analytical, and other technical support on issues relating to budget, and other administrative requirements. Your designated work group participant(s) may, from time to time, be called upon to bring in additional subject/technical expertise from his/her component.

Please make your Work Group designations no later than April 21, 1994. Copies of your decision memoranda should be sent to Samuel J. Dubbin, NPR liaison for the Department (FAX 202-307-4652), and to Stephen R. Colgate, Assistant Attorney General for Administration.

If you have questions regarding the FOIPA laboratory, please contact Sam Dubbin on (202) 514-3116.

I am very enthusiastic about the prospects for this NPR laboratory and look forward, as I hope you do, to its success. Thank you for your combined support and cooperation.

cc: Richard L. Huff
Daniel J. Metcalfe
Co-Directors
Office of Information and Privacy

Attachment

Participants in Preliminary FOIPA Meetings

Julie Jones	JMD, Systems Policy Staff
Peggy Irving	Office of Information and Privacy
Steve McPeck	Justice Performance Review Team
Tom Klausing	JMD, Budget Staff
Jim Sholly	JMD, Management and Planning Staff
Renee Barley	Bureau of Prisons
Bonnie Gay	Executive Office for U.S. Attorneys
Keith Gehle	Federal Bureau of Investigation
Florastine Graham	US Marshals Service
James Kovakas	Civil Division
Frank Newett	Criminal Division
Magda Ortiz	Immigration and Naturalization Service
Linda Vettori	Drug Enforcement Administration



U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

December 13, 1993

MEMORANDUM

TO: Michael E. Shaheen, Jr.
Counsel
Office of Professional Responsibility

FROM: Philip B. Heymann
Deputy Attorney General *P. H.*

SUBJECT: Disclosure of the Results of Investigation of
Alleged Professional Misconduct by Department
Attorneys

I understand that the Department in the past has publicly disclosed the results of investigations conducted by the Office of Professional Responsibility only in rare cases in which OPR found knowing and intentional misconduct by senior officials. Upon reviewing that policy, I have concluded that more frequent disclosure of the results of OPR's findings concerning professional misconduct by attorneys will promote public accountability and further the fair administration of justice and the law enforcement process. Accordingly, I hereby adopt a policy that will result in the disclosure of findings in a larger number of cases.

While we must respect legitimate privacy interests of Department employees, we must also recognize that serving as an attorney with the Department of Justice carries with it a responsibility to observe high ethical standards. The public's interest in knowing whether all of our attorneys are consistently satisfying those standards should be weighed in the balance when making the determination about whether disclosure is appropriate.

Accordingly, in the future the Department will disclose the final disposition, after all available administrative reviews have been completed, of any matter in the following categories:

1. Any finding by the Department of intentional or knowing professional misconduct by a Department attorney in the course of an investigation or litigation conducted under the authority of the Department of Justice, where the Attorney General or Deputy Attorney General finds that the public interest in

disclosure outweighs the privacy interest of the attorney and any law enforcement interests.

2. Any case involving an allegation of serious professional misconduct where there has been a demonstration of public interest in the disposition of the allegation, including matters where there has been a public referral to the Department by a court or bar association, where the Attorney General or Deputy Attorney General finds that the public interest in disclosure outweighs the privacy interest of the attorney and any law enforcement interests.
3. Any case in which the attorney requests disclosure, where law enforcement interests are not compromised by the disclosure.

Prior to any disclosure in category (1) or (2), the attorney whose name is to be released will receive notice of the planned disclosure and will be given an opportunity to object in writing to the public disclosure. The Deputy Attorney General shall resolve any such objections.

In each disclosed case, the Department will disclose the name of the employee, sufficient facts to explain the context of the allegation, and the disposition of the allegation, including any final action taken by the Department.

Please ensure that procedures are implemented in your office so that each matter falling within one of the above categories is forwarded to the Deputy Attorney General after resolution by your office. Your referral should include your recommendation about whether disclosure is appropriate. If you believe that disclosure is appropriate, please include a brief summary of the matter appropriate for public release.

Depending upon the degree of public interest in the matter, we may release the information when the matter is resolved or include it in OPR's annual report.



U.S. Department of Justice
Office of Information and Privacy

Washington, D.C. 20530

February 1, 1994

MEMORANDUM

TO: All Department of Justice FOIA/PA Coordinators

FROM: *RH* Richard L. Huff
DM Daniel J. Metcalfe
Co-Directors

SUBJECT: Expediting FOIA Requests as a Matter of Agency Discretion to Promote Public Accountability

As you are aware, many Department of Justice components are unable to meet the FOIA's deadlines for responding to requests. Following Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 614-16 (D.C. Cir. 1976), those components process their requests on a "first-in, first-out" basis, ordinarily taking requests out of order only when they satisfy one of the two court-recognized grounds for expediting the processing of FOIA requests: a threat to life or safety, or the loss of substantial due process rights. See FOIA Update, Summer 1983, at 3.

As a matter of agency discretion, the Attorney General has determined that the Department of Justice will expedite the processing of a third category of FOIA requests, based upon the Department's institutional interest in promoting public accountability. This category consists of those FOIA requests for which the Director of Public Affairs expressly finds that:

1. there exists widespread and exceptional media interest in the requested information; and
2. expedited processing is warranted because the information sought involves possible questions about the government's integrity which affect public confidence.

The goal of such expedited processing is to permit the public to make a prompt and informed assessment of the propriety of the government's actions in exceptional cases. It is recognized that in some cases (e.g., those involving ongoing law enforcement investigations) the Department's ability to disclose requested records without harm to protectible interests will be greatly limited. An expedited FOIA response in those cases will nevertheless provide the maximum public assurance possible through the

FOIA process. All requests for expedited FOIA processing in this new category should be forwarded to the Office of Public Affairs.

Finally, we suggest that future Open America declarations should take cognizance of this third category when describing the circumstances under which a component will expedite the processing of a FOIA request.

INTERNATIONAL TAX ENFORCEMENT EFFORTS

The Tax Division plays an important role in the IRS' international enforcement efforts by assisting it in obtaining information regarding international financial transactions.

1. ISSUE STATEMENT

In 1986, the IRS established the Office of Assistant Commissioner (International) to coordinate Service activities in dealing with taxpayers involved in international transactions. Overall, the Service estimates that international tax issues are present in 90-95 percent of the corporate examinations currently under way. And the monetary stakes are staggering: the six largest international cases pending in the Tax Court involve tax deficiencies of \$9.4 billion, and nearly \$32 billion in deficiencies are involved on the total international docket.

2. STATUS

The key to an effective international tax enforcement program is information. No matter whether an investigation is focused on transfer pricing issues -- ensuring that profits attributable to the domestic phase of an international transaction are reported for taxation in the United States -- or on a taxpayer's attempt to hide monies abroad, the Service cannot adequately perform its function without information.

The Tax Division plays a crucial role in this information-gathering effort on two fronts: litigating cases which seek enforcement of summons, subpoenas and Hague Convention requests for foreign-based information; and assisting in the negotiation of treaties that require the assistance of foreign governments in these information-gathering efforts.

For example, in litigation we supervised, the Supreme Court of Hong Kong recently ordered production of bank records pursuant to a letter request of the District Court for the Northern District of Alabama. We are currently working with the Departments of Treasury and State in negotiating income tax treaties, mutual legal assistance treaties and tax information and exchange agreements with Nicaragua, Colombia, El Salvador, and various other foreign governments.

3. DEPARTMENT POSITION

"[T]he Division regularly participates in tax treaty negotiations in which the Division's unique expertise will play a constructive role.... Our participation in these negotiations has been very useful to us from the standpoint of tax enforcement, because we have a strong interest in

obtaining evidence that will be admissible in court."

Remarks of Assistant Attorney General Loretta C. Argrett to the National Legal Center for the Public Interest on April 5, 1994.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

We are not aware of any position taken with respect to this issue by a Judiciary Committee member.

5. REFERENCE MATERIALS

None.

6. COMPONENT CONTACT

James Springer, 202/514-2427.

Clinton Presidential Records Digital Records Marker

This is not a presidential record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

This marker identifies the place of a tabbed divider. Given our digitization capabilities, we are sometimes unable to adequately scan such dividers. The title from the original document is indicated below.

96

Divider Title: _____

PENDING FOIA LEGISLATION (INCLUDING ELECTRONIC RECORD ISSUES)

1. **Statement:** Presently pending before a subcommittee of the Senate Judiciary Committee is a bill entitled the "Electronic Freedom of Information Improvement Act of 1993." It primarily addresses two subjects: (a) "electronic record" FOIA issues and (b) the longstanding problem area of administrative backlogs of FOIA requests. This bill, S. 1782, is substantially identical to a predecessor bill (S. 1940, 102d Cong.) that was the subject of a subcommittee hearing in the previous Congress.

The bill would update the Freedom of Information Act so as to explicitly address the maintenance and disclosure of information in electronic form. When it enacted the FOIA in 1966, Congress did not anticipate an "electronic" environment or the complex FOIA issues that can arise with advancing technology. The Act does not currently even define the term "record," let alone address whether something such as computer software, for example, is encompassed within it. Although there is no question that the FOIA applies to electronic information generally, some controversial issues have arisen (with scant case law on point) regarding agency search and disclosure obligations for information maintained in electronic form.

S. 1782 would address these issues by providing, among other things, that: (a) computer software is a "record" in all cases; (b) FOIA requesters are entitled to choose a preferred form of disclosure among any existing forms in which a record is maintained; (c) agencies must make "reasonable efforts" to convert requested records to an electronic form or format preferred by requesters; and (d) agencies must conduct database searches according to requester specifications, without limitation as to any computer reprogramming required. (See attached outline.) The latter two provisions are of greatest concern to most federal agencies overall; the difficult questions underlying the software issue are of particular concern to several agencies as well.

The bill also addresses the serious FOIA backlog problem that exists at many federal agencies (including the Justice Department), which has been a matter of growing concern and tension in FOIA administration governmentwide. As a general rule, the Act requires agency responses within ten working days, but most agencies cannot meet that deadline and many agencies--especially those dealing with high-volume FOIA demands for particularly sensitive records--maintain large backlogs greatly exceeding that length of time.

S. 1782 would address this problem area by: (a) establishing penalties for time-limit noncompliance; (b) precluding "routine" backlogs from serving as grounds for any time-limit extension; (c) allowing partial agency retention of FOIA fees as an "offset" to the costs of time-limit compliance; and (d) providing for "expedited access" upon request, based upon satisfaction of a "compelling need" standard. (See attached outline.) The former two provisions are of greatest concern to many federal agencies.

No provision is made in the bill for modification of the Act's existing time limits in any circumstance.

2. Status: This proposed legislation is pending before the Judiciary Committee's Subcommittee on Technology and the Law, which is chaired by Senator Leahy. No hearing is anticipated on this reintroduced bill, but subcommittee staff has advised OMB that Senator Leahy is aiming to mark up a revised version of it at the subcommittee level, tentatively on May 26, as a step to move the bill forward toward possible enactment either in this Congress or the next. OMB has informed subcommittee staff that the Administration is not yet in a position to take an official position on any current or revised provision of the bill, especially its complex electronic record provisions. The understanding between OMB and subcommittee staff is that such positions may be taken, with substantial revisions made, at the time of any full committee consideration later in the spring or early summer.

Meanwhile, to aid its process of clearing governmentwide positions on the bill's electronic record issues, OMB has established an electronic record working group under the auspices of the Information Infrastructure Task Force (IITF). (See attached OMB memorandum.) In the past three weeks this IITF group has met five times, including with several representatives of the FOIA-requester community, to discuss a list of identified electronic record issues and related concerns. (See attached issue list.) To facilitate this process, and as a foundation for legislative drafting, OIP has prepared a set of proposed electronic record FOIA principles for the consideration of this working group and Administration policymakers. (See attached proposed principles.)

3. Department Position: The Department has been supportive of updating the Act through remedial legislation, subject to OMB's governmentwide clearance process for official positions on proposed legislation. Through OIP, it is heavily supporting the ongoing OMB/IITF process toward the development of consensus electronic record provisions. The Department should support passage of S. 1782, once it is revised to accommodate a range of practical administrative concerns.

4. Judiciary Committee Member Interest/Positions: S. 1782 was introduced jointly by Senators Leahy and Brown, just as they introduced the predecessor bill (S. 1940, 102d Cong.) in the previous Congress. Senator Leahy has been most strongly supportive of remedial FOIA legislation and, as chairman of the subcommittee with jurisdiction over the Act, is most interested in the Act's administration. The other four subcommittee members--Senators Kohl, Feinstein, Specter and Pressler--are all new to the subcommittee in this Congress and are not known to have expressed an interest or position in this subject area.

5. Reference Materials: (a) text of S. 1782; (b) outline of provisions of S. 1782; (c) OMB memorandum establishing IITF electronic record working group; (d) working group issue list; (e) OIP proposed electronic record FOIA principles.

103D CONGRESS
1ST SESSION

S. 1782

To amend title 5, United States Code, to provide for public access to information in an electronic format, to amend the Freedom of Information Act, and for other purposes.

IN THE SENATE OF THE UNITED STATES

NOVEMBER 22, 1993

Mr. LEAHY (for himself and Mr. BROWN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 5, United States Code, to provide for public access to information in an electronic format, to amend the Freedom of Information Act, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Electronic Freedom
5 of Information Improvement Act of 1993".

6 **SEC. 2. FINDINGS AND PURPOSES.**

7 (a) FINDINGS.—The Congress finds that—

8 (1) since the enactment of the Freedom of In-
9 formation Act in 1966, and the amendments enacted

1 in 1974 and 1986, the Freedom of Information Act
2 has been a valuable means through which any per-
3 son can learn how the Federal Government operates;

4 (2) the Freedom of Information Act ensures ac-
5 cess to information held by the Government, which
6 is a valuable national resource;

7 (3) the Freedom of Information Act has led to
8 the disclosure of waste, fraud, abuse, and wrong-
9 doing in the Federal Government;

10 (4) the Freedom of Information Act has led to
11 the identification of unsafe consumer products,
12 harmful drugs, and serious health hazards;

13 (5) Government agencies increasingly use com-
14 puters to conduct agency business and to store pub-
15 licly valuable information; and

16 (6) Government agencies should use new tech-
17 nology to enhance public access to information.

18 (b) PURPOSES.—The purposes of this Act are to—

19 (1) foster democracy by ensuring access to pub-
20 lic information;

21 (2) improve public access to agency records and
22 information;

23 (3) ensure agency compliance with statutory
24 time limits; and

1 (4) maximize the usefulness of agency records
2 and information collected, maintained, used, re-
3 tained, and disseminated by the Federal Govern-
4 ment.

5 **SEC. 3. PUBLIC INFORMATION AVAILABILITY.**

6 Section 552(a)(1) of title 5, United States Code, is
7 amended—

8 (1) in the first sentence by inserting “electroni-
9 cally by computer telecommunications, and by other
10 means,” after “Federal Register”;

11 (2) by striking out “and” at the end of sub-
12 paragraph (D);

13 (3) by redesignating subparagraph (E) as sub-
14 paragraph (H); and

15 (4) by inserting after subparagraph (D) the fol-
16 lowing new subparagraphs:

17 “(E) an index of all information retrievable or
18 stored in an electronic form by the agency;

19 “(F) a description of any new database or
20 database system with a statement of how such
21 database or system shall enhance agency operations
22 under this section;

23 “(G) a complete list of all statutes that the
24 agency head or general counsel relies upon to au-
25 thorize the agency to withhold information under

1 subsection (b)(3) of this section, together with a spe-
2 cific description of the scope of the information cov-
3 ered; and”.

4 **SEC. 4. HONORING FORMAT REQUESTS.**

5 Section 552(a)(3) of title 5, United States Code, is
6 amended by—

7 (1) inserting “(A)” after “(3)”;

8 (2) striking out “(A) reasonably” and inserting
9 in lieu thereof “(i) reasonably”;

10 (3) striking out “(B)” and inserting in lieu
11 thereof “(ii)”;

12 (4) adding the following new subparagraphs at
13 the end thereof:

14 “(B) An agency shall provide records in any form in
15 which such records are maintained by that agency as re-
16 quested by any person.

17 “(C) An agency shall make reasonable efforts to pro-
18 vide records in an electronic form requested by any person,
19 even where such records are not usually maintained in
20 such form.”.

21 **SEC. 5. DELAYS.**

22 (a) FEES.—Section 552(a)(4)(A) of title 5, United
23 States Code, is amended by adding at the end thereof the
24 following new clause:

1 “(viii) If at an agency’s request, the Comptroller Gen-
2 eral determines that the agency annually has either pro-
3 vided responsive documents or denied requests in substan-
4 tial compliance with the requirements of paragraph
5 (6)(A), one-half of the fees collected under this section
6 shall be credited to the collecting agency and expended to
7 offset the costs of complying with this section through
8 staff development and acquisition of additional request
9 processing resources. The remaining fees collected under
10 this section shall be remitted to the Treasury as general
11 funds or miscellaneous receipts.”.

12 (b) PAYMENT OF REQUESTER’S EXPENSES.—Section
13 552(a)(4)(E) of title 5, United States Code, is amended
14 by adding at the end thereof the following new sentence:
15 “The court may assess against the United States all out-
16 of-pocket expenses incurred by the requester, and reason-
17 able attorney fees incurred in the administrative process,
18 in any case in which the agency has failed to comply with
19 the time limit provisions of paragraph (6) of this sub-
20 section.”.

21 (c) CIVIL PENALTY FOR DELAY.—Section
22 552(a)(4)(E) of title 5, United States Code, is further
23 amended—

24 (1) by inserting “(i)” after “(E)”; and

1 (2) by adding at the end thereof the following
2 new clause:

3 “(ii) Any agency not in compliance with the time lim-
4 its set forth in this subsection shall demonstrate to a court
5 that the delay is warranted under the circumstances. It
6 shall be within the discretion of the court to award the
7 requester an amount not to exceed \$75 for each day that
8 the agency’s response to his request exceeded the time lim-
9 its set forth in paragraph (6) of this section.”.

10 (d) AGENCY BACKLOGS.—Section 552(a)(6)(B) of
11 title 5, United States Code, is amended in the fourth sen-
12 tence by inserting “shall not include routine agency back-
13 logs and” after “ ‘unusual circumstances’ ”.

14 (e) NOTIFICATION OF DENIAL.—The fourth sentence
15 of section 552(a)(6)(C) of title 5, United States Code, is
16 amended to read: “Any notification of any full or partial
17 denial of any request for records under this subsection
18 shall set forth the names and titles or positions of each
19 person responsible for the denial of such request and the
20 total number of denied records and pages considered by
21 the agency to have been responsive to the request.”.

22 (f) EXPEDITED ACCESS.—Section 552(a)(6) of title
23 5, United States Code, is amended by adding at the end
24 thereof the following new subparagraph:

1 “(D)(i) Each agency shall promulgate regulations,
2 pursuant to notice and receipt of public comment, provid-
3 ing that upon receipt of a request for expedited access to
4 records and a demonstration by the requester of a compel-
5 ling need for expedited access to records, the agency shall
6 determine within five days (excepting Saturdays, Sundays,
7 and legal public holidays) after the receipt of such a re-
8 quest, whether to comply with such request. No more than
9 one day after making such determination the agency shall
10 notify the requester of such determination, the reasons
11 therefor, and of the right to appeal to the head of the
12 agency.

13 “(ii) A requester whose request for expedited access
14 has not been decided within five days of its receipt by the
15 agency or has been denied shall not be required to exhaust
16 administrative remedies. An agency failing to comply with
17 this time limitation shall be subject to the provisions of
18 paragraph (4)(E)(ii).”.

19 **SEC. 6. COMPUTER REDACTION.**

20 Section 552(b) of title 5, United States Code, is
21 amended by inserting before the period in the sentence
22 following paragraph (9): “, and such deletion shall be indi-
23 cated on the released portion of the record at the place
24 where such deletion was made”.

1 SEC. 7. DEFINITIONS.

2 Section 552(f) of title 5, United States Code, is
3 amended to read as follows:

4 “(f) For purposes of this section—

5 “(1) the term ‘agency’ as defined in section
6 551(1) of this title includes any executive depart-
7 ment, military department, Government corporation,
8 Government controlled corporation, or other estab-
9 lishment in the executive branch of the Government
10 (including the Executive Office of the President), or
11 any independent regulatory agency;

12 “(2) the term ‘record’ includes all books, pa-
13 pers, maps, photographs, data, computer programs,
14 machine readable materials, and computerized,
15 digitized, and electronic information, regardless of
16 the medium by which it is stored, or other documen-
17 tary materials, regardless of physical form or char-
18 acteristics; and

19 “(3) the term ‘search’ includes a manual or
20 automated examination to locate records.”.

○



U.S. Department of Justice
Office of Information and Privacy

Washington, D.C. 20530

2/17/94

Outline of Provisions of S. 1782

The provisions of S. 1782 fall into three basic categories: "electronic record" provisions, time limit provisions and miscellaneous provisions.

A. "ELECTRONIC RECORD" PROVISIONS

1. Definition of "Record" -- Section 7 of the bill. Would define the term "record" for the first time under the Act, such that it would specifically include computer software and other "electronic information" as well.

2. Definition of "Search" -- Section 7. Would define the term "search" to explicitly include an "automated" search. Appears to be intended to require agencies to undertake computer programming for requested data-retrieval purposes, without limitation.

3. "Computer Redaction" -- Section 6. Would require agencies to provide specific indications of deletions wherever made. Might be intended as logical basis for requiring programming for FOIA-processing purposes as well. Note: It is unclear whether this provision (which does not by its terms match its section heading) is intended to apply to both electronic and conventional FOIA processing.

4. "Honoring Format Requests" -- Section 4. Two-part provision. First, would allow FOIA requesters to choose any existing record form or format, regardless of agency preference. Second, would require record conversion (presumably even from paper form) to any "electronic form" preferred by a requester, wherever such conversion could be accomplished with "reasonable efforts."

5. Database Descriptions -- Section 3 (new subsections (E) and (F)). Two separate, but related, provisions. First, would require automatic publication of indices for all agency databases. Second, would require preparation and publication of statements of FOIA impact at the outset of any database creation.

6. "Electronic" Federal Register -- Section 3. Would expand the FOIA's Federal Register publication mechanism to include dissemination electronically as well.

B. TIME LIMIT PROVISIONS

1. Retention of Fees -- Section 5(a). Would permit timely agencies (as certified by GAO) to retain half of all FOIA fees charged, in an effort to "offset" the costs of time-limit compliance. Note: While agencies generally cannot retain FOIA fees under existing law, those fees typically amount to only a small percentage of their FOIA costs.

2. Requester's Expenses -- Section 5(b). Would authorize courts to award FOIA requesters their "out-of-pocket expenses" and any attorney fees incurred at the administrative level, on the basis of time limit noncompliance alone. Note: This provision would expand existing law as to both the type of fees awardable to FOIA requesters and the basis for such awards. Also, as with the "civil penalties" provision below, it would interrelate with the new 5-day time limit for "expedited access" decisions.

3. "Civil Penalties" -- Section 5(c). Would authorize courts to award FOIA requesters "civil penalties" of up to \$75 per day for time limit noncompliance, including noncompliance with the 5-day "expedited access" deadline.

4. Backlogs -- Section 5(d). Would preclude any "routine agency backlog" from serving as a basis for a 10-day extension of the Act's time limits on the statutory ground of "unusual circumstances." Note: This provision might have been intended also to preclude the common judicial practice of affording agencies lengthy stays of proceedings in FOIA lawsuits based upon the distinct statutory ground of "exceptional circumstances."

5. "Expedited Access" -- Section 5(f). Would explicitly provide for expedited FOIA access, according to a "compelling need" standard, and also seems intended to require that agency decisions on whether to grant expedited access be made within five working days. Note: This provision as drafted makes ambiguous use of the term "request," in such a way as to appear to inadvertently condition its 5-day deadline upon satisfaction of the "compelling need" standard itself.

C. MISCELLANEOUS PROVISIONS

1. Listing of Exemption 3 Statutes -- Section 3 (new subsection (G)). Would require agencies to publish descrip-

tive lists of all statutory provisions relied upon by them in withholding records under Exemption 3 of the FOIA (which incorporates the disclosure prohibitions of other statutes).

2. Denial Notifications -- Section 5(e). Would require that all FOIA denial letters specify both the name and title of the responsible agency decisionmaker(s). More significantly, would require specification of the total numbers of denied records and record pages found responsive to a request (specifications which could be sensitive in exceptional cases).

3. Definition of "Agency" -- Section 7. The bill includes a definition of the term "agency," but it inadvertently contains exactly the same language as in existing law. It might have been intended that this provision expand the reach of the FOIA to the Offices of the President and Vice President, to Congress, or to both, as in a previous legislative proposal (S. 1939, 102d Cong.).



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

APR 21 1994

MEMORANDUM FOR DISTRIBUTION

FROM:

Bruce W. McConnell
Bruce W. McConnell, Chief
Information Policy Branch
Office of Information and
Regulatory Affairs

SUBJECT:

Electronic Record FOIA Legislation Group

This memorandum requests your participation in an inter-agency group, under the auspices of the Information Infrastructure Task Force (IITF), to consider possible legislative proposals to amend the Freedom of Information Act (FOIA) with respect to the subject of electronic records.

This Electronic Record FOIA Legislation Group is being formed as a subgroup of the Government Information Working Group (GIWG), which I chair, at the direction of the IITF's Information Policy Committee, chaired by Sally Katzen. Dan Metcalfe of the Justice Department's Office of Information and Privacy has agreed to chair this new group.

The purpose of the Electronic Record FOIA Legislation Group will be to develop possible consensus positions on electronic record FOIA issues in the form of proposed legislation. Its primary focus will be in four distinct issue areas:

- o the definition of the term "record" under the FOIA with respect to information in electronic form, including computer software;
- o the FOIA-related obligations that should be placed upon agencies in connection with the creation, description and indexing of electronic databases, database systems or any other information maintained in electronic form;
- o the form or format in which information should be disclosed under the FOIA upon request, both in cases in which the information already exists in multiple forms and in cases in which the requester seeks conversion to a preferred electronic form or format; and
- o the extent to which agencies should undertake computer programming in order to search for and retrieve data from electronic databases according the specifications of FOIA requests.

In its examination of these issues the group will consider the provisions of S. 1782, which is presently pending before the Subcommittee on Technology and the Law of the Senate Judiciary Committee. It will consider the individual agency views that have been provided to OMB on the provisions of that proposal and the views of the FOIA-requester community. Its goal will be to refine proposed legislative provisions on these issues that could receive wide, consensus support.

The membership of this group will consist of FOIA officers and experts in electronic information systems drawn from Federal departments and agencies. I ask that you contribute your expertise and best individual judgments on the issues under consideration. Your participation will not commit your agencies to any particular legislative proposal that is developed.

The first meeting of the Electronic Record FOIA Legislation Group will be held within the next week, at a time and place to be scheduled. It will meet regularly during the coming weeks in an effort to coordinate its schedule with legislative consideration of S. 1782. The following milestone activities are anticipated:

- o The group will review the background of the issues under consideration with reference to existing case law, policy recommendations and overall administrative practice.
- o It will solicit input from representatives of the FOIA-requester community as to the issues under consideration.
- o It will discuss each issue from the Federal agency perspective, taking into consideration the practical administrative effects of all proposed issue resolutions.
- o It will try to develop a general consensus position on each issue.
- o It will place those positions into the form of legislative language for formal circulation and comment.

Please do not hesitate to contact either Dan Metcalfe at Justice (202-514-3642) or Virginia Huth of OIRA (202-395-3785) for any information on this subject.

- c: (1) Information Infrastructure Task Force
(2) Federal Information Resource
Management Policy Council

Electronic Record FOIA Legislation Group

Dan Metcalfe, DOJ - Chair
Virginia Huth, OMB Liaison

FOIA EXPERTS

Charlie Talbott, DoD
John Greer, CIA
David Pritzker, ACUS
Pam Werner, NASA
Richard Friedman, HHS
Frank Machak, State
Steve Siciliano, FRB

TECHNOLOGY-IRM EXPERTS

Ken Schefflin, DoD
Linda Bagby, DoD
Mary Ronan, NARA
Rob Weeks, DOJ
Bill Olmstead, NRC

Electronic Record FOIA Legislation Group

Issue Outline

1. Definition of "record" -- Section 7 of S. 1782
 - a. computer software
 - agency-generated vs. acquired vs. "joint"
 - information content
 - database dependency
 - "embedded" proprietary software
 - b. other electronic information (e.g., "digitized")
 - c. "distributed" database information
 - d. "dynamic" data
 - e. conventional reference items (e.g., books, maps)
 - f. explicit exclusion of specific items (e.g., government-acquired, commercially available software; government-generated reference items, such as publications)
 - g. interplay with other statutes (e.g., FRA and PA)
 - h. costs/fees
2. Form or format of disclosure -- Section 4 (revision)
 - a. choice among existing forms
 - conventional forms
 - paper vs. electronic
 - complicated by redaction process?
 - costs/fees
 - b. conversion to new form or format
 - governing standard
 - within electronic realm only?
 - value added
 - costs/fees
3. Affirmative record obligations -- Section 3 (revision)
 - a. electronic Federal Register
 - limited to subsection (a)(1)
 - covered by recent legislation?
 - extension to subsection (a)(2)?
 - extension to records processed under (a)(3)?
 - electronic reading rooms?
 - b. electronic information indices--covered by GILS?
 - c. new database system descriptions and statements
 - definition of "database" and "system"
4. Computer programming -- Section 7
 - a. for search purposes
 - compelled software creation
 - b. for processing purposes (following from elsewhere)
5. Computer redaction -- Section 6 (revision)
 - a. specification of place and extent
 - b. modification or "compacting" of data?

Electronic Record FOIA Legislation Group

Consensus Electronic Record Principles

GENERAL

1. As a general rule, information maintained in electronic form should be no less subject to the Act than information maintained in conventional record form.

2. Agencies should not diminish the Act's applicability to any information through its maintenance in electronic form.

3. Agencies should strive to make information available affirmatively on their own initiative in order to meet expected public demands for it, rather than be compelled to meet such demands under subsection (a)(3) of the FOIA. In other words, FOIA processes should not be encumbered by requests for routinely available records or information that can most efficiently be made available to the public through some other means.

4. An agency's capability to make records and information affirmatively available to the public apart from the FOIA should be far greater as to nonexempt records than as to any record or information that is partially exempt and requires redaction.

5. Agencies should strive to make information available through electronic means wherever possible, including under the FOIA; public access to agency records and information should be enhanced through electronic means.

6. Agencies should make use of advanced electronic information technology in order to most efficiently administer their responsibilities under the Act.

7. Agencies should strive to meet their responsibilities under subsection (a)(1) of the Act, and to the maximum extent practicable under subsection (a)(2) as well, through electronic means.

8. For any records or information made available under the FOIA in the form of electronic products or through electronic services, applicable fees should neither exceed nor be less than the direct costs of providing those products or services.

9. Proprietary interests in computer software or any other valuable electronic information that is maintained by an agency should be protected in as effective a manner as possible under

the Act; where such protection is limited under existing law, Congress should consider whether it should be extended as a matter of legislative policy.

10. In determining the applicability of the Act to information maintained in complex electronic information systems, consideration should be given to the potential for FOIA requests to "shut down," and thus impair the operation of, entire systems.

DEFINITION OF "RECORD"

"Distributed" Data

1. Information or data generated outside of the government that is accessed electronically by an agency, but merely viewed by agency employees, should not be subject to the Act.

2. Any such data that is retrieved into an agency database, or copied in any way, would become subject to the Act.

3. Rules governing the circumstances under which agencies may merely view, and not preserve, distributed data in the performance of their activities (e.g., regulatory functions) should be established through legal and policy mechanisms other than the FOIA.

"Dynamic" Data

1. Data that is continuously changing should nonetheless be subject to the Act.

2. Special procedures might be required to accommodate FOIA applicability to such data on a "snapshot" basis, while at the same time not unduly impairing the operation of the database system involved.

"Digitized" Data

1. The Act should generally apply to information maintained by an agency in "digitized" form.

2. However, the Act should not apply any such information that is of such character (i.e., transitory and nonsubstantive) that it is not required to be preserved under the Federal Records Act and its implementing regulations; such information should be explicitly excluded. Examples: voicemail and security monitor tapes?

3. Agencies should not convert any information into "digitized" form for the purpose of altering its status under the Federal Records Act or the FOIA.

Computer Software

1. Items of computer software should be treated as "records" as a general, categorical rule--regardless of their inherent characteristics in individual cases--if effective protection of the proprietary interests existing in many software items can be provided for as well.

2. Any software that has been acquired by the government, and is made commercially available by the outside proprietary interest holder, should be explicitly excluded from the Act's coverage as a threshold definitional matter; the most effective handling of a FOIA request for such software would be for the agency to simply identify the software as commercially available.

3. In exceptional situations in which acquired software is not made commercially available by the outside proprietary interest holder, the circumstances of the acquisition and of the proprietary interest will have to be assessed in order to determine the software's status under the Act.

4. Software that is generated by the government, in which there exists no outside proprietary interest, should be subject to the Act and disclosed if not covered by a FOIA exemption (e.g., Exemption 2, which can protect against circumvention of computer-system security); such software should be made available at direct cost under the FOIA absent any specific authorization by Congress for the charging of a greater (e.g., market value or product development-related) fee.

5. Software that is generated by an outside party under a government contract, in which the government likewise retains all proprietary interest, should likewise be subject to disclosure under the Act.

6. Software (or any other valuable electronic information) that is generated by an agency and an outside party jointly or cooperatively under a cooperative research and development agreement (i.e., CRADA) should Software or any other information that is generated by an agency and furnished to an outside party "exclusively" under a CRADA arrangement should ...

7. Agencies should not maintain electronic information systems in such a manner that meaningful disclosure (i.e., public understanding) of nonexempt information is dependent upon software that is unavailable to the public; if an agency does so, it should upon request convert the data as necessary to afford full FOIA disclosure.

8. Similarly, agencies should not maintain electronic information systems in such a manner that disclosure of nonexempt

information is impaired by the presence of "embedded" software that cannot be disclosed; if an agency does so, it should upon request convert its system as necessary to afford full FOIA disclosure.

Reference Items

1. The Act's definition should broadly encompass items in conventional media form--e.g., books and maps--as well information maintained in electronic form.

2. However, it should explicitly exclude any such reference item that has been acquired by the government and is made commercially available by the outside proprietary interest holder. Example: library reference materials, such as are discussed in the Tax Analysts decisions. Exception: photocopies of publication portions that, as maintained in agency files, are themselves reflective of agency activity (e.g., copies of sections of the United States Code located in a prosecution file).

3. Likewise, the definition should explicitly exclude any such reference item that is generated by the government for publication and sale through GPO or any other such government publication outlet (e.g., GSA's Consumer Information Center). Question: Should this apply as well to records and information (not necessarily "publications") that are made available to the public through NTIS?

4. Likewise excluded should be any electronic reference information that is made commercially available by any government agency; such information should be made available through established electronic information outlets, not through FOIA requests.

AFFIRMATIVE ELECTRONIC INFORMATION OBLIGATIONS

1. The term "database" (or electronic information "system") should be defined. In other words, the scope of electronic information subject to any affirmative FOIA obligation should be clearly established.

2. At the time of database or electronic system creation, agencies should consider both the potential FOIA availability of the information involved as well as the affirmative availability of the information apart from the FOIA.

3. Agencies should establish indices of their electronic information (the scope of which should be clearly defined) to the maximum extent practicable. Example: the prospective Government Information Locator System (GILS). Question: Wouldn't this best be handled through established IRM channels (i.e., through GILS) instead of under the FOIA?

4. An agency should not be required to identify the existence of a particular database or a system in the exceptional circumstance in which its existence is itself a sensitive, exempt fact. Example: a new investigatory database the existence of which necessarily reflects the existence of an ongoing law enforcement investigation protectible under Exemption 7(A).

FORM OF DISCLOSURE

Choice of Existing Forms

1. As a general rule, the requester should be given the choice of any existing form of disclosure. In other words, the precedent of Dismukes v. Department of the Interior (which gives the agency its choice among existing multiple record forms, so long as it chooses "reasonably") should no longer be followed.

2. This should apply to choices between conventional record forms (e.g., paper vs. microfilm) as well as to choices between existing electronic formats.

3. An exception should be considered for circumstances involving partially exempt records in which agencies need to handle the records in a certain form for purposes of redaction and therefore cannot so readily disclose them, as redacted, in a previously existing form. Example: microfilm that must be converted to paper form for redaction purposes.

4. As another general rule, a FOIA requester should be entitled to obtain a paper "printout" of any nonexempt database--or any readily retrievable, nonexempt part of a database--if the requester so prefers.

New Form or Format

1. Agencies should disclose requested records or information in a new form or electronic format, as a matter of administrative discretion, where they determine that it is most efficient for them to do so in order to meet identified public demands for that information; in this sense, format conversion becomes comparable to affirmative disclosure.

2. Agencies should be required to disclose requested records or information in a new form or electronic format only where information already is maintained in one electronic format, the requester seeks to have it disclosed in a different electronic format, and the agency determines that it can convert the information to the requested format at an expense of less than \$____ in direct costs (which shall be charged to the requester).

AUTOMATED REDACTION

1. Agencies should make use of the capability to redact exempt information through electronic means, including through the acquisition of software packages for those purposes, wherever it is most efficient to do so.
2. Where redactions are made by electronic means, or within electronic information in a manner that is not readily apparent, the requester should be notified of the nature and extent of the redactions.
3. This likewise should apply to redaction in conventional record form, in which case the nature and extent of redactions usually can be shown on the face of partially disclosed records.
4. An agency should not be required to specify the nature or extent of any redaction or withholding of exempt information in the exceptional circumstance in which that itself a sensitive, exempt fact. Example: where the very volume of exempt information would reveal the magnitude of an ongoing law enforcement investigation.
5. Agencies should not be required to "compact" or modify electronic data in any way in order to disclose it in nonexempt form; they may do so as a matter of administrative discretion, just as FOIA requesters may modify their requests in order to encompass only nonexempt data.

AUTOMATED SEARCH AND RETRIEVAL

1. In responding to a FOIA requests seeking only specified portions of databases, agencies should search for and retrieve data in the manner in which they do so in the ordinary course of agency business (i.e., with their existing retrieval-programming capability) for the database systems involved.
2. Where requesters seek to have data retrieved according to specifications other than those ordinarily used by agencies for data retrieval from the database system involved, agencies should comply with such requests, as a matter of administrative discretion, where they can efficiently do so.
3. Agencies should be required to retrieve data according to such new specifications only where the extraordinary retrieval activity involved meets some specific standard--ideally, an objective one (e.g., a set amount of "programming" time, measured in dollar value or otherwise, or the use of a specified level of "programming" expertise). (Any such requirement, in tandem with the "record" status of agency software, holds some potential for compelled software creation.)