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Date: 2/1/99

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
1. Memo	Mike Horowitz to Cicconi Re: Social Security ([illegible]), ~~3p~~ 1p	11/9/82	~~P5~~
2 — Memo —	Horowitz to DAVE Stockman, 2p —	9/30/81 —	~~P5~~
3 2. Memo	Fay Iudicello to Jim Tozzi, Nat Scurry Re: HCFA Proposal (partial, p4), 4p	10/21/82	~~P5~~
4 3. Memo	Joseph Wright to Cicconi Re: Copyright legislation (partial, p2), 2p	6/22/82	~~P5~~
5 4. Memo	Mike Horowitz to Cicconi Re: Indian Land Claims Bill, 1p	3/25/82	~~P5~~ B6
6 5. Letter	Alfred Regnery to Robert McConnell Re: Indian Lands Claims Settlement Act, ~~4p~~ 3p	3/9/82	~~P5~~ B6
7 +chronology	[redacted] re Indian Bill, 1p	n.d.	P5

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]
- P-1 National security classified information [(a)(1) of the PRA].
- P-2 Relating to appointment to Federal office [(a)(2) of the PRA].
- P-3 Release would violate a Federal statute [(a)(3) of the PRA].
- P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA].
- P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA].
- P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA].

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Freedom of Information Act - [5 U.S.C. 552(b)]
- F-1 National security classified information [(b)(1) of the FOIA].
- F-2 Release could disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA].
- F-3 Release would violate a Federal statue [(b)(3) of the FOIA].
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- F-6 Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA].
- F-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA].
- F-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA].
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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

December 16, 1982

MEMORANDUM FOR JIM CICCONI

FROM: FRED KHEDOURI

SUBJECT: Information on Non-Attainment Areas

As it turns out, EPA has not quite finished drafting the Federal Register submission for the proposed SIP disapprovals.

Their current plan calls for publication of disapprovals for carbon monoxide and ozone with the next week. Disapprovals based on non-attainment for sulfur dioxide, particulates, and oxides of nitrogen will follow in early January.

The attached list of proposed disapprovals would be published in the FR as just that: a list of proposed disapprovals. States would have 30 days in which to comment (or pass I&M legislation, if that is the problem).

Unresolved at this point is a very important aspect of the proposed notice. EPA could include a list of proposed sanctions; they could also wait until after the comment period and combine issuance of a final notice with identification of sanctions. The construction ban on new sources is mandatory; the other sanctions are discretionary.

(3)

1982 SIP's--PROPOSED DISAPPROVALS

Region	State	Area	SIP submittal status	Affected pollutant(s)	** Bases for Disapproval ** Attainment demonstration	I/M	Control measures	RFP	Other	Comments
I	CT	Statewide	Draft	O_3, CO			x		Air quality data	- Missing RACT regulations on CTG sources and 100-ton sources not covered by CTG - Need commitments/schedules to correct deficiencies
II	NY	New York City	Final	O_3, CO	x		x			- Do not demonstrate attainment by 1987 - No plan for CO - Missing RACT regulations on CTG sources and 100-ton sources not covered by CTG
III	PA	Philadelphia & Pittsburgh	Final	O_3, CO	x	x	x			- Shortfall of 25 TPD for VOC's - Missing RACT regulations for 100-ton sources not covered by CTG - State legislature acted to prohibit I/M
	DC	Metro. Washington	Draft	O_3, CO					See comments	- Draft O_3 plan presents 3 scenarios for attainment; need firm measures and commitments
	MD	Baltimore and Metro. Washington	Final	O_3, CO		x				- I/M start-up July 1, 1983
IV	KY	Louisville	Final	O_3, CO		x				- Expect adoption of I/M regulations by January 5, 1983, that would permit start-up by July 1, 1983
	TN	Memphis	Final	CO		x				- I/M schedule has slipped in Memphis
		Nashville	Final	CO		x				- Nashville will not commit to I/M
V	IL	Chicago	Draft	O_3, CO	x	x	x			- Numerous technical concerns with attainment demonstrations for O_3 and CO - Insufficient reductions for O_3 attainment by 1987 - Missing RACT regulations for CTG sources and other 100-ton sources
		East St. Louis	Draft	O_3	x	x	x			

1982 SIP's--PROPOSED DISAPPROVALS

Region	State	Area	SIP submittal status	Affected pollutant(s)	** Bases for Disapproval **					Comments
					Attainment demonstration	I/M	Control measures	RFP	Other	
V	IN	Metro. Chicago and Metro. Louisville area	Draft	O_3, CO	x	x	x			- Do not demonstrate attainment in southeast Wisconsin - Problems with CO attainment demonstration - Missing RACT regulations on 100-ton sources not covered by CTG - I/M proposed only as a contingency measure
	MI	Detroit	Draft	O_3, CO	x	x	x			- Need commitments to I/M, RACT on 100-ton sources of VOC and additional control measures for CO
	WI	Milwaukee	Draft	O_3, CO	x	x	x			- Modeling demonstration for O_3 based upon range of emission reduction targets - Start-up date proposed for I/M is April 1, 1984 - Need commitments for RACT on other 100-ton sources
VII	MO	St. Louis	Draft	O_3, CO	x	x	x	x		- Plan lacks necessary commitments and key elements for I/M - Technically invalid attainment demonstration - Failure to demonstrate attainment by 1987 - Plan does not demonstrate that RACT required for all major sources of VOC
VIII	CO	Denver	Final	CO	x		x			- Control measure necessary to demonstrate attainment is unapprovable
	UT	Salt Lake City	Final	O_3, CO		x				- State legislature has failed to provide legal authority for I/M

1982 SIP's--PROPOSED DISAPPROVALS

Region	State	Area	SIP submittal status	Affected pollutant(s)	** Bases for Disapproval ** Attainment demonstration	I/M	Control measures	RFP	Other	Comments
IX	CA	Los Angeles area	Draft	O_3, CO	x	x				- For areas indicated, draft SIP fails to demonstrate attainment by 1987
		Fresno	Draft	O_3, CO	x	x				- I/M proposed for disapproval because implementation date beyond December 31, 1982
		Sacramento, Ventura	Draft	O_3	x	x				
		San Diego	Draft	O_3, CO		x				
	NV	Las Vegas and Reno	Final	CO	x	x		x		- SIP fails to adequately demonstrate attainment of CO for Reno by 1987 - Las Vegas implementation date for I/M is July 1983

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STATUS OF RULEMAKING ACTIONS ON 1982 SIP'S
That Have Completed 10-day Review
(December 1, 1982)

Notices of Proposed Rulemaking

Area (Pollutants)	Federal Register Status	Proposed Action
OR - Portland (O_3/CO)	Published 7/21/82	Approval
OR - Medford (CO)	AA Office	Approval
WA - Vancouver (O_3)	To FRO 9/17/82	Approval
WA - Seattle (O_3/CO)	Published 10/19/82	Approval
NH - Manchester (CO)	Published 9/13/82	Approval
MA - (O_3/CO)	Region submitted revised package 12/1/82	Approval
NM - Bernalillo Co. (CO)	Published 11/10/82	Approval
CO - Denver (O_3/CO) Greely, Fort Collins, Colorado Springs (CO)	10-day review ended 11/29/82	Approval except for Denver CO plan
AK - Anchorage (CO)	AA Office	Approval

Notices of Final Rulemaking

Area	Federal Register Status	Action
OR - Portland (O_3/CO)	Published 10/7/82	Approval
WA - Vancouver (O_3)	10-day review ended 12/1/82	Approval

STATUS OF 1982 SIP SUBMITTALS
(December 1, 1982)

Region	State	SIP Status O_3	SIP Status CO	Public Hearing	Projected Date for Final	Comments*
I	RI	Final	N.R.			Shows attainment by 12/31/82 - Proposed for approval
	MA	Final	Final			Proposed for approval
	CT	Draft	Draft	10/82	1/83	Proposed for disapproval
	NH	N.R.	Final			NPRM published 9/13/81 (approval)
II	NY	Final	No submittal			Proposed for disapproval
	NJ	Draft	Draft	10/82	12/82	Parallel processing - approval
III	PA	Final	Final			Proposed for disapproval (I/M)
	DE	Final	N.R.			Proposed for approval
	MD	Final	Final			Proposed for disapproval (I/M)
	DC	Draft	Draft	12/82	12/82	Proposed for disapproval
	VA	Draft	Draft	9/82	12/82	Parallel processing - approval
IV	GA	N.R.	Final			Proposed for approval
	KY	Final	Final			No. Kentucky: approval Louisville: disapproval (I/M)
	NC	N.R.	Final			Parallel processing - approval
	TN	Final	Final			Proposed for disapproval (I/M)

N.R. - None required
Final - State adopted and effective
*SIP's with proposed disapproved I/M programs are shown in parenthesis.

Region	State	O_3	CO	Public Hearing	Projected Date for Final	Comments*
V	MI	Draft	Draft	9/82	12/82	Proposed for disapproval (I/M)
	WI	Draft	Draft	10/82	12/82	Proposed for disapproval (I/M)
	IL	Draft	Draft	9/82	12/82	Proposed for disapproval (I/M)
	IN	Draft	Draft	10/82	1/83	Proposed for disapproval (I/M)
	OH	Final	Final			Shows 1982 attainment for ozone - proposed for approval
VI	NM	N.R.	Final			NPRM published 11/10/82 (approval)
	TX	Draft	N.R.	7/82	12/82	Proposed for approval
VII	MO	Draft	Draft	8/82	12/82	Proposed for disapproval (I/M)
VIII	CO	Final	Final			Denver CO plan proposed for disapproval - NPRM in Headquarters
	UT	Final	Final			Proposed for disapproval (I/M)
IX	CA	Draft	Draft	8/82	11/82-1/83	Proposed for disapproval: 1982 SIP's for Fresno, Sacramento, Ventura and Los Angeles (do not show 1987 attainment for O_3): I/M for all of above plus San Diego
	NV	N.R.	Final			Proposed for disapproval- Las Vegas (I/M)
X	ID	N.R.	No submittal			Draft being prepared
	OR	Final	Final			Portland: NFRM published 10/7/82 (approval) Medford: I/M problem
	WA	Final	Final			Seattle NPRM published 10/19/82 (approval)
	AK	N.R.	Final			I/M problem

N.R. - none required
Final - State adopted and effective
*SIP's with proposed disapproved I/M programs are shown in parenthesis.

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OMB memo

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

MEMORANDUM

February 18, 1983

To: Jim Cicconi

From: Mike Horowitz MH

Subject: H.R. 100

The testimony put me to sleep -- which I gather to be one of its objectives. (On the other hand, the Cabinet Council presentation was also -- I hope unintendedly -- rather soporific.)

Given our time limitations, I have suggested modest changes which I think will move us away from what is likely to play as a phony plea for study time. By ducking issues on the basis of the claim that we haven't studied matters enough, we leave ourselves open to the charge that we have not been serious in our efforts to date.

cc: Jim Murr

Draft #5
2-18-83

DRAFT

STATEMENT OF T. TIMOTHY RYAN, JR.,
SOLICITOR OF LABOR,
U.S. DEPARTMENT OF LABOR
BEFORE THE
SUBCOMMITTEE ON COMMERCE, TRANSPORTATION, AND TOURISM
COMMITTEE ON ENERGY AND COMMERCE
U.S. HOUSE OF REPRESENTATIVES

February 22, 1983

Mr. Chairman and Members of the Subcommittee:

I appreciate this opportunity to come before your Subcommittee today. I am accompanied by Diane E. Burkley, who serves as my Special Assistant, and Peggy Connerton, a Senior Economist at the Department. They have served as key staff members on the Administration's Working Group on Equal Pension Benefits. This hearing and H.R. 100 focus on discrimination in all forms of insurance, I will primarily address a more limited matter which is of extreme importance to this nation's working women and their families, retirement equity.

The inclusion of "sex" as a prohibited basis of employment discrimination in Title VII of the Civil Rights Act of 1964 has been the paramount tool for ensuring that women have the opportunity to realize their rightful--equal--place in the American workforce. ~~The Executive Order 11246 program relating to equal employment opportunity by Federal contractors has similarly given the Department of Labor the ability to ensure that these contractors often some~~

~~of the largest corporations in the country treat men and women equally.~~

This Administration is extremely concerned about equity in pension plans because this issue affects the standard of living of millions of men and women in their retirement years. However, this is an extremely complex matter which does not lend itself to easy answers or approaches. There are many factors involved--each in themselves presenting many complicated variables--which need to be addressed severally and jointly.

It would helpful for me to take a minute or two to describe some of the background of the Federal government's involvement in this area. In 1970 the Labor Department issued regulations providing in effect that it was not necessary for men and women to receive equal benefits from a Federal contractor's pension program so long as the contractor's contributions are the same for each sex. In contrast, in 1972 the Equal Employment Opportunity Commission adopted a Title VII guideline requiring that pension benefits be equal. Both the Ford and Carter Administrations formed working groups which attempted to resolve this contradiction and to develop a unified approach to the question. Unfortunately, these attempts were not successful, and the conflict was not resolved.

In 1978 the Supreme Court issued its decision in City of Los Angeles v. Manhart. This case held that Title VII prohibits employers from requiring women to make larger contributions in a pension fund than men, even though the differential was based on the fact that women as a group have a longer life expectancy than men and as a result tend to receive larger total pension benefits over their lifetimes. Manhart gave us only half a loaf; it dealt solely with the questions of contributions to a benefit plan. It did not address the issue of equality of benefits. The lower courts have reached different conclusions on this latter question.

Faced with this lack of clarity, in June 1982 this Administration's Cabinet Council on Legal Policy, chaired by the Attorney General, established a Working Group on Equal Pension Benefits which I was asked to head. Other members of the Group have included representatives of the Offices of the President and Vice President, the Council of Economic Advisers, the EEOC, the Departments of Treasury, Justice, and Defense, the Veterans Administration, and the Office of Personnel Management. We have been working on the extremely difficult and complex legal and actuarial questions for almost nine months. In addition to the efforts of dozens of staff members, the Working Group has met about twenty times to discuss and debate the issues.

One result of our deliberations was that the Government recently filed a memorandum in the Supreme Court in response to a petition for review in TIAA-CREF (Teachers Insurance and Annuity Association and College Retirement Equity Fund) v. Spirt. The Government took the position that the employer in question violated Title VII by its use of sex-based actuarial tables resulting in unequal pension benefits to males and females.

You should also be aware that the Supreme Court has granted review of another equal benefits case, Arizona v. Norris. The question presented by Norris is whether Title VII permits employers to provide employees the option of selecting one of several pension payment forms, some providing equal benefits and some providing unequal payments comparable to those available on the open-market. We did not address the viability of this so-called "open-market exception" in our response in Spirt .

Based on our efforts to date, we agree that legislation is needed to address the issue of pension equity. In fact, the President in his State of the Union message in January stated that the Administration will submit legislation to remedy inequities based on sex discrimination in employer pension systems. Although the Supreme Court is considering the issues presented in Norris, there are other matters

made clear

which are ripe for legislative consideration, such as the effects of maternity or paternity leave on length of service and divorce on beneficiary rights.

In fashioning legislation, it is necessary ~~to take into account that there are competing purposes and principles.~~ Insurance and pension programs are guided by a focus on group characteristics. The use of generalizations, such as actuarial tables, is the accepted norm. However, in the nondiscrimination sphere, employment related and otherwise, the focus is on the individual, and each person is to be treated on the basis of his or her own merit. These principles have been translated into statutes enacted to effectuate them, specifically the Employee Retirement Income Security Act (ERISA) and Title VII of the Civil Rights Act.

Before discussing the various specific options which might be open to us, I believe it would be helpful for us to provide you with a brief overview of the pension plan universe. I will touch upon the scope of that universe, the forms of benefit payments normally available, and the types of plans that are offered.

There are presently 46 million participants in 460,000 pension plans nationwide, both private and public--that is, government sponsored. The present value of all of these plans is $560 billion. I would further note that

this figure is estimated to balloon to an almost unbelievable figure of $3 trillion by 1995, a mere twelve years from now.

These participants receive their retirement incomes normally in one of three forms. The first is a life annuity whereby the individual receives periodic payments for life, normally on a monthly basis. Secondly, there is is a joint and survivor annuity which is similar to the life annuity; however, upon the participant's death, another, normally the spouse, continues to receive benefits for the remainder of their life. Finally, there is a lump sum payment.

These various benefit forms can be offered by either of two basic types of plans: defined benefit plans and defined contribution plans. Under a defined benefit plan, an employer undertakes to provide its employees with a specified level of retirement benefits in a particular form. Twenty-nine percent of the private plans in operation are defined benefit plans, and ninety percent of the workers covered by private plans receive their sole or primary benefit from them.

Under a defined contribution plan the employer does not undertake to provide a specific benefit level. Rather, annual contributions are made by the employer to individual accounts established for each participating employee.

Upon retirement, the employee is usually entitled to receive the balance in his or her account normally in the form of a lump sum distribution. Seventy-one percent of the private plans in operation are defined contribution plans, and thirty-five percent of the workers in the private pension system receive some benefits from these plans.

There is nothing inherently discriminatory about either type of plan. The problem arises when payments are determined using mortality tables. Unequal treatment mainly occurs when these tables are used to convert the original form of benefits (called the "normal form") into optional benefit forms. Approximately __ million employees are in plans which use sex-based for this conversion.

Mr. Chairman, I am now going to ask Ms. Burkley to explain to you how discrimination occurs in the pension area and various options that are being considered to address the problem.

MS. BURKLEY:

In order to understand how unequal treatment arises in the pension context, it is necessary to look at the two types of plans separately, for the one is the mirror image of the other. In defined contribution plans, women receive less money when sex-based tables are used. But

in defined benefit plans, men are the ones who may receive lower benefit payments.

~~Defined contribution plans present the situation most people think of when they think of discrimination in pensions.~~ The normal form of benefit in these plans, as Mr. Ryan indicated, is a lump sum equaling the amount that has accumulated in the individual's account. Assuming equal contributions are made for men and women, as is typically the case, this benefit will be equal for similarly situated individuals regardless of their gender. Therefore, no sex discrimination problem arises. The same cannot be said, however, when the plan provides an annuity option or when only an annuity is offered. In these instances, the equal lump sum will be converted into a life annuity on the basis of its actuarial value, measured by the life expectancy of the beneficiary. Because women as a group live longer, their benefits are projected to be spread out over a longer period of time. Accordingly, the single life annuity that can be purchased by an equal lump sum provides lower monthly benefits for women than for men.

Conversely, the normal benefit form provided by defined benefit plans is a single life annuity. Despite the fact that a given periodic benefit will cost more for a woman than for a similarly situated man, employers generally

have provided equal monthly payments to both sexes. Thus, the employer is subsidizing women's annuity benefits. The difference in treatment occurs when the plan provides additional, optional benefit forms based on the life annuity's actuarial present value. Because women live longer, female employees receive larger lump sum payemnts than men; they will also receive larger joint and survivor annuity payments.

The reason men receive smaller lump sums is fairly easy to understand. Because their lifespan is shorter, they would have received a smaller number of periodic payments over their lifetime. Let me refer you to Chart __. In the example set forth there, the woman would receive $5,000 more than the man since she would be expected to live five years longer, continuing to receive $1,000 each year.

The reason why male retirees receive smaller payments when a joint and survivor annuity is more complicated. Because ~~the~~ men ~~has~~ a shorter lifespan, the female surviving spouse of a male retiree will generally receive a greater portion of the total benefits than will the male survivor of a female retiree. The male retiree's payments ~~will~~ are therefore ~~be~~ reduced ~~now~~ to fund the payments his spouse will receive, ~~later~~. ~~The problem~~ is compounded by the fact that the present value of the annuity is worth more to the woman to begin with.

So, in our Chart __ example, if Mr. A and Mrs. B both have 65 year old spouses, it can be predicted that Mr. A's spouse would outlive him by five years. Therefore, his annuity payments would be reduced from $1,000 to $800 per year in order to fund the $400 his wife is likely to receive. Mrs. B, on the other hand, is probably going to outlive her spouse. But since some husbands will outlive their wives, there is also a small statistical probability that Mr. B will outlive Mrs. B. For this reason, Mrs. B's payment will be reduced a little, to perhaps $900 a year. Mr. B, if he outlived his wife, would then receive $450 a year.

In the aggregate, the impact of men being disfavored under the lump sum option is fairly small because only two percent of male retirees in defined benefit plans select such ~~that~~ option. But the scope of the joint and survivor annuity problem is large--30% of male retirees select this option. The significance of this statistic is of course magnified by the fact that 90% of retirees receive their sole or primary pension from defined benefit plans.

Having defined ~~how the difference in treatment occurs~~ the issues, the Working Group next examined the numerous options available to address the problem. We found that there are three basic questions which need to be addressed in selecting a solution: Who? How? What?

The first question is who will be covered by remedial legislation? Will it cover future retirees only or will it cover all retirees, past and future?

Second, how will the new, non-discriminatory level of benefits be established? There are two options available. The first is called "topping up," whereby the benefits of the currently disfavored sex are raised to the level of the other. The second method is the use of a sex-neutral table which takes into account the mortality of both men and women. This approach would permit plans to set a benefit level in-between what the sexes now receive, probably as a weighted average which takes into account the proportion of men and women in the plan.

Third, what benefits will be affected by the non-discriminatory requirements? At one end of the spectrum, even past payments could be affected. Alternatively, the payments made in the future could be totally equalized. While this approach is properly characterized as prospective in the sense of when the payouts are made, it also has a retroactive aspect due to the way pension plans are structured and regulated under Federal law. That is, a payment made tomorrow has actually been funded, and has accrued, over the course of the worker's career. If purely prospective application is desired, the requirement could be limited to benefits which accrue in the future, the third possible alternative.

With these considerations in mind, we have identified several possible options for implementing an equal benefits requirement, which are set forth on Chart __. Let me say at the outset, Mr. Chairman, that we have not included the possibility of affecting past payments, of a taking a case-by-case approach because these did not seem appropriate for legislative responses.

The first two options both involve topping up total future benefit payments. They differ only in whether the requirement is applied to all retirees (Ia), or only to future retirees (Ib). As we understand it, H.R. 100 takes the first of these approaches.

The next two options simply substitute a sex-neutral approach for topping up; total benefits would still have to be equalized. Again, the provision could be applied to all retirees (IIa), or limited to future retirees (II).

Finally, equalization could be mandated only for benefits accruing in the future, through the use of sex-neutral tables (III). Theoretically, this could be applied to workers already retired (IIIa). But because you have to be working to accrue benefits, it would only actually affect future retirees (IIIb).

MR. RYAN:

Mr. Chairman, let me now explain some of the economic ramifications of these options. Estimates of the costs of equalizing pension benefits for similarly situated men and women vary all over the spectrum. For the approach taken by H.R. 100, they range between $0 and $5.5 billion per year in additional funding costs to plans.

To eliminate some of the resulting uncertainty and to contribute, we hope, in a positive fashion to resolution of the critical sex equality issue, the Department of Labor conducted its own study of the short-term costs of various measures for equalizing pension benefits. The study examined a multitude of options and covered the entire pension plan universe.

Because of the highly technical nature of pension plans, the methodology is somewhat complicated and is described in the report, so I will not describe it in detail at this time. We recognize that the methodology has some limitations and can be further refined. However, we believe that it provides a reasonable ballpark estimate of the economic impacts expected in the short-run. To account for the large uncertainty that must necessarily exist, the analysis provides a range of estimates, rather than a single "best estimate."

Now turning to chart __, I will highlight some of the major cost findings.

First, the short-run costs of H.R. 100 could be substantial, upwards to $1.7 billion annually if employers are required to top up total payments for all retirees.

Second, costs of the unisex option are relatively inexpensive in comparison. For example, annual costs to equalize total payments for future retirees with unisex tables are only twenty percent of "topping up" costs.

Third, application to past accrued benefits also increases the costs substantially. For example, the chart shows that application of unisex tables to total payments nearly doubles the costs to plans.

Fourth, coverage of past retirees can also add substantial costs. For example, the chart shows that including all retirees increases employer costs to top up total payments by about fifty percent.

Finally, for each method of equalizing pension benefits, men as a group receive higher payments. The principal reason, as I mentioned earlier, is that men are currently disfavored under the joint and survivor options in defined benefit plans. An additional reason can be found in men's higher earnings. In the aggregate, women tend to do relatively better under toppping up than under a unisex approach.

This is because the increased payments to women in defined contribution plans are more than offset by decreases in their joint and survivor payments in defined benefit plans.

Let me emphasize, Mr. Chairman, that these estimates reflect only the direct costs to plans. The cost estimates do not include indirect costs arising out of lost investment opportunities or from increases in short-term deficits with the introduction of unisex tables because of "adverse selection" which can occur because there are winners and losers under unisex tables which will affect a selection of form of payment.

It is clear that there will be some increased uncertainty over the likely costs in the short-run. However, these costs will not continue in perpetuity. Over the long-run, most of these costs will be shifted to current or future participants in the form of smaller increases in pension benefits. The only dispute is how fast they can be passed on to employees. However, costs for past retirees reflect nontransferable losses to employers.

CONCLUSION:

Mr. Chairman, all the options, facets of options, and costs ~~, and conflict with present statutory language~~ must be considered in depth, as we are presently doing, before

final decisions on the appropriate approach can be made. There are two matters upon which decisions from the Administration's standpoint have been made. First, we need to address not only equality of benefit programs, but other aspects of the pension system which work to the detriment of women. Senator Dole has introduced S. 19; we are examining his and others' recommendations in developing our legislative package.

Second, we believe that the pension matter should be treated separately from others relating to differential treatment in other forms of insurance. Various Administrations and the Congress have been studying the issue for at least eight years. Other types of insurance--life, health, automobile--

[illegible] The issues presented [illegible] must be subjected to the [illegible].

[illegible] may differ depending on the context. For example, young women drivers may have to pay more for auto insurance than they now do.

would, under gender-neutral plans, appear to increase costs to women and lower costs to men. Such an outcome

we believe, [redacted] could create
real disadvantages to women --
hardly an appropriate outcome
when the objective is to
decrease discrimination
against women.

a Goalset

The Administration believes both sexes should be treated fairly and intends to vigorously address all forms of discrimination in insurance. ~~We intend to develop recommendations by the end of the year. But it should be kept in mind that unlike pensions, insurance is an issue which has traditionally been left to State regulation.~~

Mr. Chairman, allow me to conclude this presentation by reiterating the Administration's determination to remedy sex based inequities in pension systems. ~~In continuation~~ of ~~such a condition is intolerable, and we will do our utmost to see that it is eradicated in a fair and equitable fashion to all concerned.~~ We commend you for your interest in this issue as well as other members of the House and Senate who have voiced concern. Any resolution of the problem will out of necessity and out of merit demand cooperation between the Congress and the Executive Branch. I trust that this cooperative effort will result in beneficial consequences to the millions of people adversely affected by sex-based discrimination in pension plans.

any

This concludes our formal presentation. We will be pleased to attempt to answer any questions you may have.

Thank you.

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20 through 24 years	12.00	9.00	8.00	6.00	1.60	1.20
25 through 29 years	13.00	9.75	8.50	6.37	1.70	1.27
30 through 34 years	14.00	10.50	9.00	6.75	1.80	1.35
35 through 39 years	19.00	14.25	11.50	8.62	2.30	1.72
40 through 44 years	31.00	23.25	17.50	13.12	3.50	2.62
45 through 49 years	50.00	37.50	27.00	20.25	5.40	4.05
50 through 54 years	79.00*	59.25*	41.50	31.12	8.30	6.22
55 through 59 years	131.99*	99.00*	68.00	51.00	13.60	10.20
60 through 64 years	199.99*	149.99*	102.00*	76.50*	20.40	15.30
65 through 69 years	330.99*	248.24*	167.49*	125.62*	33.50	25.12
70 through 74 years	445.98*	334.49*	225.00*	168.74*	45.00*	33.75*

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1 Pages To Follow

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JAB

There's nothing here that was not in my earlier memo (which you showed to the President).

I've asked Joe to check on whether GSA is indeed reviewing SSA's purchase, if anything can be done, etc.

AC 2/8

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

OFFICE OF
THE DIRECTOR

February 7, 1983

NOTE FOR: Jim Baker
Ed Meese

FROM: Joe Wright

At a recent Senior Staff meeting you asked about the purchase of Hitachi Computers by GSA - attached is an explanation.

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

February 7, 1983

MEMORANDUM FOR: Joe Wright

THRU: Ken Clarkson

FROM: Keith Fontenot

SUBJECT: Social Security Administration (SSA) Purchase of Hitachi Computers

Recent news articles have focused on the contrast between an SSA decision to purchase Hitachi computers and an FBI decision to purchase from IBM, even though Hitachi machines were the cheapest in both cases. The SSA purchase was made through an American vendor, the VION Corporation. GSA has reviewed SSA's procurement decision and concluded that it "appears both reasonable and in accordance with appropriate regulations."

SSA and GSA advise us that procurement regulations required SSA to purchase from VION since their bid was nearly $4 million cheaper over the life of the system than the nearest competitor. They note that the Trade Agreement Act of 1979 specifically designates Japanese companies as eligible to sell to the U.S. Government, providing an exception to the Buy American Act. SSA was aware that Hitachi was under investigation; they checked weekly with GSA to ensure Hitachi had not been suspended from conducting business with the U.S. Government. Privately, SSA officials are bewildered by the FBI's decision not to purchase from the lowest bidder, since their consultations with both GSA and HHS' General Counsel indicated that procurement law and regulations require purchases from the lowest responsible bidder.

Facts

° Request for proposals issued June 18, closed August 2, 1982.

° Two firms within competitive range.

° Negotiations from August 25 through November 22, 1982.

° Best and final offers on December 3, 1982.

° Award made December 13, 1982 to VION Corporation. Contract purchase price for FY83 $5,497,193. Purchase price evaluated over systems life of $6,953,263.

° Award made based on lowest overall cost to the government, price and other factors considered, for the systems life. VION bid $3,870,000 lower over systems life than nearest competitor.

Attachment

THE WASHINGTON TIMES
January 26, 1983

Hitachi sells two computers to U.S.

Associated Press

The Social Security Administration has purchased two multimillion-dollar computers made by Japan's Hitachi Ltd., which faces federal charges of computer piracy.

The powerful computers that Social Security bought for $7 million through a U.S. dealer are the same type equipment that the FBI decided not to buy last summer, even though Hitachi's vendor also was the low bidder in that instance.

Top officials of Social Security and the General Services Administration, the government's purchasing agency, say that federal regulations left them no choice but to award the contract for the Hitachi equipment to ViON Corp., a private firm that specializes in computer sales to the federal government.

The FBI apparently came to the opposite conclusion last July when it awarded to International Business Machines Corp. a $18.8 million computer contract — the biggest in FBI history — despite a bid from ViON that was $1.1 million cheaper.

A federal grand jury indicted Hitachi last June on charges of conspiring to transport stolen property.

A federal grand jury in San Jose, Calif., indicted Hitachi and 17 individuals last June on charges of conspiring to transport stolen property. Hitachi allegedly had paid an undercover FBI agent $622,000 for what was purported to be stolen technical data on IBM computers.

Japan's Mitsubishi Electric Corp. and four individuals were indicted on similar charges for allegedly paying $26,000 to obtain trade secrets. A judge later dropped charges against three of the defendants.

No date has been set for the Hitachi or Mitsubishi trials. Both firms have acknowledged making payments to the FBI front organization called Glenmar Associates for computer information, but they deny trying to steal any secrets.

FBI officials have said ViON had nothing to do with the alleged theft of trade secrets.

IBM was runner-up in competition for the computer contract for Social Security's telecommunications network between its headquarters outside Baltimore and its 1,300 field offices. ViON won with its National Advanced Systems model 9060, made by Hitachi.

ViON is a dealer-distributor for National Advanced Systems, which is a subsidiary of National Semi-Conductor Corp. NAS imports its large-scale computers from Hitachi.

IBM won the FBI contract with its top-of-the-line 3081K processor. IBM has filed a civil suit for damages against Hitachi that stem from the alleged piracy. Irwin Schorr, a spokesman in IBM's Washington office, said, "We feel that because of this current litigation, it would be inappropriate to comment."

Neither ViON, NAS nor Hitachi has been suspended or debarred from doing business with federal agencies.

OMB memo

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

January 19, 1983

MEMORANDUM FOR JIM CICCONI

FROM: FRED KHEDOURI

SUBJECT: Farmer's Home

I have attached a revised version of the SOTU passage on farm credit.

You might be interested to know that my staff unearthed the following facts:

--USDA estimated total farm debt at the close of 1982 at $215 billion; Farmers Home holds $23.7 billion of this, or 11 percent.

--Farmers Home estimates that it has 270,000 current borrowers.

--We have no current estimate of the total number of borrowers; at the last survey point (1/1/80), there were 1,270,000. At that time there were only 170,000 FmHA borrowers, or 13.3 percent of the total.

--The USDA analysts responsible for credit surveys believe that there is no reason to assume any significant change in the total number of farm borrowers. If this is the case, the FmHA share would have risen to 21.3 percent.

OMB memos

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

COUNSEL TO THE DIRECTOR

MEMORANDUM November 9, 1982

To: Jim Cicconi

From: Mike Horowitz MH

Per our discussion, for your confidential use, I am attaching the memo earlier sent to Dave re Stan Ross. As indicated, Dave wanted him on the Commission, but Schweiker felt otherwise.

In any event, I believe you will find Ross to be informative and helpful.

MEMORANDUM September 30, 1981

To: Dave Stockman

From: Mike Horowitz

Subject: Social Security Blue Ribbon Task Force

I received a call this morning from Stan Ross. For the reasons indicated, I believe that our hopes for leadership in the entire Social Security area can and should be built around him.

As you know, he supports substantial reform and this morning's call indicated a clear willingness to assume a central leadership role on the Blue Ribbon Task Force. Stan has both impeccable technical/professional credentials as well as vast political credentials sufficient to box out the objections that Ball, Cohen, et al. would love to raise against him. (Ball and Cohen have no personal objections against Ross, but have described him as their principal intellectual adversary.)

Among his professional credentials are the following:

- He served as Carter's Social Security Administrator.
- Before that appointment, he served as Chairman of the Advisory Council on Social Security, the Council that issued the last report under Democratic auspices.
- He served on Johnson's domestic White House staff during the period of expanded Social Security benefits.
- He was a key member on the Treasury staff involved in the Kennedy tax bill.

In addition to what can be noted from the above, the following are his political credentials:

- He is Joe Califano's law partner and closest friend and that friendship will serve to neutralize the potential opposition of O'Neill to his leadership, and might even engage Califano for a possible national leadership role in support of significant Blue Ribbon Panel recommendations.

- He, Califano and his firm are, at present, exceedingly close to Howard Baker.

- He is exceedingly close to Jake Pickle on a personal and professional basis. Ross can be expected to serve as a pressure force on Pickle to resurrect Pickle's earlier reform proposals that the House leadership has now gutted.

- He worked closely with Dole and Long on the $1 billion disability reform act of 1980. Ross is well liked and respected by Dole and Long, as well as the relevant Hill staffs.

- He has already testified in favor of major Social Security changes -- indeed for more cost saving changes than we have proposed. At the same time, his credibility as a critic of this Administration is clear in that he testified against our proposal for its too-rapid reduction of 62-65 benefits. (On this score, he testifed in favor of a total elimination of 62-65 benefits, but on a slower basis.)

In my opinion, Ross is prepared to cash all of his chips, including all of his heavy Democratic credentials, to provide national leadership on Social Security.

His interest in and preparedness to assume this leadership role makes the Blue Ribbon Task Force a substantially more promising vehicle than anything that can presently be expected.

I urge you to call Ross for advice on the Blue Ribbon matter as well as to determine for yourself if we should -- as I believe -- place our bets on him.

from OMB memo

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

October 25, 1982

MEMORANDUM FOR JIM CICCONI

FROM: CHRIS DEMUTH CD

SUBJECT: Medicare Reimbursement of Optometrists

A subsequent round of critical letters from Dr. Paton and other leading opthalmolgists, and a personal conversation with a good friend who is Chief of Opthalmology at the University of Pennsylvania, inspired me to look further into the matter of reimbursing optometrists for post-surgical examination of aphakia patients. A briefing paper prepared by my staff is attached. I am now convinced that the HHS proposal is not unreasonable, and I intend to clear the final rule (perhaps with some clarification in the preamble) when it comes over to me next spring.

Attachment

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

MEMORANDUM FOR CHRIS DeMUTH

THRU: JIM TOZZI
NAT SCURRY

FROM: FAY IUDICELLO

SUBJECT: Ophthalmologists Opposition to HCFA Proposal to Expand Medicare Coverage of Optometrists Services

Issue

HCFA NPRM proposes an expansion of Medicare coverage which will allow optometrists to be reimbursed for examination services furnished to aphakic patients to the same extent that previous policy allowed ophthalmologists to be reimbursed for these services.

Background

On June 22, 1982, an NPRM expanding Medicare coverage for services furnished by optometrists was published in the Federal Register. This proposal implements Section 937 of the Omnibus Reconciliation Act of 1980 which expands Medicare coverage of optometrists' services beyond dispensing services and authorizes "services related to the condition of aphakia." ("Aphakia" means the absence of the natural lens of the eye due to surgery or to natural causes.) In defining these services as examination services, HCFA relied on language in the House Budget Committee Report and the Committee on Ways and Means Report.

HCFA has proposed that examination services include the following:

- o Case history (the determination of changing visual performance as it related to the condition of aphakia);
- o External examination (the inspection with illumination and magnification of eyelids and surrounding areas of the eye);
- o Ophthalmoscopy (the inspection with illumination and magnification of the internal structure of the eye);
- o Biomicroscopy (the inspection of frontal tissues of the eye, using illumination and magnification);

- o Tonometry (the measurement of the internal pressure of the eye, visual fields, and evaluation of the control and peripheral field of vision);

- o Ocular mobility (the determination of the ability of the eye to move efficiently);

- o Binocular function (an evaluation of the ability of the eye to obtain single, clear, two-eyed vision; and

- o Evaluation for contact lenses and the provision of ophthalmic prosthesis and services.

Under the proposal, an optometrist may receive Medicare reimbursement for these services only to the extent that the optometrist is licensed to perform them in the State in which the practice occurs.

The American Academy of Ophthalmology (AAO) strongly opposed the legislation and is currently seeking congressional repeal. In addition, they are attempting to convince HHS/HCFA staff to interpret the statutory provision narrowly. The AAO views the HCFA proposal as deficient in several areas. First, AAO believes the proposal will result in duplicative payments for similar diagnostic procedures. The rationale for this concern is that in many areas of the country a surgeon's global fee covers up to three months of postoperative treatment. If a patient seeks examination services from an optometrist during this postoperative period, Medicare will be reimbursing twice for the same service. Second, AAO believes that the proposal will result in poorer quality care because an optometrist is not trained to treat post-surgical complications, patients with intraocular lens implants ("pseudo-aphakics"), and aphakic patients using perma lens.

Presumably, an area of additional concern to the AAO is the fact that many states have expanded the types of services which optometrists are licensed to perform. Some of these states permit a wider scope of optometric practice than proposed by HCFA. Medicare reimbursement of services related to aphakia could contribute further to the expansion of optometric practices as well as result in increased utilization of services.

Discussion

A perception which contributed to the passage of the original legislation was that there was a shortage of ophthalmologists in various parts of the country. Consequently, expanding Medicare coverage to include optometric treatment of certain indications appeared to be in the best interest of a previously unserved

population. In fact, ophthalmologists appear to be well distributed throughout the country. Despite the absence of its original justification, the legislation is not in any danger of repeal. In the draft Report to the Congress on Legislative Recommendations on Optometric Services, HCFA recommends no additional changes, either repeal or extension of benefits, in the coverage for optometric services under Medicare at this time. This, along with Senator Robert Dole's alleged support of this provision, will no doubt undermine any fledgling repeal effort which the ophthalmologists hope to get started.

Although the final rule is not scheduled to be published until next spring (third quarter FY 83), the ophthalmologists have been successful in generating considerable interest in this proposal. Representatives of the AAO met with the Secretary, HCFA Administrator and other HCFA policy staff before the NPRM was published. Two weeks ago, representatives met with the Under Secretary on their objections to the proposal.

Despite this high level discussion, there does not appear to be any interest within the Department to reconsider the original technical staff recommendations. Viewing the AAO's position as "protective" of the profession, HHS/HCFA staff are reluctant to take any regulatory action to restrict optometrists in the delivery of services to aphakics for several reasons:

- o Coverage of examination services by optometrists during the postoperative period is consistent with other Medicare coverage policies which permit coverage of certain services delivered by a podiatrist after foot surgery or services delivered by a chiropractor after orthopedic surgery. While HHS/HCFA staff agree that such treatment does not constitute good medical care, they do not consider it appropriate for Medicare to withhold coverage and reimbursement if a patient elects to seek services from such a provider.

- o Duplicate reimbursement during the postoperative period as a result of variant fee structures is a reccuring problem in all types of surgery. While administrative mechanisms, i.e. carriers, should be able to catch duplicate billings in the same area, this is not usually possible where the billing is done through different carriers from different geographic locations. This same situation applies to services currently being delivered by different ophthalmologists. HCFA maintains that the amount of money in question is minimal and would not justify the administrative costs of increased vigilance.

- o HHS/HCFA staff do not agree that optometrists are not trained to deliver services to "pseudo aphakics" and aphakic patients wearing perma-lens. The first issue is temporarily moot

since only a few of these medical devices have received FDA pre-market approval for use only by the investigator who is presumably an ophthalmologist.

Alternatives

The following options are open to OMB:

1. Seek repeal of the original legislative provision

2. Clear the final rule when we receive it next spring

3. Negotiate now with the Department to make certain modifications

4. Require certain modifications as a condition of OMB clearance during our review period

Recommendation

We would recommend selecting alternative #2. While we question the appropriateness of "nonphysician" care during the postoperative period and the attendant duplicate reimbursement, we are not convinced that OMB should be advocating additional regulatory restrictions. However, we believe that clarifying language in the preamble of the regulation could lay out the Department's intent, even discourage the delivery of postoperative care by optometrists, without codifying such a prohibition in regulation. This may appease AAO to some degree.

f OMB memo

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

JUN 22 1982

MEMORANDUM TO: James W. Cicconi

FROM: Joseph W. Wright

Subject: Copyright Legislation - Home Video and Audio Recording

Commerce, Justice, and the Arts Endowment are scheduled to testify on Thursday, June 24, 1982, on legislation (H.R. 5705) that would levy a copyright royalty fee on home audio and video cassette recorders (VCRs) and blank tapes as a means of compensating copyright holders of material recorded for private use.

The legislation stems primarily from a suit brought by Universal City Studios and Walt Disney Studios against Sony (maker of "Betamax" VCR), in which they argued that home taping of video programs violates copyright, and that Sony is liable for contributing to this infringement. The District Court decided in favor of Sony; the Appeals Court decided in favor of Universal. On June 14, 1982, the Supreme Court agreed to hear the case in its coming session.

The arguments for and against the legislation are both convincing. Royalty fee proponents argue:

- It is unfair for home tapers to use programs without copyright holders being compensated, and a royalty fee is the most practical form of compensation.
- When a viewer plays back a tape he can "fast forward" through commercials to avoid watching them; advertisers will pay less for viewers who have this option than for "live" viewers.
- Home tapers can save programs for future replay, reducing the audience and revenue for all future showings of the program on television, in theatres, etc.
- These revenue losses will hurt actors, technicians, and others whose salaries are paid from program revenues, and will hurt consumers because fewer new programs will be produced.

Opponents of royalty fees argue:

- A viewer can set his VCR to record a program while he is away, and then play it back whenever he wants, so the audience size and advertising revenue for some programs will increase.

- o VCR owners have a higher demand for pay television services than non-owners, so more VCRs will result in increased payments to copyright holders for letting their programs be shown on pay television.

- o A royalty fee will raise the prices of VCRs and tape, although royalty fee proponents claim most of the fee will be absorbed by VCR and tape manufacturers. There is no reason to think consumers are better off with slightly more programs and artifically high prices for VCRs and tape than with slightly fewer programs and cheaper VCRs and tape.

- o Division of the royalty fee pool among copyright holders can at best roughly approximate the value of each program to consumers. Thus, even if the royalty encouraged the production of more programs, it would not be very effective in encouraging production of programs consumers prefer.

As I see it there are three options:

1. Support the bill on the grounds that this is basically a "user pays" issue and consistent with the Administration commitment to encourage private sector support for the arts.

2. Oppose the bill on the grounds that economic harm to the video industry has not been demonstrated (although a case of economic harm can be made for the audio industry) and the royalty fee is an inefficent way to encourage the production of more programs.

3. Await the decision of the Supreme Court, which has agreed to hear the case -- while acknowledging that the arguments both for and against a royalty fee have merit.

Given the options available, we intend to instruct the agencies to adopt a postion in their testimony along the lines indicated in the third option.

cc: Chris DeMuth

f OMB memo

3/1 → CICCONI
JAB not seen
Will he need
for leg. Strategy?
Suggest discussion
w/ JAB

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

MEMORANDUM February 24, 1982

To: James A. Baker III

From: David A. Stockman

Subject: GAO Opinion on Library Rescission

- The opinion reverses past GAO rulings and its settled understandings with OMB and Congress.
- Issue is not our ability to impound but whether the Impoundment Control Act is applicable; according to GAO we cannot reserve library funds during 45-day statutory period that Congress considers our rescission proposal.
- If Congress refuses to endorse our proposed rescission during the 45-day period of the Act, the funds will be released.
- GAO opinion is precedent for much more than the library statute; it could seriously affect the President's ability to send up large numbers of rescission and deferral proposals.
- Peyser dispute is not so much with Administration as with Congress; question is whether Congress can reconsider its spending priorities during carefully defined periods during which the appropriated funds will not lapse. (Impoundment Control Act was a Congressional initiative designed to protect Congress' options to reconsider spending.)
- The Comptroller General will shortly be acknowledging that the issue posed is a close question on which reasonable parties can disagree.

f OMB memos

JAB has seen

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

April 7, 1982

Copies sent to:
Gergen
Svahn
Cribb (Meese)
(& Dole) 4/12

MEMORANDUM FOR JAMES BAKER

FROM: Chris DeMuth CD

SUBJECT: Handicap Regulations

Summary

The regulations governing non-discrimination in federally funded programs are being revised for the Task Force on Regulatory Relief. The existing regulations are extremely costly, inflexible, and inconsistent. The Vice President's office, OMB, and DOJ are in essential agreement on appropriate revisions, but are being resisted by the career staff in DOJ's Office of Civil Rights. Yesterday's wire story was based on leaked documents over a month old, which have already been discussed extensively in the press. Yesterday's story was particularly inaccurate and biased; the source, who is from one of the handicapped groups, has called Boyden Gray to apologize and claim he was misquoted. The handicapped groups have been consulted extensively during the revision process and generally are not opposed to our revisions, which will be issued for formal public comment.

Detail

- The Department of Justice is responsible for developing "generic" regulations to implement Section 504 of the Rehabilitation Act, which requires non-discrimination on the basis of handicap. Transportation and other agencies develop specific 504 regulations for their programs, based on the DOJ regulations.

- Last year the Task Force on Regulatory Relief targetted the Section 504 regulations for review because of numerous complaints from State and local governments and institutions of higher education.

- In January 1982, DOJ provided a draft of the revised regulation to OMB and the Vice President's office for review. At the same time, DOJ sent copies of the draft to other Federal agencies. This was contrary to our agreement to limit distribution and discussion to EOP and DOJ.

- In early March OMB and the Vice President's office provided DOJ with suggested revisions to its draft. Our revisions:
  - Made the rules less prescriptive.
  - Included "safe harbors" of assured compliance to state and local governments.
  - Deleted references to employment discrimination on the basis of handicap, since that responsibility is outside Justice's jurisdiction.
  - Limited the number of routine compliance reviews.
  - Deleted references to elementary and secondary education, deferring to the Department of Education to cover those requirements in their regulations implementing the Education of All Handicapped Children Act.
  - Expanded on the concept of "reasonable accommodation" of the handicapped, in accordance with a recent Supreme Court decision.
- The EOP revisions leaked from somewhere in EOP, not DOJ. We know this because Brad Reynold's office obtained a copy of our revisions before we gave them to him. I have been unable to determine the circumstances of the leak.
- The DOJ draft and our revisions have both been around town for several weeks now and have been picked up in several newspaper articles, including the Post in early March. Yesterday's story was, however, far more biased and inaccurate than earlier ones.

cc: C. Boyden Gray
Joe Wright
Don Moran

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THIS FORM MARKS THE FILE LOCATION OF ITEM NUMBER 5-6 LISTED ON THE WITHDRAWAL SHEET AT THE FRONT OF THIS FOLDER.

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

November 17, 1981

MEMORANDUM FOR: James A. Baker III

FROM: Glenn R. Schleede

SUBJECT: Justice Testimony on Foreign Corrupt Practices Act

In connection with your question at this morning's staff meeting, OMB staff tell me that the subcommittee has explicitly requested that Justice testimony be largely confined to an accounting of Justice's enforcement of the Act.

A copy of these testimony Jonathan Rose is scheduled to deliver tomorrow is attached.

The testimony does conclude (pages 13-15) by reiterating Administration policy: that the current law needs revision and that the Administration supports legislation along the lines of the Chafee-Rinaldo proposal (S. 708, H.R. 2530). Briefly, those bills would:

- Simplify the accounting standards of the Act and add a scienter requirement to make clear that only a knowing failure to comply with accounting standards will form a basis for liability;
- Replace the Act's vague "reason to know" standard, under which a U.S. concern may be held liable for an illegal payment, with standards specifying liability where a corrupt payment is made and the U.S. concern directs or authorizes, either expressly or by a course of conduct, that the payment be made;
- Clarify the extent of responsibility of a U.S. concern for the accounting standards of a partially-owned subsidiary;
- Consolidate enforcement of the Act's anti-bribery provisions in the Department of Justice; and
- Sanction the issuance of guidelines for compliance with the Act, to be issued by the Attorney General in consultation with other interested Federal agencies.

Attachment

cc: Dick Darman
Craig Fuller
Fred Fielding

JAB has READ
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STATEMENT

OF

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ASSISTANT ATTORNEY GENERAL

OFFICE OF LEGAL POLICY

DEPARTMENT OF JUSTICE

CONCERNING DOJ ENFORCEMENT

OF THE

FOREIGN CORRUPT PRACTICES ACT

BEFORE

THE COMMITTEE ON ENERGY AND COMMERCE

SUBCOMMITTEE ON TELECOMMUNICATIONS, CONSUMER

PROTECTION AND FINANCE

OF THE

UNITED STATES HOUSE OF REPRESENTATIVES

November 18, 1981

DRAFT

Mr. Chairman, I am very pleased to have the opportunity to appear before the Subcommittee this morning to participate in its oversight hearings on the Foreign Corrupt Practices Act.

You have asked me to describe the past and current enforcement efforts of the Department of Justice relating to bribery of foreign government officials by American companies. These efforts began more than a year before the enactment of the Foreign Corrupt Practices Act (FCPA) and have continued since December 1977 when that Act was signed into law. With your permission, I will describe our pre-FCPA cases, as well as our enforcement actions under the Foreign Corrupt Practice Act itself.

I. THE DEPARTMENT OF JUSTICE'S INVESTIGATIONS WHICH PRE-DATED THE ENACTMENT OF THE FOREIGN CORRUPT PRACTICES ACT

As many of you may recall, it became public knowledge in the mid-1970's that a number of American corporations had engaged in possibly illegal practices involving domestic and foreign payments. I use the words "possibly illegal" advisedly because there was genuine uncertainty at the time over whether the foreign payments were in fact illegal. In response to those revelations, the Securities and Exchange Commission developed a program under which publicly held corporations voluntarily made generic disclosures, in public filings at the Securities and Exchange Commission, of their past practices involving such overseas and domestic payments. In connection with this voluntary disclosures program, a substantial number of American

corporations undertook internal investigations to determine the nature and extent of these practices.

In October 1976, the Department of Justice established its own Task Force to examine the facts underlying the voluntary corporate disclosures which had been made to the Securities and Exchange Commission, in order to determine whether any criminal statutes had been violated. At the time the Task Force was established, about 70 corporations had made voluntary disclosures to the SEC about various payments made at home and abroad. By summer 1977, the number of corporations which had made voluntary disclosures had risen to more than 400. It soon became apparent that if the facts underlying the corporate disclosures were to be reviewed by Justice Department prosecutors in a thorough and even-handed manner, the Task Force effort, as originally conceived, had to be expanded and intensified.

In the summer of 1977, 15 prosecutors were assigned full-time to the Task Force. Special Agents from the United States Customs Service -- first 25 part-time and later 7 full-time -- participated in the Task Force effort. In addition, the Federal Bureau of Investigation was asked to conduct a survey of the relevant public filings. Initially, the Department sought to identify those corporations whose activities warranted more thorough investigation. Eventually the prosecutors assigned to the Task Force in Washington conducted investigations into disclosures made by approximately 90 corporations. Various United States Attorney's Offices conducted investigations into

disclosures made by another 140 corporations. Since there have been substantial misconceptions about the nature of the voluntary disclosures that were made by American corporations in the mid-1970's, it might be useful for me to take a moment to outline generally the results of the Department's review of those disclosures.

We found that relatively few of these corporations had actually disclosed to the Securities and Exchange Commission that their employees and officials had bribed foreign government officials. Apparently, many corporations, acting upon the advice of counsel, disclosed any questionable practices they found, which practices, in themselves, might not have constituted either domestic or overseas bribery. For example, approximately 25 corporations disclosed that they had been engaged in illegal ocean freight rebating. Publicly held ocean carriers had been engaged in the practice, in violation of the rate schedules regulated by the Federal Maritime Commission, of rebating to shippers a portion of the fees that the carrier charged for transporting the shippers' goods. This type of rebating had absolutely nothing to do with bribery of foreign officials. However, it led to the successful criminal prosecution of a number of carriers on the grounds that they had engaged in a criminal conspiracy to defraud the Federal Maritime Commission. These prosecutions were conducted by the United States Attorney's offices in Cleveland, Ohio and Newark, New Jersey.

The Department's review also disclosed that many of the corporations which had made voluntary disclosures had engaged not in bribery of foreign government officials, but rather in a practice known as "accommodation overinvoicing". Corporations selling goods to foreign customers engaged in this practice in order to assist the customer in avoiding the tax and currency control laws of the customer's home country. For example, at the request of an overseas customer, a company would send an invoice for goods which indicated that the goods were worth $120,000 when in fact the actual sales price for the goods had been $100,000. The overseas customer would make a $120,000 payment to the American corporation which would, in turn, remit the excess $20,000 to the overseas customer's bank account either here in the United States or in some third country. In this way the overseas customer was able to maintain a U.S. dollar account which would be hidden from the authorities in his own country in violation of his country's currency control laws. The overseas customer would also thereby obtain documentation, in the form of falsely inflated invoices, to support a claim of increased costs which would reduce his tax liability in his own country. We found, in a number of instances, that the American companies which were supplying the inflated invoices would file Shipper's Export Declarations with the United States Customs Service and the Department of Commerce which reflected the higher invoice amount. Some of those cases were referred to the Department of Justice's Civil Division which brought civil actions against the

American companies enjoining them from the further filing of false Shipper's Export Declarations.

To illustrate how far afield certain of these disclosures were from the foreign bribery area, I would like to point to a few other examples. Some of the larger liquor companies disclosed to the Securities and Exchange Commission that they had been making illegal rebates in the United States to domestic liquor distributors. The Department also learned that a number of corporations had declared possible violations of the Federal Elections Campaign Act which prohibited corporate contributions in federal election campaigns.

The Department further discovered that a substantial number of companies disclosed, as "questionable" payments, commissions which had been paid to independent foreign sales agents. These commissions were often disclosed whenever the company had some indication that the commission appeared to be unusually large or was for some other reason possibly "questionable". In many such instances, there was no evidence that any portion of the commission had actually been passed on to a foreign government official.

The Department also discovered that certain companies had engaged in a practice of making payments to petty officials in connection with their performance of ministerial functions. The nature of these payments led the Department to conclude that investigations of this type of activity were not warranted.

Similarly, in a number of corporate disclosures, the amounts of payments were de minimis and, on that basis alone, did not warrant further investigation.

Finally, the Department identified a limited number of companies which had paid bribes to foreign government officials. In the vast majority of instances, it was discovered that the payments had been made by overseas corporate subsidiaries without any territorial connection to the United States. Since no violations of federal criminal law were found, the investigations were closed without prosecution. In ten instances, the Department was able to identify situations in which corporations had bribed foreign government officials and in the process violated an existing federal criminal law. In those cases, the appropriate federal criminal charges were filed.

Thus, the Department's review of the disclosure to the Securities and Exchange Commission made clear that far fewer than 400 companies had disclosed that they had engaged in bribery of foreign government officials. In several instances, the Department brought public prosecutions against companies which had paid bribes to foreign government officials and in connection therewith had made false filings with an agency of the United States Government in violation of 18 U.S.C. §1001. In other instances, the Department initiated prosecutions of corporations which, in the process of paying bribes to foreign government officials, had violated the Currency and Foreign

Transactions Reporting Act.*/ In several instances, an extension of the so-called Isaacs-Kerner theory of mail fraud was utilized to prosecute companies for the act of bribery itself. See United States v. Isaacs, 493 F.2d 1124 (7th Cir. 1974). Under that theory, a person paying a bribe to a government official can be prosecuted under the mail fraud statute on the ground that he engaged in a scheme to defraud the public, or the employing government, of the honest services of the recipient of the bribe, in violation of the recipient's fiduciary duty.

For the convenience of the Subcommittee, I have attached to this statement a list of the prosecutions resulting from the coordinated enforcement efforts of the Department of Justice in this area. The list indicates the office which brought the prosecution, the penalties paid by the defendants and the statutes under which the charges were brought. The pre-FCPA program has thus far resulted in the successful prosecution of six individuals and eighteen corporations which have paid a total of $7,662,000 in criminal fines, civil penalties and civil settlements.

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*/ The Currency and Foreign Transactions Reporting Act makes it an offense for anyone to transport into or out of the United States $5,000 or more in currency or bearer instruments without reporting certain information to the United States Customs Service.

II. THE DEPARTMENT OF JUSTICE'S ENFORCEMENT PROGRAM UNDER THE FOREIGN CORRUPT PRACTICES ACT

The pre-FCPA enforcement effort, which as I stated began in the summer of 1977, is only now being completed. With the enactment of the Foreign Corrupt Practices Act in December 1977, the same group of prosecutors responsible for investigating and prosecuting pre-FCPA violations were also charged with the responsibility for investigating and prosecuting violations of the new statute. Because of the highly sensitive nature of these cases arising from their potential foreign policy and national security implications, the United States Attorney's manual has been amended so that most of the Foreign Corrupt Practices Act investigations are being conducted by Justice Department prosecutors in the Fraud Section of the Criminal Division here in Washington rather than by the various United States Attorneys' offices. Investigations are conducted here in Washington to maintain close supervision of these cases and to minimize the adverse foreign policy consequences that any one of these cases can produce.

Thus far, the Department has completed 29 investigations into allegations of violation of the Foreign Corrupt Practices Act. These completed investigations have led to two public prosecutions by the Department of Justice. The first such prosecution was a civil injunctive action in United States v. Roy J. Carver, et al. In that case, Mr. Carver had disclosed to the United States Ambassador to Qatar that he and his associate had

obtained an oil concession in Qatar, prior to the effective date of the Foreign Corrupt Practices Act, by paying a $1.5 million bribe to Qatar's Director of Petroleum. After the Act became effective, Mr. Carver and his associate sought the assistance of the Ambassador in identifying an official of Qatar who could be paid to renew the concession. Our enforcement action resulted in the defendants being enjoined from future violation of the Act.

The second public prosecution by the Department of Justice under the Foreign Corrupt Practices Act was brought against the Kenny International Corp. and its owner Finbar B. Kenny. In that case, the defendants had paid $337,000 to the Prime Minister of the Cook Islands. The payment took the form of a contribution to the political party of the Prime Minister in return for an agreement from the Prime Minister that if re-elected he would renew an exclusive stamp distribution contract which Mr. Kenny had with the Cook Islands government. The corporation pled guilty to a criminal violation of the Foreign Corrupt Practices Act and paid criminal fines of $50,000. Both Mr. Kenny and the corporation consented to a civil injunction under the Act and made restitution of $337,000 to the Cook Islands Government.

The Department of Justice is currently conducting approximately 57 investigations of allegations of Foreign Corrupt Practices Act violations. Some of these investigations have continued for as long as three years. Many are difficult and complex. As is often the case in white collar crime

investigations, the Department, in some instances, has had to review hundreds of thousands of documents, interview dozens of witnesses and adduce testimony before the Grand Jury from dozens more.

Added to the difficulties of ordinary complex investigations are some considerations unique to the Foreign Corrupt Practices Act which the Department has come to understand better as it has gained enforcement experience under the Act. It may be useful to share with you some of these considerations.

In an ordinary domestic bribery case, the offense is usually committed by two parties, i.e., the citizen who pays the bribe and the public official who receives the bribe. Since ordinarily neither of these two parties is willing to testify voluntarily about the transaction, a standard approach used by prosecutors to investigate domestic bribery is to offer one of the two consenting parties immunity or a favorable plea agreement in return for testimony against the other party. Generally, the government offers such a favorable disposition to the citizen who paid the bribe on the theory that there is a greater public interest in successfully prosecuting and removing from office the corrupt public official than there is in pursuing the person who paid the bribe.

The Foreign Corrupt Practices Act is, however, a bribery statute which is quite different from domestic bribery laws. The Congress clearly intended that prosecution of the corrupt foreign official be left to his or her own government.

Under the Foreign Corrupt Practices Act, therefore, only the conduct of the United States citizen or entity paying the bribe is criminalized. For obvious reasons, we cannot and have not attempted to obtain the testimony of the corrupt foreign official who has received the bribe for use against the Americans who may have made the payment. Thus, in order to prosecute American companies or citizens for violation of the Foreign Corrupt Practices Act we have had to develop evidence of the violation without the cooperation of either the offeror or the recipient of the bribe.

Another investigative limitation which results from the nature of the Foreign Corrupt Practices Act is that the Department has been unable to utilize some of the more traditional international evidence gathering tools, such as Interpol. Interpol, as you know, functions through local foreign law enforcement agencies. When our law enforcement authorities make a request for assistance through Interpol, local law enforcement agencies in the foreign country conduct the investigation. Because allegations of violation of the Foreign Corrupt Practices Act often involve allegations of corrupt payments to senior foreign government officials, we have been of the view that it would usually be inappropriate to ask foreign law enforcement agencies to conduct investigations on our behalf into the activities of their own government officials.

Still another limitation on how we conduct investigations of Foreign Corrupt Practices Act violations is imposed by

a peculiar feature of bribery cases. Our experience has shown that all too often criminal confidence men operating as middlemen overseas, in order to induce their victims to part with their money in a transnational transaction, will suggest to the victim that extra money is essential in order to bribe a foreign government official. Although he may even identify the foreign government official, the confidence man may have no intention of bribing that government official and that government official may have no knowledge of the confidence man's representations to the victim. This situation can occur, not only when an independent operator attempts to defraud his victim, but also when a renegade employee attempts to defraud his own employer and embezzle the money.

Finally, soon after the enactment of the Foreign Corrupt Practices Act, the Department recognized that there was a growing and legitimate concern in the private sector and among many lawyers over what were perceived as ambiguities in language in the Foreign Corrupt Practices Act. In response, the Department established the Foreign Corrupt Practices Act Review Procedure, which is modeled after the Antitrust Division's Business Review Procedure, under which a company can submit for the Department's review a written description of a proposed transnational commercial transaction. After reviewing the transaction, the Department will inform the company whether or

not it will take any enforcement action under the FCPA if the transaction proceeds.

The Department had hoped that the establishment of the Review Procedure program would provide a mechanism which would eliminate doubts about the meaning and application of the Foreign Corrupt Practices Act and thereby prevent any unnecessary losses of exports due to perceived uncertainty about the Act. Unfortunately, relatively few companies have taken advantage of the Procedure. Thus far, the Department has published only four releases describing our actions under the Procedure. Three additional requests are pending. In part, we believe this underutilization of the review procedure results from a concern that confidential business information provided to the Department of Justice as part of the program would ultimately be publicly disclosed under the Freedom of Information Act.

The Department of Justice is very concerned that the Act be interpreted and enforced in a predictable and uniform manner. Our concern stems from what we believe are problems with the existing Act's clarity. We believe that in some respects the Act is overly broad, sometimes confusing, and often unnecessarily uncertain in its application. These problems ought to be corrected. We also share with the Office of the Special Trade Representative, the Department of Commerce, the Department of State, and the Treasury Department a deep concern over the effect of the difficulties reported under the current law on trade competitiveness.

This Administration has carefully and thoroughly reviewed the difficulties encountered under the Foreign Corrupt Practices Act at the Cabinet-level, with involvement by all interested agencies, and has agreed upon specific legislative reforms. We believe that U.S. interests at home and abroad would be better served by the adoption of the Administration supported reform legislation.

The Department believes that surely the Congress can draft a law that is carefully designed to proscribe the conduct at issue. When any new law is passed, a period of experience with the law often reveals problems which the Congress must and generally does correct.

In this area, in particular, we believe that legislative reforms are imperative if we are to have an effective law prohibiting foreign bribery that does not result in unnecessary and unintended harm to our national economic interests. In addition, in as much as our nation is engaged in seeking an international solution to the problem of illicit payments, reform of the FCPA becomes that much more important in demonstrating to the world that it is possible to enforce a law of this kind without unnecessary harm to competitiveness.

I recognize, however, that the Committee has not invited testimony on how the language of the existing law should be changed. Rather, we have been asked here today to report on how the existing law is being enforced. We will honor the limits of that invitation and not take up the Committee's time

with a set of recommendations which we believe deserve full and separate consideration. We would hope to have a return invitation very soon to explore with the Committee ways in which the law should be improved. As you know, the Senate has already recognized the need for change and has undertaken some very useful steps in this area. The Administration strongly supports legislation along the lines of the Chafee-Rinaldo proposal, and urges this Subcommittee to take legislative action on this matter.

I would be pleased to answer any questions the Subcommittee may have.

CMB primer

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

Kate
FYI + follow up

File
Clean Air Act

March 24, 1981

MEMORANDUM FOR FRANK HODSOLL

FROM: FRED KHEDOURI FNK

SUBJECT: Status of Clean Air Act Working Group

The Clean Air Act Working Group, composed of representatives selected by the Secretaries of the Cabinet Agencies that belong to the Cabinet Council on Natural Resources and the Environment, conducted its first meeting yesterday afternoon. Secretary Watt came to the meeting and presided. He assigned a number of studies to the various agencies. These reports are due next Monday.

On another front, Secretary Watt, Anne Gorsuch, and I met with the Vice President to discuss the role of the Vice President's Task Force on Regulatory Relief in the development of Clean Air Act proposals.

Secretary Watt has also asked that I prepare a strategy paper laying out a schedule and a plan for developing support for Administration proposals in this area. I will provide you with a copy of this when it is ready.

Indian Bill

Jan. 6. Call from Horowitz of OMB, telling me that Gary Lee was drafting bill to solve Indian Land Claims in New York and S. Carolina, that he wanted to introduce it as soon as possible after Congress came back, and asked me to see that we got our comments back to OMB as quickly as possible.

I thereupon related same to Hughes, and asked him to get me a copy of the bill as soon as it came in.

Jan. 8. We received bill from OLA. Deadline to return was Jan. 14.

Jan. 12-15 (approximately) call from Mike McConnell at OMB to ask if progress had been made, I had not seen anything yet; checked with Hughes, who reported it was being worked on but not yet ready.

Jan. 14. Harris at PLSL talked to OLA and asked them to send the bill to OLC right away so that we could get their answer quickly.

Week of Jan 18. I started meeting regularly with Harris of PLSL to work out our letter, and to try to streamline the process.

Jan. 22 First phone call with Mike McConnell of OMB on substance I reiterated our problems to him. Several phone calls followed over next several days.

Jan 29. Spoke to Tidwell at DOI about several technical problems we had with the Legislation that involved Interior.

Feb. 1 Met at Interior with McConnell, Tidwell and Mike Nazzolio of Congressman Lee's Staff. Went through the bill line-by line to discuss each of our problems and try to work out problems.

Week of Feb. 1 - several phone calls with McConnell about specific, substantive problems.

Feb. 2. One, perhaps two phone calls from Nazzolio about particular substantive problems - I don't remember what.

Feb. 3 Conference call with Tidwell, McConnell and Nazzolio regarding Cong. Lee's new draft, which Nazzolio had prepared after our Feb. 1 meeting. Discussed each change

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Feb. 5. Called Don Baker at OLA and told him to call OLC to speed up the process, since Lee wanted to introduce bill Feb. 10.

Feb. 8. Calls with McConnell about progress; he asked me to speed process up. I called Larry Simms, who said he would check on it. He called me back to say that Ted Olson had it, was working on it himself and wouldn't be done until at earliest Monday Feb. 15. I called Olson, who told me the same. I related that to Mike McConnell. Nazzolio called me late in afternoon to beg me to speed it up and get him the letter Feb. 9. I told him I couldn't.