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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

1 CFR Parts 305 and 310

Recommendations of the Administrative Conference Regarding Administrative Practice and Procedure

AGENCY: Administrative Conference of the United States.

ACTION: Recommendations and statements.

SUMMARY: The Administrative Conference of the United States, at its Thirty-fourth Plenary Session, adopted five recommendations and one statement.

Recommendation 87–1, Priority Setting and Management of Rulemaking by the Occupational Safety and Health Administration, suggests to OSHA that it create an advisory committee, and adopt certain new procedures, to augment its ability to control and direct the rulemaking process used to adopt new standards for regulating health and safety hazards. Recommendation 87–2, Federal Protection of Private Sector Health and Safety Whistleblowers, calls on Congress to enact new legislation to provide for uniform treatment of private sector whistleblowers and recommends improved regulations to facilitate the processing of administrative proceedings concerning alleged retaliation by employers for whistleblowing activity. Recommendation 87–3, Agency Hiring of Private Attorneys, recommends that agencies should adopt written proceures, which should be made publicly available, for hiring private attorneys and for governing conflict of interest and other ethical considerations. Recommendation 87–4, User Fees, sets out general principles, for the use of Congress and relevant agencies, in establishing and implementing user fee programs. Recommendation 87–5, Arbitration in Federal Programs, urges agencies to use arbitration and other alternative dispute resolution techniques in resolving disputes between the agencies and members of the public.

Statement 12, Statement on Resolution of Freedom of Information Act Disputes, sets out the Conference' view that no need has been demonstrated for the appointment of a FOIA ombudsman within the Department of Justice, but that the resolution of administrative appeals of denials of requests under the Freedom of Information Act would be aided by greater agency use of informal alternative dispute resolution techniques.

Recommendations and statements of the Administrative Conference are published in full text in the **Federal Register** upon adoption. Complete lists of recommendations and statements, together with the texts of those deemed to be of continuing general interest, are published in the Code of Federal Regulations (1 CFR Parts 305 and 310).

DATES: These recommendations were adopted June 11–12, 1987, and issued June 17, 1987.

FOR FURTHER INFORMATION CONTACT: Jeffrey S. Lubbers, Research Director (202–254–7065).

SUPPLEMENTARY INFORMATION: The Administrative Conference of the United States was established by the Administrative Conference Act, 5 U.S.C. 571–576. The Conference studies the efficiency, adequacy and fairness of the administrative procedures used by federal agencies in carrying out administrative programs, and makes recommendations for improvements to the agencies, collectively or individually, and to the President, Congress, and the Judical Conference of the United States (5 U.S.C. 574(1)).

At its Thirty-fourth Plenary Session, held June 11–12, 1987, the Assembly of the Administrative Conference of the United States adopted five recommendations and one statement, the texts of which are set out below.

These texts will be transmitted to the affected agencies and, if so directed, to the Congress of the United States. The Administrative Conference of the United States has advisory powers only, and the decision on whether to implement the recommendations must be made by each body to which the various recommendations are directed.

The transcript of the Plenary Session will be available for public inspection at the Conference's offices at Suite 500, 2120 L. Street, NW., Washington, DC.

List of Subjects

1 CFR Part 305

Adjudication, Administrative practice and procedure, Alternative dispute resolution, Arbitration, Attorneys, Rulemaking, Safety and health, Whistleblowers.

1 CFR Part 310

Administrative practice and procedures, Freedom of Information Act.

PART 305—RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

1. The authority citation for Parts 305 and 310 continues to read as follows:

Authority: 5 U.S.C. 571–576.

2. The table of contents to Part 305 of the Title 1 CFR is amended to add the following new sections:

Sec.
305.87–1 Priority setting and managment of rulemaking by the Occupational Safety and Health Administration (Recommendation 87–1).
305.87–2 Federal protection of private sector health and safety whistleblowers (Recommendation No. 87–2).
305.87–3 Agency hiring of private attorneys (Recommendation No. 87–3).
305.87–4 User fees (Recommendation No. 87–4).
305.87–5 Arbitration in Federal programs (Recommendation No. 87–5).

3. The table of contents to Part 310 of Title 1 CFR is amended to add the following new section:

Sec.
310.12 Statement on resolution of Freedom of Information Act disputes.

4. New §§ 305.87–1 through 305.87–5 are added to Part 305, to read as follows:

§ 305.87–1 Priority setting and management of rulemaking by the Occupational Safety and Health Administration (Recommendation 87–1).

The Administrative Conference has undertaken a study of the rulemaking process at the Occupational Safety and Health Administration. It is recognized that OSHA's mandate to regulate any substance or hazard that poses a significant risk to workers and, to the extent feasible, make every workplace safe is daunting, and that alternative approaches to substance-by-substance regulation may be necessary. The Conference plans to address this larger issue in its continuing study. In this recommendation, the Conference suggests procedures that OSHA can institute administratively to improve two aspects of its current process for developing health and safety standards.

In Part 1, the Conference recommends to OSHA a procedure for systematically setting long-term priorities for promulgating standards for regulating health and safety hazards. Once established, the recommended regulatory priorities lists will serve as a baseline against which additions or modications of the lists can be considered. The task of developing the priority lists would be assigned to a permanent, internal agency committee, with additional representation from the National Institute for Occupational Safety and Health (NIOSH). The committee would work closely with other health and environmental agencies in developing initial priority lists which would be submitted for decision to the Assistant Secretary for Occupational Safety and Health, Department of Labor.[1]

Although these regulatory priorities lists should generally govern when OSHA initiates rulemaking, the Conference does not intend that this priority-setting process should in any way diminish the Assistant Secretary's authority to promulgate rules on an expedited basis under the Occupational Safety and Health Act or the Administrative Procedure Act. Moreover, the recommendation (in paragraph 1.d.) takes account of the need for an expedited priority decision process in certain situations, such as referral by the Environmental Protection Agency of rulemaking topics under the Toxic Substances Control Act or the filing of rulemaking petitions.

The Conference believes that the procedures suggested in Part 1 would be infeasible if OSHA's regulatory priority rankings could be challenged in suits for judicial review. Therefore, the Conference urges that the regulatory priorities lists not be treated as rules for which judicial review would be appropriate.[2] Nonetheless, public participation is desirable, and the Conference sets forth specific steps OSHA should take to involve the public in its priority-setting process.

Part 2 of the recommendation suggests procedures for OSHA's management of rulemaking. The Conference's study revealed the need for systematic monitoring of the progress of individual rulemakings and for greater coordination at the staff and policy levels. Thus, the recommendation suggests that OSHA adopt a computer-based tracking system, a team approach to rulemaking, and an options review process to involve high-level agency policymaking oficials in designated major rulemakings.

The Conference does not intend either the priority-setting or management procedures in this recommendation to affect OSHA's compliance with any other procedural requirements to which it is subject pursuant to statute or executive order.

Recommendation

1. Setting of Priorities for Rulemaking

This part recommends procedures that the Occupational Safety and Health Administration should follow in establishing priorities for promulgating standards for regulating health and safety hazards.

a. *Regulatory Priorities Committee.* OSHA should establish a permanent committee charged with developing regulatory priorities which, once they are approved by the Assistant Secretary for Occupational Safety and Health, Department of Labor, will presumptively apply when the agency undertakes rulemaking to establish health and safety standards.

(1) This committee should include high-level management officials and experienced professionals from OSHA and a representative from the National Institute for Occupational Safety and Health (NIOSH). To provide continuity, committee members should be appointed for staggered terms and be eligible for reappointment. The committee should otherwise be no larger than necessary to discharge its duties.

(2) OSHA should provide adequate staff support for the committee and additional resources as necessary to enable it to gather information on potential rulemaking topics and, where appropriate, to perform risk assessments and priority-setting.

(3) The committee should establish initial priority lists for health and safety regulation and, thereafter, meet regularly to consider addition, deletions or revisions of the lists and to conduct periodic reviews.

(i) In developing an *initial* priority list, the committee should use existing information, including risk assessments and other technical and policy considerations. The committee should avoid elaborate risk assessments or weighting systems, and it should not incorporate by reference lists prepared by other agencies for other purposes.

(ii) It may be appropriate, however, for the committee to utilize more sophisticated risk assessments or weighting systems when it conducts a periodic review of, or considers modifications to, a priority list.

(4) OSHA should work closely with NIOSH, other relevant health and environmental agencies, and the National Toxicology Program in developing its initial priority lists and in revising these lists. In addition, OSHA and NIOSH should establish procedures that will permit rapid exchanges of information on projects that OSHA assigns to the expedited decision process (*see* paragraph d. below).

b. *Judicial Review.* The Assistant Secretary's decision to place a topic on a regulatory priorities list, the ranking of a topic on a list, and subsequent modification of a topic's priority on a list should not be treated as rules for which judicial review would be appropriate. However, the Assistant Secretary should allow public participation in the priority-setting process (in accordance with paragraph c. below) and provide an explanation of priority decisions.

c. *Public Participation.* OSHA should take the following steps to involve the public in its regulatory priority-setting process:

(1) Before establishing the initial priority lists, OSHA should hold public workshops at which interested persons are invited to comment on regulatory priorities.

(2) The results of meetings of the regulatory priorities committee should be made public after the Assistant Secretary has had an opportunity to review any proposed decisions of the committee.

(3) The Assistant Secretary should publish for public comment the proposed initial priority lists of rulemaking topics and, thereafter, any proposed modifications to the lists. The topics on the lists should either be ranked individually or assigned to classes.

d. *Expedited action.* Once the initial priority lists are developed, OSHA should establish a procedure for expediting priority decisions on additional topics or modifications that are presented by referrals from EPA under the Toxic Substances Control Act, rulemaking petitions, or requests from Congress, the President, or other agencies. While separate from the agency's routing priority-setting process, this expedited process should be coordinated with it. The outcome of the expedited process should be the placement of the topic on the appropriate list, modification of a list (*e.g.*, deletion or changed ranking of a topic), or a determination not to place, or modify the placement of the topic, on the list, together with a public explanation for the action.

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[1] In 1982 the Conference addressed the importance of interagency cooperation in identifying and ranking potentially cancer-causing chemicals for regulation and recognized the important role played by the National Toxicology Program in fostering such cooperation, *see* ACUS Recommendation 82-5, Federal Regulation of Cancer-Causing Chemicals, Part II, 1 CFR 305.82-5.

[2] The tentative nature of agency rankings and the need for flexibility were previously recognized by the Conference in considering priority-setting for the regulation of cancer-causing chemicals. *See* ACUS Recommendation 82-5, *id.*, Part I, ¶ 5.

2. *Management of the Rulemaking Process.*

This part recommends procedures that OSHA should adopt for the management of its rulemaking process.

a. *Action Tracking System.* OSHA should establish a computer status system to set deadlines for meeting established milestones in rulemaking and to provide for systematic review of the progress of ongoing rulemaking. Under this system, management officials, representing all interested agency components, should meet at regular intervals with the Assistant Secretary or a Deputy Assistant Secretary to discuss progress toward designated milestones.

b. *The Team Approach.* OSHA should establish a team concept in rulemaking. A team for each individual rulemaking, consisting of representatives of all potentially interested components of OSHA and the Department of Labor (*e.g.*, the Office of the Solicitor), should be appointed early in the rulemaking process to gather and analyze information, draft documents, respond to comments and advise the Assistant Secretary. Successfully functioning teams should be assigned to additional rulemakings where feasible.

c. *Options Review Process.* OSHA should implement an "options review" process to provide policy guidance to teams working on designated health and safety standard rulemaking. This process [3] would provide that at least once in the early development of such rules (and perhaps again at later stages of rulemaking), the rulemaking team will identify and analyze regulatory options for consideration by a high-level agency policymaking official in an options review meeting. This meeting should produce discussion of alternative approaches for rulemaking and a narrowing of the range of options to be considered in the future; any decisions should be recorded in a memorandum that is available to the team. The options review meeting could be held in conjunction with the regular action tracking meetings recommended above (paragraph 2.a.).

§ 305.87-2 Federal protection of private sector health and safety whistleblowers (Recommendation 87-2).

Private sector employees who make disclosures concerning health and safety matters pertaining to the workplace are protected against retaliatory actions by over a dozen federal laws. By common usage these employees, as well as others who make similar disclosures concerning fraud or other misconduct (but who are byond the Conference's current study),[1] have become known as whistleblowers. Under current statues, for example, nuclear power plant workers, miners, truckers, and farm laborers are specifically protected when acting as whistleblowers. Other workers may be covered under the more general protections granted by the Occupational Safety and Health Act (OSHA) or various environmental laws.

The protection provided employees by the so-called whistleblower statutes under study serves the important public interest of helping ensure the health and safety of workers in the various regulated industries or activities, as well as that of the general public. The statues are intended to create an environment in which an individual can bring a hazardous or unlawful situation to the attention of the public or the government without fear of personal reprisal. Such disclosures can be a valuable source of information especially where the public lacks the knowledge or access to information necessary to be fully informed on these important issues.

In its examination of the current federal statutory scheme designed to protect whistleblowers in the private sector, the Conference found that, as currently written, the various whistleblower statutes lack uniformity in a number of areas including the following:

1. Investigative responsibility is assigned to numerous agencies, including the Department of the Interior and several within the Department of Labor (DOL), with little coordination among them.

2. Adjudicatory responsibility is similarly divided. For example, while several statutes provide for adjudication by a DOL administrative law judge, others provide for decisions by different agencies or for trial in the district court.

3. Judicial review likewise differs. Some statutes provide for review in the district court, some in the court of appeals. And for some, no review is available.

4. Statutes of limitations for filing a complaint range from 30 days to 180 days.

5. Definitions of protected conduct differ according to statute. For example, protected disclosure may include any disclosure or may be more narrowly defined as disclosure to "the public," to the media, to the responsible agency, or to a union or employer. Protected conduct may or may not include refusals to work.

6. In certain cases where the designated agency declines to proceed with the complaint (under either the OSHA or the Asbestos Hazard Emergency Response Act), the complaining employee is left without any further administrative or judicial review.

As a result of these statutory incongruities, available procedures and protections may differ depending solely upon the industry to which an aggrieved employee belongs. For example, an employee seeking protection under the Clean Air Act (CAA) has 30 days in which to file a complaint, while an employee filing under provisions of the Migrant Seasonal and Agricultural Worker Protection Act (MSAWPA) has 180 days. And while both CAA and MSAWPA violations are investigated by the Wage and Hour Division of the Department of Labor, adjudication of CAA complaints is before a DOL administrative law judge, while MSAWPA complaints are adjudicated in the district courts. The Conference has concluded that this lack of uniformity does not appeal to be reasoned, but most likely reflects the incremental enactment of the various statutes over a period of years.

Accordingly, the Conference believes that omnibus whistleblower legislation providing for centralization of the investigative and adjudicative functions is needed. Because the Department of Labor now investigates and adjudicates such complaints under the majority of existing statutes, centralization in that Department is the logical choice. Although specialized expertise possessed by agencies responsible for the various regulatory programs covered by whistleblower provisions may be required in exceptional circumstances to resolve these disputes, the Conference believes that centralization is preferable and that enforcement and adjudicative responsibilities should where feasible be assigned to the DOL.

The Conference study also discussed areas of regulation where gaps in whistleblower protection exist. These include the aviation and aeronautics industries, vessel construction and operation, and manufacturing and production of food, drugs, medical devices or consumer products generally. Where Congress has judged it necessary to regulate an industry so as to ensure the safety of its workplace, products, services or the environment, Congress should consider whether it is appropriate that enforcement of the regulatory scheme be strengthened by providing whistleblower protection for the industry's employees who report statutory violations.

The study also indicated that access to written decisional precedents in these cases needs to be improved. The Department of Labor's Office of Administrative Law Judges does not yet publish its decisions (although it has recently announced plans to do so), and a unified index for these decisions and those of other agency adjudicative bodies does not exist. Publication and indexing of existing case law should help narrow the issues for future adjudications, contribute to a sense of fairness in the adjudicatory process, and improve case management. In addition, the study found that, with certain exceptions, there is little interation between the program agency and the investigating/adjudicating agency, thus diminishing the involvement of the lead program agencies. Procedures should be established by which program agencies provide assistance to investigative agencies, and adjudicatory agencies report decisions back to the program agency.

Finally, the Conference notes that there is a growing amount of litigation in state courts concerning whistleblowers, but does not take a position on whether federal statutes do or

[3] The options review process herein recommended is currently employed successfully by the Environmental Protection Agency.

[1] The Conference has limited its study to health and safety related disclosures because in this area a pattern of federal statutory protections has emerged with sufficient experience to allow a study.

should preempt state law in this field. (ACUS Recommendation 84-5, Preemption of State Regulation by Federal Agencies, recommends that Congress address foreseeable preemption issues, and advises regulatory agencies to be aware of situations where a conflict might arise.)

With the increasing interest in these matters by Congress, the media and the general public, the Conference hopes that its study will provide a foundation for needed improvements.

Recommendation

1. In the interest of uniform treatment of private sector health and safety whistleblowers, Congress should enact omnibus legislation for the handling and resolution of whistleblowers' complaints. In enacting this legislation, Congress should review the categories of workers to which it is appropriate to extend whistleblower protection. As a general matter, the administration of this program should be centralized in the Department of Labor in furtherance of efficiency and harmony of results. If, however, Congress deems it necessary for a program agency to retain or receive investigative or adjudicative responsibility for whistleblower complaints, Congress should strive for uniformity in the substantive protections and procedures applicable to the separate program.[2] The omnibus and any other whistleblower legislation should include:

(A) A uniform definition of protected conduct;

(B) A uniform statute of limitations of not less than 180 days governing the filing of complaints;

(C) A uniform provision for remedies:

(D) Assignment of preliminary investigative responsibility to the Secretary of Labor [3] for all private sector health and safety whistleblowing retaliation cases;

(E) Authorization for the Secretary of Labor to employ alternative means of resolving these disputes, with the consent of the parties (see ACUS Recommendation 86-3, Agencies' Use of Alternative Means of dispute Resolution);

(F) Provision for an opportunity by any affected person to request an on-the-record APA hearing before a Department of Labor administrative law judge and for discretionary review by the Secretary of Labor, judicial review in the courts of appeals, and enforcement in the district courts;

(G) A grant of subpoena power to the Secretary of Labor for whistleblowing investigations and hearings, with provision for judicial enforcement; and

(H) A grant of rulemaking authority to the Secretary of Labor with respect to investigative and adjudicatory procedures, notice-posting requirements and mandatory coordination with other agencies.

II. Whether or not Congress enacts omnibus whislteblowing legislation, the Secretary of Labor should:

(A) Promulgate rules of appellate procedure governing practice and procedure in connection with the Secretary's review of administrative law judge decisions in whistleblower cases;

(B) Transfer primary private sector health and safety whistleblowing investigative responsibility to a single entity within the Department of Labor, absent compelling reasons to the contrary;

(C) Develop, in consultation with the agencies responsible for the substantive regulatory programs, detailed written procedures for coordinating investigation, adjudication and follow-up in whistleblowing cases; and

(D) In accordance with the Freedom of Information Act, 5 U.S.C. 552(a)(2)(A), index and publish all ALJ and Secretarial decisions in whistleblowing cases, including those rendered prior to the date of this recommendation.

[2] The Conference does not intend to suggest that whistleblower protection provisions now administered by the Department of Labor be reassigned. Nor is this recommendation intended to affect the existing jurisdiction of the National Labor Relations Board to investigate and adjudicate allegations of unfair labor practices.

[3] All references to the Secretary of Labor in recommendations I(D)-I(H) encompass other appropriate agency heads in instances where Congress deems it necessary for a program agency to retain responsibility.

§ 305.87-3 Agency hiring of private attorneys (Recommendation 87-3).

In 1985 the Federal Government employed over 20,000 lawyers in various positions. At the same time it spent millions of dollars to retain private attorneys to provide diverse legal services. The Federal Deposit Insurance Corporation (FDIC) and the Federal Home Loan Bank Board/Federal Savings and Loan Insurance Corporation (FHLBB) accounted for most of these expenditures. The attorney fees paid by the FDIC and the FHLBB have increased rapidly since 1982 and have been incurred primarily in their capacities as receivers or liquidators of failed financial institutions for which they have provided deposit insurance. In those cases, the legal fees and other expenses are borne by the estate of the failed bank. However, many other federal agencies, including government corporations, utilize the services of private attorneys—in some instances on a regular basis—and the fees are usually paid from appropriated funds.

This recommendation results from a survey of the use of private attorneys by government agencies and consideration by the Conference of the process that should be employed in deciding whether to retain outside counsel, including the ethical concerns that may arise when outside counsel are retained. The recommendation applies to any agency that hires private attorneys to represent the agency or to provide it with legal advice, i.e., where an attorney-client relationship is established. The scope of the recommendation accordingly does not extend to instances where an agency hires an individual who may be an attorney but is clearly not being hired to act in that capacity. The scope may therefore exclude some persons who are hired to do independent research, arbitrators hired to decide personnel or other disputes, or persons hired to provide mediation or similar services in connection with negotiated rulemaking.[1]

Retention of private attorneys for litigation, where lawfully authorized, is within the scope of this recommendation. Congress has generally vested the power to litigate in the Department of Justice, although several agencies have been granted independent litigating authority by statute. Unless an agency is granted such authority, the consent of the Department of Justice is required for another agency to retain outside counsel for those purposes (5 U.S.C. 3106).

While some elements of the recommendation may state principles that are relevant to obtaining the services of other professionals, the Conference has studied only the retention of private attorneys. The focus of this recommendation on attorneys recognizes the role of the lawyer in implementing and enforcing government policy and the ethical requirements that are peculiarly applicable to attorneys.

In the private sector, it is cost-effective both to employ a full-time legal staff and to contract out some legal assignments. Many corporations have focused attention on methods to ensure that the size of the in-house staff is optimal and that work is contracted out only when necessary or for certain categories of work. Corporations have developed guidelines, criteria, and procedures to control the cost and ensure the quality of legal services.

In the public sector, concern for cost-effectiveness, a multi-faceted goal which does not look at the factor of price in isolation, is also clearly appropriate. The Conference has considered whether there should be a fixed cap on hourly fees to be paid to private attorneys hired by agencies, and has concluded that a government-wide limitation is inadvisable because it may prevent the government from obtaining high quality legal services. In many cases, the aggregate cost of legal services does not depend on hourly rates alone, and all relevant facts should be considered in determining the economic efficiency of a proposed contract for legal services. It may, however, be appropriate for individual agencies to limit hourly rates for certain types of services, if such limits are set at realistic levels. In hiring private counsel, agencies can also take into consideration the

[1] The Administrative Conference has not studied the appointment of independent counsel under the Ethics in Government Act, 28 U.S.C. 591-598, and this recommendation does not address the selection of such counsel.

attorney's willingness to negotiate fees, seeking the most competitive fees available, while securing the skills and efficiency required.

Important additional considerations bear on the decision of the federal government to rely on outside counsel. An agency should be acutely aware of the need for control over the activities of outside counsel to ensure, among other things, that the constitutional vesting of governmental authority in "officers" of the United States is observed in fact. The need for close control may vary with the circumstances, but it must assume preeminent importance in litigation.

In procuring the services of attorneys, agencies must also scrupulously avoid favoritism, or the appearance of favoritism, which can erode public confidence in the integrity and fairness of the government. Competitive procedures, whether mandated by procurement statutes or imposed as a matter of agency policy, will reduce the prospect or appearance of favoritism and result in higher quality legal services and savings in cost. Depending on the circumstances, the requisite procedures may range from a public solicitation of formal proposals to informal telephone requests to several sources for information relating to qualifications, availability, and fees. Appropriate competitive procedures should consider both cost and the more subjective elements of professional skill and efficiency.

Attorneys performing work for the goverment must maintain the highest ethical standards. They should be particularly sensitive to questions of appearances and propriety. Neither the circumstances of their retention nor their conduct of their engagement should provide the slightest basis for loss of public confidence in the administration or justice or the integrity of the governmental process.

The hiring of outside counsel may raise important questions regarding conflicts between the interests of the government and others, which federal criminal law (18 U.S.C. 202 *et seq.*), ethics rules applicable to federal employees, and codes of professional responsibility seek to guard against. The principal ethical problem for outside attorneys involves simultaneous representation of the agency and, in a separate matter, a private party whose interests are adverse to the agency or the related interests of another agency. An important additional question is presented when an attorney or firm appears before an agency in a non-adversarial role on behalf of one client while simultaneously acting as attorney for the agency in a different matter.

The government, like any client of a private attorney, may consent to representation of adverse interests by its outside counsel. Any such consent, however, should be fully informed. Accordingly, to afford full protection to the government and the public, every effort must be made to identify conflicts or potential conflicts before work is contracted out, and to assure that, during the course of the representation, previously unanticipated problems are immediately disclosed so that the agency may take appropriate action.

Retainer agreements should identify the "client" with specificity and address questions related to existing or potential adverse representations. In many instances, only the agency that retains the private attorney will have an interest in the subject matter of the engagement, and in those instances that agency should ordinarily be considered the "client." This would have the effect of allowing outside counsel to appear before, or represent interests adverse to, other Executive Branch agencies in unrelated matters. Where broader interests of the government may be implicated, the agency retaining outside counsel will need to take those interests into account when drafting the retainer agreement.

To assure that all of these concerns are taken into account, any agency that anticipates a need to hire private attorneys should prepare written public guidelines concerning when and how it will seek outside counsel. As an element of agency control and to avoid later misunderstandings, appropriate written instructions should be given to attorneys when they are retained. The FDIC, FHLBB, and the Department of Justice have developed documents for these purposes, and agencies drafting guidelines and instructions should refer to them as possible models. Agencies may also find useful models in the private sector for some elements of their guidelines.

To respond to the concerns surrounding government use of outside counsel, agencies should prepare an annual public report listing basic information relating to legal service contracts awarded.

Recommendation

1. Scope of Recommendation

This recommendation applies to any agency that hires private attorneys to represent the agency or to provide it with legal advice, i.e., where an attorney-client relationship is established.

2. Use of In-House Government Attorneys

(a) Government agencies should continue to obtain most of the legal services that they need from government attorneys.

(b) When agencies cannot develop the necessary legal resources in-house, they should explore the possibility of utilizing the expertise found at other agencies of the government, on a temporary or short-term basis. The Office of Personnel Management should establish a procedure for sharing information among agencies on the kinds of legal resources available within the government.

3. Guidelines for Hiring Outside Counsel

Each agency that anticipates a need to hire private attorneys should prepare written public guidelines detailing: (a) The criteria for deciding whether or not to seek outside legal assistance, (b) the factors relevant to the choice of attorney or firm, (c) the procedures for procurement, (d) appropriate limitations on counsel's authority, (e) conflict of interest and other ethical considerations, (f) billing practices, and (g) procedures for review of fees.

4. The Decision to Hire Outside Counsel

When an agency is considering whether to hire outside counsel, the agency should first assure itself (a) that it is authorized by law to hire outside counsel for the particular matter, (b) that it can exercise sufficient control over the performance of the services to be obtained, and (c) that such employment is cost-effective. The price of the services should not, however, be the sole test of cost-effectiveness. Also of importance in assessing the benefit to be gained from the use of outside counsel are the quality of the services provided, the availability of necessary expertise within the agency, and the need for an outside independent perspective.

5. Competition

In obtaining outside counsel, the agency should employ appropriate competitive procedures to assure that the requisite quality of service is obtained at a reasonable price without the fact or appearance of favoritism. The Office of Federal Procurement Policy should review the existing provisions of the Federal Acquisition Regulation to ensure that legal services can be procured consistently with the objectives of this recommendation.

6. Control of Performance

The contracting agency should retain such control over the performance of outside counsel as is necessary to assure that the governmental and public interests at stake are fully protected. To facilitate control, the agency should at the outset provide the attorney with specific written instructions regarding the conduct of the professional representation. Control is particularly important where the outside counsel is engaged to represent an agency in litigation.

7. Public Reports

Each agency that hires outside counsel should prepare and maintain in the office of its chief legal officer an annual public report, listing for each occasion on which outside counsel has been retained: (a) The attorney or firm and the type of work involved, (b) the reasons for engaging outside counsel, (c) the competitive procedures used, if any, (d) the fee range or other basis for compensation, and (e) the actual fee paid. For cases involving small amounts, aggregate figures would be acceptable.

8. Ethical Considerations

(a) An agency should require outside counsel whom it plans to hire to disclose fully and in writing all existing or potential conflicts of interest. The disclosure should include all matters that the attorney's firm has pending before, or reasonably expects to come before, that agency. The agency should then decide whether to proceed with the hiring in light of the information provided. If the attorney-client privilege or other rules prevent outside counsel from making full disclosure to the agency, then the outside counsel should not be employed. The agency's agreements with outside counsel should specifically identify the types of professional employment that cannot be undertaken because of the attorney's service to the agency.

(b) Federal agencies and such private attorneys as they retain should be mindful of the constraints imposed by statutes, regulations, executive orders, codes of professional conduct, and any applicable guidelines that pertain to conflict of interest and other potential ethical problems. Such provisions and guidelines should be explicitly identified and incorporated in the agency's contracts with outside counsel.[2]

(c) When an attorney retained by an agency is not a special government employee within the meaning of 18 U.S.C. 202(a), at a minimum those restrictions which apply to such employees should be adopted by the contract with the attorney unless they are clearly inappropriate. Such restrictions include rules of employee responsibilities and conduct contained, for example, in 5 CFR Part 735.[3]

(d) The Department of Justice and the Office of Government Ethics should provide guidance on the applicability of 18 U.S.C. 203-208 to agency hiring of outside counsel. Subject to that guidance, agency guidelines should provide that, for purposes of disqualification based on prohibitions against simultaneous or sequential representation of opposing parties, different departments or independent agencies of the federal government should normally be considered to be different clients.[4] The guidelines should also provide that, if more than one agency has a common interest in the matter, then the definition of "client" should include any such agency or agencies. The guidelines should also make clear that all lawyers in the firm, including all branch offices of the firm, are subject to the applicable restrictions on simultaneous or sequential representation, and that these restrictions apply not merely to litigation, but to all matters in which an attorney-client relationship has been established.[5]

(e) The guidelines should also address the varying circumstances in which an attorney may represent other clients in matters involving the agency. The guidelines should identify those situations that should be avoided.

(f) If a private attorney represents the same agency frequently, then their relationship should be considered as a continuing one. In such a situation, neither the attorney nor the attorney's firm should agree to represent another client in a matter involving the client agency without the agency's explicit consent, even if, at that time, the attorney is not representing or advising the agency on a specific matter.

9. Limitations on Hourly Rates

No government-wide limitation on hourly rates should be established for hiring of private counsel. It may be appropriate for agencies to set a fixed cap on hourly rates that they pay to private attorneys for routine legal tasks; a higher fee cap may be appropriate for unusual or complex legal work. Such limits, if adopted, should be set at realistic levels, in line with fees typically charged for similar services in the same locale, so that agencies hiring outside counsel will be able to obtain the needed degree of expertise.

§ 305.87-4 User fees (Recommendation 87-4).

There is widespread interest in Congress and the Executive Branch in instituting user fees in certain government programs. Although a general user fee statute (31 U.S.C. 9701) dates to 1952, recent studies, including a report of the President's Private Sector Survey on Cost Control, have urged expanded application of such fees. In light of these developments, the Administrative Conference has undertaken a study of the user fee concept in cooperation with the Office of Management and Budget and other federal agencies.

The decision to institute a user fee for a particular service or good is a policy decision for Congress and the Executive Branch to determine, and the Conference does not address this subject. Nevertheless, when Congress or an agency establishes a user fee, that action should be based upon general principles that guide the setting and implementation of fees. The Conference, therefore, in this recommendation seeks to provide a set of such basic principles.

In this recommendation "user fee" means a price charged identifiable individuals or entities by the federal government for a service or good which the government controls. The recommendation addresses only the institution and implementation of user fees to promote the efficient and fair allocation of government services and goods. Accordingly, the Conference does not address the imposition of charges intended primarily to enhance federal revenues or primarily to encourage or discourage behavior unrelated to resource allocation.

Recommendation

A. Benefits

A government service for which a user fee is charged should directly benefit fee payers. A service provided by the government as a condition to the pursuit of commercial or other activity (*e.g.*, inspections) may properly be regarded as a benefit to the fee payer where it confers an advantage on the fee payer or lessens the fee payer's imposition of costs or risks on others or on society as a whole.

B. Basic Considerations for Establishing Fee Levels

1. Market and Cost Considerations

When Congress or an agency establishes a user fee for a service or good provided by an agency, the fee should rest on market factors where possible. In the absence of a reliable market price, the fee normally should cover the agency's costs, including all related processing costs and that portion of other agency costs properly allocable to the service or good provided (such as anticipated capital replacement or repair costs).

2. Other Considerations

a. When criteria other than those set forth in paragraph 1 above (*e.g.*, national policy objectives, program goals or fairness) influence the decision to establish fees, the costs to be recovered, or the granting of waivers or reductions, agencies should explain the criteria used and the rationale for their selection.

[2] The contract should indicate whether and to what extent outside counsel may take inconsistent positions on behalf of an agency and a private client.

[3] See 5 CFR 735.301–306, which prescribe ethics and conduct rules for special government employees. See, particularly, 5 CFR 735.301, which advises agencies that appropriate ethics and conduct rules for regular employees, stated elsewhere in Part 735, may also be made applicable by regulation to special government employees.

[4] This paragraph of the recommendation refers to "clients" solely for the purpose of determining disqualification. The implicit premise of the recommendation is that the Executive Branch is a unitary entity whose interests and legal positions are determined by the President or his delegates, including the Attorney General.

[5] The Department of Justice should consider, in accordance with Recommendation 84-5, 1 CFR 305.84-5, whether to issue a regulation that explicitly preempts any state rule of attorney practice that is in conflict with its guidance.

b. Where third parties or the general public benefit significantly from a governmental service, user fees need not be set to recover fully the cost of providing that service. Agencies should consider the practicability to allocating costs between fee payers and others when determining the proportion of service costs to be recovered by user fees (as opposed to alternative financing mechanisms).

c. The fee level may be set without regard to the distribution of benefits among the customers, employees and owners of the fee payers. However, selection of the point of collection should take into account the costs of administration.

C. Disposition of Fee Receipts

The Conference takes no position on whether fee receipts should be deposited in the Treasury general fund or earmarked to a specific fund. In either event, agencies administering programs that collect fees should be provided with funds sufficient to provide adequate service. In enacting a user fee, Congress should specifically address the issue of how the proceeds are to be used.

D. Implementation of Principles

Congress in revising or enacting user fee legislation, and the Office of Management and Budget in providing implementation guidance and other information on user fees to agencies, should incorporate the principles set out in this recommendation. Agencies should review thier user fee statutes and existing programs to determine whether changes are necessary to implement these principles.

§ 305.87-5 Arbitration in Federal programs (Recommendation 87-5).

The Administrative Conference has recommended that agencies employ alternative means of dispute resolution (ADR) in federal programs.[1] ADR techniques for rulemaking include structured negotiation and mediation; for adjudication, they also include arbitration, factfinding and minitrials.[2] The bulk of these techniques do not alter the placement of policymaking authority within the agencies, and therefore pose few of the legal and policy concerns of binding arbitration, which typically involves the use of outside arbitrators authorized to make descisions binding upon the government. If an arbitrator decides a claim by or against the government, public money will be involved. Arbitration decisions concerning other issues in administering a federal program, such as the resolution of enforcement cases or disputes between the agency and its employees, affect administration of the program. In programs where the agency's role is to resolve disputes between private parties, arbitrated disputes will relate to the purposes of the program, for example by resolving disputes related to program administration. In addition, the Constitution requires that significant duties pursuant to public law must be performed by Officers of the United States and their employees. These concerns can be met if Congress, in authorizing the use of arbitration, or the agency, when adopting arbitration, confines it to appropriate issues and provides for the agency's supervision of arbitration.

Existing law authorizes resort to arbitration in a variety of different contexts, including claims by and against the government, disputes between private individuals that are related to program administration, and labor relations issues between the government and its employees. Recommendation 86-3 calls on Congress to act to authorize agency officials to choose arbitration to resolve many additional disputes.

This recommendation contains procedural advice for Congress, and occasionally agencies, in an effort to ensure the fairness and acceptability of arbitration in federal programs. The criteria are necessarily general, and the appropriateness of particular arbitral procedures must be judged in the context of the particular functions they serve. Agencies are generally in the best position to assess the need for informal and expeditious process, and to weigh that need against considerations of accuracy, satisfaction, and fairness. While the Conference encourages granting agency officials broad "on-the-spot" discretion to use arbitration, it recognizes the need for preliminary steps to meet concerns that the process provide some executive oversight, preserve judicial functions and ensure quality decisions, and maintain legality and fairness. This recommendation sets forth procedural criteria to aid Congress and agencies in taking these first steps.

Recommendation

1. In all cases, congressional authorization for voluntary binding arbitration, whether performed by government employees or private arbitrators, should ensure that Congress has made, or the agency will make, an explicit judgment that arbitration is appropriate for the case or class of cases in question. Criteria for determining whether arbitration is appropriate include the following:

(a) Cases subject to arbitration should involve questions of fact or the application of well-established norms, even if statutory, rather than precedential issues or application of fundamental legal norms that are evolving.

(b) In determining whether to employ arbitration, Congress or the agency should consider the nature and weight of the private interests involved, the nature and weight of the government's interests, and the tradeoffs between the costs and benefits of arbitration and those of more formal processes. A heavy adjudicative caseload and the particularization of decisions in accord with previously declared guidelines justify the use of private arbitrators or other non-government persons.

2. Congress should assess the desirability of mandatory arbitration in light of the extent to which a person's participation in the affiliated program is voluntary.[3] For example, participation in an entitlement program is more likely to reflect need than consent, and should not be regarded as consent to arbitration of eligibility.

3. Congressional authorization for arbitration should ensure that:

(a) The agency has an opportunity to choose whether to resort to arbitration,[4] and to review the overall composition of any arbitral pool to ensure its neutrality and, where appropriate, specialized competence. Agencies should either employ arbitral pools and procedures that are well-established, such as those of the AAA, or should develop rosters or pools to meet their special needs; [5]

(b) Parties to an arbitrable controversy, including an agency, have a role in the selection of the arbitrator, consistent with preserving the neutrality of the decider, for example by striking names from a list; and

(c) Arbitral awards are review by agencies or by courts under the criteria of the U.S. Arbitration Act, which authorizes review of the facial validity of the award and the intergrity of the process. Agencies can be authorized ordinarily to review individual awards with no specific provision for judicial review.[6] If so, no special provision need be made for judical review of individual awards. Judicial review of the overall structure and fairness of the arbitration program should suffice. In the rare case in which a serious constitutional issue attends an individual arbitration, such as an allegation of a taking, existing law provides avenues for relief.

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[1] *See generally* Recommendation 86-3, *Agencies' Use of Alternative Means of Dispute Resolution*, 1 CFR 305.86-3.

[2] *See* Recommendation 82-2, *Resolving Disputes Under Federal Grant Programs*, 1 CFR 305.82-2; Recommendations 82-4 and 85-5, *procedures for Negotiating Proposed Regulations*, 1 CFR 305.82-4 and 85-5; and Recommendation 84-4, *Negotiated Cleanup of Hazardous Waste Sites Under CERCLA*, 1 CFR § 305.84-4.

[3] *See* Recommendation 86-3, ¶¶7-9, *Agencies' Use of Alternative Means of Dispute Resolution*, for other limitations on the use of mandatory arbitration.

[4] *See Id.*

[5] *See* Recommendation 86-8, ¶1(c), *Acquiring the Services of Neutrals for Alternative Means of Dispute Resolution*.

[6] *See* Recommendation 86-3, ¶4, *Agencies' Use of Alternative Means of Dispute Resolution*.

4. Agencies should ensure that the standard for arbitral decisions is reasonably specific, by promulgating administrative standards where statutes do not sufficiently guide arbitral decision. A substantial justice standard for arbitral awards should be used only when explicitly approved by the agency, because of the resulting difficulties of administrative or judicial review of the outcome. The sufficiency of other standards should be judged by whether the parties can consent meaningfully to arbitration and can prepare their cases, whether the arbitrators can produce reasonably consistent decisions, and whether reviewing entities can judge the facial validity of awards.

5. The following considerations should govern the ongoing administration of arbitral programs:

(a) Agencies should be careful to preserve the objectivity of arbitration by avoiding instructions or forms of oversight that would threaten to undermine the arbitrator's neutrality in a particular case. Plainly, however, generally applicable indicators of pertinent government policy, such as interpretive regulations, are meant to be controlling, whether proceedings be in the form of arbitration or agency adjudication.

(b) Authority to determine the arbitrability of particular disputes can be placed in the courts, as under the U.S. Arbitration Act, or in another neutral third party, such as the administering agency where arbitration concerns private parties, or in an agency other than one which is a party to arbitration.

(c) Interpretive rulemaking can alter the standards for future arbitration when monitoring of awards reveals outcomes inconsistent with the agency's expectations in employing arbitration.

5. Add a new § 310.12 to 1 CFR Part 310, to read as follows:

§ 310.12 Statement on resolution of Freedom of Information Act disputes.

The Administrative Conference sponsored a study of the resolution of disputes arising out of Freedom of Information Act ("FOIA") requests that are not handled to the requester's satisfaction at the agency level. Specifically, the study proposed the establishment of an independent administrative tribunal to resolve these disputes, either in formal hearing proceedings or through informal conciliation. Alternatively, the study suggested the appointment of an ombudsman within the Department of Justice to review and report on agency FOIA decisions, mediate FOIA disputes, and/or provide informal assistance to persons requesting information from agencies under FOIA.

Currently available data do not clearly establish the need for either of these specific mechanisms for handling FOIA disputes. The ability of the administrative tribunal in particular to increase the efficiency or effectiveness of FOIA dispute resolution is doubtful, especially given the moderate FOIA caseload (approximately 500 new federal court filings per year) and the high degree of public confidence in the current system of *de novo* judicial review of agency FOIA decisions.

However, the Conference believes that greater reliance on informal approaches to FOIA dispute resolution could result in more effective handling of some FOIA disputes without resort to court litigation; thus these approaches bear further exploration. Accordingly, the Administrative Conference concludes the following:

1. The Conference does not at this time recommend supplanting or changing the currently available remedy of judicial review in federal district courts for requesters denied information under the Freedom of Information Act. However, the Conference does believe that a number of cases filed each year challenging agency denials of information under the Act could be resolved without litigation. Additionally, some disputes involving agency handling of Freedom of Information Act requests (i.e., issues such as processing delay, adequacy of the agency's records search, or availability of fee waivers as distinct from the outcome of the request on the merits) may arise from misunderstandings that could be quickly cleared up through informal investigation or discussion. Continuing attention should be given to developing mechanisms to simplify and to speed the process of review.

2. The Department of Justice and other agencies handling FOIA requests should explore the voluntary use of informal alternative dispute resolution techniques, such as informal investigation of complaints, mediation or conciliation, and provision of a neutral government official to aid the parties in reaching settlement,[1] to avoid unnecessary litigation of Freedom of Information Act disputes, and should use these techniques when appropriate.

3. On a limited basis, the Department of Justice already provides informal assistance to requesters that the Conference believes helps them in resolving Freedom of Information Act disputes. However, this function is not generally known to the public. These services would be valuable to a larger number of people than now receive them, and the Conference encourages the Department of Justice to explore means of making them better known and more generally available.

[1] *See* ACUS Recommendation 86-3, Agencies' Use of Alternative Means of Dispute Resolution, Paragraph 10.

Jeffrey S. Lubbers,

Research Director.

June 17, 1987.

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FEDERAL ELECTION COMMISSION

[Notice 1987-9]

11 CFR Parts 4 and 5

Public Records and the Freedom of Information Act; Request for Comments

AGENCY: Federal Election Commission.

ACTION: Interim rules with request for comments.

SUMMARY: The Commission is revising its regulations governing the Freedom of Information Act (the "FOIA") by promulgating interim rules implementing certain relevant provisions of the Freedom of Information Reform Act of 1986 (Pub. L. 99-570). The Commission requests comments on the interim rules. Specific information on the interim rules is provided in the supplementary information which follows.

DATE: The interim rules are effective on June 24, 1987. To be assured of consideration, comments must be in writing and must be received on or before July 24, 1987. Comments should refer to specific sections in the regulations.

ADDRESS: Comments must be addressed to: Ms. Susan E. Propper, Assistant General Counsel, 999 E Street, NW., Washington, DC 20463. All comments received will be available for public inspection in the Commission's Office of Public Records at 999 E Street, NW., Washington, DC between the hours of 9:00 a.m. and 5:00 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Ms. Susan E. Propper, Assistant General Counsel, 999 E Street, NW., Washington, DC 20463, (202) 376-5690 or Toll Free (800) 424-9530.

SUPPLEMENTARY INFORMATION: The interim rules revising certain of the Commission's regulations set forth at 11 CFR Part 4 arise from the Freedom of Information Reform Act of 1986 ("the Reform Act"), which was enacted on

October 27, 1986 as part of the omnibus Anti-Drug Abuse Act of 1986 (specifically, as sections 1801–04 of that Act). Among the Reform Act's requirements is that agencies follow the revisions to the FOIA's fee provisions beginning on April 27, 1987. The Commission is revising its regulations accordingly. However, the Commission must have fee guidelines to govern FOIA requests received before the final rules are published. Therefore, the Commission is publishing these revised fee regulations as interim rules, while requesting comment on them. These interim rules will be effective until final rules are published. Interim rules are permitted under the Administrative Procedure Act when an agency can show that good cause exists because compliance with the notice and public comment procedures are impracticable. 5 U.S.C. 553(b). As the Commission must now follow the Reform Act's fee provisions, there must be a mechanism for assessing fees pending the Commission's adoption of final rules. Interim rules serve this purpose. Moreover, as required by the Reform Act, the Commission's interim rules adhere closely to the final guidelines issued by the Office of Management and Budget ("OMB"), which were issued after notice and public comment. The Commission will issue final rules following the conclusion of the comment period.

Generally, the Reform Act broadened the law enforcement protections of the FOIA and modified the FOIA's fee provisions. The Reform Act accomplished the former by extensively revising one of the categories for exempting information from disclosure under the FOIA, "Exemption 7" (11 CFR 4.5(a)(7)), and by establishing three special exclusions for specific types of law enforcement records. Only one of these exclusions is relevant to the Commission's work (11 CFR 4.5(b)) insofar as the other two special exclusions govern records maintained by a criminal law enforcement agency and records maintained by the Federal Bureau of Investigation ("FBI"), respectively. *See* 5 U.S.C. 552(c) (2) and (3). The new law enforcement provisions of the Reform Act became effective immediately upon the law's enactment.

The other sections of the FOIA which were revised by the Reform Act were the fee provisions. The purpose of revising the fee provisions is to make the FOIA fees charged by government agencies more uniform. The Reform Act required OMB to promulgate guidelines aimed at developing a standard schedule of fees which can be utilized by all agencies which are subject to the FOIA. Since the exact costs of providing various chargeable services under the FOIA vary among agencies, OMB has developed, in its final guidelines, a set of definitions and procedures governing fees for FOIA services, rather than a single set of specific fees. (*See* 52 FR 10012, March 27, 1987.) In these interim rules, the Commission has followed OMB's guidelines in revising its fee regulations, insuring that they are in conformance with government-wide standards.

In addition to mandating revisions in FOIA fee schedules, the Reform Act also revised the fee reduction and waiver standard. That issue was not covered in OMB's guidelines insofar as OMB determined that it lacked the authority to issue guidance on fee waivers. Accordingly, the Commission's interim rules include a revision of the FOIA fee reduction and waiver standard drawn directly from the language of the Reform Act, along with procedures for implementing that standard.

Finally, along with the revisions to 11 CFR Part 4, the Commission is concomitantly updating certain fees in its fee schedule governing documents obtained from the Commission's Public Disclosure division, which is set forth at 11 CFR 5.6. This fee schedule involves documents which are obtained independently of the FOIA and therefore is unaffected by the Reform Act. The Commission is, however, proposing certain changes in the Public Disclosure fee schedule which are consistent with the revised FOIA fee schedule. These revisions involve the costs of reels of microfilm and staff time and result from changes in the direct costs of microfilm and salaries to the Commission since these regulations were last revised in 1984.

Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is hereby certified that these interim rules will not have a significant economic impact on a substantial number of small entities. The basis for this certification is that any economic impact on small entities resulting from these interim rules would be attributable to the Reform Act, not to these regulations.

List of Subjects

11 CFR Part 4

Freedom of Information Act.

11 CFR Part 5

Archives and records.

For the reasons set out in the preamble, Title 11, Parts 4 and 5 of the Code of Federal Regulations are revised as follows.

PART 4—PUBLIC RECORDS AND THE FREEDOM OF INFORMATION ACT

1. The authority citation for Part 4 is revised to read as follows:

Authority: 5 U.S.C. 552, as amended.

2. Section 4.1 is amended by adding paragraphs (g) through (n) to read as follows:

§ 4.1 Definitions.

* * * * *

(g) "Direct costs" means those expenditures which the Commission actually incurs in searching for and duplicating (and, in the case of commercial use requestors, reviewing) documents to respond to a FOIA request. Direct costs include the salary of the employee performing the work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating duplicating equipment. Direct costs do not include overhead expenses such as the cost of space and heating or lighting the facility in which the records are stored.

(h) "Search" means all time spent looking for material that is responsive to a FOIA request, including page-by-page or line-by-line identification of material within documents. This includes both manual searches and searches conducted with a computer using existing programming. Search time does not include review of material in order to determine whether the material is exempt from disclosure.

(i) "Review" means the process of examining a document located in response to a commercial use request to determine whether any portion of the document located is exempt from disclosure. Review also refers to processing any document for disclosure, i.e., doing all that is necessary to excise exempt portions of the document and otherwise prepare the document for release. Review does not include time spent by the Commission resolving general legal or policy issues regarding the application of exemptions.

(j) "Duplication" means the process of making a copy of a document necessary to respond to a FOIA request. Examples of the form such copies can take include, but are not limited to, paper copy, microform, audio-visual materials, or machine readable documentation (e.g., magnetic tape or disk).

(k) "Commercial use" means a purpose that furthers the commercial, trade, or profit interests of the requestor or the person on whose behalf the request is made. The Commission's determination as to whether documents are being requested for a commercial use will be based on the purpose for which the documents are being requested. Where the Commission has reasonable cause to doubt the use for which the requestor claims to have made the request or where that use is not clear from the request itself, the Commission will seek additional clarification before assigning the request to a specific category.

(l) "Educational institution" means a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

(m) "Non-commercial scientific institution" means an organization that is not operated on a commercial basis, as that term is defined in paragraph (k) of this section, and which is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry.

(n) "Representative of the news media" means a person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term news means information that is about current events or that would be of current interest to the public. Examples of news media entities include, but are not limited to, television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of news, as defined in this paragraph) who make their products available for purchase or subscription by the general public. A freelance journalist may be regarded as working for a news organization and therefore considered a representative of the news media if that person can demonstrate a solid basis for expecting publication by that news organization, even though that person is not actually employed by that organization. The best means by which a freelance journalist can demonstrate a solid basis for expecting publication by a news organization is by having a publication contract with that news organization. When no such contract is present, the Commission will look to the freelance journalist's past publication record in making this determination.

3. Section 4.5 is amended by revising paragraphs (a) introductory text and (a)(7), redesignating paragraphs (b) through (d) as paragraphs (c) through (e), and adding a new paragraph (b) to read as follows:

§ 4.5 Categories of exemptions.

(a) No requests under 5 U.S.C. 552 shall be denied release unless the record contains, or its disclosure would reveal, matters that are:

* * * * *

(7) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:

(i) Could reasonably be expected to interfere with enforcement proceedings;

(ii) Would deprive a person of a right to a fair trial or an impartial adjudication;

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;

(v) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(vi) Could reasonably be expected to endanger the life or physical safety of any individual.

(b) Whenever a request is made which involves access to records described in 11 CFR 4.5(a)(7) and

(1) The investigation or proceeding involves a possible violation of criminal law; and

(2) There is reason to believe that—

(i) The subject of the investigation or proceeding is not aware of its pendency, and

(ii) Disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings;

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of the Freedom of Information Act.

* * * * *

4. Section 4.7 is amended by revising paragraph (c) to read as follows:

§ 4.7 Requests for records.

* * * * *

(c) Records or copies thereof will normally be made available either immediately upon receipt of a request or within ten working days thereafter, or twenty working days in the case of an appeal, unless in unusual circumstances the time is extended or subject to 11 CFR 4.9(f)(3), which governs advance payments. In the event the time is extended, the requestor shall be notified of the reasons for the extension and the date on which a determination is expected to be made, but in no case shall the extended time exceed ten working days. An extension may be made if it is—

(1) Necessary to locate records or transfer them from physically separate facilities; or

(2) Necessary to search for, collect, and appropriately examine a large quantity of separate and distinct records which are the subject of a single request; or

(3) Necessary for consultation with another agency which has a substantial interest in the determination of the request, or with two or more components of the Commission which have a substantial subject matter interest therein.

* * * * *

5. Section 4.9 is revised to read as follows:

§ 4.9 Fees.

(a) *Exceptions to fee charges*—(1) *General.* Except for a commercial use requestor, the Commission will not charge a fee to any requestor for the first two hours of search time and the first 100 pages of duplication in response to any FOIA request.

(2) *Free computer search time.* For purposes of this paragraph, the term "search time" is based on the concept of a manual search. To apply this to a search conducted by a computer, the Commission will provide the equivalent dollar value of two hours of professional staff time, calculated according to paragraph (c)(4) of this section, in computer search time. Computer search time is determined by adding the cost of the computer connect time actually used for the search, calculated at the rate of $25.00 per hour, to the cost of the operator's salary for the time spent conducting the computer search, calculated at the professional staff time rate set forth at paragraph (c)(4) of this section.

(3) *Definition of pages.* For purposes of this paragraph, the word "pages" refers to paper copies of a standard agency size which will normally be 8½"

x 11" or 8½" x 14". Thus, while a requestor would not be entitled to 100 free computer disks, for example, a requestor would be entitled to 100 free pages of a computer printout.

(4) *Minimum charge.* The Commission will not charge a fee to any requestor when the allowable direct cost of that FOIA request is equal to or less than the Commission's cost of routinely collecting and processing a FOIA request fee.

(b) *Fee reduction or waiver.* (1) The Commission will consider requests for the reduction or waiver of any fees assessed pursuant to paragraph (c)(1) of this section if it determines, either as a result of its own motion or in response to a written submission by the requestor, that disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and that disclosure of the information is not primarily in the commercial interest of the requestor.

(2) A request for a reduction or waiver of fees shall be made in writing by the FOIA requestor; shall accompany the relevant FOIA request so as to be considered timely; and shall include a specific explanation as to why the fee for that FOIA request should be reduced or waived, applying the standard stated in paragraph (b)(1) of this section to the facts of that particular request. In addition, the explanation shall include: the requestor's (and user's, if the requestor and the user are different persons or entities) identity, qualifications and expertise in the subject area, and ability and intention to disseminate the information to the public; and a discussion of any commercial or personal benefit that the requestor (and user, if the requestor and user are different persons or entities) expects as a result of disclosure, including whether the information disclosed would be resold in any form at a fee above actual cost.

(c) *Fees to be charged.* (1) The FOIA services provided by the Commission in response to a FOIA request for which the requestor will be charged will depend upon the category of the requestor. The categories of FOIA requestors are as follows:

(i) *Commercial use requestors.* A requestor of documents for commercial use will be assessed reasonable standard charges for the full allowable direct costs of searching for, reviewing for release and duplicating the records sought, according to the Commission's schedule of fees for those services as set forth at paragraph (c)(4) of this section. A commercial use requestor is not entitled to two hours of free search time nor 100 free pages of duplication of documents.

(ii) *Educational and non-commercial scientific institution requestors.* The Commission will provide documents to requestors in this category for the cost of duplication of the records provided by the Commission in response to the request, according to the Commission's schedule of fees as set forth at paragraph (c)(4) of this section, excluding charges for the first 100 pages of duplication. Requestors in this category will not be charged for search time. To be eligible for inclusion in this category, requestors must show that the request is being made as authorized by and under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a non-commercial scientific institution) research.

(iii) *Requestors who are representatives of the news media.* The Commission will provide documents to requestors in this category for the cost of duplication of the records provided by the Commission in response to the request, according to the Commission's schedule of fees as set forth at paragraph (c)(4) of this section, excluding charges for the first 100 pages of duplication. Requestors in this category will not be charged for search time. To be eligible for inclusion in this category, the requestor must meet the criteria listed at 11 CFR 4.1(n) and his or her request must not be made for a commercial use. A request for records supporting the news dissemination function of the requestor shall not be considered to be a request that is for a commercial use.

(iv) *All other requestors.* The Commission will charge requestors who do not fit into any of the categories listed in paragraphs (c)(1) (i), (ii) or (iii) of this section the full direct costs of searching for and duplicating records in response to the request, according to the Commission's schedule of fees as set forth at paragraph (c)(4) of this section, excluding charges for the first two hours of search time and the first 100 pages of duplication. Requests from record subjects for records about themselves will continue to be treated under the fee provisions of the Privacy Act of 1974 which permit fees only for duplication.

(2) The Commission may assess fees for the full allowable direct costs of searching for documents in response to a request even if the Commission fails to locate any documents which are responsive to that request and, in the case of commercial use requestors, of reviewing documents located in response to a request which the Commission determines are exempt from disclosure.

(3) If the Commission estimates that search or duplication charges are likely to exceed $25.00, it will notify the requestor of the estimated amount of the fee unless the requestor has indicated in advance a willingness to pay a fee as high as that estimated by the Commission. Through this notification, the Commission will offer the requestor the opportunity to confer with Commission staff to reformulate the original request in order to meet the requestor's needs at a lower cost.

(4) The following is the schedule of the Commission's standard fees. The cost of staff time will be added to all of the following fees, generally at the "Professional" rate listed below, except for the cost of "Photocopying from photocopying machines" which has been calculated to include staff time.

Photocopying

Photocopying from photocopying machines—$.07 per page
Photocopying from microfilm reader-printer—$.15 per page
Paper copies from microfilm-paper print machine—$.05 per frame page

Reels of Microfilm

Daily film (partial or complete roll)—$2.85 per roll
Other film (partial or complete roll)—$5.00 per roll
Publications: (new or not from available stocks)
Cost of photocopying document—$.07 per page
Cost of binding document—$.30 per inch
Publications: (available stock)

If available from stock on hand, cost is based on previously calculated cost as stated in the publication (based on actual cost per copy, including reproduction and binding). Commission publications for which fees will be charged include, but are not limited to, the following: Advisory Opinion Index, Report on Financial Activity, Financial Control and Compliance Manual, MUR Index, and Guideline for Presentation in Good Order.

Computer Tapes

Cost to process the request at the rate of $25.00 per hour connect time plus the cost of the computer tape ($25.00) and professional staff time (see Staff Time).

Computer Indexes (including Name Searches): Cost to process the request at the rate of $25.00 per hour connect time plus the cost of professional staff time (see Staff Time).

Staff Time

Clerical: $4.50 per each half hour (agency average of staff below a GS-11) for each request.

Professional: $12.40 per each half hour (agency average of staff at GS-11 and above) for each request.

Other Charges

Certification of a Document: $7.35 per quarter hour.

Transcripts of Commission meetings not previously transcribed: $7.50 per half hour (equivalent of a GS-11 executive secretary).

The Commission will not charge a fee for ordinary packaging and mailing of records requested. However, the Commission will charge the requestor for the full direct costs of all special services, such as express mail, when they are requested.

(5) Upon receipt of any request for the production of computer tape or microfilm, the Commission will advise the requestor of the identity of the private contractor who will perform the duplication services. If fees are charged for the production of computer tape or microfilm, they shall be made payable to that private contractor and shall be forwarded to the Commission.

(d) *Interest charges.* FOIA requestors should pay fees within 30 days following the day on which the invoice for that request was sent to the requestor. If the invoice is unpaid on the 31st day following the day on which the invoice was sent, the Commission will begin assessing interest charges, which will accrue from the date the invoice was mailed. Interest will be charged at a rate that is equal to the average investment rate for the Treasury tax and loan accounts for the 12-month period ending on September 30 of each year, rounded to the nearest whole percentage point, pursuant to 31 U.S.C. 3717. The accrual of interest will be stayed by the Commission's receipt of the fee, even if the fee has not yet been processed.

(e) *Aggregating requests.* A requestor may not file multiple requests, each seeking portions of a document or documents, in order to avoid payment of fees. When the Commission reasonably believes that a FOIA requestor or group of requestors acting in concert is attempting to break a request down into a series of requests for the purpose of evading the assessment of fees, the Commission will aggregate any such requests and charge the appropriate fees. In making this determination, the Commission will consider the time period in which the requests have occurred, the relationship of the requestors, and the subject matter of the requests.

(f) *Advance payments.* The Commission will require a requestor to make an advance payment, i.e., a payment before work is commenced or continued on a request, when:

(1) The Commission estimates or determines that allowable charges that a requestor may be required to pay are likely to exceed $250. In such a case, the Commission will notify the requestor of the likely cost and, where the requestor has a history of prompt payment of FOIA fees, obtain satisfactory assurance of full payment, or in the case of a requestor with no FOIA fee payment history, the Commission will require an advance payment of an amount up to the full estimated charges; or

(2) A requestor has previously failed to pay a fee in a timely fashion (i.e., within 30 days of the date of the billing). In such a case, the Commission may require that the requestor pay the full amount owed plus any applicable interest or demonstrate that the fee has been paid and make an advance payment of the full amount of the estimated fee before the Commission begins to process a new request or a pending request from that requestor.

(3) If the provisions of paragraph (f)(1) or (2) of this section apply, the administrative time limits prescribed in 11 CFR 4.7(c) will begin only after the Commission has received the payments or the requestor has made acceptable arrangements to make the payments required by paragraph (f)(1) or (2) of this section.

PART 5—ACCESS TO PUBLIC DISCLOSURE DIVISION DOCUMENTS

1. The authority citation for Part 5 continues to read as follows:

Authority: 2 U.S.C. 437f(d), 437g(a)(4)(B)(ii), 438(a), and 31 U.S.C. 9701.

2. Section 5.6(a)(1) is amended by revising the fees for "Reels of Microfilm", "Research Time/ Photocopying Time", and "Other Charges" to read as follows:

§ 5.6 Fees.

(a)(1) * * *

Reels of Microfilm

Daily film (partial or complete roll)—$2.85 per roll

Other film (partial or complete roll)—$5.00 per roll

Research Time/Photocopying Time

Clerical: First ½ hour is free; remaining time costs $4.50 per each half hour (agency average of staff below a GS-11) for each request

Professional: First ½ hour is free; remaining time costs $12.40 per each half hour (agency average of staff at GS-11 and above) for each request

Other Charges

Certification of a Document: $7.35 per quarter hour

Transcripts of Commission meetings not previously transcribed: $7.50 per half hour (equivalent of a GS-11 executive secretary)

* * * * *

Dated: June 18, 1987.

Scott E. Thomas,

Chairman, Federal Election Commission.

[FR Doc. 87-14220 Filed 6-23-87; 8:45 am]

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FEDERAL HOME LOAN BANK BOARD

12 CFR Part 563

[No. 87-661-A]

Regulatory Capital Requirements of Insured Institutions; Clarification

Dated: June 10, 1987.

AGENCY: Federal Home Loan Bank Board.

ACTION: Final rule; clarification.

SUMMARY: The Federal Home Loan Bank Board ("Board") as operating head of the Federal Savings and Loan Insurance Corporation ("FSLIC") is amending its regulation setting the regulatory capital requirements for institutions insured by the FSLIC ("insured institutions") by clarifying a portion of the regulatory capital regulation that affects the computation of the contingency component.

EFFECTIVE DATE: June 10, 1987.

FOR FURTHER INFORMATION CONTACT: Jerilyn Rogin, Staff Attorney, (202) 377-7018, Jerome L. Edelstein, Assistant Director, (202) 377-7057, John F. Connolly, Deputy Director for Capital and Finance, (202) 377-6465, Regulations and Legislation Division, Office of General Counsel; Richard C. Pickering, Deputy Director, (202) 377-6770, or Joseph A. McKenzie, Director, Policy Analysis Division, (202) 377-6763, Office of Policy and Economic Research, Federal Home Loan Bank Board, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: This amendment is made pursuant to the Board's general authority under the National Housing Act and specifically under section 403(b), 12 U.S.C. 1726(b), as amended by the Garn-St Germain Depository Institutions Act of 1982, Pub. L. 97-320, section 202(d), 96 Stat. 1469, 1492.

On August 15, 1986, the Board adopted its revised regulatory capital regulation establishing the levels of capital required for all insured institutions. *See* Board Res. No. 86-857, 51 FR 33565-88 (Sept. 22, 1986) ("capital regulation"). Among other things, the capital regulation requires that insured