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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

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June 18, 1981

The Honorable Jack Brooks
Chairman, Committee on Government
Operations
House of Representatives

Dear Mr. Chairman:

This is in response to your request for our comments on H.R. 316, 97th Cong., 1st Sess., which if enacted would be cited as the "Limitation on Government Recordkeeping Requirements and Actions Act of 1981."

On the basis of remarks made upon the introduction of similar bills in the 96th Congress, it seems clear that the intent of this bill is to protect individuals and businesses against untimely Government regulatory enforcement with respect to their otherwise private business or personal endeavors. Although the bill thus would not seem to be intended to apply to those dealing directly with the Government by contract, grant, loan, or other mechanism for transferring funds or benefits, as presently drafted, it would have this effect. Among other things, our comments address a number of undue burdens which the present bill language would place on Government operations. Many of these burdens would be eliminated by redefining "person" in section 2(b)(3) of the bill to exclude those dealing directly with the Government.

Section 2(a)(1) of the bill would preclude an agency from requiring, or enforcing any law or regulation which requires, a person to maintain, prepare or produce any record (other than a record relating to a dangerous material), more than four years after the date of the transaction or event which is the subject of the record.

Section 2(a)(2) of the bill would preclude an agency from taking legal action against any person:

--for enforcement of a law or regulation, or

--for collection of civil fine, penalty or forfeiture, more than four years after the date of the act or failure to act which is the subject of the action.

These provisions in section 2 would not apply when the Internal Revenue Code of 1954 or its implementing regulations provide otherwise.

RECORDKEEPING PROVISIONS

The bill would provide a uniform four-year limit on the time that any agency could require a person to retain records. While we believe that reducing records retention requirements is a desirable goal, we do

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not believe that imposing a single maximum retention period is a desirable way to achieve that goal. Instead, we prefer the approach recently adopted by the Congress in section 2(b)(2) of the Paperwork Reduction Act of 1980, Pub. L. No. 96-511, December 11, 1980, 94 Stat. 2825, which amended 44 U.S.C. § 2905 to provide that:

> "The Administrator of General Services shall assist the Administrator for the Office of Information and Regulatory Affairs in conducting studies and developing standards relating to record retention requirements imposed on the public and on State and local governments by Federal agencies."

This provision for the first time provides for review and coordination of records retention requirements imposed on the public. The objective of this provision is to establish realistic requirements and to provide some consistency to presently conflicting requirements. We believe that the proper implementation of this provision will accomplish essentially the same records retention objective as H.R. 316 without placing an artificial ceiling on records retention requirements.

Should the Committee decide, however, that a uniform retention period for all federally mandated recordkeeping is desirable, there are several changes in H.R. 316 that we must recommend.

The bill measures the four-year retention period from the date of the "transaction or event" which is the subject of the record. However, the bill does not define what is meant by "transaction or event."

If one interprets the "transaction or event" as the negotiation or award of a Government contract, this bill would seriously curtail GAO's post-award audit capabilities as well as agency audit efforts, especially when contracts are of long duration. For example, if the four-year period starts at the negotiation date, and assuming that the contract takes three to four years to complete (as often happens on major contracts such as those for weapons system production or major construction), then neither this Office nor any other agency will have access to the records needed to determine whether the contract has been properly negotiated and carried out, and to sustain a case for recovery for defective pricing, price fixing, kickbacks, or fraud. The records of the negotiation of the contract, as well as of transactions during the entire period of the contract, are needed for audit purposes. If the bill is enacted as worded and four years have elapsed, such data may have been destroyed or access to them could be denied. Currently, GAO has access to contractors' records for three years from the date of final payment under a contract (see 41 U.S.C. § 254(c), 10 U.S.C. § 2313(b)), and we favor continuation of this authority.

We recommend that records relating to Government contracts be exempted from the provision of this bill. Alternatively, the bill should be amended to provide that with respect to Government contracts the "transaction or event" refers to the point of time when final payment is made under the Government contract or when the program to which the contract relates is completed.

LIMITATION ON BRINGING ACTIONS

The bill would establish a uniform four-year limitation period on the bringing of actions by the Government to enforce laws or regulations or to collect fines, penalties or forfeitures. It would in this respect conflict with other statutes establishing limitations on the bringing of actions by the Government.

For example, currently, an action by the United States for enforcement of any civil fine, penalty or forfeiture is barred unless commenced within five years of the date the claim first accrued, if within this period the offender or his property is found within the United States in order that proper service may be made. 28 U.S.C § 2462. Section 2(a)(2) of the bill would conflict with this provision. The statute of limitations for bringing contract actions by the United States is currently six years (28 U.S.C § 2415(a)), and that for tort actions is three years or six years depending on the tort (28 U.S.C. § 2415(b)). There are also myriad separate limitations periods under various Federal programs. Section 2(a)(2) of the bill would be in conflict with most of these provisions. If it is the intent of the bill that section 2(a)(2) supersede these existing statutes of limitations, these provisions should all be repealed to eliminate any confusion.

However, we are opposed to enactment of a law which imposed a four-year limitation on the bringing of all actions by the Government. A law with such a broad application would have a devastating effect upon ongoing efforts to collect $24 billion in delinquent receivables that have been identified by Federal agencies. To illustrate, over $1.3 billion in delinquent amounts have been referred to the Justice Department for collection, and we understand that almost all these debts involve transactions more than four years old.

Furthermore, since the limitation period for actions against the Government is in most instances six years, such a law would result in affording litigants against the Government a greater period of time within which to sue to protect a private interest than the Government is afforded to sue to protect a public interest. We see no justification for such discrimination against the Government.

Rather than shortening the limitation period, we favor extending it in some instances to allow the Government to recover moneys owed it.

In testimony before the Governmental Affairs Committee, we recommended that the current statute of limitations be amended to explicitly recognize that the six year limitation period does not prohibit the offset of debts owed the Government. We recommended this legislative action because many debts to the Government are now or soon will be six years old. Without such action, billions of dollars may be lost to the Government.

The limitation of actions provision of the bill also needs to be further clarified. For example, it applies to actions brought to enforce a "law or regulation." However, while section 2(b)(4) of the bill defines "regulation" as used in the bill, "law" is left undefined. Thus it is unclear whether "law" is used in a narrow sense and is intended to include statutes only, or whether it is used in a broader sense and is also intended to include actions to enforce judgments rendered by courts of competent jurisdiction, or common law or equitable actions (for example, suits for breach of contracts, tort actions or actions for the recovery of money wrongfully, erroneously or illegally paid by agents of the Government).

Thus, it is unclear whether the bill is intended to apply to contract actions brought by the Government. This doubt exists because although actions to enforce contracts have their origin in the common law, the terms and conditions under which the Government contracts are governed for the most part by statutes and statutory regulation. Thus, the Committee should clarify the intent of the bill in this regard and define the term "law" as used in section 2 of the bill.

The bill also does not define "the date of the act or failure to act" from which the limitation period begins to run. With regard to debts owed the Government, it is crucial that this term be defined.

Without this definition, the bill's provision might be interpreted as requiring transaction dates (that is, the date the debt was incurred) for determining the act or failure to act used as the starting point for the running of the statute of limitations. This would be highly undesirable. It would charge Federal agencies with the burdensome task of establishing a limitation period for each transaction comprising an overall debt. More importantly, however, a law limiting debt collection actions to four years after transaction dates would virtually eliminate the possibility of Federal agencies:

—Collecting loans to educational institutions and students under programs such as the National Direct Student Loan Program. At the present time, the Department of Education has over $2.2 billion in such loans outstanding that are primarily related to transactions more than four years old.

—Recovering unused funds on unauthorized expenditures under grants that are in effect for three years or more. Receivable amounts in

these grants are usually identified after grant expiration dates during processes, such as onsite audits, to check on performance by grantees. Data is not readily available to estimate the receivable amounts that are identified in close-out processes, but available evidence suggests that hundreds of millions of dollars may be involved.

DANGEROUS MATERIALS

While section 2(a)(1) of the bill excludes from its application records relating to dangerous materials, section 2(a)(2) of the bill does not. Consequently, while persons could still be required to retain records related to dangerous materials for more than four years, their value for Government litigative and law enforcement purposes would be reduced. (Of course they would remain useful for purposes of private litigation.) It is unclear whether this distinction was intended.

Also the definition of "dangerous material" provided by 2(b)(2)(A) of the bill includes hazardous waste as defined by section 1004 of the Resource Conservation and Recovery Act of 1972 (42 U.S.C § 6903). While this definition includes dangerous substances found in industrial waste products, it does not include dangerous substances produced for use and application in the environment (such as toxic chemicals found in pesticides). Whatever purpose is sought to be achieved by excluding records relating to harmful waste products from the bill's restrictions may also justify excluding records relating to other harmful substances. Thus, the Committee may wish to consider broadening the definition of dangerous materials.

Sincerely yours,

Milton J. Socolar

Acting Comptroller General
of the United States