10/2/95-IRM cys to: Cranford, Levin, Graser, Goldberg, Shelton, Voglewede

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PAPER NUMBER: CRC-95-0837 LOGGING DATE: Sep 28 95

ACTION OFFICE: EDO

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ADDRESSEE: AGENCY HEADS

LETTER DATE: Sep 21 95 FILE CODE: OM-12 OMB

SUBJECT: GUIDELINES AND INSTRUCTIONS FOR IMPLEMENTING SECTION 204, "STATE LOCAL, AND TRIVAL GOVERNMENT INPUT," OF TITLE II OF P.L. 104-4

ACTION: Appropriate

DISTRIBUTION: RF

SPECIAL HANDLING: NONE

CONSTITUENT:

NOTES:

DATE DUE:

SIGNATURE: DATE SIGNED:
AFFILIATION:

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

THE DIRECTOR

September 21, 1995

M-95-20

MEMORANDUM FOR THE HEADS OF DEPARTMENTS AND AGENCIES

FROM: Alice M. Rivlin
Director

SUBJECT: Guidelines and Instructions for Implementing Section 204, "State, Local, and Tribal Government Input," of Title II of P.L. 104-4

On March 22, 1995, President Clinton signed into law the "Unfunded Mandates Reform Act of 1995" (P.L. 104-4) (the "Act"). Section 204(a) of the Act requires that --

> "Each agency shall, to the extent permitted in law, develop an effective process to permit elected officers of State, local, and tribal governments (or their designated employees with authority to act on their behalf) to provide meaningful and timely input in the development of regulatory proposals containing significant Federal intergovernmental mandates."[1]

Section 204(b) of the Act provides an exemption from the Federal Advisory Committee Act (5 U.S.C. App.) for intergovernmental consultations involving intergovernmental responsibilities or administration.

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[1] The Act's consultation requirement builds on that set forth by President Clinton on October 26, 1993, in Executive Order No. 12875. In order "to reduce the imposition of unfunded mandates upon State, local, and tribal governments," the Executive order requires agencies, when they seek to impose unfunded mandates upon State, local, or tribal governments through a regulation, to provide to the Director of the Office of Management and Budget "a description of the extent of the agency's prior consultation with representatives of affected State, local, and tribal governments, the nature of their concerns, any written communications submitted to the agency by such units of government, and the agency's position supporting the need to issue the regulation containing the mandate" (Sec. 1(a)(2)).

Section 204(c) requires the President to issue guidelines and instructions to Federal agencies "for appropriate implementation" of both of these provisions "consistent with applicable laws and regulations." In accordance with the President's delegation of authority,[2] OMB is today issuing those guidelines and instructions.[3]

I. THE PROCESS FOR INTERGOVERNMENTAL CONSULTATION.

It is important that this intergovernmental consultation process not only achieves meaningful input, but also builds a better understanding among Federal, State, local, and tribal governments. As described in Part II, below, the process required by the Federal Advisory Committee Act is not to act as a hindrance to full and effective intergovernmental consultation.

A. What Agencies are Covered?

The process for intergovernmental consultation called for by Section 204(a) applies to all Federal agencies (as defined in 5 U.S.C. 551(1)), with the exception of independent regulatory agencies.

B. When Should Intergovernmental Consultations Take Place?

Intergovernmental consultation should take place as early in the regulatory process as possible. Except where the need for immediate agency action precludes prior consultation, consultation should occur before publication of the notice of proposed rulemaking or other regulatory action proposing a significant Federal intergovernmental mandate. Consultation should continue after publication of the regulatory action initiating the proposal. Except in exceptional circumstances where the need for immediate action precludes prior consultation, consultation must occur prior to the formal promulgation in final form of the regulatory action.

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[2] See 60 Fed. Reg. 45039 (August 29, 1995).

[3] Portions of these guidelines and instructions are based on OMB Memorandum M-94-10, entitled "Guidance for Implementing E.O. 12875, 'Reduction of Unfunded Mandates,'" issued by Director Leon E. Panetta on January 11, 1994. These guidelines and instructions are not intended, and should not be construed, to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or its employees. Neither are these guidelines and instructions intended, nor should they be construed, to limit the availability of any exclusion from the Federal Advisory Committee Act contained in that Act or any applicable regulations.

C. With Whom Should Agencies Consult?

The statute directs agencies to develop an effective process to ensure that "elected officers of State, local, and tribal governments (or their designated employees with authority to act on their behalf)" who wish to provide meaningful and timely input are able to do so.

Each agency needs to develop an intergovernmental consultation process for that agency. To do so, the agency should first develop a proposal for that process, and consult with State, local, and tribal governments (as appropriate) concerning this proposed process, as soon as possible.

One approach an agency may wish to adopt is to designate a person or an office through which intergovernmental consultation should be coordinated. Another approach is for an agency to instruct those responsible for developing a rule to seek out the views of elected officers or their designated employees. An agency may also wish to develop other effective means of generating meaningful input or expand those that it already has. An agency will be able to obtain the fullest range of meaningful input from State, local, and tribal governments by undertaking the following kinds of consultation.

(1) Heads of Government.

Agencies should seek to consult with the highest levels of the pertinent government units, e.g., the Office of the Governor, Mayor, or Tribal Leader (or their designated employees with authority to act on their behalf). These officials are the ones elected to represent the people and are the ones that the public holds directly accountable for the actions of those government units.

(2) Both Program and Financial Officials.

Many regulatory agencies have functional counterparts in State, local, and tribal governments, e.g., those government officials who implement or enforce regulatory responsibilities required in whole or in part by the Federal agency. These local officials tend to be those most familiar with the Federal agency's regulatory program, and should be consulted as a source of important information concerning the likely effects of, or effective alternatives to, Federal regulatory proposals.

In addition, agencies should consult with those State, local, and tribal officials most directly responsible for ensuring the funding of compliance with the Federal mandate, e.g., the applicable treasury, budget, tax-collection, or other financial officials. These officials are institutionally responsible for

balancing the competing claims for scarce State, local, or tribal resources.

(3) Washington Representatives.

It is also important that Federal agencies consult with Washington representatives, where available, of associations representing elected officials. These Washington representatives often know which local elected officials are the most knowledgeable about, interested in, or responsible for, implementing specific issues, regulations or programs, and can ensure that a broad range of government officials learn of and provide valuable insight concerning a proposed intergovernmental mandate.

(4) Small Governments.

Agencies should make special efforts to consult with officials of small governments, and to develop a plan for such consultation under section 203 of Title II of the Act. Agencies may wish to consider several mechanisms for reaching small governments, including special task forces, periodic mailings through small government associations, or communication through rural development councils.

D. How Much Consultation Should There Be?

The scope of intergovernmental consultation should be based on common sense and be commensurate with the significance of the action being taken. The more costly, the more potentially disruptive, the more broadly applicable, the more controversial the proposed Federal intergovernmental mandate -- the more consultation there should be. An agency should decide the extent of its consultation on a case-by-case basis; a one-size-fits-all prescription is neither appropriate nor desirable.

E. What Should Be the Content of Consultation?

Agencies should seek views of State, local, and tribal governments regarding costs, benefits, risks, and alternative and flexible methods of compliance regarding their regulatory proposals. Agencies should also seek views on potential duplication with existing laws or regulations at other levels of government, and on ways to harmonize their rules with State, local and tribal policies and programs.

To assist with these consultations, agencies should first estimate the direct costs to be incurred by the State, local, or tribal governments in complying with the mandate and then inform the affected governmental units of these cost estimates. Estimates should cover both up-front and recurring costs, for a reasonable number of years after the rule is to be put into

effect. To the extent practicable, agencies should make reasonable efforts to disaggregate these cost estimates as they affect the various levels of government, or otherwise provide the criteria by which those affected can disaggregate the cost estimates in order to determine the potential costs to themselves. Where quantitative estimates are not feasible, agencies should work with other levels of government to discern and discuss qualitative costs.

Agencies should also consult on and estimate the benefits expected from the mandate for States, localities, tribes, and their residents and businesses. Estimates should cover both up-front and recurring benefits for a reasonable number of years after the rule is to be put into effect. To the extent practicable, agencies should make reasonable efforts to disaggregate these benefit estimates as they affect the various levels of government, or otherwise provide the criteria by which those affected can disaggregate the benefit estimates in order to determine the potential benefits to themselves. Where quantitative estimates are not feasible, agencies should work with other levels of government to discern and discuss qualitative benefits.

Agencies should also, during the consultative process, seek views on the expected method of compliance. Governmental units may have suggestions as to how to achieve the Federal regulatory objective in a way that is more effective, efficient, flexible, and consistent with State, local, and tribal governmental regulatory and other functions.

F. How Should Agencies Integrate These Intergovernmental Consultations into the Rulemaking Process?

It is important for agencies to integrate these consultation activities into the ongoing rulemaking process. The cost and benefit estimates, any additional viable suggestions received during the pre-notice consultations, and the agency plan to carry out intergovernmental consultation should be included in the preamble to the notice of proposed rulemaking. Publication of the cost and benefit estimates and the intergovernmental consultation plan in the **Federal Register** will assure that those governmental units that are not contacted directly will have access to the same cost and benefit estimates as those who were contacted directly, and have the opportunity to make their concerns known. Similarly, and consistent with E.O. 12875, any preamble transmitted to the **Federal Register** on or after October 2, 1995, should include, as of the particular stage of the rulemaking, the extent of the agency's prior consultations with representatives of affected State, local, and tribal governments, the nature of their concerns, any written communications submitted to the agency by such units of government, and the

agency's position supporting the need to issue the regulation containing the mandate.

G. What Compliance Reports Should Agencies Submit to OMB?

Under Section 208 of the Act, OMB is required to submit a report to Congress on agency compliance with the requirements of Title II of the Act, which includes the intergovernmental consultation requirement, on or before March 22, 1996, and annually thereafter. Accordingly, agencies should provide the Administrator of the Office of Information and Regulatory Affairs, by January 15, 1996, and annually on that date thereafter, a written report of each agency's compliance with Title II of the Act. The report should include a description of the process established by the agency to ensure meaningful input, as well as a description of agency consultations with State, local, and tribal governments for each proposed and final rule "containing significant Federal intergovernmental mandates." As part of the report to be submitted by January 15, 1996, agencies should also describe the plans they have developed to consult with small governments, under Section 203 of Title II of the Act.

II. THE EXEMPTION FROM THE FEDERAL ADVISORY COMMITTEE ACT

In order to facilitate the consultation process, section 204(b) of the Act provides an exemption from the Federal Advisory Committee Act ("FACA") (5 U.S.C. App.) "for the exchange of official views regarding the implementation of public laws requiring shared intergovernmental responsibilities or administration."[4] This exemption applies to all Federal agencies subject to FACA, and is not limited to the intergovernmental consultations required by Section 204(a) but instead applies to the entire range of intergovernmental responsibilities or administration. In accordance with the legislative intent, the exemption should be read broadly to facilitate intergovernmental communications on responsibilities or administration.

This exemption applies to meetings between Federal officials and employees and State, local, or tribal governments, acting through their elected officers, officials, employees, and Washington representatives, at which "views, information, or advice" are exchanged concerning the implementation of intergovernmental responsibilities or administration, including those that arise explicitly or implicitly under statute, regulation, or Executive order.[5]

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[4] House Conference Report 104-76 (March 13, 1995), p. 40.

[5] Specifically, this exemption from FACA applies where --

"(1) meetings are held exclusively between Federal officials

The scope of meetings covered by the exemption should be construed broadly to include any meetings called for any purpose relating to intergovernmental responsibilities or administration. Such meetings include, but are not limited to, meetings called for the purpose of seeking consensus; exchanging views, information, advice, and/or recommendations; or facilitating any other interaction relating to intergovernmental responsibilities or administration.

The guidance given above should help determine when a meeting qualifies under Section 204(b) of the Act for an exemption from the FACA. We also note that meetings that do not meet these guidelines for an exemption may nonetheless not be subject to the FACA in the first instance. Accordingly, to determine whether there is even a need for an exemption from the FACA, agencies should also consult the FACA itself, as well as the General Service Administration's regulations at 41 C.F.R. Subpart 101-6.10, and the court decisions construing the FACA.

* * * * *

It is important that agencies make their best efforts to implement these guidelines and instructions. As the Conference Report stated, "an important part of efforts to improve the Federal regulatory process entails improved communications with State, local, and tribal governments. Accordingly, this legislation will require Federal agencies to establish effective mechanisms for soliciting and integrating the input of such interests into the Federal decision-making process."[6]

If agencies have any questions concerning these guidelines and instructions, they should contact the Administrator of the Office of Information and Regulatory Affairs, or her staff. OMB will provide additional guidance as experience and need dictate.

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and elected officers of State, local, and tribal governments (or their designated employees with authority to act on their behalf), acting in their official capacities; and

"(2) such meetings are solely for the purposes of exchanging information, or advice relating to the management or implementation of Federal programs established pursuant to public law that explicitly or inherently share intergovernmental responsibilities or administration."

[6] House Conference Report 104-76 (March 13, 1995), p. 40.