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

B-202303 June 14, 1983

The Honorable William V. Roth, Jr.
Chairman, Committee on Governmental Affairs
United States Senate

Dear Mr. Chairman: Do not make available to public reading

This is in response to your request for our comments on S. 827, 98th Cong., 1st Sess., which if enacted would be cited as the "Federal Recordkeeping and Civil Action Limitation Act of 1983."

On the basis of remarks made upon the introduction of this bill and an identical bill in the 97th 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 defining "person" for the purpose of proposed section 560 of Title 5 of the United States Code to exclude those dealing directly with the Government.

RECORDKEEPING PROVISIONS

The bill would provide a uniform 3-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 not believe that imposing a single maximum retention period is a desirable way to achieve the 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 the 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 S. 827 without placing an arbitrary ceiling on records retention requirements.

We note that the Office of Management and Budget recently issued regulations to implement its Paperwork Act responsibilities, which state:

> "Unless the agency is able to demonstrate that such collection of information is necessary to satisfy statutory requirements or other substantial need, OMB will not approve a collection of information:
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> * * * * *
>
> "Requiring respondents to retain records, other than health, medical, or tax records, for more than three years." 5 C.F.R. Sec. 1320.6(f), set forth at 48 Fed. Reg. 13690-13691 (March 31, 1983).

Furthermore, Attachment C to OMB Circulars A-102 and A-110 dealing with imposition of record retention requirements imposed upon State and local governments, Indian tribal governments, institutions of higher education, hospitals, and other nonprofit institutions which receive Federal grants, provides that:

> "Financial records, supporting documents, statistical records, and all other records pertinent to a grant shall be retained for a period of three years, with the following qualifications:
>
> a. If any litigation, claim or audit is started before the expiration of the 3-year period, the records shall be retained until all litigations, claims, or audit findings involving the records have been resolved.

b. Records for nonexpendable property acquired with Federal funds shall be retained for 3 years after its final disposition.

c. When records are transferred to or maintained by the Federal sponsoring agency, the 3-year retention requirement is not applicable to the grantee."

Thus for many records, a 3-year retention period is already in effect.

Should the Committee decide, however, that a uniform retention period for all federally mandated recordkeeping is desirable, there are several changes in S. 827 that we must recommend.

The bill measures the 3-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 3-year period starts at the negotiation date, and assuming that the contract takes 3 to 4 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 exceptions in section 560(b) for fraud, knowing violations, and untrue statements would not preclude destruction of records of such events at the end of the 3-year period.) 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 3 years have elapsed, such data may have been destroyed or access to them could be denied. Currently, GAO has access to contractors' records for 3 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.

The provision of S. 827 could also severely impact on the ability of the Government to properly administer the Medicare and Medicaid programs. These programs normally pay institutional providers (hospitals, nursing homes, etc.) on a retroactive reasonable cost basis. This payment system requires the accumulation of accurate cost records and the retention of supporting records.

Institutional providers receive interim payments during the cost reporting years and submit cost reports after the end of the year which, along with supporting records, are subject to audit. Final cost settlement is often not made until more than a year after the close of the cost reporting year which would be more than 2 years after many of the transactions reflected in the cost report. Final settlements are subject to a number of administrative appeals and finally appeal to the courts.

Additionally, cost reports can be reopened up to 3 years after final settlement if new information indicates improper payments have been made, for example, where an audit of a subsequent cost report reveals an improper practice not disclosed while auditing earlier cost reports. A maximum allowable record retention period of 3 years from the date of transaction would obviously have a serious impact on this process and the ability of the Government to ensure that only proper payments are made.

Alternatively, providers can be paid on a prospective basis, but such payments are normally based on prior costs to providers. Therefore, this payment method also requires accurate cost records and their retention. Prospective payment systems normally include provisions for cost report auditing and often include provisions for retroactive readjustment of payments when audits reveal material inaccuracies or fraud in cost reports.

Claims for payment for noninstitutional provider services (physician's, laboratories, etc.) can usually be submitted up to 2 years after the service was provided. A 3-year retention period could affect an agency's ability to review such claims for medical necessity, program coverage of services provided, etc. This is particularly true because in may cases it is necessary to have data over relatively long periods of time to reveal abusive practices.

Finally, we note that it is not unusual for Medicare and Medicaid fraud cases to go back more than 3 years. The exceptions to the 3-year limitations imposed by the amendment

for fraud, for knowing violations of a rule, or for misleading statements, would be useless in these situations since it is unlikely that persons engaged in these activities would voluntarily retain records possibly evidencing their behavior for a period of time longer than the law requires. Consequently, in situations where the Government suspects that because of fraud it has made overpayments to providers over a long period of time it could probably only seek recovery for 3 years prior to the discovery of the fraud since that is the only time period records likely will be available to support the Government's case.

We recommend that records relating to Government contracts, grants, loans or other mechanisms for transferring funds or benefits be exempted from the provision of this bill. Alternatively, the bill should be amended to provide that with respect to Government contracts or grants 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 or grant relates is completed.

LIMITATIONS ON BRINGING ACTIONS

The bill would establish a uniform 3-year limitation period on the bringing of actions by the Government to collect fines, penalties or forfeitures.

This provision would conflict with another statute establishing limitations on the bringing of actions by the Government. Currently, an action by the United States for enforcement of any civil fine, penalty or forfeiture is barred unless commenced within 5 years of the date the claim first accrued. 28 U.S.C. § 2462. Section 560(a)(2) would conflict with this provision. If it is the intent of the bill that section 560(a)(2) supersede this existing statute of limitations, this provision should be repealed to eliminate any confusion.

We note that although 28 U.S.C. § 2462 and the proposed section 560(a)(2) are similar, they are not identical.1/ For example, the 5-year period for commencing actions under 28 U.S.C. § 2462 begins to run from the date the claim first accrues (regardless of whether it accrued under a statute or a rule) while the 3-year limitation under proposed section 560(a)(2) begins to run from the date of the act or failure to act in violation of some rule2/ occurs. Additionally, 28 U.S.C. § 2462 tolls the running of the 5-year limitation when neither the person nor his property is within the United States to permit a proper service of process thereon. No similar tolling provision is provided to prevent the running of the 3-year limitation under proposed section 560(a)(2).3/

1/ 28 U.S.C. § 2462 provides:

> "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

2/ 5 U.S.C. § 551(4) which would apply to proposed section 560(a)(2) should it be adopted defines "rule" to mean:

> "* * * the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporation or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, cost, or accounting, or practices bearing on any of the foregoing;"

3/ Furthermore, the tolling provisions of 28 U.S.C. § 2416, would not apply to actions under proposed section 560(a)(2).

DANGEROUS MATERIALS

The definition of "dangerous materials" provided by proposed section 560(d) includes hazardous waste as defined by section 1004(5) of the Solid Waste Disposal Act (42 U.S.C.A. § 6903(5)), and byproduct material, material source or special nuclear material as such terms are clauses (e), (z), and (aa) (1976 and Supp. III, 1979)). However, there is no guarantee that the determination of what are dangerous materials for the purpose of the exception to application of the limitations of proposed section 560(a) will be coextensive with determinations of materials dangerous or hazardous to the public's health or to the environment as determined under other acts. See for example sections 307 and 311 of the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1317 and 1321. See also section 101 (14) & 103 of the Comprehensive Environmental Reponse, Compensation, and Liabilities Act of 1980, 42 U.S.C.A. §§ 9601 (14) & 9603; section 6 of the Toxic Substances Control Act, 15 U.S.C. § 2604; and the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136 et seq.

We note that most of the laws dealing with protection of the health and environment from the adverse effects of various forms of pollution require some form of recordkeeping and provide for some fine or penalty (as well as damages and criminal sanctions) for violating pollution standards or failing to keep required records. The effect of the bill will be to limit the effectiveness of some of these measures for controlling dangerous pollutants when these pollutants fall outside the scope of the proposed definition for "dangerous materials", while permitting other measures for controlling dangerous pollutants to remain unaffected. We are unaware of any justification or reason for the disparity.

Furthermore, this problem is not alleviated by the provision in proposed section 560(c) which will exempt from the 3-year recordkeeping limitation records determined to be "essential to protect the public from serious harm" as determined by "any agency responsible for protection of health and safety." This merely provides a vague standard which will permit varying interpretations by the agencies implementing this provision for determining when the limitation of proposed section 560(a)(1) is to be inapplicable. Determinations under this provision may or may not be coextensive with other health and safety law requirements for recordkeeping.

Finally, while it permits the keeping of these records which then could be used in criminal proceedings and actions for damages, they could not be used in proceedings for

collection of fines, penalties or forfeitures where they relate to actions more than 3 years old. We know of no reason or justification for this disparity.

REGULATORY AND PAPERWORK IMPACT

While the bill attempts to provide a simple solution to an extremely complex problem, a simple answer concerning its paperwork and regulatory impact is not possible. However, the bill may not substantially limit the burden of the public as is intended. Furthermore, the bill could result in shifting recordkeeping requirements from the public to the Government.

Records which would be affected by the proposed legislation contain evidence of financial and legal commitments that must be preserved to protect the legal and property rights of citizens. For example, the Department of Labor relies on private records to enforce truth-in-disclosure requirements for pension systems in accordance with the Employee Retirement Income Security Act. If the bill were enacted, the Department might require that private pension plans furnish the records to the Government in order to preserve the rights of employees under pension plans. Added reporting requirements could be imposed in connection with Federal contracts, grants, loans or under other programs, in order to preserve the Government's and indirectly the public's rights. Therefore, present recordkeeping requirements could become reporting requirements and result in an increase in Federal records storage.

The reduction in recordkeeping requirements proposed by S. 827 affects only Federal laws. Each level of Government--Federal, State, and local--has the ability to legislate, regulate, and enforce laws which may impose recordkeeping regulations. The various governments' laws, rules, and regulations often affect the same organizations or individuals. There is very little coordination of the views and requirements of each level of Government. The paperwork and regulatory requirements imposed often have different emphasis and different timeframes. Therefore, the imposition by the Federal Government of a 3-year limit on recordkeeping in some cases, does not necessarily reduce the public recordkeeping burden if these records still must be kept to meet the requirements of the other levels of Government.

Estimating the paperwork and regulatory impact of the bill would require a program by program analysis and consideration of similar requirements imposed by other levels of government. At present, the total recordkeeping burden imposed is not available. While as of July 1, 1981, the

Office of Management and Budget (OMB) has required that agencies report their recordkeeping burden in connection with OMB's reviews of Federal forms and regulations, this requirement has not been consistently applied. If, as this Office recommended in our report to the Director of OMB entitled "More Guidance and Controls Needed Over Federal Recordkeeping Requirements Imposed on the Public", GAO/GGD-83-42, April 28, 1983, OMB was to consistently apply this requirement, then eventually this data could provide a basis for measuring the potential impact of S. 827. No such basis now exists. This data could also help OMB to implement the record retention provisions of the Paperwork Reduction Act by developing reasonable, consistent Federal retention requirements.

Sincerely yours,

Charles A. Bowsher

Comptroller General
of the United States