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MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

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SUBJECT: Disclosure and Simplification as Regulatory Tools

In the Memorandum on Transparency and Open Government, issued on January 21, 2009, the President called for the establishment of “a system of transparency, public participation, and collaboration.”<sup>1</sup> The Memorandum required the Office of Management and Budget (OMB) to issue an Open Government Directive “that instructs executive departments and agencies to take specific actions implementing the principles set forth in this memorandum.”

Following the President’s Memorandum, OMB’s Open Government Directive requires a series of concrete measures to implement the commitments to transparency, participation, and collaboration.<sup>2</sup> Section 4 of the Directive specifically instructs the Administrator of the Office of Information and Regulatory Affairs to “review existing OMB policies . . . to identify impediments to open government and to the use of new technologies and, where necessary, issue clarifying guidance and/or propose revisions to such policies, to promote greater openness in government.”

Executive Order 12866 directs agencies “to foster the development of effective, innovative, and least burdensome regulations” (Section 6(a)(2)), and to “identify and assess available alternatives to direct regulation, including . . . providing information upon which choices can be made by the public” (Section 1(b)(3)). Executive Order 12866 also directs agencies to analyze “potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions)” (Section 6(a)(3)(C)(iii)).

The purpose of the following documents is to set out guidance to inform the use of disclosure and simplification in the regulatory process. To the extent permitted by law, and

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<sup>1</sup> President Barack Obama, Memorandum on Transparency and Open Government (Jan. 21, 2009), *available at* <http://www.gpoaccess.gov/presdocs/2009/DCPD200900010.pdf>.

<sup>2</sup> OFFICE OF MANAGEMENT AND BUDGET, OPEN GOVERNMENT DIRECTIVE, *available at* [http://www.whitehouse.gov/omb/assets/memoranda\\_2010/m10-06.pdf](http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-06.pdf).

where appropriate in light of the problem to which they are attempting to respond, agencies should follow the relevant principles.

## Disclosure as a Regulatory Tool

**PURPOSE.** In many statutes, Congress requires or permits agencies to use disclosure as a regulatory tool. Executive Order 12866 provides, “Each agency shall identify and assess available alternatives to direct regulation, including . . . providing information upon which choices can be made by the public.” The Open Government Directive of the Office of Management and Budget calls for disclosures that will “further the core mission of the agency.” The purpose of this guidance is to set forth principles designed to assist agencies in their efforts to use information disclosure to achieve their regulatory objectives. Agencies should follow the principles outlined here in accordance with their own authorities, judgments, and goals, to the extent permitted by law.

**DISCLOSURE AS A REGULATORY TOOL.** Sometimes Congress requires or authorizes agencies to impose disclosure requirements instead of, or in addition to, mandates, subsidies, or bans. For example, automobile companies are required by law to disclose miles per gallon (MPG) ratings for new vehicles, and a standardized Nutrition Facts panel must be included on most food packages. The goal of disclosing such information is to provide members of the public with relevant information at the right moment in time, usually when a decision is made. Often that decision is whether to purchase a particular product.

Well-designed disclosure policies attempt to convey information clearly and at the time when it is needed. People have limited time, attention, and resources for seeking out new information, and it is important to ensure that relevant information is salient and easy to find and to understand. There is a difference between making a merely technical disclosure — that is, making information available somewhere and in some form, regardless of its usefulness — and actually informing choices. Well-designed disclosure policies are preceded by a careful analysis of their likely effects.

There are two general types of release that Congress may require or permit: summary disclosure and full disclosure. With summary disclosure, often required at the point of purchase, agencies highlight the most relevant information in order to increase the likelihood that people will see it, understand it, and act in accordance with what they have learned. Full disclosure is more comprehensive; it occurs when agencies release, or require others to release, all relevant information (often including underlying data).

**SUMMARY DISCLOSURE.** With summary disclosure, agencies attempt to provide people with clear, salient information at or near the time that relevant decisions are made. Examples include nutritional labeling, energy efficiency labeling, tobacco warnings, and government provision of information (e.g., fact sheets, telephone hotlines, and public interest announcements).

*Principle One: In order to select which information to highlight and how to present that information, agencies should explicitly identify their goals.*

Explicit identification of goals will have important implications for the nature of disclosure. If the goal is to discourage behavior by informing people that certain activities or

products impose certain risks (for example, tobacco smoking), agencies should decide whether they seek to use vivid descriptions and persuasive images or merely to disclose relevant facts. If the goal is to present a warning, then graphic messages might be justified; the same is not true when the aim is simply to inform. And if the goal is to present a warning, it will often be useful to inform users of the precise steps that they might take, or the plans that they might formulate, to avoid the risk in question. Warnings (and disclosures in general) are most effective when people have a clear and specific sense of an appropriate course of action. They are likely to be less effective when the appropriate course of action is abstract, vague, or ambiguous.

*Principle Two: Summary disclosure should generally be simple and specific, and should avoid undue detail or excessive complexity.*

Summary disclosure should focus on the central issues and should be presented in a manner that is straightforward and easy to understand. Simple, specific disclosure is generally preferable. People have limited time and attention, and their reactions to new information are not always predictable. If information is unduly complex and detailed, there is a risk that it will not be carefully read or processed, especially if the relevant area is technical or new and unfamiliar. Agencies should be aware of the importance of how information is presented; if a potential outcome is presented as a loss, for example, people may pay more attention than if it is presented as a gain. Effective disclosure also avoids abstraction and ambiguity. Summary disclosure should be designed so as to be relevant to the affected population, enabling people to know why and how the information is pertinent to their own choices.

*Principle Three: Summary disclosure should be accurate and in plain language.*

By its very nature, summary disclosure can be misleading; a summary of complex material might give undue prominence to isolated aspects of a product or a context, and might divert attention from what most matters. Summary disclosure should be designed to be as fair and accurate as possible. Summary disclosure should also avoid jargon, technical language, or extraneous information. Each of these is distracting and threatens to turn away or to confuse users.

*Principle Four: Disclosed information should be properly placed and timed.*

Careful thought should be given to the time and location of summary disclosure. Agencies should attempt to offer the information that users need when they need it. To this end, they should take steps to provide people with relevant information when they are actually making the decision or taking the action in question. For example, information about fuel economy is most useful if it is present and visible when people are shopping for motor vehicles. Similarly, summary disclosure should be provided in a prominent place, so that it will actually come to people's attention.

*Principle Five: Summary disclosure through ratings or scales should be meaningful.*

Summary disclosure may involve numerical ratings or scales, because these are convenient ways to simplify and display complicated information. For nutrition, percent daily values are a common example of this sort of summary disclosure. When users understand what such scales mean, they can be among the most effective ways to communicate information. But if the scales are unclear or poorly designed, people may have a difficult time knowing what to make of the information; they might fail to incorporate it into their choices or draw the wrong conclusions. Agencies should select numbers and scales that are meaningful to users. For example, the Energy Guide label provides an estimate of annual operating cost, along with a cost range for similar models. Annual savings or benefits, measured in terms of dollars, provide a metric that is both meaningful and easy to understand. When monetary values are at stake, agencies should give careful consideration to disclosure of savings or benefits in terms of dollars.

*Principle Six: To the extent feasible, agencies should test, in advance, the likely effects of summary disclosure, and should also monitor the effects of such disclosure over time.*

For all significant summary disclosure, it is important to observe whether and how people react to a given piece of information. To the extent feasible, and when existing knowledge is inadequate, agencies should consider several alternative methods of disclosure and test them before imposing a disclosure requirement. Scientifically valid experiments are generally preferable to focus group testing, and randomized experiments can be especially valuable. When focus groups are used, they should attempt to elicit information about actual choices and behavior (rather than simply reactions to or preferences for labels and formats). Consultation with experts can also be a valuable supplement to focus group testing.

Consistent with available resources, an agency requiring or making a disclosure should also consider performing market surveys or research to determine whether the desired effect is being achieved. These studies should determine whether users are aware of the disclosure, whether they understand the disclosure, whether they remember the relevant information when they need it, whether they have changed their behavior because of the disclosure, and, if so, how. Agencies should be aware that users might not report their behavior accurately; self-reports may be misleading. To the extent possible, agencies should attempt to verify whether reported changes are actually occurring (for example, through empirical study of practices or through surveys that reliably measure behavior).

With respect to summary disclosure, agencies will often be able to learn more over time. A disclosure requirement that seems promising at one stage may turn out to be less effective than anticipated. A disclosure requirement that was effective at an early stage may turn out to have less or little impact as time passes. New strategies will often emerge as experience accumulates and circumstances change. Agencies should be open to fresh evidence and consider new approaches to the extent feasible and as the evidence warrants.

*Principle Seven: Where feasible and appropriate, agencies should identify and consider the likely costs and benefits of disclosure requirements.*

Executive Order 12866 requires agencies, to the extent permitted by law, “to assess both the costs and the benefits of the intended regulation” and “recognizing that some costs and benefits are difficult to quantify,” to proceed only “upon a reasoned determination that the benefits of the intended regulation justify the costs.” In accordance with this requirement, and where feasible and appropriate in the circumstances, agencies should adopt disclosure requirements only after considering both qualitative and quantitative benefits and costs. That assessment should, in turn, help agencies to decide which requirements to select.

It is important to acknowledge that in some contexts, the costs and benefits of disclosure may be difficult or even impossible to specify, and a formal analysis may not be feasible or appropriate. Quantitative assessment of benefits may involve a high degree of speculation, and a qualitative discussion, based on available evidence, may be all that is feasible. In assessing benefits, agencies should consider the fact that improvements in welfare are a central goal of disclosure requirements, but should also note that informed choice is a value in itself (even if it is difficult to quantify that value).

It is also important to recognize that people may react differently to disclosure requirements. While some consumers might use calorie information to reduce their overall calorie intake, others might not. Heterogeneity can have potentially significant effects; those who have the most to gain or to lose may or may not be benefiting from the relevant disclosure. Agencies should attempt to take divergent behavior and preferences into account when formulating disclosure policies and assessing their likely consequences.

**FULL DISCLOSURE.** Sometimes Congress requires or authorizes agencies to promote regulatory goals by disclosing, or by requiring others to disclose, a wide range of information about existing practices and their effects. Full disclosure will include far more detail than is available in a summary. It may well include multiple variables, supporting data, and materials that extend over long periods of time. For example, agencies use the Internet to provide detailed information about fuel economy and nutrition; such information is far more comprehensive than what is provided through summary disclosure.

Full disclosure can often promote the purposes of open government, including transparency, participation, and collaboration. The central goals of full disclosure are to allow individuals and organizations to view the data and to analyze, use, and repackage it in multiple ways, typically taking advantage of emerging technological capacities (perhaps including social media). To promote those goals, agencies should consider the following principles.

*Principle One: Disclosed information should be as accessible as possible. For that reason, the Internet should ordinarily be used as a means of disclosing information, to the extent feasible and consistent with law.*

Transparency is generally good practice, and agencies cannot always know which information will be most useful and in what format it will prove most valuable. Engaging in full

disclosure (to the extent feasible, subject to valid restrictions, and to the extent permitted by law) is often both desirable and important.

Full disclosure will frequently involve large amounts of complicated data, and most people may not find it worth their time to seek out and analyze all or most of it. In such cases, the data may be most directly useful to groups and organizations with technical capabilities and with an interest in obtaining, analyzing, and repackaging relevant information. Such groups and organizations may reorganize and disseminate the information in ways that turn out to be highly beneficial to the general public (sometimes by improving the operation of markets). At the same time, agencies should strive to make full disclosure as useful as possible, and should therefore promote clarity and accessibility.

*Principle Two: Disclosed information should be as usable as possible. For that reason, information should usually be released in an electronic format that does not require specialized software.*

Consistent with the goals of open government, it is important to make information not merely available but also usable. If information is made available electronically, it will be easier for people to sift through it and to analyze or repackage it in various ways. Agencies should select an electronic format that is suitable to achieving that goal. The best method should be chosen in light of existing technology. At the present time, a structured XML format is conducive to this purpose.

*Principle Three: Agencies should consider making periodic assessments of whether full disclosure is as accurate and useful as possible.*

Where feasible and to the extent consistent with relevant laws, regulations, and policies (including protection of privacy), agencies should consider steps to investigate whether current disclosure policies are fulfilling their intended purposes. They might explore, for example, what information is being frequently used by the public and how those in the private sector are adapting and presenting information. By so doing, agencies can improve their disclosure policies and practices after learning about the value of particular information to the public. Similar forms of continuing assessment might prove useful for summary disclosure as well.

Agencies should also consider whether it might be useful to seek public comment on significant disclosures. As appropriate, agencies might use the Federal Register to obtain such comment. The public comment period associated with the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 et seq., might also be used for this purpose. Agencies might consider requesting public comment on the following:

- 1) The quality of the information;
- 2) The usefulness of the information;
- 3) Other related information the agency should collect and/or disclose; and
- 4) Means of improving disclosure, such as more effective methods for collecting, organizing, analyzing, and disseminating information.

*Principle Four: Where feasible and appropriate, agencies should consider the costs and benefits of full disclosure.*

As noted above, Executive Order 12866 requires agencies, to the extent permitted by law, “to assess both the costs and the benefits of the intended regulation” and to proceed only upon “a reasoned determination that the benefits of the intended regulation justify the costs.” In addition, the Paperwork Reduction Act of 1995 imposes a series of requirements on efforts to collect information; these requirements are designed (among other things) to increase the practical utility of information collections and to minimize burdens on the private sector. In accordance with these requirements, and to the extent feasible and appropriate, agencies should evaluate full disclosure in terms of both qualitative and quantitative benefits and costs.

Here, as with summary disclosure, quantitative assessment of benefits may involve a degree of speculation, and a qualitative discussion, based on available evidence, may be all that is feasible. In assessing benefits, agencies should consider the fact that improvements in welfare are a central goal of disclosure requirements, that informed choice is also a value in itself (even if it is difficult to quantify that value), and that full disclosure may effectively complement and improve on summary disclosure. It is also important to recognize that significant benefits may be associated with recombining information in new and different ways, even if quantification of those benefits is difficult.

**SUMMARY DISCLOSURE AND FULL DISCLOSURE.** Congress may require or authorize agencies to require summary disclosure but not full disclosure; alternatively, Congress may require or authorize agencies to require full disclosure but not summary disclosure. When Congress grants agencies discretion, and to the extent feasible, they should consider the likely effects — including the qualitative and quantitative costs and benefits — of both approaches.

Summary disclosure is the best method for informing consumers at the point of decision. Full disclosure is the best method of allowing groups and individuals access to a broad range of information, allowing them to analyze and disseminate that information in creative ways, and to use it to inform private and public decisions or otherwise to promote statutory goals. The two approaches may well be complementary. For example, it may be desirable to use summary disclosure at the point of purchase while also making full information available on the Internet.

## Simplification As A Regulatory Tool

**PURPOSE.** In some statutes, Congress requires or permits agencies to simplify regulatory requirements. In other statutes, Congress requires or permits agencies to use default rules, such as automatic enrollment, to simplify people's decisions and to promote regulatory objectives. Executive Order 12866 provides, "Each agency shall identify and assess available alternatives to direct regulation." It also provides, "Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty." It adds, "When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective."

The purpose of this guidance is to set forth principles designed to assist agencies in using simplification to achieve their regulatory goals. Agencies should follow the principles outlined here in accordance with their own authorities, judgments, and goals, to the extent permitted by law.

**SIMPLIFICATION AND DEFAULT RULES.** In recent years, significant attention has been given to the possibility of improving outcomes by easing and simplifying people's choices. Sometimes this goal can be achieved by reducing complexity, ambiguity, and paperwork burdens; sometimes it can be achieved by selecting appropriate starting points or "default rules." A default rule (such as automatic enrollment) specifies the outcome in a given situation if people make no choice at all.

In the domain of savings for retirement, for example, private and public employers might create an "opt in" system, in which employees do not reserve any of their salary for savings unless they affirmatively elect to do so (and hence opt in). Alternatively, employers might create an "opt out" system, in which a certain amount of salary is placed in a retirement plan unless employees affirmatively elect not to participate in the plan. Default rules play a large role in many domains. Both private and public institutions make numerous choices between opt-in and opt-out design.

Considerable evidence suggests that the choice of the default rule can have a significant effect on behavior and outcomes, even if it is simple and essentially costless to opt in or opt out. A typical finding is that under an opt-in system, fewer people are likely to participate than in an opt-out system. One reason is that inertia can be a powerful force; people may procrastinate or decline to make the effort to rethink the default option. Another reason is that the default rule might be taken to carry an implied endorsement by those who have chosen it; people may not depart from the default rule on the ground that it might have been selected because it is helpful or appropriate. Whatever the reason, it is clear that in some contexts, the chosen default rule can have significant effects, perhaps more significant than alternative possibilities, including disclosure of relevant information and even monetary incentives. It follows that if, for example, the relevant goal is to enable people to increase savings, an opt-out regime could be helpful for achieving that goal (as many private employers have found).

Instead of choosing opt in or opt out, private or public institutions might select a distinctive approach, which is to require "active choosing." Under this approach, no default rule

is put in place. People are asked to make an explicit statement of their preference among the alternatives. Compared to opt in, active choosing has been found to increase participation rates substantially. Agencies may wish to consider whether active choosing is preferable to a default rule as a means of promoting their objectives. If, for example, agencies are uncertain about which default rule will be best for the public, or if any default rule creates risks, requiring active choices may be an attractive alternative.

More generally, people may not participate in important programs simply because the required steps for participation are complex and daunting; agencies can often improve outcomes by reducing unnecessary paperwork burdens and by simplifying choices. For example, many agencies have taken active steps to dispense with paper and to allow people to use electronic forms (“fillable fileable,” including electronic signatures). Others have reduced burdens by eliminating unnecessary questions, using skip patterns, allowing “prepopulation” of forms, authorizing less frequent reporting, and eliminating redundancy.

In making choices among possible approaches, agencies should consider the following principles, to the extent permitted by law.

*Principle One: To promote regulatory goals, agencies should consider whether it is appropriate to use default rules (such as automatic enrollment) as a substitute for, or as a supplement to, mandates or bans.*

In some contexts, appropriate default rules have advantages over mandates and bans, because they preserve freedom of choice. Sometimes people’s situations are diverse and a mandate is poorly suited to individual circumstances; a default rule has the virtue of permitting people to adjust as they see fit. And when the statutory goal is to improve outcomes without imposing firm mandates, a default rule may be simpler, more effective, and less costly than other possibilities.

Sometimes, of course, the law requires certain behavior (often to prevent harms to third parties), and in such cases, a default rule may not be sufficient. But in such contexts, default rules may be useful and complementary. If, for example, people are required by law to engage in certain behavior, it may be both useful and appropriate to select the default rule that promotes compliance and best achieves the regulatory objective. Such an approach can increase ease and simplicity for those who are asked to comply with the law.

*Principle Two: When choosing among potential default rules, agencies should attempt to specify their likely effects, and should identify the rule that would most benefit the relevant population.*

According to standard economic theory, a default rule should generally have little or no effect, at least if it is not burdensome or costly for people to depart from it. But empirical evidence suggests that in many contexts, outcomes are significantly affected by the choice of default rules. Many people will not opt in to a certain program or situation, even if they would also not opt out.

When choosing the appropriate default rule, agencies should attempt to specify and assess the likely effects of the alternative possibilities (including, to the extent feasible and permitted by law, both qualitative and quantitative costs and benefits, in accordance with Executive Order 12866). An important question is whether most people in the relevant population would benefit from participation in the pertinent program or activity. This question will not always be easy. It should ordinarily be answered by asking what most people would choose if they had adequate information. And if one set of outcomes is required by law, agencies should consider selecting a default rule that would simplify and promote compliance.

One approach to the choice of default rule is to choose a general rule that will apply to all of the relevant population, subject of course to opt in or opt out. An alternative approach is more personalized, in the sense that it attempts to distinguish among, and to suit the diverse situations of, members of the affected group. For example, geographic or demographic information (such as age) might be taken into account if it helps to increase the likelihood that the default rule will be suited to the situations of those to whom it applies. Agencies might consider a personalized approach if they have good reason to believe that such an approach would more accurately reflect the informed judgments of members of the affected population. On the other hand, agencies should avoid a personalized approach if the underlying categories would be too crude or inconsistent with relevant laws, regulations, or policies, such as those involving privacy.

*Principle Three: Agencies should consider active choosing as an alternative to a specified default rule, especially when the relevant group is diverse and appropriately informed.*

In some cases, it may be difficult for agencies to be confident about which default rule will be best for the public or the relevant population; they may lack adequate information. In such cases, active choosing might well be preferable. This approach avoids a specified default rule. Instead, active choosing asks people to make an explicit selection of the option that they prefer.

Active choosing has particular advantages over a default rule when preferences and situations are diverse and heterogeneous, so that a single approach does not fit all. To that extent, active choosing can be preferable to either an opt-in or an opt-out regime. And when preferences and circumstances are diverse, a default rule may have the disadvantage of giving uniform treatment to differently situated people. More personalized default rules may avoid some of the problems of a uniform default rule, but when agencies lack full information, active choosing might well be the best approach.

These points also suggest the circumstances in which a default rule might be preferred to active choosing. Where agencies have reason to be confident about the appropriate default rule, and when preferences and situations are not relevantly diverse, active choosing may not be the best approach; a default rule might be best. Where the situation is unfamiliar, highly technical, and complex, a default rule might be preferred to active choosing, to the extent that the latter approach requires people to make decisions for which they lack experience and expertise. Provision of information might, of course, help to reduce the latter problem. Agencies should consider whether existing evidence provides a basis for deciding between a specified default rule and active choosing, or whether it is appropriate to attempt to obtain such evidence. Assessment

of likely effects, including both qualitative and quantitative costs and benefits, will prove useful in making that decision.

*Principle Four: Agencies should consider how best to eliminate unnecessary complexity and to simplify people's choices.*

In some cases, a default rule will not fit with the relevant law or help solve the problem with which agencies are concerned. In such cases, agencies should nonetheless take steps to eliminate undue complexity and should attempt, where appropriate and consistent with law, to simplify and ease people's decisions.

For example, burdensome paperwork requirements can impose large costs on the private and public sectors, have unintended adverse effects, reduce compliance, and prevent significant numbers of people from participating in relevant programs. Consistent with the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 et seq., and the Government Paperwork Elimination Act, 44 U.S.C. 3504, and to the extent permitted by law, agencies should attempt to reduce such requirements by eliminating unnecessary, ambiguous, excessive, and redundant questions; by permitting electronic filing (including electronic signatures); by allowing "prepopulation" of forms, where appropriate and feasible by sharing information across offices or agencies; and by promoting administrative simplification by coordinating and reducing requirements from multiple offices and agencies.