



STATE OF KANSAS

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September 12, 1980

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ATTORNEY GENERAL OPINION NO. 80- 194

Mr. Richard E. Brown
Legislative Post Auditor
Mills Building
Topeka, Kansas 66612

Re: Legislature--Legislative Post Audit--Responsibility for
Auditing Federal Grants

Synopsis: Attachment P to Circular A-102 of the U.S. Office of Management and Budget (OMB) effects a new federal policy respecting the auditing of federal grants made to state and local governments. Even though the indirect effect of such policy is to shift the responsibility for the auditing of federal grants from the federal granting agencies to the state and local governments that receive funds, such policy directly affects and regulates the fiscal policies and procedures of federal agencies. As such, it is a valid exercise of OMB's authority, lawfully delegated by the President, to promote efficiency and uniformity in federal procedures and policies. Cited herein: L. 1980, ch. 153, 3 U.S.C.A. §301, 5 U.S.C.A. §§305, 901.

* * *

Dear Mr. Brown:

You have requested an opinion from this office regarding compliance with the newly promulgated federal audit requirements for state agencies which receive federal grants. At issue is the propriety of a revision to Circular A-102, Uniform Requirements for Grants-in-Aid to State and Local Governments, prepared by the U.S. Office of Management and Budget. Attachment P to Circular A-102 replaces

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the Audit Requirements section of A-102, and "provides for independent audits of financial operations including compliance with certain provisions of federal law and regulation." 44 Fed. Reg. 60958 (1979). The effect of this new policy is to shift the responsibility for the audit of federal grants from the federal granting agency to the state and local governments that receive funds. From the effective date of the revision (October 22, 1979) audits are to be made by a state on an organization-wide basis, rather than by the federal government on a grant-by-grant basis. Because these new audit requirements were imposed through federal regulations and not through the legislative process, you question whether compliance with the new rule is necessary for the continued receipt of federal grants.

The validity of a rule or regulation is tested in three ways. First, is the rule or regulation constitutional; second, is the rule or regulation promulgated pursuant to some specific grant of statutory authority; and third, was the procedure used to develop the final rule or regulation proper and sufficient? It is well known that a rule or regulation made by an agency--and as such a product of administrative legislation, that is, pursuant to a grant of power to make law through rules--are legislative rules and have the same force as a statute if they are valid. See Davis, Administrative Law Text, 137 (1972). It is therefore necessary for us to examine Attachment P in light of the above-enumerated tests for validity.

The Office of Management and Budget (OMB) was created in 1970 by President Nixon pursuant to the provisions of Chapter 9 of Title 5 of the United States Code (5 U.S.C.A. §§901 et seq.) which allow the President to reorganize executive agencies. Reorganization Plan No. 2 of 1970, effective July 1, 1970 (35 Fed. Reg. 7959, 84 Stat. 2085), transferred the powers of the existing Bureau of the Budget to the President, and then to a newly created executive agency, the OMB. The agency was authorized to "perform such functions as the President may from time to time delegate or assign thereto." Reorganization Plan No. 2 of 1970, §101(d). Such a delegation of authority by the President is authorized by 3 U.S.C.A. §301, which provides:

"The President of the United States is authorized to designate and empower the head of any department or agency in the executive branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate, to perform without approval, ratification, or other action by the President (1) any function which is vested in the President by law, or (2) any function which such officer is required or authorized by law to perform only with or subject to the approval, ratification, or other action of the President: Provided, That nothing contained herein shall relieve the President of his responsibility in office for the acts of any such head or other official designated by him to perform such functions. Such designation and authorization shall be

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in writing, shall be published in the Federal Register, shall be subject to such terms, conditions, and limitations as the President may deem advisable, and shall be revocable at any time by the President in whole or in part."

It is interesting to note at this time the purposes for which the OMB was created. President Nixon, in his message to the Congress which accompanied Reorganization Plan No. 2 of 1970, explained that the OMB "would be the President's principal arm for the exercise of his managerial functions." According to the Supplementary Information given at 44 C.F.R. 37912, the OMB has certain functions as an executive office of the President, including:

"To assist the President in his program to develop and maintain effective government by reviewing the organizational structure and management procedures of the executive branch to ensure that they are capable of producing the intended results;

"To assist in developing efficient coordinating mechanisms to implement Government activities and to expand interagency cooperation;

"To assist the President in the preparation of the budget and the formulation of the fiscal program of the Government;

"To supervise and control the administration of the budget;

"To assist the President by clearing and coordinating departmental advice on proposed legislation and by making recommendations as to Presidential action on legislative enactments, in accordance with past practice;

"To assist in the development of regulatory reform proposals and in programs for paperwork reduction, especially reporting burdens of the public;

"To assist in the consideration and clearance and, where necessary, in the preparation of proposed Executive orders and proclamations;

"To plan, conduct and promote evaluation efforts to assist the President in the assessment of program objectives, performance, and efficiency;

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"To keep the President informed of the progress of activities by agencies of the Government with respect to work proposed, work actually initiated, and work completed, together with the relative timing of work between the several agencies of the Government all to the end that the work programs of the several agencies of the executive branch of the Government may be coordinated and that the moneys appropriated by the Congress may be expended in the most economical manner with the least possible overlapping and duplication of effort." Id. at 37912, 37913.

Further interpretation of OMB's functions can be found at 5 C.F.R. §1310.1 (1979):

"In carrying out its responsibilities, the Office of Management and Budget issues policy guidelines to Federal Agencies to promote efficiency and uniformity in government activities. These guidelines are normally in the form of circulars."

As you will note, OMB guidelines are issued to federal agencies to insure uniformity in federal procedures and policies. Therefore, Attachment P to Circular A-102 is a directive to the various federal agencies that issue grants to states and state agencies, and does not directly affect individual state governments. However, this circular has an indirect effect on the several states, in that federal agencies incorporate its provisions in grant agreements with individual grantees in the form of regulations. Specific statutory authority for the promulgation of such circulars and policy determinations can be found in 5 U.S.C.A. §305(b):

"Under regulations prescribed and administered by the Director of the Bureau of the Budget, each agency shall review systematically the operations of each of its activities, functions, or organization units, on a continuing basis."

(Reorganization Plan No. 2 of 1970 vested the powers and duties of the Bureau of the Budget in the OMB, as previously mentioned.) A 1979 amendment to 5 U.S.C.A. §305(b) substituted "President" for "Director of the Budget" (Pub.L. §6-54, §2(a)(2), Aug. 14, 1979, 93 Stat. 381).

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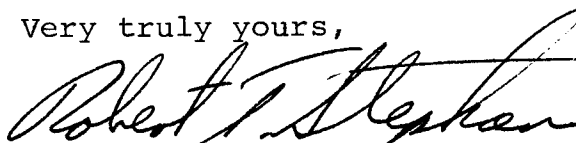
However, President Carter re-delegated these functions to the OMB in Executive Order No. 12152, Aug. 14, 1979, 44 Fed.Reg. 48143.

From the foregoing, it is apparent that the President has the authority to direct the OMB to issue policy guidelines by virtue of his authority to oversee administrative aspects of governmental activities, and that Attachment P to Circular A-102 was promulgated pursuant to a valid statutory authority.

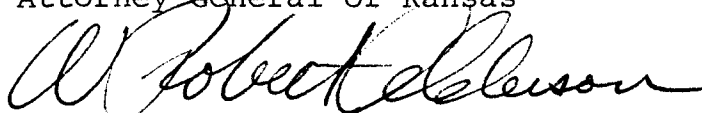
As to the other two tests for determining a regulation's validity, we have determined that the regulation in question has satisfied these requirements, as well. In order to avoid unduly burdening this opinion, suffice it to say that we have found the regulation to be regularly adopted, in that all publication, notice and other procedural requirements applicable thereto were met. Finally, we have found no basis for challenging the regulation on constitutional grounds.

Therefore, it would appear that the only options available to the State of Kansas are compliance with the audit provisions, or non-receipt of federal grant funds. That compliance was contemplated by the Kansas Legislature is evidenced by the passage of 1980 House Bill No. 3257 (L. 1980, ch. 153), which incorporates the audit provisions of the OMB circular.

Very truly yours,



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Attorney General of Kansas



W. Robert Alderson
First Deputy Attorney General

RTS:WRA:phf