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AGENT ORANGE

Remarks of Michael J. Horowitz
Counsel to the Director of
the Office of Management and Budget

Toxic Torts Seminar
Sheraton Washington Hotel
Washington, D.C.
October 20, 1983

I appreciate the opportunity to meet with you to explain the Administration's policymaking activities in the toxic torts area, and to relate some of my thinking about this complex issue. I am sure you will find, if you have not already, that the questions involving the compensation of persons exposed to toxic substances are among the more important and difficult we face today -- with far-reaching consequences for all Americans.

Let me begin by summarizing what the Administration has done in this area, and what we hope to accomplish in the near future. Roughly one year ago we recognized that the complexity and importance of this issue required Administration-wide policy review. At the time, we established an Ad Hoc Inter-Agency Committee chaired by OMB for the purpose of assessing the policy issues and the various options the Administration should explore. While the results of this effort were mixed, it was soon apparent that this issue would have to be dealt with at the Cabinet level, and that substantial research, coordination of views and analysis would need to be undertaken on a government-wide basis before any policy decisions could be made.

Accordingly, at the beginning of this summer, the Administration established under the Cabinet Council for Legal Policy what is formally known as the Toxic Torts/Compensation Working Group. The Working Group, consisting of senior officials of twelve agencies, has been charged with the task of examining in detail the issues involved in the compensation of persons exposed to toxic substances and reporting back appropriate recommendations to the Cabinet Council. In addition, the Working Group will identify and analyze relevant legislation, litigation and agency proceedings, as well as coordinate agency activities in this area and serve as an internal Administration information clearinghouse. The Working Group is co-chaired by Paul McGrath, head of the Civil Division of the Department of Justice, and myself.

As indicated, we firmly believe that the complexity and importance of this issue dictate that any policy recommendations be based on careful and thorough analysis. Accordingly, the Working Group has identified certain key areas that are presently being analyzed by agency staff. Among these areas are a detailed review of the major legislative proposals, a study of the Black Lung benefits program, an analysis of the Superfund Section 301(e) Study Group Report, an examination of the long-term costs and economic consequences of compensation programs, and an analysis of existing and potential non-federal alternatives to a federally administered compensation program.

These projects, and the others that are presently underway or which we may undertake, will enable the Working Group, and eventually the Cabinet Council on Legal Policy, to make policy decisions based on hard facts and a full appreciation of the long-term consequences of any decisions in the area.

At the outset, it is important to note what the Working Group is not about. The Working Group will not be dealing with the type of environmental or health-related command and control regulations with which most of you are familiar. At one and the same time compensation proposals involve health issues, environmental policy, potentially far-reaching changes in our legal system, possibly massive fiscal implications, important economic considerations involving potentially large societal transfers of income, and basic questions of social equity. As a consequence, compensation issues involve many different agencies within the federal government: HHS because of its experience with administering income maintenance systems and medical care programs; EPA because of its environmental expertise; Labor because of its knowledge of workers' compensation systems and occupational diseases; OMB because of its expertise in fiscal and budgetary matters; Justice because of the need for extensive legal analysis, and to assess implications posed for the legal system as a whole; Treasury and the Council of Economic Advisors because of the economic considerations; and the Office of Science and Technology Policy because of the broad scientific issues involved. These are but a few of the agencies directly involved

in this effort. As stated in a recent letter of William Ruckelshaus to Congressman Florio, "the various agencies participating in the Working Group have different contributions to make -- and reflect different concerns and perspectives, not unlike the differing perspectives that exist within Congress and society as a whole. Those different contributions reflect the diversity of experience and expertise within the Executive Branch."

Let me discuss for a moment what I believe to be among the key issues that must be considered by this or any other Administration seeking to make sensible policy in this difficult area. This list is by no means meant to be exhaustive -- it is only a highlight of what, in my view, are crucial concerns that must be addressed.

One of the questions we are now analyzing is the long-term fiscal implications of proposed compensation programs. We cannot, of course, predict precisely what each proposal would cost. But we already know that the potential long-term costs of a major compensation program could be extraordinary. This should not surprise those familiar with the pending proposals. Some current proposals almost amount to national health insurance coverage for those suffering catastrophic or chronic illnesses. National health insurance, by any measure, is a highly expensive proposition.

While we are now in the process of evaluating the long-term fiscal implications of major compensation proposals, we already have costed out one important piece of legislation -- the asbestos compensation bill introduced in the last Congress by Representative Miller. Using conservative assumptions, the Department of Labor has found that over the next thirty years the asbestos compensation program contained in the bill could cost as much as half a trillion dollars -- this for only one toxic substance. The cost of such a compensation program would almost necessarily have to be borne by the federal government. The taxes necessary to support such a program would need to be set at $1,000 per ton of asbestos immediately, increasing to $3,200 per ton by 1990. Asbestos sells, however, for only a little over $300 per ton. And even these figures assume that asbestos would continue to be sold at current levels -- a doubtful assumption to say the least if asbestos is taxed at that level, and in light of recent regulatory efforts to limit and in some instances ban its use.

This cost estimate is entirely consistent with our historical experience with other major entitlement programs. Particularly illustrative is the Black Lung benefits program. That program began in the late sixties on a relatively modest scale; total expenditures over the life of the program were estimated at $200 to $300 million -- no more than half a billion dollars. The program has now expended over $16 billion, and will continue to expend nearly $2 billion every year.

This experience is not unique to the Black Lung benefits program. The history of entitlement programs in the seventies has been remarkably consistent in one key sense -- invariably, the major entitlement programs began as relatively modest efforts that within only a few short years underwent a fiscal explosion after the particular entitlement right was established as a matter of law. We are now seeking to determine how, if persons are to be compensated for toxic substances exposure, we can formulate a program that will not replicate this history of fiscal uncontrollability.

This brings me to a second and related question of preeminent importance -- how can we ensure that a toxic substances compensation program will remain politically stable? Programs such as Black Lung undergo their extraordinary growth because they create entitlement expectations that generate powerful political pressures to which Congress responds. This is all the more true where the ultimate entitlement beneficiaries -- and this is particularly the case here -- are not the poor, the elderly, or the underprivileged, but the much more politically powerful middle class.

Past experience indicates that once the expectation is created that the federal government will guarantee that persons exposed to toxic substances will be compensated, those expectations can dictate the growth and nature of such a

compensation program. We thus must take special care to ensure that any compensation program is reasonably self-limiting and structured to remain politically stable.

Fiscal conservatives like myself are not, however, the only ones concerned with this issue of fiscal and political stability. As noted in a recent Washington Post editorial, in light of the "enormous transfer of funds" involved, a "reasonable solution may well require abandoning the idea that is possible to apply current standards of indemnification to people exposed to hazards that were either unknown or accepted in an earlier time." The alternative is that existing entitlement programs benefiting the poor, the elderly, or the underprivileged, may simply be crowded out. Ultimately, we have to face the inescapable reality that we may be able to compensate a new class of beneficiaries only at the expense of already established classes.

This brings me to a third question to which we have begun to give considerable thought -- what is fundamentally fair? Many of the toxic substances that would be covered by the compensation proposals are alleged or proven carcinogens. Yet we know that hundreds of thousands of Americans die every year from cancer, and that only a fraction of these cancers -- even under the most liberal reading of the scientific and medical evidence -- can now be traced to the types of substances and exposures at issue in these proposals. We know that diet and smoking, for instance, are major if not the leading causes of cancer in America.

Even if a federally administered toxic substances program were established, the vast majority of Americans that develop cancer might never be eligible for special compensation. This raises the difficult question of how we can justify compensating a fraction of cancer victims -- often on highly uncertain scientific and medical evidence -- while leaving the greater number uncompensated. This fairness question becomes all the more difficult in light of the fact that chronically ill Americans already are present beneficiaries of major entitlement programs such as Social Security disability, medicare/medicaid, and a wide variety of generic health and income maintenance programs.

One of the most important and difficult questions with which any compensation proposal must deal -- indeed, the cornerstone of any compensation system -- is the issue of causation. The standard of causation will, of course, determine whether the program compensates those that truly deserve compensation. A standard that is too narrow may leave many who deserve compensation uncompensated. A standard that is too broad or too vague will undoubtedly benefit someone, but may not compensate those whom the program is intended to compensate, may benefit many more than is justifiable, and may undercompensate a core class of intended beneficiaries.

It is in this area that I think much more work needs to be

done. Many of the causation standards that have been proposed are remarkably vague, or are far too broad to accomplish the intended purpose. Particularly troubling are the medical presumptions contained in some of the proposals, many of which are either unsupported by or go well beyond accepted scientific and medical evidence.

The appropriate standard of causation is important for a second reason. I believe that any causation standard that is developed as part of a toxic substances compensation program will significantly affect the standard of causation used in other areas, particularly in tort litigation and workers' compensation. Indeed, I think it naive to believe that a standard of causation can be limited to a particular substance, or type of exposure, or compensation program. There is little doubt in my mind that a toxic substances compensation program will have significant ramifications for our entire legal system, and that those consequences must be understood.

There are many other questions that have to be considered in analyzing this issue. For example: What type of compensation should be awarded -- only medical costs and lost earnings, or should a program offer the full panoply of tort damages, including compensation for pain and suffering? Should a compensation program be structured as a regulatory tool or should it be used primarily for remedial purposes? How should a compensation program be funded? Should a program be administered

on the federal or state level? How can a compensation program be integrated with existing legal remedies, particularly tort litigation and workers' compensation systems? How would the benefits of a toxic substances compensation program be integrated with other government benefits such as Social Security disability and medicare/medicaid? In the latter regard, many of the proposals have suggested some form of off-set of current benefits. While this approach has obvious advantages, the mechanics of an off-set mechanism, particularly the issue of exhaustion of remedies, will not be easily resolved. Another critical question is the decisionmaking mechanism. Should it be a system modelled on tort litigation grounded in adversarial proceedings, or on informal administrative proceedings of a nonadversarial nature? And, should a compensation program operate retroactively -- and if not, how do we justify compensating those who will be injured while leaving uncompensated those who are injured? Finally, how can we avoid compromising the integrity of the scientific and medical decisionmaking process? The unavoidable reality is that many of the most important scientific and medical questions involved in this area cannot be answered with the degree of precision that many policymakers desire. Can a compensation program be structured that maintains the integrity of the scientific and medical decisionmaking process -- that will not attempt to force that process into premature and speculative conclusions in a search for false certainty? These are all crucial questions which the Administration is trying to answer, and which we

believe must be considered in any responsible attempt to deal with this issue.

There is, however, one proposed approach to this area about which I have particular concerns. That is what is known as a federal toxic torts cause-of-action; in effect, a new federally created tort that could be used by plaintiffs and their attorneys to sue for tort damages. A federal cause-of-action is particularly attractive to some because it does not encounter the same fiscal constraints as an administrative compensation program; it often is viewed as an off-budget, "free" entitlement. Of course, it is nothing of the kind. To the contrary, such a cause-of-action could conceivably involve massive transfers of income. Principled budgeting requires that we not simply mandate millstones oblivious of the costs involved. Some have argued that if the federal government wishes to establish a program of generous compensation, it should be willing to take the responsibility for funding the program and for maintaining its integrity. The concern is that unless the government accepts that responsibility, it will simply create one entitlement after another. It has been observed, for example, that much if not all of the present budget deficit could be eliminated by taking federally administered programs such as Social Security, and mandating direct payments from businesses to workers. This would clearly be an improper response to the budgetary pressures generated by existing entitlement programs; a federally created -- but not budgeted for -- cause-of-action may be no less

improper as a means of dealing with the budgetary pressures that would be generated by toxic substances compensation programs.

In addition, we must recognize that a federal cause-of-action ultimately may be among the most expensive of all compensation options. A recent Rand study of the asbestos litigations found that roughly two-thirds of all industry asbestos pay-outs are lost to legal fees and litigation expenses. It may well be that a federal toxic torts cause-of-action would be no different in generating such phenomenal transaction costs.

Let me close with three observations about the relationship of the Administration to the business community in the toxic torts context.

First, the Administration is firmly committed to responsible policymaking in this area. Given the extraordinary potential costs and the fundamental potential changes to our legal system that could be generated by compensation programs, it is imperative that policy not be driven by anecdotal information or vague and unproven assertions of need.

In this regard, the Administration is firmly opposed to the "legislate first, study afterwards" approach. Two examples illustrate the dangers of this approach. First, Congress is now seriously considering a bill that would provide compensation to Vietnam veterans for three diseases allegedly caused by Agent

Orange exposure. Despite the fact that the medical evidence does not support the assumptions of the bill, indeed appears to go in the opposite direction, one subcommittee already has reported the bill favorably. What is particularly troubling is that we are now engaged in extensive studies that should within a few years provide far better data -- perhaps dispositive evidence -- on the long-term adverse health effects, if any, of Agent Orange exposure. A second example of this phenomenon is a recently proposed amendment to the House RCRA reauthorization bill which would create a federal cause-of-action for hazardous waste exposure. Although it now appears that no amendment will be brought to the floor as part of RCRA reauthorization, it is particularly troubling that Congress might seriously consider such legislation without the benefit of any hearings to assess its costs and long-term implications.

The Administration thus is committed to taking the steps necessary to ensure that national policy in this area is made responsibly. But we may have little success if the business community is unwilling to expend its own political capital to ensure that national policies are based on proven facts. That is not to say that the Administration will be in complete agreement with the business community in this area. Differences exist and will inevitably arise as developments occur. But it is crucial that the business community be prepared to insist that the need and effect of toxic substances compensation proposals be thoroughly studied and understood if they are to be seriously

considered.

My second general observation about the relationship of the Administration to the business community is directed at some who have criticized us for considering different compensation areas involving different substances and different exposures in the context of one overall policymaking effort. For instance, in a recent article in the Legal Times, Leslie Cheek of Crum & Forster was quoted as stating that he felt the Administration's integrated approach to toxic substances compensation policy was mistaken because, in his view, he "would prefer to have these things boiling in separate kettles at their own speed rather than stewing together in one pot."

While we obviously recognize that there are unique aspects to each of the compensation areas, there are compelling reasons for viewing these proposals as closely related. First, there are certain generic issues to these compensation proposals -- many of which I have already discussed -- that can only be considered in the context of all or a number of the proposals. Second, our decisions in any one of these compensation areas -- be it asbestos, toxic wastes, Agent Orange or radiation -- may serve as a precedent for the other areas. Because of the relatedness of many of the issues, it could be difficult to justify different results once one resolution has been implemented for a particular substance. Third, these areas -- whatever their unique aspects -- are politically far more closely related than may be

understood. The buy-out of Times Beach -- a Superfund toxic waste issue -- has been a major impetus behind the Agent Orange compensation legislation now in Congress. And, resolution of the Agent Orange legislation could in turn have important consequences for victims compensation legislation. Similarly, the asbestos compensation legislation and the Superfund victims compensation proposals are closely related politically, and will impact each other substantially throughout the course of this Congress. This is not a matter of Administration policy -- it is a matter of political reality.

The third and final observation I wish to make is that the Administration is highly encouraged by the growing number of private sector initiatives in this area. There is an unfortunate tendency to believe in this day and age that major problems can only be resolved through legislation or regulation. This simply is not true. Indeed, there are numerous opportunities in the toxic torts area for the private sector to take the initiative rather than wait around for a government dictated and administered solution.

There already are a number of examples of such initiatives. In the context of the asbestos litigations, Dean Wellington of the Yale Law School is chairing a tripartite plaintiffs-defendants-insurers effort to establish claims handling processes that would reduce the burden on the courts and ensure that a greater percentage of the industry pay-out goes to

diseased workers rather to pay for the transaction costs of the process. I am particularly heartened by this effort because it may resolve a situation that is both unseemly and unfair to many who may have just claims. The situation I am referring to is the continuing litigation over which insurers are liable for which asbestos claims. Because of this seemingly endless litigation over which policies cover which claims, many asbestos manufacturers may find themselves in the untenable position of having to pay off claims without obtaining insurance reimbursement, even though it is often clear that some insurer ultimately is liable. I do not want to suggest here that insurers may not have meritorious defenses to some of these claims, but I do believe that litigation about the applicable period of coverage is a matter that can and should be resolved promptly. The consequence of this litigation is that many asbestos manufacturers may find themselves in a financial bind that could lead to bankruptcy. Such bankruptcies deprive plaintiffs of their opportunity to seek relief under existing laws -- a situation that is both unfair and will lead to increased pressure for a federal compensation program. We will seriously review our policy alternatives before this insurance controversy forces a string of bankruptcies that deprives persons of their relief and that may lead to a Black Lung type program.

Another example of private-sector initiative that we find highly encouraging is the on-going efforts by insurance organizations such as the National Council on Compensation

Insurance and Crum & Forster, along with responsible state agencies, to review state workers' compensation laws to remove some of the remaining inequitable barriers faced by some occupationally diseased workers. A promising effort in the area of environmental exposure is the recently commissioned independent scientific study by the Chemical Manufacturers Association on the effects of certain chemicals on individuals, and on the actual extent of an exposure problem. Similarly, major efforts to analyze many of the issues underlying the proposed compensation programs have been launched by the Chamber of Commerce and the National Association of Manufacturers. Finally, what may eventually prove to be highly important for this area, there is an increased realization by the business community of the need to obtain the scientific and medical evidence to support a greater use of risk assessment and risk management techniques, both in the private and the public sectors.

All of these efforts will help us to understand better the issues that must be dealt with in making sensible and effective policy in this area. But these efforts are not enough. More is needed, and I hope you will take that message back with you.