



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

July 8, 2008
(House Rules)

STATEMENT OF ADMINISTRATION POLICY

H.R. 5811 – The Electronic Message Preservation Act

(Rep. Waxman (D) California and two cosponsors)

H.R. 5811 would unwisely overturn the longstanding framework governing the management of an incumbent President's records. The bill also has the potential to impose substantial costs and reduce the efficiency of records management across the Executive Branch. If H.R. 5811 were presented to the President in its current form, his senior advisors would recommend that he veto the bill.

Presidential Records Act Amendments

The bill would amend the Presidential Records Act (PRA) in fundamental ways that would upset the delicate separation of powers balance that Congress established in 1978 and require the Archivist to intrude, in an excessive and inappropriate manner, into the activities of an incumbent President and his or her staff. The bill would substantially alter the framework that Congress crafted in the PRA by subjecting the President and White House offices to requirements resembling those that the Federal Records Act (FRA) applies to Executive Branch agencies. The bill would require the Archivist to promulgate regulations that would establish "standards necessary for the economical and efficient management of Presidential records during the President's term of office." The bill does not define "economical and efficient management," and, therefore, would appear to provide the Archivist with substantial leeway to establish standards that could impose significant costs and burdens on an incumbent Administration, which could interfere with a President's ability to carry out his or her constitutional and statutory responsibilities. Moreover, the bill would require the Archivist to "annually certify whether the records management controls established by the President meet requirements" of specific provisions in the PRA, as well as to submit annual reports to Congress on the status of the annual certifications. Such authority is unprecedented and would mark a significant departure from accepted and longstanding practice.

Federal Records Act Amendments

The Administration has serious concerns with amendments the bill would make to the Federal Records Act. First, the bill's provision requiring "the electronic capture, management, and preservation" of "electronic messages that are records" is onerous and overly broad and, in some cases, will prove counterproductive. Congress should reconsider whether mandating that all government e-mail records be preserved in electronic form is consistent with the greater goals of the Federal Records Act, where related records on a case or project continue to remain in traditional paper files as maintained in many Federal agencies. Second, the bill's requirement that electronic messages be "readily accessible for retrieval through electronic searches" is

vague. The bill does not make clear which electronic records need to be searchable and by whom.

Third, the bill could impose enormous unfunded costs on agencies. The costs of managing all Federal electronic communications in electronic records management applications (RMAs) -- including e-mail records, but also potentially including in the near term instant messaging, wikis, blogs, and other record types that are emerging from web 2.0 social networking software applications -- would likely be much higher than the current CBO cost estimate. The National Archives and Records Administration testified in an April 23 hearing that they estimate that the potential cost of complying with this bill could be in the billions of dollars.

Fourth, the bill would place restrictions on the technological approach that could be adopted. While electronic records management systems as defined by the bill could be one method for managing electronic message records, there are likely to be a variety of solutions, especially in future years, that could be more appropriate and effective.

Finally, the bill would require that, “[t]o the extent practicable, the regulations promulgated under [the bill] shall also include requirements for the capture, management, and preservation of other electronic records.” The statement that the regulations shall include such requirements “[t]o the extent practicable” does not provide sufficient clarity regarding the breadth of these requirements and the burdens that would be imposed on agencies.

Conclusion

The Administration recognizes the need for effective management of electronic messages in the Executive Branch and appreciates congressional concern for the preservation of these records. However, the Administration believes that existing policy and guidance under current law is sufficient to ensure proper management of Executive Branch electronic communications and records requiring preservation.

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