

the *Rutan*-covered process, in addition to following up on violations of the *Rutan*-exempt process addressed in the Initial Report. This Report will also provide a brief overview of the recommendations made in the Initial Report where work is still needed, discuss work that has been completed by IDOT and the Governor's Office, and include a number of additional recommendations. We anticipate that our next report will address the ongoing investigation into the involvement of the Governor's Office.

II. ADDITIONAL FINDINGS OF SPECIAL MASTER'S INVESTIGATION

Our continued investigation has revealed weaknesses in the employment processes used to fill both *Rutan*-exempt and *Rutan*-covered positions. While further review is still necessary, we discuss some of our findings below. Unless stated otherwise, items discussed in this Section pertain to actions and events that occurred under the prior Administrations.

A. The *Rutan*-Exempt Process is Systemically Flawed

As noted above, the Special Master was tasked with investigating the scope of any violations of the 1972 Decree and recommending measures that may be necessary to prevent any recurrence. Our investigation uncovered several patterns of abuse with respect to filling *Rutan*-exempt positions under prior Administrations. We believe the patterns of abuse flourished, in part, because of flaws in the process. Absent systemic reforms to this process, violations may continue.

Under the current framework, there is no limit on the number of *Rutan*-exempt positions within any state agency, including IDOT. When an agency establishes a new position, or clarifies an existing one, it sends a position description to CMS for a *Rutan* determination. CMS uses "*Rutan* Scales" developed in 1991 to make *Rutan* determinations based on the job duties described in the agency drafted position descriptions. Thus, CMS relies entirely on the agency's job description to make the *Rutan* determination whenever a new position is established or clarified, which results in the same position (*e.g.*, Project Manager, Executive Secretary, Staff Assistant) having different *Rutan* determinations depending on the job description's wording.

CMS maintains the *Rutan* Scales in confidence in an attempt to prevent agencies from crafting position descriptions aimed at obtaining a desired *Rutan* status. CMS produced the confidential *Rutan* Scales to the Special Master as part of her investigation with the understanding that she and her staff would maintain the contents of the scales in confidence. After reviewing the scales, the Special Master believes they are overly broad and too vague to produce reliable *Rutan* determinations and should no longer be used. Moreover, even if narrow *Rutan* Scales were developed and maintained in confidence, agencies could still craft position descriptions to obtain desired *Rutan* status for an unlimited number of positions. *Rutan* exemption is defined by common law as a matter of public record and, under the current framework, there are no limits on the number of *Rutan*-exempt positions within a state agency. Further, as is evidenced by the abuse of the Staff Assistant positions, once a job description is designated as *Rutan*-exempt, an agency can use the

same “buzz words” to obtain *Rutan*-exempt status for an unlimited number of positions. We believe these systemic flaws contributed to the abuse of the *Rutan*-exempt positions at IDOT.

B. The *Rutan*-Exempt Abuses Extended Beyond the Staff Assistant Hires

Our investigation revealed numerous historical abuses of the *Rutan*-exempt process that extended beyond the Staff Assistant hires. Notably, we discovered a pattern of politically connected candidates who were identified first, and then the agency searched to find them positions. Oftentimes the candidates were unqualified for the positions. Thus, rather than the agency searching for a qualified candidate when a legitimate *Rutan*-exempt position opened, the agency searched to find a position for an already identified politically connected candidate. In some instances, “emergency” positions were created in order to put politically connected candidates on IDOT’s payroll, without any identified operational need.

In discussing specific politically connected candidates, documents produced by IDOT show that the candidate often came before any position needed to be filled. For example, documents from the prior Administration show the following discussion about a particular identified candidate:

- “Can u have her find something?” “I need her to come up with a recommendation for what he could do.” When there appeared to be a delay in hiring the candidate, the IDOT official noted that “I can’t wait that long” and suggested hiring the candidate initially as a 60 day emergency hire.

In another instance, the Governor’s Office forwarded a politically connected candidate (with no policy experience) to IDOT for hire. Documents reveal the following discussion:

- “The Governor’s Office would like for us to interview [candidate]. Would you be able to meet with [candidate] and let us know if there is a potential *rutan*-exempt position that fits?” Following the candidate’s hire, his new manager reported to IDOT personnel: “To my surprise, [candidate] arrived at the Thompson Center this morning. . . . I have no paperwork on him. [IDOT official] is orienting him now, and then she and I are going to meet to discuss where to place him. I’d appreciate one of you sending me his resume, assuming he provided one to you.”

Other examples of finding a candidate first and then searching for a position are plenty. Documents reveal the following comments:

- “[Official] in the Governor’s Office has offered to assist me in getting [candidate] on the payroll.”
- “Can we identify a spot?”
- “Need to find an exempt TMIV legislative position in Chicago for [candidate].”

- “Need to move [candidate] to a TMIV in Secretary’s office. *Rutan*-exempt of course, Teamster position.”

One hiring sequence that highlights a number of abuses in the *Rutan*-exempt process under the prior Administration involves the effort to get the step-daughter of a State Senator hired at IDOT in 2012. Documents reveal that IDOT officials were instructed to find her a *Rutan*-exempt position. Her resume and application were circulated between IDOT and the Governor’s Office, and list her prior work experience in customer service, merchandising, and telemarketing. Just prior to joining IDOT, she worked for Federal Express as a package handler at O’Hare Airport.

Notwithstanding her previous work history and lack of college degree, documents show that IDOT officials worked to find her a *Rutan*-exempt position in the Cook County area. IDOT officials identified an open Region I Asset Recovery Analyst position in the Office of Chief Counsel (OCC) and noted: “If this position doesn’t work [for her] then we will need to start a new epar from scratch.” Notably, at that time, another candidate with a law degree had been approved by the Chief Counsel’s office for the Asset Recovery position, but that candidate was never hired.

In order to get the politically connected candidate on the payroll quickly, she was initially hired as a 60 day emergency Staff Assistant in District 1. When she arrived to work at the District 1 office, her manager stated he: “never was told, never got a resume to find something, or interview.” An IDOT personnel official responded: “IDOT has been asked to put [candidate] on as an emergency hire.”

The candidate remained in an emergency appointment, with several extensions (apparently directed by the Governor’s Office), until she was appointed into the permanent *Rutan*-exempt Asset Recovery Specialist position in OCC despite objections from OCC personnel. When OCC employees were notified of her impending hire, they had no idea who she was, and commented: “Who is [candidate]? . . . Where is s/he located? No one knows anything about this person,” “I never heard of [her] until yesterday,” and this “was not made by me as a staffing request. Until yesterday we were unaware of [candidate] and her approval.”

Again the Governor’s Office contacted IDOT personnel about the candidate, and IDOT personnel told OCC: “We need to make that offer.” That same day, OCC extended the candidate an offer for the Asset Recovery Specialist position, which is responsible for:

administering claims for damage to highway appurtenances and other property and other accounts for collection in the Region I area. The incumbent is responsible for analyzing and determining third party liability claims by the Department within his/her authority. The incumbent must be cognizant of and apply comparative negligence laws to properly investigate, negotiate, compromise and settle each claim within his/her authority. Additionally, the incumbent determines which cases should be referred to a collection agency and/or the Attorney General’s Office or establishes an installment agreement with the claimant for payment of monies owed the Department. S/he performs field appraisals

for property damages, photographs damages and secures evidence for trial in the recovery of state funds.

As noted above, the candidate's resume and application reveal no qualifications for the position, and she displaced another candidate with a law degree who had been approved by OCC.

Additionally, documents reveal that various elected officials and other state officials asserted pressure on IDOT personnel to hire certain candidates without regard to whether they possessed any particular job skills or qualifications. Filling *Rutan*-exempt positions without regard to qualifications and/or legitimate operational needs is inconsistent with the policies underlying *Rutan* exemption. The selection of qualified candidates who can effectively perform legitimate *Rutan*-exempt jobs should remain the paramount consideration. Party affiliation is only a proper consideration where "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti v. Finkel*, 445 U.S. 507, 519 (1980) (emphasis added).

C. *Rutan*-Covered Process Has Been Politically Manipulated

Due to the numerous variables impacting onboarding, promoting, or transferring an employee at IDOT, the *Rutan*-covered process is not simple. Below is an overview of the steps and processes involved at IDOT. As further explained below, some of these processes are vulnerable to manipulation.

1. *Rutan*-Covered Selection Process

Generally, the department seeking to fill a position completes an Internal Personnel Request (IPR). The supervisor is supposed to assess whether the position description duties are accurate. If they are not accurate, the department head is supposed to clarify the job description and resubmit it to CMS for a *Rutan* determination, if necessary (some positions are always *Rutan*-covered and would not require *Rutan* review by CMS). After the IPR and job descriptions are finalized, the department submits interview Questions and Criteria (Q&C) along with the IPR, to the Bureau of Personnel Management (BPM/IDOT Personnel) for review. IDOT Personnel is then supposed to verify budgetary approval and that the position is necessary before posting the position. Generally, unless a CBA states otherwise, the posting duration is ten (10) days and the department head requesting the position determines whether it is posted internally or externally.

Candidates who timely applied to the posting are contacted to schedule an interview, except where CMS promotional grade or union seniority makes interviews unnecessary. Interviews are conducted by panels of two interviewers, both of whom are *Rutan* certified by CMS. The interviewers jointly submit one Candidate Evaluation Form per candidate. The scores should be tallied and weighted to rank all the candidates from highest to lowest. The interviewers complete an Employment Decision Form identifying the selected candidate (usually the highest ranked candidate, unless other considerations justify a different selection). IDOT Personnel staff should

then complete any necessary background checks and other similar inquiries, review the Employment Decision Form, and perform a final review of the entire interview packet. The Secretary, or someone with delegated signatory powers, signs off on the final selection and process.

According to CMS's "Interview and Selection Criteria and Techniques" training manual, the policies and procedures that IDOT and other State agencies use for hiring, promotion, transfer, and recall decisions regarding *Rutan*-covered positions should "assure compliance with the requirements of the *Rutan* decision" and "ensure all such [hiring, promotion, transfer, and recall] decisions are based on criteria other than party affiliation and support, such as the merit and qualifications of the candidates." *See* Interview and Selection Criteria and Techniques, Ch. 1, p. 1. Interviewers should "[m]aintain consistency and objectivity in asking interview questions and interpreting responses." *Id.* at 4.

2. Manipulation of *Rutan*-Covered Interview and Selection Process

The Special Master's investigation revealed that IDOT's *Rutan*-covered interview process is vulnerable to manipulation. As part of our initial investigation into the *Rutan*-covered interview process, the Special Master's office requested and reviewed sixteen (16) interview packets of *Rutan*-covered interview sequences that occurred between the years 2011 and 2014. A review of those interview packets revealed evidence of manipulation, including the following:

- Several interview sequences in which a candidate's scores appear to have been manipulated, giving favor to a politically connected candidate.
- Two interview sequences revealed that a candidate's professional references were directly involved in the selection process by either creating the Q&Cs or conducting the interview.
- Two interview sequences showed signs of preselection by interviewing only a single candidate (undermining the purpose of requiring a competitive process) or favoring a candidate because he or she was "performing the duties of this job since last year" as a Staff Assistant.
- At least six interview sequences showed inconsistent medium (pen versus pencil) used for writing contemporaneous notes and scores, raising concerns that the notes and scores were altered and not completed at the same time or by the same person.

Significantly, at least thirteen (13) of the employees who conducted the interviews for the sixteen (16) *Rutan*-covered interview sequences reviewed in our investigation were individuals who had been hired as *Rutan*-exempt political appointees. Additionally, current or former Staff Assistants were interviewers in eight (8) of the sixteen (16) sequences reviewed.

In one interview sequence, the evidence strongly suggested that an elected official from Rockford was preselected for a Realty Specialist II Appraiser position. The interviewers were both

former Staff Assistants, one of whom previously worked for Congressman Phil Hare (whose district included part of Rockford). *See* OEIG Report at 74, 199. The second-ranked candidate—who was not selected—possessed a degree in planning, had taken several courses in property evaluation, was a professionally certified appraiser, and had worked for five years as a county appraiser in another state. The elected official, on the other hand, possessed no college degree, had no courses in property evaluation, was not a professionally certified appraiser, and had not worked as an appraiser. After the initial scoring, the interviewers lowered the scores of the objectively more qualified candidate and the politically connected candidate was selected. It is highly suspect that the politically connected candidate with lower credentials was the highest ranking candidate after politically connected interviewers lowered another candidate's scores.

Similarly, in the interview sequence for an Engineering Technician IV Local Program Technician position, there was an obvious example of scoring manipulation to benefit a politically connected candidate. The interviewers (both former Staff Assistants) gave a fellow Staff Assistant a seven and an eight for Education and Training when she had an Associate's Degree in Business Administration; however, they both gave another candidate a score of three on Education and Training, despite the fact that the candidate had a Master's Degree in Business Administration. While this scoring variation alone does not prove systemic manipulations, it is evidence that interviewers can ensure that *Rutan*-covered interviews result in the selection of politically connected candidates.

Moreover, of the small subset of interview packets reviewed by our office, numerous hand-written interview question sheets revealed that notes and scores were written in separate mediums—one in pen and one in pencil. While IDOT policy allows the interviewers to collaborate on scoring while compiling the Candidate Evaluation Forms, it is suspicious the scores and notes would be written in different mediums, especially given the above evidence of lowering certain candidates' scores to elevate other more politically connected candidates.

Furthermore, there were additional examples of procedural abnormalities including instances where interviewers asked a different number of questions and/or asked questions regarding a different subject matter for the same position during the same interview sequence. CMS's "Interview and Selection Criteria and Techniques" requires interviewers to ask the same questions for each candidate. *See* Interview and Selection Criteria and Techniques, Ch. 3, p. 1 ("It is important to assure each candidate interviewed has an opportunity to respond to the same interview questionnaire."). Finally, other documents suggest that incomplete interview packets were submitted to IDOT Personnel, creating additional opportunities for manipulation.

Although the examples provided above are primarily historical, to date we have been unable to assess the current *Rutan*-covered process. Moreover, some of the currently certified *Rutan* interviewers were hired improperly as *Rutan*-exempt Staff Assistants and have political connections. Some of these individuals continue to conduct interviews at IDOT. We believe monitoring of the *Rutan*-covered process is necessary at this time to ensure IDOT's compliance

with the 1972 Decree. Further investigation is necessary to root out systemic problems and change the underlying processes that allowed them to develop.

III. *RUTAN* COMPLIANCE UNDER THE CURRENT ADMINISTRATION

The Court's Order of November 18, 2014, set up a process whereby the Special Master should circulate a "draft" of each report to the parties for comment prior to filing the report with the Court. On July 16, 2015, the Special Master submitted her Second Report Draft to the parties. By agreement, IDOT and the Governor's Office were given additional time to respond to the draft report. On August 7, 2015, IDOT submitted a written response ("Response") to the Special Master's Second Report, attached hereto as Exhibit A. After reviewing the Response, the parties held a telephone status with the Court to discuss concerns raised by the Response and thereafter, the Special Master's office sought additional clarification from IDOT. As a result, IDOT modified or clarified its positions taken in the Response, as explained below.

Many of IDOT's objections to some of the Special Master's recommendations, such as the recommendation to modify the *Rutan* review process, will likely be addressed over time with the parties or by Court Order. Certain statements contained in IDOT's Response to the Second Report of the Special Master, however, warrant additional discussion now.

On page one of IDOT's Response, it states: "We are not aware of any *Rutan* violations that occurred since our Administration took office." First, we are not sure that statement is entirely accurate. IDOT did violate *Rutan* when it hired an employee into a *Rutan*-exempt union covered position in April of 2015. IDOT acknowledged the mistake and quickly removed the employee from IDOT (although she thereafter ended up on a different state agency payroll).

A larger problem with this statement, however, is that IDOT has not provided information about its *Rutan* practices that would allow us to assess its current compliance. In her Initial Report, the Special Master asked for seven-day advance notice of all future *Rutan*-exempt appointments. IDOT agreed to provide such notice. On May 18, 2015, IDOT presented the Special Master with four proposed appointments. After we raised questions about two appointments, IDOT withdrew the proposed appointments but agreed to provide notice of any future appointments. Despite this agreement, we discovered IDOT subsequently made three *Rutan*-exempt appointments without the requisite notice.

IDOT's Response refers to the failure to provide notice as a "mistake." Response at 6. Although we appreciate that mistakes do occur, the need for advance notice of these appointments is not just a "technical" requirement. Advance notice is our only opportunity to weigh in regarding whether a position is properly designated as *Rutan*-exempt, prior to the appointment being made. As reported previously, IDOT and CMS have over-designated positions as *Rutan*-exempt. We are concerned that some *Rutan*-exempt appointments made in 2015 would not meet the legal *Rutan*-exempt test.

In addition to failing to provide the notice, when we requested information about certain appointments, IDOT refused to provide such information. On May 28, 2015, our office sent specific requests for information about two *Rutan*-exempt appointments made in March and May of 2015. One of those appointments was for an IDOT employee implicated in Staff Assistant hiring and another was for a position that most likely fails to meet the *Rutan*-exempt standards. Rather than providing the information requested and engaging in a dialogue about potential *Rutan* problems, IDOT continually refused to provide the requested information until after it conducted a full review of *Rutan*-exempt positions. *See* Response at 6-7.¹ Waiting until after *Rutan*-exempt appointments are made to supply information and engage in a dialogue with the Special Master defeats the entire purpose of providing advance notice of *Rutan*-exempt appointments to avoid *Rutan* violations in the first place.

IDOT has been reluctant to provide information in other instances also. To date, this office has been unable to actually monitor and assess ongoing hiring/promotion practices through in-person attendance at interviews and review of hire packets. IDOT has similarly prevented us from attending *Rutan* training. Although IDOT modified its position and agreed to accommodate access to interviews and *Rutan* training, IDOT's reluctance to provide the requested information and access is counterproductive. This reluctance needlessly slows the reform process and increases IDOT's costs. The larger point here, is that IDOT cannot claim there are no current *Rutan* violations and simultaneously bar access to the information that is necessary to verify that assertion.

Additionally, we have some concerns about the accuracy of information provided by IDOT. With respect to our concern regarding the use of current or former Staff Assistants to conduct interviews, IDOT represented to our office that only eight (8) current or former Staff Assistants are *Rutan* certified interviewers. In its Response, IDOT claimed that all of those former Staff Assistants transitioned into their current positions through an open and competitive *Rutan*-covered interview (with one exception). Our research revealed thirty-two (32) current or former Staff Assistants who are *Rutan* certified interviewers, and we do not know whether those employees transitioned to other positions through an open and competitive process. The parties are continuing to discuss this matter, including how many of those thirty-two Staff Assistants are actually conducting interviews and whether they should be removed from that role.

¹ After additional communications, on August 19, 2015, IDOT agreed to provide "employment packets" for the individuals in question. Our request, however, was that IDOT provide position description(s), personnel file(s), and answers to questions such as: who made the decision to appoint the employee?; and, is the appointment a promotion? We hope that IDOT will also provide the remaining information in the future. Ultimately, this delay slows the review process and increases costs for IDOT.

Finally, although IDOT has taken important steps to reform its employment practices, some of IDOT's statements in its Response expose a fundamental disagreement about the scope of the prior violations, the reasons for the prior violations, and the remedies necessary to prevent future violations. Our initial investigation reveals abuses in both the *Rutan*-exempt and *Rutan*-covered processes. And, in our opinion, these violations do not appear to be isolated instances "perpetrated by a relatively small number of people in prior administrations." See Response at 3. Nor can these abuses be fixed by the relatively modest changes in procedures proposed by IDOT. Rather, we believe that IDOT needs to adopt comprehensive policies and procedures that ensure a transparent and fair employment system, a compliance/monitoring system that can detect and then promptly remedy violations, and a process for public reporting about future *Rutan* violations.

IV. STEPS TAKEN BY IDOT / GOVERNOR'S OFFICE TO INSTITUTE REFORMS

In her Initial Report, the Special Master recommended that IDOT: (A) create and maintain accurate job descriptions; (B) identify *Rutan*-exempt positions; (C) narrowly define technical positions; (D) update *Rutan* guidance and training; and, (E) identify *Rutan*-exempt union-covered positions. See Initial Report at 27-29. Moreover, she recommended the State identify *Rutan*-exempt union-covered positions statewide. Below we describe the progress made by IDOT and the Governor's Office to fulfill these recommendations.

A. Create and Maintain Accurate Job Descriptions

IDOT started a preliminary internal review of the current job classifications and descriptions. While the entire process will take substantial additional time, IDOT counsel and staff agreed to review all job descriptions and classifications prior to filling any positions via new hires, transfers, or promotions. Although IDOT agreed to provide confirmation that all job descriptions for *Rutan*-exempt positions were reviewed for accuracy prior to hire, the parties have not agreed upon the process for providing such verification. IDOT has proposed to simply provide the Internal Personnel Request ("IPR") as verification that the job description was reviewed for accuracy. We believe that this is insufficient.

The IPR is a single-page fillable form that includes a section requesting a "brief summary of duties." However, as was evidenced by the abuse of the Staff Assistant position, IPRs can be and have been submitted with false job descriptions information. With respect to *Rutan*-exempt positions, we believe IDOT should submit an affirmative verification (or certification), by a senior IDOT official, that the job description was actually reviewed (and if necessary, updated), that the front line supervisor was questioned, and that IDOT has a good faith belief that the duties fall within the *Rutan*-exempt paradigm. We look forward to trying to reach agreement with IDOT on a process that all parties can agree to.

B. Identify *Rutan*-Exempt Positions

All positions currently labeled *Rutan*-exempt at IDOT have been identified by senior IDOT personnel. However, neither IDOT nor the Governor's Office have identified the positions at IDOT (or any other agency) that are properly *Rutan*-exempt. While the Governor's Office created a task force with the directive to look at CMS's designation system for classifying positions, it remains the Special Master's position that IDOT must identify a limited and discrete number of *Rutan*-exempt positions that truly require party affiliation for the effective performance of the job. We request that IDOT submit to our office a proposed list within forty-five (45) days from the filing of this Report. That initial designation by IDOT is necessary to advance the parties' discussions regarding proper *Rutan* designations.

C. Narrowly Define Technical Positions

IDOT counsel and senior staff are drafting a new definition of "technical." Once finalized, this definition will be used to determine which jobs are properly classified as technical positions and exempt from the State's Personnel Code. While the definition is not finalized and we have not reviewed any drafts, IDOT counsel stated they intend to produce a draft for review and commentary in the coming months. We look forward to working collaboratively with IDOT staff and counsel on this ongoing project.

D. Update *Rutan* Guidance and Training

In her Initial Report, the Special Master recommended that IDOT and/or the Governor's Office (and CMS if appropriate) work with the Special Master to prepare written *Rutan* guidelines to be disseminated to senior IDOT personnel. Although IDOT has not collaborated with the Special Master in updating its *Rutan* guidance, it has taken certain steps to implement the recommendation. The Special Master recently learned that CMS anticipates updating its "Interview and Selection Criteria and Techniques" training manual—which is used by all State agencies, including IDOT—in the near future. This document instructs agencies on the *Rutan*-covered interview process.

IDOT and CMS have also continued to provide *Rutan* training to IDOT employees. IDOT and CMS initially rejected (or continued to delay) our request to attend *Rutan* training. Although they have now agreed to our attendance, the delay and reluctance to collaborate on the content of the new manual and training impedes the overall reform effort. The Special Master renews the recommendation that her office be included in the development of new *Rutan*-exempt and *Rutan*-covered guidance and training, so that she can monitor IDOT's compliance with the 1972 Decree.

E. Identify All *Rutan*-Exempt Union-Covered Positions at IDOT (and Statewide)

Following the Initial Report, IDOT and the Office of the Governor identified all positions currently occupied by *Rutan*-exempt union-covered appointments statewide and implemented a freeze on filling any additional *Rutan*-exempt union-covered positions. The Special Master

commends both IDOT and the Governor's Office for acting so swiftly to curtail this ongoing *Rutan* violation.

F. Other Steps Taken By IDOT

In addition to the steps taken towards completing some of the Special Master's formal recommendations, IDOT implemented other proactive measures on its own. In a Memorandum to all agency heads dated July 1, 2015, the Office of the Governor outlined the elimination of the internal Electronic Personnel Action Request (ePAR)² system and stated that: "Further guidance on *Rutan*-exempt positions will be forth coming and may be addressed on an agency-by-agency basis." IDOT also abolished the Staff Assistant position for future hires or transfers³ and put a freeze on utilizing 60 day emergency temporary positions. Other steps taken by IDOT, CMS and the Governor's office are discussed further in IDOT's Response.

V. ADDITIONAL INTERIM RECOMMENDATIONS

Over the past several months, the Special Master has made several additional recommendations to IDOT to ensure future compliance with the 1972 Decree.

A. Eliminate CMS's Position-By-Position *Rutan* Review Process

To prevent future recurrences of the aforementioned abuses, the Special Master recommends the elimination of CMS's position-by-position review of job descriptions to make *Rutan* determinations. Instead, she renews her recommendation that IDOT (and each state agency) conduct an internal audit to determine the specific and limited number of positions which meet the narrow definition set forth in *Branti v. Finkel*, 445 U.S. 507, 518-9 (1980) ("The ultimate inquiry . . . is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."). Developing a finite number of *Rutan*-exempt positions at each state agency will help prevent future abuses of the *Rutan*-exempt process.

As further explained in IDOT's attached Response, it has rejected this recommendation. We anticipate that the parties will continue to discuss this recommendation.

² An ePAR is an electronic record used to authorize the filling of any vacancy. For *Rutan*-covered positions, the record required approval from relevant members of IDOT senior management and the Governor's Office of Management and Budget. For *Rutan*-exempt positions, the record required approval from the Office of the Governor. OEIG Report at v.

³ According to IDOT, there are forty-one existing Staff Assistants who still hold the title at IDOT. Their status is the subject of pending litigation.

B. Identify and Freeze All *Rutan*-Exempt Code-Covered Positions at IDOT (and Statewide)

The Special Master views granting the employment protections under the Illinois Personnel Code to *Rutan*-exempt employees as a *Rutan* violation. Senior IDOT officials and the Governor's Office have agreed that Code protection for *Rutan*-exempt employees is problematic. The Special Master recommended that IDOT freeze the filling of all *Rutan*-exempt Code covered positions. Although IDOT has not agreed to such a freeze, it has (to our knowledge) only filled one such position. Because Code protection would constitute improper protection of an otherwise at-will *Rutan*-exempt appointment in any agency, not just IDOT, the Special Master recommends that the Governor's Office institute a freeze on filling such positions in all agencies statewide.

As explained in IDOT's Response, the State has not accepted this recommendation. The parties will continue to discuss this recommendation.

C. Provide the Special Master Notice of and Access to *Rutan*-Covered Interviews

The Special Master and her staff have requested notice of and access to *Rutan*-covered interviews. IDOT Personnel Management began providing weekly notice of all job postings on June 19, 2015. IDOT is also providing monthly lists of the positions filled and the names of all employees who were hired, promoted, or transferred into those positions.

On-site monitoring of *Rutan*-covered interviews has proven to be particularly helpful in identifying systemic employment practices in the Special Master's previous monitoring appointment. After continued communication with IDOT concerning this recommendation, IDOT has now agreed to allow the Special Master and her staff access to *Rutan*-covered interviews. The Special Master appreciates IDOT's continuing cooperation with this request.

VI. CONCLUSION

We want to commend IDOT and the Governor's Office for their work in taking steps towards reforming their employment practices in order to prevent future violations of the 1972 Decree. We fully recognize that completing this process requires a coordinated and multi-layered approach that cannot be fixed overnight. We believe the process is more efficient when the Special Master and her staff are included in the ongoing reform process, rather than being advised of reforms after the fact. We look forward to continued collaboration with the parties to implement the recommendations set forth in the Initial Report and herein.

Respectfully submitted,

/s/ Noelle C. Brennan

Dated: August 20, 2015

Noelle C. Brennan
Leah M. Farmer
NOELLE BRENNAN & ASSOCIATES, LTD.
20 S. Clark St., Suite 1530
Chicago, IL 60603
(312) 422-0001

EXHIBIT

A



Illinois Department of Transportation

Office of Chief Counsel
2300 South Dirksen Parkway / Springfield, Illinois / 62764

August 7, 2015

Ms. Noelle Brennan
Noelle Brennan & Associates, Ltd.
20 S. Clark St., Suite 1530
Chicago, Illinois 60613

Dear Ms. Brennan:

The Governor's Office and the Illinois Department of Transportation (IDOT) have met or consulted by phone with your office numerous times since the issuance of your first report. We look forward to continuing a cooperative, working relationship with you and your team as we continue on the path to restoring integrity and public confidence in State employment.

We recognize that your draft Second Report focuses on historical practices of prior administrations. We are not aware of any *Rutan* violations that occurred since our Administration took office. Nor do we have reason to believe you or Plaintiffs' counsel has heard of any such violation.

As discussed below, we have implemented numerous changes to the hiring and employment process both on our own and in cooperation with your office.

- I. Responses to the Special Master's Additional Findings.
 - A. The *Rutan* Process is not Fundamentally Flawed.

The Governor's Office and IDOT respectfully dispute the underlying assumption in your draft report that the *Rutan* hiring process is systemically flawed. The existing process, in place for over 20 years, aims at removing political considerations from any hiring into *Rutan*-covered positions. As practiced, it includes specific steps by which positions are assigned a *Rutan* status (*i.e.*, covered or exempt), created, modified, posted, and filled in a manner that complies with *Rutan* and its progeny.

Ms. Noelle Brennan
August 7, 2015
Page 2

Since 1991, the State, through the Department of Central Management Services (CMS), has determined the *Rutan* status of every position based on its duties and level of responsibility as shown by the job description. Jenner & Block and Ernst & Young developed this approach after the *Rutan* decision and in accordance with subsequent case law (including *Branti*). In reviewing a position for a *Rutan* determination, CMS considers not only the duties and level of responsibility in the job description, but also other factors, including its relationship with other jobs in similar classifications and the agency's organizational structure. For the majority of State positions, CMS possesses this knowledge through its administration of the Personnel Code. For those positions that fall outside the Personnel Code (non-Code), such as IDOT's technical positions (see 20 ILCS 415/4c(12)), CMS relies only on the job description because it lacks the additional information about the nature and structure of the organization. The State – by and through the Governor, IDOT, and CMS – recognizes this disconnect, and it is taking steps to improve CMS's ability to accurately determine the *Rutan* status of non-Code positions. Notably, the State is working to better define the term "technical" so as to bring more positions under the Personnel Code and subject to CMS review. For positions that remain technical, the State is exploring additional changes to improve the strength and integrity of the *Rutan* designation process.

The issues raised by the hiring of Staff Assistants at IDOT expose a second shortcoming to the existing process: accurate job descriptions. The job description for a Staff Assistant accurately sets forth *Rutan*-exempt duties. Those employees who were actually performing the job duties of a Staff Assistant were properly *Rutan* exempt. The system was not flawed – fundamentally or otherwise – with regard to those hires. Unfortunately, certain IDOT employees hired and placed employees into the Staff Assistant position with no intention of having them perform Staff Assistant duties. We stopped this practice and are designing procedures to prevent similar occurrences in the future. Moreover, as discussed below, IDOT has instituted a number of practices to ensure that employees – both *Rutan*-exempt and *Rutan*-covered – are performing the duties set forth in their job descriptions.

Your draft report proposes scrapping the current *Rutan* system and replacing it with another. We, on the other hand, believe the current process is fundamentally sound and that, with the adjustments discussed herein, political considerations will continue to be

Ms. Noelle Brennan
August 7, 2015
Page 3

eliminated in the *Rutan*-covered hiring process. Can we guarantee that the current process is foolproof? Certainly not. People who have low regard for law and rules can often find ways to corrupt seemingly incorruptible systems. Any system – including the process you propose, which limits the number of *Rutan*-exempt positions to specific titles – contains a human component and can, therefore, be manipulated by lawless people. But to keep this matter in perspective, please appreciate that the few examples of hiring abuse discussed in your report were perpetrated by a relatively small number of people in prior administrations, and the total number of improper hires represents a small percentage of total IDOT employees.

Furthermore, aside from the egregious circumstances that produced this case, the State of Illinois can be rightfully proud of its history of success in *Rutan* litigation. Based on that experience and understanding the cause of the abuse that prompted your appointment as Special Master, we are committed to maintaining and improving the current hiring processes. We see no need to entirely remake the system. Rather, we recommend devoting attention to improving the existing system by ensuring that: positions are properly designated; job descriptions accurately detail position duties; and appropriate positions are deemed “technical.” With those improvements, CMS can perform the robust and consistent review envisioned by the current process. To that end, IDOT is reviewing the accuracy of existing job descriptions, eliminating unnecessary *Rutan*-exempt positions, and more accurately defining “technical.”

Although we agree that prior administrations abused the *Rutan* hiring process, the process itself is not systemically flawed. Moreover, the steps we have already taken and those we plan to implement should prevent future abuse.

- B. The *Rutan* Determination Process is fundamentally sound, but was abused by certain individuals in ways that can be prevented in the future.

The communication gap between IDOT and CMS in the *Rutan* determination process that permitted earlier abuse will be closed through the implementation of two key steps: (1) narrowing the definition of the Personnel Code’s exemption for IDOT’s technical

Ms. Noelle Brennan
August 7, 2015
Page 4

positions, thus reducing the number of employees who exist outside of the oversight of CMS and its corresponding organizational knowledge; and (2) providing CMS with a view into IDOT's overall organizational structure through such things as its organizational charts and classification systems so that CMS' insight can extend to both Code and non-Code IDOT positions.

Additionally, IDOT has taken numerous steps to ensure that, both before a position is filled and throughout an employee's tenure, that employee's position description accurately describes the duties to be performed. Before an employee is hired, IDOT verifies the duties of the position through the use of the Internal Personnel Request form ("IPR") (attached). If the job description is more than two years old when the supervisor seeks to fill the position, the supervisor must complete form PM 1863 to verify that the proper review of the job description has occurred. Not less than once each year, each supervisor, as part of the annual performance review process, must review the employee's position description to ensure that it accurately reflects the current job duties and responsibilities.

These changes to both the *Rutan* determination and the *Rutan*-exempt hiring processes eliminate loopholes that prior IDOT employees exploited. The Special Master, the Governor's Office, IDOT, and CMS have discussed modifications or additions to how the State manages *Rutan*-exempt hiring. These changes will complement the changes IDOT has already implemented (or plans to implement).

C. IDOT is working to remove opportunities for manipulation in the *Rutan*-covered hiring process through both personnel and process changes.

In your Second Report, you note historical examples that suggest political manipulation in the *Rutan*-covered interview process. IDOT has implemented, and will continue to implement, changes to enhance the soundness of the current *Rutan*-covered interview process.

One factor you note is the presence of current and former Staff Assistants involved in the interview process. All of those former Staff Assistants transitioned into their current positions through a *Rutan*-covered interview. Put another way, they participated in an open and competitive hiring process to obtain their current

Ms. Noelle Brennan
August 7, 2015
Page 5

positions.¹ Cognizant of its operational needs and the training process, IDOT will gradually transition the former Staff Assistants away from the interview process. In addition, the current administration emphasizes the requirement that *Rutan*-covered scoring be accurate, complete, and relative to each candidate's skill and experience.

In addition to the IPR process, described above, which ensures establishment and affirmation of accurate duties and requirements for each position before the position is filled, IDOT has refined the *Rutan*-covered interview scoring process. The current scoring method requires a strict comparison between the established job criteria and the candidate's attributes, rather than an average of scores assigned to the candidate's responses. IDOT's Bureau of Personnel Management then reviews the scores for consistency between interviewer notes and resulting scores. Beginning July 27, 2015, IDOT now reconciles each candidate's responses with the skill and experience information provided on the candidate's application. Finally, IDOT adheres to the policy of asking all questions of all applicants. Consistent with IDOT policy, follow-up questions for the purpose of clarification may be asked of a candidate, provided the follow-up questions address the original question.

II. Additional Items Already in Process.

A. Accurate Job Descriptions.

As noted, IDOT has started its preliminary review of job descriptions, especially the *Rutan*-exempt job descriptions. Executing additional steps partly depends on other related actions, such as completing the definition of "technical." As we resolve these related issues, IDOT will continue its phased approach to the review of job descriptions. For positions that are to be filled, the actions IDOT takes to verify accurate job descriptions before the job is filled are described above. We propose that the completed IPR serve as verification of such internal review.

¹ One current Staff Assistant was in a position to participate in the *Rutan* interview process at the time the draft Second Report was received but has since been removed from the list of *Rutan*-certified interviewers.

Ms. Noelle Brennan
August 7, 2015
Page 6

B. Identifying *Rutan*-Exempt Positions

IDOT is reviewing current positions so, among other reasons, it can provide you with a list of the positions it believes are (or should be) *Rutan*-exempt. IDOT intends to provide this list of current positions within 45 days of the issuance of your Second Report.² The parties will surely agree on the *Rutan*-exempt designation for some positions. We will likely also agree that some current *Rutan*-exempt positions should either be eliminated or converted to *Rutan*-covered status. For positions that fall between those two groups, the parties might not agree on the *Rutan*-exempt designation. At that point, the parties can conduct a position-by-position analysis and discussion.

IDOT and your office are working through the finer details of providing you with notice of *Rutan*-exempt appointments. Consistent with my assurances in a letter dated May 15, 2015, IDOT will provide you with notice of future *Rutan*- exempt hires. Additionally, before providing such notice, IDOT will review the positions into which we want to hire, verify that the job description is up to date (as described above), update the job description (if necessary), and confirm the position's *Rutan* exempt status. When providing your office with notice of future *Rutan*- exempt hires, IDOT will supply you with a copy of the relevant job description. I recognize that IDOT recently hired into two high-level *Rutan*-exempt positions prior to notifying you, which was a mistake. Future hires will follow the notification process detailed herein.

IDOT notes that your draft Second Report and letter dated August 3, 2015, reference perceived issues with specific *Rutan*-exempt hires and the exempt nature of specific positions. As noted during the recent conference with Judge Schenkier, IDOT believes that questions about specific positions are premature and should wait until IDOT performs its review of exempt positions. Accordingly, IDOT is willing to discuss the *Rutan*- exempt appointments raised

² We do not agree with the Special Master's recommendation that IDOT should set a discrete number of *Rutan*-exempt positions. Our participation in the review of existing *Rutan*-exempt positions, therefore, should not be viewed as tacit acceptance of the Special Master's proposal. Rather, we regard this review as a necessary step to correct potential abuse by prior administrations and to move toward strengthening the existing process. To this end, the Special Master has acknowledged that some flexibility is needed over time as new positions with new duties are created. While the parties have significant differences in their expectations for the future of the hiring process, they continue to discuss this issue in a cooperative manner.

Ms. Noelle Brennan
August 7, 2015
Page 7

in your May 28, 2015 letter, but not until after the first phase of proposing the *Rutan*-exempt list is completed.

C. Narrowly Define Technical Positions.

IDOT is committed to narrowing the definition of “technical.” We recognize that our commitment has not yet produced a result. But the task is not as simple as it may seem. IDOT’s definition may impact other agencies, as well as collective bargaining units. Consequently, IDOT needs to produce a definition that is acceptable not only within IDOT but also to others, including CMS and the Civil Service Commission. When IDOT defines the term in a manner acceptable to those others, it will provide it to you.

D. Identify All *Rutan*-Exempt Union-Covered Positions at IDOT (and Statewide).

In addition to identifying *Rutan*-exempt union-covered positions, we devoted substantial time and resources toward drafting and lobbying for passage of a bill that, if passed, would have enabled us to correct one of the problems at the heart of your first report – that is, the inconsistency between a *Rutan* exemption and union membership. That bill is still pending before the General Assembly.

III. Additional Interim Recommendations in the Draft Second Report.

A. Eliminate CMS’s Position-By-Position *Rutan* Review Process.

As noted above, we are committed to the current *Rutan* review process. The problems that prompted this case can be resolved through modification of the existing system. The hiring issues you raise in your reports resulted from the specific actions of individuals who took advantage of a system that permitted employees to perform duties outside of their job description. Inadequate oversight and guidance into the maintenance and creation of *Rutan*-exempt positions compounded the problem at IDOT, where a majority of the employees are not subject to the Personnel Code. The Governor’s Office, IDOT, and CMS are addressing these issues and continue to discuss other issues, such as oversight and guidance regarding future hiring. Also, CMS created and filled a new position specifically dedicated to *Rutan* review and compliance. The employee in that position is actively engaged in supporting

Ms. Noelle Brennan
August 7, 2015
Page 8

agencies in their *Rutan* compliance efforts and will support IDOT's efforts as well. Identifying a discrete number of *Rutan*-exempt positions at IDOT (or any other agency) is neither necessary nor appropriate to address and eliminate the past manipulation of the hiring process.

B. Identify and Freeze All *Rutan*-Exempt Code-Covered Positions at IDOT (and Statewide).

We understand your recommendation regarding *Rutan*-exempt Code-covered positions. Although we have not accepted that recommendation, we have not ignored it. We have discussed it internally at length and externally with one of the original authors of the State's *Rutan* policy. We are trying to evaluate its possible impact while we explore possible alternatives. We hope to be able to offer a more definitive response to your recommendation sometime in the next ten weeks. As always, we appreciate your and the court's patience as we work through these challenges. As we proceed, we pledge to consult with you and, if necessary, the court.

C. Provide the Special Master Notice of and Access to *Rutan* Training and *Rutan* -Covered Interviews.

CMS will soon complete updating its hiring manual, entitled "Interview and Selection Criteria and Techniques Hiring Manual." As soon as it produces an updated manual, CMS will invite you or a member of your team to accompany CMS's *Rutan* reviewer as an observer at one of the Chicago training sessions for *Rutan*-certified interviewers. We will provide details and, if necessary, any conditions of attendance by separate letter.

As you note, we have not previously agreed to allow you or your staff to attend IDOT interviews for *Rutan*-covered positions. As we reported to the court during our last status hearing, we have been working diligently on a variety of hiring issues, while simultaneously seeking a legislative remedy to some of the problems. And, as reported in the previous paragraph, CMS is updating its hiring manual. As reported in the next paragraph, we hope to enlist the help of the Office of Executive Inspector General in monitoring IDOT hiring practices. In short, we would like time to get our house in order before any guests arrive.

Nevertheless, we understand your interest in observing interviews sooner rather than later. To accommodate that interest, we will

Ms. Noelle Brennan
August 7, 2015
Page 9

arrange for you or a member of your team to observe a limited number of interviews. Of course, we hope your observations will satisfy you that we are conducting the interviews properly. If not, we hope you will afford us the courtesy of reporting any adverse finding so, if we concur with you, we can immediately correct the problem. We also hope you will agree to delay your interview attendance until you have observed one of our *Rutan* training sessions. As we reported to both you and the court, the Office of the Executive Inspector General has statutory authority to monitor *Rutan* hiring. But, that office has numerous other responsibilities, and lacks sufficient funds to devote significant resources to the *Rutan* hiring task. Nevertheless, we have met separately with both the prior and current acting Executive Inspectors General. If we can find adequate funding, they are willing to devote the appropriate personnel to that task. At your recommendation, we also made contact with the City of Chicago's Inspector General. He, too, supports our concept and offered to provide his guidance "book." Our next step is to consult with you, the court, and to internally determine whether sufficient IDOT funds will be available to support a position or positions at the OEIG through an inter-governmental agreement.

Thank you for considering the State's comments to your draft Second Report.

Sincerely,

A handwritten signature in black ink, appearing to read 'William M. Barnes', with a long horizontal line extending to the right from the top of the signature.

William M. Barnes
Chief Counsel

cc: Joe Hartzler (via e-mail only)
Brent Stratton (via e-mail only)



**Illinois Department
of Transportation**

Internal Personnel Request

Box 1 Division/Office		Box 2 Bureau	
Box 3 Location/County		Box 4 Yard/Zone	
Box 5 Position Title		Box 5 Working Title	
Box 7 Position Number	Box 8 Rutan Status <input type="checkbox"/> Covered <input type="checkbox"/> Exempt	Box 9 Number of Positions	Box 9a Is this a mandatory/collective bargaining position? <input type="checkbox"/> Yes <input type="checkbox"/> No
Box 10 Requested Action		Box 11 Action Type	
<input type="checkbox"/> Appointment (External)	<input type="checkbox"/> Establish Position	<input type="checkbox"/> PFT	<input type="checkbox"/> Internship
<input type="checkbox"/> Promotion (Internal)	<input type="checkbox"/> Blanket	<input type="checkbox"/> PPT	<input type="checkbox"/> Emergency
<input type="checkbox"/> Lateral Transfer (Code only)	<input type="checkbox"/> Voluntary Reduction (Code only)	<input type="checkbox"/> CO-OP	<input type="checkbox"/> Temporary
<input type="checkbox"/> Status Change (PPT to PFT)		<input type="checkbox"/> Recruit	<input type="checkbox"/> 75-Day
<input type="checkbox"/> Term Appointment			<input type="checkbox"/> Intermittent
Previous Incumbent Information			
Box 12 Name		Box 13 Date Position Vacated: Monthly Salary:	
Box 14 Reason for Vacancy			
<input type="checkbox"/> Promotion	<input type="checkbox"/> Resignation _____	<input type="checkbox"/> Long-term Leave of Absence	<input type="checkbox"/> Discharge
<input type="checkbox"/> Transfer	<input type="checkbox"/> Retirement _____	<input type="checkbox"/> End of Temporary Program	<input type="checkbox"/> Layoff
<input type="checkbox"/> Other (Specify) _____			<input type="checkbox"/> Death
Box 15 Justification			
Brief Summary of Duties:			
What critical, front-line service needs will the position fill?			
How many similar positions are in the agency and in this location? _____ positions			
What is the appropriate staffing for this position? _____ Authorized/ _____ Vacant			
What will happen if the position is not filled by a certain date?			
If the IPR is for a <u>specific person</u> :			
Box 16 Is Position Budgeted? <input type="checkbox"/> Yes <input type="checkbox"/> No	Box 17 Is Position Within Headcount? <input type="checkbox"/> Yes <input type="checkbox"/> No	Box 18 ePAR Funding Source	
Box 19 Requesting Director			Box 20 Date
Box 21 Director of Finance & Administration			Box 22 Date
Box 25 Bureau Chief of Personnel Management			Box 23 IPR Number
Date			Box 24 CMS Requisition Number

Internal Personnel Request Instructions

(please detach and retain instructions for your records)