United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

February 23, 2007

The Honorable Henry A. Waxman
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
2157 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Waxman:

This letter presents the views of the Office of Government Ethics (OGE) on H.R. 984, the "Executive Branch Reform Act of 2007," as approved by the Committee. Please note that this letter is confined to sections 2 through 4 of the bill and does not address any potential Administration concerns with respect to the remaining sections, which do not pertain to OGE's area of expertise.

At the outset, we want to emphasize that OGE shares the Committee's desire to promote integrity, transparency and accountability in Government. We appreciate the Committee's efforts to ensure that adequate rules are in place to maintain the public's confidence in the Federal Government. We also want to acknowledge that the Committee has made a number of positive changes to this bill along lines suggested by OGE staff providing technical assistance on H.R. 5112, a similar bill considered in the 109th Congress.

We also would like to observe that any ethics reform must involve the careful balancing of various Governmental interests. These include not only the interest in preventing actual and apparent corruption, but also the Government's interest in recruiting and effectively using qualified personnel. Congress recognized these important principles and sought to achieve this very balance in the original Ethics in Government Act of 1978. *See, e.g.*, S. Rep. 95-170, at 32 (1977). Many of the specific comments set out below reflect our continuing efforts to maintain the appropriate balance.

Section 2

OGE has concerns about the breadth of section 2 of the bill, which would add a new Title VI to the Ethics in Government Act of 1978. Section 2 would require large numbers of executive branch employees to report information to OGE about contacts made by private parties seeking to influence Government action. The scope of section 2 presents a series of practical concerns for those charged with meeting the requirements. OGE also is concerned about the magnitude and novelty of the new regulatory responsibilities for OGE itself, given its existing resources and other important responsibilities for preventing conflicts of interest. It is likely that other executive branch agencies, whose employees must comply with the reporting requirements of this bill, also would have resource issues.

Impact on the Executive Branch

OGE believes that the breadth of the disclosure requirement would create significant difficulties for the executive branch.

It is important to appreciate the size of the class of covered executive branch officials that would be required to make quarterly reports of contacts. With respect to a similar bill introduced in the previous Congress, H.R. 5112, the Congressional Budget Office estimated that the reporting requirements would have applied to approximately 8,000 executive branch officers and employees. Congressional Budget Office, Cost Estimate for H.R. 5112, April 26, 2006, p. 2. That number would be even greater for H.R. 984, because the new bill adds an another category of covered official (in addition to all Executive Level appointees, Schedule C employees, 0-7 and above uniformed officers, and White House confidential employees): all noncareer Senior Executive Service members.

It should also be noted that the disclosure requirement would not be limited to contacts by persons acting as professional lobbyists or paid representatives. In the course of a given work day, one might expect covered officials to receive numerous contacts from citizens seeking to express their views about various Government actions. Indeed, officials who give speeches or attend other public events may well meet dozens of private persons who take the opportunity to express their views and try to influence official action.

In order to understand the practical difficulties, it is important to remember that thousands of officials would, themselves, bear the responsibility for reporting all of these contacts. In this respect, the bill diverges from the approach of the Lobbying Disclosure Act of 1995 (LDA), under which the lobbyist, not the Government, bears the cost and burden of compliance. Therefore, in contrast to the LDA system, this new system would create the potential for disruption to the work of Government. For each of the covered contacts, officials would be obligated not only to keep detailed records and make reports to OGE, but also to obtain information from the private parties. For example, the bill would require the official to obtain not only the name of the private person but also the identity of any clients the person may be representing. Unlike the LDA, which places these burdens on the person making the contact, this bill places the burden on the Government official, who may not be in as good a position to know this information and, equally problematic, would have to devote substantial time and resources to the documentation and reporting requirements at the expense of other public duties.

We note also that the new reporting requirements placed on executive officials would overlap with existing reporting requirements placed on lobbyists under the LDA. However, because the legal requirements are not identical and would be administered by different offices (OGE, on the one hand, and the Clerk of the House and Secretary of the Senate, on the other), one could expect inconsistencies and potential confusion over the respective requirements.

Finally, it is not clear why the executive branch is singled out for the expanded disclosure requirements. The LDA reflected equal concern for lobbying transparency in the legislative and executive branches. It is not apparent why this no longer would be the case.

Impact on OGE

As you are aware, OGE has important responsibilities for preventing conflicts of interest among executive branch employees. Our current responsibilities include the executive branch financial disclosure system (including the clearance of reports filed by all nominees for Senate-confirmed positions), the development of conflict of interest policies and regulations, oversight of agency ethics programs, ethics

training, and the whole range of specific duties in the Ethics in Government Act of 1978, the Ethics Reform Act of 1989, and Executive Order 12731. Section 2 of the bill would add to these an entirely new set of responsibilities, for which OGE has no existing expertise and which would pose serious problems of implementation for the Agency.

Section 2 is closely related, in its purpose and much of its language, to the LDA. However, although the Secretary of the Senate and the Clerk of the House already have over ten years of experience under that Act with systems for the collection and public disclosure of information about executive branch lobbying contacts, OGE has never had any regulatory authority or experience related to this subject. The new responsibilities prescribed for OGE under section 2 (collecting and reviewing contact reports, investigating compliance, and developing computer systems for collating, indexing, disseminating and searching information) are not something that can be absorbed simply and readily by the Agency. Particularly during the start-up period,[1] the attention of the Agency could be diverted from OGE's historic conflict prevention functions, given the limits of OGE's resources. This is especially true given that the initial period would likely overlap with the next Presidential transition, a time of particularly high work volume in the clearance of Presidential nominees and the counseling of departing employees.

The problems for OGE would be exacerbated by the practical difficulty of implementing many features of the proposed system. For example, section 602(a)(2) would require OGE to "verify the accuracy, completeness, and timeliness of reports." As noted above, over 8,000 officials would be covered, and each of these would be required to file four reports per year. Hence, OGE would have to review over 32,000 reports annually--compared with the 1,000 to 1,500 financial disclosure statements OGE currently reviews annually. (Note that, under Title I of the Ethics in Government Act, agency ethics officials, rather than OGE, review the financial disclosure statements of the vast majority of filers, and those officials also play a key preliminary role in

---

[1] Under section 2(b), OGE is given nine months to promulgate "draft" initial implementing regulations and three more months to promulgate "final" regulations, in time for the one year effective date of the law.

reviewing those statements for which OGE is ultimately responsible.) Each of the reports could well contain a large number of contacts. It is hard to imagine how OGE could verify the entries on each of these reports. Apart from the sheer magnitude of the task, the information necessary to verify the accuracy and completeness of the reports typically would not be available to OGE; even if OGE undertook to audit or interrogate filers, it is not apparent that OGE could independently verify or challenge entries on the reports.

Section 3

OGE has several concerns about the various new "revolving door" requirements in section 3 of the bill, which would add a new Title VII to the Ethics in Government Act of 1978. In addition to a number of specific concerns about each of the new requirements (proposed new sections 701, 702 and 703 of the Ethics in Government Act), OGE has overarching concerns about section 3 as a whole.

General Concerns

First, OGE believes that it is particularly problematic to create several new ethics restrictions that are both overlapping and inconsistent with existing provisions in the ethics laws and regulations. Proposed sections 701 (post-employment cooling-off period) and 702 (negotiation of future employment) would overlap with, yet differ from, criminal prohibitions already found in chapter 11 of title 18, specifically, 18 U.S.C. § 207(c) and (d), and 18 U.S.C. 208. Moreover, proposed section 703 (cooling off period for persons entering Government) would substantially overlap with 18 U.S.C. § 208 as well as OGE's own impartiality regulation, 5 C.F.R. § 2635.502(b)(1)(iv). All three sections would overlap with provisions in the Procurement Integrity Act, 41 U.S.C. § 423, particularly as that Act would be amended under section 4 of this bill. *See* 41 U.S.C. § 423(c) (employment contacts); 423(d) (post-employment restriction); H.R. 984, § 4(c) (procurement restrictions concerning former employer).

Numerous critics have objected that the conflict of interest laws and regulations governing executive branch officials are already quite complex. *See* OGE, *Report to the President and to Congressional Committees on the Conflict of Interest Laws Relating to Executive Branch Employment* 15-17 (January 2006) (OGE *Report*). Further adding to this intricate

web of restrictions would only compound the problems that well-meaning employees already have in understanding and complying with the requirements, as well as the problems encountered by prosecutors in establishing willful violations when employees claim they did not understand a given prohibition.[2] It is important to remember that a central purpose of the landmark 1962 overhaul of Federal conflict of interest laws was to clean up the patchwork quilt of restrictions that had evolved over the years, especially the "overlap and inconsistency" of the various provisions. S. Rep. 2213, 87th Cong., 2d Sess., Sept. 29, 1962 (Pub. L. 87-849); *see also* B. Manning, *Federal Conflict of Interest Law* 5-6 (1964). Provisions such as those in section 3 of the bill undermine the goal of a uniform and consistent set of understandable standards.

Second, section 3 of the bill subjects the Vice President to two new disqualification requirements, in section 702 (concerning employment negotiations) and section 703 (concerning former employers and clients). *See* section 705 (definition of "covered executive branch official" includes Vice President). The Vice President has never been covered by the existing disqualification provisions in 18 U.S.C. § 208 or 5 C.F.R. § 2635.502. Moreover, from discussions with the Department of Justice, OGE understands that provisions requiring the Vice President to be disqualified from performing certain functions of his office would raise constitutional problems.

Proposed New Section 701 of the Ethics in Government Act

Our general concern about creating new civil restrictions that partially overlap with existing criminal and civil restrictions is even more heightened in the area of post-employment law, which is the subject of proposed section 701. The current post-employment restrictions are an especially complicated body of law. The main criminal statute, 18 U.S.C. § 207, already contains no fewer than seven separate restrictions for the executive branch. To these must be added the post-employment restrictions of the Procurement Integrity

[2]These concerns are not speculative. For example, OGE has been advised more than once that officials in certain executive agencies have so focused on the post-employment restrictions in the Procurement Integrity Act, 41 U.S.C. § 423(d), that they have overlooked or underappreciated the related, but different, criminal restrictions in 18 U.S.C. § 207(a).

Act, the post-employment application of 18 U.S.C. § 203, and miscellaneous post-employment restrictions of special applicability, such as 12 U.S.C. § 1820(k), not to mention the legal ethics rules, such as ABA Model Rule 1.11. Therefore, OGE is particularly concerned about the accretion of yet one more layer of post-employment restrictions that must be explained to employees and harmonized with existing provisions.

Furthermore, it is not clear how section 701 is intended to apply to employees who meet the definition of "covered executive branch official," in proposed section 705, but who are not already subject to 18 U.S.C. § 207(c) or (d). For example, the definition at proposed section 705(3) includes employees "described in section 7511(b)(2)(B) of title 5, United States Code." It is our understanding that 5 U.S.C. § 7511(b)(2)(B) describes what are commonly known as Schedule C employees, i.e., noncareer employees below the Senior Executive Service level, typically General Schedule (GS) employees serving in various confidential or policy positions. *See, e.g.*, Office of the Clerk, House of Representatives, *Lobbying Disclosure Act Guidance*, § 2 (same language in Lobbying Disclosure Act generally covers Schedule C employees, but not SES), http://clerk.house.gov/pd/guideAct.html. Such GS-level employees do not meet the pay or other criteria for coverage under the existing restrictions in section 207(c) or (d).[3] We believe the better reading of proposed section 701 is that covered executive branch employees would not be subject to the new two-year ban if they were not already subject to the existing one-year ban in section 207(c) or (d), but this should be clarified. We are concerned that the suggestion that such employees are subject to a two-year cooling-off period would impede the recruitment and retention of individuals to serve in

[3] It is important to remember that these employees nevertheless are subject to other important post-employment restrictions that reduce the potential for misuse of influence. These include a lifetime ban on representing anyone in connection with a particular matter involving specific parties in which the employee participated for the Government, as well as a two-year ban on representing anyone in connection with any such matters that were pending under the employee's official responsibility during the final year of Government service. *See* 18 U.S.C. § 207(a)(1), (2).

positions that historically have been well below the level of status and responsibility for coverage under section 207(c) or (d).

Proposed New Section 702 of the Ethics in Government Act

Section 702, which imposes a recusal requirement on covered officials who are negotiating or have an arrangement with a prospective employer, also raises concerns about overlapping and inconsistent ethics provisions. This provision on employment negotiations overlaps not only with 18 U.S.C. § 208 but also with the employment contact provision in the Procurement Integrity Act, 41 U.S.C. § 423(c). A covered official, therefore, could be put in the position of having to follow the three sets of overlapping but different requirements pertaining to a single employment negotiation. Interpretive confusion--*e.g.*, proposed section 702 uses the term "any official matter," whereas section 208 uses the term "particular matter" and section 423(c) uses the term "Federal agency procurement"--is almost inevitable.

We note also that section 702 would add a new waiver standard and procedures that differ from those under section 208(b). Although we appreciate and share the Committee's concerns about employment--negotiation waivers, we believe this added statutory complexity is unnecessary. Pursuant to Executive Order 12731, OGE already exercises a consultative role with regard to waivers issued by agencies under 18 U.S.C. § 208(b). During these consultations, OGE sometimes recommends against the issuance of the waiver and often recommends changes to proposed waivers to prevent real or apparent conflicts of interest. Moreover, in 2004, OGE issued a memorandum to all designated agency ethics officials cautioning that waivers covering employment negotiations require "particular scrutiny" and should be "issued only in compelling circumstances." OGE Memorandum DO-04-029, http://www.usoge.gov/pages/daeograms/dgr_files/2004/do04029.pdf. In light of this guidance and OGE's existing consultative role, we do not believe that the practice of granting waivers for employment negotiations is widespread.

Finally, although proposed sections 701 and 703 each contain a paragraph indicating that no effect on the parallel criminal conflict of interest statute is intended, section 702

lacks such a paragraph. The significance of this omission is not clear.

Proposed New Section 703 of the Ethics in Government Act

OGE shares the Committee's concern about the so-called "reverse" revolving door, i.e., officials participating in matters involving their former employers. For this reason, OGE has issued its own rule dealing with impartiality concerns arising from an employee's participation in matters involving a former employer or client. *See* 5 C.F.R. § 2635.502(b)(1)(iv).

Proposed section 703, however, has certain features that could impair the efficient use of expert personnel and create other administrative problems.

First, section 703 would create a two-year recusal period for certain matters affecting the financial interests of a former employer or client. OGE chose a one-year focus for its rule, because it was thought that a longer period of disqualification would unduly hamper the ability of agencies to take advantage of the expertise of employees who have specialized experience from their former employment.[4]

Second, the waiver provision in section 703 cannot practicably be administered because it requires written OGE approval for every waiver. Given the large number of employees covered by this prohibition, as well as the potential range of matters subject to the prohibition, it would be infeasible for OGE to become involved in every single waiver determination for

---

[4] We note also that the extended recusal requirement under section 703 would apply to any particular matter involving specific parties that "would affect the financial interests" of the former employer or client. This contrasts with the OGE rule, which focuses on particular matters in which the former employer or client actually *is* a party or representative of a party. Thus, under section 703, employees would have to consider whether their former employer or client has some financial interest even though not actually a party or representative of a party. For example, an employee might have to recuse from participating in a lawsuit brought by someone other than his former employer, if the lawsuit set a precedent benefiting an entire industry of which the former employer was a member.

every covered official. Apart from the magnitude of the task, OGE would not even have the familiarity with agency programs and the impact of those programs on every former employer and client to be able to make informed decisions. Moreover, because section 703 generally parallels 18 U.S.C. § 208, it seems anomalous that the parallel breaks down in this regard: the waiver of an employee's own financial interest, under 18 U.S.C. § 208(b)(1), is approved by the employee's appointing official, whereas the waiver of a non-financial relationship, which does not even implicate a criminal restriction, would have to be approved directly by OGE.

Section 4

OGE has concerns about certain amendments to the Procurement Integrity Act in section 4 of the bill.

First, OGE believes that the extension of the current one-year employment ban in 41 U.S.C. § 423(d) to two years might very well impede the recruitment and retention of qualified employees. A recent report by the National Academies of Science describes the kinds of recruitment problems that may be expected with an expansion of the post-employment restrictions under the Procurement Integrity Act: "In its 1992 study of this issue, the National Academies committee reported that presidential recruiters, as well as scientists and engineers who have been approached by recruiters, found that the laws restricting post-Government employment have become the biggest disincentive to public service. Overlapping, confusing, and in some respects overbroad measures that were suspended with the passage of the 1989 Ethics Reform Act have come back into effect, and there is constant pressure to broaden the restrictions further by banning officials involved in specific procurement actions from working in any capacity for any competing contractors for 1 or 2 years." National Academy of Sciences, et al., *Science and Technology in the National Interest: Ensuring the Best Presidential and Federal Advisory Committee Science and Technology Appointments* 202 (2004). One might expect similar problems with recruiting and retention of specialized experts other than scientists and engineers. *See generally* OGE, *Report* at 24-26.

We note additionally that section 4(e) of the bill provides a special effective date for this new post-employment restriction: March 31, 2007. Consequently, a wide swath of career procurement officials would be denied any meaningful

notice or opportunity to adjust their career plans in response to this significant change in conditions of employment. One could well expect that such a short, even retroactive, effective date could create morale problems among the acquisition workforce.

Second, OGE has concerns about the proposed two-year bar, in section 4(c), on former contractor employees participating in a procurement involving their former employer. There is already an OGE rule requiring officials to consider the need for disqualification from "party" matters involving their former employers and clients for a one-year period, and OGE is not aware that this rule has proven inadequate in the procurement context. *See* 5 C.F.R. § 2635.502(b)(1)(iv). Furthermore, OGE is concerned about the potential for confusion if there are essentially two rules, i.e., a two year provision for procurement matters and a one year provision for all other party matters. Of course, the situation would be further complicated by section 3 of the bill, in particular proposed new section 703 of the Ethics in Government Act, which would create yet a third standard for "covered executive branch officials."

Third, there is no waiver provision in this reverse revolving door provision. This is problematic because the prohibition is not limited to contracts of any particular size or to procurement duties of any particular type or degree of importance, in contrast to other provisions of the Procurement Integrity Act. *See* 41 U.S.C. § 423(c) (contracts in excess of simplified acquisition threshold); 423(d) (contracts in excess of $10M, and specifically enumerated procurement duties). Nor does the bill permit agencies to divide large former employers into separate divisions or affiliates for this purpose, unlike the post-employment restriction in the Procurement Integrity Act. *See* 41 U.S.C. § 423(d). Such a blanket restriction could affect the Government's ability to recruit and efficiently use the services of experts coming from the private sector.

Thank you for the opportunity to present the views of OGE. Please do not hesitate to contact us if we may be of additional

assistance. The Office of Management and Budget has advised us that, from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Robert I. Cusick
Director

cc: The Honorable Tom Davis
Ranking Member
Committee on Oversight and
Government Reform