United States
Office of Government Ethics
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Director

March 19, 2002

The Honorable Joseph I. Lieberman
Chairman
Committee on Governmental Affairs
U.S. Senate
Washington, DC 20510

The Honorable Fred Thompson
Ranking Member
Committee on Governmental Affairs
U.S. Senate
Washington, DC 20510

Dear Mr. Chairman and Senator Thompson:

The Office of Government Ethics (OGE) was very pleased to see the introduction of S. 1811 which incorporates a substantial portion of the recommendations we made in our April 2001 report on Improvements to the Financial Disclosure Process for Presidential Nominees.

We note that Section 4 of the bill includes more categories of amounts than we had recommended for many of the reportable items. We believe the extra categories would result in detail unnecessary for purposes of a sound ethics program, sufficient public information, and streamlining the disclosure process. While we hope that you will reconsider our original recommendations for categories, we consider the following recommendations for change much more critical to the ethics program and OGE's responsibilities.

1. In Section 4, the most troublesome requirement is in proposed section 202(j) of the Ethics in Government Act, as amended. This provision requires that notifications of waivers of the criminal conflict of interest statutes issued to individuals who are required to file public financial disclosures must be sent monthly to OGE, which must thereafter place them on the Internet. Please understand that we firmly support the current statutory requirement that waivers be publicly available. What we are concerned about is the misplaced emphasis that this bill would give these waivers by requiring them to be placed on the Internet. The posting of the issuance of these waivers would overshadow the more important information, which is the public financial disclosure form and all other manners of resolving a potential conflict of interest. We are genuinely concerned that this emphasis will stigmatize the issuance of a waiver when, in a given circumstance, it may be the most appropriate tool for handling an apparent conflict of interest.

The criminal conflict of interest statute generally involving waivers (18 U.S.C. § 208) is quite broad; it covers situations in which there might be a potential appearance of, but not actual personal self-dealing.[1] The statute specifies circumstances where recusal is initially necessary but it also anticipates that there will be circumstances governed by the prohibition that need not ultimately require recusal. The statute provides for a process that allows someone other than the employee to make that determination–all prior to the employee's taking any act. The statutory test for issuing a waiver is that the employee's financial interest in the matter on which he would otherwise act "is not so substantial as to be deemed likely to affect his services [in that matter]." But recusal and waiver are not the only options. The Government can, in addition, require the employee to divest the interest that is creating the conflict (or resign from the outside position). By regulation, the test for divestiture is that the interest creating the conflict will require the employee's disqualification from matters so central or critical to the performance of his official duties that the employee's ability to perform the duties of his position would be materially impaired or that recusal would adversely affect the efficient accomplishment of the agency's mission because another employee cannot be readily assigned the work from which the employee would be disqualified. The emphasis on waivers ignores the equally useful tools for protecting Governmental processes that exist in recusal and divestiture.

Part of our responsibility in carrying out an effective ethics program is to ensure fairness to employees and to help ensure confidence of the public in its Government. Our experience in running the ethics program is that individuals and agencies try to take steps to avoid being singled out, even for quite valid reasons. We believe that an Internet listing of waivers may discourage employees from seeking a waiver (or agencies issuing them when appropriate) or, of greater concern, employees may insist on not acting on matters when the Government wants and needs their services and a waiver (rather than divestiture) is appropriate. In fact, waivers can help the Government continue to receive the services it desires from the employee, after an objective and individualized review. We think that Internet posting of waivers will give the public a skewed view of the entire ethics program that will not promote public confidence. Any or all of these results would hurt rather than help the Government and its ethics program.

Finally, as a matter of simple statutory placement, this requirement should not be included in a public financial disclosure law. The current requirement for public availability of the waivers is where it ought to be, as a part of the statute that provides the Government the authority to make such waiver determinations. See 18 U.S.C. § 208(d)(1). This Office is in the process of conducting a study of the criminal conflict of interest statutes. If a different system for public availability of waiver determinations made under these statutes is called for, let it be a part of that study, not as a part of the financial disclosure process.

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[1]For example, section 208 requires recusal from matters in which the interest involved is the interest of one's general partner even though the partnership with the employee is not affected.

For these reasons, we request that section 202(j) as it appears in this bill be deleted.

2. Section 7 is entitled "Attorney General Review of Conflict of Interest Law." The text, however, states that OGE will conduct the review, not the Attorney General. We believe the title is simply an error and the section was intended to reflect the commitment OGE made in our April 2001 report in that OGE would take the lead and "work with the Department of Justice in any review of criminal conflict of interest statutes ." Therefore the title should be amended by deleting "Attorney General" and substituting "Office of Government Ethics."

With regard to our April 2001 commitment, we are already well underway in conducting a study of the criminal conflict of interest statutes applicable to the executive branch. We had not committed to, and have not included a review of the application of the criminal statutes to the legislative and judicial branch. Given that OGE's role is solely to oversee the executive branch ethics program, we do not have experience with the practical application of those laws within those two branches–a critical element of an appropriate and worthwhile review. We also have not included the civil ethics statutes and the regulations referenced in this bill in the work we have completed thus far. Thus, in order to reflect the scope of our earlier commitment and our expertise, we request that the provision be amended in subsection (a) by deleting "Federal employment" and inserting "executive branch employment" and in subsection (b) by deleting subparagraphs (A) and (B) of paragraph (1) and inserting in lieu thereof–

"(1) sections 203, 205, 207, 208, and 209 of title 18, United States Code."

3. Section 7(b)(2) of the bill directs OGE to submit recommendations to the President and Congress for legislation. We understand that the Department of Justice has determined that this provision would be unconstitutional under the Recommendations Clause of the Constitution (U.S. Constitution, Article II, Section 3), which grants to the President the authority to make those legislative recommendations that he, in his discretion, deems appropriate and necessary. This provision should therefore either be eliminated or amended to make the submission of such recommendations discretionary.

4. The bill deletes a practical provision from the Administration's proposed bill that would be quite important to the smooth running of the executive branch ethics program. That provision would have allowed OGE by regulation to change threshold values for reporting requirements based on a change in a law or regulation. In particular, we believe it is appropriate for this Office, based on inflation, to be able to change by regulation such amounts as the value of an individual gift that must be considered when aggregating for disclosure purposes. We also believe that as our regulatory exemptions change, it would be helpful to match a reporting category to that threshold so that it would be easy to determine whether an asset fell within an exempt category. For example, shortly a regulatory exemption for a publicly traded stock with a value that does not exceed $15,000 will

become effective. If we were to change the exemption in the future to, for example, $20,000 to match inflation, we would like to be able to change the threshold of that second category for assets to "$20,001" without having to seek a statutory change. Therefore, we reiterate our request for such authority so that we can make small streamlining changes when necessary to match either new statutory restrictions or new regulatory exemptions to make an amount more easily remembered (such as changing the soon-to-be recalculated $104 aggregating threshold for gifts to something more easily remembered such as $100 or $110). The provision that was dropped from the draft bill we submitted last July was contained in proposed section 202(j). That provision read–

> "(j) The Director of the Office of Government Ethics may by rule published in the Federal Register change the range of any categories of value or the amounts set forth in subsections (a) or (d) of this section."

A less desirable alternative would be a more narrowly drawn authority that would allow OGE to match an internal threshold of a category of value to a regulatory exemption issued by OGE or to a change in some applicable conflict of interest law.

5. Finally, Section 5 places the responsibility for transmitting to Presidential candidates an electronic record about Presidentially appointed positions with the White House (through the Executive Clerk). We understand the Administration believes this responsibility, if it remains in the bill, should be borne by the Director of the Office of Personnel Management and not the White House; the Director of OPM could consult with the Executive Clerk in carrying out the responsibility.

We very much appreciate the Committee's pursuit of this important legislation. If I or my staff can be of further assistance or provide any additional information, please do not hesitate to contact me.

Sincerely,

Amy L. Comstock

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