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Sent: Thursday, November 01, 2012 4:48 PM
To: Herms, Kevin W.; paul.ledvina@oge.gov
Cc: (b)(6)
Subject: Comments on Office of Government Ethics proposed emergency information collection

Good evening,

I would like to offer my personal comments on OGE's emergency Proposal for a Form 201-A Ethics in Government Act Access Form, as described in their Federal Register notice (FRN) at 77 Fed. Reg. 66075 (Nov. 1, 2012). I will follow the order suggested in the FRN, which listed specific areas where public comments are requested. (I also regret that OGE only offers five days for initial public comments, when the underlying statutes have been on the books now for many months... any "emergency" is man-made.)

1. The need for this information collection:

OGE's FRN states that the proposed Form 201-A will collect information from persons requesting access to public financial disclosure reports "posted on the Internet in accordance with section 11(a) of Public Law 112-105." Section 11(a) of Public Law 112-105 (the STOCK Act) requires that "financial disclosure forms filed pursuant to title I of the Ethics in Government Act in calendar year 2012 and in subsequent years, by executive branch employees specified in section 101 of that Act" be "made available to the public on the official websites of the respective executive branch agencies." In addition, OGE's FRN lists "5 U.S.C. appendix section 402(b)(1) and 5 CFR 2634.603(c) and (f)" as its source of legal authority for undertaking this information collection, which would "collect the following information from any requesting person seeking access to such [Internet-posted public financial disclosure] reports: the person's name and the person's city, state, and country of residence." However, neither that law nor that regulation authorize this proposed information collection.

As background, section 105(b)(2) of the Ethics in Government Act of 1978 states that in general, public financial disclosure reports "may not be made available under this section to any person nor may any copy thereof be provided under this section to any person except upon a written application by such person stating—

(A) that person's name, occupation and address;

(B) the name and address of any other person or organization on whose behalf the inspection or copy is requested; and

(C) that such person is aware of the prohibitions on the obtaining or use of the report.

[Section 105(c)(1) lists these prohibitions, making it 'unlawful for any person to obtain or use a report for any unlawful purpose; for any commercial purpose, other than by news and communications media for dissemination to the general public; for determining or establishing the credit rating of any individual; or for use, directly or indirectly, in the solicitation of money for any political, charitable, or other purpose.']

Any such application shall be made available to the public throughout the period during which the report is made available to the public."

But limiting language in section 11 of the STOCK Act, Public Law 112-105, specifically states that “For purposes of filings under this section, section 105(b)(2) of the Ethics in Government Act of 1978 does not apply.” By its plain language then, the STOCK Act says that the information collection generally authorized by section 105(b)(2) does not apply to “filings under *this section*” – section 11 of the STOCK Act, referencing internet publication of current and future public financial disclosure reports. Presumably, OGE is aware of this key limiting language, because they did not cite it in their FRN proposing this information collection of requester names and addresses – a collection normally specifically authorized (but not in this case) by section 105(b)(2)(A) of the Ethics in Government Act.

Instead, OGE cites a much more generic authority, section 402(b)(1) of the Ethics in Government Act, which gives OGE general power to “develop[]...rules and regulations establishing procedures for the filing, review, and public availability of financial statements filed by officers and employees in the executive branch as required by title II of this Act.” But OGE cannot interpret this general authority to override the specific limiting language in section 11 of the STOCK Act, which, if it means *anything*, must mean that agencies cannot force people seeking to view the *public* financial disclosure reports published on the Internet under section 11 to first provide any of the information otherwise required by section 105(b)(2) of the Ethics in Government Act. In essence, OGE is implicitly pretending that this proposed information collection is different from the collection specifically prohibited by section 11 because it doesn’t request *all* of the information that would normally be required under section 105(b)(2). But again, that interpretation would still essentially render the limiting language in section 11 meaningless, despite the Supreme Court’s repeated reference to the rule that “statutes should be read to avoid making any provision ‘superfluous, void, or insignificant.’” *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1841 (2012). If section 402(b)(1) allows agencies to collect information when such collections would otherwise be barred under section 11 of the STOCK Act, then that portion of section 11 is essentially meaningless, which cannot be correct. Instead, the proper interpretation of section 11 must be to permit essentially anonymous public access to public financial reports posted on the Internet under that section.

There is no essential statutory conflict between section 11 and sections 402(b)(1) or section 105(b)(2), because the latter two sections may still allow collection of requesters’ identifying information when requesters submit (OGE Form 201) requests for access to paper reports, rather than Internet requests as discussed under section 11 of the STOCK Act. Moreover, while the Privacy Act, 5 USC 552a(c), may generally be interpreted to require agencies to record the date, name, and address of requesters accessing Privacy Act records (like public financial disclosure reports), this provision if applied literally would also negate the limiting language in section 11 of the STOCK Act. If there is a conflict, “the more recent of two irreconcilably conflicting statutes governs,” *Watt v. Alaska*, 451 U.S. 259, 267 (1981), and “the specific governs the general.” *Long Island Care at Home v. Coke*, 551 U.S. 158, 170 (2007). Here, the limiting language in section 11 of the STOCK Act is both much more recent and much more specific than any of the general provisions enacted in the Ethics in Government Act or the Privacy

Act, dating from the 1970s. [OMB should ask itself: Under OGE's interpretation of those laws, what would be the practical effect of the limiting language in section 11 of the STOCK Act? If they can assign no significant, independent meaning to it, then that interpretation must be erroneous.] Therefore, section 11 must control.

Finally, to the extent that OGE's FRN cites 5 CFR 2634.603 as authority for this proposed information collection, this explanation also must fail. 5 CFR 2634.603 simply repeats the language of section 105(b)(2) of the Ethics in Government Act, which specifically does not apply to internet postings of public financial disclosure reports, as stated in section 11 of the STOCK Act. OGE simply cannot overrule the STOCK Act by regulation. They may wish to collect this information, but they have no legal authority that would override the plain language of section 11: "For purposes of filings under this section, section 105(b)(2) of the Ethics in Government Act of 1978 does not apply." The law is clear, and it does not authorize this information collection by OGE or by any agency posting public financial disclosure reports under section 11(a) of the STOCK Act. Therefore, there is no need for it, and OMB should not authorize it.

2. The practical utility of this information collection:

Besides the fact that there is no legal authority for this proposed information collection, its utility is also extremely dubious. For example, unlike mailed requests for access to paper public financial disclosure reports using OGE's Form 201, where a requester's identity and address can be plausibly verified because of the need for a return name/address to mail those reports, there is no such certainty using the Internet. There is no way to stop requesters from providing fake names and addresses, because they are not being physically mailed any paper records. Rather, they will access reports virtually and instantaneously, through the Internet. Because of the transparent ease of avoiding verification, there is simply no point in using government resources to collect a long list of fake names and addresses from people who will inevitably be requesting online access to records filed by their neighbors, supervisors, ex-spouses, and other sensitive individuals. Even a collection of requesters' IP addresses would be meaningless, because requesters could simply access records from the computers at their local public library. All of this simply underscores the obvious point of the limiting language in section 11 – Internet access inevitably means anonymous access. There is no reason to waste taxpayer money attempting to avoid this basic fact of life in the 21st Century.

3. The accuracy of OGE's burden estimate:

I suspect that OGE is understating the number of potential requesters who may be more interested in the detailed financial records of ex-spouses, neighbors, etc. than in Presidential candidates, as used to formulate the burden estimate in OGE's FRN.

4. The enhancement of quality, utility, and clarity of the information collected:

Other than my general comments above, I have nothing substantive to add regarding this issue.

5. The minimization of burden (including the use of information technology):

I have nothing substantive to add regarding this issue.

Thank you for your time.