U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

March 8, 2007

The Honorable Henry A. Waxman
Chairman
Committee on Oversight and Government Reform
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on the amended substitute bill, H.R. 984, the "Executive Branch Reform Act of 2007." The Department strongly opposes this legislation.

Constitutional Concerns

Section 2. Section 2(a) of the bill would add a new Title VI to the Ethics in Government Act of 1978 that would require all covered Federal officers and employees to file a quarterly report with the Office of Government Ethics (OGE) describing all "significant contacts" made to them by any private party seeking "to influence official action." *See* proposed new sections 601(a), 604(2)(A) of the Ethics in Government Act of 1978. A "private party" is defined as anyone other than a member of the Federal, State, or local government, or person representing such entities; see § 604(3). Proposed section 602 would charge the OGE with issuing regulations to "provide guidance" regarding what contacts need to be reported, and to maintain a database for this information. Proposed section 602(a)(8) would require OGE to report noncompliance with the reporting requirement to the United States Attorney's Office for the District of Columbia. Under proposed section 603(b), an employee who violated this legislation is "subject to administrative sanctions, up to and including termination of employment," and one who "deliberately attempts to conceal a significant contact" could be fined up to $50,000. Under proposed section 601(c), communications exempt under the Freedom of Information Act ("FOIA") would not need to be reported.

This provision violates the separation of powers in two specific, related ways. First, by reaching communications with the President's and Vice President's advisors (excepting only

their chiefs of staff), the provision would interfere with the President's constitutionally protected ability to obtain advice in confidence from whomever he chooses. As the United States Court of Appeals for the District of Columbia Circuit noted in *In re Cheney*, 406 F.3d 723, 728 (D.C. Cir. 2005): "In making decisions on personnel and policy, and in formulating legislative proposals, the President must be free to seek confidential information from many sources, both inside the government and outside." By imposing a public disclosure process by which the President's close advisers formulate advice for the President, Section 2 violates the separation of powers. Second, more broadly, the bill intrudes onto the day-to-day operations of the Executive branch by burdening more than 8000 Executive branch employees with an onerous recordkeeping and disclosure requirement. Congress lacks constitutional authority to micromanage the affairs of the Executive branch to this extreme and unprecedented degree. Finally, the bill raises substantial First Amendment concerns in that the disclosure process would burden the public's right to petition the Government to redress grievances in an extreme and unprecedented manner. In particular, the bill's requirements will deter and discourage covered officials from even receiving, much less considering, a broad range of meritorious contacts from citizens legitimately seeking to voice their grievances respecting government activities.

The potential reach of the provision is so broad that full compliance could undercut the ability of the Executive branch to discharge its legal and constitutional duties. For example, the definition of "significant contact" may cover, among other things, the following: (a) certain contacts from citizens affecting the decision to prosecute a Federal crime; (b) any letter (including routine letters of reference) to a covered official supporting the employment of a person to a Federal government position, including low-ranking GS appointments or appointments to the Federal judiciary (Federal hiring is an "official action" by the Executive branch which such letters would seek "to influence"); (c) a letter or phone call from a crime victim urging prosecution; and (d) contacts made with a United States diplomatic or other Government representative abroad by friendly opposition leaders in foreign countries whose governments are hostile to, or enemies of, the United States. Under the bill, each such individual contact must be reported separately to OGE. Moreover, whether a communication falls within the definition of "significant contact" turns on the speaker's subjective purpose or intent. The onus is placed on the official to divine the speaker's subjective purpose or intent for determining whether a reporting requirement under this provision is triggered, which carries with it the threat of severe administrative and civil penalties.

Additionally, section 604(3), defines "private party" to exclude Federal, State, and local officials, but fails to exclude foreign officials. Although certain contacts with foreign officials fall outside the bill's reach based upon exceptions in the Lobbying Disclosure Act, those exceptions almost certainly do not cover unofficial contacts with foreign officials, or contacts with foreign political parties or oppositions groups friendly to the United States. Therefore, section 604(a)(3) potentially could impinge on the President's ability to conduct foreign affairs through his advisers.

Virtually every person or entity's contact with a Government employee is meant to "influence" that employee's decision in some way. While we certainly support ensuring the absence of undue influence on the Department's leadership and political appointees, this kind of reporting requirement would impose a tremendous burden on the operations of Government, and potentially bring the Department's activities to a halt. We note that many Assistant Attorneys General and more senior officials regularly meet with outside groups and individuals as part of their official duties in order to explain the Department's policies and activities and to learn the interests and concerns of the public. More importantly, we do not believe that senior prosecutors and high-level officials within the Department of Justice should be required to disclose non-exempt contacts with private parties such as witnesses, subjects, and defendants during ongoing criminal investigations and prosecutions merely because such contacts could be construed as "significant contacts" within the meaning of the bill. This would lead to substantial difficulty in conducting such communications and could lead to the obstruction of justice if those communications were disclosed.

Section 3. Section 3 of the bill would amend the Ethics in Government Act of 1978 by adding a new Title VII to that act. Sections 702 and 703 of the new title would prohibit "covered executive branch officials" from participating in official matters "in which, to the official's knowledge, a person or organization with whom the official is negotiating or has any arrangement concerning prospective employment has a financial interest," in the absence of a waiver; or engaging in certain conduct relating to a covered entity in which the official had a financial interest. The definition of "covered executive branch official" in section 705 would include the Vice President of the United States, whereas prior disqualification provisions of this type have excluded the Vice President. We object to this unprecedented extension of these provisions to the Vice President primarily because, in the absence of express language to the contrary, they could be construed to disqualify the Vice President in some cases from the performance of crucial constitutional duties textually committed to the Vice President. Under Article I, sec. 3 of the Constitution, "The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided." Under the 25th Amendment, the Vice President is required in various described circumstances of Presidential disability to "discharge[]" or to "assume" the powers and duties of the Presidency "as Acting President." Although we believe that the disqualification provisions of sections 702 and 703 of the bill would not properly apply to the Vice President when he is serving as President of the Senate under Article I or acting as President under the 25th Amendment, a contrary interpretation is plausible in the absence of express language addressing such circumstances.

Section 6. Section 6 of H.R. 984 would require that any "communication" paid for by an Executive agency (either directly or through a contract award) must include "a prominent notice informing the target audience that the advertisement or other communication is paid for by that

Executive agency." The term "communication" is sweepingly defined to include "a communication by an individual in any form, including speech, print, or by any electronic means." The scope of this requirement is so overly broad — extending, for example, to any printed, audio, or video communication, of any kind that is made using agency funds — that compliance would impermissibly interfere with the President's ability to exercise the Executive power vested in him under Article II, sec. 1, cl. 1 of the Constitution. For example, all speeches, letters, memoranda, and reports prepared by an individual receiving a Government salary, or prepared using agency appropriations would appear to be "communications" that are "paid for by an Executive agency." It is axiomatic that effective exercise of the Executive power requires effective communications. Accordingly, we strongly object to section 6.

Section 7. Subsection 7(b) would ban agency use of "pseudo" classification designations, *e.g.*, designations such as "sensitive but unclassified" or "for official use only," pursuant to regulations to be promulgated by the Archivist of the United States. The bill would allow those regulations to provide limited exceptions to the ban that, under section 7(b)(3), would "constitute the sole authority by which Federal agencies, offices, or contractors are permitted to control information for the purposes of safeguarding information prior to review for disclosure, other than authority granted by Federal statute or by an Executive order relating to the classification of national security information." However, we are seriously concerned that the term "pseudo classification" might apply to documents and information legitimately designated as "privileged" because of deliberative privilege, attorney-client privilege, or other legitimate privileges, and that the savings provision would not apply to those privileges falling outside of "national security information." Privilege designations are "used to . . . control the accessibility of Government information," and thus appear to fall within the definition of "pseudo classification." *See* paragraph 7(d)(2). To the extent that section 7 would require or permit the Archivist to promulgate regulations prohibiting the Government's use of legitimate, constitutionally recognized privileges, it is unconstitutional and we strongly object to this provision.

Paragraph 7(c)(2) of the bill would require the Archivist to make certain legislative recommendations on subjects designated by Congress. This provision violates the Recommendations Clause, U.S. Const. art. II, § 3, which reserves to the President the authority to submit to Congress only such legislative recommendations as he considers "necessary and expedient." This provision should be removed or amended to be made precatory.

Other Concerns

As a general matter, we have very serious concerns about the drafting of the bill and its scope and ambiguities. It would create a variety of heavy burdens throughout the Justice Department that do not appear to be counterbalanced by any corresponding public benefit.

Section 2. Apart from its constitutional difficulties, section 2 raises additional concerns. The reporting requirement and the associated expenses incurred would impede the Executive branch's need to conduct outreach with stakeholders in the normal course of policymaking. Of particular concern is the likely negative impact from disclosure of contacts related to national security and homeland security matters.

Section 601's language is extremely broad, requiring covered officials to record and report such communications as questions from the audience at speeches and presentations, calls from listeners on radio and television shows in which covered officials participated, discussions with the public at meetings, receptions, and other public and private events. Hundreds of officials in a department or agency may be covered. The burden of the covered official to record the names of the parties, dates, and subjects of these conversations would consume large amounts of money and the covered officials' time. For the acquisition workforce, if the phrase "significant contact" is interpreted to cover negotiations or routine business contacts (where those contacts represent the position of their company), it is in effect most of the acquisition professional's responsibilities and duties. An agency that exists for the purpose of public interaction, such as the Small Business Administration, Office of Advocacy, and which receives daily public contacts designed to "influence" the agency, would be subject to such a serious burden as to raise questions about its ability to undertake its core functions of receiving complaints and criticisms and represent the views and interests of small business before other Government agencies whose operations may affect small businesses. Other agencies or employees might block all or most of their calls and emails from sources outside a Government agency to avoid the bill's heavy reporting burden, blocking the ability of citizens to discuss matters of public importance with government officials.

Further, for all of the contacts addressed in this section, covered officials would be obligated not only to keep records and make reports to OGE, but also to obtain accurate information from the private parties. For example, section 601(b) would require the official to obtain not only the name of the private person, but also the identity of any client (or clients) the person may be representing. In many cases, the covered officials will know neither the names of persons who communicate with them nor the persons they represent. Unlike the Lobbying Disclosure Act, which places the burden upon the person making a lobbying contact to report such information about himself and his own clients, section 601 places this burden on the official, who is not in as good a position to know this information. Given the large number of reports that would have to be submitted and the detail that would be required, one naturally would anticipate widespread reporting inaccuracies or omissions. Thorough compliance, under the threat of civil monetary penalties, would leave officials with two basic options: either (1) dramatically reduce the normal and expected daily exchanges with the public or (2) devote considerable time and resources to the documentation and reporting requirements at the expense of other important duties.

Further, proposed subsection 601(c) "does not require the filing with the Office of Government Ethics of information that is exempt from public disclosure under [the Freedom of Information Act]." Yet, because a FOIA analysis is necessarily fact-intensive and must be conducted on a case-by-case basis, the FOIA exemption provision creates little assurance that what an official determines to be exempt would not, in turn, amount to willful non-compliance and subject the official to stiff administrative and civil penalties. Consequently, enforcement of the reporting requirements is, at its core, plagued by uncertainty and subject to arbitrary and inconsistent application. We note that the rule proposed applies only to the Executive branch. From a public policy perspective, this distinction does not seem reasonable.

Subsection 602(a)(3)(B) directs OGE to adopt filing systems including "computerized systems." This requirement limits available options to meet the bill's requirements to minimize the burden of filing and maximizing public access, which may not require a "computerized" approach. The requirement of multiple "systems" also may be unnecessary. We recommend deleting the word "computerized" and changing "systems" to "system(s)."

Reporting requirements imposed on officials defined in subsection 604(1) may result in the delegation of outreach communications to lower-level staff not covered under the provision. In addition, the provision lacks clarity, including a precise definition of what constitutes a violation and the scope of administrative sanctions.

Finally, under the penalty provisions in Title VI, an employee who either knowingly or inadvertently violated provisions of the bill would be "subject to administrative sanctions, up to and including termination of employment."[1] Additionally, under Title VI, an employee who deliberately attempted to conceal a significant contact in violation of the statute would be subject to a civil fine. The chilling effect of thorough compliance under the threat of termination essentially would leave officials with two options: (1) dramatically reduce the normal and expected daily exchanges with the public; or (2) devote considerable time and resources to the bill's documentation and reporting requirements, at the expense of performing their substantive duties. Further, the bill's language implies the imposition of mandatory administrative sanctions, for even inadvertent or minor violations. If mandatory sanctions are required by the statute, this result is unduly harsh and would restrict management's authority and decision-making unnecessarily. Such possible requirements run contrary to traditional personnel law principles, which allow consideration of the circumstances surrounding an alleged infraction, such as mitigating factors. In addition, these sanctions would further oblige employees to address matters that are not central to the performance of duties and the agency's mission. While we do oppose undue influence on Government employees by third parties, we do not believe this proposal appropriately addresses it.

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[1]We note that administrative sanctions were not included in the parallel bill from the previous Congress, H.R. 5112.

The language in section 603(b) is inconsistent. It makes the actionable offense "deliberate[] attempts to conceal a significant contact in violation of this title." However, the prohibited acts are limited to such "deliberate[] attempts." As written, the only individuals covered are the incompetent and the early apprehended, who have failed to successfully conceal and have only managed to attempt to do so. The provision fails to address completed concealment. However, the bill provides that the individuals who deliberately attempt are subject to a civil fine depending "upon proof of such deliberate violation."

Section 3 (New Section 701 of the Ethics in Government Act). Existing law prohibits senior- and very senior-level employees from contacting the agency at which they worked for a period of one year after leaving Federal service, and prohibits very senior former officials from communicating across the Executive branch to Senate-confirmed appointees. *See* 18 U.S.C. § 207(c) and (d). Ever since 18 U.S.C. § 207(c) was enacted in 1978, the cooling-off period was limited to one year. (The same is true with respect to the cooling-off period for very senior employees in subsection 207(d), which was added in 1989.) It would upset longstanding expectations and career plans of a large number of honorable officials to extend this restriction to two years. In this connection, it is significant that proposed section 701 would apply even to career officers (0-7 and above) in the uniformed services. Moreover, in a recent report submitted to Congress and the President, OGE specifically rejected proposals to extend this cooling-off period on the ground that "such an added restriction could adversely affect the recruitment and retention of new Federal employees." REPORT TO THE PRESIDENT AND TO CONGRESSIONAL COMMITTEES ON THE CONFLICT OF INTEREST LAWS RELATING TO EXECUTIVE BRANCH EMPLOYMENT 27-28 (January 2006).

Proposed new section 701 also could be read as imposing a two year cooling-off period on a large number of employees who have never been subject even to the one-year restriction under subsection 207(c). The definition of "covered executive branch official," in proposed new section 705, includes employees "described in section 7511(b)(2)(B) of title 5, United States Code." Subparagraph 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 employees do not meet the pay or other criteria for coverage under the existing cooling-off provisions in section 207. Likewise, the bill would cover any employee serving in a noncareer position in the Executive Office of the President or the Office of the Vice President, which could include employees who otherwise do not meet the pay and other criteria for coverage under subsection 207(c). There is no question that this proposal would impede the recruitment and retention of individuals to serve in positions that historically have been well below the threshold for coverage under section 207.

Because "covered officials" covered by the bill are not necessarily the same employees who are covered by section 207(c) and (d), this restriction would increase the complexity of the operation of criminal statutes that are already complicated. For instance, currently, all SES appointees paid less than $145,300 are not subject to the one-year restriction in section 207(c). This proposal could be read to subject non-career SES (many of whom are paid less than $145,300) and Schedule C appointees (many of whom are paid on a GS scale) to a two-year restriction. Moreover, career SES appointees who make $145,300 or more are subject to a one-year restriction, and non-career SES appointees whose salary exceeds that amount, Executive Schedule officials, and Generals and Admirals will be subject to both the one-year and two-year restrictions.

The one-year ban is intended to prevent senior official who recently have left the Government from using their influence with former colleagues. We are unaware of any circumstances suggesting that the one-year ban is inadequate. We oppose this measure because it would restrict the actions of private citizens while providing no governmental benefit in return. It will particularly discourage qualified, knowledgeable, and skilled executives who do not plan a career in the Government from performing public service.

Additionally, proposed new sections 701 — as well as 702 — would alter the conflict-of-interest restrictions on high-level officials by providing civil sanctions for certain conduct, but leaving intact the criminal and civil conflict-of-interest restrictions set forth in 18 U.S.C. §§ 207 and 208. We believe that such changes would unduly complicate the conflict-of-interest restrictions and thereby hinder our criminal enforcement efforts. The conflict-of-interest laws are complex. We experience substantial difficulty in establishing willful criminal violations when Government employees claim that they did not understand the restrictions. Adding an additional layer of restrictions on top of the existing conflict-of-interest provisions in sections 207 and 208 would add to the confusion that already exists.

Finally, we note that section 701(c), although somewhat unclear, may provide that it is effective as to Government officials who leave service after March 31, 2007. In the event that the bill became law after that date, it could have a harsh retroactive effect on officials who leave Government between that date and the date of enactment with a legitimate expectation that these changes would not apply to employment decisions that they had made.

Section 3 (New Section 702 of the Ethics in Government Act). Currently, 18 U.S.C. 208 and implementing regulations (*see* 5 C.F.R. 2640 & Part 2635, Subpart D) require an employee to be recused or to obtain a waiver for continued activity, if the employee has a personal financial interest in a matter in which the employee is working. The language is very broad, applying to "any official matter" that may affect a prospective employer. Section 208 and the regulations state that an employee has a financial interest in an entity with which he is negotiating employment or has an arrangement for future employment. Initially, we note that the Justice Department rarely has granted a waiver allowing an employee to participate in a matter

involving an entity with which he is negotiating for employment. In all but a small number of cases, we do not believe that the statutory standard for granting a waiver — that the financial interest is insubstantial — has been met.

Further, as noted in our discussion of proposed new section 701, *supra*, both new section 701 and new section 702 would unduly complicate the conflict-of-interest restrictions and thereby hinder our criminal enforcement efforts. Indeed, the creation of overlapping and inconsistent provisions is even more acute with respect to proposed section 702. Proposed new section 702 overlaps not only with a criminal statute, 18 U.S.C. § 208, but also with the employment contact provision in the Procurement Integrity Act, 41 U.S.C. § 423(c)) ("PIA"). Therefore, a covered official could be put in the position of having to follow three sets of overlapping but different requirements pertaining to a single employment negotiation. Interpretive confusion is almost inevitable. For example, proposed new 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."

Proposed new section 702 also would establish a new waiver standard and set of procedures that differ from those in section 208. Under section 208, waiver decisions are made by the appointing official at the agency, based upon a determination that the financial interest is "not so substantial as to be deemed likely to affect the integrity of the services" of the employee.

Not only would the proposed new requirements add to the complexity of the law, they are unnecessary. OGE already exercises a consultative function under Executive Order 12731 with respect to waivers issued by agencies under 18 U.S.C. 208(b). Moreover, OGE issues general guidance, such as its 2004 memorandum to all designated agency ethics officials, cautioning that waivers covering employment negotiations require "particular scrutiny" and should be "issued only in compelling circumstances." http://www.usoge.gov/pages/daeograms/dgr_files/2004/do04029.pdf. In light of this guidance and OGE's consultative role, it would not appear that the practice of granting waivers for employment negotiations currently is widespread. Little value, and considerable inefficiency, would be added by requiring OGE to make certifications with respect to every such waiver. Indeed, the bill requires OGE to make these determinations in writing and with respect to "any particular matter."

Section 3 (New Section 703 of the Ethics in Government Act). Section 3 of the bill would create new section 703 of the Ethics in Government Act. This provision would prohibit an employee from working on any matter involving an entity for which he served as "an officer, director, trustee, general partner, or employee" or "worked as a lobbyist, lawyer, or other representative" *within the past two years*. Under the provision, an agency's ethics officer could waive the prohibition only with OGE's approval, granted under the standard of existing law: that the relationship or interest is not so substantial as to be likely to affect the integrity of the employee's service. Enactment of this provision would negatively and dramatically limit the

Government's talent pool for hiring and retaining individuals for covered positions, thus having a detrimental impact on policy making and Government operations.

Proposed new section 703 substantially overlaps with OGE's impartiality regulation, 5 C.F.R. § 2635.502(b)(1)(iv). The OGE rule requires officials to consider the need for disqualification from particular matters involving their former employers and clients as a party or representative of a party, for a one-year period. Moreover, at the discretion of the agency, an employee may be disqualified for longer periods of time, in order to address continuing concerns that the employee's impartiality reasonably may be questioned. 5 C.F.R. § 2635.502(a)(2). The rule appropriately allows agencies ample flexibility to shape recusal obligations to deal with so-called "appearance" problems, which do not involve an actual financial conflict on the part of the employee.

It is unclear why the current rules of financial disclosure of prior employee stock holdings and recusals are insufficient to protect the Government from ethical violations. Currently, individuals can be made to sell large amounts of stock in former employers so that they can participate in matters that affect the financial interests of those entities. If a Government employee has no ties (financial or otherwise) to their former employer, it is unclear where the risk of impropriety exists. Those stock sales would be rendered largely superfluous under this provision because the official could not participate in particular party matters that have an effect on the former employer or client, even if that entity is not a party and does not represent a party in the matter. New employees will be prevented from participating in procurement actions for two years, even if the action is competitive, because they may result in an award to a former employer. Federal agencies would be deprived of the expertise of these individuals in evaluating proposals. The prohibition is also unnecessary, since contracting officers already possess the means of removing these employees from evaluating committees when their participation would be inappropriate. The prohibition would particularly negatively affect the Defense Department and NASA, which require the development and manufacture of specialized and high-technology equipment. Due to the consolidation of the industry into a relatively small number of vendors, actions by a former employee of a defense contractor, even one who has divested himself of all potentially conflicting financial interests, would not be able to participate in decisions related to sophisticated equipment for which his former employer acts even as a subcontractor unless he receives a prior determination by OGE. These effects would apply negatively to a host of other Government agencies and departments as well.

Moreover, we consider it unnecessarily burdensome to require that the Department obtain the concurrence of OGE for any waiver in these circumstances. As discussed above, with respect to proposed new section 702, mandatory review by OGE may delay granting a waiver and slow the Department's operations unnecessarily. We consult with OGE on most financial conflict issues. We frequently address personal conflicts issues and, as warranted, seek OGE's views when we are presented with unique or unusual issues. However, we do not believe it efficient or necessary to mandate OGE's participation in each waiver decision. As we have

noted, the current process streamlines the consultative process and recognizes the agency's assessments in this arena. We strongly oppose any change to this process.

Section 4. The PIA prohibits employees who play key roles in the selection of contractors to accept a job with a contractor within one year as an "employee, officer, director, or consultant." 41 U.S.C. 423(d). Section 4 of the bill would expand the scope of prohibited covered positions to include "lawyers and lobbyists" for the contractor. It is not clear to us that expanding the provision to cover lawyers and lobbyists would have any substantive impact. For example, at the Department, an employee who currently is covered by the PIA and is involved actively in decisions to award contracts rarely is a lawyer. Additionally, while it is possible, we also question how frequently a senior contracting official or someone who serves in a similar role will become a lobbyist upon leaving the Federal government.

Furthermore, extension of the one-year employment ban likely would create serious barriers to the recruitment and retention of qualified employees. A report by the National Academies of Science concluded that the post-employment restrictions, including the employment ban in the PIA, "have become the biggest disincentive to public service" among scientists and engineers. 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 at 202 (2004).

We also question whether expanding the prohibition against a contracting officer or deciding official from working for a contractor for two years rather than one year after leaving Federal service would have any substantive, positive impact and benefit for the Government. We are concerned with the fairness of this or any restriction that would adversely affect an employee's ability to seek non-Government employment while yielding no benefit for the Government. It also might discourage employees from participating actively in contracting matters in their final years of service in order to keep open the opportunity of seeking employment with a contractor.

Section 4(a)(2) changes the exception provision in the PIA. The exception still allows former employees to accept compensation from a different division or affiliate of the contractor that does not produce the same or similar products or services. Section 4(a)(2) would permit the exception only if the agency's designated ethics officer determines that: (1) the offer of compensation is not a reward for any action the employee took on the relevant contract; and (2) acceptance of the compensation is appropriate and will not affect the integrity of the procurement process. As a consequence, the agency ethics official will now be required to investigate whether the offer is a reward. As a practical matter, this will be difficult to determine. In addition, there is no standard articulated for what constitutes "appropriate" compensation. Furthermore, the future tense language "will not affect the integrity of the procurement process" is confusing in this context, as the procurement process would be completed before any question could arise about post-employment compensation.

We are concerned about the expansion of the PIA in section 4(c), which would add a new subsection (i) to 41 U.S.C. § 423 that would be applicable to personnel who "participate personally and substantially" in a procurement decision. Under the current PIA, senior procurement officials who are planning to leave Government disqualify themselves from procurement decisions to avoid the application of the PIA to themselves. Consequently, many experienced and knowledgeable procurement officials do not participate in major procurements where their expertise is most needed. By expanding the scope of the PIA to employees who merely "participate personally and substantially," this legislation will trigger more disqualifications and greatly exacerbate this problem. Such an expansion would also apply to personnel who play a tangential role, such as providing data, reviewing alternatives, or participating in advisory groups.

Additionally, proposed subsection 4(c) would ban an employee from working on any matter or award of contract involving his former employer for two years. Subsection 4(d) would amend the PIA to direct the Administrator of the Office of Federal Procurement Policy, in consultation with OGE, to issue regulations to "carry out and ensure the enforcement of this provision." Again, as a practical matter, we question whether there is any substantial benefit to mandating the restriction in statute. As discussed in connection with section 3 (proposed new section 703 of the Ethics in Government Act), *supra*, OGE's impartiality rule addresses particular matters involving former employers, which would include procurement matters involving a former employer as a contractor or bidder. *See* 5 C.F.R. § 2635.502(b)(1)(iv). This arrangement is flexible, allowing for case-by-case evaluation and application of common sense. There is no indication that the OGE rule has proven inadequate in the procurement context. Furthermore, unlike the OGE rule, the bill contains no waiver provision, which is especially troubling because the prohibition is not limited to contracts of any particular size or to procurement duties of any particular type or degree of importance, nor does it permit agencies to treat separate divisions or affiliates of large companies as separate contractors. Another existing regulation, 5 C.F.R. 2635.503, disqualifies participation in particular matters for two years by employees who received extraordinary payments from their former employers. Such a blanket restriction obviously affects the Government's ability to recruit and efficiently utilize the services of experts coming from the private sector. Again, in the context of the Defense Department, where the number of potential contractors is so small, the official's former employer is likely to be a bidder or subcontractor in almost all major contracts.

Finally, under subsection 4(e), provisions of the bill extending from one year to two years the bar against former officials' accepting compensation from a contractor would apply to individuals who terminate Government service after March 31, 2007 (in contrast to other amendments in that section, that would take effect upon the date of enactment). If the bill became law after March 31, 2007, it could have a harsh retroactive effect upon agency officials who leave the Federal government between that date and the date of enactment with a legitimate expectation of working for a contractor within one year after serving.

Section 5. Section 5 would create new 31 U.S.C. 1355, prohibiting the unauthorized expenditure of funds for "publicity or propaganda." This provision appears to overlap existing appropriations statutes, including the Purpose Statute, 31 U.S.C. § 1301(a). Current law already prohibits the spending of funds for any purpose unless authorized by law, including for publicity or "propaganda." Although this language is similar to that contained in various appropriations Acts, it would raise serious constitutional concerns if interpreted to interfere with necessary Executive branch communications and functions, and is objectionable on that basis as well.

Moreover, section 5 does not define "publicity" or "propaganda", thereby permitting the terms to be defined so broadly as to include virtually any and all communication. The term "publicity" also does not appear in the current text of either title 10 or 38, United States Code. This suggests that there is no extant explicit authorization of the use of funds for publicity purposes in the Department of Defense and the Department of Veterans Affairs.

We are concerned that this section, as written, could adversely affect communication and outreach efforts that are inherent parts of agency operations. The explicit prohibition on expenditures for publicity may act to bar communications activities currently undertaken on the basis of less specific authorizations. Federal agencies have a responsibility to communicate to the regulated communities and impacted stakeholders on a variety of action, including new regulations, enforcement actions, regulatory compliance, and assistance. Both the Department of Veterans Affairs and the Department of Defense, for instance, spend considerable sums to effectively communicate information such as changes in benefits' features and design to veterans, military personnel, the public, and the press. We are concerned that a broad prohibition on expenditures for "publicity" may produce undesired and unanticipated negative consequences for Department of Veterans Affairs and Defense Health Program beneficiaries.

Additionally, Federal agencies often publicize significant accomplishments, milestones, and achievements, so that Congress and the general public may be made aware that federal agencies are achieving the goals society has set and are earning the value of the taxpayer's money. As an example, in 2004, US-VISIT ran several advertisements in overseas newspapers to help educate and reassure the international traveling public that implementation of the US-VISIT inspection process would not interfere with, and should not be a deterrent to, their traveling to the United States. Also, US-VISIT conducted a domestic media effort to educate travelers leaving through the land ports about a new pilot inspection process on exit from the United States. Often, communications such as these are incorporated into the operational budgets of individual programs and offices and are not line-item appropriated by Congress.

We recommend, in addition to clarifying what "publicity" and "propaganda" mean, the following changes should be made to the bill **(changes in bold):**

"§ 1355. Prohibition on unauthorized expenditure of funds for publicity or propaganda purposes.

"An officer or employee of the United States Government may not make or authorize expenditure or obligation of funds for publicity or propaganda purposes within the United States unless authorized by law.

"This prohibition does not apply to communications and outreach efforts designed to inform the general public, regulated entities, and stakeholders on matters that are an integral part of the United States Government's efforts, including, but not limited to, delivering public services, performing legal and regulatory compliance assistance, announcing program performance, providing health and safety information, and promoting energy and environmental conservation."

Section 6. Section 6(a) of the bill should be amended by striking "Each" and inserting, "Except as otherwise authorized by existing law, each..." or "Unless authorized by existing law, each". This recommended change would reduce the extent to which section 6 would have the effect of precluding certain United States activities.

Section 7. Section 7 of the bill would require each Federal agency to compile a report to the Archivist on the use of "pseudo" classifications, which it defines broadly as "information control designations . . . not defined by Federal statute, or by an Executive order relating to the classification of national security information." *See* paragraph 7(d)(2). Additionally, section 7 would require the Archivist to promulgate regulations banning the use of "pseudo" classifications, *see* paragraph 7(b)(1), and appears to contemplate further legislation in this area, *see* paragraph 7(c)(2). We note that the requirement in paragraph 7(b)(1) overlaps with responsibilities outlined in section 3503 and 3506 of the Paperwork Reduction Act for OMB and agency heads, respectively, to carry out Federal-wide and agency-specific Information Resources Management activities to improve agency productivity, efficiency, and effectiveness.

Section 7 would severely limit the ability of the Executive branch to direct information within the Executive branch by imposing administrative control markings in lieu of, or in addition to, national security classification markings. At the outset, section 7 mischaracterizes administrative control markings by referring to them as "'pseudo' classification designations.' This mischaracterization appears to be based on the mistaken premise that administrative information markings are themselves the legal basis for withholding information from public release. Unlike national security classification markings, which are specifically prescribed by Executive Order 12958, as amended, and have the force and effect of law, administrative control markings (such as AIUO, FOUO, PROPIN, ATTORNEY WORK PRODUCT, ATTORNEY-CLIENT PRIVILEGED INFORMATION, DELIBERATIVE PROCESS PRIVILEGED INFORMATION, LAW ENFORCEMENT SENSITIVE, etc.) are not specifically prescribed by

law, but are merely flags that the Executive branch uses to control information within the Executive branch and to identify information that may be subject to protection from public release based on specific statutes or common law privileges. Thus, the administrative control markings themselves do not form the legal basis for withholding information from public release, and do not guarantee that information so marked will be determined to be eligible for withholding when such information is reviewed for public release.

More specifically, sections 7(a)(3) and (a)(4) require that a report on the use of administrative control markings across the Executive branch be prepared by the Archivist of the United States and submitted to a variety of Congressional committees after public notice and comment. These requirements are uniquely inappropriate, and the Archivist is unsuited to prepare such a report. While it is true that the Archivist plays a role, through the Information Security Oversight Office, in setting policy for, and performing oversight of, the national security classification programs in both Government and industry, he does not at the same time possess the authority to classify information, which is an authority more appropriately reserved to the President, the Vice President, and those agency heads and officials specifically designated by the President. Furthermore, the public-notice-and-comment requirement is inconsistent with the nature of the report. Under the framework suggested by subsection 7(b) of the bill, however, the Archivist would be empowered to determine the need (or not) for departments and agencies to use information-control designations to safeguard sensitive information. We believe in this context, as we would in the classified context, that the Archivist is ill-suited to engage adequately the broad range of federal and non-federal stakeholders whose respective missions, authorities, activities, and responsibilities are the true drivers of the underlying sensitivity and resulting treatment of information within their possession. Simply stated, reform of controlled unclassified information marking and handling standards must give due consideration to all related equities and authorities and be better balanced than the formulation proposed in section 7.

The report is designed to be an examination of agency information-protection activities and will be based on reports submitted by individual agencies. Individual agencies will likely limit the discussion of their information activities in their reports if the overall report will be subject to public notice and comment. Lastly, the Congressional intelligence oversight committees are conspicuously absent from the list of committees to which the report will be provided.

Although section 7(a) mandates a report to examine the use of administrative information-control markings by the Executive branch, section 7(b), in advance of any review of the results of the report, mandates the elimination of all administrative-control markings, subject to exceptions authorized by a regulation promulgated by the Archivist that incorporates the minimum statutory standards for the continued use of such markings that are set forth in section 7(b)(2). Once again, the Archivist is an inappropriate official to make exception determinations. Moreover, the proposed elimination of all administrative-control markings, notwithstanding the ability to seek exceptions, is itself problematic. Administrative information control markings

exist because individual agencies within the Executive branch need the ability to control the flow of information within the Executive branch, and the ability to identify information that may be subject to protection from public release based on specific statutes or common law privileges. Without the availability of such administrative control markings to indicate which information may require controlled handling, there will necessarily be a presumption that any unmarked information within the Executive branch may require controlled handling and will need to be subjected to extensive review in response to any information release requests. This will likely result in less rather than more information being released.

We note the reporting requirements seem particularly burdensome, given that paragraph 7(b)(1) would eliminate the use of "pseudo" classifications within 15 months of the bill's enactment. Further, there would be substantial implications associated with eliminating these classifications. Labeling such documents may provide useful evidence when we investigate the misuse of such information or an obstruction of justice. Moreover, many law enforcement components utilize such "pseudo classification" markings to protect extremely sensitive information, the disclosure of which, for example, could endanger witnesses and law enforcement personnel, or compromise vital ongoing investigations. Despite its sensitivity, such information cannot be classified unless its disclosure could also result in some articulable harm to national security. Even information that could lead to the death of a witness or undercover agent cannot be classified under currently applicable law unless its disclosure could also result in some articulable harm to national security.

Additionally, enactment of section 7 would be counterproductive and encourage a result that is the opposite of its purpose. One reason for the use of administrative control markings is to *foster* information sharing. Use of "SBU", for example, facilitates sharing of certain threat and vulnerability information with myriad people at the State and local levels and in contractor communities, while keeping it from a larger audience that should not have such information. The SBU system allows this broader — but not limitless — information sharing, without the panoply of requirements and review processes that are necessarily part of the classification system. The Government is able to get SBU information to the customer or user community in a timely, efficient, and cost-effective way. Eliminating administrative information-control markings like SBU and FOUO, or imposing a more rigid legislative standard for their use, would make it harder to protect sensitive information from uncontrolled dissemination to classification. to . Paradoxically, then, barring or restricting the use of administrative information control markings would have the unintended effect of expanding the application of classification controls and thus of making information sharing more difficult and more costly.

We support efforts to promote and enhance the effective and efficient use, management, and sharing of sensitive unclassified information in a manner that protects privacy, proprietary, and other legitimate interests. We also share Congress' concerns about the effective use of information-control designations. To that end, various elements of the Administration, in consultation with critical non-federal stakeholders, have been actively and aggressively working

to standardize the procedures for sensitive but unclassified information. These efforts will reduce the proliferation of inconsistently applied controls by institutionalizing a governance process to assure that the dynamic and complex issues of information safeguarding and protection are addressed appropriately in the future.

More fundamentally, we are concerned that the proposal could undermine the Administration's ongoing efforts under the President's December 16, 2005, Memorandum for the Heads of Executive Departments and Agencies, entitled "Guidelines and Requirements in Support of the Information Sharing Environment (ISE)". These Presidential Guidelines were issued specifically to implement the mandates of section 1016 of the Intelligence Reform and Terrorism Prevention Act of 2004 and Executive Order 13388 for developing the Terrorism Information Sharing Environment. Guideline 3 of the Presidential Memorandum instructs the Executive branch to "standardize procedures for sensitive but unclassified information," and, over the past year, the interagency working group has been working actively and aggressively to fulfill this mandate. (It should be noted that our studies indicate that 279 requirements for safeguarding and handling SBU information have resulted from Congressional mandates). The Administration's efforts have already resulted in significant progress to standardize department and agency procedures concerning sensitive but unclassified information, such as moving towards a governance process for reducing the proliferation of controls for safeguarding and protecting sensitive information.

This legislation not only fails to acknowledge the Administration's progress in implementing the ISE, but may have the unintended effect of hampering information-sharing and privacy protection by failing to recognize adequately the complexity of the existing legal regimes in this area. Accordingly, while we share Congress' concerns about the overuse of, and confusion about, information-control designations, we believe the Administration, in consultation with the Program Manager for the ISE and critical non-federal stakeholders, has already undertaken significant efforts to standardize the procedures for sensitive but unclassified information.

For several months, the State Department has been engaged in an interagency effort (led by the ODNI's Program Manager for the Information Sharing Environment, Ambassador Thomas McNamara) to review and standardize Government policy for identifying, marking, sharing, and safeguarding sensitive, unclassified information. Working at the direction of the President, the interagency group chaired by Ambassador McNamara (the SBU Coordinating Committee) has made substantial progress and is in the final stages of designing a system that would achieve the objectives of the proposed legislation. Both the National Archives and Records Administration and the Information Security Oversight Office already are involved in that effort. The timeframes that the SBU Coordinating Committee has set for itself are tighter than those in the bill.

Ambassador McNamara has developed recommendations for a new Controlled Unclassified Information (CUI) regime designed to standardize SBU procedures shared within the ISE. These recommendations are intended to enable the sharing of CUI information as broadly as possible in the ISE; to create a limited and defined number of permissible CUI categories, markings, safeguarding, and dissemination standards; and to be guarded by the imperatives of simplicity, security, openness, cost-effectiveness, privacy, and the legal rights of Americans. The SBU CC recommendations are currently undergoing extensive interagency comment and review and will be submitted to the President in the near term. It is anticipated that recommendations for legislative reform will be included in the report submitted to the President.

The lack of Government-wide standards for unclassified information, including SBU information, severely impedes our ability to share information more rapidly to those who protect our homeland. SBU standardization is therefore essential because it will enable our Federal government, as well as our State, local, and tribal defenders to rely on consistent policies and procedures for sharing and protecting SBU information, thus giving them tools to meet the threats of today. The Program Manager is committed to working with Congress to implement these recommendations.

It is unclear if the scope of section 7(b) would include such classifications as "procurement sensitive" and "source selection" information. This language could compromise the integrity of the procurement process. The aggregate effect of the bill's burdensome requirements as they apply to federal acquisition workforce would be substantial and have a strong detrimental effect on the Government's ability to attract and retain top notch acquisition personnel.

Thank you for the opportunity to present our views. Please do not hesitate to call upon 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,

Richard A. Hertling

Richard A. Hertling
Acting Assistant Attorney General

cc: The Honorable Thomas M. Davis III
Ranking Minority Member