

UNITED STATES OFFICE OF  
GOVERNMENT ETHICS



September 9, 2019

The Honorable Richard Burr  
Chairman  
U.S. Senate Select Committee on Intelligence  
United States Senate  
211 Hart Senate Office Building  
Washington, D.C. 20510

The Honorable Mark Warner  
Vice Chairman  
U.S. Senate Select Committee on Intelligence  
United States Senate  
211 Hart Senate Office Building  
Washington, D.C. 20510

The Honorable Adam Schiff  
Chairman  
U.S. House of Representatives Permanent  
Select  
Committee on Intelligence  
United States House of Representatives  
Capitol Visitor Center HVC-304  
U.S. Capitol Building  
Washington, DC 20515-6415

The Honorable Devin Nunes  
Ranking Member  
U.S. House of Representatives Permanent  
Select  
Committee on Intelligence  
United States House of Representatives  
Capitol Visitor Center HVC-304  
U.S. Capitol Building  
Washington, DC 20515-6415

The Honorable James Inhofe  
Chairman  
U.S. Senate Committee on Armed Services  
United States Senate  
228 Russell Senate Building  
Washington, D.C. 20510

The Honorable Jack Reed  
Ranking Member  
U.S. Senate Committee on Armed Services  
United States Senate  
228 Russell Senate Building  
Washington, D.C. 20510

Dear Chairmen Burr, Schiff, and Inhofe, Vice Chairman Warner, and Ranking Members Nunes and Reed:

I write to advise you of concerns the U.S. Office of Government Ethics (OGE) has with legislation to establish an intelligence community public-private talent exchange. This legislation is under consideration as section 306 of H.R. 3494, the Damon Paul Nelson and Matthew Young Pollard Intelligence Authorization Act for Fiscal Years 2018, 2019, and 2020 and section 9304 of S. 1790, the National Defense Authorization Act for Fiscal Year 2020.

OGE recognizes the importance of innovative and flexible human capital options for increasing Federal recruitment and retention. OGE is concerned, however, that public-private exchange programs such as the one contemplated by these bills task detailed private sector personnel with work in which there is an enhanced risk of conflicts of interest that are adverse to the public interest. This includes a heightened risk of financial conflicts of interest arising from continued outside employment and divided loyalties arising from the continued payment of their salary by the private sector.

Although certain provisions of the proposed program purport to deal with those risks, in OGE's experience these provisions are not enough to secure public integrity. Accordingly, OGE recommends that these bills and any similar bill include, at minimum, the following safeguards to reduce conflict of interest risks: (1) the implementing agency or component should be required to consult with OGE



regarding the structure of the program; (2) procedures should be included to avoid financial conflicts of interest, without the need to resort to waivers; and (3) the impact of allowing private sector detailees to be paid by their for-profit employers for government services should be considered, including the application of the criminal statute prohibiting supplementation of government salaries. These safeguards are discussed in detail below.

### **Consultation with OGE Regarding the Structure of the Program**

In OGE's experience, public-private exchanges are likely to pose novel and precedential questions regarding the ethics laws. As the supervising ethics office of the executive branch,<sup>1</sup> OGE believes that the formal consultation between the Director of National Intelligence and OGE is necessary to ensure uniform implementation of the ethics laws to temporary detailees in the executive branch. Accordingly, OGE recommends that paragraph (a) of the legislation, entitled "Policies, Processes, and Procedures Required," direct the Director of National Intelligence to consult with OGE to develop policies and procedures for the program aimed at ensuring that such authority is exercised in a manner consistent with all relevant ethical constraints and principles, including the avoidance of any prohibited conflict of interest or appearance of impropriety.

### **Procedures to Avoid Financial Conflicts of Interest**

Given the purpose of the legislation and the fact that detailees' expertise often relates to the activities of their for-profit employers, OGE is concerned that personnel assigned from for-profit organizations will have a heightened risk of conflicts of interest arising from their continued employment. The criminal financial conflict of interest prohibition states, in relevant part, that a government official may not participate in any particular matter that will have a direct and predictable effect on the financial interests of an outside organization of which the official is an "employee."<sup>2</sup> As OGE said in 2006, section 208 issues often arise with detailees under the existing Intergovernmental Personnel Act exchange program,<sup>3</sup> and these issues have at times been the subject of scrutiny.<sup>4</sup> Concerns regarding conflicts of interest are only exacerbated when the outside entity has a profit motive and competitive interest in the very work to be accomplished by the detailee.

As a result, many of the activities that might be contemplated by the legislation might violate the criminal conflict of interest law. At the same time, waivers of such conflicts would be extremely hard to justify under the standard set forth in the waiver provisions of the financial conflict of interest statute and under the appearance of impartiality standards set forth in Standards of Conduct for Employees of the Executive Branch.<sup>5</sup> Absent extraordinary facts, OGE would therefore anticipate objecting to the issuance of any waiver permitting a detailee to participate in a particular matter that would affect the financial interests of the detailee's for-profit employer.<sup>6</sup>

To help mitigate this enhanced risk of financial conflicts of interest, OGE supports an explicit provision restricting the Director of National Intelligence from assigning private sector employees to

---

<sup>1</sup> See 5 U.S.C. app. § 402.

<sup>2</sup> See 18 U.S.C. § 208(a).

<sup>3</sup> See OGE Legal Advisory 06x10 (October 19, 2006).

<sup>4</sup> See Government Accountability Office, *DHS Needs to Improve Ethics-Related Management Controls for the Science and Technology Directorate*, GAO-06-206 (2006).

<sup>5</sup> See 18 U.S.C. § 208(b)(1) and OGE's regulations at 5 C.F.R. § 2635.502(d), respectively. See also OGE Legal Advisory 07x4 (February 23, 2007).

<sup>6</sup> *Id.*

particular matters in which their private sector employer has a financial interest.<sup>7</sup> Even with that language, as a practical matter, financial conflicts of interest can be difficult to identify. Therefore, agency ethics officials will need to be consulted prior to a detailee's appointment and on an ongoing basis as the detailee is assigned work. To further mitigate these potential conflicts of interest, OGE believes that strict policies would be needed to ensure that the intelligence community elements develop strategies to assess potential risks on the front end to avoid appointing detailees from for-profit companies to positions that would involve work with, or otherwise have an effect on, those companies.

### **Clarity About the Application of the Criminal Prohibition Against Supplementation of Government Salaries**

OGE is also concerned that the proposed program turns government activities over to individuals who are paid by for-profit, private interests.<sup>8</sup> Generally, outside entities are barred from paying federal officials' salaries.<sup>9</sup> The reason for this prohibition is to ensure that government officials are not serving "two masters to the prejudice of [their] unbiased devotion to the interests of the United States."<sup>10</sup> OGE believes that these types of arrangements directly implicate the concerns motivating the rule. As the Supreme Court stated in *Crandon v. U.S.*, "First, the outside payor has a hold on the employee deriving from his ability to cut off one of the employee's economic lifelines. Second, the employee may tend to favor his outside payor even though no direct pressure is put on him to do so. And, third, because of these real risks, the arrangement has a generally unwholesome appearance that breeds suspicion and bitterness among fellow employees and other observers."<sup>11</sup>

The primary way to remedy this issue would be to eliminate the provision allowing private sector detailees to continue to receive pay and benefits from the private sector organization from which they are assigned. If, however, the legislation intends for detailees to receive salary payments from their for-profit employers without violating the criminal prohibition against supplementation of government salaries, the bill language should explicitly state this exception. To this end, OGE recommends clarifying the language that exempts payments provided by private employers of federal detailees, while leaving the prohibition applicable to all other supplementations of government salary.<sup>12</sup>

### **Additional Ethics Considerations in Implementing the Proposed Program**

In addition to the concerns discussed above, we note that this type of program potentially raises issues under other criminal conflict of interest statutes, including the prohibitions against government employees representing outside parties against or before the United States<sup>13</sup> and the post-employment prohibitions<sup>14</sup>. Moreover, it also raises a number of potential issues under the Standards of Conduct for Employees of the Executive Branch, such as the use of nonpublic information and the receipt of gifts

---

<sup>7</sup> Language could be included to the effect that private sector employees "shall not be assigned to participate in any particular matter in which the private-sector organization from which such employee is assigned has a financial interest."

<sup>8</sup> See paragraph (g)(1) of the proposed program.

<sup>9</sup> See 18 U.S.C. § 209.

<sup>10</sup> See 33 Op. Att'y Gen. 273 (1922).

<sup>11</sup> *Crandon v. U.S.*, 494 U.S. 152, 165 (1990) (quoting *Association of the Bar of the City of New York, Conflict of Interest and Federal Service* 211 (1960)).

<sup>12</sup> Accordingly, OGE recommends that paragraph (g)(2)(B) of the proposed program be amended to read, "(b) sections 201, 203, 205, 207, 208, 209, 603, 606, 607, 643, 654, 1905, and 1913 of title 18, United States Code, except section 209 does not apply to any salary, or contribution or supplementation of salary made pursuant to paragraph (1) of this subsection."

<sup>13</sup> See 18 U.S.C. §§ 203 and 205.

<sup>14</sup> See 18 U.S.C. § 207.

from outside sources. Finally, OGE notes that the provisions of the bill regarding the status of government employee detailees to private sector organizations could be further clarified.<sup>15</sup>

### **Conclusion**

As noted above, OGE recognizes the important human capital concerns animating this proposed legislation. OGE believes that addressing the above concerns would help diminish, though not eliminate, the possibility of conflicts of interest that are inherent in the program contemplated by the legislation. OGE is happy to offer technical assistance regarding the implementation of any of the above safeguards.

The Office of Management and Budget has advised OGE that, from the perspective of the Administration's program, there is no objection to submission of this letter. If you have questions please do not hesitate to contact Shelley K. Finlayson, OGE's Chief of Staff and Program Counsel, at (202) 483-9314.

Sincerely,

Emory A. Rounds, III  
Director

cc: Chairman Ron Johnson and  
Ranking Member Gary C. Peters  
U.S. Senate Committee on Homeland Security  
and Governmental Affairs

---

<sup>15</sup> OGE also raises whether it is appropriate for detailees to conduct inherently governmental functions.