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Office of Government Ethics
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April 21, 2008

The Honorable Nancy Pelosi
Speaker
United States House of Representatives
H-232, The Capitol
Washington, DC 20515-6501

Dear Madam Speaker:

The Office of Government Ethics (OGE) has the following comments on H.R. 5687, a bill to amend the Federal Advisory Committee Act, which has been reported out of the Committee on Oversight and Government Reform. Our comments are confined to the conflict of interest provisions in sections 2 and 4 of the bill.

General Concerns

Before discussing the details of specific provisions of the bill, OGE wants to express several serious concerns about the bill generally.

1. Lack of Distinction Between Government Employees and Representatives of Outside Interests

The conflict of interest provisions in the bill apply equally to all advisory committee members, regardless of whether those members are Government employees. This failure to distinguish between those who are Government employees and those who are not engenders several problems. The regulation of conflicts of interest must take into account the fundamental differences between advisory committee members who are special Government employees and those who are merely representatives of outside interest groups.

For one thing, the bill does not take into account the fact that advisory committee members who are Government employees, unlike "representatives," are already subject to a very large

body of conflict of interest laws and regulations.[1] This includes not only criminal restrictions, such as the prohibition on financial conflicts of interest in 18 U.S.C. § 208, but a substantial number of ethics regulations governing such issues as impartiality in performing official duties and limits on such outside activities as expert testimony, under 5 C.F.R. part 2635. To impose a new set of conflict of interest restrictions, through the vehicle of the Federal Advisory Committee Act and implementing regulations, raises a significant risk of duplicative, overlapping and inconsistent requirements. As described more fully below, certain provisions of the bill overlap with existing legal requirements found in the criminal conflict of interest law, 18 U.S.C. § 208, as well as the financial disclosure provisions found in Title I of the Ethics in Government Act, 5 U.S.C. app. § 101, et seq. OGE wants to emphasize that an important goal of conflict of interest legislation and regulation, ever since the landmark overhaul of conflict of interest laws in 1962, has been to achieve a uniform and consistent set of understandable standards and to avoid a patchwork quilt of restrictions that are overlapping and inconsistent. See S. Rep. 2213, 87th Cong., 2d Sess. (Sept. 29, 1962)(regarding P.L. 87-849). Provisions such as those discussed below raise serious questions concerning the intended relationship between the bill and existing law and will further complicate the implementation and enforcement of conflict of interest requirements.

Moreover, OGE does not believe that the bill identifies any conflicts of interest on the part of special Government employees that cannot be addressed under these existing laws and regulations. For example, if the concern is that employees may be acting without impartiality because of outside interests or business relationships, such concerns can and should be addressed through training and enforcement with respect to existing requirements. See, e.g., 5 C.F.R. § 2635.502.

Additional problems stem from the way in which the bill imposes conflict of interest requirements on advisory committee members who are not Government employees at all. In particular, the requirement that OGE promulgate conflict of interest

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[1]For a comprehensive discussion of the wide range of ethical restrictions already applicable to special Government employees, see OGE Advisory Memorandum 00 x 1 (reviewing ethics laws and regulations applicable to special Government employees), http://www.usoge.gov/pages/advisory_opinions/advop_files/2000/00x1.html.

regulations for non-employee representatives, under section 2(c)(1) of the bill, is inconsistent with OGE's organic authority under Title IV of the Ethics in Government Act (EIGA). EIGA states that OGE shall provide "overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency." 5 U.S.C. app. § 402(a)(emphasis added). Furthermore, it is not apparent how the conflict of interest requirements of the bill would apply to representative members, because by definition such representatives are not intended to serve as unbiased experts but rather as spokespersons for the interests of certain outside groups. Nor is it clear how such requirements could be enforced: OGE rules governing the conduct of employees are enforced through disciplinary proceedings, but Government supervision and discipline are foreign to the very concept of representatives, who by definition serve non-Government masters.

2. Inconsistency With Longstanding Policy of Limiting Barriers to Service by SGEs With Relevant Expertise

OGE is concerned that the bill would undermine the fundamental policy, reflected in the 1989 amendments to 18 U.S.C. § 208(b), that special Government employees serving on Federal advisory committees should be subject to fewer barriers to service than regular employees. In 1989, Congress enacted 18 U.S.C. § 208(b)(3), which created a less restrictive conflict of interest waiver standard for advisory committee members. This legislation implemented the recommendations of an outside commission, which reported: "In the absence of particularized provisions for the treatment of special Government employees within the general conflict of interest prohibition of 18 U.S.C. § 208, however, the Commission believes that the Government is needlessly handicapped in obtaining advice and information from individuals with expertise who are located in the private sector." Report of the President's Commission on Federal Ethics Law Reform, at 29 (March 1989). As described below, not only does the waiver standard in the bill impose different and stricter requirements than section 208(b)(3), but also it arguably imposes stricter waiver standards on advisory committee members than those applicable to regular employees.

Section 2(b) of the Bill

OGE has a number of specific concerns about section 2(b) of the bill, which requires agencies to take certain measures with respect to conflicts of interest of advisory committee members.

First, the bill does not define "conflict of interest," and the intended reach remains vague. Section 2(c) requires OGE to define "conflict of interest," but it is not clear what the scope should be. OGE is aware of no generally applicable definition of "conflict of interest." Rather, as used in the context of Federal ethics requirements, the phrase is used typically to denote the various requirements of positive law, primarily the criminal laws in chapter 11 of Title 18 of the U.S. Code, but also sometimes the requirements of other ethics statutes, such as EIGA, as well as Executive Order 12674 and the OGE regulations promulgated thereunder. Moreover, for special Government employees, who are already subject to numerous ethical requirements under existing law, it would be peculiar for the term conflict of interest to be defined--comprehensively and for the first time--under the rubric of the Federal Advisory Committee Act, rather than the statutes and rules that have been developed by Congress and the Executive Branch expressly for the purpose of regulating ethical conduct.

Second, section 2(b) raises the related issue concerning the intended relationship between this law (including any implementing regulations) and 18 U.S.C. § 208. Section 208 already specifies the kinds of financial conflicts of interest that require disqualification of Government employees, including special Government employees serving on advisory committees. Moreover, OGE already has issued implementing regulations providing guidance and interpretation, in 5 C.F.R. § 2640. It is not apparent whether the bill is intended to add anything to section 208 and the implementing regulations. The bill thus raises the risk of confusion between the requirements of existing law and regulations and the new requirements that would be imposed.

Third, section 2(b) appears to set out a standard for waiving conflicts of advisory committee members that differs from the standard already applicable under criminal law, 18 U.S.C. § 208(b)(3). The bill says the agency shall ensure that no individual has a conflict unless "that conflict is unavoidable" and the "need for the individual's services outweighs the potential impacts of the conflict of interest." Section 208(b)(3), by contrast, says nothing about unavoidability. Moreover, the language in 208(b)(3), while similar to the language of the bill, is not identical: "the need for the individual's services outweighs the potential for a conflict of interest created by the financial interest involved." The significance of these differences between the

bill and existing law is unclear. Moreover, the addition of an "unavoidability" standard arguably would make waivers more difficult to justify than under section 208(b)(3) and, in fact, could make waivers more difficult to justify than under the standard for regular, full-time employees, under 18 U.S.C. § 208(b)(1). Under the latter standard, a conflict need not be unavoidable, as long as the financial interest is so insubstantial that it will not affect the integrity of the employee's services. By contrast, the bill language would seem to preclude a waiver for even a de minimis financial interest--for example, a modest amount of publicly traded stock that represents a very small percentage of the advisory committee member's net worth--unless it can be demonstrated that the conflict is unavoidable. The standard in the bill is overbroad because even a de minimis conflict may not be unavoidable, in the sense of being inevitable or unpreventable: for example, members can always be required to divest financial interests or resign outside positions as a condition of their appointment, even though such remedies may be clearly disproportionate to the degree of conflict posed. Not only would this result undermine the purpose of 18 U.S.C. § 208(b)(3), as described above, but it would create barriers to service by advisory committee members that do not exist even for regular, career civil servants.

Fourth, although the bill requires that advisory committee members disclose conflicts of interest to the agency, it is not clear how this requirement relates to existing financial disclosure requirements for special Government employees under Title I of the Ethics in Government Act. Section 2(b) of the bill requires that members "inform" the appointing official of "any actual or potential conflict of interest." However, all special Government employees serving on advisory committees must file at least a confidential disclosure form, if not a public form, already. See 5 C.F.R. § 2634.904(a)(2). It is not apparent to us what the bill would add to this existing requirement. Additionally, by requiring the members themselves to report "conflicts" (both actual and potential), the bill would appear to give the members the authority to self-identify conflicts. By contrast, existing law requires individuals to report a range of financial information to the agency, and then it is the responsibility of agency ethics officials to decide whether that information reveals any actual or potential conflicts. Thus, not only is it unclear how the bill relates to existing disclosure requirements, but the existing mechanism would appear to be a more objective and effective prophylactic approach.

Fifth, section 2(b) is problematic because it requires the evaluation of conflicts of interest at the point of the member's initial appointment, when the facts that would give rise to a conflict of interest often cannot be ascertained or do not even exist. As the Institute of Medicine observed in a seminal study of scientific advisory committees:

> When a new committee is formed, or a new member is appointed to an existing committee, it is impossible to anticipate all of the issues or applications on which the FDA will seek the committee's advice. The general jurisdiction of the committee will of course be known, but its future agenda cannot be.

IOM, Food and Drug Administration Advisory Committees 160 (National Academy Press 1992). In other words, conflicts of interest do not exist in the abstract, without a consideration of the actual assignments of the committee members, which often are unknown and unknowable at the time of appointment, particularly in the case of standing committees with multi-year appointments. In OGE's experience, most advisory committee members have very active outside professional lives and often have a wide range of financial interests and professional relationships. Frequently, it will not be possible to determine which of these many interests and relationships actually will pose a conflict without knowing the specific agenda items on which they will participate; at best, agency ethics officials can be alert to potential conflicts as agenda items arise.[2] In many cases, therefore, an agency will have no realistic basis for making the advance, abstract determination required by section 2(b) of the bill.

Finally, although the precise meaning of section 2(b) is not clear to us, OGE believes it is capable of being read to preclude one of the most common remedies for a conflict of interest: recusal. Section 2(b) would appear to require an agency to deny appointment to a prospective advisory committee member if there is a conflict of interest "with the functions to

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[2]For this very reason, OGE has worked with certain agencies, such as the Environmental Protection Agency and the Department of Health and Human Services, to develop "meeting-specific" financial disclosure statements that are tailored to the particular agenda of a given advisory committee meeting. These systems have been developed as alternatives to the standard OGE Form 450, which is submitted only once per year by covered employees. See 5 U.S.C. app. § 107(a)(1); 5 C.F.R. § 2634.905.

be performed by the advisory committee." Under existing laws and regulations, however, many potential conflicts are averted, not by denying appointment to otherwise qualified individuals, but by requiring appointed members to recuse themselves from those particular aspects of the committee's work that actually affect the individual's personal or imputed interests. This is especially true with standing committees whose agenda items are numerous and varied. The bill, therefore, would arguably impose a new barrier to the recruitment of qualified experts, whose real conflicts otherwise could have been managed through targeted recusal. Again, this development seriously undermines the policy reflected in existing laws, such as 18 U.S.C. § 208(b)(3), to remove unnecessary barriers to the use of part-time advisors who can provide expertise otherwise unavailable to the Government.

Section 2(c) of the Bill

As indicated above, section 2(c) would require OGE to issue regulations governing the conduct of a class of representatives who are not even Government employees. This would extend the jurisdiction of OGE beyond its longstanding limitation to policies applicable to Government officers and employees, under Title IV of EIGA. Beyond issues of jurisdiction, OGE also has noted above the practical problems of implementation and enforcement with respect to individuals who are, by definition, not subject to supervision or discipline by OGE or other agencies.

Additionally, section 2(c) also would appear to authorize OGE to issue regulations regarding a subject that has nothing to do with OGE's statutory mission and expertise in preventing conflicts of interest. Section 2(c) provides for OGE regulations "to carry out and ensure the enforcement" of certain FACA requirements, including the new requirement that agencies ensure that advisory committee reports are "the result of the advisory committee's judgment, independent from the agency." (See section 2(b) of the bill, adding new section 9(c)(2) of FACA.) Whatever may be the policy merits of ensuring that advisory committees are not subject to influence from the Government itself, OGE would be acting outside its jurisdiction. The concern that Government agencies may exert undue influence over advisory committees does not pertain to conflict of interest policy, which entails protecting Government processes from the intrusion of private interests. Rather, this is an advisory committee management issue, as to which OGE has no expertise or experience.

Sec. 4(a) of the Bill

Section 4(a) provides for various public disclosures concerning the interests of advisory committee members, but it does not provide for the withholding of information usually exempt from disclosure under related laws. The bill requires public disclosure of "any conflict of interest relevant to the functions to be performed by the committee." It also requires public disclosure of a list of special Government employees who have received 208(b) waivers, including a "summary description" of the conflict and the reasons for granting the waiver. Unlike 18 U.S.C. § 208(d)(1), which already governs the public disclosure of these conflict of interest waivers, the bill does not provide for the withholding of information that would be exempt from disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Situations can arise in which the nature of the conflict cannot be described without information that would be exempt under FOIA, such as national security or trade secret information, which is why section 208(d)(1) permits such withholding. Given that the information to be disclosed under the bill must be affirmatively posted on the agency web site (under section 4(b) of the bill), the risk of abuse of information otherwise exempt from disclosure is all the greater. Additionally, the existence of two public disclosure provisions, one in FACA and one in section 208(d)(1), adds further complexity and potential confusion between the requirements.

Thank you for the opportunity to present the views of OGE. Please do not hesitate to contact OGE's Congressional Liaison Officer, Shelley Finlayson, at (202) 482-9314, if additional assistance is needed. 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,

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Director

cc:

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