



DEC 13 2006

**TO:** Daniel Meron  
General Counsel

**FROM:** Daniel R. Levinson  
Inspector General

**SUBJECT:** Vulnerabilities in Departmental Issuance of Conflict of Interest Waivers

### Introduction

The purpose of this memorandum is to identify certain vulnerabilities relating to the Department's issuance of conflict of interest waivers pursuant to 18 U.S.C. § 208. This issue arises from an inquiry conducted by the Office of Inspector General (OIG) regarding a conflict of interest waiver granted to Thomas A. Scully (Scully), former Administrator of the Centers for Medicare & Medicaid Services (CMS), in May 2003. What follows is a brief summary of that inquiry and its results, findings of four areas of vulnerability uncovered by the inquiry, and four recommendations for the Department's ethics program.

### Background regarding issuance of Scully waiver and OIG inquiry

In early spring 2003, Scully informed then Secretary Tommy G. Thompson that he had received overtures from acquaintances in law firms and wanted to begin exploring future employment opportunities. Scully subsequently consulted with Associate General Counsel Edgar Swindell (Swindell), the Department's Designated Agency Ethics Official (DAEO),<sup>1</sup> and received legal advice with respect to the application of ethics rules to his plans to seek employment with law firms, consulting firms, and health care investment firms.

Scully was counseled about the requirements of 18 U.S.C. § 208, including its recusal obligation with respect to prospective employers. Specifically, he was advised that he

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<sup>1</sup>As the primary source for ethics guidance and policy within each Executive Branch agency, the DAEO provides advice and training directly to senior management officials. The Ethics Division in the Office of the General Counsel administers the ethics program for the Department. The Associate General Counsel for Ethics, who serves concurrently as the DAEO, heads the Division.

must not participate in any matter that could affect the financial interests of a person or entity with which he was seeking employment. He was also informed about the possibility of receiving a conflict of interest waiver under 18 U.S.C. § 208(b). Swindell explained that if Scully received a waiver, it would be a “limited” waiver that would permit him to continue to exercise his general responsibilities as CMS Administrator, while prohibiting his participation in particular matters that could directly affect prospective employers.

In May 2003, Scully was granted a limited waiver under the provisions of 18 U.S.C. § 208. In the memorandum supporting the limited waiver, Swindell analyzed the applicable law and the effect the limited waiver would have on Scully’s performance of his responsibilities as CMS Administrator. The language of the waiver stated that the identified financial interests of Scully were determined to be “not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from him.”

After obtaining the limited waiver, Scully continued to serve as the CMS Administrator for 7 months and never recused himself from any particular matters. Scully stated that in September 2003 he began negotiating for employment with certain law firms and investment companies. Scully resigned as the CMS Administrator in December 2003 and announced that he was joining a law firm and an investment firm.

In late 2003, OIG received inquiries concerning the waiver issued to Scully. Members of Congress and the media raised questions about the circumstances surrounding the issuance and terms of the Scully waiver. Specifically, concerns were raised about the propriety of permitting Scully to pursue employment in the health care industry during the time he was leading the Department’s efforts on pending Medicare reform bills (later enacted as the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA)) that would likely affect the clients of the entities with which he was seeking employment. In response to these concerns, OIG undertook an examination of the process by which the Department received, analyzed, and made determinations regarding the approval of section 208(b) waivers to senior departmental officials. The objectives of OIG’s inquiry were to determine:

- whether the process by which Scully’s waiver was approved was appropriate and whether the waiver was consistent with other waivers granted to senior departmental officials,
- the propriety of granting Scully a waiver to pursue employment in the health care industry while simultaneously working with Congress on the passage of the MMA, and

- whether vulnerabilities exist in the waiver process that should be brought to the attention of departmental officials and Members of Congress.

As part of the review, OIG conducted a wide array of interviews, issued subpoenas, and reviewed a series of previously granted waivers, as well as applicable regulations and policies. With respect to OIG's first two objectives, our inquiry revealed that the waiver issued to Scully was determined to be legally granted and comparable with similar waivers issued to Department officials in the past. Additionally, it appears that Scully obtained the waiver in accordance with existing procedures prior to engaging in employment negotiations. This memorandum focuses on the findings of our third objective regarding vulnerabilities.

### **Applicable law and regulations pertaining to conflicts of interest and waivers**

The criminal conflict of interest statute, 18 U.S.C. § 208, prohibits a Federal employee from personally and substantially participating in a particular matter in which he or certain other persons or entities with which he or she has a relationship has a financial interest. To avoid violating this prohibition, an employee may recuse himself or herself from taking any official action in a matter covered by this statutory prohibition. In addition, the conflict of interest statute contains an alternative to recusal. Under 18 U.S.C. § 208(b)(1), the official responsible for the employee's appointment may opt to issue a waiver if the appointing official determines in writing "that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee."

The Office of Government Ethics (OGE)<sup>2</sup> has promulgated regulations at 5 CFR Part 2640 governing the issuance of waivers under 18 U.S.C. § 208. The regulations state that "[t]he disqualifying financial interest, the particular matter or matters to which the waiver applies, and the employee's role in such matters do not need to be described with any particular degree of specificity." (5 CFR § 2640.301(a)(6)) OGE also has advised that in determining the substantiality of the disqualifying financial interest, "[o]ther factors which may be taken into consideration include the sensitivity of the matter and the need for the employee's services in the particular matter. . . ." The responsible agency official is to consider all the relevant factors, including the nature and sensitivity of the particular matters, the types of official duties involved, the identity and interest of the prospective employer, and any other circumstances that might mitigate or heighten concerns that the integrity of the employee's services would be subject to question. (5 CFR § 2640.301(b)) In requesting a limited waiver, there is no requirement that an employee specifically

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<sup>2</sup>OGE provides guidance in the Executive Branch to prevent conflicts of interest on the part of Government employees and to resolve those conflicts that do occur. OGE is responsible for promulgating the Standards of Ethical Conduct for the Executive Branch, interpreting ethics statutes, and overseeing agency ethics programs for the Executive Branch.

name the entities with which he or she may negotiate for future employment. Rather, the individual must provide enough information so as to describe the prospective employer as a member of a discrete and identifiable class by referring to the industry or economic sector in which the prospective employer operates.

## Findings

Based on OIG's inquiry, we identified four areas of vulnerability related to the Department's issuance and monitoring of conflict of interest waivers.

### **Waivers issued by the Department relied on "boilerplate" language and were not tailored to the individual circumstances of the requestor.**

In assessing the waiver issued to Scully, we compared its wording with that of other waivers issued to senior Department officials. The Scully waiver was modeled on and incorporated much of the language of a waiver that was prepared for former Secretary Donna Shalala in June 2000. Because OGE had reviewed the language of the Shalala waiver, Swindell stated that he believed that incorporating the similar language into the Scully waiver would be acceptable to OGE, even though he never actually consulted OGE. OGE disagreed with any suggestion that it had approved a generic "boilerplate" format for granting waivers involving employment negotiations. Rather, OGE indicated that it gave particular scrutiny to proposed waivers covering future employment negotiations.

We compared the language of the waivers granted to Secretary Shalala and Scully and found significant similarities between them. Neither waiver cited specific potential employers, and both authorized job search activities with an entire class of entities without referring specifically to any one member of that class. Neither waiver was time-limited, although, coincidentally, both individuals received their waivers approximately 7 months prior to actually leaving Government.

Both waivers cited OGE regulations permitting Federal employees who are on a leave of absence from an institution of higher learning (and therefore have a financial interest in a particular member of the specific class comprised of colleges and universities) to participate in any particular matter of general applicability that will affect the class comprised of all institutions of higher learning. (5 CFR § 2640.203(b)) In this respect, the similarities between the two waivers did not reflect the differences in the circumstances of the two requestors. Secretary Shalala was seeking employment with colleges and universities after her Government service, while Scully was not.

There is no OGE exemption applicable to employees who intend to negotiate for future employment with law firms, consulting firms, or investment firms. We examined a sampling of other conflict of interest waivers approved by Swindell over the last 7 years and found that those issued after the Shalala waiver generally cited this regulatory

exemption for employees on leave of absence from colleges and universities, even in instances in which the requestor was interested in employment in a for-profit entity rather than in academia.

**The Department did not have in place an adequate process to ensure that the issuance of waivers was subject to proper oversight.**

Rules governing issuance of waivers under section 208(b) provide for little required oversight. The determination as to whether a disqualifying interest is substantial enough to compromise the integrity of the employee is vested solely in the “government official responsible for appointing the employee to his position” (or his designee). (5 CFR § 2640.301) There is no requirement that OGE approve every waiver, but OGE regulations and section 301(d) of Executive Order 12674 require agency officials to consult formally or informally with OGE “when practicable” prior to granting a waiver. Thus, the regulations require no independent OGE review of the decision to grant a waiver, but a copy of the waiver must be forwarded to OGE. The Department did not consult with OGE regarding the decision to issue the Scully waiver.

On January 6, 2004, White House Chief of Staff Andrew Card issued a memorandum to Executive Branch departments requiring that future proposed waivers for senior political appointees be cleared with the White House before issuance. The purpose of this directive was to ensure that White House officials would be in a position to undertake the balancing test “of the individual’s need for the waiver to seek post-Government employment against the propriety of allowing one of our most senior Administration officials to take action on a matter where his loyalty to the Government is subject to question.” The memorandum addresses only waivers requested by Senate-confirmed Presidential appointees who are negotiating for future employment. Swindell advised us that the Department has discontinued issuing section 208(b) waivers to all employees who are negotiating for future employment.

**The conflict of interest waivers issued by the Department were not limited in duration to ensure their continued appropriateness.**

As discussed previously, the decision to grant a conflict waiver requires an understanding of the particular circumstances of the employee, especially in the case of future employment negotiations. OGE directs the responsible agency official to consider all the relevant factors, including the nature and sensitivity of the particular matters, the type of official duties involved, the identity and interest of the prospective employer, and any other circumstances that might mitigate or heighten concerns that the integrity of the employee’s services would be subject to question. Given the dynamic nature of a senior official’s responsibilities and other changing circumstances, the appropriateness of the waiver may need to be reassessed periodically.

The DAEO himself indicated that, in hindsight, he did have concerns that some of the waivers issued by his office did not limit the period of the waivers. With respect to the Scully matter, both Swindell and Scully thought the waiver would be in effect for only 2-3 months. In fact, it remained in effect for 7 months, during which time Scully's work on the Medicare reform bills became increasingly prominent. Even so, the waiver contained no end date, nor any requirement that the DAEO periodically review its continued appropriateness.

**The Department did not have in place effective screening and monitoring mechanisms for cases in which the employee had received a limited waiver.**

Limited waivers nonetheless require an employee to recuse him or herself from particular matters that would specifically affect the financial interests of any prospective employer. For such recusals to be effective, OGE advises employees and ethics officials to set up a screening process to shield the employee from covered matters. OGE has provided to agencies guidance on the importance of setting up such screening arrangements. Although the duty to recuse always remains with the employee, OGE's guidance states that an employee should provide appropriate oral or written communication about the recusal to close colleagues so that they will be aware of the scope of the disqualification and may assist in screening the employee. It does not appear that an effective screening process was put in place for Scully.

## **Recommendations**

**Waivers issued by the Department should reflect an analysis of the requestor's individual circumstances.**

Reliance on "boilerplate" language is inconsistent with an individualized waiver determination. Future waivers issued by the Department (if any) should be based on an analysis of the individual circumstances of the requestor. Those individuals who approve such a waiver request should seek to determine, with as much particularity as possible, the nature of an individual's search for employment, relying on OGE guidelines for factors to be considered.

**Additional oversight by the DAEO is needed to ensure the proper issuance and monitoring of limited waivers.**

Although the January 6, 2004, Card memorandum addresses ethics review of waivers requested by Senate-confirmed Presidential appointees, the temporal nature of the directive suggests that the Department should adopt additional safeguards. Enhanced oversight of the issuance of conflict of interest waivers by the Department for all covered employees is advisable. This may include a departmental policy requiring consultation with OGE on the issuance of ethics waivers covering negotiations for future employment. This would help ensure that an appropriate balance is struck between the interests of the

individual seeking the waiver and the propriety of allowing continued participation in matters where there may be a conflict. Again, we note that the DAEO advised that the Department has granted no such waivers since the Card memorandum was issued.

**Conflict of interest waivers should be limited in duration.**

Appropriate time limits on waivers would ensure that waivers are periodically revisited and the balance of interests reconfirmed. A more particularized analysis of a requestor's circumstances, as suggested in the first recommendation above, would inform the decision regarding the appropriate period to be specified in a waiver.

**Effective screening and monitoring mechanisms are needed in cases in which the employee has received a limited waiver.**

In cases in which the employee has received a limited waiver from the requirements of the conflict of interest statute, additional steps should be taken to ensure compliance with its terms. Internal agency practice should provide for monitoring after a waiver is issued to ensure its continued appropriateness. Although the employee ultimately is responsible for his or her compliance with the Government's ethical requirements, the Department should consider requiring employees who have received waivers to report periodically on the status of their employment negotiations. By screening particular matters that might affect prospective employers and their clients, the employee can be recused from those matters and avoid the potential for conflict of interest.

**Conclusion**

As the result of our review, OIG identified four areas of vulnerability related to the Department's issuance of conflict of interest waivers. These include: (1) the use of "boilerplate" language in waivers without addressing an individual's specific circumstances, (2) the insufficiency of an oversight process by the Department in granting waivers, (3) the absence of time limits to ensure that the waiver's appropriateness is reevaluated, and (4) a lack of screening and monitoring mechanisms for cases in which the employee has received a limited waiver to ensure that the employee has recused him or herself from matters not covered by the waiver.

For your reference, I am attaching a copy of the October 25, 2006, letter I sent to Congressman Dingell regarding our inquiry, which includes more detailed information about a number of our findings concerning the waiver issued to Scully. Please let me know if you would like to discuss further any issues raised in this memorandum.

I can be reached at (202) 619-3148.

Attachment

cc: Edgar Swindell, Associate General Counsel