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ONE HUNDRED EIGHTH CONGRESS

U.S. House of Representatives
Committee on Energy and Commerce
Washington, DC 20515-6115

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October 21, 2004

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BUD ALBRIGHT, STAFF DIRECTOR

Mr. Daniel Levinson
Acting Inspector General
Department of Health and Human Services
330 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Mr. Levinson:

On December 22, 2003, I requested that the Inspector General of the Department of Health and Human Services (HHS) investigate the circumstances of a waiver of the Department's code of ethics issued to Thomas A. Scully, then-administrator of the Centers for Medicare and Medicaid Services (CMS) (copy attached). The waiver allowed Mr. Scully to discuss prospective jobs with organizations which had "substantial interests in matters pending" at CMS while he was still employed by CMS.

Because the waiver was unprecedented in its scope and did not even state the name(s) of the organizations that Mr. Scully wished to talk to, I questioned how the procedures required to evaluate the basis for such a waiver could have been followed. Federal law states that the only basis for a waiver of the ethics rules for post-government employment is a demonstration that the organization interested in hiring the government employee has only an insubstantial financial interest in matters before that employee. Obviously, without knowing who the prospective employer is, it would be impossible to do that evaluation. In fact, in over 20 post-employment waivers from other federal agencies that were provided to the Committee on Government Reform, each one named a specific prospective employer and evaluated that organization's specific interests.

Mr. Scully subsequently revealed that he had discussed employment with at least five organizations that had large financial interest in the Medicare bill and regulations proposed to revise the average wholesale price (AWP) charged to the federal government by drug companies for prescription drugs.

My letter asked several straightforward questions about the process used in granting Mr. Scully's waiver, including a request to identify all other waivers given to HHS officials and provide information about those waivers, including a description of the terms of each waiver.

Mr. Daniel Levinson

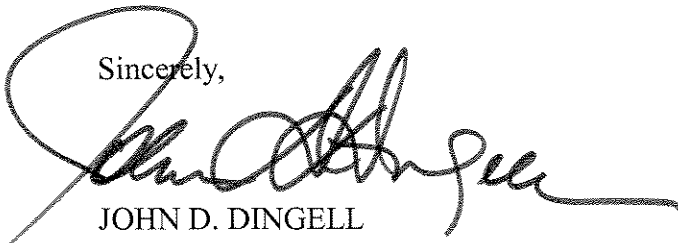
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The Inspector General has issued many reports on various issues in the intervening 10 months, but somehow has not been able to complete this report. Since June of 2004, my staff has been verbally informed on a regular basis that the report is "almost finished," but we have yet to see it. And despite the fact that federal law mandates the release of such waivers (18 U.S.C. 208(d)(1)), the Department has refused to provide them to Congressional requesters. This is most curious. There also are allegations that Mr. Scully was not the only high-level employee to receive such a broad waiver. If true, this would be problematic.

Therefore, I request that you immediately provide the answers to the questions posed in my letter of December 23, 2003, and provide copies of all of the post-employment waivers issued by HHS's ethics officer since 2001. If your staff has any questions or needs further clarification, please have them contact Reid Stuntz, Minority Staff Director and Chief Counsel, Committee on Energy and Commerce, at (202) 225-3641.

Thank you for your attention to this matter.

Sincerely,



JOHN D. DINGELL
RANKING MEMBER

Attachment

cc: The Honorable Joe Barton, Chairman
Committee on Energy and Commerce

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DAN R. BROUILLETTE, STAFF DIRECTOR

December 22, 2003

Ms. Dara Corrigan
Acting Principal Deputy Inspector General
Department of Health and Human Services
330 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Ms. Corrigan:

Recent reports in the New York Times and the Washington Post stated that earlier this year the general counsel of the Department of Health and Human Services (HHS) waived the Department's code of ethics to allow Thomas A. Scully, Administrator of the Centers for Medicare and Medicaid Services (CMS), to discuss prospective jobs with organizations which had "substantial interests in matters pending" at CMS while he was still employed by CMS. Those interests include the prescription drug program and chronic care reimbursements which were included in the recently passed Medicare bill and regulations proposed to revise the average wholesale price (AWP) charged by drug companies to the Federal Government to Medicare and Medicaid patients ("Medicare Chief Scully Says He's 'Checking out of Dodge,'" Washington Post, Dec. 3, 2003, A27; "Health Industry Bidding to Hire Medicare Chief," New York Times, Dec. 3, 2003, A1; "Waiver under Section 208(b)(1), Title 18 of the United States Code – ACTION," May 12, 2003" (hereafter "Waiver")). According to the waiver document, HHS Secretary Tommy Thompson personally approved Mr. Scully's waiver. Because this episode raises serious questions about HHS' code of ethics, its applicability to Mr. Scully, and how it might be applied in the future, I ask your office to examine these matters.

Federal regulations and HHS' code of ethics require that any employee seeking a job in the private sector must immediately recuse himself from "any official matter," including legislative initiatives or proposed rules that involve the prospective employer. Failure to do so can lead to criminal prosecution under 18 U.S.C. 208. Waivers are allowed under certain circumstances. As a federal employee is deemed to have the same financial interest in the matter that the prospective employer does, the regulations governing the issuance of a waiver require that the employee make a full disclosure of that financial interest to his appointing official and ethics officer, and that those officials determine that the financial interest is "not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such employee" (5 CFR 2635.402(d)(2)(i)). An ethics officer assessing a waiver request must

know the identity of the prospective employer, because the “disqualifying financial interest, the particular matter or matters to which it applies, the employee’s role in the matter or matters, and any limitations on the employees’ ability to act in such matters” must be included in each waiver (5 CFR 2640.301(a)). An insubstantial financial interest is the only basis for an exemption for a full-time federal employee like Mr. Scully (18 U.S.C. 208(b)).

Nonetheless, Secretary Thompson, HHS’s ethics officer, and two other HHS officials, approved giving Mr. Scully an indefinite, prospective waiver from this requirement on May 12, 2003, stating that it was “neither practicable, nor in the interest of the Department, for Mr. Scully to remain disqualified from such a large number of important and broadly applicable matters while he is seeking future employment.” This is not a basis for granting waivers under the applicable federal law and HHS’ regulations.¹ Elsewhere, in this very confusing document, Edgar Swindell, HHS’ ethics officer, states that Mr. Scully’s unnamed prospective employers were “likely to have substantial interests” in matters before Mr. Scully, that those interests were to be imputed to Mr. Scully, but that they were “not so substantial as to be deemed likely to affect” the integrity of his services (Waiver, pp. 1-3). In addition, a supporting document prepared by the Ethics Division of HHS’ Office of the General Counsel incorrectly states that the agency can grant an employee a waiver from Section 208 because “the interest of the government in the employee’s participation outweighs the concern that a reasonable person may question” the agency’s integrity (“Seeking Future Employment,” HHS, undated). But it references a regulatory provision that specifically states it is not applicable to employees seeking employment.²

Waivers from Section 208 can be granted only upon a determination that the employee’s financial interest is insubstantial. It appears that at the time of the granting of the waiver, no one in the Department knew with whom Mr. Scully was going to discuss future employment as there is no statement in the waiver of who the prospective employer is, its financial interest in a particular matter that Mr. Scully is involved in, or why his interest is “not so substantial” as to not be disqualifying. In actuality, most of the organizations with which he discussed future employment had significant interests in various sections of the Medicare bill and in the average wholesale price regulations. Mr. Scully was personally involved in developing both the legislation and the AWP regulations and was a decision maker.

¹This exemption, known as the “public interest” exemption, was proposed when this provision was added in 1963, but was rejected by Congress (H.R. Report No. 748 (87th Cong. 1st Session)). A similar provision was added in 1989 for part-time, special government employees serving on advisory committees, but it does not apply to full-time, appointed employees.

²5 CFR 2635.502 is directed to financial relationship involving an employee’s household or persons with whom the employee has a “covered relationship.” Prospective employers are exempted from covered relationships, as stated in a note to 5 CFR 2635.502(b)(1)(i): “An employee who is seeking employment . . . shall comply with subpart F of this part rather than with this section.”

It appears that this waiver may have been granted to encourage Mr. Scully to remain at HHS through the negotiation of the Medicare legislation. He publicly stated that he wanted to leave in May, which was the same month he was granted a waiver, but was asked to stay by Secretary Thompson. But this would not be a reason under applicable statutes and regulations to grant a Section 208(b) waiver.

Mr. Scully told the New York Times that he had been talking to the following organizations:

1. Alston & Bird, an Atlanta-based law firm which represents the National Association for Home Care, and Johnson & Johnson, a healthcare and pharmaceutical company which, among many other products, manufactures Doxil, a injectable cancer drug which sales are affected by the average wholesale price regulations. Both clients also were directly affected by provisions in the Medicare legislation. (Mr. Scully ultimately was hired by Alston & Bird.)
2. Baker, Donelson, Bearman, Caldwell & Berkowitz, a national law firm which represents the Disease Management Association of America, a trade organization of managed care and other health providers. In the recent Medicare bill, these groups obtained a provision establishing for the first time payment for chronic care management. Baker, Donelson also represents the American Association for Homecare and Mr. Scully's former employer, the Federation of American Hospitals, whose members also were directly affected by provisions in the Medicare bill.
3. Ropes & Gray, a Boston-based law firm, which represents the Pharmaceutical Research and Manufacturers Association (PHARMA), the main lobbyist for the pharmaceutical industry. According to the New Republic, PHARMA was "ecstatic" because the Medicare legislation subsidizes drug purchases and prohibits the Federal Government from using its negotiating power to hold down the costs of drugs ("TRB," Dec. 15, 2003). Ropes & Gray also represents numerous individual drug companies with direct and substantial financial interest in these provisions.
4. Welsh, Carson, Anderson & Stowe, a private equity investment firm with a major stake in U.S. Oncology. U.S. Oncology lobbied for higher payments under Medicare, and also a high average wholesale price for the cancer drugs its physicians administer which provides a significant profit for U.S. Oncology's practitioners.

Waivers of the conflict-of-interest regulations should be rare and based on clear evidence that the prospective employer's financial interests in the matter before the employee are insubstantial and are not deemed likely to affect the integrity of his government service. When waivers are given, the requirements allowing their use must be followed. Moreover, Mr. Scully's waiver may not be a one-time incident. We have been informed that several other high-ranking

HHS officials are planning to leave the Department in the next year, and they, too, may be requesting ethics guidance on their job searches. Therefore, I request that your office conduct an inquiry into this event to determine the following:

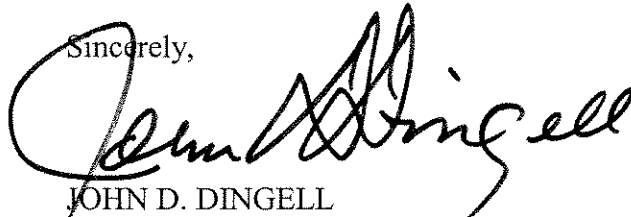
1. When was Mr. Scully's waiver requested and by whom?
2. What role did Secretary Thompson play in requesting and/or granting the waiver?
3. What were the terms of the waiver, who approved it, and on what date was it approved? Please identify all persons who approved this waiver, and the dates on which they approved it.
4. What, if any, changes were made to the waiver during the approval process? Who made them and for what purpose?
5. Was the waiver granted as a condition for Mr. Scully to stay in his position after May 2003? If so, who suggested that such a waiver was necessary? Did the waiver have a termination date, or was it applicable until Mr. Scully left CMS on December 16, 2003?
6. Did Edgar Swindell, HHS' ethics officer, know the financial interests of Mr. Scully's prospective employers when he granted the waiver? Did Mr. Scully subsequently report the specific organizations with which he was discussing employment and their financial interests in each particular matter before Mr. Scully to HHS' ethics officer for additional review?
7. What factors listed in 5 CFR 2640.302(b) were considered by Mr. Swindell in making his determination concerning the "substantiality of the disqualifying financial interest" for Mr. Scully? Was the "dollar value of disqualifying interest" established prior to making the determination?
8. Who monitored the waiver to determine whether its terms were complied with? Who determined, as Mr. Scully is quoted in the New York Times as stating, that he didn't have to disqualify himself because his "job negotiations were not serious enough"? Was the "seriousness" of his job negotiations a criteria for obtaining the waiver?
9. Mr. Scully's waiver allows him to work on "particular matters of general applicability" that would affect the financial interests of his prospective employers (Waiver, pg. 2). HHS' regulations define "particular matter of general applicability" in a provision allowing an exemption for special Government employees with financial conflicts who are serving on advisory committees (5 CFR 2640.203(g)). Please provide all documentation of the use of this exemption for other full-time, non-advisory committee employees.

10. Did the waiver allow Mr. Scully to talk to potential employers while working on “matters of general applicability like the Medicare reform bill,” even though those employers had very specific financial interests in the bill?
11. When and how many meetings did Mr. Scully hold with the firms with which he was discussing employment or their clients to (1) discuss employment, or (2) to discuss matters before him in his role as a Federal Government official? How many meetings did persons reporting to Mr. Scully hold with these firms or their clients to discuss matters before the agency? Was Mr. Scully aware of those meetings?
12. What provision in federal law or regulations allows conflict-of-interest waivers to be granted unless the particular matter before the employee would have an “extraordinarily significant financial impact” on the prospective employer?
13. Has a similar waiver been used before by the Department to allow employees to conduct a job search with organizations actively lobbying on issues for which the official is responsible? Please identify all similar waivers, including date of waiver, officials receiving and approving the waiver, length of the waiver, reason for the waiver and a description of its terms.

If you have any questions or need additional information, please have your office contact Edith Holleman, Minority Counsel, at (202) 226-3400.

Thank you for your attention to this matter.

Sincerely,



JOHN D. DINGELL
RANKING MEMBER

cc: The Honorable W. J. “Billy” Tauzin, Chairman
Committee on Energy and Commerce

The Honorable Tommy G. Thompson, Secretary
Department of Health and Human Services