DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of Inspector General

Washington, D.C. 20201

OCT 25 2006

The Honorable John D. Dingell
Ranking Member
House Energy and Commerce Committee
Washington, DC 20515

Dear Mr. Dingell:

On December 10, 2003, you wrote to the Office of Inspector General (OIG) regarding Thomas A. Scully, the former Administrator of the Centers for Medicare & Medicaid Services (CMS), and his May 2003 waiver under section 208(b)(1), Title 18 of the U.S. Code.

Based upon your letter and those of others, OIG undertook a preliminary fact-finding inquiry concerning the process by which the Department receives, analyzes and makes determinations regarding the approval of section 208(b) waivers to senior departmental officials. OIG advised you on January 16, 2004, of the decision to conduct the inquiry.

On October 21, 2004, you wrote to me on the Scully waiver matter asking the status of the OIG review. Because the matter had been referred to the Department of Justice in August 2004, I responded on November 29, 2004, advising you that the matter was ongoing as the result of the identification of additional information pertinent to the investigation. In July 2006, the U.S. Attorney's Office (USAO) reached a settlement of matters related to this inquiry.

Because the matter has now been concluded, we are able to provide you with the findings and conclusions outlined below.

SUMMARY

In late 2003, OIG received inquiries from Public Citizen and Members of Congress concerning a conflict of interest waiver given to Thomas A. Scully, former Administrator of CMS. In response to these inquiries, OIG opened an inquiry as to the propriety of a waiver of the prohibition of the criminal conflict of interest statute pursuant to 18 U.S.C. § 208(b) being granted to Scully to allow him to pursue employment in the health care industry. This waiver was granted during the time he was negotiating the passage of the Medicare Prescription Drug, Improvement, and Modernization Act (MMA). Members of Congress questioned whether it was proper for Scully to seek employment with entities that would likely have clients that would be affected by the new legislation.

To ascertain whether there was evidence indicating a violation of 18 U.S.C. § 208, OIG conducted a preliminary inquiry, which included interviews with the Department's Designated Agency Ethics Official (DAEO),[1] the Office of Government Ethics (OGE)[2] and Scully. OIG reviewed most of the waivers granted by the DAEO over a 7-year period and compared those waivers to each other and to the standards set forth by OGE in regulation. In addition, we reviewed the December 10, 2003, congressional testimony of the DAEO regarding the Scully waiver, as well as the documentation provided by the Department to the Senate Finance Committee concerning the Department's conflict of interest waiver policies and the Scully waiver.

The objectives of OIG's preliminary inquiry were to determine:

- whether the process by which the waiver was approved was appropriate and whether the waiver was consistent with other waivers granted to senior departmental officials;

- the propriety of Scully receiving a waiver to pursue employment in the health care industry while simultaneously negotiating the passage of the MMA; and

- whether circumstances surrounding the waiver or Scully's conduct under the waiver disclose possible vulnerabilities that should be brought to the attention of departmental officials and Members of Congress.

As set forth more fully below, 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, Scully properly obtained the waiver in accordance with existing procedures prior to engaging in employment negotiations. Based on the results of the investigation, the matter was referred to the United States Attorney's Office for the District of Columbia. Although the matter was not resolved as a violation of 18 U.S.C. § 208, Scully entered into a civil settlement agreement and paid the U.S. Treasury $9,782 to settle the Government's claims under the civil False Claims Act related to his alleged violation of Government travel regulations.

As part of our inquiry, we also identified four areas of vulnerability related to Scully's waiver, including issues with: (1) use of "boilerplate" language in waivers without

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[1]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.

[2]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 establishing and maintaining a uniform legal framework of Government ethics for Executive Branch employees.

addressing an individual's specific circumstances; (2) sufficiency of oversight by the DAEO in granting the waiver and monitoring its continued appropriateness; (3) absence of time limits to ensure that the waiver's appropriateness is reevaluated; and (4) lack of screening mechanisms to ensure that the employee is recused from matters not covered by the waiver. In view of his position as the CMS Administrator and senior member of the Medicare legislative team, Scully's failure to recuse himself from any matters at the very least created the appearance that he may not have been strictly adhering to all applicable ethics rules.[3]

SEQUENCE OF EVENTS

In early spring 2003, Scully told Secretary Tommy G. Thompson that he would continue to serve as CMS Administrator only until the then-pending Medicare reform legislation was passed, which was expected to occur sometime in July 2003. Scully explained that he had received overtures from acquaintances in law firms and wanted to begin to explore future employment opportunities. In early May 2003, Scully spoke with the Department's General Counsel, Alex Azar, regarding what he needed to do prior to seeking outside employment. Azar told him to consult the DAEO, Associate General Counsel Edgar Swindell.

Scully met with Swindell on May 8, 2003, for approximately 45 minutes. During the meeting, Scully sought 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 must not participate in any matter that could affect the financial interests of a person or entity with whom 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 limiting his participation in particular matters that could directly affect prospective employers. Scully was also given several standard handouts concerning various ethics and post-employment rules. (Attached at Tab A.) Scully indicated his interest in pursuing a waiver and was informed that

[3]Subpart E (Impartiality in Performing Official Duties) of the Standards of Ethical Conduct provides procedures whereby employees may consult an ethics official in circumstances where a reasonable person with knowledge of the relevant facts might question the employee's impartiality in a matter. The employee is to refrain from participating in the matter that raises a potential problem unless he has received authorization from the ethics official. (5 CFR § 2635.502(a)) While employees are not required to utilize this process for circumstances other than those described in 5 CFR § 2635.502(b) (which would not have applied to Scully), the process can be utilized to deal with concerns about possible apparent conflicts of interest.

Secretary Thompson was the only individual who could approve his request for a waiver.[4]

In a memorandum dated May 12, 2003, Swindell recommended that Secretary Thompson grant a limited waiver under the provisions of 18 U.S.C. § 208. The memorandum set out Swindell's analysis of the applicable law and the effect the limited waiver would have on Scully's performance of his responsibilities as CMS Administrator. On May 14, 2003, Chief of Staff Robert Wood authorized the waiver to be auto-penned with Secretary Thompson's signature. The language of the waiver states 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 conflict of interest waiver, Scully said that he never recused himself from any particular matters. During the 7 months that the limited waiver was in effect, Scully continued to serve as CMS Administrator. While Scully received the waiver soon after May 12, he stated that he did not have any formal contact or serious conversations with potential employers until September 2003, when Rusty Conner, the Managing Partner at Alston & Bird, asked him to consider joining the firm. In the late fall of 2003, Scully also began negotiating for employment with the investment firm of Welsh, Carson, Anderson & Stowe. He stated that he felt there could be no conflict of interest because, to his knowledge, none of the firms with whom he was negotiating had dedicated health care groups or represented any clients that had anything to do with the Medicare reform legislation.

While Scully said that he did not believe that any of the prospective employers or their clients raised potential conflicts of interest, the two firms that he eventually joined have significant involvement in health care issues. According to the Alston & Bird Web site (www.alston.com), the firm has a national health care practice with more than 60 attorneys dedicated to the health care industry, which the Web site represents as the largest health care practice in the region and one of the largest in the country. According to the Welsh, Carson, Anderson & Stowe Web site (www.welshcarson.com), the company is the leading private equity investor in information and business service, health care, and communications. Interviews with prospective employers confirmed that they had discussed the nature of the firms' health care practices with Scully.

For purposes of determining whether he should have recused himself from any particular official matters, OIG tracked the non-governmental contacts made by Mr. Scully during the 7 months between issuance of the waiver and his resignation. As a practical matter, we could not reconstruct every phone call, e-mail, correspondence, meeting or other contact that would be necessary to establish conclusively whether a recusal might have been warranted. We did, however, review appointment calendars, e-mails, and correspondence in an attempt to identify what meetings he had during the relevant time

[4]Under 18 U.S.C. § 208(b)(1), an employee seeking a waiver must first advise "the Government official responsible for appointment to his or her position" and the same official must make the determination 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."

period and whether any such meetings were related to particular official matters that may have impacted potential future employers. In addition we interviewed approximately 32 individuals and issued 11 subpoenas to law firms and other entities that we determined to be related to Scully's job search.

Upon review, we determined that there was evidence that Scully might have exceeded the parameters of his limited waiver. That evidence included documents indicating meetings between Scully and clients of prospective employers. That evidence was provided to the USAO in the summer of 2004.

Scully submitted his resignation on December 3, 2003, effective December 18, 2003, and announced he was joining both the law firm of Alston & Bird as a senior counsel and the investment firm of Welsh, Carson, Anderson & Stowe as a senior advisor. In August 2004, OIG presented this matter to the USAO in the District of Columbia. Although the matter was not accepted for prosecution as a violation of 18 U.S.C. § 208, the investigation identified evidence that Scully violated Government travel regulations. Pursuant to a civil settlement agreement, Scully paid $9,872 to resolve the Government's claims under the civil False Claims Act.

The MMA was passed by Congress and signed into law on December 8, 2003.

SECTION 208(b)(1) WAIVERS IN GENERAL

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. For example, if a Federal employee owns stock worth above a certain value in a particular company, the statute and applicable OGE regulations prohibit the employee from participating in a particular official matter in which that company has a financial interest. The covered entities referenced by the statute include "any person or organization with whom . . . [the employee] is negotiating or has any arrangement concerning prospective employment." Thus, if a Federal employee is negotiating for future employment with a law firm, he or she is prohibited from participating personally and substantially in a particular matter affecting the financial interest of that firm. In such an instance, the employee usually must recuse himself or herself from taking any official action in the matter. The disqualification requirement is met if the employee simply refrains from participating in the Government matter; there is no requirement that the employee report or document a disqualification.

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." In short, when faced with a financial conflict of interest involving a prospective employer, a Federal employee must

recuse himself or herself from official action, or, when appropriate, seek and obtain a waiver.

OGE has promulgated regulations at 5 CFR Part 2640 governing the issuance of waivers under 18 U.S.C. § 208. The regulation essentially tracks the wording of the statute and provides that a waiver must be issued in writing by the appointing official or other Government official with appropriate delegated authority.
(5 CFR § 2640.301(a)(2)) Additional OGE guidance to officials granting waivers explains 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. . ."
(5 CFR § 2640.301(b)(6)) There is no requirement that OGE approve every waiver, but OGE regulations and Executive Order 12674(d) require agency officials to consult formally or informally with the Office of Government Ethics "when practicable" prior to granting a waiver. In all cases, a copy of all waivers must be forwarded to OGE.
(5 CFR § 2640.303)

A limited waiver permits the official to continue to carry out his or her broad Federal responsibilities while limiting involvement in particular matters that would directly affect prospective employers. Under the terms of such limited waivers, job-seeking officials may continue to participate in particular matters of general applicability, such as formulating initiatives that would affect the financial interests of prospective members of a discrete and identifiable class of similarly situated entities. These matters include legislation and regulations that would affect a broad sector of similarly situated entities—a class that includes entities with which the Federal employee is negotiating for future employment. In Secretary Thompson's January 2004 response to the Senate Finance Committee, the Department stated the belief that in participating in such broad matters, the job-seeking employee's integrity would be less likely to be compromised by concern for his or her own financial interest. Additionally, the limitations that are routinely included in the waiver are intended to reduce or eliminate the likelihood that the public would question the integrity of the employee's services in general.

In requesting a limited waiver, there is no requirement that an employee specifically 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. Once the limited waiver is granted, the employee continues to be prohibited from participating in particular matters that specifically affect prospective employers and remains personally responsible for abiding by any recusal obligations.

According to DAEO Swindell, the periodic turnover of officials between the private and public sector poses a challenge under 18 U.S.C. § 208, because some of these officials

may begin to consider their next career moves before they have actually resigned or retired. Top management officials often cannot readily ask their superiors to arrange for their official responsibilities to be reassigned and so may not easily recuse themselves from such duties. Absent a waiver, their basic options are to reject the possibility of prospective employment altogether or to resign from their Federal positions to await job offers that may or may not materialize. Because both of these alternatives pose significant disincentives to recruitment and retention in the public service, Department ethics officials have offered job-seeking employees the alternative of seeking a limited section 208(b)(1) waiver.

SCULLY'S WAIVER

The waiver granted to Scully is a limited section 208(b)(1) waiver. (Attached at Tab B.) The memorandum justifying the waiver clearly states that Scully is seeking employment with law firms, consulting firms, and health care investment firms that are likely to have substantial interest in matters pending before the Department. The waiver memorandum recognizes that Scully has responsibilities for matters that may affect the financial interests of these firms and their clients and notes that "upon initiation of employment negotiations, the financial interest of Scully's prospective employers will be imputed to him and create a recusal obligation." Thus, the memorandum recommends granting "a limited waiver allowing Scully to participate in any particular matter of general applicability that would affect the financial interest of his prospective employers as members of a discrete and identifiable class of similarly situated entities."

At the same time, the memorandum makes it clear that Scully would not be permitted to participate in any matter that would have "a direct or predictable effect" on any of the firms with which he negotiates for future employment. Furthermore, a footnote in the memorandum clarifies that the recusal obligation extends to matters affecting a client of the prospective employer, if Scully is aware that the firm is providing services to the client with respect to that matter.

While the waiver memorandum does not specifically reference the legislation that became the MMA, it does explain that Scully could participate in policy decisions surrounding the development of broad regulations even though a prospective employer might be affected by the regulation. However, the memorandum cautions that "Scully has been advised to seek guidance concerning any particular matter of general applicability affecting any of his prospective employers as a member of a class if the matter would have an extraordinarily significant financial impact on the firm." Additionally, the memorandum makes it clear that Scully would not be able to meet in his official capacity with representatives of a prospective employer.

AGENCY AND FEDERAL PRACTICE WITH RESPECT TO WAIVERS

As previously mentioned, the DAEO serves as the ethics counselor for high-level officials of the Department, including all political appointees. Therefore, the DAEO and the Ethics Division in OGE handle waiver requests from these employees. According to

Swindell, all waivers issued by his office were evaluated on an individual basis; however, the same general format was used as long as the circumstances were similar.

At the time of OIG's interview of DAEO Swindell, he reported that the Department had issued 10 waivers for individuals seeking future employment during the current Administration. During the prior Administration, the Department issued approximately 25 such waivers. He stated by way of comparison that the Department of Education had issued approximately 24 waivers in conjunction with job seeking during this Administration. Swindell did not recall a single instance in which the Department denied a request for a waiver to permit negotiating for future employment.

Swindell stated that the Scully waiver was based on criteria in 18 U.S.C. § 208(b)(1) and OGE executive branch-wide regulations in 5 CFR Part 2640. To determine whether the waiver issued to Scully was unusual, we compared its wording with 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. That earlier waiver was reviewed by both OGE and the Counsel to the President, and signed by President Clinton. (Attached at Tab C.) Because OGE had reviewed the language of the Shalala waiver, Swindell believed that incorporating the similar language into the Scully waiver would be acceptable to OGE, even though he never actually consulted OGE.

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.

In at least one respect, the similarities between the two waivers appeared to be inconsistent with the circumstances of the two requestors. Secretary Shalala was seeking employment with colleges and universities after her Government service. OGE regulations permit 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)) The fact that Secretary Shalala had previously been covered by this exemption was cited by the Counsel to the President in support of the recommendation to grant a section 208(b) waiver while she negotiated for future employment with colleges and universities.

By contrast, Scully had previously worked for a health care trade association and was interested in future employment with for-profit firms. While the Scully waiver indicated that its scope was similar to the above-cited regulation and analogous to an employee on a leave of absence from an academic institution, there is no OGE exemption applicable to employees, like Scully, who intend to negotiate for future employment with law firms,

consulting firms, or investment firms. We also reviewed a sampling of the other conflict of interest waivers approved by Swindell over the last 7 years. We noted in particular that the waivers issued after the Shalala waiver generally cited this regulatory exemption for employees on leave of absence from colleges and universities, even where the requestor was interested in employment in a for-profit entity rather than academia.

Swindell indicated that, in hindsight, he did have some concerns that some of the waivers issued by his office did not limit the period of the waiver. Swindell felt it might be appropriate to consider adding this additional limitation on future waivers. Swindell explained that at the time Scully sought his waiver, the Medicare reform legislation was expected to pass in July before the Congress adjourned for the summer recess. Thus, both Swindell and Scully thought the waiver would only be in effect for 2-3 months. Swindell stated that Scully probably should have sought additional guidance once his activities related to the passage of the Medicare reform legislation became more prominent via his active lobbying for its passage. However, Scully was not required to do so under the express terms of the waiver.

VIEWS OF OGE

OGE regulations direct agency officials to consult with OGE "when practicable" prior to granting a waiver and to provide a copy of all waivers once executed. (5 CFR § 2640.303) When consulted, OGE only provides advice regarding the language used in waivers and does not approve or disapprove them.

We met with OGE and discussed the Scully waiver. Upon review, OGE determined that the waiver was legally granted. OGE did, however, express some reservations. OGE disagreed with any suggestion that it had approved a generic "boilerplate" format for granting waivers involving employment negotiations. OGE stated that, historically, it has given particular scrutiny to proposed waivers covering employment negotiations. Whenever OGE reviews such waivers, it considers 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 questions. Finally, OGE indicated that it might at some future time issue additional guidance to agency ethics officials regarding the granting of section 208(b) waivers.

WHITE HOUSE MEMORANDUM

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. (Attached at Tab D.) This would ensure that White House officials 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

only addresses waivers requested by Senate-confirmed Presidential appointees. However, since issuance of the Card memorandum, the Department has granted no waivers relating to seeking future employment.

VULNERABILITIES IN THE AWARD OF SECTION 208(b) WAIVERS

While the waiver granted to Scully was determined to be legally granted, this preliminary inquiry revealed certain vulnerabilities in the process of granting and monitoring waivers under section 208(b). They are:

1) *Boilerplate Language.* The particular facts surrounding a waiver request must be assessed on a case-by-case basis. Reliance on boilerplate language can undercut that individualized determination. A review of conflict of interest waivers issued by the Department indicates that those issued after the Shalala waiver contained standardized language that in some cases was not consistent with the requestor's circumstances.

2) *Oversight.* Rules governing issuance of waivers under section 208(b) provide for little or no required oversight. The determination as to whether a disqualifying interest is substantial enough to compromise the integrity of the employee's official decision-making is vested solely in the "government official responsible for appointing the employee to his position" (or his designee). (5 CFR § 2640.301) Consultation with OGE is required only "when practicable." (5 CFR § 2640.303) Thus, the regulations provide for no independent review of the supervisor's decision to grant a waiver.

   The January 2004 memorandum from Andrew Card does direct ethics officials in the Executive Branch to seek clearance from the White House before issuing any section 208(b) waivers to Senate-confirmed presidential appointees who wish to negotiate for future employment. This provides beneficial oversight. However, the directive could be revoked at any time by this Administration and need not be followed by a future one.

   We believe that enhanced oversight of the issuance of conflict of interest waivers would be prudent. Consideration could be given to mandatory consultation with OGE to ensure that an independent entity offers its assessment on the balance between the individual's need for a waiver to seek future employment and the propriety of allowing the employee to continue to participate in matters where there might be an appearance of a conflict of interest.

   Internal agency practices could also be improved to provide for monitoring after a waiver is issued to ensure its continued appropriateness. In this case, once he had received the waiver, Scully was not required to and did not consult further with the DAEO; neither did the ethics office contact Scully during the 7 months during

which the waiver was in effect.[5] Swindell acknowledged that, in hindsight, there were some things that could have been handled differently. Specifically, because ultimately the employee is responsible for his or her compliance with the Government's ethical standards, Scully could and should have sought additional guidance from his ethics office, particularly as his role in negotiating the passage of MMA gained prominence. Swindell further stated that time limits on any future waivers would help to guarantee this continued consultation (see below).

3) *Time Limits.* While both Swindell and Scully may have anticipated that the waiver would only be in effect for 2-3 months, Scully's waiver remained in force for 7 months. Swindell indicated that it might be appropriate in future waivers to consider adding a time limitation that would ensure that the waiver is periodically revisited and the balance of interests reconfirmed.

4) *Screening Mechanisms.* We found that Scully did not take sufficient steps to ensure that he was screened from particular matters that might affect his prospective employers and their clients. Scully was issued a limited waiver that, by its terms, did not permit him to participate in any particular matter that would have a direct and predictable effect on the firms with which he was negotiating. He also was not permitted to participate in any matter that would have a special or distinct effect on the prospective employers other than as a discrete class of similarly situated entities. The limited waiver provided no exemption from these potential matters. Formal recusals and appropriate screening could have ensured that Scully did not encounter such conflicts.

In this regard, OGE has provided guidance to agencies on the importance of setting up a screening arrangement to assist employees such as Scully with the obligation of recusal.[6] While the duty to recuse always remains with the employee, the guidance states that an employee should provide appropriate oral or written communication about the recusal to colleagues with whom the employee works closely so that they will be aware of the matters from which he or she is recused, and may assist in screening the employee from those matters. (See footnote 6.) See DAEOgram #DO-99-018, p. 2. (Attached at Tab E.) In view of the fact that Scully received a limited and not a blanket waiver, it would have been prudent for him to implement stronger measures to identify issues that could

[5]It is our understanding that the CMS ethics coordinator and the CMS Deputy Ethics Counselor did not know that Scully had been granted a waiver and were never asked about implementation of screening mechanisms.

[6]The Director of the Office of Government Ethics issued a memorandum to DAEOs on April 26, 1999, entitled "Recusal Obligation and Screening Arrangements" that provided practical tips on steps to be taken to ensure that employees are shielded from official matters which they may not participate in due to a recusal. On June 4, 2004, OGE issued an update to the 1999 memorandum. (See, DAEOgram #DO-04-012, "Effective Screening Arrangements for Recusal Obligations.") (Both documents attached at Tab E.)

potentially fall outside the scope of the waiver and to ensure that he did not become personally involved in those matters.

CONCLUSION

Based on interviews of Department and OGE officials, it appears that the waiver issued to Scully was legally granted and comparable with similar waivers issued to Department officials in the past. Additionally, Scully properly obtained the waiver prior to engaging in employment negotiations. The evidence we collected suggested that Scully may have violated the terms of the waiver he was issued with respect to negotiations with law firms and investment firms while simultaneously working on significant Medicare legislation. At a minimum, his conduct created at least the appearance of a possible conflict of interest. Based on the results of the OIG investigation, we concluded Scully may have exceeded the scope of the limited waiver and the matter was referred to the USAO. Although the matter was not accepted for prosecution as a violation of 18 U.S.C. § 208, the investigation identified evidence that Scully violated Government travel regulations. Pursuant to a civil settlement agreement, Scully paid $9,782 to resolve the Government's claims under the civil False Claims Act. In addition, as a result of this investigation, we identified four areas of vulnerability in the granting and monitoring of waivers under 18 U.S.C. § 208.

Sincerely,

Daniel R. Levinson

Daniel R. Levinson
Inspector General

Enclosures:

Tab A (Standard OGE handouts for waiver seekers)
Tab B (Scully waiver)
Tab C (Shalala waiver)
Tab D (Andrew Card Memorandum)
Tab E (1999 OGE Screening Memorandum—DEAOgram; 2004 update)