DEPARTMENT OF HEALTH & HUMAN SERVICES

OGC

Office of the Secretary

Office of the General Counsel
Washington, D.C. 20201

May 12, 2003

MEMORANDUM

TO: The Secretary
Through: DS
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FROM: Associate General Counsel for Ethics
Designated Agency Ethics Official

SUBJECT: Waiver Under Section 208(b)(1), Title 18 of the United States Code – ACTION

Action Requested By: As Soon as Possible

ISSUE

The purpose of this memorandum is to recommend that you grant a limited waiver of the provisions of 18 U.S.C. § 208, concerning potential financial conflicts of interest, for the Administrator of the Centers for Medicare and Medicaid Services (CMS), Thomas A. Scully.

DISCUSSION

Section 208(a) prohibits Federal Executive Branch employees from participating personally and substantially in particular matters in which the employee has a financial interest. An employee is deemed to have a financial interest in an official matter if that matter would have a direct and predictable effect on some financial interest of the employee or any person or organization whose interests are imputed by law to the employee. The financial interests of any organization with which an employee is negotiating for employment or has an arrangement for prospective employment are imputed to the employee. Pursuant to section 208(b)(1), however, the official responsible for the individual's appointment to a Government position has authority to grant a waiver of this prohibition, after disclosure of the financial interest, upon a 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" the individual.

Mr. Scully has advised my office that he is interested in seeking employment with a number of different entities, including law firms, consulting firms, and health care investment firms. These entities are likely to have substantial interests in matters pending before the Department, and Mr. Scully has responsibility for such particular matters that may affect the financial interests of

the firms with which he may seek employment, or have an arrangement concerning future employment, including matters on which such firms are providing services to clients.[1] As Administrator of CMS, Mr. Scully's duties cover a wide spectrum of Department programs, policies, and operations, including: health care financing issues on which a law firm or consulting firm may be lobbying or seeking official action; policy matters concerning investigatory or enforcement issues on which a prospective employer may be providing representation or otherwise have an interest; and qualification for reimbursement issues on which a prospective employer may be providing representation to a pharmaceutical company or medical device manufacturer.

Upon initiation of employment negotiations, the financial interests of Mr. Scully's prospective employers will become imputed to him and create a recusal obligation. Parallel disqualification provisions contained in 5 C.F.R. Part 2635, Subpart F, also require an immediate recusal at the earliest stage of any focused employment search.

Therefore, I recommend that you grant a limited waiver allowing Mr. Scully to participate in any particular matter of general applicability that would affect the financial interests of his prospective employers as members of a discrete and identifiable class of similarly situated entities. However, he will not be permitted to participate in any matter that will have a special or distinct effect on the firms with which he is negotiating for employment, or has an arrangement concerning employment, other than as part of a class, and he will not be permitted to participate in any particular matter involving specific parties that will have a direct and predictable effect on any of his prospective employers.

Under waivers of this type, for example, Mr. Scully could participate in policy decisions surrounding the development of a new regulation, such as regulations involving Medicare reimbursement, or the Health Insurance Portability and Accountability Act (HIPAA), even though a firm with which he has begun discussions concerning prospective employment may be affected by the matter. However, he would not be permitted to participate, for example, in an investigation of a hospital's Medicare reimbursement claims practices, or an investigation into an allegation that a State Medicaid agency violated Department regulations, if a firm with which he is seeking employment, or has an arrangement concerning prospective employment, would be affected by the matter. Likewise, he would not be permitted to participate in the formulation of a new regulation where a firm that is a prospective employer is providing representation on the matter to an entity that is one of just two or three entities likely to be impacted. Even though the

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[1] For purposes of 18 U.S.C. § 208, a firm, such as a law firm or consulting firm, is deemed to have a financial interest in a particular matter if a client of the firm has a financial interest in the particular matter, the firm is providing services to the client with respect to that matter, and the employee is aware the firm is providing services on the matter. Accordingly, this waiver will include particular matters not only affecting a prospective employer, but also matters affecting the prospective employer's clients if the firm is providing services to a client on the matter.

rule, on its face, would apply to a class of entities, if the client would be among the very few known to operate programs likely to be impacted by the rule, the matter would have a distinct effect on the entity other than as part of a class.

In addition, Mr. 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.

A waiver as described above is appropriate, in large part, because the limits on the waiver significantly minimize the potential for conflict of interest. First, it is well-recognized that matters affecting the interests of a class of similarly affected entities pose less of a risk that the integrity of an employee's services might be compromised by an interest in any one affected entity. In fact, the scope of this waiver is similar to a regulation that already exempts employees from the conflict of interest statute in the analogous situation of participation in particular matters of general applicability affecting the interests of certain institutions from which an employee is on a leave of absence. *See* 5 C.F.R. § 2640.203(b). While the incentive to please a potential employer may be different than the impulse to favor a current employer, neither is particularly acute in matters affecting broad classes. Second, at no time would Mr. Scully be in a position to meet directly, as part of his official duties, with representatives of an organization with which he is negotiating or has an arrangement for employment.

Additionally, as Administrator of CMS, Mr. Scully has a very high level of responsibility for a broad range of matters that potentially could affect a very large number of entities. It is 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. A PAS official must be able to perform the duties of his position to the fullest extent possible, consistent with applicable law.

RECOMMENDATION

Therefore, I recommend that you grant Mr. Scully a limited waiver under section 208(b)(1) because the financial interest involved is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from him. The waiver would be expressly limited as described above. Please indicate your decision below and return the signed original to my office for placement in Mr. Scully's SF 278 Public Financial Disclosure Report file.

Edgar M. Swindell

DECISION

Based upon the recommendation of the Designated Agency Ethics Official, and my determination, made in accordance with 18 U.S.C. § 208(b)(1), that the identified interests of the Administrator of CMS, Thomas A. Scully, relating to prospective employment are not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from him, the waiver as described and limited above is hereby granted.

Approved ✓ Disapproved _____ Date _____

Tommy G. Thompson

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