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Joan Claybrook, President

December 22, 2003

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

Dear Ms. Corrigan:

Public Citizen is writing to express its strong concern about the granting of a waiver from conflict of interest regulations for a senior level employee charged with developing what is one of the nation's most important laws enacted this year: the controversial overhaul of Medicare.

On May 12, 2003, Department of Health and Human Services (HHS) Secretary Tommy Thompson granted a waiver from Executive branch ethics regulations, pursuant to 18 U.S. Code §208(b)(1) and 5 CFR 2640.301, to Thomas Scully, the Administrator of the Centers for Medicare and Medicaid Services. The waiver allowed Mr. Scully, who resigned on Dec. 16, to seek private employment from lobbying firms and investment companies representing the pharmaceutical and other health care industries, while simultaneously allowing him to negotiate a major overhaul of the Medicare program that provided clear and substantial benefits to the potential employers, their clients and Mr. Scully through his potential future employment.

The waiver, which was kept confidential for the most crucial period of Mr. Scully's involvement in the Medicare legislation, ignored the substantial conflicts of interest at stake, runs contrary to some aspects of ethics regulations and was the result of a lackluster process at HHS.

**1. The conflict of interest in this situation was so substantial as to render any consideration of exemption unwarranted.**

A conflict of interest exists when a public employee involved in an official proceeding, or any person or organization with whom the employee is negotiating potential employment, has a *substantial* personal financial interest at stake in the outcome of that proceeding such as to "affect the integrity of the employee's service to the Government." [18 USC 208(a) and 5 CFR 2640.301(a)]

**Ralph Nader, Founder**

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All parties involved in this conflict of interest – the lobbying firms as potential employers of Mr. Scully, the clients of those lobbying firms, and Mr. Scully himself – stood to gain substantial economic benefit from his involvement in the Medicare legislation.

HHS attempted to downplay the extent of potential economic benefits involved in this situation. According to the waiver, the financial interests of Mr. Scully’s potential employers as a class “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 such matters, “the incentive to please a potential employer...[is not] particularly acute.”

First, Mr. Scully stood to personally gain a great deal from placing himself on the job market while working on the Medicare bill. This conflict between simultaneously trying to appeal to potential employers and the obligation to serve the public interest reaches to the very heart of conflict of interest issues. At no other point in time are Mr. Scully’s services more valuable to prospective employers and, at the same time, so entrusted with the public’s interest. This is when Mr. Scully may directly affect the interests of the potential employers in the legislative negotiations, and when potential employers may seek to influence the outcome of those negotiations.

Mr. Scully can undoubtedly benefit from such a commanding position. As a public servant, his government salary was \$134,000. The *New York Times* (Dec. 3, 2003) reported that Washington lobbyists are estimating he could earn five times his current salary from these potential employers in the private sector. A partner at one of the law firms Mr. Scully was negotiating employment with said, “Tom’s recent experience at the highest levels of the government makes him very attractive to our firm.”<sup>1</sup>

Second, the potential employers and, indirectly, their clients have the greatest leverage to influence the legislative process during employment negotiations. Mr. Scully has disclosed the names of three law firms and two investment firms in which he had been in employment discussions. [See Attachment, “Thomas Scully’s Potential Employers and Their Clients”] These five firms represent at least 41 companies or industry associations that are directly affected by the Medicare legislation and have substantial interests in its outcome.

Among Mr. Scully’s potential employer’s clients are 12 pharmaceutical companies and their industry association, the Pharmaceutical Research and Manufacturers of America (PhRMA), including five of the top 10 grossing pharmaceutical companies in 2002. These companies are widely acknowledged to be among the biggest beneficiaries of the Medicare bill—receiving a substantial increase in their drug sales, a prohibition against Medicare administrators negotiating lower drug prices for the program, and effectively a prohibition on the reimportation of lower-priced drugs from Canada.

In addition to the benefits provided to the pharmaceutical companies, 10 health care providers, four trade associations representing health care providers, and three physician professional organizations are either represented by the three lobby firms or are owned in whole or in part by the two investment firms that held employment discussions with Mr. Scully. Health care

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<sup>1</sup> Robert Pear, “Medicare’s top official defends job offers,” *New York Times*, December 3, 2003.

providers received numerous huge benefits under the Medicare bill, including the repeal of a scheduled 4.5 percent reduction in physician payments and the substituted 1.5 percent increase in both 2004 and 2005.

Not surprisingly, these potential conflicts of interest bore fruit for Mr. Scully, as he landed choice positions with two of the firms with which he was discussing employment while negotiating, supposedly on behalf of the American people, for an overhaul of Medicare. On December 18, Mr. Scully announced that he will be joining the investment firm Welsh, Carson, Anderson & Stowe and the law firm Alston & Bird.

## **2. The waiver process was structurally flawed.**

Conflict of interest regulations establish specific procedures for seeking and granting waivers from ethics rules. In determining whether a waiver is appropriate, a governmental agency must consider all appropriate facts and circumstances that weigh for and against such a decision. When, and if, a waiver is ever granted, the process should publicly disclose all relevant personal gains. Only through such a full and open disclosure system can the public rest assured that such a waiver is appropriate.

Instead, the waiver granted to Mr. Scully was structurally flawed because:

- No estimate of financial gain for either Mr. Scully, the potential employers or their clients was ever considered in the waiver process, despite the fact that regulations call for such an estimate in justifying a waiver. [5 CFR 2640.301(b)(3): “*The dollar value of the disqualifying financial interest, if it is known or can be estimated.*”] In fact, there is not even any discussion by HHS in the waiver process as to the identity of the potential employers, let alone the financial interest at stake.
- No reason was given as to why Mr. Scully was so indispensable to the negotiation process, other than the statement in the waiver that “[i]t 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.” [5 CFR 2640.301(b)(6)(ii)] Mr. Scully had announced his intention to leave the Department for private sector work well before negotiations were in full swing, allowing HHS either to find a replacement or to receive assurances from Mr. Scully that no further employment negotiations would occur for the duration of his public service.

This waiver treats conflict of interest regulations more as a nuisance to be readily sidestepped, rather than a cornerstone for public confidence in the governmental process. If this is the rationale and procedure for granting a waiver, then the conflict of interest regulations serve no real purpose – they are effectively nullified as they apply to HHS.

Finally, the public in general, and Congress in particular, were not even informed that a conflict of interest waiver had been granted to Mr. Scully to seek private employment opportunities from those directly affected by the Medicare legislation.

The Associate General Counsel of Ethics at HHS, who recommended this unwarranted waiver, and Secretary Thompson, who approved the waiver without following the appropriate procedural safeguards, acted in possible violation of the conflict of interest regulations. Therefore, Public Citizen requests that the action of granting a waiver for Thomas Scully be reviewed by your office.

In order to prevent future violations of ethical behavior by the Department, Public Citizen also recommends that your office clarify in writing the proper procedures for adherence to the ethics regulations and, if ever appropriate, for granting exemptions to the regulations.

Sincerely,

Joan Claybrook  
President  
Public Citizen

Frank Clemente  
Director  
Public Citizen's Congress Watch

cc: The Honorable Tommy Thompson, Secretary, Department of Health and Human Services  
Marilyn L. Glynn, Acting Director, Office of Government Ethics