Testimony of

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Regarding public financial disclosure laws for Presidential appointees

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of the Senate

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Mr. Chairman and members of the committee:

Thank you for the opportunity to testify today about the history and importance of public financial disclosure laws for Presidential appointees as the Committee looks into the appointment process for the Executive branch. The possibility that negative aspects of the appointment process are deterring good people from serving in federal government positions is a real and legitimate concern. The efforts of this Committee and others to explore reforms to the appointment process are therefore worthwhile and commendable.

We have been asked to focus our comments on public financial disclosure laws. Common Cause has long been an advocate of public financial disclosure, dating back to the 1970s when we pushed to replace confidential disclosure rules with a public disclosure apparatus, and the late 1980s, when Common Cause fought against weakening the Ethics in Government Act.

Public financial disclosure laws are essential safeguards against both corruption in government and the appearance of corruption. Public disclosure of personal financial interests reveals potential conflicts of interest among government officials. It is essential to assure the public that individuals are not using public office for personal gain or making public policy decisions on any other basis other than the public interest. Any changes regarding current public disclosure rights should be made with great caution and should not damage the ability of the Office of Government Ethics (OGE) or agency

officials to meaningfully gauge real, potential, or perceived conflicts of interest that create the appearance of corruption.

In exploring the possibilities for reform, it is important to note that, while some financial disclosure procedures have drawn their share of criticism, other aspects of the appointment process are more responsible for turning good people away from public service. Numerous studies on the appointment process support our view that the worst problems in the appointment process stem not from financial disclosure laws, but rather from the politicization of appointments and media frenzies surrounding high-profile scandals. Many of these incidents, such as "nanny scandals," are unrelated to financial disclosure forms.

REFORMING THE APPOINTMENT PROCESS

A recent Brookings Institution Presidential Appointee Initiative survey of 435 senior level officials from the Reagan, Bush, and Clinton administrations found that former presidential appointees had mixed feelings about the state of federal government service. On one hand, more than half of those surveyed "said they would strongly recommend presidential service to a good friend," and 71% said the appointment process was fair.[1] Yet, on the other hand, the survey also found that the former officials felt the nomination process "exacts a heavy toll on nominees, leaving them exhausted, embarrassed, and confused."[2]

Flaws in the Appointment Process

In 1997, the Century Foundation (formerly the Twentieth Century Fund) released a report by Colby College Professor G. Calvin Makenzie that identified several problems in the presidential appointment process, many of which can be addressed without harming the disclosure system. Makenzie found that "the administration as a whole experienced a vacancy rate in appointed positions in the executive branch that frequently exceeded 25 percent."[3] "The appointment process is no longer merely a mechanism for filling important jobs," he wrote, "it is a political and policy battleground of the first order – one in which the qualifications of nominees are often merely incidental to the real purposes of those who support and oppose them. Too many good people decline to enter this obstacle course, or get ambushed by it, or waste too many months enduring it."[4] He concluded that there is an increase in the practice of Senators blocking nominations, lackluster protection of sensitive FBI files, a trend of appointments getting batched to regulatory commissions, a tendency for the Senate to shy away from its "traditional deference to presidential authority in the selection of subcabinet appointees," and a frequency of high-profile nomination controversies – all of which serve to deter people from government service.[5]

In their recent article for *Foreign Affairs,* entitled "The Confirmation Clog," Norman Ornstein and Thomas Donilon also detail problems in the appointment process. The two authors identify five points of "blockage" which have led to a "crisis" for government service: an expansion in the number of federal appointees, "incremental changes in the law and executive orders...[that] have accumulated into an unworkable morass of rules intended to legislate morality," the frequent use of Senate holds as a

means of holding "nominees hostage to the whims or unrelated demands of individual senators," the frequent use of lawsuits as a means of embarrassing political opponents, and the intense media scrutiny of nominees during which "public figures are deemed guilty until proven innocent." [6]

Ornstein and Donilon argue that one of the major symptoms of politicization of the appointment process is that nominations are held up, much to the detriment of both the nominees' well-being and the public interest. "For many selected to serve at the beginning of an administration, a year or more in limbo is typical," they write. "This wait leads to widespread frustration and demoralization for individuals who must give notice to their employers, plan moves across the country, coordinate school schedules for their children, and make home sales and purchases."[7] They give the example of Peter Burleigh, "one of America's most seasoned and effective diplomats," who resigned from government service after his nomination to a foreign service post was held up in the Senate for nine months.[8] Burleigh's nomination was delayed "because Senator Charles Grassley [of Iowa], upset about the State Department's treatment of an American whistle-blower at the United Nations, had exercised his senatorial prerogative to hold up Bruleigh's nomination and two other ambassadorial appointments indefinitely." [9]

As do Ornstein and Donilon, the National Academies Committee on Science, Engineering, and Public Policy's "Panel on Ensuring the Best Science and Technology Presidential Appointments," asserts that one of the most serious flaws in the appointment process is its slow pace. "The appointment process is slow, duplicative, and unpredictable," the panel writes in its publication, *Science and Technology in the*

National Interest. "From 1964 to 1984, almost 90% of presidential appointments were completed within 4 months ... from 1984 to 1999, only 45% were completed in 4 months."[10] The panel also complains that "variations in pre-employment and post-employment requirements among agencies, departments, and congressional committees create an environment of uncertainty and inequity for appointees."[11]

Repetition in the Disclosure Process

Like other aspects of the appointment process, the financial disclosure system is not flawless. One of its particularly problematic aspects is the repetition involved in filling out the required forms. "While nominees complain about several aspects of the process, they regularly and uniformly express frustration with the repetitive and duplicative questions," writes Terry Sullivan of the University of North Carolina.[12] In a recent article for the *Brookings Review*, he details the process:

> Anyone nominated for a position requiring Senate confirmation must file four separate forms. The first, the Personal Data Statement (PDS), originates in the White House and covers some 43 questions laid out in paragraphs of text. Applicants permitted by the White House to go on to the vetting stage fill out three other forms. The first, the Standard Form (SF) 86.... has two parts: the standard questionnaire and a "supplemental questionnaire" that repackages some questions from the SF-86 into broader language often similar though not identical to questions asked on the White House PDS.
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> The second additional questionnaire, SF-278, comes from the U.S. Office of Government Ethics (OGE) and gathers information for financial disclosure.... Having returned each of these four forms, some nominees will receive a fifth questionnaire ... with more specific questions about the nominee's agency or policies it implements."[13]

According to Sullivan, the forms are highly repetitive. For instance, 78% of the questions which relate to the appointees' public and organizational activities are repeated across the various forms.[14] In addition, 71% of questions relating to legal and administrative

proceedings are repetitive, as well as 66% of questions regarding tax and financial information, 64% of questions regarding professional and educational background, and 36% of questions that deal with family and personal background.[15] Ornstein and Donilon argue that "simply filling out the forms...takes weeks of effort and a considerable amount of money ... Most of the information on the forms goes into public files for any inquisitive neighbor, opposition researcher, or reporter to peruse or even publish."[16]

Clearly, the difficulty for the appointee and repetitive nature of disclosure forms are problems worth addressing. As will be discussed in further detail later, Common Cause supports efforts to streamline the disclosure process and make it user-friendly, so long as important categories of disclosure are not eliminated.

Reforming the Appointment Process

In addition to streamlining the disclosure process, there are other proposals for appointment reform that have been made by various individuals and organizations. While some proposals may prove detrimental to the public interest, many of these reform plans would improve the system without detracting from the ability of the public, the government, and the appointee to prevent corruption or the appearance thereof.

Among the various reform proposals, there are several common proposals which could help reform the system without harming the disclosure process. The "findings of the half-dozen bodies that have studied the appointment process over the past two decades cluster around seven major ideas," writes Alvin S. Felzenberg of the Heritage

Foundation. "First, start transition planning early…. Second, assist new nominees…. Third, decide which positions merit a 'full-field' FBI investigation…. Fourth, clarify conflict-of-interest restrictions…. Fifth, allow cabinet officers to do the hiring in their departments…. Sixth, make fewer political appointments…. Seventh, establish limits on senatorial 'holds' and make fewer positions [subject] to Senate approval."[17] Any of these proposals would be worth exploring.

Ornstein and Donolin propose several of the aforementioned reforms, and also recommend implementing a common electronic nominations form, removing criminal penalties from the appointment process, limiting access to FBI files to the chair and ranking minority member of a Senate committee, enacting procedural reforms in the Senate, holding hearings on national security-related appointees before Inauguration Day, reducing the number of political appointees, and taking measures to reduce the "legal assault on the executive branch."[18] Removing criminal penalties for false disclosure, which, as will be discussed in further detail later, would be detrimental to the public interest, as would placing too many restrictions on access to relevant information. However, the other proposals set forth by Ornstein and Donilon are further examples of ways that the system could be reformed without removing essential disclosure safeguards.

In a December 2000 letter to then President-elect Bush, the Council for Excellence in Government also made recommendations for improving the presidential appointment process. The Council recommended utilizing financial disclosure software, streamlining the FBI investigation process, setting up an orientation program, and easing revolving door restrictions on post-government employment. While most of these proposals are

worthy of consideration, weakening "revolving door" restrictions would be a mistake. If government employees arrange for future employment with the companies they are regulating, it is a recipe for corruption or the appearance thereof.

THE BENEFITS OF PUBLIC DISCLOSURE

I now want to turn to more close attention to the issue of public financial disclosure.

Public financial disclosure is a powerful tool for identifying potential corruption stemming from conflicts of interest. Public disclosure helps officials help themselves determine if they have a conflict; "the reports have the...benefit of necessitating a close review by each government official of the possibilities for conflicts of interest represented by his personal financial interests," wrote the President's Commission on Federal Ethics Law Reform in 1989. "The counseling of employees, particularly those new to government service, by agency ethics officials during the report review process has also proved invaluable."[19] Former Common Cause Chairman and U.S. Solicitor General Archibald Cox explained during 1988 testimony before the Subcommittee on Governmental Affairs that public disclosure serves "three vital interests. First, the officials making disclosure pay more attention to complying fully and accurately with the Act. Second, Designated Agency Ethics Officials are made more diligent in advising officials of potential conflicts of interest and in dealing with violations of ethical standards. Third, the officials guilty of intentional or unintentional violations may be brought by publicity to take corrective action." [20]

Recently, Treasury Secretary Paul O'Neill's holdings in companies such as Alcoa, General Motors, and Microsoft were called to public attention after he submitted his financial disclosure forms. Following public pressure, in what *The New York Times* referred to as "an abrupt reversal," O'Neill decided to divest himself of his Alcoa holdings.

During the Clinton Administration, financial disclosure forms revealed that Treasury Secretary Lloyd Bentsen had extensive holdings in the stock market which amounted to a potential conflict of interest with his government post.

During the 1980s, as Cox pointed out in his testimony, "it should be remembered that it was public disclosure of Attorney General Edwin Meese's 'limited blind partnership' and of Attorney General William French Smith's $50,000 severance arrangement from a firm in California that raised serious questions about the impropriety of such arrangements."[21]

BACKGROUND ON FINANCIAL DISCLOSURE

Laws mandating the public disclosure of Presidential appointees' personal finances were enacted in 1978 as part of the Ethics in Government Act, a sweeping ethics reform bill which also established the executive Office of Government Ethics (OGE) and amended "revolving door" restrictions on post-government employment.[22]

Prior to the passage of the Ethics Act, a flawed system of confidential disclosure was in place. Studies conducted by the General Accounting Office (GAO) found that non-compliance with disclosure laws was rampant under the confidential system. A

follow-up GAO study concluded that this problem was remedied by the public disclosure provisions of the Ethics Act.[23]

After ten years, the Ethics in Government Act's financial disclosure provisions were widely credited with preventing and exposing conflicts of interest in the executive branch. In its 1989 report on federal ethics reform, the President's Commission on Federal Ethics Law Reform concluded that "in the Commission's view, ten years of experience with the Ethics in Government Act requirement have demonstrated the value of public financial disclosure to the maintenance of public confidence in the integrity of the actions of government officials."[24] Common Cause was also pleased with the success of the Ethics Act's public disclosure provisions. "The record of experience after a decade under the Act shows that the financial disclosure provisions have proved to be reasonable and balanced and have worked very well," Common Cause wrote to President Bush.[25]

In 1989 President Bush signed the Ethics Reform Act, which modified federal financial disclosure laws. Under the new provisions, all appointed employees of the Executive Office of the President were covered by financial disclosure rules, and low-level foreign service officers were exempted. A $200 threshold for reported income was established (an increase from $100 under the old rules) and disclosure requirements were extended to unearned income – capital gains, rent, interest, and dividends – in excess of one million dollars. Additionally, appointees were exempted from reporting gifts worth $75 or less (up from $35 or less) and from reporting financial holdings in mutual funds, pension plans, regulated investment companies, and other investment funds with widely diversified holdings. Furthermore, new regulations regarding reimbursements from travel

expenses were put into place (appointees were required to list travel itineraries, dates, and nature of expenses). The Act also broadened the disclosure requirements to include honoraria paid to appointees' spouses and gifts to dependent children (that are received independently of the appointee).

CHANGES IN THE DISCLOSURE PROCESS

As was previously noted, it is clearly problematic if good potential public servants are deterred from accepting federal posts because of disdain for the nomination process. It is equally problematic if honest servants fail to comply with rules because of the difficulties involved in the disclosure procedures. Thus, efforts to make the disclosure process more user-friendly are commendable. However, it is vitally important that reforms do not come at the expense of providing the public the information necessary to prevent and expose corruption. Specifically, any reforms to the financial disclosure system must not prevent disclosure from being public, infringe on the ability of the public to determine conflicts of interest, substantially reduce the "categories of value" components of the disclosure form, or weaken the penalty for false disclosure.

þ Keeping Disclosure Public

In Archibald Cox's words, "by reason and definition, 'confidential' disclosure is not disclosure at all."[26] Public disclosure puts extra pressure on the appointees to tell the truth and the government to weed out conflicts of interest. It allows the public to be the final arbiter of whether a conflict is inappropriate and it allows for public pressure to check and balance the government.

þ Protecting the Public's Ability to Determine Conflicts of Interest

It is crucial that efforts to make the disclosure forms more user-friendly do not result in the removal of meaningful reporting categories. Significantly reducing the categories would be like removing a major piece from a puzzle – it would create a loophole in the overall disclosure process.

Disclosing information regarding assets, sources of income, financial transactions, arrangements or agreements (such as future employment promises and pensions), positions held outside government, and excessive compensation, allows the public to determine if there are sizable outside influences on an appointee's professional behaviors that result in favoritism of private interests over the public interest. The public should have the right to know if, for example, an appointee to the Department of Interior holds millions of dollars in oil stock, if the spouse of an appointee to the Department of Labor has a large union pension, if the spouse of an appointee to the Department of Justice anti-trust division works for Microsoft, or if an employee of another agency sold millions of dollars in stock in a company whose industry he or she was regulating.

Similarly, gifts, reimbursements, and travel expenses are methods of wielding influence. As former Senator Paul Douglas put it, gifts create "some real problems for a public official. If he accepts everything that comes his way...he is likely to have his independence undermined."[27] If Dow Chemical, for example, flies a public official's spouse and children to Hawaii for a conference, clearly it may influence that official's

judgment, or, just as importantly and potentially damaging, may create the appearance of a conflict of interest.

þ Categories of Value

Common Cause has never favored the disclosure of tax information, which is essentially designed to gauge the personal net worth of an appointee. The OGE disclosure form, however, does not ask for the actual amount of each appointee's assets and income. Rather, the form requires the appointees to indicate categorical value ranges for each item. For instance, someone with $350,000 in Microsoft stock would check off a box for $250,001-$500,000. It is important for the public to have some sense of the value of each asset or income source, since the size of one's holding, debt, gift, etc. is directly related to the degree of influence it wields; someone with $3,000 of Dupont stock is less likely to be influenced by their holding than someone with three million dollars worth of the same stock. Former Secretary of the Treasury and Secretary of State James Baker III, for example, had millions of dollars of Chemical New York bank securities while he "play[ed] a leading role in Third World debt issues, even though he…held substantial shares in a bank that was a major holder of such debts."[28] Had his holding been smaller in Chemical Bank, he would have had a greatly reduced financial stake in such policy, and, thus, less of an opportunity for a conflict of interest.

þ Penalties for False Disclosure

In order for the enforcement of disclosure laws to be most effective, appointees need to have the maximum incentive to be honest. Public scrutiny is one important

incentive. Civil and criminal penalties are another. Eliminating civil penalties would create a disincentive for prosecutors to investigate problems with appointees' disclosure statements that they do not view as criminal-worthy, while eliminating criminal penalties would weaken the incentive for the worst potential offenders (i.e. those who would intentionally lie on their forms) to be honest. Criminal penalties are appropriate for willful and knowing violations.

þ Positive Reform to the Disclosure Process

Common Cause supports efforts to streamline this process in order to make it more user-friendly, as long as important categories of disclosure are not eliminated. We applaud the OGE's efforts to simplify the disclosure process through the production of "new pamphlets, booklets, videos, and games for agency use and [utilizing] satellite broadcasts to do annual ethics training nationwide."[29] Efforts to better utilize Internet technology may provide the key to making disclosure more user-friendly. We also support the use of standardized software to decrease duplication.

CONCLUSION

The presidential appointment process can be reformed for the better without weakening federal disclosure laws by streamlining the disclosure process and enacting non-disclosure related reforms. Gutting disclosure rules as part of reform would be a big mistake. Public disclosure of financial information for Presidential appointees has proven over time to be an essential safeguard against corruption and conflicts of interest – both intentional and unintentional.

"Despite recent disclosures," wrote Senator Paul Douglas in 1953, "there is little doubt that the general level of conduct on the part of most government employees is relatively high."[30] The same can be said of government officials today. However, as was the case in 1953, there are some public officials who – intentionally or unintentionally – place private interests over the public interest. "Try as we may to make the standards of judgment and the procedures of administration more definite," wrote Douglas, "there will still remain a tremendous field for administrative discretion….and wherever there is discretion, there is possible field for corruption and abuse."[31] Public financial disclosure is an important safeguard against corruption, abuse, and the appearance thereof.

[1.] Paul C. Light, "Placing the Call to Service." *Brookings Review, Spring 2001,* Vol. 19, No 2; Pages 44-47.
[2.] Norman Ornstein and Thomas Donilon, "The Confirmation Clog." *Foreign Affairs,* November-December 2000; Pages 89-90.
[3.] G. Calvin Mackenzie, "Starting Over: The Presidential Appointment Process in 1997." *The Century Foundation*. Obtained from the internet: "http://www.centuryfoundation.org/" Accessed 3/28/01.
[4.] Century Foundation.
[5.] Century Foundation.
[6.] Ornstein and Donilon, 92-93.
[7.] Ornstein and Donilon, 89.
[8.] Ornstein and Donilon, 87.
[9.] Ornstein and Donilon, 87.
[10.] National Academies Committee on Science, Engineering, and Public Policy, "Science and Technology in the National Interest." Page 3.
[11.] National Academies, 3.
[12.] Terry Sullivan, "Fabulous Formless Darkness." *Brookings Review*, Spring 2001, Vol. 19, No. 2; Pages 22-27.
[13.] Terry Sullivan..
[14.] Terry Sullivan.
[15.] Terry Sullivan
[16.] Ornstein and Donilon, 90.
[17.] Alvin S. Felzenberg, "Fixing the Appointment Process: What the Reform Commissions Saw." *Brookings Review*, Spring 2001, Vol. 19, No. 2; 17-21.
[18.] Ornstein and Donilon, 94-99.
[19.] President's Commission on Federal Ethics Law Reform, "To Serve with Honor." Page 80.
[20.] Archibald Cox, testimony before the Senate Subcommittee on Oversight of Government Management, 1998; Page 12.
[21.] Cox, page 12.

[22.] Presidential Commission Report, Page 121
[23.] Archibald Cox, Page 12.
[24.] Presidential Commission Report, 1989, page 80.
[25.] Common Cause letter 3/27/89
[26.] Cox, page 12.
[27.] Senator Paul H. Douglas, "Ethics in Government." Cambridge: Harvard University Press: 1953; Page 46.
[28.] Walter Pincus, "Which Ethical Rules for Baker." *Washington Post,* March 23, 1989; A25.
[29.] Stephen Potts, "Director's Column." *Government Ethics Newsgram*, U.S> Office of Government Ethics for the Executive Branch, Spring 1998, Vol. 15, No. 1.
[30.] Douglas, 27.
[31.] Douglas, 43.