

February 4, 2013

The Honorable Porter Goss, Chair
The Honorable David Skaggs, Vice Chair
Office of Congressional Ethics
425 3rd Street, SW
Suite 1110
Washington, DC 20024

Dear Chairman Goss and Vice-Chairman Skaggs:

As attorneys who practice before the Office of Congressional Ethics, we were surprised to learn that the Board has amended its rules without providing any opportunity for notice or comment. To our knowledge, no summary or explanation of these changes has been made available to the public.

A close review of the revised rules shows that a number of these changes are at odds with the resolution that established and governs the office. Others roll back important protections that ensure the credibility and fairness of the findings transmitted to the Committee on Ethics and released to the public. We ask that the Board vacate these rules, and adopt new rules after providing the public with an opportunity to comment. We submit this letter as individual practitioners, and not on behalf of any client or with regard to any particular matter.

Adopted by the 110th Congress and renewed by subsequent Congresses, H. Res. 895 is the sole source of OCE's authority. The OCE Resolution was crafted to ensure that OCE's reviews and reports are informed and fair. The resolution requires OCE to inform a respondent of the matters that it is investigating. *See* H. Res. 895 § 1(c)(1)(A)(ii). It gives the subject the opportunity to present a statement in response to the allegations and any findings that the Board proposes to make, without limiting the subject's ability to place relevant facts on the record. *See id.* § 1(f)(3). It prohibits OCE from stating in its findings "any conclusions regarding the validity of the allegations upon which it is based or the guilt or innocence of the individual who is the subject of the review." *Id.* § 1(c)(2)(C)(i)(II).

The new rules undermine these guarantees. Where the resolution requires OCE to disclose the nature of the review to the subject, the revised rules claim the power to "address any additional potential violations within its jurisdiction that are discovered in the course of a review" without providing any notice to the subject. OCE R. 3(E). The resolution guarantees the right to make a statement to the Board: the rules prohibit the Board from considering "any information included in a subject's statement that was not previously provided during the investigation ..." OCE R. 9(B). The resolution prohibits any conclusions about the subject's guilt or innocence: the rules claim the authority to draw negative inferences against a subject because of the unwillingness of a third party witness to swear under penalty of perjury that they have provided all the documents relevant to OCE's inquiry. OCE R. 4(A). We are unaware of any government agency that is allowed to draw a negative inference against a party based solely on a third party's unwillingness to cooperate.

The new rules also short-circuit important checks and balances that help ensure thoughtful and proper outcomes – again, without any notice or comment. They allow the OCE to proceed to second-phase review on the same facts that led it to open the matter in the first place, thereby guaranteeing a report to the Committee on Ethics. *See* OCE R. 8(A). They narrow the requirement that the OCE provide subjects with exculpatory evidence, saying that it does not apply if the evidence is "merely favorable" to the subject, OCE R. Definitions (4), or if OCE believes subjects or their counsel already possess it. OCE R. 4(F). And the new rules allow the Board to advance a matter based merely on an oral report from staff. OCE R. 8(D).

The task force that urged the OCE's creation felt "strongly that part of any reform must include a more transparent system ..." Report of the Special Task Force on Ethics Enforcement, at 14 (Dec. 2007). To make such major changes to the OCE's rules behind closed doors is fundamentally incompatible with this goal of transparency. Still more troubling is that these changes depart from the OCE Resolution and curtail basic safeguards that protect the reputation of Members and the integrity of the House. Removal of those safeguards will inevitably lead to the same lack of public confidence in the ethics process that prompted the House to create OCE in the first place. We urge the Board to reconsider these ill-advised changes.

Sincerely,

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cc: Omar Ashmawy, Staff Director and Chief Counsel
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