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COMPTROLLER GENERAL OF THE UNITED STATES

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B-223545

July 25, 1986

RELEASED

The Honorable Howard M. Metzenbaum
United States Senate

Dear Senator Metzenbaum:

This responds to your letter of June 25, 1986, also signed by Senators Hatch and Kennedy, which poses a number of legal questions concerning the Task Force on Terminations in connection with the nomination of Mr. George R. Salem to be Solicitor of Labor.

The enclosed detailed analysis presents the results of our review and answers each of the specific questions you posed. By way of summary, we conclude that the Task Force on Terminations was not subject to the Federal Advisory Committee Act. Therefore, the Task Force was not required to comply with the balance and public access provisions of the Act. We also conclude that once the Department decided to treat the Task Force members as "special Government employees," its actions, including the granting of waivers under 18 U.S.C. § 208, were appropriate. The Department, however, should have resolved the status of the Task Force members and addressed conflict-of-interest issues before the Task Force began to conduct business.

We hope that our response will be useful to you in considering Mr. Salem's nomination.

Sincerely yours,

Milton J. Socolar

for Comptroller General
of the United States

Enclosure

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B-223545

ANSWERS TO LEGAL QUESTIONS CONCERNING
THE TASK FORCE ON TERMINATIONS

QUESTION 1: Was the Task Force on Terminations, which was created on December 18, 1985, subject to the Federal Advisory Committee Act?

ANSWER: No. The Task Force on Terminations served as a component of a parent organization, the Advisory Council on Employee Welfare and Pension Benefit Plans, which is covered by the Federal Advisory Committee Act. However, since the Task Force reported only to the parent body, the Task Force itself was not subject to the Advisory Committee Act as interpreted in a recent judicial decision.

ANALYSIS: The Federal Advisory Committee Act is codified at 5 U.S.C. App. (1982). Section 3(2) of the Act defines "advisory committee" as follows:

> "The term 'advisory committee' means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as 'committee'), which is--
>
> (A) established by statute or reorganization plan, or
>
> (B) established or utilized by the President, or
>
> (C) established or utilized by one or more agencies,
>
> in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government * * *."

added). The Act does not cover groups performing staff functions such as those performed by the so-called task forces.

"The task forces at issue do not provide advice directly to the President or any agency, but rather are utilized by and provide advice to only the Executive Committee, which then provides advice to the President or agency. The distinction is not just a semantic one. Before the Committee can produce final recommendations, it must gather information, explore options with agencies to get comments and reactions, and evaluate alternatives. Plaintiffs admit that, under their proposed interpretation of the Act, the procedural requirements of the FACA would apply to these preliminary actions. But surely Congress did not contemplate that interested parties like the plaintiffs should have access to every paper through which recommendations are evolved, have a hearing at every step of the information-gathering and preliminary decision-making process, and interject themselves into the necessary underlying staff work so essential to the formulation of ultimate policy recommendations. * * *

"There is no reliable evidence that the task forces at issue have gone beyond such functions and have actually started advising agencies on policy recommendations. If the task forces were in fact providing advice directly to agencies, they might indeed be functioning as advisory committees within the meaning of the Act. However, not only do the task forces lack authority to do this but plaintiffs have wholly failed to demonstrate by deposition or otherwise that such is the case. * * *" Id. at 529.

Judge Gesell's decision was affirmed by the Court of Appeals for the District of Columbia Circuit. 711 F.2d 1071. The Court of Appeals noted new allegations by the plaintiffs that the task forces were transmitting their reports directly to federal agencies and that the subcommittee of the Executive Committee was merely "rubber stamping" the task force recommendations. The Court of Appeals suggested that the plaintiffs seek appropriate relief from the District Court under

these newly alleged facts. Id. at 1075-1076. The plaintiffs did bring these allegations before the District Court; however, Judge Gesell determined that the allegations had not been substantiated:

> "* * * A review of the transcripts of Committee proceedings * * * has satisfied the Court that the Committee proceedings were in fact deliberative and not a mere sham. The Task Force's recommendations were distributed to the members of the Executive Committee for study in advance of the public hearing and at the hearing comments, including those of the plaintiffs, were specifically brought to the attention of the full membership even though they had been belately filed. * * * In other instances the Committee has, in fact, rejected recommendations contained in the staff reports presented through the same process and it has functioned as originally represented to this Court." 566 F. Supp. 1515, at 1516.

The National Anti-Hunger Coalition case represents the law of the District of Columbia Circuit, and we are aware of no contrary judicial interpretations in other circuits. In addition, the General Services Administration, which has authority under section 7(c) of the Act to prescribe administrative guidelines for advisory committees, has adopted the National Anti-Hunger Coalition interpretation. See the preamble to interim rules published at 48 Fed. Reg. 19324, 19325 (April 28, 1983), and § 101-6.1007(a)(3) of the interim rules, id. at 19328. It is against this background, therefore, that we consider the status of the Task Force on Terminations.

According to a Department of Labor press release dated December 18, 1985, the Task Force on Terminations was formed by the Advisory Council on Employee Welfare and Pension Benefit Plans (hereafter referred to as the Advisory Council) as "a bipartisan task force to study issues relating to pension plan terminations in which excess assets revert to the sponsors of employee benefit pension plans covered by the Employee Retirement Income Security Act (ERISA)." The Advisory Council was established by section 512 of ERISA, 29 U.S.C. § 1142 (1982), and is covered by the Advisory Committee Act.

The press release is contradictory with respect to the Task Force's reporting responsibilities. At one point the press release states that the Task Force will "if appropriate, make specific legislative or administrative recommendations to the Secretary [of Labor]," but it later states that the Task Force "will report its findings and recommendations to the [Advisory] Council." Department of Labor officials have indicated that the former statement is incorrect; rather, in accordance with the latter statement, the Task Force was designed to report its findings and recommendations only to the Advisory Council. As discussed below, the Task Force did report to the Advisory Council. We found no indication that the Task Force submitted recommendations directly to the Secretary of Labor or to any other federal official.

The Task Force consisted of 12 members. Four of its members, including the Task Force Chairman, were also members of the Advisory Council. The Task Force held 11 meetings from December 20, 1985, to May 14, 1986. We understand that two of these meetings were open to the public for the purpose of receiving public comments; the other Task Force meetings were closed to the public. On June 2, 1986, the Task Force formally presented a report containing its findings and recommendations to the Advisory Council. We have been informed by a Department of Labor official that the Task Force's report had been made available to the public and to the members of the Advisory Council in advance of the June 2 formal presentation.

The Advisory Council met three times to consider the Task Force report and recommendations. On June 2, 1986, it held an open meeting to hear the Task Force's presentation of the report and to receive public comments on the report. The Advisory Council held two additional meetings, on June 3 and June 12, to consider the Task Force report and to develop its own report to the Secretary of Labor. On June 26, 1986, the Advisory Council submitted its report to the Secretary. This report incorporates all of the basic recommendations made by the Task Force.

The Department of Labor takes the position that under the test established in the National Anti-Hunger Coalition case, the Task Force on Terminations was not required to comply with the Advisory Committee Act. We agree. Whether it is categorized as "staff," a "subcommittee" or an "other subgroup," the Task Force clearly was a component of the Advisory

Council and reported only to the Council. It is also clear to us that the Advisory Council's review and disposition of the Task Force's findings and recommendations was not a "rubber stamp" or "sham." On the contrary, the facts in this case, as described above, indicate that the Advisory Council conducted a thorough review.

In sum, the Task Force was not "established or utilized" for the purpose of providing advice or recommendations directly to federal officials. Therefore, it meets the test for exclusion from the statutory definition of an "advisory committee" prescribed in National Anti-Hunger Coalition.

QUESTION 2: If the answer to the preceding question is yes, was the Task Force established in accordance with the provision in the Federal Advisory Committee Act that the membership of such bodies be fairly balanced in terms of the points of view represented and the functions performed?

QUESTION 3: If the answer to the first question is yes, were the Task Force meetings conducted in accordance with the provision in the Federal Advisory Committee Act that calls for meetings to be open to the public unless the Secretary determines otherwise pursuant to applicable law?

ANSWER: As stated in response to the first question, the Task Force on Terminations was not subject to the Federal Advisory Committee Act. Therefore, the provisions of the Act relating to balance and public meetings did not apply to the Task Force.

QUESTION 4: Did the composition of the Task Force or the holding of Task Force meetings in private create an appearance of impropriety based on the requirements set forth in 29 C.F.R. § 0.735-4?

ANSWER: The provisions of 29 C.F.R. § 0.735-4 (1985) are addressed to the conduct of individual Department of Labor employees; they appear to have no direct application to the overall composition of the Task Force or the nature of its meetings. How to constitute the Task Force and whether to hold Task Force meetings in public or in private were policy issues presenting different options. We have no basis to conclude that the judgments made on these issues created an appearance of impropriety.

QUESTION 5: Did the Department of Labor violate applicable federal law or regulations by allowing the Task Force on Terminations to conduct meetings prior to its receipt of financial disclosure forms from the Task Force members?

ANSWER: No. Task Force members were not legally required to file financial disclosure forms under the Ethics in Government Act's public disclosure system or under the confidential system which had been mandated by Executive Order 11222. For this reason, the Department of Labor's failure to obtain disclosure statements in advance of the initial Task Force meeting cannot be found to violate any provision of law or regulation. As a matter separate and apart from the issue of financial disclosure, we believe that the Department failed to comply with applicable guidelines in determining the status of Task Force members and addressing conflict-of-interest issues only after the Task Force had conducted 9 of its 11 meetings.

ANALYSIS: Title II of the Ethics in Government Act of 1978, as amended, 5 U.S.C. App. (1982 & Supp. III, 1985), established a system of public financial disclosure for higher level executive branch employees who serve for more than 60 days in a calendar year. Because members of the Task Force on Terminations served for fewer than 60 days they were not required to file public financial disclosure statements under this authority. As to other systems of financial disclosure, section 207(c) of the Ethics in Government Act states:

> "The provisions of this title requiring the reporting of information shall supersede any general requirement under any other provision of law or regulation with respect to the reporting of information required for purposes of preventing conflicts of interest or apparent conflicts of interest. * * *"

Section 207(a), as in effect prior to March 19, 1986, provided in part:

> "The President may require officers and employees in the executive branch * * * not covered by this title to submit confidential reports in such form as is required by this title.* * *"

In May of 1979, the Assistant Attorney General, Office of Legal Counsel, Department of Justice, advised the Director of the Office of Government Ethics (OGE) that the effect of sections 207(a) and 207(c) was to supersede the requirements for confidential financial disclosure contained in Executive Order 11222 and to constrain any new system of confidential disclosure that might be required by the President to the format required for public disclosure statements.

Effective March 19, 1986, section 148 of Pub. Law No. 99-190 (December 19, 1985), 99 Stat. 1325, amended subsection 207(a) to give the President new authority to provide for a comprehensive financial reporting system for officers and employees of the executive branch. Prior to that enactment the President had not exercised his authority under section 207(a) of the Ethics in Government Act and, to date, the President has not exercised his authority under the new legislation.

In net effect, there has been no general requirement for executive branch employees to file confidential statements of employment and interests since January 1, 1979. For this reason we are unable to conclude that the Department of Labor's failure to obtain confidential disclosure statements from task force members in advance of the initial task force meeting violates any federal law or regulation. Had the confidential disclosure system not been superseded, the Department would have been subject to the requirement of 5 C.F.R. § 735.412(d) to obtain a confidential statement of employment and financial interests prior to the appointment of any special Government employee.

As a matter distinct from the question of financial disclosure, we note that the Department of Labor did not even determine that all members of the Task Force on Terminations were special Government employees until after the Task Force had held 9 of its 11 meetings. Its delay in making this determination and in addressing the conflict-of-interest issues that arise with special Government status is not in compliance with guidelines issued by OGE.

On July 9, 1982, the Director of OGE issued a memorandum to Heads of Executive Branch Departments and Agencies discussing the applicability of the conflict-of-interest statutes, 18 U.S.C. §§ 202-209 (1982), to members of advisory

committees, boards, commissions or the like.[1]/ As explained in that memorandum, the conflict-of-interest statutes apply only to those members who are special Government employees. Based on authoritative interpretations dating back to 1962, the memorandum draws a distinction between those members who serve in a representative capacity to speak for any recognizable group, such as industry or labor, and those who, because of their individual qualifications, serve in an independent capacity. Only the latter are employees subject to 18 U.S.C. §§ 202-209. Insofar as they serve for not more than 130 days during any period of 365 consecutive days, they are special Government employees within the meaning of 18 U.S.C. § 202(a) and they are subject to the less stringent limitations imposed by 18 U.S.C. §§ 203, 205 and 209.

The OGE memorandum sets forth guidance for determining whether members of a particular organization have the status of special Government employees. Where the members receive compensation for their services, they necessarily are special Government employees. In all other cases, the determination is one that turns on the organization's function and purpose. If the Government convenes it to obtain the views of non-governmental groups and if the members are called upon to function as spokespersons for those outside interests, they serve in a representative capacity, free of the constraints imposed by 18 U.S.C. §§ 202-209. If the individuals are called upon because of their expertise to offer their independent judgment to the organization's effort they serve as special Government employees.

The OGE memorandum contemplates that the agency sponsoring the organization will determine in advance of the members' entrance on duty whether they are to serve as employees or in a representative capacity. Advance determination as to their status enables the Government to enforce the applicable conflict-of-interest procedures, if any. Advance determination is also a matter of fairness to the individual members, who are entitled to know whether their service subjects them

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1/ While the Task Force on Terminations was not subject to the Federal Advisory Committee Act, its members clearly have a status equivalent to advisory committee members for purposes of the conflict-of-interest laws. Of course, four of its members were also members of an advisory committee--the Advisory Council on Employee Welfare and Pension Benefit Plans.

to any constraints in terms of their non-governmental interests and, in turn, whether their individual interests limit their ability to contribute to the organization's effort.

In the case of the Task Force on Terminations, all members were eventually determined to be special Government employees and, ultimately, all were called upon to file and did file financial disclosure statements on a confidential basis. In addition, they were asked to provide specific information concerning any outside activities they might have involving the Department of Labor or pension fund terminations. The determination that all were special Government employees was not made until April 1986, after the Task Force had held 9 of its 11 meetings. Of the 12 Task Force members, only 6 had filed financial disclosure statements in advance of that determination. The remaining six filed financial disclosure statements in advance of the 10th task force meeting on April 30, 1986.

Task Force records indicate that ethics officials within the Department of Labor attempted to resolve the status of Task Force members from as early as the first Task Force meeting on December 20, 1985. Because members of the Advisory Council on Employee Welfare and Pension Benefit Plans are compensated for their service, a determination was made that the four Task Force members who were also members of the Advisory Council had the status of special Government employees. This determination is reflected in letters dated February 13, 1986, addressed to those four members asking them to complete and furnish on a confidential basis specified schedules of the Form 278 used for public disclosure.

The records indicate that Department ethics officials also addressed, but were unable to resolve until later, the status of the other eight Task Force members. At the initial Task Force meeting on December 20, 1985, the Assistant Secretary for Pension and Welfare Benefits explained that he expected a decision from OGE as to the status of Task Force members who were not also members of the Advisory Council. The Assistant Secretary, on January 6, 1986, sent a memorandum to the Associate Solicitor for Legislation and Legal Counsel identifying five of these eight Task Force members with specific constituencies and indicating that they acted as representatives of these interests. This memorandum was supplemented on March 21, 1986, with an additional memorandum

indicating that the other three Task Force members who were not also members of the Advisory Council served the Task Force as representatives of the general public.

Although the matter had not been finally resolved, the Assistant Secretary, on February 13, 1986, sent a memorandum to the eight Task Force members indicating that members of the Task Force "deemed to be federal employees are subject to the conflict of interest laws, including 18 U.S.C. 208." The memorandum asked each to complete specified schedules of the Form 278 and to furnish that information on a confidential basis for the purpose of facilitating conflict-of-interest waiver determinations. That request met with varying responses; several of the Task Force members indicated their belief that they were not serving as employees and for that reason declined to complete the form.

With the issue still unresolved, the Assistant Secretary, on March 28, 1986, sent a letter to the Director of OGE requesting advice as to the status of the eight Task Force members who did not serve on the Advisory Council. Informal contacts between Department of Labor ethics officials and an OGE attorney indicated that the matter could not be readily resolved on the basis of the information which had been furnished by the Department of Labor. In early April, the Department of Labor withdrew its request and reported to OGE that it had decided to resolve the issue by affirmatively appointing the eight Task Force members as special Government employees. Personnel actions appointing the eight Task Force members as employees were processed, to be effective April 30, 1986. The individuals were advised by memorandum dated April 14, 1986, that this action would be taken. Each was asked to complete the confidential disclosure statement designed for use of special Government employees and to provide additional information concerning his representational activities before the Department of Labor and his involvement in pension plan terminations. On April 28, 1986, in advance of the final two Task Force meetings, subsection 208(b)(1) waivers were executed in favor of all 12 Task Force members.[2/]

In failing to determine the status of the Task Force members in advance of their service, we believe the Department of Labor failed to comply with the July 9, 1982 guidelines issued

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2/ These waivers are discussed in response to question 7.

by OGE. The difficulty encountered by Department ethics officials in making this determination may have been related to that portion of the OGE guidelines which contemplates that the status of committee members will be ascertained from the "language used in the enabling legislation, Executive Order, committee charter or other pertinent document to describe the role of the committee member." In the case of the Task Force on Terminations, there was no specific enabling authority and no charter; individual members received no formal document or letter inviting their participation on the Task Force.

We believe, however, that the OGE memorandum provides guidance for agencies in dealing with this type of situation. The memorandum concludes by stating:

> "* * * The choices are two: (1) the use of words to command the members to exercise individual and independent judgment, or (2) the use of words to characterize them as the representatives of individuals or entities outside the Government who have an interest in the subject matter assigned to the committee. Where the language does not articulate a deliberate choice, it is fair to conclude that a member is an employee of the United States, for that is the usual status of someone appointed by an officer or agency of the Government to serve it. * * *"

In the case of the Task Force on Terminations, we believe that the presumption in favor of an employment relationship would have been a fair one, as evidenced by the Department of Labor's belated determination to formally appoint the eight Task Force members who did not concurrently serve on the Advisory Council.

QUESTION 6: Did the Department's failure to obtain financial disclosure forms from the Task Force members prior to the first meeting of the Task Force create an appearance of impropriety based on the requirements set forth in 29 C.F.R. § 0.735-4?

ANSWER: As explained in response to the fourth question, the provisions of 29 C.F.R. § 0.735-4 (1985) are addressed to the conduct of individual Department of Labor employees and not to the actions or inactions of the Department of Labor in

carrying out its responsibilities. In any event, it appears that the delay in obtaining the financial information resulted from genuine doubts over the status of the Task Force members. As noted previously, all requested financial information was eventually filed, albeit belatedly.

QUESTION 7: Did the Department of Labor violate applicable federal law or regulations when it granted waivers to the members of the Task Force on Terminations?

ANSWER: No. Authority to waive the conflict-of-interest restrictions imposed by 18 U.S.C. § 208(a) is contained in subsection 208(b). The decision to grant individual waivers under subsection 208(b)(1) is specifically committed to the discretion of appointing officials. The waivers executed by the Secretary of Labor in favor of each of the 12 Task Force members appear to have been granted in accordance with applicable legal standards.

ANALYSIS: Regular as well as special Government employees are subject to the conflict-of-interest restrictions contained in 18 U.S.C. § 208(a), which prohibit an employee's personal and substantial participation in a particular matter in which he or other specified persons or organizations have a financial interest. This conflict-of-interest prohibition extends to matters affecting the financial interests of any organization in which the employee is serving as an officer, director, trustee, partner, or employee. Subsection 208(b)(1) of the statute contains specific authority to waive the application of subsection 208(a) in favor of an individual employee who:

> "* * * first advises the Government official responsible for appointment to his position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official 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 * * *."

Individual exemptions granted under this authority are commonly referred to as "208(b)(1) waivers."

Because 18 U.S.C. § 208 is a criminal statute, its interpretation is a matter within the authority of the Department of Justice. Under specific delegation from that Department, OGE has authority to render advisory opinions interpreting this and other provisions of the conflict-of-interest statutes. While there are no regulations or formal guidelines governing the granting of waivers, both the Justice Department's Office of Legal Counsel and OGE have issued opinions on this subject.

In 1978, the Office of Legal Counsel rendered an opinion clarifying the application of 18 U.S.C. § 208 to members of advisory bodies who participate in deliberations having general applicability. 2 Op. Off. Legal Counsel 152 (1978). That opinion took note of the fact that members of advisory groups are often specifically chosen because of an expertise that results from their affiliation with particular organizations, firms, or groups having a general interest in the very matter before the advisory group. As opposed to disqualifying an individual member from participation in the group's deliberations, the opinion explains that it may be appropriate to grant an individual waiver under 18 U.S.C. § 208(b)(1) if a determination can be made that the individual's interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from him. The opinion provides the following guidance for exercising the waiver authority:

> "The responsibility for issuing exemptions under § 208(b)(1) lies with the Agency concerned. We should stress, however, that § 208(b)(1) contemplates a close scrutiny of each special Government employee's outside affiliation to determine whether an affiliation may properly be deemed unlikely to affect the integrity of service as an advisory committee member. It may also be appropriate in certain cases to tailor the exemption in a way that permits the employee to participate in general policy matters but not in those proceedings which more narrowly affect the organization or firm with which he is affiliated. While the

> ultimate result of utilizing the exemption procedure in this manner to facilitate participation in general policy matters may be the same as if § 208(a) were construed to be wholly inapplicable in such a setting, this does not mean that granting an exemption should be viewed as a mere formality or an empty exercise. * * *." 2 Op. Off. Legal Counsel at 157.

The opinion specifically sanctions the use of "blanket" waivers covering a given financial interest where the appointing official concludes that the interest will not be so substantial as to affect the integrity of the employee's services in whatever context it arises.

The Office of Legal Counsel more particularly addressed the waiver standard of 18 U.S.C. § 208(b)(1) in an unpublished memorandum addressed to the General Counsel of the Department of Defense dated January 19, 1983. Focusing on the necessary determination that the disqualifying interest not be so substantial as to affect the integrity of the individual's service, the Office of Legal Counsel interpreted this standard as contemplating two lines of inquiry--one addressed to the magnitude and nature of the individual's financial interest and the other addressed to the nature and significance of the services he is called upon to provide. The memorandum counsels against reliance on nonstatutory factors such as the individual's reputation for personal integrity. It concludes, nevertheless, on the following note of deference to agency waiver determinations:

> "In the end, waiver decisions are committed to the judgment of the appointing official. While the statutory standard should guide the exercise of that discretion, Congress has clearly left that ultimate decision in the hands of the appointing official. It is the responsibility of that official to exercise his considerable discretion soundly and in good faith, after a careful and thorough consideration of all of the pertinent facts. We are not in a position to advise you about the pertinent facts or about the relative weight that should be assigned to the various factors discussed above. We hope this opinion will assist the decision-maker in his task, but we do not

intend for it to imply any judgment on our part concerning the proper direction of that decision."

On April 28, 1986, the Secretary of Labor executed 208(b)(1) waivers for all 12 members of the Task Force on Terminations. The waivers were issued only after each member had submitted the financial disclosure form requested by the Assistant Secretary for Pension and Welfare Benefits. On the forms the members disclosed their financial holdings as well as their employment interests. In addition, they responded to specific inquiries, including questions concerning their representational activities before the Department of Labor and their involvement in pension plan terminations. Some reported representational activities before the Department of Labor on matters unrelated to pension fund terminations; several indicated that their firms had clients with pension fund termination interests or activities; none indicated that his firm or employing organization had been or was likely to be involved in a termination.

After reviewing the individual interests disclosed and based in part on discussions with OGE, the Solicitor's Office prepared limited 208(b)(1) waivers for all 12 Task Force members. With two exceptions, the waivers contain recognition of the fact that the member's firm or employer may have interests in matters in which the Department of Labor is concerned or, in the case of certain professions, may have clients with interests in pension termination or other matters involving the Department's authorities. Each articulates the Secretary's finding that the personal interests disclosed are not so substantial as to be deemed likely to affect the integrity of the member's service on the Task Force on matters of "broad policy or general applicability" and grants a limited waiver as to those matters. Each specifies that the waiver does not extend to matters which may have a "direct, predictable and unique" effect on his financial interests or those of an organization he serves as partner, officer, director or employee.

Five of the waivers executed in favor of members who are affiliated with law firms or investment firms contain an additional caveat that the waiver does not apply to any of the member's official actions which directly and predictably affect any matter pending before or being handled by the member or his firm. In the case of the Task Force chairman,

that caveat is amplified by the statement that the waiver would not apply to actions affecting matters pending before the Department of Labor in which he or his firm may be involved. In the case of a member who serves as counsel to a life insurance company, the waiver document reflects the individual's agreement to refrain from representing that insurance company with respect to matters involving the tax treatment of pension funds for the duration of his service on the Task Force. Conditioned upon his compliance with that agreement, the waiver extends to his participation on the Task Force in relation to the tax treatment of pension funds.

All 12 waivers are executed in the format suggested by the Department of Justice as appropriate for members of advisory committees. They were executed only after consideration of the Task Force members' particular interests and only after analysis of the relationship of those interests to the member's role in the Task Force deliberations. The waivers appear to have been granted in accordance with the statutory standards set forth in 18 U.S.C. § 208(b)(1). We have no basis to question their propriety or to conclude that the Secretary of Labor violated applicable law in granting these waivers to members of the Task Force on Terminations.

QUESTION 8: Did the granting of such waivers create an appearance of impropriety based on the requirements set forth in 29 C.F.R. § 0.735-4?

ANSWER: No. For the reasons discussed in response to the previous question, there does not appear to be any impropriety in the Secretary of Labor's determination to grant limited waivers of the applicability of 18 U.S.C. § 208(a) to members of the Task Force on Terminations.