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January 30, 2009

Chairman David Skaggs  
Co-Chairman Porter Goss  
Office of Congressional Ethics  
Longworth House Office Building  
Room 1017  
Washington, D.C. 20515

Dear Chairman Skaggs and Co-Chairman Goss:

Thank you for giving the Campaign Legal Center the opportunity to express our views at the public meeting of the Office of Congressional Ethics (the “OCE”) on January 23, 2009 regarding the OCE’s Rules for the Conduct of Investigations and its Code of Conduct. To supplement our views expressed at that meeting, the Legal Center would like to submit the following written comments.

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The Legal Center has long advocated for the creation of an independent ethics enforcement process in Congress that would ensure the effective, impartial investigation of potential violations of congressional ethics rules and related statutes, as well as bringing greater transparency and credibility to the process.

H.Res. 895 (the “Resolution”)<sup>1</sup> established the OCE, and represented the culmination of an eleven-month effort by the Special Task Force on Ethics to review and reform the House ethics enforcement process. According to Rep. Michael E. Capuano, Chair of the Special Task Force, the goals of the Task Force were “to significantly increase transparency in the process through greater reporting on a timely basis and to provide for an independent element of [ethics] consideration by individuals who are not current Members of the House of Representatives.”<sup>2</sup> These goals were echoed by Speaker of the House Nancy Pelosi, who voiced support for the Task Force’s Resolution in a floor speech on March 3, 2008:

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<sup>1</sup> H.Res. 895, 110<sup>th</sup> Cong. (Mar. 11, 2008).

<sup>2</sup> Report of Representative Michael E. Capuano, *et al.* at 9 (December 2007).

Adopting the Capuano Task Force recommendations will provide the public—and the House—with the assurance that credible allegations of wrongdoing will be addressed by the Ethics Committee in a timely manner. It will also bring an additional measure of transparency to the ethics enforcement process.<sup>3</sup>

The Legal Center believes that any rules adopted by the OCE to implement the Resolution should aim to realize the House’s intent to enhance the transparency of the ethics process and to ensure that all credible allegations of ethics violations are independently, effectively and timely investigated. To this end, the Legal Center makes the following comments and recommendations regarding the OCE’s Rules for the Conduct of Investigations and Code of Conduct.

#### **I. Staff Review and Referral of Information Submitted by the Public**

The Legal Center is concerned that Rule 3 of the Rules for the Conduct of Investigations, as currently drafted, would perpetuate the lack of accountability and transparency that characterized investigations by the House Ethics Committee prior to passage of the Resolution.

First, because Rule 3 creates no duty or obligation on the part of staff to refer information submitted by the public to the Board, it does not ensure that the OCE will make the ethics investigation process more accountable and responsive to the public. Rule 3 provides that: “If the Staff finds that the information sufficiently alleges a violation within the jurisdiction of the Board, it may spend a reasonable amount of time gathering additional information with the authorization of the Chairman and Co-Chairman.” (Emphasis added.) This language appears to vest the staff with complete discretion regarding how to review information submitted to the OCE, and whether to refer such information to the Board for its review. This unbounded discretion would seem to replicate the “black hole” problem of the earlier ethics investigation process, wherein the public had no knowledge or confidence that the Committee was investigating the information or complaints it received.

The Legal Center recommends that Rule 3 be amended to mandate that the staff review and refer all information to the Board, and to establish a time frame for the staff’s initial review of submitted information. We, however, would also suggest creating a procedure by which information can be dismissed prior to referral to the full Board, if the staff recommends the immediate dismissal of the information and both the Chairman and Co-Chairman approve the staff’s recommendation. In such a case, the staff would not refer the information to the full Board, rather would only provide the Board with a report describing the allegations in the information and the grounds upon which the allegations were dismissed. Upon receipt of the report, any voting member of the Board could request further information about a dismissed matter or ask that the matter be referred in full. To establish this process, the Legal Center suggests that Rule 3 be amended to read:

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<sup>3</sup> Statement of Speaker Nancy Pelosi on House Passage of Major Ethics Reform (Mar. 11, 2008), *available at* <http://www.speaker.gov/newsroom/speeches?id=0114>.

If the Staff finds that the information sufficiently alleges a violation within the jurisdiction of the Board, it shall refer such information to the Board for review. Prior to referring such information to the Board, the Staff may gather additional information regarding the allegations ~~may spend a reasonable amount of time gathering additional information~~ with the authorization of the Chairman and Co-Chairman, for a period not to exceed 30 calendar days from the date of the receipt of the information. If the Staff determines it is necessary to seek such information from sources other than public ones, including from potential witnesses, it shall notify the subject of the allegations that it has received the allegations and is seeking information related to the Board's consideration of a preliminary review.

Within the period of initial Staff review, if the Staff determines that the violations alleged in the information are *de minimis* or wholly lacking a factual or legal basis, the Staff shall recommend the dismissal of the information to the Chairman and Co-Chairman. Notwithstanding any contrary provision of this Rule, if both the Chairman and Co-Chairman approve the Staff's recommendation of dismissal, the information shall not be referred to the Board. If information is dismissed prior to referral to the Board, the Staff shall report to the Board the allegations contained in the information, and the grounds upon which the information was dismissed. Any Board member may request further briefing regarding a dismissal, and/or may request that the information be referred in full.

Second, Rule 3 does not address the "transparency deficit" of the former ethics enforcement process, because it does not require the staff to notify an individual submitting information (the "complainant") that the OCE received and/or reviewed the submission. We believe this is contrary to the intent of the Resolution, which made clear that the OCE was intended to enhance both the efficacy and transparency of ethics investigations. The Legal Center urges the OCE to amend Rule 3 to require staff to provide timely notice to the complainant either upon receipt of the information or upon the referral of such information to the Board, provided that the complainant provided sufficient contact information in the submission.

In addition, the OCE should amend Rule 11(A)-(D) of the Rules for the Conduct of Investigations to require that notice be sent to the complainant if the Board declines to investigate the complainant's submission or terminates its investigation before it is referred to the Ethics Committee. Because the Resolution does not provide for any public disclosure unless and until the OCE refers an investigation to the Ethics Committee, the complainant will have no knowledge of the resolution of his or her submission if the OCE fails to provide such notice. The Legal Center suggests that the OCE amend Rule 11 to provide notice to the complainant if (1) the Board declines to initiate or terminates a preliminary review, or (2) the Board declines to initiate or terminates a second phase review.

## II. Recusal and Conflicts of Interest

The Legal Center is concerned that the OCE's Rules for the Conduct of Investigations and Code of Conduct require recusal only when a Board member or staff member determines that he or she is biased in fact, and not when their situation gives rise to the appearance of such bias.

Rule 6 of the Code of Conduct provides that: "A Board member who determines he or she cannot review a matter before the Board in an impartial manner must recuse him or herself." Similarly, Rule 5 of the Rules for the Conduct of Investigations provides that: "Office staff shall notify the Staff Director and shall immediately discontinue working on an investigation in the event s/he feels s/he cannot be impartial and unbiased." Neither rule appears to require recusal where there is merely an appearance of bias or partiality.

These rules therefore appear to run counter to the prevailing standard of judicial recusal in both federal and state law, which requires recusal not only when a judge has an actual personal bias or prejudice regarding a party, but also when the circumstances give rise to an appearance of such bias or prejudice.<sup>4</sup> The Legal Center urges the OCE to amend the relevant rules to conform to this standard and to make clear that recusal is required not only when Board and staff members are in fact biased or feel they cannot be impartial, but also when a reasonable person might question the impartiality of the Board or staff member.

We also recommend that the OCE amend Rule 6 of the Code of Conduct and Rule 5 of the Rules for the Conduct of Investigations to make clear that a contribution from a Board member or staff member to a political committee or other entity established or controlled by a subject of an investigation requires that member's recusal from the investigation.

Rule 6 provides that: "A Board member who has engaged in political activity on behalf of a subject, or a subject's opponent in an election, or intends to do so, shall disclose such activity to the Board and shall, if that activity compromises that Board member's ability to act in an impartial manner, recuse him or herself." The Legal Center believes that the meaning of "political activities" is unclear and suggests the Rule 6 be amended to read:

A Board member who has engaged in political activity on behalf of a subject, or a subject's opponent in an election, or intends to do so, shall disclose such activity to the Board. ~~and shall, if that activity compromises that Board member's ability to act in an impartial manner,~~ or gives rise to

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<sup>4</sup> The ABA Model Code of Judicial Conduct provides that: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned..." ABA MODEL CODE OF JUDICIAL CONDUCT (2007), Rule 2.11(A) (emphasis added), available at [http://www.abanet.org/judiciaethics/ABA\\_MCJC\\_approved.pdf](http://www.abanet.org/judiciaethics/ABA_MCJC_approved.pdf). This general standard has been incorporated into federal law and the judicial conduct codes of forty-seven states. James Sample, David Pozen and Michael Young, *Fair Courts: Setting Recusal Standards*, BRENNAN CENTER FOR JUSTICE, at 17, available at <http://www.ajs.org/ethics/pdfs/Brennancenterrecusalreport.pdf>.

the appearance that such Board member's impartiality is compromised, that Board member shall recuse him or herself. Political activities on behalf of a subject that shall require the recusal of a Board member include, but are not limited to:

- (1) a contribution to any authorized political committee of a subject, or to any other entity established, financed, maintained, or controlled by a subject, if such contribution was made within ten years from the date of the Board's first consideration of information concerning the subject; or
- (2) service as an officer, employee, agent, including a fundraising agent, or full-time volunteer of any committee or entity described in subsection (1).

Rule 5 of the Rules for the Conduct of Investigations is silent on whether staff members must recuse themselves due to political activity or campaign contributions. The Legal Center recommends that Rule 5 be amended in a manner consistent with the amendments suggested for Rule 6 of the Code of Conduct as set forth in the foregoing paragraph.

### **III. Referrals to Other Law Enforcement Authorities**

The Legal Center is troubled that Rule 13(c) of the Rules for the Conduct of Investigations appears to allow the OCE to refer information to other law enforcement authorities only in cases of "imminent harm or a threat to public safety."

It is unclear why the rules allow referral only when harm or public safety threats are imminent. The OCE was created to facilitate the investigation of potential violations of the ethics rules and related statutes, not to shield subjects of its investigations from the scrutiny of other law enforcement authorities. The Legal Center recommends that Rule 13 be amended to read:

The Staff, in consultation with the Chairman and Co-Chairman, may refer information to state and federal authorities if there is a reasonable basis to believe the information alleges a potential violation of a civil or criminal statute within the jurisdiction of the appropriate state and/or federal authority. ~~in the event that information indicates imminent harm or a threat to public safety.~~

### **IV. Selection of Alternates**

The Legal Center believes the OCE should consider clarifying the process by which alternates will be appointed to fill a vacant seat or replace a voting Board member due to recusal or disqualification.

In terms of the process for filling vacancies, the Resolution provides that: "If any vacancy occurs in the board, then the most senior alternate board member nominated by the same individual who nominated the member who left the board shall serve on the board until a

permanent replacement is selected.” H.Res. 895, §1(b)(1). However, Rule 2 of the Rules for the Conduct of Investigations does not address how partisan affiliation affects the process for filling vacancies, providing only that: “An alternate fills a voting Board member’s seat if: (1) a vacancy occurs, (2) a Board member disqualifies him or herself because of a financial conflict of interest; (3) a Board member recuses him or herself because of a lack of impartiality in a particular matter; or (4) if a voting Board member is otherwise unable to participate in Board business for good cause, as determined by the Chairman.”

The Legal Center recommends that the OCE amend Rule 2 to reflect the directive in the Resolution that a voting Board member be replaced by an alternate who shares his or her partisan affiliation. We recommend that Rule 2 be amended to read:

~~An alternate fills a voting Board member’s seat if:~~ If (1) a vacancy occurs, (2) a Board member disqualifies him or herself because of a financial conflict of interest, (3) a Board member recuses him or herself because of a lack of impartiality in a particular matter, or (4) if a voting Board member is otherwise unable to participate in Board business for good cause, as determined by the Chairman, the most senior alternate Board member nominated by the same individual who nominated the unavailable Board member shall fill the voting Board member’s seat until the voting Board member is again available or a permanent replacement is selected.

Further, the OCE should consider clarifying either in a rule or in its internal operating guidelines the procedure for calling alternates. For example, if a vacancy occurs, or a Board member disqualifies or recuses him or herself, does the alternate appointed by the same individual who nominated the voting Board member automatically fill the vacated seat, or does this process require the approval or involvement of the Chairman and/or Co-Chairman? If the alternate that shares the voting member’s partisan affiliation is not available, does the alternate affiliated with the other political party fill the vacated seat, or does the seat remain empty?

## **V. Transparency and Procedure of Board Meetings**

The Legal Center is also concerned that meetings of the OCE Board may lack the transparency that the drafters of the Resolution envisioned for the ethics enforcement process.

Rule 2 of the Rules for the Conduct of Investigations provides that: “The Board shall meet at the call of the Chairman or two Board members. The Board shall set a regular monthly meeting day.” (Citations omitted.) The Rule further provides that: “Any member of the Board may place additional items on the agenda. The Chairman shall establish the agenda for the meetings of the Board.” Rule 2 fails, however, to make clear the extent to which the agenda or minutes of Board meetings will be made public. To be sure, the Resolution directs the OCE to maintain some level of confidentiality with respect to the information it gathers in its investigations, *see* H.Res. 895, § 1(f), however the Legal Center believes this

need for confidentiality should be balanced against the procedural transparency that was indisputably one of the principle goals of the Resolution. We suggest that the OCE amend Rule 2 to provide for some measure of public disclosure regarding its meetings. For instance, the OCE could make public the agenda of its monthly meeting prior to the meeting, but could omit any specific information about investigations, *e.g.*, by redacting the names or identifying information of the subjects of investigations, or simply assigning case numbers to specific investigations.

The OCE should also consider clarifying either in a rule or its internal operating guidelines the procedures for its meetings. The following issues might be addressed: Does the Chairman have the authority to set the agenda, or can other Board members add items without his approval? Can Board members raise items in the meeting that they did not submit to the Chairman or add to the agenda in advance of the meeting? Will the OCE make public its agenda for any given meeting before such meeting or at some date after the meeting?

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We appreciate the opportunity to submit these comments.

Respectfully,

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