APPENDIX B

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July 10, 2013

Daniel A. Schwager, Esq.
Staff Director and Chief Counsel
Committee on Ethics
U.S. House of Representatives
1015 Longworth House Office Building
Washington, DC 20515

Dear Mr. Schwager:

We write on behalf of our client, Representative John Tierney. We appreciate the opportunity to respond to the report and findings transmitted by the Office of Congressional Ethics ("OCE"). The Committee on Ethics should dismiss the matter.

INTRODUCTION

In this case, a process that was intended "to increase transparency and accountability within the ethics process"[1] has instead resulted in a referral that misstates the relevant law, omits essential facts, and disregards its governing rules. It sheds no new light on a matter that has thoroughly been reviewed in other proceedings.

On the core question of whether Mrs. Tierney properly regarded the funds from her family as gifts—on which this matter entirely hinges—OCE plunges recklessly into federal tax law, a subject which regularly confounds even the most seasoned of practitioners. OCE had several opportunities to avoid its erroneous conclusion. It interviewed the experienced tax attorney who counseled Mrs. Tierney's brother, who had engaged in discussions and seen records evidencing her brother's intention to make gifts, and who voiced his opinion that Mrs. Tierney received gifts, not income. Representative Tierney also presented OCE with a memorandum from a former senior attorney of the Internal Revenue Service that reached the same conclusion.

Yet OCE disregarded this expert authority and relied on its own reading of the law. Its entire legal analysis is set forth in a lone footnote citing two cases, one of which reaches the opposite

[1] Report of the Members of the Special Task Force on Ethics Enforcement at 4 (Dec. 2007).

outcome on remarkably similar facts. OCE's analysis of central tax issues is no more credible than the "diagnosis" of a layperson who rejects the opinion of a renowned specialist and uses Google to conclude that he has a rare, incurable disease.

On the facts, OCE's "investigation" consisted almost entirely of reviewing court records that have been in the public domain for nearly two years. Yet OCE's findings consistently omit testimony and statements that support Representative Tierney's position. These omissions are so frequent, and often so close in proximity to the passages in the records cited, so as to raise serious questions about the review's care and impartiality.

Over the past four years, the Committee has repeatedly reviewed and dismissed referrals from OCE that were legally flawed and factually inaccurate. This referral is no exception. Besides clearly misunderstanding the tax laws and selectively presenting the facts, OCE never told Representative Tierney that it was considering any allegation about his taxes, nor about his 2010 personal financial disclosure statement. He received his first notice of these new allegations when OCE sent its report on June 13.

At bottom is the simple question of whether a Member of Congress must identify a spouse's family member as a source of spousal income when that family member gives money to the spouse. The law is clear: it presumes that the family member is not a reportable source of income. OCE's careless treatment of the facts, law and its own rules provides no reason to question the correctness of Representative Tierney's filings or tax returns.

DISCUSSION

I. With a Clear Lack of Understanding of Federal Tax Law, OCE Blunders Into an Erroneous Conclusion of Unreported Income

This matter must be dismissed unless the Ethics Committee can confidently conclude that OCE's understanding of the underlying tax law is correct. No one practicing tax law and familiar with the facts of this case could reach that conclusion. In a seventeen-page report, with nearly 400 pages of exhibits, the referral discusses the entire governing law in a lone footnote, citing two cases and no other authority.[2]

To understand the flimsy legal foundation upon which OCE's referral is constructed, one can start with *Lane v. United States,* one of the two cases on which OCE relies.[3] *Lane* supports Representative Tierney's position. It found that funds paid to a personal business secretary were gifts, not income. In *Lane,* the executor of a deceased taxpayer's estate sought a refund of gift

[2] OCE Findings ¶ 23 n. 6.
[3] 286 F.3d 723 (4th Cir. 2002).

taxes that, he said, were erroneously paid on compensation for services to the taxpayer's secretary over a period of five years.[4] The secretary had handled the deceased taxpayer's personal financial affairs, and received special training to do so.[5] There was no document establishing an employment or contractual relationship between them, and no other evidence of negotiation or exchange.[6] She had paid no taxes on nearly $800,000 in payments spanning five years.[7] However, there was evidence that the deceased taxpayer had regarded them as subject to the gift tax, "to his own financial detriment."[8]

The court in *Lane* upheld the secretary's treatment of the payments as gifts. The court noted the executor's attempts to get the secretary "to defend the payments by showing what she had done to deserve them, thereby twisting her words into an admission that she had 'earned' them."[9] But the court noted the circumstances supporting gift treatment: the family-like affection between the taxpayer and secretary, his longstanding practice of making substantial gifts to her and his family members, and the expressions of his intention to treat the payments as gifts, including his treatment of them as such for gift tax purposes.[10] The court noted: "Not every human interaction is animated by a desire to secure an advantage, obtain compensation for services or receive a *quid pro quo*."[11] *Lane* flatly supports Representative Tierney's position, as do other authorities, not cited by OCE, in which payments made out of affection were treated as gifts even when services were provided.[12]

To reach its conclusion, OCE not only had to ignore the clear impact of the very case it cited, but also the fact that the IRS presumes intra-family transfers to be gifts.[13] The reason for this presumption is not simply to avoid interjecting the IRS into family matters, but also to deter income shifting.[14] If Mrs. Tierney's brother had indeed been compensating her for business services, he would have had a strong incentive to treat the money as wages: he could have deducted them as business expenses and reduced his tax burden.[15] Yet he chose not to do so.

OCE's referral does not acknowledge or even try to overcome the normal presumption of gift treatment when family members provide funds to one another. Instead, it relies simply on

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[4] *See id.* at 725.
[5] *See id.* at 726.
[6] *See id.* at 726, 727.
[7] *See id.* at 726.
[8] *Id.* at 730.
[9] *Id.* at 727.
[10] *Id.* at 729-30.
[11] *Id.* at 733.
[12] *See, e.g., Kavoosi v. Commissioner.*, T.C. Memo. 1986-190 (U.S. Tax Ct.).
[13] *Harwood v. Commissioner,* 82 T.C. 239, 257-258 (1984).
[14] *Hendrickson v. Commissioner,* T.C. Memo. 1999-357 (U.S. Tax Ct.).
[15] *See Caledonian Record Publishing Co. v. U.S.,* 579 F. Supp. 449 (1983) (expenses recharacterized as gifts).

Duberstein v. United States,[16] without discussing how the case relates to the presumption. *Duberstein* stands for the proposition that the donor's intention is a critical consideration in determining whether a payment is a gift.[17] The record is replete with evidence of Mrs. Tierney's brother's intention to make a gift. For reasons unexplained in the report, OCE treats his intention as irrelevant but nevertheless cites *Duberstein* as settling the legal question. This disregard for the principal holding of *Duberstein* is simply inexplicable. The weight given to the donor's intention and the presumption that intra-family transfers are gifts continue to be guiding principles of IRS review but are ignored in the OCE referral.

Finally, the *Internal Revenue Manual* shows that OCE's citation of the general tax evasion statute, 26 U.S.C. § 7201, is not "relevant law" in this matter.[18] As the manual shows, the U.S. income tax system is one of taxpayer self-assessment. The taxpayer's duty is to employ ordinary business care in preparing a return and to pay the tax which the taxpayer determines is due. Only after a highly specified and procedurally detailed examination process may the IRS determine and notify a taxpayer of a tax deficiency.[19] The taxpayer can then challenge the determination both administratively and judicially. If the taxpayer is unsuccessful in sustaining his or her position, he is required to pay the tax owed and any accrued interest: he is not found to have "violated federal law." The question of tax evasion is raised only in extraordinary cases of deceit, subterfuge, camouflage, concealment, or some other effort to color or obscure events, or make things seem other than as they are.[20] But by OCE's logic, whenever a Member of Congress or a spouse takes a tax position that a political opponent disputes later, they face the potential charge that they "violated House rules and federal law" and may have willfully attempted to engage in tax evasion. This is not how the tax laws work. It is not how the rules of the House work.

OCE's referral presents several warning signs that should have directed it away from these clear errors:

First was the paucity of authority OCE cited, and what that authority actually said. The close parallels between the story of Jane Young, the deceased taxpayer's actual secretary in *Lane,* and Patrice Tierney, whom OCE described as her brother's "personal business secretary," should have been enough to deter altogether OCE's frivolous suggestion of tax evasion.

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[16] 363 U.S. 278 (1967).
[17] See *Yang v Commissioner,* T.C. Summ. Op. 2008-156 (U.S. Tax Ct.) (holding that donor's intention was the most critical consideration and relying on *Duberstein).*
[18] *See* H. Res. 895, 110th Cong. § 1(c)(2)(C)(i)(II)(dd).
[19] Internal Revenue Manual, http://www.irs.gov/irm/
[20] http://www.irs.gov/irm/part25/irm_25-001-001.html

Second was the testimony provided by the tax attorney consulted by Mrs. Tierney's brother.[21] He gave evidence that Mrs. Tierney's brother intended to make gifts to her: that the brother said "he wanted to give a gift to Mrs. Tierney,"[22] that they specifically discussed the gift tax rules,[23] and that his QuickBooks records identified the funds provided as "gifts for Patrice."[24] The attorney said that he believed the funds were gifts, only then to be challenged by OCE on the extent of his direct knowledge and his recollection of the *Duberstein* case.[25]

Third was a memorandum provided by Representative Tierney to OCE that was prepared by D. Sean McMahon, a former Senior Attorney in the IRS's Office of Chief Counsel and former Special Assistant United States Attorney who handled tax cases on behalf of the IRS. Written to respond to identical charges that were advanced during Representative Tierney's 2012 re-election campaign, the memorandum outlined the presumption that intra-family transfers are gifts, carefully distinguished the *Duberstein* case, and concluded from a review of the law and the same court records available to OCE that "the transfers made to Mrs. Tierney by her family are clearly gifts."[26] OCE neither acknowledged nor engaged Mr. McMahon's legal arguments. In an apparent reference to *Duberstein,* the findings say simply: "The Board notes that the legal opinion of the counsel for the campaign committee conflicts with U.S. Supreme Court precedent."[27]

Thus, OCE's referral hinges exclusively on an erroneous legal judgment that Mrs. Tierney unreasonably and wrongly treated money received from her brother as a gift while she was caring for their mother and her nieces and nephews, and assisting her absent brother in managing his personal banking account. Not only was it reasonable for her to take that tax position; it was consistent with the advice received from tax professionals, with the expert advice provided to the OCE in this matter, and even with the cases OCE itself cited. To commence a review based on OCE's inexpert, snap judgment would make the Committee on Ethics a *de facto* tax court, exposing Representative Tierney and future Members to unfounded, scurrilous charges. The Committee should summarily reject OCE's unfounded conclusion regarding the tax laws.

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[21] *See* OCE Exh. 7.
[22] *See id.* ¶ 21.
[23] *See id.* ¶¶ 21-22.
[24] *See id.* ¶ 20.
[25] *See id.* ¶¶ 24-26.
[26] To assist the Committee, we have provided a copy of Mr. McMahon's memorandum with this response. *See* Exhibit A.
[27] *See* OCE Findings ¶ 79 n.92.

II. OCE Consistently Omits Mention of the Facts That Support Representative Tierney's Reports and Returns

Only a selective and erroneous use of the facts permits OCE to claim that Mrs. Tierney should have treated the money received from her family as income. All of the facts have been in the public domain for years. They were a source of dispute most recently in Representative Tierney's 2012 campaign. Mrs. Tierney's interactions with her family were fully explored in separate legal proceedings involving Mrs. Tierney and her other brother, Danny Eremian. OCE draws almost entirely from these proceedings in its review. Except for two witness interviews, two news articles, and documents voluntarily produced or publicly filed by Representative Tierney, the court documents, transcripts and exhibits from these proceedings were all that OCE relied upon.

The court records show that Mrs. Tierney received gifts, not income. First, the judge in the case involving Mrs. Tierney said flatly: "she's not a tax evader."[28] He said further that Representative Tierney "is not implicated in this in any way, shape or form..."[29] And, far from contending that she received taxable income from her brother, the government asserted the opposite at the trial in which she testified, saying that her brother had structured the payments to avoid gift tax liability.

None of this is even mentioned in OCE's seventeen pages of written findings. Moreover, a careful review of the findings shows a consistent pattern: OCE quotes a selected passage from a court document to advance its conclusion, only to have it undercut by other passages that OCE never mentions, which occur in the same document. This happens often enough, with the exculpatory language close enough to the quoted passage, so as to raise serious questions about the findings' care and impartiality.

For example, OCE cites "a statement by the government during the sentencing proceeding of Mrs. Tierney's trial [sic]" that "she acted as her brother's personal business secretary."[30] But OCE fails to mention what the judge said in that same proceeding: "I don't downplay for a moment the truly humane and wonderful things you've done, out of love, not only for those who are closest to you but also for others in the community. And I am satisfied that that comes not from any position or public notoriety. I am satisfied that comes from the heart."[31]

In that same vein, OCE cites trial testimony and exhibits to suggest that Mrs. Tierney "received between $39,800 to $122,497 in direct payments from her brother" that should have been treated

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[28] OCE Exh. 4, at 13-1064_0175.
[29] *Id.* at 13-1064_0174.
[30] OCE Findings ¶ 32. The reference to "Mrs. Tierney's trial" is yet another mistake in OCE's referral. As the exhibits to the findings show, there was no trial in Mrs. Tierney's case; she instead waived indictment and accepted responsibility in a plea agreement with the government. *See* OCE Exh. 1, at 13-1064_0002, 0012.
[31] OCE Exh. 4, at 13-1064_0190.

as income.[32] But OCE fails to mention that, on the ensuing pages of that very same transcript, the government repeatedly referred to those amounts as "gifts," and tried to establish that her brother arranged the payments to "come under the threshold of the gift tax return" and "avoid the filing of a gift tax return..."[33] It was after this line of questioning that the judge said, "If you believe it's a gift. I mean, I'm not getting into that one," which OCE cites in paragraph 58 of its findings.[34]

From Mrs. Tierney's sentencing hearing, OCE cites a statement by her attorney that "her brother's bank account paid for her monthly car lease and her mobile phone."[35] But here is what the attorney actually said:

> In the course of that she was also taking care of her ailing elderly mother who I now think is 80 years old. It is true that her brother gave some, ***gave her some gifts***, including paying, I think it was $250 a month for her VW Beetle car auto lease. That's the auto lease. And did pay, if you will, for the cell phone which was part of a family plan that she had with the nieces and nephews. ***So these were, these were gifts from her brother.*** Her brother was by and large paying the bills for the, for the nieces and nephews, and this was part of his, ***part of the gifts that he was giving not only to Mrs. Tierney but to his mother.***[36]

OCE then cites Mrs. Tierney herself as saying that she received checks from her mother as "a way to compensate me for all that I did for her."[37] But OCE omits the next two sentences: "Q. Your mother has to pay you to help her out? A. No, she doesn't have to pay me."[38] And it omits another exchange four pages later: "Q. Well, okay. Did you do work? Were you compensated as an employee? A. No."[39]

There is one especially critical omission from OCE's findings. In the judicial proceedings involving Mrs. Tierney and her brothers, the government would have had every incentive to determine that Mrs. Tierney received income, if indeed that had been the case. But, with access to the same records that OCE had, it never suggested that the general federal tax evasion statute at 26 U.S.C. § 1701 pertained to Mrs. Tierney at all, let alone Representative Tierney. OCE cites this statute once and then abandons it, its prejudicial effect accomplished. But the judge in Mrs.

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[32] OCE Findings ¶ 49 (citing OCE Exh. 2, at 13-1064_0062-63).
[33] OCE Exh. 2, at 13-1064_0066.
[34] *Id.* at 13-1064_0071.
[35] OCE Findings ¶ 50 (citing OCE Exh. 4, at 13-1064_0185).
[36] OCE Exh. 4, at 13-1064_0185 (emphasis added).
[37] OCE Findings ¶53 (citing OCE Exh. 2, at 13-1064_0060).
[38] OCE Exh. 2, at 13-1064_0060.
[39] OCE Exh. 2, at 13-1064_0064.

Tierney's case was more straightforward than that. Of Mrs. Tierney, he said: "she's not a tax evader."[40] Of Representative Tierney, the judge said he "is not implicated in this in any way, shape or form."[41]

III. OCE's Review Is Marred By Repeated Violations of Its Governing Resolution

A. OCE withheld the true scope of its review

Under the OCE Resolution, Members have the right to know and confront the allegations against them. To commence a preliminary review, OCE must find a reasonable basis to believe an "allegation" against a Member, and must disclose that allegation to the Member in writing.[42] It may only authorize a second-phase review if it finds probable cause that the alleged violation occurred, and it may then only refer the matter to the Ethics Committee if there is substantial reason to believe that same allegation. While OCE's rules claim the authority to "address any potential violations within its jurisdiction that are discovered in the course of a review," the OCE Resolution contains no such provision.[43] In any event, neither the OCE Resolution nor the OCE rules can properly be read to allow OCE to reframe an initial, defective allegation in a way that deprives the subject of an opportunity to respond to new and more serious allegations.

Yet this is exactly what OCE has done here. The allegation that OCE presented to the Committee on Ethics is not the same one that it presented to Representative Tierney. When OCE first informed Representative Tierney of its review on January 29, it told him it was reviewing the following allegation:

> From 2007 to 2009, Representative John F. Tierney's wife allegedly received monthly payments from her brother for various services that she provided to him, including managing his bank account. The payments may have been earned income, which were not included in Representative Tierney's financial disclosure statements.
>
> If Representative Tierney failed to disclose earned income that his spouse received, he may have violated House Rule 26 and the Ethics in Government Act.

This was the allegation to which Representative Tierney responded. There was no allegation that he violated federal tax law and certainly no claim that his conduct implicated the tax laws. No facts have ever been introduced in this matter that would support such a finding, and he certainly was never given the opportunity to respond to any such claim. He produced all of the documents OCE requested of him, and he voluntarily produced his tax returns for 2007, 2008 and 2009—the

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[40] OCE Exh. 4, at 13-1064_0174.
[41] *Id.* at 13-1064_0175.
[42] H. Res. 895, 110th Cong. § 1(c)(1)(A); Office of Cong. Ethics R. 7(A).
[43] OCE R. 3(E).

years covered by the allegation.[44] Yet it soon became clear that OCE was straying well beyond what it informed Representative Tierney it was investigating. First, OCE asked Mrs. Tierney to submit to the equivalent of an IRS audit, seeking copies of her and her family's bank statements for a time period beyond the scope of the allegation. She was also asked to submit to an interview, even though she was unable to do so because of a recent head trauma she had sustained in an automobile accident. She continues to be treated for these injuries. She recently underwent an MRI, and receives regular neurological therapy and physical therapy.

Second, even after Representative Tierney timely provided OCE with a comprehensive legal analysis, showing why the allegation was baseless, OCE proceeded to second-phase review without explanation. His counsel informed OCE that the Representative would not agree to an interview only after OCE refused to explain the discrepancy between the allegation as presented and the information sought, would not explain how the underlying law supported the allegation, rejected an invitation to provide further legal analysis, and declined to consider less burdensome means of seeking any genuinely needed information.[45]

Representative Tierney appeared personally before the OCE Board to present his position on the matter, and to explain his concerns about the review, only to be rebuffed.[46] On June 13, OCE gave him its report, telling him for the first time that it had considered allegations not simply about his 2007, 2008 and 2009 financial disclosure statements, but about his 2010 statements also, and about his personal tax returns as well.

OCE can no more claim that it "discovered" new information in the course of its review, than a latter-day Columbus can claim that he discovered America. For years now, the matters involving Mrs. Tierney and her family have been the subject of partisan political attacks, court proceedings and media discussions. OCE was well aware of this when it began the review. There is no reason whatsoever why OCE could not have disclosed the review's true scope to the Representative from the beginning, as it was required to do. That it chose to do otherwise not only runs afoul of its governing resolution but manifests a desire to reach a conclusion based not on the law and facts but on a predetermined outcome.

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[44] OCE says that "Representative Tierney did not provide the OCE with his Calendar Year 2010 tax return." OCE Findings ¶ 74 n.90. While OCE sought a wide swath of personal financial information from Mrs. Tierney, it never sought tax returns from Representative Tierney, and never told him his filings covering 2010 were at issue in its review.

[45] *See, e.g.*, OCE R. 4(D) (authorizing the use of interrogatories).

[46] *See* OCE Findings ¶ 79.

B. The OCE findings are replete with prohibited and false conclusions about the validity of the allegations

OCE's authorizing resolution states that OCE Findings shall not include "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 . . ."[47] Despite this prohibition, OCE reached a clear, if erroneous legal conclusion about the nature of payments Mrs. Tierney received from her brother—a conclusion upon which OCE entirely, and improperly, based its referral.

The Ethics Committee has previously admonished OCE for injecting similar conclusions into its findings. In the Graves matter, the Committee noted that "OCE's findings improperly make conclusions regarding the truth of statements made by cooperating witnesses."[48] The Committee further noted that OCE exacerbated this error by "extrapolating" its prohibited conclusion into a conclusion regarding Representative Graves' guilt.[49] Here, as in the Graves matter, OCE has used its prohibited conclusion to form the basis of its referral. The referral depends entirely upon its unsupported legal conclusion regarding the appropriate application of tax law to the money Mrs. Tierney received from her brother.

OCE cannot avoid a prohibited conclusion simply by saying that Representative Tierney "may have" violated the law. It could have simply set forth the facts as the OCE Resolution requires, and let this Committee reach its own conclusions.[50] Instead, lacking any support for its referral in law, it chose instead to justify it through a one-sided document that repeatedly goes out of its way to place the Representative in the worst light possible.

C. OCE ignored its deadlines and kept this review open for almost half of 2013

Finally, under the authorizing resolution, OCE must transmit a written report to the Committee "upon the completion" of a second-phase review.[51] The legislative history makes clear that this must occur promptly. The Capuano Report characterized these timeline requirements as "critical," and noted that matters should spend "at most three months under consideration by the board of the OCE before being referred to the Standards Committee for resolution."[52]

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[47] H. Res. 895, 110th Cong. § 1(c)(2)(C)(ii)(II).
[48] *In the Matter of Representative Sam Graves*, Report of the Committee on Standards of Official Conduct, at 35 (Oct. 2009) (hereinafter "Graves Report").
[49] *Id.*
[50] *See* H. Res. 895, 110th Cong. § 1(c)(2)(C)(i)(II)(aa).
[51] H. Res. 895, 110th Cong. § 1(c)(2)(C).
[52] Report of the Members of the Special Task Force on Ethics Enforcement at 17 (Dec. 2007).

This matter has been before OCE for nearly five months, and it is not the first time OCE has failed to comply with these requirements.[53] In the Stark matter, OCE did not transmit its report until more than two months after the second-phase review ended.[54] The Committee noted that OCE's actions were in "contravention of [the resolution's] directive," and raised "continuing concerns with OCE's adherence to its authorizing resolution."[55] Similarly, in the Graves matter, the Committee found that OCE's second-phase review was scheduled to conclude on June 9.[56] Without voting to extend the deadline beforehand, OCE did not issue its report and findings until July 24. Accordingly, the Committee found that OCE's activities beyond the June termination date of the second-phase review were impermissible and ultra vires.[57]

Having opened this matter on January 28, OCE adopted its report on May 31, 2013, and referred this matter to the Committee on June 13, 2013. It cannot have been investigative demands that required OCE to take the additional time. It had five months to consider the testimony of its two witnesses, to review the court documents that had already long been on the public record, and to find the two cases on federal income tax law that it misread to reach its flawed legal conclusion. OCE took the time it wanted, regardless of what the task force or resolution says, and regardless of Representative Tierney's rights.

CONCLUSION

By displaying a basic misunderstanding of an area of law in which OCE has no expertise, by omitting facts from the written findings that undermine its conclusion, and by disregarding its own rules and those of the House, OCE's referral is so devoid of merit that it warrants summary dismissal by the Committee. We respectfully request that the Committee close this matter as soon as possible, thereby sparing the public, Representative Tierney and his wife the prejudicial effects of a deeply flawed review.

Very truly yours,

Brian G. Svoboda
Karl J. Sandstrom

Enclosure

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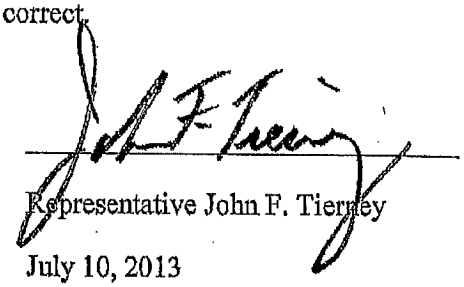
[53] *See* Graves Report, at 32-33; *In the Matter of Representative Fortney "Pete" Stark*, Report of the Committee on Standards of Official Conduct, at 2 and n. 8 (Jan. 29, 2010) (hereinafter "Stark Report").
[54] Stark Report at n. 8.
[55] *Id.*
[56] Graves Report, at 32-33.
[57] *Id.*

Declaration

I, Representative John F. Tierney, declare under penalty of perjury that the response and factual assertions contained in the attached letter dated July 10, 2013, relating to my response to the June 14, 2013, Committee on Ethics letter, are true and correct.

Signature: 

Name: Representative John F. Tierney

Date: July 10, 2013

Exhibit A

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D. SEAN MCMAHON
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OF COUNSEL
JERE J. O'SULLIVAN
* IRS Enrolled Agent

September 24, 2012

Mr. Michael Rezendes
The Boston Globe
135 Morrissey Blvd.
Boston, Massachusetts 02125

Re: Boston Globe Allegations Concerning Gifts

Dear Mr. Rezendes:

I have been asked by the John Tierney for Congress campaign to examine the allegation you are threatening to publish in the Boston Globe that Congressman Tierney's wife, Patrice, should have included payments made to her by her brother, Robert, and mother as income on her federal income tax returns filed jointly with her husband. Such an allegation is clearly very serious as it would suggest publicly both civil and criminal wrongoing. For the reasons discussed below, such an allegation is without merit based upon the facts and the publication of such a claim would be highly reckless.

By way of background, I am a former Senior Attorney with the Internal Revenue Service, Office of Chief Counsel. I am also a former Special Assistant United States Attorney for Massachusetts and New Hampshire where I was responsible for handling tax cases on behalf of the IRS. I have more than fifteen years of experience investigating, bringing and defending IRS tax matters for both the IRS and taxpayers. I hold an LL.M. in taxation. Due to the nature of my position with the IRS Office of Chief Counsel, I routinely brought and litigated cases and provided legal advice for the IRS concerning disputed tax issues.

To familiarize myself with this matter, I have reviewed the transcripts of Mrs. Tierney's sentencing hearing and her testimony at the trial of Todd Lyons and her brother Daniel Eremian. I have also read emails from you concerning your allegation that such transfers were not gifts and your claim that your position is supported by unidentified tax experts.

Your assertion that the payments to Patrice from family members were not gifts is incorrect. The test for determining the characterization of a transfer is highly fact-specific and focuses in material part on the transferor's intent. One of

the most significant facts considered in making that determination is whether the transfers were made between family members. Although the *Duberstein* and *Robertson* cases you reference correctly state the analysis involved in generally determining whether a transfer should be characterized as a gift, significantly neither case involved a transfer between family members.

As a matter of common sense and in recognition of IRS practice, legal treatises in the area have recognized that the *Duberstein* analysis is not applied literally to family transfer situations.

> **Other intrafamily transfers are also regularly treated as tax-free even though their excludability under the *Duberstein* criteria is arguable.** A promise to pay a student's college tuition and living expenses on condition that the recipient maintain a specified scholastic average or refrain from drinking or smoking may be stimulated by affection, but it also exacts a quid pro quo and imposes a moral—in some situations a legal—duty to make the payment if the condition is satisfied. Amounts paid by breadwinners to support their spouses and minor children are routinely excluded from the beneficiaries- gross income, but to the extent paid pursuant to legal compulsion, these amounts would not qualify as gifts if the Duberstein criteria were pushed to their logical extreme. Despite this, intrafamily transfers of this type can be properly viewed as excludable by a higher authority than the language of [Internal Revenue Code] § 102(a)—**a supposition, so obvious that it does not require explicit mention in the Internal Revenue Code, that Congress never intended to tax them.**

(emphasis added) Boris Bittker & Lawrence Lokken, *Federal Taxation of Income, Estates & Gifts*, par. 10.2.6 (2012).

Transfers between family members are legally presumed to be gifts. The presumption has been acknowledged by the United States Tax Court as well as tax treatises. "Intrafamily transfers are presumed to be gifts." *Dallas v. Commissioner*, T.C. Memo 2006-212. This presumption can be overcome by a showing that the family members involved conducted arms-length negotiations, which would indicate that the transfers were not gifts. See *Harwood v. Commissioner*, 82 TC 239 (1984) in which a family transaction structured by the family accountant with no arm's-length bargaining did not overcome the presumption that the transfers were gifts. In *Estate of Stone v. Commissioner*, TC Memo 2003-309 the transfers at issue were determined not to be gifts where each member of the family negotiated the transaction through his or her own independent counsel. No such evidence of arms-length negotiations exists here. Mrs. Tierney has been quite clear that her activities were done out of love and caring for her family members and appreciated as such, and this testimony is uncontradicted. There appears to be little or no evidence to overcome the

presumption that the intrafamily transfers to Mrs. Tierney were anything other than gifts.

In regard to your claim that unidentified tax experts support your allegation that the transfers to Mrs. Tierney from her family were not gifts, I note that any such opinion is only as good as the information you gave to such persons, and their experience as to how the IRS handles these matters. This is not an ivory tower exercise as to what case law might say in a vacuum. Because the determination of whether a transfer should be characterized as a gift is fact intensive, an opinion is not worth anything if it is not fully informed. Indeed, I fully recognize that the IRS agents and the prosecutors involved in the investigation of Mrs. Tierney and her brothers were far better situated than me to have made a determination as to whether the transfers to Mrs. Tierney violated the law given their unique power to investigate, learn the facts and make allegations, if there is a proper basis to do so. Here, those with the facts never made the allegation you seek to publish. In my opinion, ignoring this reality would be reckless on your part no matter what an unnamed lawyer or law professor might have told you.

I hope the analysis above helps you understand that for tax purposes the transfers made to Mrs. Tierney by her family are clearly gifts.

Sincerely,

D. Sean McMahon