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## Office of Government Ethics

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### Letter to a United States Senator dated April 22, 1997

This is in reply to your letter of March 26, 1997, concerning advice provided by the Office of Government Ethics (OGE) to [a] Department's Office of Inspector General in connection with the preparation of [a] report of investigation (the report). Your letter also asked that we evaluate the Inspector General's handling of financial disclosure issues and that we comment on the interpretation of certain of the conflict of interest laws and regulations that were at issue in the report.

In furtherance of its broad responsibilities relating to the prevention of conflicts of interest on the part of executive branch employees, OGE is responsible for "consulting, when requested, with agency ethics counselors and other responsible officials regarding the resolution of conflict of interest problems in individual cases." 5 U.S.C. app., § 402(b)(7). While our responsibilities in this area extend to consultations with Inspectors General concerning the interpretation of the conflict of interest laws in title 18, United States Code, and the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) at 5 C.F.R. part 2635, we are prohibited from making a finding that any criminal law has been or is being violated. 5 U.S.C. app., § 402(f)(5).

Several members of my staff were consulted by individuals from the Inspector General's office during the course of the investigation which led to the report. In order to respond to your questions, we obtained a copy of the report noted in your letter and relied on its summary of the facts. We recall providing advice concerning the interpretation of 18 U.S.C. § 208 and 5

C.F.R. part 2635. However, we do not recall having been consulted by the Inspector General's representatives concerning issues relating to financial disclosure requirements or the penalties for late filing, failure to file, and false filing at 5 U.S.C. app., § 104 and 18 U.S.C. § 1001. Moreover, since financial disclosure issues were not covered by the report, we are unable to respond to your inquiry concerning the Department's handling of issues relating to financial disclosure.

As already noted, members of my staff did consult with individuals at the Inspector General's office concerning the interpretation of 5 C.F.R. part 2635. More specifically, these consultations were focused primarily on section 2635.502 of the Standards of Conduct. Section 2635.502 establishes a mechanism for an employee to determine whether "appearances" require his disqualification from an assignment and to seek authorization from an "agency designee" before he does participate.

Section 2635.502 highlights certain personal or business relationships that are especially likely to raise issues of lack of impartiality. If any of these circumstances are present, then an employee has an obligation before acting in any "particular matter involving specific parties" to consider whether his participation would cause "a reasonable person with knowledge of the relevant facts to question his impartiality in the matter." Moreover, under section 2635.502(a), an employee is encouraged to use the process described in the section when circumstances other than those highlighted in the regulation are at issue.

When circumstances creating a potential appearance problem are brought to the attention of the agency designee by the employee or when the agency designee learns of those circumstances from other sources, he may make an independent determination as to whether a reasonable person with knowledge of the relevant facts would be likely to question the employee's

impartiality in the matter. 5 C.F.R. § 2635.502(c). When it is determined that a reasonable person would likely question the employee's impartiality, the agency designee may authorize an employee's participation in a matter notwithstanding that determination if the designee concludes, "in light of all relevant circumstances, that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations." 5 C.F.R. § 2635.502(d). Relevant circumstances include the effect that resolution of the matter would have upon the financial interests of the person involved in the relationship, the nature and importance of the employee's role in the matter, and the difficulty of reassigning the matter to another employee.

As explained when section 2635.502 was first proposed, the process established in that section provides employees "with a means to ensure that their conduct will not be found, as a matter of hindsight, to have been improper." 56 *Fed. Reg.* 33786 (July 23, 1991). Thus, section 2635.502 reflects OGE's concern that an employee not be placed in the position of being disciplined under the ethics rules for having failed to identify every imaginable appearance issue or for having improperly surmised the expectations of the "reasonable person." Of course, if an employee does not take the appearance of impartiality into consideration before acting in Government matters as described in section 2635.502, he may be subject to appropriate disciplinary measures. And, as we mentioned during our discussions with a representative from the Inspector General's office, a "noncareer" employee is ultimately answerable to the Government official responsible for his appointment.

The report accepts the assertion of the individual in question that she applied the "reasonable person" standard to her circumstances and concluded that disqualification was not warranted. The report also indicates that the Inspector

General's office concluded that a violation of 18 U.S.C. § 208 could not be established. Had that statute applied, she would have been required to avoid participating in the matter even at a time when the agency had no knowledge of the circumstances mandating her disqualification.

We recognize that some might find section 2635.502 of our Standards of Conduct troubling as applied in an individual case. On the other hand, we have been aware that "appearance of conflict" has been used as the weapon of choice in Washington for years. We developed these rules to afford some protection to the employee who, in good faith, takes appearances into consideration, but who decides on a course of conduct susceptible to second-guessing.

I trust this is responsive to your questions.

Sincerely,

Stephen D. Potts  
Director