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Letter to a Designated Agency Ethics Official
dated August 23, 2006

In response to your letter of August 17, 2006, I am writing to confirm this Office's interpretation of 18 U.S.C. § 208 as I described in our telephone discussion of August 15.

At the outset, I want to emphasize that the Office of Government Ethics (OGE) does not itself make findings that an individual employee has violated any criminal law. See 5 U.S.C. app. § 402(f)(5). Therefore, I will confine myself to a general discussion of OGE's interpretation of section 208 as it applies to agencies involved in the development of standards governing a particular industry or other discrete and identifiable class. See 5 C.F.R. § 2640.103(a)(1)(definition of "particular matter" includes policy making focused on a discrete and identifiable class of persons).

As I stated in my earlier conversation with you, OGE disagrees with the view that section 208 does not apply to an employee who participates in informal, preliminary discussions about possible specific changes to agency standards governing a particular industry. As I understand it, the thrust of your argument is that there is no "particular matter" in such scenarios until there is some kind of formal proposal or regulatory package pending in the agency for action. This is not OGE's interpretation, nor do we believe this interpretation would be consistent with the language and purpose of section 208.

Section 208, by its very terms, covers participation in certain preliminary stages, such as participation through "investigation" and the "rendering of advice." As the Office of Legal Counsel recently observed, section 208 covers participation in "intermediate stages in a larger proceeding." Memorandum of Steven G. Bradbury, Acting Assistant Attorney General, to Marilyn L. Glynn, General Counsel, OGE, January 11, 2006, at 11, <http://www.usdoj.gov/olc/11106nonprofitboards.pdf>. Even in the context of 18 U.S.C. § 207(a)—which uses the narrower phrase, "particular matter *involving specific parties*"—OGE has concluded that a matter may be covered prior to the receipt of any formal application or request from a private

entity, as long as there have been agency discussions about the matter. *E.g.*, OGE Informal Advisory Letters 99 x 23; 99 x 21; 90 x 3. The same analysis applies with all the more force to the broader language of section 208, which does not require that the particular matter involve parties.

It is well-understood that "[m]uch of the work with respect to a particular matter is accomplished before the matter reaches its final stage." 2 Op. O.L.C. 313, 315 (1978). The purpose of section 208 would be undermined if an employee with a financial conflict of interest could participate in a Government matter until the point at which the agency received or formulated a formal proposal. We see no reason why section 208 should not cover the crucial step of laying the groundwork for regulatory change focused on an industry, particularly where specific changes have already been discussed within the agency.

Therefore, as a general matter, OGE would not view preliminary, informal discussions with industry representatives about possible changes to industry-specific standards as falling outside the scope of section 208. I note the discussion in your letter of Example 2 following 5 C.F.R. § 2640.103(a)(1). Nothing in that Example affects OGE's interpretation that preliminary, informal discussions by agency officials with industry representatives about possible changes to standards for the industry can constitute personal and substantial participation in a particular matter, within the meaning of 18 U.S.C. § 208.

If you have any further questions concerning this matter, please contact me.

Sincerely,

Marilyn L. Glynn
General Counsel