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## Office of Government Ethics

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### Letter to an Alternate Designated Agency Ethics Official dated March 5, 1997

This is in reply to your letter of February 27, 1997, in which you request guidance from the Office of Government Ethics (OGE) concerning the propriety of a [Federal agency] Board member's participation in a pending agency rulemaking.<sup>1</sup> More specifically, your question is whether there is "a Standard of Conduct requirement" that the Board member be disqualified from participating in a[n upcoming] meeting relating to the rulemaking. The rulemaking concerns [citation deleted], a regulation specifically applicable to the [numerous entities] comprising the [industry]. Concerns at your agency relating to the Board member's proposed participation in the meeting stem from the fact that her Executive Assistant participated on an agency task force on [the regulation] at a time when he was pursuing private sector employment, in late 1996 and early 1997, with a trade association (or associations) affected by the rulemaking.

As you are aware, three senior members of my staff have had numerous discussions with representatives from the [agency's] Office of General Counsel and Office of Inspector General (OIG) since late January concerning a variety of issues arising as a result of the Executive Assistant's participation in the rulemaking and his contemporaneous search for employment.

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<sup>1</sup> The [agency] Board is composed of three members, one of whom is designated by the President as Chairman. Not more than two Board members may be members of the same political party. [Citation deleted.]

These discussions mainly focused on possible violations by the Executive Assistant of 18 U.S.C. § 208 or 5 C.F.R. part 2635, Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct), and on the accuracy of ethics advice received by the Executive Assistant in relation to his ethical obligations under those authorities. We also discussed the permissibility of the Executive Assistant's resumed participation in the rulemaking once he terminated his employment search with the trade association(s). Finally, we were also asked to discuss the Standards of Conduct in relation to the conduct of the Board member, including the permissibility of her future participation in the rulemaking. We understand from a representative of the [agency] OIG, and from your letter, that the OIG has completed its investigation into these matters and has made certain findings and recommendations.<sup>2</sup> It is in this context that you have asked OGE to provide guidance on the Standards of Conduct in relation to the Board member's proposed participation in the [upcoming] meeting. Since agency concerns about her participation apparently derive from her Executive Assistant's pursuit of employment, we turn first to his actions and applicable law.

Section 208 of title 18, United States Code, prohibits an executive branch employee from participating personally and substantially in any particular matter that would have a direct and predictable effect on the financial interests of a person or entity with whom he is "negotiating" for employment. Under subpart F of 5 C.F.R. part 2635, the disqualification requirement is triggered when an employee begins "seeking employment" as that term is defined in 5 C.F.R. § 2635.603. The term "seeking employment" encompasses "negotiations" as defined in 5 C.F.R.

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<sup>2</sup> While members of my staff have had several discussions with a representative from the OIG during the course of the OIG investigation, we have not reviewed the OIG's report.

§ 2635.603(b)(1)(i), but also extends to other conduct falling short of actual negotiations. For example, an employee commences seeking employment within the meaning of subpart F, and so triggers disqualification from a particular matter, when he dispatches an unsolicited resume to a person who will be affected directly and predictably by that matter.<sup>3</sup>

It can be difficult to determine whether a contact or contacts between an employee and a prospective employer amount to negotiations. However, since disqualification is triggered short of negotiations, it is ordinarily not necessary to make this determination unless an agency wishes to authorize an employee's participation in a particular matter notwithstanding his employment search. Thus, as explained in 5 C.F.R. § 2635.605(a), an employee who is engaged in negotiations "may participate in a particular matter that has a direct and predictable effect on the financial interests of a prospective employer only after receiving a written waiver issued under the authority of 18 U.S.C. 208(b)(1) or (b)(3)."<sup>4</sup> If the employee is not engaged in negotiations but is otherwise seeking employment with an employer, then the employee may participate in a particular matter that would have a direct and predictable effect on the financial interests of that employer "where the agency designee has authorized his participation in accordance with the standards set forth in § 2635.502(d)." [5 C.F.R. § 2634.605(b).] Section 2635.502(d) indicates that the agency designee may

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<sup>3</sup> The mere dispatch of an unsolicited resume or other employment proposal does not trigger disqualification from a regulation affecting the prospective employer only as a member of an industry or other discrete class. 5 C.F.R. § 2635.603(b)(1)(ii)(B).

<sup>4</sup> In the case of the [agency], the waiver authority resides with the Chairman of the Board, unless it has been delegated, *e.g.*, to the [agency's] Designated Agency Ethics Official.

authorize the employee to participate in a matter “based on a determination, made 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.” The section suggests several factors that the agency designee may consider when making this determination.<sup>5</sup>

We were first made aware of issues relating to the Executive Assistant’s contacts with the trade association(s) in late January in a conversation with the [agency’s] Designated Agency Ethics Official (and Deputy General Counsel). This initial discussion took place some weeks after the Designated Agency Ethics Official had advised the Executive Assistant that he could continue to be involved with [the regulation] even though he had discussed employment opportunities with the trade association(s).

In our initial conversation with your agency about this matter, we advised the Designated Agency Ethics Official that a general rulemaking affecting all [members of the industry] is a “particular matter” as that term is defined in 5 C.F.R. § 2635.402(b)(3).<sup>6</sup> In addition, we expressed our long-standing

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<sup>5</sup> As discussed in the preamble to the final rule promulgating 5 C.F.R. part 2635, OGE delegated to agencies the responsibility to designate the officials authorized to make the determinations described in section 2635.502 (and certain other determinations that may be required under other provisions of the Standards of Conduct). 57 *Fed. Reg.* 35008 (Aug. 7, 1992). Typically, an “agency designee” is an ethics official or the immediate supervisor of the employee concerned.

<sup>6</sup> The definition in section 2635.402(b)(3) provides, in part, that “[t]he term ‘particular matter’ encompasses only matters  
(continued...)

view that a rulemaking affecting the members of an industry *can* have a direct and predictable effect on the financial interests of an industry trade association. During this and subsequent discussions with you and your staff, we emphasized that this was essentially a factual determination. For example, it may be relatively easy to predict that the publication of a particular proposed rulemaking will prompt a trade association to expend resources to undertake a lobbying effort. On the other hand, we agreed that circumstances sometimes make a direct and predictable effect determination more problematic.<sup>7</sup> Finally, we also discussed the scope of the term “negotiating.”<sup>8</sup>

Your letter states that there is “a perception within the agency that the Board Member and Assistant are aligned with that segment of the industry most affected by [the regulation].” You add that the Board member and the Executive Assistant have a “close and confidential working relationship.” While the Executive Assistant was working on the task force, the Board member was aware that her subordinate had discussed

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<sup>6</sup>(...continued)

that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons.” *See also* 5 C.F.R. § 2640.103(a)(1).

<sup>7</sup> As we emphasized during our meeting with you on February 3, OGE has not consulted with the Department of Justice concerning our view that a regulation applicable to a class of entities can have a direct and predictable effect on the financial interests of a trade association that seeks to represent the interests of members of that class.

<sup>8</sup> It is our understanding that the matter of the Executive Assistant’s contacts with the trade association(s) was referred to the Department of Justice for possible prosecution under 18 U.S.C. § 208. It is also our understanding that the cognizant U.S. Attorney declined prosecution.

employment opportunities with the trade association(s). Apparently based on these facts, the OIG raised in its report the issue of whether the Board member “created or may have created an illegal appearance of violating the Standards of Conduct.” More specifically, it appears that the OIG was concerned that the Board member may have created the appearance that she was misusing her position or using her public office for the private gain of another, i.e., for the private gain of her Executive Assistant. However, as summarized in your letter, the OIG concluded that “a reasonable person would not find an appearance of loss of impartiality or misuse of position on the part of the Board Member.” You are now asking that OGE determine whether the Standards of Conduct require the Board member’s disqualification from the [upcoming] meeting.

Part 2635 implements the general ethical principles set forth in Executive Order 12674.<sup>9</sup> As described in the preamble to the rule that first proposed the Standards of Conduct --

Subpart E implements the ethical principles restated at § 2635.101(b)(8) of this proposed rule that an employee shall act impartially and not give preferential treatment to any private organization or individual. To the extent that an employee’s lack of impartiality in the performance of official duties might inure or appear to inure to his or her own benefit or to the benefit of certain other persons, the subpart implements the principles restated at § 2635.101(b)(7) and (b)(14) that an employee shall not use public office for private gain and shall

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<sup>9</sup> Executive Order 12674 of April 12, 1989, 3 C.F.R., p. 215, as modified by Executive Order 12731 of October 17, 1990, 3 C.F.R., 1990 Comp., p. 306.

endeavor to avoid even an appearance of violating these principles.<sup>10</sup>

Subpart G also provides guidance relating to the interpretation of these general principles. However, section 2635.702(d) of Subpart G cross-references section 2635.502 of Subpart E, indicating that --

To ensure that the performance of his official duties does not give rise to an appearance of use of public office for private gain or of giving preferential treatment, an employee whose duties would affect the financial interests of a friend, relative or person with whom he is affiliated in a nongovernmental capacity shall comply with any applicable requirements of § 2635.502.

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. As explained when section 2635.502 was first proposed, the process provides employees “with a means to ensure that their conduct will not be found, as a matter of hindsight, to have been improper.”<sup>11</sup> 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.” We have observed that “[m]atters such as general rulemaking and legislation tend to raise fewer concerns about an employee’s impartiality than do

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<sup>10</sup> 56 *Fed. Reg.* 33785 (Jul. 23, 1991).

<sup>11</sup> *Id.* at 33786.

matters to which there are specific parties . . . .”<sup>12</sup> Under section 2635.502(a)(2), an employee is encouraged to use the process described in Subpart E when circumstances other than those highlighted in the regulation are at issue. When applying the reasonable person standard, the employee may seek assistance from his supervisor, an agency ethics official, or the agency designee.

Based upon your letter and our conversations with [agency] staff, we are assuming that none of the circumstances highlighted in section 2635.502 are present here. More specifically, the [particular] rulemaking will not affect the financial interests of a member of the Board member’s household, nor is there any indication that the Board member knows that a person with whom she has a “covered relationship” is or represents a party to the matter.<sup>13</sup>

We gather that it has been suggested at your agency that either the Board member or the agency should have recognized that her participation in the [particular] rulemaking would -- because of her subordinate’s pending employment discussions with the trade association(s) -- cause a reasonable person with knowledge of the relevant facts to question the objectivity of her role in the rulemaking. The argument is that disqualification was warranted because a reasonable person would suspect that she would take action on the rulemaking that would assist her subordinate’s employment search. The belief is, apparently, that her past participation in those circumstances necessarily taints

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<sup>12</sup> *Id.*

<sup>13</sup> The term “covered relationship” is defined in section 2635.502(b)(1) and includes, for example, a person with whom the employee’s spouse, parent, or dependent child is seeking employment. Also, except in the unusual case, a rulemaking applicable to an industry does not involve “parties.”

her future participation in the rulemaking, at least as to her participation in the [upcoming] meeting.

Because the relevant facts will vary in each situation, OGE does not decide for an employee or an employee's agency whether a reasonable person would question the impartiality of the employee's participation in any given particular matter.<sup>14</sup> We will not deviate from that policy here. However, given the importance of the rulemaking to your agency and the uniqueness of the facts, we will offer a few comments that may be useful.

To my knowledge, no agency has before suggested to OGE that "appearances" necessarily throw into question the propriety of a supervisor's continued involvement with an assignment affecting a subordinate's prospective employer -- even where the two employees enjoy a close working relationship, share similar views concerning pending projects, and where the superior is generally supportive of the subordinate's decision to pursue employment with someone affected by those projects. Applied executive branchwide, an interpretation of the "appearance" standard that requires supervisors to be disqualified from projects in these circumstances would create obvious practical difficulties. The Standards of Conduct and 18 U.S.C. § 208 require a job seeker's disqualification in certain circumstances, in part, to guard against the appearance that the *job seeker* might perform his duties in a manner that would advance his personal interests. Certainly, as we considered the facts of this case, we found it very difficult to identify the causal link between the Executive Assistant's search for employment and the alleged

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<sup>14</sup> See, e.g., OGE Informal Advisory Letter 95 x 5.

appearance that the *Board member* used her public office for private gain.<sup>15</sup>

The question you posed is whether the Standards of Conduct require the Board member's future disqualification from the [particular] rulemaking. It is hoped that the foregoing discussion of past events and applicable law will facilitate your agency's decision.

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<sup>15</sup> We are not aware of any evidence that either the Board member or the Executive Assistant took any action on the rulemaking that was specifically intended to promote the Assistant's employment prospects.

Sincerely,

Stephen D. Potts  
Director