

OFFICE OF GOVERNMENT ETHICS

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**Letter to a Deputy Ethics Official
dated July 17, 1998**

This is in response to your letter of July 6, 1998, which requested clarification from the Office of Government Ethics (OGE) regarding the term "participate" as used in the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) at 5 C.F.R. §§ 2635.402(c), 2635.502(a), and 2635.604(a). The issue concerns whether all participation by an employee is prohibited in matters described by those sections (absent a waiver or authorization), or whether only personal and substantial participation is prohibited, consistent with 18 U.S.C. § 208(a).

Your letter notes that resolution of these questions is necessary in connection with guidance which you plan to issue for [your] Department concerning privatization matters. Further, your letter suggests that [an OGE attorney] recently advised a member of your staff that "participate" was intended to be modified by the phrase "personal and substantial" in each of the above-cited sections of the regulation. [The OGE attorney's] clear recollection, however, as well as his notes of that conversation and contemporaneous comments to me, indicate that only 5 C.F.R. § 2635.604 was discussed, not section 2635.402 or section 2635.502.

SUBPART F -- SEEKING OTHER EMPLOYMENT

In its present form, section 2635.604(a) of the Standards of Conduct regulation requires that, absent a waiver or authorization, an employee shall not participate in a particular matter that will have a direct and predictable effect on the financial interests of a prospective employer with whom he is seeking employment. As [the OGE attorney] indicated, OGE anticipates publishing a proposed amendatory regulation to codify our interpretation and intent that the restrictions in this section and throughout subpart F on seeking other employment apply only to an employee's personal and substantial participation.

Section 2635.604(a), as well as subpart F generally, implements portions of 18 U.S.C. § 208(a) and Executive Order 12674 jointly, as noted in section 2635.601. The criminal statute restricts employees' personal and substantial participation in particular matters wherein a person or organization with whom they are negotiating for prospective employment has a financial interest, while sections 101(h) and 101(j) of the Executive order direct employees to act impartially in official matters and not to engage in seeking or negotiating for outside employment that

conflicts with their official duties and responsibilities. Because these provisions of the statute and Executive order are so closely related, they were combined for implementation at subpart F, with a requirement generally for disqualification from participation in certain matters when an employee is "seeking other employment," a phrase that encompasses both negotiating and other specified lesser contacts.

It appears that the process of combining these provisions had the unintended effect of omitting the modifying phrase "personal and substantial" to qualify the term "participation." This is evident from the overview of subpart F at section 2635.601, where the criminal statute itself is referred to incompletely as requiring disqualification from "participation." As questions from ethics officials have arisen concerning this apparent discrepancy, OGE has advised that the requirements of 18 U.S.C. § 208 control, and the proposed regulatory amendments which we plan to publish are designed to clarify subpart F accordingly, to reflect that only personal and substantial participation is restricted thereby.

SUBPART D -- CONFLICTING FINANCIAL INTERESTS

Concerning subpart D of the Standards of Conduct regulation on conflicting financial interests, and 5 C.F.R. § 2635.402(c) in particular, we believe it is already evident that only personal and substantial participation is restricted thereunder, by reason of references to 18 U.S.C. § 208(a) as the sole underpinning. Section 2635.402(c) requires disqualification from participating in particular matters in which the employee or persons whose interests are imputed to him have a financial interest, if the particular matter will have a direct and predictable effect on those interests. Read in the entirety of section 2635.402, this provision unambiguously limits its disqualification requirement to an employee's personal and substantial participation.

The basic statutory prohibition is restated in section 2635.402(a), which specifically references 18 U.S.C. § 208(a) and its language on participating personally and substantially. Section 2635.402(b) defines the terms used therein, including the phrase "personal and substantial." Sections 2635.402(d) and 2635.402(e), both of which are referenced in section 2635.402(c), discuss waivers and divestitures, the absence of which would otherwise require disqualification because of 18 U.S.C. § 208(a). In this context, it is quite clear that the disqualification requirement of section 2635.402(c) applies only to personal and substantial participation by an employee.

SUBPART E -- IMPARTIALITY IN PERFORMING OFFICIAL DUTIES

In contrast, 5 C.F.R. § 2635.502(a) and subpart E of the Standards of Conduct regulation on impartiality were designed to transcend 18 U.S.C. § 208. As indicated in the preamble to the proposed rule at 56 Fed. Reg. 33785 (July 23, 1991), subpart E implements the ethical principles of Executive Order 12674 that employees shall act impartially and not give preferential treatment, that they shall not use public office for private gain, and that they shall endeavor to avoid even an appearance of violating these ethical principles. It is possible that, in certain factual circumstances to which this subpart applies, any participation, whether or not personal and substantial, could create such an appearance of impropriety.

Employees are admonished by section 2635.502(a) that they should not "participate" in a particular matter involving specific parties when they or their agency has determined that the circumstances would cause a reasonable person with knowledge of the relevant facts to question their impartiality in the matter. Whether this means that an employee should avoid any participation or only that which is personal and substantial will depend on each situation and the degree to which it is determined that a reasonable person with knowledge of the facts would question impartiality. While we believe that the appearance concern will most commonly arise where an employee participates personally and substantially, the purpose and text of subpart E clearly establish that it may apply to any participation.

CONCLUSION

I hope that the advice herein clarifies OGE's intent with respect to the use of the term "participate" in these three sections of the Standards of Conduct regulation.

Sincerely,

Marilyn L. Glynn
General Counsel