

Office of Government Ethics

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Memorandum dated April 26, 1999,
from Stephen D. Potts, Director,
to Designated Agency Ethics Officials
Regarding Recusal Obligation
and Screening Arrangements

This memorandum reviews the obligation of executive branch employees to refrain from participation in an official capacity in certain matters. It also provides some practical tips on advising employees about their recusals and the screening arrangements that may be used to help ensure that a commitment to recuse is carried out effectively.

As a legal term, "recuse" originally had application in the context of judges who were disqualified from acting in a particular case because of interest or prejudice.¹ In recent years, the term "recuse" has gained currency outside of the judiciary and has been used in connection with the prohibition on participation by executive branch employees in an official capacity in certain matters covered either by the criminal conflict of interest statute or by the administrative impartiality standard. The term is often used loosely and given a variety of meanings including the intention, commitment, decision, agreement, notice, or announcement that an employee will not participate in a certain Governmental matter. The term "recusal" has been used to mean the act of not participating in a matter as well as the written documentation of one's intent not to act.

As used in this memorandum, "recuse" means to refrain from participation in an official act. As used here, the term "recuse" does not mean that an employee is disqualified in the sense that the employee is incapacitated or deprived of the power or authority

¹ *Webster's Third New International Dictionary*, for example, states that "recuse" means "to disqualify (oneself) as a judge in a particular case" and defines "disqualify" as "to deprive of power, right or privilege." *Black's Law Dictionary*, which does not contain an entry for "recuse," defines "disqualify" as "to divest or deprive of qualifications; to incapacitate; to render ineligible or unfit; as, in speaking of the 'disqualification' of a judge by reason of his interest in the case" *The Oxford English Dictionary* defines "recuse" as "[to] object to (a judge) as prejudiced" and "to recuse to do something."

to take a particular action. What is required is that an employee avoid any official involvement in a covered matter.²

RECUSAL

Under 18 U.S.C. § 208, an employee is prohibited from participating personally and substantially in any particular matter that would have a direct and predictable effect upon an employee's own financial interest or upon the financial interests of other persons or organizations specifically designated in the statute. Adherence to the statute is accomplished by not participating in the particular matter.

Under 5 C.F.R. § 2635.502, an employee is required to consider whether the employee's impartiality would reasonably be questioned if the employee were to participate in a particular matter involving specific parties where persons, with certain personal or business relationships with the employee are involved. If the employee determines that a reasonable person would question the employee's impartiality, or if the agency determines that there is an appearance concern, then the employee should not participate in the matter unless he or she has informed the agency designee of the appearance question and received authorization from the agency. Otherwise an employee "shall not participate" in the matter as provided under 5 C.F.R. § 2635.502(e). Adherence to the regulation is accomplished by not participating in the particular matter involving specific parties.

Employees should utilize the section 2635.502 process whenever they are concerned that circumstances not specifically described in section 2635.502 would raise a question regarding their impartiality, as provided for in 5 C.F.R. § 2635.502(a)(2). For example, if an employee believes that a personal friendship, or a professional, social, political or other association not specifically treated as a covered relationship, may raise an appearance question, then the employee should use the section 2635.502 process to resolve the question. If the employee does use this process and does make a commitment to recuse, then that commitment is binding and must be observed. Although using the procedures provided for in 5 C.F.R. § 2635.502 is encouraged and recusal may be appropriate in certain situations not expressly identified in the regulation, employees should keep in mind that

² For those of you who counsel employees who may not fully appreciate the meaning of the term "recuse," here is something you could share with them. An employee should refrain, abstain, refuse, relinquish, forbear, forgo, hold off, keep away, give up, decline, desist, discontinue, end, cancel, close, quit, terminate, stop, halt, cease, drop, stay away, shun, avoid participation in the matter before him or her. In other words, just don't do it.

they have a responsibility to act on matters that are within the scope of their duties whenever they are not disqualified by conflicts or appearance concerns.

NOTIFICATION AND DOCUMENTATION

An employee who is prohibited from participating in a particular matter under 18 U.S.C. § 208, or who chooses or is directed not to participate in a particular matter involving specific parties under 5 C.F.R. § 2635.502, generally is not required to provide notice of the intention not to participate. Nevertheless, an employee who becomes aware of the need to recuse under either the conflicts statute or the appearance standard should notify the person responsible for the assignment so that the matter can be reassigned or the employee can be assigned elsewhere. The employee should provide appropriate oral or written notification to a supervisor or other appropriate official or to colleagues so that they will be aware of the matters from which he or she intends to recuse and possibly be of some assistance in screening the employee from those matters. See 5 C.F.R. §§ 2635.402(c)(1) and 2635.502(e)(1). If the employee is responsible for his or her own assignment, the employee should take the steps necessary to ensure that he or she does not participate in the matter.

In some cases, an employee may be required to document a commitment to recuse. A commitment to recuse that is within the scope of the ethics agreement provisions of 5 C.F.R. §§ 2634.801-2634.805 must be documented as provided under those regulations. In addition, an employee may be required by an agency ethics official or a supervisor to document a commitment to recuse. See 5 C.F.R. §§ 2635.402(c)(2) and 2635.502(e)(2). Of course, an employee may elect to document a commitment to recuse by providing written notice to a supervisor or other appropriate official. Documentation, whether or not required, provides greater protection both for the individual employee and the agency with regard to the scope and terms of the commitment to recuse.

IMPLEMENTATION

The obligation to recuse when necessary, and to ensure that such a recusal is observed, always remains the personal responsibility of the individual employee. Ethics officials, however, can and do provide useful advice to employees as to the nature of their obligation and as to the means of achieving effective implementation through arrangements to prevent covered matters from coming before an employee. Such arrangements are sometimes referred to as "screening arrangements."

Advice

A good implementation process within an agency begins with accurate and adequate advice to an employee regarding the scope of an employee's obligation to recuse. The following are some practical tips to consider whenever providing advice to employees in connection with their commitments to recuse.

- Employees should understand the kinds of matters in which they must not participate and those in which they should consider not participating. Employees often may not appreciate the meaning of technical terms such as "particular matter" or "particular matter involving specific parties" or the differences between the requirements of section 208 and section 2635.502. It is useful to provide relevant examples that will illustrate the kinds of matters that would be covered.

- Employees should understand when they must stay out of a particular matter. Involvement in preliminary discussions, in interim evaluations, in review or approval at intermediate levels, or in supervision of subordinates working on a matter may be personal and substantial participation requiring recusal. Employees should understand that many other degrees of participation short of primary responsibility or final approval could require recusal.

- Employees should be aware that not only their own interests, but also those of certain other persons, must be kept in mind when considering whether recusal is required. It is especially important that employees be aware of the interests of others that will disqualify them by statute from acting, as well as the business and personal relationships that are covered by the impartiality standard.

- Employees should understand that they are always personally responsible for ensuring that a commitment or a requirement to recuse is fulfilled. That responsibility does not shift to some other person who may be involved in the process such as a staff member or special assistant, an ethics official who provides advice, or an individual who screens matters from the employee.

- Employees who reduce to writing an intent to recuse and list specific interests that will trigger recusal should understand the continuing need to update that document whenever relevant changes occur such as a change in the conflicting interest, a change in duties or work assignments, a promotion or other change in position. Changes such as acquisition of a new asset or changes relating to a spouse's employment may also affect a recusal. For example, if a spouse has clients who have matters that may come before the employee and those clients are identified in a written recusal document, that list should be regularly updated. In some

situations, changes may be so significant that a commitment to recuse is no longer a viable remedy. For example, a corporation in which an employee owns stock may increase its activity with the Government to such an extent as to require frequent abstention from matters critical to the performance of the employee's duties. Some other remedial action may then be necessary to deal with the potential conflict.

- Employees should understand the continuing need to be alert to situations in which recusal may be necessary. Employees should not have the impression that recusal is accomplished simply because the necessary paperwork or documentation has been completed. This is particularly true where an agency as a matter of policy requires employees to document a general recusal in writing or an ethics agreement is required. Because these general recusals typically state that an employee will refrain from acting on any particular matter that might affect a present or future financial interest without identifying specific interests, they may not sufficiently alert the employee of the need to recuse in the future.

- Employees should be aware that the agency ethics official is available to provide advice whenever a question regarding recusal arises. Recusal questions often occur in connection with the filing of financial disclosure reports but may arise at any time.

Screening Arrangements

Ethics officials can provide practical suggestions to employees regarding screening arrangements to ensure that their commitments to recuse are fulfilled. The type of arrangement that is appropriate in any particular situation will differ depending upon a number of factors including the kind and number of matters that will come before the employee, the level of the employee's position, the nature of the employee's responsibilities, whether or not the employee is responsible for his or her own assignments, the size and organizational structure of the employee's office, and the process for controlling the flow of information, work assignments and contacts from outside persons. Ethics officials may wish to raise the following points with employees in connection with any discussion of screening arrangements.

- Recusal will mean that someone else must act in the employee's stead concerning any matters that could affect the disqualifying interest. Employees should understand the need to delegate authority, or where necessary request a superior to delegate authority, when that is required, to a person or persons who will work on matters that could affect interests specified in the recusal. Or the matter simply may be reassigned. If a matter is delegated to a subordinate, a substitute official superior for

that matter needs to be identified for that subordinate as well as the superior.

- Employees should understand the advantages of identifying an appropriate person or persons who can help with a screening arrangement. That person or those persons should be aware of the disqualifying interest. It is not necessary that the person or persons who handle the screening arrangement be ethics officials. For example, if an employee receives most written materials through or from one person and most requests for meetings through or from another person, both these persons can be helpful in screening.

- Employees should know who should be told about the recusal including immediate superiors and subordinates. In some cases, it may be appropriate for an employee to notify the entire staff of an office.

- Employees should be aware of some practical ways to set up screening arrangements. Notification may be accomplished by one or more of a number of ways including: e-mail to immediate superiors and subordinates, oral briefings, and memoranda. Paperwork flow may need to be restructured to help ensure effective screening.

- Employees should be aware of some practical ways of dealing with situations where a matter or a contact inadvertently slips through the screening process. It may be appropriate, for example, to document that an inadvertent contact has occurred.

Attached to this memorandum is a model memorandum that may be used to provide written notification of a recusal and describe the steps that will be taken to implement it. This model memorandum is a refinement of the model recusal memorandum published in section 14.5 of the SF 278 reviewer's manual, *Public Financial Disclosure: A Reviewer's Reference* at page 14-9. This model form is intended as a guide; it may need to be modified to meet the needs of a specific situation.

Attachment

MEMORANDUM

TO: [Immediate Supervisor]
FROM: [Employee name and title of position]
SUBJECT: Notification of Commitment to Recuse

This memorandum is to provide you with written notification of my commitment to refrain from participation in certain matters in which I have a financial interest or a personal or business relationship and to describe the steps that I am taking to implement this commitment to recuse.

RECUSAL UNDER 18 U.S.C. § 208

This recusal arises because I [own stock, own property, expect a payment, am an officer, am negotiating for employment, etc.] in, of or with [identify by name the asset or other interest that gives rise to the disqualifying financial interest, for example, 500 shares of XYZ Company stock or the ABC Foundation].

Under 18 U.S.C. § 208, I am prohibited from participating personally and substantially in any particular matter that would have a direct and predictable effect on my own financial interests or those of certain other persons or organizations identified in section 208. In my position of [identify position] in the [identify name of office] of the [identify name of agency], I may be called upon to participate in certain particular matters that could affect [identify the disqualifying financial interest]. These matters may include the following: [provide a description of the particular matter or matters.] Until further notice, I will not participate officially in such matters.

In order to help ensure that I do not participate officially in these matters, I have taken or will take the following steps: (1) [delegation to subordinate language]. I have instructed [name and position] to handle any particular matter that could come before me that would affect [the name or description of the interest or entity causing the disqualification] and have arranged for [name of alternate supervisor] to serve as his or her supervisor for this matter; (2) I have provided [name of person who will act] and [names of any other persons that are to help with a screening arrangement] with a copy of this memorandum [unless there is an objection to disclosure of the information] and have asked [him/her/them] to [retain] [or refer to name of substitute actor] any matters which [he/she/they] believe are covered by my commitment to recuse; and (3) I have advised my immediate subordinates [and the name of any other group that typically sends the employee work directly] of this recusal. If you would prefer

to act in these matters yourself or to select someone other than an individual under my general supervision to act in my stead, please notify me of your determination so that I might provide the appropriate information to my subordinates [and colleagues, if appropriate].

In order to ensure that this commitment to recuse continues to be effective, I will take the following steps in the future: (1) I will revise and update this memorandum whenever that is warranted by changes in my financial interests or the nature of my duties, or other changed circumstances, and provide you, the person exercising my authority and [any screening individuals] with a copy; and (2) I will advise my immediate subordinates and colleagues of any such changes.

RECUSAL UNDER 5 C.F.R. § 2635.502

I also have the following covered relationship [or financial interest of a member of my household]. [Give a full description of the covered relationship or financial interest].

Under 5 C.F.R. § 2635.502(e), unless I am specifically authorized to do so by the agency designee, I must not participate in any particular matter involving specific parties where I or the agency designee have concluded that the financial interest of a member of my household, or the role of a person with whom I have a covered relationship, is likely to raise a question in the mind of a reasonable person about my impartiality. In my position of [identify position] in the [identify name of office] of the [identify name of agency], I may be called upon to participate in certain particular matters involving specific parties that could affect [identify the covered relationship or financial interest]. These matters may include the following: [identify relevant specific party matters]. I have consulted with the agency designee and have been advised that I should not participate in specific party matters affecting [the covered relationship or financial interest]. Until further notice [or "for a period of one year" in the case of certain terminated relationships], I will not participate officially in such matters, unless authorized by the agency designee.

In order to help ensure that I do not participate officially in these matters, I have taken or will take the following steps: (1) [delegation to subordinate language]. I have instructed [name and position] to handle any particular matter involving specific parties that could come before me that would affect or involve as a party [the name or description of the interest or entity causing the disqualification] and have arranged for [name of alternate supervisor] to serve as his or her supervisor for this matter; (2) I have provided [name of person who will act] and [names of any other persons that are to help with a screening arrangement] with

a copy of this memorandum [unless there is an objection to disclosure of the information] and have asked [him/her/them] to keep [or refer to] [name of substitute actor] any matters which [he/she/they] believe are covered by my commitment to recuse; and (3) I have advised my immediate subordinates [and the name of any other group that typically sends the employee work directly] of this recusal. If you would prefer to act in these matters yourself or to select someone other than an individual under my general supervision to act in my stead, please notify me of your determination so that I might provide the appropriate information to my subordinates [and colleagues, if appropriate].

In order to ensure that this disqualification continues to be effective, I will take the following steps in the future: (1) I will revise and update this memorandum whenever that is warranted by changes in my covered relationships, the financial interests of a member of my household, the nature of my duties, or other changed circumstances, and provide you, the person exercising my authority [and any screening individuals] with a copy; and (2) I will advise my immediate subordinates and colleagues of any such changes.

cc: [Agency ethics official (where appropriate), person exercising delegated authority, and any screening individuals]