

STATEMENT OF
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ON

NIH ETHICS CONCERNS:
CONSULTING ARRANGEMENTS AND OUTSIDE AWARDS
BEFORE THE COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

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MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

Thank you for the opportunity to appear today to discuss Executive Branch ethics rules pertaining to consulting activities and awards from outside sources. Mr. Chairman, you asked in particular that I address issues that have arisen at the National Institutes of Health with respect to employees' consulting activities and outside awards. I will discuss these subjects and provide OGE's views on the general legal questions. Before discussing these specific topics, I want to provide the Subcommittee with background information about OGE and its role in the Executive Branch ethics program.

The Executive Branch Ethics Program and OGE's Role

Established by the Ethics in Government Act of 1978, OGE is the executive branch agency responsible for directing policies relating to the prevention of conflicts of interest on the part of Federal executive branch officers and employees. OGE develops rules relating to ethics and conflicts of interests, establishes the framework for the public and confidential financial disclosure systems, develops training and education programs for use by executive branch ethics

officials and employees, and supports and reviews individual agency ethics programs to ensure they are functioning properly.

As the supervising ethics office of the executive branch, OGE has developed and issued various executive branch-wide regulations in Title 5 of the Code of Federal Regulations, including the Standards of Ethical Conduct for Employees of the Executive Branch (Part 2635), rules that implement the financial reporting requirements in the Ethics in Government Act (Part 2634), and rules that implement criminal conflict of interest laws (Parts 2635, 2637, 2640 and 2641). Pursuant to the Ethics in Government Act and Executive Order 12674 (as modified by E.O. 12731), regulations interpreting the provisions of sections 207, 208, and 209 may be promulgated only with the concurrence of the Attorney General, while regulations establishing a single set of executive branch standards of conduct and a system of nonpublic financial disclosure are promulgated in consultation with the Attorney General and the Office of Personnel Management.”

Many of the rules bearing on the issues of concern to the Subcommittee today are found in OGE’s Standards of Ethical Conduct. OGE issued these rules originally in 1992, pursuant to the order of the first President Bush to “establish a single, comprehensive and clear set of executive-branch standards of conduct that shall be objective, reasonable, and enforceable.” E.O. 12674, § 201(a). In keeping with the President’s goal of promoting uniformity in the application of ethics requirements across the executive branch, the OGE standards were to supersede any agency-specific standards, unless an agency sought and obtained approval from OGE to issue supplemental regulations “of special applicability to the particular functions and activities of that agency.” *Id.* at § 301(a).

While OGE provides direction and overall leadership to the executive branch ethics program, the head of each agency has primary responsibility for the ethics program at his agency. Each agency head appoints a Designated Agency Ethics Official (DAEO) to manage the ethics program and act as a liaison to OGE. The DAEO and his staff ensure that the required ethics program elements are accomplished. Basic elements and responsibilities of an agency ethics program include effective collection and review of financial disclosure reports; ethics training that meets the requirements of OGE’s training regulations; an employee counseling program; and prompt and effective action for violations of the ethics rules. With respect to the issues of concern to the Subcommittee today, I would note that the duties of agency officials also include the approval of certain kinds of outside awards and the review and approval of certain outside activities.

OGE provides training and guidance to agency ethics officials in numerous ways. Among other things, OGE: publishes advisory opinions and issues memoranda to ethics officials; conducts periodic national and regional training courses; communicates regularly with ethics officials through an electronic list service; provides consultative services to agency officials through the OGE desk officer system and through telephonic and written advice from OGE legal staff.

OGE also monitors and evaluates the executive branch ethics program through periodic reviews of the ethics programs at each agency. The purpose of these reviews is to ensure that agencies have developed effective ethics systems and procedures, in compliance with OGE regulations, to prevent conflicts of interest and other violations of ethics laws and regulations. Typically, the focus of these reviews is on agency systems, rather than instances of misconduct by individual employees. Individual misconduct by employees is investigated by the Office of Inspector General responsible for each agency.

Awards

OGE understands that the Committee has two primary questions about the receipt of outside awards by employees. The first question pertains to the permissible sources of such awards, and the second question pertains to the distinction between an award and an honorarium for giving a lecture. In order to address these questions, it is first necessary to set out the purpose and requirements of OGE's awards rule.

The awards rule, 5 C.F.R. § 2635.204(d), is actually an exception to certain statutory and regulatory gift prohibitions. See 5 U.S.C. § 7353; 5 C.F.R. part 2635, subpart B. Generally, employees are prohibited from receiving gifts from certain prohibited sources and gifts given because of an employee's official position. Prohibited sources include any person who: (1) is seeking official action by the employee's agency; (2) does business or seeks to do business with the employee's agency; (3) conducts activities regulated by the employee's agency; (4) has interests that may be substantially affected by performance or nonperformance of the employee's official duties; or (5) is an organization a majority of whose members are such persons. 5 C.F.R. § 2635.203(d).

The awards rule provides an exception to these gift prohibitions where the gift is a "a bona fide award or incident to a bona fide award that is given for meritorious public service or achievement." An important limitation on the exception is that the donor must not be a particular type of "prohibited source," i.e., a person who has interests that may be substantially affected by the employee's duties (or an association or organization in which the majority of members have such interests). Moreover, if the gift has an aggregate value in excess of \$200 or is in the nature of cash or an investment interest, an agency ethics official must make a prior written determination that the award is part of an "established program of recognition" that meets additional criteria specified in the rule.

1. The source limitation

One question that has been raised is whether the head of an office, such as the Director of one of the Institutes at NIH, may receive an award from an entity that has grants, contracts or other business with the same office. In other words, is someone doing business with a particular office always going to be a person who has interests that may be substantially affected by the duties of the head of that office, even if the head of the office has delegated the relevant functions to subordinates and does not currently have any personal involvement in matters affecting that source?

OGE has not issued written guidance on this question. One possible reading of the regulation might be that the head of an office “may” have duties that could affect any person doing business with that office. The theory would be that the head of the office has authority over every matter pending in his office and therefore has the power, whether exercised or not in any given instance, to intervene in any such matter. Regardless of any delegations or other attenuating circumstances, the office head always “may” still perform the duties that would affect the source.

While this may be a reasonable interpretation, OGE declines to adopt such a broad reading. For one thing, we think it important that the source limitation uses terms such as “performance” and “duties,” which suggests that some actual involvement by the employee must at least be reasonably foreseeable. Other ethics provisions expressly cover matters that are merely under an employee’s “official responsibility,” and we could have used such language in the awards rule, but did not. See, e.g., 5 C.F.R. § 2637.202(b)(2)(all matters pending in agency are under official responsibility of agency head). Moreover, since the awards rule intentionally carves out only a particularly problematic subset of prohibited sources, it would be somewhat peculiar to say that the agency head and other senior management essentially may never receive an award from anyone involved with the agency; again, we have drafted other rules that expressly apply special provisions to agency heads and other senior officials, but that was not the course chosen in the awards rule. See, e.g., 5 C.F.R. §§ 2635.102(b)(conduct of agency head); 2635.807(a)(2)(i)(E)(3)(activities of high level political appointees).

Perhaps most important, we think the broad interpretation would lead to unreasonable results. Under this interpretation, virtually every person doing business with an office would be an impermissible award source for the office head, regardless of the size of the office or the nature or importance of the business. For example, a relatively autonomous component of a very large agency might make a significant number of modest grants to various associations, universities, and other nonprofits to fund meetings or other informational events on a wide range of noncontroversial topics, with such grants being handled routinely by employees several levels below the agency head and without any foreseeable intervention by higher level officials. Under these circumstances, we do not believe it would make sense to say that an association whose sole connection to the agency is one of these lower level grants would be an impermissible source for an otherwise legitimate award to the agency head. The broad interpretation of the source limitation could produce even more extreme results. For example, a component of an agency may procure paper products from a supplier; even though the head of the agency may have the legal authority to participate in this purchase, there is very little likelihood that the agency head would become involved in such matters, and it would seem unreasonable to say that the paper supplier would be an impermissible source for an award.

At the same time, however, we do not believe it is necessary or desirable to limit the reach of the source restriction to those situations where the donor currently has

matters before the head of an office personally. Nor do we think the restriction can be avoided merely because the head of an office usually or normally leaves such matters to subordinates. In our view, the word “may” in the source limitation does not mean that it must be “more likely than not” that the office head will intervene in a matter substantially affecting the source. If there is at least a reasonable prospect that the office head may become involved in a matter, we do not believe that a donor who could be substantially affected by such involvement should be allowed to grant an award, possibly with the hope of building good will with the office head in the event that his intervention may be needed or desired.

The approach we would follow, therefore, is one of reasonableness: is it reasonable to assume that the office head may become involved in a matter substantially affecting the interests of the donor, or is the chance of such intervention simply a remote and speculative possibility? To assist agency ethics officials in making such determinations, we have identified several factors they should consider, in light of the totality of the circumstances:

- How have such matters been handled historically by the office? For example, is there precedent for the office head becoming involved in matters of this type and/or matters involving this particular donor in the past?
- Are matters of this type typically handled at a level far below the office head, or are they handled at an intermediate level somewhat closer to the agency head?
- How large is the office for which the employee is responsible?
- Is there a multitude of similar matters pending somewhere in the office at any given time, such that the matter affecting the donor may be less likely to have any particular prominence?
- How important or sensitive is the matter? For example, does the matter involve a significant dollar amount or is there any particular controversy or novelty? On the other hand, is the matter relatively routine and one that does not call for the exercise of significant discretion?
- Is the office head typically apprised of such pending matters and any attendant issues, for example, through status reports that identify the affected source?
- Can it be said that the donor is a regular “constituent” or “stakeholder” with respect to the programs and operations of the office? For example, does the particular donor have a number of matters pending in the office or does the donor regularly seek business or official action from the office?

The foregoing list of factors is not intended to be exhaustive, and ethics officials should consider any information indicating that it is more or less foreseeable that an office head

would be in a position to exercise duties substantially affecting a particular donor.

Finally, OGE wants to emphasize that the awards exception is subject to the same general limits as all the other gift exceptions in the OGE standards of ethical conduct. Among those limitations is the caveat that employees may not “[a]ccept gifts from the same or different sources on a basis so frequent that a reasonable person would be led to believe the employee is using his public office for private gain.” 5 C.F.R. §2635.202(c)(3). Although it is not feasible to specify a bright line test for frequency of awards, we do think that ethics officials should be cautious where high level employees have a history of accepting awards of significant monetary value, as such circumstances can increase the risk that an official may appear to be using public office for private gain.

2. Awards vs. compensation for services

A second issue pertains to the relationship between the awards exception and other ethical limitations concerning the receipt of earned income and compensation. In particular, questions have been raised about whether certain “lectureships” or “lecture awards” are permissible awards, or more appropriately should be treated as outside earned income or compensation for speaking. In certain instances, there have been concerns that impermissible outside earned income or compensation for speaking related to the employee’s official duties may have been misidentified as permissible awards. OGE shares these concerns and recognizes that agency officials must exercise judgment to distinguish true awards from what are essentially speaking fees.

Quite apart from the rules pertaining to awards and other gifts, there are ethical restrictions that focus on the receipt of earned income or compensation in certain situations. Certain Presidential appointees are prohibited from receiving “any earned income for any outside employment or activity performed during” their Presidential appointment. Executive Order 12731, § 102. Similarly, a provision in the Ethics in Government Act limits the annual amount of outside earned income that certain high level political appointees, such as noncareer members of the Senior Executive Service, may receive to 15 percent of the annual rate of basic pay for level II of the Executive Schedule. For these purposes, earned income generally means “compensation for services.” 5 C.F.R. § 2636.303(b). This includes compensation for an employee’s services as a speaker, such as “honoraria.” *Id.* Earned income does not, however, include items that may be accepted from a prohibited source under the gift rules in the Standards of Ethical Conduct. § 2636.303(b)(1).

There is another restriction that focuses specifically on compensation for speaking. Under 5 C.F.R. § 2635.807(a), all employees—not just Presidential appointees or other noncareer personnel—are prohibited from accepting compensation for speaking that is related to their official duties. Like the restrictions on earned income discussed above, section 2635.807(a) covers payments for an individual’s activities or services, specifically “any form of consideration, remuneration or income . . . given for or in connection with the employee’s teaching, speaking or writing activities.” §

2635.807(a)(2)(iii). Similar to the definition of earned income, the definition of “compensation” in section 2635.807(a)(2)(iii)(A) does not include “items that could be accepted from a prohibited source under Subpart B” of the Standards of Ethical Conduct.

It should be apparent from this discussion that the rules governing awards and the rules governing compensation or earned income serve different purposes and have different requirements. On the one hand, a bona fide award for meritorious public service or achievement is a gift, which may be received notwithstanding the gift prohibitions, under certain circumstances. Payments for speaking activities, on the other hand, are not considered gifts but compensation for a service or activity, and the permissibility of such compensation is judged by different standards than those governing the receipt of gifts. The exclusion of certain gifts governed by Subpart B of the Standards of Ethical Conduct from the definitions of earned income and compensation underscores the distinct treatment of gifts and compensation or earned income.

Nevertheless, OGE recognizes that it may not always be immediately apparent to employees and agency officials whether a particular offer from an outside source should be viewed as a gift subject to the awards exception or as compensation for a speaking activity. This is especially true where an employee is offered something of value in connection with a “lectureship” or “lecture award” sponsored by an outside organization. In some instances, it may not be clear whether the real intent of the payment is to honor the employee for meritorious public service or achievement, or to compensate the employee for providing a speech on a subject of interest to the sponsor or the intended audience.

The question is further complicated by the fact that even clearly bona fide awards programs sometimes involve the recipient giving a substantive speech, i.e., not merely a brief “thank you” or acceptance remarks. For example, recipients of the Nobel Prize for Medicine—which is cited specifically in the OGE rule as an example of a bona fide award—deliver a “Nobel Lecture” which can be of significant duration and scientific content. E.g., www.nobel.se/medicine/laureates/2002/horvitz-lecture.html (one of three co-recipients in 2002 delivered 51 minute lecture, complete with data and graphs). Plainly, the delivery of a speech by an award winner is not, in and of itself, enough to convert an award into earned income or compensation for speaking, for purposes of the ethical restrictions discussed above.

By the same token, invitations to engage in speaking activities often are motivated by the speaker’s past accomplishments. The fact that the sponsor of a lectureship extends an offer of compensation based on the prospective speaker’s curriculum vitae does not, in and of itself, mean that the lectureship is an award as opposed to a compensated speaking engagement. Even if the lectureship itself carries a certain prestige within a particular profession or discipline, the primary intent of the sponsor still may be to obtain the services of a well-qualified speaker for an event.

OGE has not had occasion to issue written guidance on this question, but we

believe that the appropriate approach to such questions is to determine whether the primary purpose of the arrangement is to honor the employee for meritorious public service or achievement, or to compensate the employee for services as a speaker. In a somewhat analogous area of federal income taxation, we note that authorities have focused on whether an award is “intended primarily to provide gratuitous honorific recognition of achievement” or instead is “primarily compensatory in nature.” Rogallo v. United States, 475 F.2d 1, 2, 5 (4th Cir. 1973); see generally Kogan, The Taxation of Prizes and Awards: Tax Policy Winners and Losers, 63 Wash. L. Rev. 257 (1988)(historic concern for awards as disguised compensation). Given the range of award and lecture programs, this analysis inevitably involves a case-by-case consideration of any factors bearing on the purpose or intent of the particular program.

OGE has identified several factors that can be relevant to such determinations. The list that follows is by no means intended to be exhaustive. Moreover, in many cases, no one factor will be determinative, and agencies will have to discern the primary purpose of the program from the totality of the circumstances.

- How has the sponsor historically characterized the program? It would be relevant, for example, if the sponsor’s written materials traditionally have referred to the program as “an award” or, alternatively, as a “lecture series.”

- How is the event promoted by the sponsor? For example, extensive publicity by the sponsor advertising the speech as the draw for attendance at an event could indicate that the speaker was invited primarily to attract an audience for a lecture. Of particular concern would be publicity by the sponsor in which the event is portrayed as an opportunity for the audience to receive specialized information or unique insights from the speaker.

- Is it the policy of the sponsor to make the delivery of a speech a condition of receiving the award? If the award winner has the discretion to accept the full award but decline to make a speech, then the arrangement almost certainly would be an award rather than a compensated speaking activity. As noted above, however, the fact that an award winner may be expected to make a speech does not necessarily mean that the award is primarily intended as compensation for speaking.

- What is the nature of the expected speech? If the speech consists of little more than brief acceptance remarks, the award can hardly be characterized as compensation for speaking. It also may be relevant whether the anticipated speech would convey new or previously unpublished information, or focus in significant part on new or ongoing work of the speaker; this could suggest an intent to compensate the recipient for the content of the speech rather than to honor the recipient for past work. On the other hand, a speech merely reviewing the past work for which the speaker is being honored could well be consistent with a purpose to honor the recipient gratuitously for past achievement.

Consulting Activities

One of the major areas that can give rise to conflict of interest questions is outside activities. Two basic issues must be addressed when an employee proposes to engage in an outside activity: whether the employee may participate in the outside activity at all, and, if so, what limitations apply to such participation.

a. Conflicting Outside Activities and Appearance Problems

OGE's Standards of Ethical Conduct for Employees of the Executive Branch prohibit an employee from engaging in an outside activity that conflicts with his official duties. 5 C.F.R. § 2625.802. An outside activity will conflict with an employee's official duties if it is prohibited by statute or an agency supplemental regulation, or if the disqualification required to avoid a conflict of interest is so central or critical to the performance of the employee's official duties that his ability to perform his job is materially impaired.

There are two substantive provisions that may require disqualification or recusal. A criminal statute, 18 U.S.C. § 208, prohibits employees from participating in certain matters affecting their personal and imputed financial interests. An OGE regulation, 5 C.F.R. § 2635.502, provides for employees and agency officials to consider recusal from matters involving persons with whom the employee has certain business and personal relationships. When an employee wishes to participate in an outside activity that will require recusal under either of these provisions, agency officials must exercise informed judgment to determine whether the scope of any recusal will materially impair that employee's ability to do his job. Such management determinations take into account a variety of factors, including the nature of the employee's duties, the needs of the office, and the ability to reassign projects in the office.

Even if an outside activity is not prohibited under this standard, it may nonetheless violate other principles or standards and therefore be prohibited. One important standard is that employees may not use their public office for their own private gain or the private gain of others with whom they have certain relationships. 5 C.F.R. § 2635.702. Certain outside activities may be prohibited under this standard, whether or not the activity would require the employee to recuse from matters that are central or critical to the position. For example, even if the head of an office reasonably can recuse from a matter affecting an entity with which he has a consulting arrangement, there still could be an appearance that the entity is benefiting from the employee's official position: depending on the circumstances, one might reasonably question, for instance, whether subordinates involved in the matter would feel subtle pressure to favor the entity with which their supervisor has a substantial business relationship. Moreover, some outside consulting relationships may involve a subject matter that is so closely related to an employee's official work that the overlap would give rise to an appearance that the employee took advantage of his official position to obtain the outside consulting

opportunity or that the employee is providing insights obtained on the job only to those willing to pay.

The Standards provide that whether “particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.” 5 C.F.R. § 2635.101(b)(14). Agencies are undoubtedly in the best position to determine if an outside activity is permissible under these Standards generally, and with respect to appearances in particular. Some things that an agency should consider in making a decision about whether participation in an outside activity will create the appearance that an employee is using public office for private gain are the level of the employee’s position and the nature of his duties; the subject of the outside work and its relation to agency programs and operations; the identity of the outside employer and its relationship to the agency, including whether it receives grants or contracts; and the timing of the offer of employment.

Although the standards mentioned so far generally require a case-by-case consideration of the proposed outside activity, the OGE Standards also permit agencies to promulgate blanket prohibitions on certain outside activities. These prohibitions, called supplemental agency regulations, must be approved by OGE, pursuant to an Executive Order requiring OGE concurrence in any departures from or additions to the uniform standards of conduct applicable to the entire executive branch. The Department of Health and Human Services, in fact, has promulgated certain supplemental prohibitions on outside activities. 5 C.F.R. part 5501.

We note that a 1995 OGE review of the NIH ethics program discovered that NIH had a series of restrictions on outside consulting that were not promulgated in accordance with the procedures prescribed in the Executive Order. OGE directed that NIH either remove these restrictions or propose them for inclusion in the HHS supplemental regulation. At that time, NIH chose to remove the restrictions and did not propose any additional outside activity restrictions in the HHS supplemental regulation. As we understand it, NIH decided to rely on case-by-case evaluations, under the general standards applicable to all executive branch employees.

Subsequently, questions have arisen concerning the current NIH system and the need for more specific restrictions on certain kinds of outside activities. In this connection, we understand that NIH now is considering recommendations from the Blue Ribbon Panel on Conflict of Interest Policies, which panel is a Working Group of the Advisory Committee to the Director, which was appointed by the Director of NIH. The Panel report makes numerous recommendations, including proposals for supplemental regulations governing certain outside activities, such as consulting. OGE has received a copy of this report and is in the process of reviewing it. If the Department of Health and Human Services decides to request amendments to its supplemental regulation, in response to any recommendations of the Panel, OGE stands ready to assist the Department and act expeditiously on any request.

b. Limitations When an Outside Activity Is Undertaken

The Standards of Ethical Conduct provide that an employee who is engaged in an outside activity must comply with all applicable provisions set forth in the ethics rules and statutes. This includes rules that prohibit the misuse of official title, authority, resources, information, and time in connection with outside activities. There are also important restrictions on representing others before the Government and serving as an expert witness in matters affecting the Government. Additionally, certain noncareer employees are subject to limitations on outside earned income, compensated service on boards of directors, and involvement with entities providing professional services of a fiduciary nature.

Particularly relevant in the context of the present inquiry are the rules that require employees not to participate in certain Government matters when their own interests, or the interests of certain others, are affected by such matters. As mentioned above, disqualification or recusal from certain matters may be required under 18 U.S.C. § 208 or 5 C.F.R. § 2635.502. The obligation to recuse when necessary and to ensure that a disqualification is observed always remains the personal responsibility of the individual employee subject to the disqualification. An employee should notify his supervisor when he becomes aware of the need to disqualify himself from certain matters because of a potential conflict of interest. Once it is determined that the outside activity is permissible, the employee's supervisor has a responsibility to facilitate the disqualification by ensuring that the employee is not assigned to work on matters from which he is disqualified. Agency ethics officials obviously have an important role through direct counseling to, and education of, employees and supervisors to ensure that they understand when a recusal is required and how to effectively implement a required recusal.

OGE Program Reviews at NIH

As I stated earlier, OGE conducts systemic reviews of all executive branch department and agency ethics programs to determine whether agencies have developed effective ethics systems and procedures, in compliance with OGE's regulations, to prevent conflicts of interests. OGE typically has conducted reviews of approximately 35 agencies annually, with major agencies being reviewed approximately every 5 to 6 years. Agencies are selected for review based on the length of time since their last review, OGE staff concerns about an agency's program, and news media reports of ethical concerns.

These reviews generally focus on several ethics program elements, including the structure and staffing of the ethics program, the financial disclosure systems, the ethics education and training program, the advice and counseling services, the outside activity approval process, ethics systems for advisory committees, acceptance of travel payments from non-Federal sources under 31 U.S.C. § 1353, ethics staff relations with the Office of Inspector General, and ethics issues unique to that agency. In large agencies or

departments, OGE may look at how the ethics program is managed in its individual components rather than the entire agency. The reviews do not typically look at individual employee cases of conflict. On occasion concerns about an individual employee will arise in the course of a review, and OGE will consider the facts giving rise to the concern and make appropriate recommendations.

Since 1990, OGE has completed three program reviews at NIH. These prior reviews focused on, among other issues, NIH practices and policies pertaining to teaching, speaking, writing and other outside activities. OGE has initiated a 2004 review of the NIH ethics program. This review is being performed at the Office of the Director, NCI, NIAID, and the Clinical Center. The focus of the current review is on the structure and staffing of NIH's ethics program, the public and confidential financial disclosure systems, the criteria and process for approving outside activities, and the criteria and process for approving the acceptance of awards. The review is ongoing.

Conclusion

In closing, I would like to emphasize that OGE stands ready to work with you, the Committee, HHS, and NIH to ensure that the public has the highest confidence in the important work of all the components at NIH.

I would be happy to answer any questions you may have.