United States
Office of Government Ethics
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DO-04-012

MEMORANDUM

TO: Designated Agency Ethics Officials, General Counsels and Inspectors General

FROM: Marilyn L. Glynn
Acting Director

SUBJECT: Effective Screening Arrangements for Recusal Obligations

On April 26, 1999, the Office of Government Ethics (OGE) issued DAEOgram DO-99-018 concerning recusal obligations and screening arrangements. That DAEOgram identified the types of situations when employees make commitments not to participate in certain matters. Recusals are generally required when an employee (i) is prohibited from participating personally and substantially in a particular matter as a result of 18 U.S.C. § 208; (ii) chooses or is directed not to participate in a particular matter involving specific parties under 5 C.F.R. § 2635.502; or (iii) receives an extraordinary payment from a former employer under 5 C.F.R. § 2635.503. DAEOgram DO-99-018 also explained how ethics officials can help establish screening arrangements to prevent employees from participating in a covered matter.

In order to ensure that employees comply with their recusal obligations, this memorandum reiterates some of the relevant principles set forth in our previous DAEOgram, and identifies some screening arrangement guidelines that agencies should consider. Attached to this DAEOgram is a model memorandum that may be used to memorialize and provide notification of employees' screening arrangements. Also attached is a brief set of guidelines for employees who are selected to screen matters for an employee with a recusal obligation.

Effective Screening Arrangement Guidelines

The ultimate responsibility for recusal rests with the employee. However, a good screening arrangement can help the employee with this obligation by establishing a system under which ethics officials, assistants, and others actively screen for covered matters and refer any such matter to other agency personnel

for appropriate handling. The following guidelines should help establish effective screening arrangements.

1. Counsel Employees

Ethics officials play a critical role by counseling employees regarding the significance of screening arrangements and recusal obligations. Employees need to understand that a screening arrangement is not a mere technical requirement. To the contrary, a screening arrangement creates a viable process for preventing covered matters from coming before an employee. This, in turn, could prevent a violation of an employee's recusal obligations. Thus, ethics officials should explain to employees that the screening arrangement must be adhered to in practice.

Ethics officials should also counsel employees regarding the scope of their recusals, including the kinds of actions that may constitute personal and substantial participation. For example, employees with recusal obligations should not assign covered matters on an *ad hoc* basis. Participating in a decision concerning who should work on a matter, how a matter should be handled, or whether a matter should be acted upon, is a form of participation in the matter. Involvement in preliminary discussions, in interim evaluations, in review or approval at intermediate levels, or in supervision of subordinates working on a matter also amounts to personal and substantial participation.

2. Identify a Gatekeeper

Second, an effective screening arrangement typically should identify a person or persons, i.e., a gatekeeper, who will screen incoming phone calls, correspondence and other communications to determine if they are a covered matter from which the employee is recused. This gatekeeper can be identified by name, by position, or even by office, *provided* that it is absolutely clear who will be screening matters for the recused official. Because a gatekeeper must fit seamlessly into the flow of the agency's work, gatekeepers frequently are confidential assistants, schedulers and administrative assistants.

To be effective, the gatekeeper must understand when a matter is covered by the recusal. If a gatekeeper is uncertain whether a matter is covered by the employee's recusal obligations, he should seek assistance from an agency ethics official.

3. Refer Covered Matters to An Identified Employee

Third, an effective screening arrangement should identify an agency official who will handle matters covered by the employee's recusal obligations. When the gatekeeper identifies a covered matter, he then refers the matter to the designated official. The gatekeeper should not refer a matter to anyone other than the person(s) who has been identified in the screening arrangement. The designated person(s), without the knowledge or involvement of the employee, then decides whether and how the matter should be handled. In some cases, an employee may have to delegate authority to act as part of establishing a screening arrangement.

One issue that arises in this regard is whether a matter can be referred for action or assignment up or down the chain of command from the employee with the recusal obligation. In general, we believe it is a better practice not to refer matters to the employee's immediate subordinate if there is any indication that the subordinate may not be truly independent. For example, the perceived loyalty of a special assistant who has been working for many years with a recused appointee may create an appearance concern if he is chosen to handle matters in which the official is barred from participating. It is critical that the person acting in lieu of the official is, and is perceived to be, able to exercise independent judgment on the covered matter. Accordingly, the screening arrangement should require that covered matters are referred to someone who has actual and apparent authority to act on the matter.

4. Provide Adequate Notification

A fourth aspect of an effective screening arrangement is to provide adequate notice to appropriate personnel about the recusal and their role in the screening process. Of course, the gatekeeper and the person(s) who will be acting in the place of the recusing official should receive notice and/or a copy of the document memorializing the screening arrangement. In addition, ethics officials should ensure that an employee who has a screening arrangement notifies other employees who are likely to assign, forward, refer or otherwise bring a covered matter to his attention. These individuals may include an employee's immediate supervisor, confidential or personal assistant, scheduler, or administrative assistant, as well as the office receptionist. It also may be appropriate to consider notifying other individuals who work directly with the employee, such as the employee's deputy or additional supervisors. See DAEOgram DO-99-018 for further discussion.

5. Remind Employees to Be Alert to Situations That Circumvent the Gatekeeper or That Otherwise Are Not Caught by the Screening Arrangement

Sometimes an employee with a screening arrangement might be contacted directly about a matter that is the subject of a recusal. For example, an outside organization may email or call the employee directly. Similarly, someone may approach an employee at an industry meeting or social event and begin talking about a matter that falls within the scope of the employee's recusal. Or there simply may be times when a matter inadvertently slips by the gatekeeper, such as when an agency official outside the normal chain of command brings a matter to the attention of the employee.

When someone begins discussing a matter that is covered by the employee's recusal obligation, the employee should not steer the person to anyone other than the person who has been designated to act in the place of the recused employee. For example, the employee should not determine what action should be taken and then choose which agency official should handle the matter. Instead, the employee should promptly explain that he is recused, refrain from any further participation in the matter (including any discussion with colleagues or any persons likely to consider the matter), and refer the person to the designated employee. In the event that an employee receives written material concerning a matter from which the employee is recused, he should promptly forward the document to the person(s) designated in the screening arrangement document.

6. Monitor Recusal Obligations

The obligation to recuse is an ongoing commitment. Employees need to be aware of any change that might require them to modify or execute new ethics agreements and/or modify their screening arrangements. Such changes could include an expansion of official duties, a promotion or job transfer, and certain changes in financial interests, personal relationships, or business relationships. For example, an employee whose ethics agreement requires him to divest stock in ABC Company should be recused from acting on matters that could affect ABC Company until the divestiture is complete. After the employee divests the stock, appropriate personnel, such as the gatekeeper and the person who would have acted in the employee's stead, should be notified that the employee is no longer recused from matters affecting ABC Company.

Another example of such a change is when an appointee agrees to resign from his position as a board member of a non-profit organization within 90 days of his appointment. Section 208 of Title 18 prohibits the employee from participating in a particular matter having a direct and predictable effect on the financial interests of the non-profit until he resigns; after he resigns, he has a "covered relationship" under section 2635.502 and may have to recuse himself for one year from the date of his resignation with respect to particular matters involving specific parties in which the organization is or represents a party. As these examples demonstrate, when an employee's recusal obligations change, he may need to consider taking some of the following actions, as appropriate: consulting with an agency ethics official; revising or executing a new ethics agreement (i.e., describing any specific matters or subjects covered by a new recusal); modifying or terminating the screening arrangement; and notifying the appropriate personnel of any changes.

Providing Evidence of Compliance to OGE

As part of its oversight responsibilities, OGE requires agencies to provide "evidence of compliance" for certain recusals made by persons nominated to, or occupying, positions that require Senate confirmation (appointees). By providing to OGE the documents concerning appointees' recusals and their screening arrangements, agencies enable OGE to track the recusal commitments. OGE, in turn, can assist agencies and appointees in effectively carrying out these recusal obligations.

The evidence of compliance must be provided in the following circumstances. First, agencies are required to demonstrate compliance with recusal obligations for specific recusals that arise under 18 U.S.C. § 208. See 5 U.S.C. app. § 110; 5 C.F.R. § 2634.804. Second, agencies are required to submit evidence of compliance with certain recusals made by appointees under 5 C.F.R. § 2635.502, which arise from personal or business relationships. (See DAEOgram DO-02-004, dated March 8, 2002, for additional guidance concerning evidence of compliance with 502 recusal commitments.) Third, evidence of compliance needs to be provided concerning all recusals made under 5 C.F.R. § 2635.503, relating to extraordinary payments received from former employers.

Appropriate evidence of compliance consists of a memorandum (such as the model attached to this DAEOgram) describing the screening arrangement. See 5 C.F.R. § 2634.804(b)(1). We note that in the unusual situation when a nominee's ethics agreement describes a screening arrangement in detail, there is no need for

a separate document that repeats the screening process. Usually, however, a nominee signs his ethics agreement before an agency can identify a gatekeeper and otherwise implement a screening process. Therefore, appointees typically must execute both an ethics agreement and, after they are appointed, a written screening arrangement.

Model Screening Arrangement

The attachment to DAEOgram DO-99-018 has served as a useful model for a screening arrangement document. We are attaching to this DAEOgram a new model Screening Arrangement, which also may be used. Of course, screening arrangement documents are not “one size fits all;” it is important to tailor such documents to the specific needs of each situation.

Finally, we note that agencies should avoid using recusal language in a screening arrangement that is different from the recusal language in the ethics agreement. Having inconsistent recusals not only can be confusing for the employee, but also can raise logistical, counseling and enforcement issues. Accordingly, we recommend that screening arrangements either refer to the ethics agreement without summarizing the recusals, or carefully track the language of the ethics agreement.

Attachments

MEMORANDUM

To: [Employee’s Supervisor]

From: [Employee’s Name, Title] [Employee’s signature]

Date:

Re: Screening Arrangement

This memorandum is to provide you with written notification of the screening arrangement I have implemented to ensure that I comply with my obligation to recuse myself from certain matters with which I have a financial interest, or a personal or business relationship. These recusal obligations are set forth in the Ethics Agreement I executed on [date] (copy attached), prior to my confirmation as [title, agency].

I am disqualified from participating personally and substantially in any particular matter that would have a direct and predictable effect on:

> List each asset, entity or other interest that gives rise to a disqualifying interest under 18 U.S.C. § 208, e.g., XYZ Company or ABC Foundation].

Unless I am authorized to participate, I [also] am disqualified from participating in any particular matter involving specific parties in which any of the following entities is a party or represents a party:

> [List each entity with which the employee has a covered relationship or is otherwise covered by 5 C.F.R. § 2635.502, and any entity from which the employee received an extraordinary payment under 5 C.F.R. § 2635.503].

In order to help ensure that I do not participate in matters relating to any of the entities listed above, I have taken or will take the following steps:

1. I have instructed [gatekeeper's name, title], to screen all [agency] matters directed to my attention that involve outside entities or that require my participation, to determine if they involve any of the entities or organizations listed above.

2. If [gatekeeper's name, title] determines that a matter involves any of these entities or organizations, directly or indirectly, [he] will refer them to [name and title of the person with authority to act on behalf of the employee] for action or assignment, without my knowledge or involvement.

3. I will provide [names and titles of gatekeeper(s) and persons who will act on behalf of the employee] with a copy of this memorandum so that they may fully understand the purpose and scope of my recusal obligations and this screening arrangement. In order to help ensure that I do not inadvertently participate in matters from which I should be recused, I am directing [name and title of gatekeeper] to seek the assistance of an agency ethics official if [he/she] is ever uncertain whether or not I may participate in a matter.

4. I will provide a copy of this memorandum to my principal subordinates [or, advise my principal subordinates of my recusal obligations and screening arrangement, as set forth in this memorandum]. I also will instruct my principal subordinates that all inquiries and comments involving any of the entities listed above should be directed to [name and title or the person(s) who will act on behalf of the employee], without my knowledge or involvement.

5. In consultation with an agency ethics official, I will revise and update my ethics agreement and/or this memorandum whenever that is warranted by changed circumstances, including changes in my financial interests, my personal or business relationships, or the nature of my official duties.

6. In the event of any changes to this screening arrangement, I will provide a copy of the revised screening arrangement memorandum to [or, advise] you, [name and title of gatekeeper], [name and title of person or office acting in my stead, if known], and my principal subordinates.

Attachment [the employee’s ethics agreement]

cc: Office of Government Ethics
Designated Agency Ethics Official
[Gatekeeper’s name, title, e.g., confidential assistant, scheduler, or other administrative personnel]
[Person(s) who are authorized to act on behalf of the official]
[Additional supervisors or subordinates, as appropriate]