



United States
Office of Government Ethics
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LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: Walter M. Shaub, Jr.
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SUBJECT: Effect of the Supreme Court's Decision in *United States v. Windsor* on the Executive Branch Ethics Program

On June 26, 2013, the Supreme Court struck down section 3 of the Defense of Marriage Act as unconstitutional. *United States v. Windsor*, 133 S. Ct. 2675 (June 26, 2013). Section 3 provided that, "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7.

Following the Supreme Court's decision in *Windsor*, the U.S. Office of Government Ethics (OGE) now interprets the terms "marriage" and "spouse" to include a same-sex marriage and a same-sex spouse where those terms appear in federal ethics provisions, regardless of the employee's state of residency.¹ OGE now similarly interprets the term "relative" to include a same-sex spouse when used in federal ethics provisions.² For example, OGE now construes

¹ Examples of federal ethics statutes administered by OGE that use the terms "spouse" and "marriage" include the following: 18 U.S.C. §§ 203, 205, 208; 5 U.S.C. app. §§ 102, 109; 5 U.S.C. § 7351; and Act of Sept. 28, 2012, Pub. L. No. 112-178, § 3 (modifying 5 U.S.C. app. § 103(l) to require a covered employee to make periodic reports of transactions of securities owned separately by the employee's spouse). In addition, several provisions in OGE's regulations at 5 C.F.R. parts 2601, 2634, 2635, 2636, and 2640 employ the terms "spouse" and "marriage." OGE now similarly interprets the terms "marriage" and "spouse" to include a same-sex marriage and a same-sex spouse when they appear in agency supplemental standards of ethical conduct adopted with the concurrence of OGE under 5 C.F.R. § 2635.105. For purposes of ethics provisions contained in agency-specific statutes and regulations, it is OGE's presumption that the terms "marriage" and "spouse" now include a same-sex marriage and a same-sex spouse; however, OGE will necessarily defer to the interpretation of an agency charged with jurisdiction over the interpretation of a particular statute.

² Examples of federal ethics statutes administered by OGE and OGE's regulations that use the term "relative" include the following: 5 U.S.C. app. §§ 102, 109, 505; and 5 C.F.R. parts 2634 and 2635.

18 U.S.C. § 208, the primary criminal conflict of interest statute, to impute the financial interests of a federal employee's same-sex spouse to the employee. Likewise, OGE deems a federal employee's same-sex spouse to be an "eligible person" with regard to the issuance of a Certificate of Divestiture. 5 C.F.R. § 2634.1003.

The Supreme Court's decision addressed the constitutionality of a statute that defined "marriage" and "spouse" for purposes of federal law to include only opposite-sex couples. The terms "marriage," "spouse," and "relative" as used in the federal ethics provisions will continue to be interpreted not to include a federal employee in a civil union, domestic partnership, or other legally recognized relationship other than a marriage.³

OGE has consulted with the U.S. Department of Justice regarding this legal advisory and will now begin applying this interpretation to the substantive conflicts of interest and financial disclosure programs that OGE administers under the federal ethics provisions. For administrative purposes related to the implementation of the *Windsor* decision, OGE will use the date of this legal advisory as the date on which federal employees are on notice of the applicability of the federal ethics provisions employing the terms "marriage," "spouse," and "relative" to a same-sex marriage and a same-sex spouse. Thus, for example, a federal employee who has filed financial disclosure reports before the date of this legal advisory need not amend the reports to add new information about his or her same-sex spouse. Going forward, OGE and agency ethics offices throughout the Executive Branch will collect information regarding the financial interests of the same-sex spouse of a federal employee who is subject to public or confidential filing requirements, pursuant to existing ethics provisions regarding the financial interests of a federal employee's spouse. *See* 5 U.S.C. app. § 102(e); *see also* 5 C.F.R. §§ 2634.309, 2634.907(h). For purposes of periodic transaction reports under 5 U.S.C. app. § 103(l), OGE and agency ethics offices will collect information from a federal employee subject to the public filing requirements regarding the covered transactions of his or her same-sex spouse made on or after the date of this legal advisory.

Agency ethics officials should proactively notify all federal employees at their agencies of these new requirements. For additional assistance, agency ethics officials should consult with their OGE Desk Officers.

Attachment: Suggested Employee Notification Language

³ Note that a civil union, domestic partnership, or other legally recognized relationship other than a marriage may trigger the impartiality provisions of the Standards of Ethical Conduct for Employees of the Executive Branch. *See* 5 C.F.R. part 2635, subpart E. An employee who is in a domestic partnership or civil union has a "covered relationship" with his or her partner. *See* 5 C.F.R. § 2635.502(a).