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TO: Designated Agency Ethics Officials

FROM: Don W. Fox

General Counsel

SUBJECT: THE OGE SUPPLEMENTAL AGENCY REGULATION PROCESS

The Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Ethical Conduct) codified in 5 C.F.R. part 2635 applies to all executive branch employees. As authorized by Executive Order 12674 and implemented by 5 C.F.R. § 2635.105, an agency may modify or supplement the Standards of Ethical Conduct, with the concurrence of OGE, to meet particular needs of that agency. A supplemental agency regulation is issued jointly by the agency and OGE and is published in title 5, Code of Federal Regulations.

The U.S. Office of Government Ethics (OGE) has the exclusive authority to oversee the supplemental ethics regulation process. Executive Order 12674, as modified by Executive Order 12731, requires OGE to "establish a single, comprehensive, and clear set of executive-branch Standards of Ethical Conduct that shall be objective, reasonable and enforceable." Section 301 of Executive Order 12731 specifically states, "[a]ny supplementary agency regulations shall be prepared as addenda to the branch-wide regulations and promulgated jointly with the Office of Government Ethics, at the agency's expense, for inclusion in Title 5 of the Code of Federal Regulations." Given the mandate of Executive Order 12731 and its implementation under 5 C.F.R. § 2635.105, agency ethics regulations and policies promulgated outside of the OGE supplemental regulation process may lack legal effect. *See* Exec. Order No. 12731, § 301 55 Fed. Reg. 42,547 (Oct. 17, 1990); *see also*, Preamble to 5 C.F.R. § 2635.803, 57 Fed. Reg. 35,034; DAEOgram D0-95-008 (Agency supplementation of standards and revocation of superseded standards).

When determining whether an agency should have a supplemental ethics regulation, ethics officials should consider the following questions:

• What are the issues the agency is trying to address and what is the outcome the agency is trying to achieve?

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¹ Exec. Order No. 12674, 54 Fed. Reg. 15,159 (April 12, 1989); *and* Exec. Order No. 12731, 55 Fed. Reg. 42,547 (Oct. 17, 1990). *See generally* 5 U.S.C. app. § 402(a)-(b) (requiring the Director of OGE to evaluate "the need for changes in rules and regulations issued by the Director and the agencies regarding conflict of interest and ethical problems, with a view toward making such rules and regulations consistent with and an effective supplement to the conflict of interest laws." 5 U.S.C. app. § 402(b)(12)). OGE's authority in this area is described in 5 C.F.R. § 2635.105, which permits agencies to act without supplemental regulations only in clearly defined instances.

- Does the agency need a supplemental ethics regulation to achieve this goal?
- What is the statutory authority under which a regulation would be issued?
- How have other agencies addressed similar issues?
- When and how should the agency consult with OGE?

This advisory is intended to help ethics officials answer these questions by providing tools to better navigate the supplemental agency ethics regulation process. Specifically, this legal advisory identifies the types of agency ethics policies that fall within the exclusive authority of OGE and, as a result, must be developed through the OGE supplemental agency regulation process. In addition, this advisory identifies agency policies that may derive from authorities outside the scope of OGE authority. Finally, this advisory contains a brief summary of the agency OGE consultation process.

There are three attachments to this advisory. The first attachment illustrates how an agency may determine it needs a supplemental regulation. The second attachment identifies which agencies have a supplemental regulation as well as which ethics issues are addressed by each agency. Finally, the third attachment specifies how the ethics issues are addressed by each agency.

When Agency Ethics Policies Belong in Supplemental Agency Regulations

Whether it is appropriate to create or modify a supplemental ethics regulation will depend on the issue the agency is trying to address and the underlying statutory authority for the proposed regulation.

Implementation by an agency of an agency policy requiring the expansion of restrictions on agency employees set by the Standards of Ethical Conduct is likely to implicate the supplemental regulation process. Common topic areas requiring the creation of a supplemental ethics regulation include, but are not limited to, outside activity restrictions, prior approval requirements for outside activities, prohibited financial holdings, and designation of separate agency components. In addition, if the proposed policy is only generally related to one of the fourteen General Principles of the Standards of Ethical Conduct contained in 5 C.F.R. §2635.101, then OGE can consult with the agency to determine whether the supplemental regulation process is implicated.

An important distinction exists between legally binding ethics regulations and ethics-related practice or advice. Agencies may advise employees to uphold a stricter standard of ethical conduct voluntarily as a best practice; however, an agency may not levy additional legally binding ethics-related requirements on its employees without submitting the proposed regulation or agency policy through the OGE supplemental agency regulation process. For example, an agency may not implement an agency policy requiring some or all of its employees receive prior approval before engaging in outside activities without issuing a supplemental ethics regulation. By consulting with OGE at an early stage of the policy formulation process, an agency can determine whether a supplemental regulation is required to implement a particular agency ethics related policy.

When Agency Policies May Not Belong in a Supplemental Agency Regulation

When there is specific and direct congressional authority to issue ethics related regulations independent from OGE, even if the regulations build upon the Standards of Ethical Conduct, agencies may promulgate these regulations separately from the title 5 supplementary process. Two primary categories of direct congressional authority meeting this standard include:

- When Congress has directed an agency to promulgate ethics regulations without requiring OGE concurrence or approval; or
- When the scope of the proposed regulation falls outside of OGE's authority.

Congress can enact agency-specific statutes granting specific and direct authority to an agency to issue ethics related regulations independent from OGE, but it is unusual for Congress to do so.² A relatively recent example of Congress creating an agency-specific statute granting specific and direct authority to an agency to issue ethics related regulations is the Emergency Economic Stabilization Act of 2008. See 12 U.S.C. § 5218 (stating that the Secretary of the Treasury "shall issue regulations . . . to prohibit conflicts of interest that may arise in connection with the administration . . . [of] this Act . . ."). Because these agency-specific statutes come in several different variations and address different topics, an agency should consult with OGE concerning statutory authority it invokes when considering implementing ethics regulations outside of the OGE supplemental agency regulation process.

OGE must concur that an ethics related regulation is appropriately promulgated separately within the agency's independent regulations. 5 C.F.R. §2635.105(c)(3). Examples of regulations relating to employee conduct that should not be placed in agency supplemental regulations include regulations addressing: cooperation with official inquires, use of government vehicles, the Hatch Act, care of documents and data, and the Privacy Act. Several of these topics deal with the improper use of nonpublic information; however, regulations implicating non-ethics statutes such as the Privacy Act should not be part of a supplemental agency ethics regulation.

The OGE supplemental agency regulation process is not required for materials, pamphlets, or website postings merely explaining the Standards of Ethical Conduct or a supplemental ethics regulation. 5 C.F.R. §2635.105(c)(1). In addition, policies "documenting or processing any determination, approval or other action required or permitted by [the Standards of Ethical Conduct] or by supplemental agency regulations" may be issued outside the OGE supplemental

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² General enabling legislation is usually insufficient authority for an agency to issue ethics regulations outside of the OGE supplemental agency regulation process. An established cannon of statutory construction holds that the specific governs the general. Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992). Executive Order 12674, as modified by Executive Order 12731, as well as the Ethics in Government Act of 1978 as implemented by 5 C.F.R. § 2635.105, states specifically that supplemental ethics regulations shall be issued jointly with OGE in Title V of the Code of Federal Regulations. *See* Exec. Order No. 12731, § 301 55 Fed. Reg. 42,547 (Oct. 17, 1990); 5 U.S.C. app. § 402(b)(12); 5 C.F.R. § 2635.105.

³ Post-employment restrictions also do not belong in an agency supplemental ethics regulation because supplemental agency regulations only apply to employees, not former employees. *See* 5 C.F.R. § 2635.105.

agency regulation process. 5 C.F.R. §2635.105(c)(2)(ii). Finally, agencies may also "delegate to an agency designee authority to make any determination, give any approval, or take any other action required or permitted by [the Standards of Ethical Conduct]" without codifying the delegation in its supplemental agency regulations. 5 C.F.R. §2635.105(c)(2)(i).

The Supplemental Agency Regulation Consultation Process

An agency's OGE desk officer is the initial point of contact on supplemental regulations. Subsequently, an OGE attorney may provide advice for structuring the substantive ethics provisions of a supplemental regulation, and officials at the Federal Register can offer more complete assistance with the formatting of the proposed rule. In addition, OGE is available to review proposed regulations and offer substantive advice on the composition of the rule and the drafting of a preamble (i.e., justification or explanation) to the rule.

Once the proposed regulation is prepared, and has received initial OGE concurrence, an agency will likely be required to submit the rule to OMB for an informal review. ⁴ A representative from the agency will need to contact the agency's OMB desk officer facilitating this review process. Once OMB has given its informal approval to the supplemental agency regulation, the agency should submit the final signed version, in triplicate, to the Director of OGE for approval.

Upon receipt of the signed version of the supplemental regulation from OGE, the agency should submit the regulation directly to the Federal Register for publication. If the rule is a "final" rule, it is effective upon its publication completing the supplemental process. However, supplemental regulations are often first published as either interim rules or proposed rules. If the regulation is first published as an "interim" rule, the rule is effective upon publication; however, an agency must respond to comments to an interim rule. If the supplemental regulation is first published as a "proposed" rule, the rule is not effective upon publication. In the case of a proposed rule, the rule will only be effective once the agency publishes a final rule responding to the comments it received before the end of the notice and comment period. For both a proposed and interim rule, the agency will have to resubmit an updated final rule and preamble, incorporating stakeholder comments, to OGE for re-approval and signature by the Director of OGE. Depending on the extent of the comments and the changes made to the rule, an agency may also have to resubmit the rule to OMB for its informal clearance before publication of a final rule.

⁴ Most supplemental agency regulations are non-significant rules requiring only an informal review. *See generally* Exec. Order No. 12866, § 3(f) 58 Fed. Reg. 51,736 (Oct. 4, 1993). However, if the proposed regulation does not qualify as non-significant, OMB may require a formal 90-day review. *Id.* at § 6(b).

⁵ 5 C.F.R. § 2635.105(b) ("After concurrence and co-signature by the Office of Government Ethics, the agency shall submit its supplemental agency regulations to the FEDERAL REGISTER for publication and codification at the expense of the agency in title 5 of the Code of Federal Regulations.")

Conclusion

Each agency in the Executive Branch has a unique mission. The OGE supplemental ethics regulatory process provides agencies a mechanism to tailor the Standards of Ethical Conduct to meet agency specific needs. After reviewing this legal advisory, agency ethics officials should be better able to appropriately address their agency specific ethics issues.

Attachment 1 – Determining Whether an Agency Needs a Supplemental Ethics Regulation

Attachment 2 – Supplemental Regulations Quick Reference Chart

(Citations are hyperlinked to the e-CFR)

Attachment 3 – Supplemental Regulations Detailed Chart

(Citations are hyperlinked to the e-CFR)