OFFICE OF GOVERNMENT ETHICS

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Letter to the Co-Chairman of a Panel
dated April 19, 2004

The Office of Government Ethics (OGE) is mindful of concerns raised by Members of Congress and others about the level of public financial disclosure among higher level officials at [a component within a Department]. As you know, OGE recently approved a request from [a Department] for "equal classification" determinations to require a number of [the Department component] officials to file public financial disclosure statements. Moreover, we stand ready to evaluate any further requests for equal classification determinations with respect to any additional positions requested by the Department.

At the same time, however, OGE believes that the issue of public disclosure is separate from the issue of what constitutes an ethically permissible outside activity. First, as I discuss more fully below, OGE does not have the authority to approve any proposed agency supplemental regulation, pursuant to 5 C.F.R. § 2635.105, that would require public financial disclosure as a condition of the permissibility of certain outside activities. Second, as I also explain below, OGE would have policy concerns about a regulatory or legislative proposal that ties the permissibility of certain outside activities to the public disclosure of those activities.

It is important to remember that public financial disclosure for employees of the executive branch is governed by title I of the Ethics in Government Act of 1978 (EIGA). 5 U.S.C. app. §§ 101-111. The legislative history of the EIGA indicates that Congress viewed public reporting for executive branch employees as an extraordinary and almost unprecedented measure. *E.g.*, S. Rep. 170, 1st Sess. 28 (1977)(existing Executive order on ethics required no executive branch officials to file public reports); H.R. Rep. 642, Part I, 95th Cong., 1st Sess. 19 (1977)(only two agency-specific statutes required public disclosure). In view of constitutional and other issues concerning the privacy of employees, Congress sought "to strike a careful balance between the rights of individual officials and employees to their privacy and the right of the American people to know that their public officials are free from conflicts of interest." H.R. Rep. No. 800, 95th Cong., 1st Sess. 18 (1977).

For these reasons, OGE has long held that the public reporting provisions of the EIGA constitute the exclusive authority under OGE's jurisdiction to require public financial disclosure. OGE has eschewed any effort to extend public disclosure beyond the limits carefully prescribed by Congress in title I of that Act. Moreover, the EIGA itself states that "the provisions of this title [title I] requiring the reporting of information shall supersede any general requirement under any other provision of law or regulation with respect to the reporting of information required for purposes of preventing conflicts of interest or apparent conflicts of interest." 5 U.S.C. app. § 107(b).[1]

Therefore, OGE does not view its authority to approve agency supplemental standards of conduct regulations as extending to any additional requirements for public financial disclosure beyond those set out in title I of the EIGA. This would include any proposed supplemental provision conditioning the permissibility of an outside activity upon the public disclosure of the activity or any income earned there from (beyond whatever public disclosure may be required for the employee already under title I of the EIGA).[2]

Beyond the question of OGE's authority under existing law, my Office would have policy concerns about any proposal, regulatory or legislative, that ties the permissibility of certain outside activities to public disclosure of those activities. In our view, expanded public disclosure is neither a sufficient nor a necessary remedy for many ethical concerns about the outside activities of executive branch employees.

For one thing, such a standard might carry an implicit message: otherwise problematic outside activities are permissible as long as they are publicly disclosed. From OGE's perspective, outside activities that otherwise raise serious questions under the Standards of Ethical Conduct for Executive Branch Employees, including the standard prohibiting the use of public office for private gain, 5 C.F.R. § 2635.702, are not necessarily cleansed from any taint by public disclosure. We recognize that some non-Governmental organizations, including certain academic institutions and professional journals, have adopted the philosophy that public

[1]Section 107(b) excepts only the reporting requirements of the Foreign Gifts and Decorations Act, 5 U.S.C. § 7342.

[2]OGE regulations do permit agencies to impose supplemental financial disclosure requirements, with OGE approval, but any such requirements pertain only to confidential, not public, disclosure. *See* 5 C.F.R. § 2635.103(a)(2).

disclosure is sufficient to resolve ethical concerns.[3] However, this philosophy has not been adopted generally for the executive branch of the Federal Government. Indeed, Congress has expressly provided otherwise: "Nothing in this Act [EIGA] requiring the reporting of information shall be deemed to authorize the receipt of income, gifts, or reimbursements; the holding of assets, liabilities, or positions; or the participation in transactions that are prohibited by law, Executive order, rule, or regulation." 5 U.S.C. § 107(c). Given the importance of maintaining the integrity of the Federal workforce, disclosure is a complement, not an alternative, to compliance with substantive rules of ethical conduct.

Expanded public disclosure also is not necessary to address the most serious ethical concerns about outside activities. Pursuant to section 107(a) of the EIGA, OGE has established a confidential financial disclosure system for certain employees whose positions are not covered by the public reporting requirements but whose duties nevertheless pose a risk of conflict of interest. As we provide in our basic statement of the "policies of confidential financial disclosure reporting," the purpose of these confidential reports is to "assist an agency in administering its ethics program and counseling its employees." 5 C.F.R. § 2634.901(a). Furthermore, agency approval requirements for outside activities, pursuant to 5 C.F.R. § 2635.803, assist agency ethics officials in helping employees to avoid outside activities that are inconsistent with Federal ethics requirements. If the confidential reporting system and any outside activity approval system work as intended, agency ethics officials will identify the vast majority of potentially problematic outside activities. To the extent that ethical problems may have arisen with certain outside activities at [the Department's component], one could conclude that the most direct remedy would to be to bolster the [Department component] systems for reviewing confidential reports and outside activity requests. Expanded public disclosure would not appear necessary for this purpose.

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[3]Although mere disclosure seems to be the rule for many organizations, there appears to have been some movement, at least in the area of biomedical research, toward substantive prohibitions on certain financial interests. *See, e.g.*, Lo, et al., "Conflict-of-Interest Policies for Investigators in Clinical Trials," *New England Journal of Medicine*, vol. 343, no. 22 (November 30, 2000); Cho, et al., "Policies on Faculty Conflicts of Interest at U.S. Universities," *Journal of the American Medical Association*, vol. 284, no. 17 (November 1, 2000).

I hope this has been helpful to the Panel in understanding the role and views of OGE. If you have any further questions, please do not hesitate to contact me.

Sincerely,

Marilyn L. Glynn
Acting Director