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Letter to a Designated Agency Ethics Official
dated February 10, 2005

This is in response to your letter of February 9, 2005, in which you inquire whether the deliberations of the President's Advisory Panel on Federal Tax Reform would constitute particular matters for purposes of 18 U.S.C. § 208. The first meeting of the Panel is scheduled for February 16, and the need for a prompt resolution of the question is apparent. Your letter follows up on earlier telephone conversations in which my Office advised that the proposed work of the Panel, as described to us, did not constitute a particular matter or particular matters within the meaning of the conflict of interest statute. We continue to be of the same view.

Pursuant to Executive Order 13369 (January 7, 2005), the Panel is charged with producing a single report that will address a range of "revenue neutral policy options" for legislative reform of the Federal tax system. The contemplated scope of the report is quite broad, as indicated by the three guiding principles in the Executive order: the options should "(a) simplify Federal tax laws to reduce the costs and administrative burdens of compliance with such laws; (b) share burdens and benefits of the Federal tax structure in an appropriately progressive manner while recognizing the importance of homeownership and charity in American society; and (c) promote long-run economic growth and job creation, and better encourage work effort, saving, and investment, so as to strengthen the competitiveness of the United States in the global marketplace." Executive Order, § 3. The Executive order only prescribes that "at least one option submitted by the Advisory Panel should use the Federal income tax as the base for its recommended reforms." *Id.* Consistent with this broad mandate, your letter indicates that Panel deliberations are expected "to focus on a wide range of tax matters--including both matters that have the potential to affect all taxpayers (e.g., the alternative minimum tax and the compliance burdens for large, small and individual taxpayers) as well as matters that specifically and uniquely affect taxpayers comprised of

industry sectors (e.g., depletion allowance for the oil and gas industries)."

As you know, section 208(a) prohibits employees from participating personally and substantially in any "particular matter" in which they have a personal or imputed financial interest. Under the interpretive regulations issued by the Office of Government Ethics, "[t]he term 'particular matter' includes only matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons." 5 C.F.R. § 2640.103(a)(1). The phrase generally is understood to include matters of general applicability that are narrowly focused on the interests of a discrete industry, such as the meat packing industry or the trucking industry. *E.g.*, 5 C.F.R. § 2640.103(a)(1) (example 3); 5 C.F.R. § 2635.402(b)(3) (example 2). However, the term does not extend to the "consideration or adoption of broad policy options directed to the interests of a large and diverse group of persons." § 2640.103(a)(1).

The work of the Panel, as described above, fits comfortably within the latter exclusion for consideration of broad policy options directed to the interests of a large and diverse group of persons. Indeed, the Panel's report is expected to address issues affecting every taxpayer in the United States. In this regard, the matter is analogous to example 8 following section 2640.103(a)(1), in which the consideration of a legislative proposal for broad health care reform is held not to be a particular matter because it is intended to affect every person in the United States. However, your letter refers to the preamble discussion of this example in the final rule and indicates that it suggests that the larger legislative proposal may be broken down into different constituent parts that might be viewed as separate particular matters in their own right. 61 *Fed. Reg.* 66830, 66832 (December 18, 1996). You note that some of the many tax policy options to be considered by the Panel will focus more narrowly on discrete industries and question whether the language in the preamble means that the consideration of these options should be treated as separate particular matters, apart from the overall report.

It was not OGE's intention that example 8 and the preamble should be read as requiring that broad legislative proposals of this type be fractionated into separate provisions or issues for purposes of identifying particular matters. Such an approach would prove little, since the consideration of most matters of

broad public policy can be carved up into successively finer and more focused parts: after all, much of policymaking inevitably involves the consideration of how different aspects of an overall proposal will affect different constituencies in a pluralistic democracy. Nor do we think it would be workable to employ a variation of what one court has criticized as an "elastic approach" to identifying particular matters, which is contingent on the part of the overall matter in which the particular individual happened to be involved. *Van Ee v. EPA*, 202 F.3d 296, 309 (D.C. Cir. 2000).¹ It would not be logical to conclude that an employee could participate in considering the overall legislative proposal but not its constituent parts.

In any event, the text of example 8 does not state that work on the broad health care proposal must be divided up into separate particular matters. It simply indicates that "consideration and implementation, through regulations, of a section of the health care bill" that limits prices for prescription drugs would be a particular matter that is focused on the pharmaceutical industry. § 2640.103(a)(1) (example 8) (emphasis added); see also 60 *Fed. Reg.* 47208, 47210 (September 11, 1995) (preamble to proposed rule) (broad policy matters may later become particular matters when implemented in a way that distinctly affects specific persons or groups of persons). At most, the preamble language indicates only that there may be other conceivable situations where a narrowly focused provision in a larger legislative proposal should not be viewed as merely an integral part of the broader policy deliberations. Although OGE has not had occasion to render any opinions on such situations, an example might be (depending on the facts) a private relief bill that becomes attached to a larger legislative vehicle focused on an unrelated subject.

Apart from example 8, the OGE regulations contain another example that appears to be almost indistinguishable from the work of the Panel. Example 5 following section 2640.103(a)(1) states that "deliberations on the general merits of an omnibus bill such as the Tax Reform Act of 1986 are not sufficiently

¹ *Van Ee* involved the use of the same phrase, "particular matter," in a related conflict of interest statute, 18 U.S.C. § 205. In interpreting the same regulatory definition of particular matter discussed above, the Court in that case criticized the Government for focusing on "aspects of the [Government matter] that might ultimately affect specific groups or individuals, rather than upon the overall focus of the proceeding itself." 202 F.3d at 309.

focused on the interests of specific persons, or a discrete and identifiable group of persons to constitute participation in a particular matter." As my Office explained in our earlier telephone conversations, the Tax Reform Act of 1986 itself contained numerous provisions, which, if considered alone, might have constituted separate particular matters, such as specific tax provisions for the oil, gas and pharmaceutical industries. See Pub. L. 99-514, October 22, 1986. However, the inclusion of such topics simply as components of a much more global tax reform proposal meant that the Tax Reform Act, like the comprehensive tax reform deliberations of the new Panel, must be viewed as too broadly focused to be considered a particular matter.

If you have any further questions about this matter, feel free to contact my Office.

Sincerely,

Marilyn L. Glynn
Acting Director