

Office of Government Ethics

03 x 4

**Memorandum dated June 30, 2003,
from Amy L. Comstock, Director,
to Designated Agency Ethics Officials
Regarding Inherently Governmental and
Commercial Ethics Official Activities**

We have received a number of questions from the ethics community about whether certain ethics official activities are "inherently Governmental" or "commercial" in nature. This issue was raised again recently when the Office of Management and Budget (OMB) released a revised version of Circular No. A-76, the document that establishes Federal policy for the competition of commercial activities.¹ The revised Circular requires each agency to identify all activities performed by Government personnel as either "commercial" or "inherently Governmental," to perform inherently Governmental activities with Government personnel but rely on the private sector to provide commercial products and services, and to adhere to new rules governing the competition of commercial activities.

This DAEOgram: (i) briefly summarizes some significant features of the revised OMB Circular A-76; (ii) explains that Designated Agency Ethics Official (DAEO) and Alternate DAEO (ADAEO) functions are inherently Governmental and must be performed by Government employees; and (iii) identifies some common ethics official activities that are inherently Governmental, as well as some activities that may be commercial in nature. We hope that this information helps you inventory your agency's ethics official activities, and that you will provide this information to relevant officials in your agency, as appropriate.

OMB CIRCULAR A-76

The revised OMB Circular A-76, which became effective May 29, 2003, establishes new policies and procedures for

¹ The revised OMB Circular A-76 may be viewed at http://www.whitehouse.gov/omb/circulars/a076/a76_rev2003.pdf. See also Revision to OMB Cir. No. A-76, "Performance of Commercial Activities," 68 *Fed. Reg.* 32134, May 29, 2003.

identifying commercial activities and determining whether they should be provided by public or private sector sources. According to OMB, the new A-76 rules will improve the framework for implementing public-private competitions and advance the President's competitive sourcing initiative.

Of particular relevance to the executive branch ethics program is the Circular's requirement that agencies identify all activities performed by Government personnel as either commercial or inherently Governmental. By June 30 of each year, agencies are required to submit to OMB an inventory of commercial activities performed by Government personnel,² an inventory of all inherently Governmental activities performed by agency personnel, and an inventory summary report.

Consistent with the former version of Circular A-76,³ the revised A-76 provides that inherently Governmental activities must be performed by Government personnel. The Circular requires agencies to justify, in writing, any designation of Government personnel performing inherently Governmental activities. In contrast, the Circular directs that commercial activities generally are subject to competition unless exempted by the agency. If an agency exempts a commercial activity performed by Government personnel from private sector performance, it must justify, in writing, why the activity should not be performed by the private sector. Accordingly, properly identifying activities as inherently Governmental or commercial will be critical under the new A-76 rules.

OMB Circular A-76 defines an "inherently Governmental" activity as one that is so intimately related to the public interest that it must be performed by Government employees. The revised Circular provides that agencies must determine that there be an exercise of "substantial discretion" in applying

² The obligation to submit to OMB a list of agency activities that are not inherently Governmental is set forth in the Federal Activities Inventory Reform (FAIR) Act of 1998.

³ The revised A-76 replaces the former version of OMB Circular No. A-76. It also supersedes and rescinds the following documents: OMB Circular No. A-76 Revised Supplemental Handbook (Revised 2000), March 1996; OMB Circular No. A-76 Transmittal Memoranda Nos. 1-25; and Office of Federal Procurement Policy (OFPP) Policy Letter 92-1, *Inherently Governmental Functions*, September 23, 1992.

Government authority and/or in making decisions for the Government in order for an activity to be considered inherently Governmental. Such an activity involves, among other things, binding the United States to take or not take some action or significantly affecting the life, liberty, or property of private persons. According to the revised Circular, the use of discretion is considered "inherently Governmental" if it commits the Government to a course of action when two or more alternative courses of action exist and decision making is not already limited or guided by existing policies, procedures, directions, orders, and other guidance that (1) identify specified ranges of acceptable decisions or conduct and (2) subject the discretionary authority to final approval or regular oversight by agency officials. The revised Circular also sets forth factors, such as the existence of statutory restrictions and the degree to which official discretion is or would be limited, that an agency must consider in order to avoid transferring inherently Governmental authority to a contractor.

A "commercial activity," according to Circular A-76, generally is a recurring service that could be performed by the private sector, and is not so intimately related to the public interest as to mandate performance by Government personnel. The Circular notes that commercial activities may be found within, or throughout, organizations that perform inherently Governmental activities or classified work.

DAEOs

Consistent with the new rules of OMB Circular A-76, the Office of Government Ethics (OGE) has determined that the DAEO and ADAEO functions must be performed by Government personnel. The very nature of a DAEO's duties requires the exercise of substantial discretion in the application of Government authority and/or making decisions for the Government. As you know, each agency has a DAEO (and an ADAEO) who have been designated by the agency head to have primary responsibility for the administration, coordination, and management of the agency's ethics program. A DAEO's oversight responsibilities include ensuring that his or her agency's ethics program has adequate resources, is effective, and is administered in accordance with applicable laws and regulations. In addition, many DAEO duties involve actions that bind the United States and/or that significantly affect the life, liberty, or property of private persons. For example, the DAEO selects deputy ethics officials, makes delegations of authority, and ensures that prompt and effective action is taken to remedy potential or actual

conflicts of interests. Finally, DAEs and ADAEs are responsible for and often do perform all of the ethics official activities identified below as being inherently Governmental. Accordingly, neither the DAE nor the ADAE function may be contracted out.

ETHICS OFFICIALS ACTIVITIES

OGE also has concluded that there is a core set of activities performed by those ethics officials who are not DAEs or ADAEs that may not be contracted out. Below, we first list some of the typical ethics official activities that OGE has determined are inherently Governmental, and then list some activities that may be "commercial."

A. Inherently Governmental Activities

Based on our analysis of the A-76 requirements, OGE has determined that the following activities regularly performed by ethics officials are inherently Governmental and must be performed by Government personnel:

- providing final written or oral opinions concerning the application of the conflict of interest laws or the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct), including giving advice directly to Government employees;
- serving as an "agency designee" under the Standards of Conduct, *e.g.*, approving a Government employee's request for outside employment or authorizing an employee's participation in a widely attended gathering;
- certifying public and confidential financial disclosure forms;
- determining agency policies, *e.g.*, determining (with OGE approval) the need to issue, and content of, supplemental standards of ethical conduct regulations, and recommending for designation departmental or agency components for purposes of 18 U.S.C. § 207;
- referring a criminal or regulatory matter to the appropriate Inspector General for investigation;

- referring a criminal matter to the Department of Justice (DOJ);
- ensuring that administrative action is taken after declination of prosecution by DOJ;
- ensuring that administrative action is taken regarding regulatory violations;
- exercising delegated authority to grant individual waivers under 18 U.S.C. § 208(b)(1) and (b)(3); and
- selecting deputy ethics officials.

Of course, this is not an exhaustive list of inherently Governmental ethics official activities. We recognize that agency missions, organizational structures, and staff resources differ widely. To the extent that ethics officials (other than DAEOs and ADAEOs) are given substantial discretion, such that they effectively administer the ethics program on a day-to-day basis, many of their other activities presumably should be considered inherently Governmental as well.

B. Commercial Activities

On the other hand, the following duties or activities could be considered "commercial" and thus, depending on the circumstances, might be suitable for contracting out, given the structure and organization of the agency's ethics program:⁴

- developing and conducting training;
- maintaining, distributing, and collecting financial disclosure reports;

⁴ We note that the revised Circular provides six "reason codes" that may be used to explain why Government personnel are currently performing a commercial activity. For example, if an agency determines that an activity is eligible but not appropriate for private sector performance using "Reason Code A," it must prepare a written justification of such exemption. Given the variations in ethics programs, we encourage any agency that wishes to properly code the Government performance of a commercial activity to review Attachment A of Circular A-76, as well as any relevant OMB guidance.

- reviewing for technical completeness (but not certifying) financial disclosure reports;
- preparing the draft version of written ethics advice or an advisory opinion, to be issued by an ethics official who is a Government employee;
- receiving, reviewing, and granting requests for disclosure of public financial disclosure reports (SF 278s), in accordance with relevant laws and regulations;
- receiving and conducting an initial review of outside activity forms;
- conducting a preliminary inquiry into ethics hot line calls;
- preparing the draft version of an agency supplemental standards of ethical conduct regulation and forwarding same to OGE; and
- maintaining ethics program records, including notifying OGE of criminal referrals to DOJ and notifying the DAEO or OGE of administrative action taken in response to an ethics violation.

These are only some of the activities that may be performed by your agency's ethics office. We recommend that you consult the revised OMB Circular A-76 and related FAIR Act guidance for additional information. Of course, we remain available to answer any questions you may have. Please feel free to contact OGE in this regard.