**Office of Government Ethics**

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**Letter to the Project Director**
**of a Federal Program**
**dated August 22, 2000**

I am writing in response to your letter dated August 1, 2000, inviting an Associate General Counsel of this Office to participate in a working group responsible for the design and implementation of an [exchange] program. While the Office of Government Ethics (OGE) will be available to provide guidance to the working group on ethics laws and regulations, I have decided that this Office should not participate as a member of the working group.

The working group, as your letter indicates, will focus on the design and implementation of an exchange program. The working group may well consider organizational and other conflicts in making policy choices about what is in the Government's best interest in establishing the program; but these choices are separate and apart from the legal analysis associated with determining what steps would need to be taken, whatever the program design, to prevent individuals from transgressing ethics laws or regulations.

Although we will not be participating in the working group, we do want to give you some general information about conflict of interest restrictions for purposes of reference. In this regard, here is a very brief summary of issues that will need to be considered in connection with an exchange program.

The extent to which ethics laws and regulations apply to exchange participants will depend on whether those persons are considered "employees" of the Government, as the ethics laws and regulations primarily concern persons who are "employees." OGE is not the arbiter of whether an individual is an employee, but certain factors have been developed in the context of the application of the conflict of interest statutes to aid in analyzing the issue. *See* 1 Op. O.L.C. 20 (1977). These factors address whether an individual has been appointed into the Federal service,[1] is engaged in the authorized performance of a Federal

[1] An identifiable act of appointment is not absolutely essential for an individual to be considered an employee; it is sufficient that there be a mutual understanding of a relatively formal relationship. *See* 1 Op. O.L.C. at 21.

function, and is subject to the supervision of a Federal officer or employee while engaged in the duties of his or her position. *Id.* If persons exchanged to the Government from the private sector were nothing more than observers of Government processes, we do not believe those persons would be likely to be considered Federal function, and is subject to the supervision of a Federal officer or employee while engaged in the duties of his or her position. *Id.* If persons exchanged to the Government from the private sector were nothing more than observers of Government processes, we do not believe those persons would be likely to be considered Federal employees. However, if private sector individuals are placed in the Government in executive roles with operational or policy-making responsibilities, an application of the factors would likely result in a different conclusion.

If a Government official is assigned to work with a private sector entity, a threshold question is whether the acts taken by the official on behalf of the private sector entity are considered to be taken in the Federal employee's official capacity. Like the question of whether a person is a Federal employee, the issue of whether an act is in an employee's official capacity is not one within the jurisdiction of this Office. We note that if a Federal employee is receiving pay from the Government in connection with his service to the private entity, that compensation would be indicia of service in an official capacity.

The criminal prohibition contained in 18 U.S.C. § 208 bars a Government employee from working on an official matter in which the employee, or certain persons with whom the Government employee is affiliated, has a financial interest. Persons whose interests are attributed to the employee include the Government employee's non-Federal employer or a person with whom the employee is negotiating or has an agreement or arrangement for future employment. Section 208 would have to be considered in connection with any private sector executives who were employees of the Government and were assigned to work on matters affecting their outside employers. It could also be implicated in connection with Government executives employed by private sector entities if such person were: (a) considered to be "employees" of the non-Federal entities (or if they were negotiating or had an arrangement for future employment); (b) their work was in an "official capacity"; and (c) their work affected those outside entities. In an appropriate case, a waiver of the criminal prohibition may be issued by an employee's agency.

Also of concern are the criminal prohibitions on Federal employees representing outside organizations before the Federal Government. 18 U.S.C. § 205 prohibits representational activity by an executive branch employee who is acting as an agent or attorney

of an outside entity before the Government. Depending on the facts, this statute might preclude a Government employee from making representations back to any Government agency on behalf of the private organization with which he is working. Similarly, 18 U.S.C. § 203 prohibits compensated representational activity before the Government by executive branch employees on behalf of outside entities. Receipt of compensation or benefits from an outside employer for making representations on behalf of the outside employer to the Government would raise questions under this statute.

18 U.S.C. § 209 of the criminal statutes prohibits the payment or receipt of a supplementation of a Government employee's salary as compensation for services rendered by the employee to the Government. This would preclude payment of benefits by outside entities to a Government employee for carrying out official duties. If a Government executive were exchanged to a private entity and while working at that entity were carrying out official duties, the private entity and the employee might run afoul of section 209 were the private entity to pay or compensate the employee in connection with carrying out those duties. Also, if private sector employees were exchanged to work for the Government, were considered to be Government employees, and were compensated by their outside employer in connection with the work they were doing for the Government, this arrangement would raise systemic questions under section 209.[2]

18 U.S.C. § 207 concerns post-employment restrictions. These prohibit former executive branch employees from coming back to represent persons before the Government with respect to specific matters they worked on as Government employees; former employees are also restricted for two years from representing any person back to the Government on certain matters that were under their supervision when they were with the Government; senior employees (that term is statutorily defined to include levels 5 and 6 of the Senior Executive Service) are prohibited from making certain representations on any matter back to the agency where they worked for a year after leaving Federal service. The application of section 207 to exchange participants depends on the answer to the questions of whether exchange participants are Federal "employees"

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[2] Section 209(e) excepts from the Section 209 prohibition the payment and receipt of "actual relocation expenses incident to participation . . . in an executive exchange or fellowship program in an executive agency: Provided, That such program has been established by statute or Executive order . . . ." The exception is limited to appointments of no more than a year.

when acting pursuant to the exchange and whether acts taken by exchange participants are taken in an official capacity. If a private sector executive were exchanged to the Government and considered to be a Government employee, upon departure from Government service, that person would be precluded from making representations back to the Government on certain matters pursuant to section 207. Likewise, if a Government official were exchanged to a private sector entity and were working in an official Government capacity for that entity, upon leaving Government service, the former Government employee would be precluded from making representations back to the Government on certain matters, such as specific matters the employee had worked on while at the non-Government entity.

As is clear from the above discussion, the status of persons involved in the exchange program will be critical to the scope of the application of the conflict statutes. Whether a person is acting in an official capacity or is acting pursuant to statutory authority can also impact the extent to which the conflict of interest statutes apply to their activities. For example, sections 203 and 205 do not apply to acts taken as a part of proper discharge of official duties. If, by authorized direction of his agency, an employee is representing another before the Government, the potential bars of sections 203 and 205 may not apply. *See* Memorandum for Larry R. Parkinson, General Counsel, Federal Bureau of Investigation, from Beth Nolan, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of 18 U.S.C. § 205 to Employees Serving on an Intergovernmental Personnel Act Assignment*, (1999). Similarly, if an employee acts in his official capacity and pursuant to a statute in a matter affecting an outside organization which he is serving, the prohibitions of section 208 may not apply. *See* Memorandum for Howard M. Shapiro, General Counsel, Federal Bureau of Investigation, from Beth Nolan, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Service on the Boards of Directors of Non-Federal Entities by Bureau Personnel in Their Official Capacities* (1996). Therefore, establishing the status of the exchange participants and the authority pursuant to which they are operating is critical to reaching any conclusions about the ethics regimen that is applicable. We note that the degree to which the program is properly authorized may impact other legal issues such as whether an exchange of private sector personnel (paid by private entities) to an agency would constitute an improper augmentation of an agency's appropriation or that Federal procurement regulations were bypassed in obtaining services for the agency.

In terms of non-statutory ethics concerns, the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of

Conduct) govern employee conduct. These rules govern such matters as gifts from outside sources, impartiality, seeking employment, and misuse of Government position. Government employees on assignment to private entities would be subject to these restrictions. To the extent private sector officials became employees of the Government, they also would be covered by the Standards of Conduct. Here again, the status of the exchange participants is critical to reaching conclusions on the applicability of conduct regulations.

I understand there may be legal issues that arise in developing the exchange program aside from those associated with conflicts of interest and the Standards of Conduct. The Associate General Counsel told me that, for example, a question came up regarding the application of the Federal Advisory Committee Act to the working group. As that issue is beyond the jurisdiction of this Office, I encourage you to seek advice as to the breadth of application of that statute.

You may contact my Office with any questions you have regarding conflicts of interest or the Standards of Conduct in connection with the establishment of the exchange program.

Sincerely,

F. Gary Davis
Acting Director