

OFFICE OF GOVERNMENT ETHICS

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**Letter to Two United States Senators
dated July 9, 2001**

As requested by [a Government office], I am pleased to respond to your letter of May 18, 2001, which addresses the policies of [a] Committee [of the United States Senate] with respect to the divestiture and recusal commitments of nominees for Senate-confirmed positions in [a] Department. As you know, [the Government office] indicated that the Office of Government Ethics (OGE) would be answering your questions about the impartiality provisions in the Standards of Ethical Conduct for Employees of the Executive Branch.

You point out that the Committee generally prefers divestiture to recusal for nominees who have financial interests in firms doing business with [the Department]. You indicate that the Committee prefers severing ties, by resignation or divestiture, rather than recusal, to insure that the nominee is not inhibited with respect to the matters on which he or she may work after confirmation. As a separate matter, we have asked to meet with you to discuss this requirement.

In your letter, you ask that the requirements of section 2635.502 be reviewed in order to "ensure that the rule is written and applied in a manner that effectively evaluates a nominee's conflict of interest and impartiality on matters relating to 'covered relationships.'" Specifically, you are concerned about situations in which a Senate-confirmed appointee severs all conflicting ties to an entity, pursuant to Committee policy, but still has a "covered relationship," under 5 C.F.R. § 2635.502(b)(1)(iv), by virtue of prior employment during the previous one-year period. You ask whether the rule might impose "unreasonable limitations on the ability of these employees to do their jobs." For the reasons explained below, we do not believe that section 2635.502 imposes any unreasonable recusal obligations.

Section 2635.502 implements the principle, articulated in section 101(h) of Executive Order 12674, that employees "shall act impartially." This impartiality principle is separate from the principle that employees "shall not hold financial interests that conflict with the conscientious performance of duty." § 101(b), Executive Order 12674. The very structure of the implementing regulations presupposes that there are other sources of impartiality or appearance concerns, such as relationships that do not otherwise create disqualifying financial interests under the federal conflict of interest statute, 18 U.S.C. § 208. Therefore, the divestiture of potentially conflicting interests, pursuant to the Committee's

policy, does not necessarily resolve all impartiality or appearance concerns that may stem from a nominee's personal and business relationships.

It has long been recognized that former employment with a private organization can raise impartiality concerns. Members of the public, the press, and even the Congress sometimes have questioned whether a particular public official might be subject to continuing influence by a former employer. *E.g.*, "Probe of 3 FDA Officials Sought," Washington Post, p.A3, April 19, 1994 (members of Congress request GAO investigation of agency employees with prior ties to company).¹ Well before OGE identified former employment as a "covered relationship" in section 2635.502, some version of a recusal requirement with respect to former employers was followed by many officials and agencies. *See, e.g., Center for Auto Safety v. FTC*, 586 F. Supp 1245, 1248-50 (D.D.C. 1984) (collecting various recusal policies respecting former employers); 45 C.F.R. § 73a.735-201 (one-year recusal obligation in former FDA regulation).

What section 2635.502 added to this area was a measure of uniformity, objectivity, and, we believe, reasonableness. Most important, section 2635.502 employs the concept of "covered relationship," which "pinpoint[s] certain relationships that are especially likely to raise issues of lack of impartiality [and] helps to focus the employee's inquiry." 57 *Fed. Reg.* 35006, 35025 (August 7, 1992) (preamble to final rule). Under section 2635.502, employees are deemed to have a covered relationship with a former employer only for a limited and clearly understood time period, *i.e.*, one year after completion of service for the employer.

Moreover, section 2635.502 has other features that help to provide reasonable limits on any recusal obligation with respect to former employers. First, the primary focus of section 2635.502 is on particular matters involving specific parties (as opposed to policymaking and other matters of general applicability, which typically pose fewer concerns) and, more specifically, on those matters in which the former employer actually is a party or represents a party. Second, an employee does not even have an obligation to consider the need to recuse unless it is determined, by the employee or the agency, that a reasonable person with

¹More recently, we note that two members of the Committee wrote to the [head of an agency] to express their concern that [the agency head] not participate in certain particular matters involving his former employer. [Citation deleted.] [The agency head] responded that he would recuse himself from the matters identified by the Committee members for the one-year period specified in section 2635.502 and that he would not seek an authorization to participate. [Citation deleted.]

knowledge of all relevant facts would question the employee's impartiality in a particular matter. Third, an "agency designee" still may "authorize" the employee's participation in the matter, based on a determination that the interest of the Government in the employee's participation outweighs any impartiality concerns. As OGE indicated at the time it first proposed this regulation, section 2635.502 was intended to provide agencies with a "flexible standard" and "broad discretion," rather than an inflexible prohibition that might unreasonably interfere with agency operations. 56 *Fed. Reg.* 33778, 33786 (July 23, 1991).

This flexibility and discretion extend to the manner in which agencies exercise the authority to authorize an employee's participation, i.e., waive the recusal requirement. In this connection, we want to emphasize that section 2635.502 does not require that authorizations be made only on a "matter-by-matter" basis. An agency designee has the discretion to issue an advance authorization covering a class of future matters in which the particular employee might be expected to participate, provided that the regulatory standard for granting an authorization can be met with respect to all such expected matters. In this regard, we believe that section 2635.502(d) operates much in the same way as the provisions governing the issuance of waivers under the criminal conflict of interest statute, 18 U.S.C. § 208(b)(1); as to the latter, OGE specifically has recognized that agencies, under appropriate circumstances, may issue a waiver that would "apply to all matters which an employee would undertake as part of his official duties." 5 C.F.R. § 2640.301(a) (Note).

Similarly, we believe that agencies retain the discretion to limit or otherwise modify an authorization after it has been granted. Your letter correctly notes that section 2635.502(d) contains a provision that precludes employees from continuing to disqualify themselves from certain matters once they have received an authorization from the appropriate agency designee. This provision is necessary to preserve an agency's prerogative to direct the assignments and manage the workload of its employees, which would be jeopardized if employees could unilaterally disqualify themselves from any matter notwithstanding a proper authorization under section 2635.502(d). This provision does not, however, limit the ability of an employee to bring new facts or concerns to the attention of the agency designee, or the ability of the agency designee to alter or even revoke a previous authorization with respect to a matter that appears particularly problematic in a subsequent light. Especially in the case of Senate-confirmed appointees, we would expect that agency designees and other officials generally would be receptive to any misgivings expressed by the individual about potential public controversy stemming from participation in a matter of particular concern.

In light of the above considerations, we continue to believe that section 2635.502 strikes the appropriate balance between the need to protect the integrity of Government operations and the need to preserve the Government's ability to make optimal use of its personnel.

We would, of course, be happy to meet with you or your staff at any time to discuss these issues further. Please feel free to contact me or OGE's General Counsel.

Sincerely,

Amy L. Comstock
Director