

Letter to a Federal Employee
dated December 22, 2006

This is in response to your letter of November 9, 2006. You indicate that you are a Federal employee (GS-15) with responsibility for managing and supervising a staff that performs information technology (IT) audits of the Federal department for which you work. You have requested that the Office of Government Ethics (OGE) describe how ethics laws and regulations apply to your proposed private business activities. Specifically, you indicate that you have established a limited liability corporation (LLC) that performs computer systems security reviews and you would like to know when, and under what conditions, you may perform outside consulting while still employed by the Federal Government.

Ordinarily, we advise employees to seek the advice of the Designated Agency Ethics Official (DAEO) for their agency if they have questions concerning the permissibility of a proposed outside activity, because the DAEO is in a better position to evaluate that activity within the context of the employee's responsibilities. Nevertheless, we can provide the following general outline of some of the restrictions on outside activities that your questions may involve.

PRIOR AGENCY APPROVAL FOR CERTAIN OUTSIDE ACTIVITIES

Many agencies require their employees to receive prior approval before they can engage in certain outside activities. In this instance, your agency has supplemental ethics regulations requiring that its employees obtain written approval from the agency prior to engaging in many outside activities.¹ Some of the outside business activities

¹ According to [citation deleted], "An employee . . . must obtain written approval prior to engaging--with or without compensation--in the following outside activities . . . (1) on behalf of any other person in connection with a particular matter: (i) In which the United States is a party; (ii) In which the United States has a direct and

you indicate you are considering appear to be the type of outside activities covered by your agency's supplemental regulation. Your agency's DAEO can advise you on the procedures for submitting a request for prior approval under the supplemental rules.

CONFLICTING OUTSIDE EMPLOYMENT AND ACTIVITIES

In your letter you ask whether your outside IT consulting activities could be deemed too closely related to your official duties so that these activities might conflict with your job. Under 5 C.F.R. § 2635.802 an employee is prohibited from engaging in an outside activity that conflicts with his official duties. An outside activity will conflict with an employee's official duties if it is prohibited by statute or by an agency supplemental regulation. 5 C.F.R. § 2635.802(a). In addition, an outside activity will pose a conflict when, under the standards set forth in 5 C.F.R. § 2635.402 and 5 C.F.R. § 2635.502, it would require the employee's disqualification from matters so critical to the performance of his official duties that the employee's ability to perform his job would be materially impaired. You should seek the assistance of your agency's DAEO if you are unsure whether engaging in an outside business opportunity would constitute a conflict with your job. The DAEO is in a position to evaluate whether your activity, within the context of your official responsibilities, would require you to disqualify yourself from matters critical to the performance of your job.

FEDERAL ACQUISITION REGULATION LIMITATIONS

In addition to the prohibitions outlined above, the Federal Acquisition Regulation (FAR) generally prohibits a contracting officer from awarding a contract to a Government employee "or to a business concern or other organization owned or substantially owned or controlled by one or more Government employees." 48 C.F.R. § 3.601. Although this is not an ethics rule under OGE's purview, it is clear that the FAR provision is intended to avoid any employee "conflict of interest" as well as "the appearance

substantial interest; or (iii) If the provision of services involves the preparation of materials for submission to, or representation before, a Federal court or executive branch agency."

of favoritism or preferential treatment by the Government toward its employee." *Id.* The exception to this rule applies "only if there is a most compelling reason to do so, such as when the government's needs cannot reasonably be otherwise met." 48 C.F.R. § 3.602. Thus, it appears that this provision generally would prohibit an agency contracting officer from awarding a contract to your LLC while you serve as a Federal employee. Please note that it is beyond the jurisdiction of OGE to make any determination concerning whether what you referred to in your letter as a "quasi Government entity" is subject to the FAR. If you are unsure whether the FAR applies to a "quasi Government entity" you should consult with your agency DAEO prior to pursuing business opportunities before any such entity. The agency DAEO, on a case-by-case basis, will make a determination whether the FAR applies.

If your agency DAEO concludes that your activities are not prohibited by your agency's supplemental regulations, the FAR or other statutory prohibitions, he should still advise you regarding several criminal conflict of interest statutes and regulatory provisions that could limit your private business activities.

LIMITATIONS ON REPRESENTATIONAL ACTIVITY

Sections 203 and 205 of title 18 of the U.S. Code are criminal laws that impose related restrictions on outside activities involving representation of others before the Federal Government. Section 203 prohibits a Federal Government employee from receiving compensation based on anyone's representations before a Government department, agency or officer in relation to any particular matter, such as a contract or claim, in which the United States is a party or has a substantial interest. In addition, section 205 bars the same activity even if no compensation is received. You have indicated that, on behalf of your LLC, you may wish to seek contracts with a Federal department or agency while you are a Federal employee. Both sections 203 and 205 specifically prohibit an employee from representing a third party (including an LLC) in this situation. This prohibition also applies to receipt of compensation for representational services when the employee receiving the compensation represents a subcontractor for a Government contractor. Please be sure to consult with your agency's DAEO prior to accepting compensation as a subcontractor to ensure that any

compensation you may receive does not qualify as compensation for representational services.²

REPRESENTATIONAL ACTIVITIES BEFORE PRIVATE ENTITIES

In your letter you also indicate that while you are still a Federal Government employee your LLC may contract with a private company with no Federal affiliations. Since neither section 203 nor section 205 applies to representations made on behalf of another before a private company with no Federal affiliations, neither statute prohibits an employee from representing another in this situation. However, there are various other restrictions on employees' ability to use their offices for private gain which may be applicable and are discussed at the end of this letter.

STATUS OF "QUASI-GOVERNMENT" ENTITIES FOR CONFLICT OF INTEREST PURPOSES

In your letter you asked whether contracting with or having discussions concerning a business opportunity with a "quasi Government entity" that does not receive appropriated funds would be prohibited under ethics rules. The Department of Justice, Office of Legal Counsel is charged with interpreting whether an entity is an "agency" for the purposes of the conflict of interest laws, including sections 203 and 205. The Office of Legal Counsel looks to the definition of "agencies of the United States" in 18 U.S.C. § 6 to determine if an entity should be regarded as an agency of the United States for the purposes of the conflict of interest laws. 12 Op. O.L.C. 84 (1988). The term is defined for purposes of title 18 generally to include any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.

²Representational services are defined as communications to or appearances before specified Federal entities, with the intent to influence the Government on behalf of a third party. See OGE Informal Advisory Memorandum 99 x 25.

The Department of Justice has taken the position that the definition of "agency" in 18 U.S.C. § 6 is an expansive one, including for the purpose of offenses involving a conflict of interest. 5 Op. O.L.C. 194 (1981)(holding that the Office of the Architect of the Capitol is an "agency" as that term is defined in 18 U.S.C. § 205); 12 Op. O.L.C. 84 (1988). However, any analysis of whether a particular Federal entity is an "agency" for the purposes of the conflict of interest laws needs to be determined on a case-by-case basis and is beyond the scope of this letter.³ In addition, since the definition of "agency" is expansive for this purpose, you should definitely consult with your agency's DAEO prior to pursuing business opportunities before any entity you referred to in your letter as a "quasi Government entity."

PERSONAL FINANCIAL INTEREST

A third criminal conflict of interest statute that could be implicated in your situation is 18 U.S.C. § 208, which prohibits a Government employee from taking official actions on particular matters affecting the employee's personal financial interests or the financial interests of, among others, his spouse, minor child, or partner. It also prohibits the employee from taking official actions in a particular matter affecting an organization in which he serves as an officer or has an ownership interest. Since you have an ownership interest in the LLC, you would be prohibited from acting on particular Government matters affecting the LLC, should they come before you in your capacity as a supervisory auditor (Information Technology).

In addition, 18 U.S.C. § 208 prohibits a Government employee from taking official actions on particular matters affecting the financial interests of any person or organization with whom the employee is negotiating or has any arrangement for prospective employment. Thus, section 208 might require you to recuse yourself from participating in any Government matter involving a contactor for your agency with which your LLC is negotiating a business relationship. If you are unsure whether your work at your agency on any matter would affect your personal financial interests, you should discuss it

³ See 12 Op. O.L.C. 84 (1988), for a discussion of the factors considered in making a determination whether an entity is an "agency" under 18 U.S.C. § 6.

with your DAEO or alert your supervisor prior to beginning work on the matter.

MISUSE OF OFFICIAL POSITION

In your letter you state that you are taking certain steps to ensure that you do not violate 5 C.F.R. part 2635, subpart G--Misuse of Official Position. There are several regulatory provisions in subpart G that could limit your outside activities if you choose to maintain your LLC and market its services. In general, you may not use your public office for the private gain of yourself or any organization with which you are affiliated in a private capacity. 5 C.F.R. § 2635.702. Refer to example 2, in 5 C.F.R. § 2635.802 for guidance in this area. The example provides an illustration of the type of consulting contract that is prohibited because of the appearance that the employee had used his official position to obtain an outside business opportunity.

Subpart G also prohibits the suggestion that the Government endorses or sanctions your personal activities. 5 C.F.R. § 2635.702(b). Thus, you are prohibited from using your position or title in an attempt to induce or coerce anyone to provide a benefit, or to endorse any product, service, or enterprise such as the services provided by your LLC. Also, please note that there are restrictions on use of official property and official time (including the time of subordinates) for unauthorized purposes. 5 C.F.R. §§ 2635.704 and 2635.705. Subpart G also prohibits employees from using non-public information that they obtain through their Federal employment to further their own private interest. 5 C.F.R. § 2635.703. You should seek the assistance of your agency's DAEO if you are unsure whether engaging in an outside business opportunity would create the appearance of misuse of your official position.

I hope you find this information to be of assistance.

Sincerely,

Marilyn L. Glynn
General Counsel