
Office of Government Ethics

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Letter to an Agency Ethics Official dated September 8, 1997

Your letter of August 8, 1997, requested that the Office of Government Ethics (OGE) approve five proposed waivers of ethics requirements for a specified group of employees, in order to test recommendations made by [a] Department's Ethics Pilot Study under the National Performance Review (NPR). We understand that the theory behind this pilot study and the requested waivers is that ethical conduct of employees could be maintained or improved, with less burden and cost, if the fundamental principles of ethical behavior were fewer and stated more positively, and if the financial disclosure requirements were more fully administered through computerized methods. As indicated in the following discussion, we neither concur with, nor are empowered to approve, the requested waivers concerning the basic fourteen principles and the standards of conduct and training regulations. We are, however, granting limited permission to test expanded computer automation in the confidential financial disclosure system, as described below.

BASIC ETHICS PRINCIPLES AND THE STANDARDS OF CONDUCT REGULATION

With respect to standards of ethical behavior, your letter requests OGE's approval, in connection with the proposed test, for reducing the fourteen fundamental principles of ethical service established by Executive Order 12674 to six, which would be restated in a more positive, rather than prohibitive, manner. In order to accomplish this, the proposal requests that OGE suspend the regulatory Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) at 5

C.F.R. part 2635, which we issued as required by Executive Order 12674 to implement the fourteen principles, and that OGE also suspend the requirement at 5 C.F.R. § 2638.704(c)(1) for annual employee training that covers these provisions. For the reasons indicated below, OGE is not approving the requested waivers of either part 2635 or section 2638.704(c)(1).

First, OGE does not have the authority to waive application of the fourteen fundamental principles established by Executive Order 12674 or the implementing regulation at 5 C.F.R. part 2635 that it required OGE to issue. Notably absent from the six proposed alternative principles, for example, are precepts directly relating to gift acceptance, financial interests, outside activities, and avoiding actions that create appearances of impropriety. It is not within OGE's province to set aside any provisions of the Executive order. Additionally, Congress directed OGE, at 5 U.S.C. app., § 402, to provide overall direction of executive branch policies on preventing conflicts of interest, including the issuance of regulations pertaining to conflicts of interest and ethics, and the interpretation of such regulations. Our approval of the philosophical restructuring that [the Department's] pilot study proposes would, in our view, abrogate that statutory responsibility. For these reasons, OGE is not at liberty to waive the application of the fourteen fundamental principles in the Executive order or the implementing Standards of Conduct regulation.

Second, even if OGE had the authority to waive application of the fourteen fundamental principles, we would not be inclined to do so. Your letter suggests trusting the test group of employees to abide by the spirit of the six proposed substitute guidelines, with the aid of computerized and printed training resources, as a demonstration that expectations of good ethical judgment can result in appropriate ethical behavior, without detailed and standardized rules of guidance. We do not agree with the supposition that this would create a "simple,

enforceable, common-sense system.” In fact, we consider the proposal unworkable, because it would foster inconsistent interpretation and thwart disciplinary accountability. Employees would be expected to understand and abide by the suggested six substitute ethical principles primarily by using common sense and sound judgment. This ignores real-life experience with Federal ethics programs over the past several decades, which has indicated that lack of clear standards breeds both intentional and inadvertent breaches. Furthermore, dropping the prohibitive precepts and relying solely on a recast version of the existing positive ethical principles could, in our opinion, mislead and confuse employees, and would disregard fundamental American legal traditions that citizens are governed by laws rather than mere exhortations to do the right thing. It might also frustrate a basic purpose stated in the Executive order for having comprehensive ethical principles and implementing regulations, which is “to ensure that every citizen can have complete confidence in the integrity of the Federal Government.”

We believe that employees and the public alike understand and respect a format of positive principles combined with specific prohibitions, which not only affords clear and consistent interpretation, but also provides a basis for appropriate accountability and deterrence. Without the Standards of Conduct regulation and the body of interpretive OGE opinions and guidance that has developed over the years to ensure uniform application, employees would be forced to determine whether a particular course of conduct is permitted by consulting various undeveloped alternative training resources proposed by the pilot study. As a result, it would be very difficult to hold them accountable to their fellow employees, the Government, and the public through disciplinary action, because there would be no clear notice of the rules. Moreover, employees would not have the protections afforded by the Standards of Conduct

regulation through its specific expectations and definitions that operate to limit the overzealous application of ethical principles.

Third, without the application of OGE's regulation at 5 C.F.R. part 2635, the Executive order and two civil statutes would impose absolute gift prohibitions. The solicitation and acceptance of gifts by employees from specifically described outside sources are prohibited by both the Executive order and 5 U.S.C. § 7353, except as allowed by regulation issued by OGE. Suspension of the Executive order's gift prohibition or of OGE's regulatory definitions and exceptions in subpart B of 5 C.F.R. part 2635 would leave employees without any legally authorized exceptions to the absolute statutory prohibition on soliciting or accepting *anything* of value from the described sources, and the legal requirement therein for appropriate disciplinary and remedial action for violations. Similarly, 5 U.S.C. § 7351 prohibits solicitation and acceptance of gifts to superiors, authorizes exceptions only through regulations issued by OGE, and contains a legal requirement that violations be dealt with through appropriate disciplinary action. Suspension of OGE's regulatory definitions and exceptions in subpart C of 5 C.F.R. part 2635 would leave employees subject to that absolute statutory bar as well, without any legally approved exceptions.

Finally, although your letter acknowledges that the criminal statutes would continue to apply to employees in the test group, we believe that the Standards of Conduct regulation, along with related OGE interpretive opinions and guidance, provides significant assistance in applying those statutes, without which criminal violations would be more likely to occur.

For all these reasons, we are unable to approve substitution of the proposed six principles for the existing fourteen, or suspension of the Standards of Conduct regulation. It may be possible, however, to incorporate a more positive statement of these precepts into required training and other educational

resources. We see no impediment to an initiative that would seek to emphasize in a positive way the fourteen principles and the implementing Standards of Conduct regulation, so long as it carefully preserves the concept enunciated in both the Executive order and the regulation that these ethical rules state enforceable obligations of Government service.

**CONFIDENTIAL FINANCIAL DISCLOSURE
REGULATION**

As required by Executive Order 12674, and authorized by 5 U.S.C. app., § 107, OGE developed and issued the governing financial disclosure regulation in 1992, which is codified at 5 C.F.R. part 2634. [The Department's] pilot study requests waivers of certain requirements in section 2634.905(c), section 2634.605(b)(2), and section 2634.605(a) of that regulation, in order to test expanded computer automation for the confidential disclosure system. As indicated below, OGE is granting limited permission to conduct that test.

Although the proposed waivers allude to a system of targeted financial disclosure, we understand from the details of the request that you do not in fact seek authority to alter the format of the standardized OGE confidential disclosure forms (OGE Form 450 and OGE Optional Form 450-A) or the information required by them. Instead, the proposed waivers seek OGE's approval for electronic filing of confidential disclosure reports without the use of a paper copy, electronic review and storage of the data contained in confidential disclosure reports, and use of electronic signatures by both the filer and the reviewer of confidential disclosure reports.

The first requested waiver seeks authority from OGE under section 2634.905(c) for electronic submission as an alternative procedure in lieu of the current requirement at section 2634.601 for signed paper copies of OGE Form 450 and OGE Optional

Form 450-A. The request acknowledges that OGE has already made available throughout the executive branch an automated computer software package for preparing the OGE Form 450, but proposes to develop another version with more user-friendly questions, which would also incorporate the new OGE Optional Form 450-A (certificate of no new interests) and would allow electronic filing by use of an electronic signature.

As suggested in our DAEOgram DO-94-046 of December 8, 1994, OGE took steps to remove the previous restrictions on agency development and use of electronic software for completing confidential disclosure forms. Thus, even though OGE has developed and distributed software for completing OGE Form 450, we have no objection to an agency's development and use of other versions, including coverage of the new OGE Optional Form 450-A. These various automated formats allow filers to prepare confidential disclosure reports through user-friendly questions and answers, which guide filers with a series of prompts to help ensure that they understand and complete all sections. Additionally, OGE's software version provides an aid to reviewers by highlighting any changes that the filer makes when he prepares a new report by updating an earlier submission.

As the 1994 DAEOgram stressed, however, electronic signatures of filers have not been authorized because of concerns about administrative controls, security, and legal sufficiency. All forms completed with electronic software must currently be printed, certified by handwritten signature, and submitted as paper documents. [The Department's] pilot study has proposed using a personal identification number (PIN) as an electronic signature, which may help alleviate some of our concerns. Therefore, we are now willing to permit a one-year test of electronic filing of confidential disclosure reports and of the filer's certification by electronic signature thereon, as outlined in the proposal, so long as it is conducted with careful

administrative and security controls. We understand that employees in the test group will be given the option of using this electronic method or of filing a paper form, if they prefer.

Informal discussion with enforcement experts indicates some trepidation about the absence of a handwritten signature, which could cause evidentiary problems in connection with a filer's certification if disciplinary action were initiated because of incomplete or false disclosures. In order to minimize that concern, we will require as part of this test that each participating filer sign and place on file with [the Department] a written acknowledgment in advance, stating that his use of an assigned PIN on electronically submitted confidential disclosure reports will constitute his certification that the statements therein are true, complete, and correct, to the best of his knowledge.

The second requested waiver seeks relief by OGE from that portion of section 2634.605(b)(2) which requires the reviewer of confidential disclosure reports to certify by signature on the report that, based upon the information therein, he believes the filer is in compliance with laws and regulations for proper completion and for avoiding conflicts of interest. With appropriate administrative and security controls, we are willing to permit a one-year test of electronic signature and certification by the reviewer of confidential disclosure reports with the use of a PIN, in lieu of a handwritten signature, as outlined in the proposal. All other requirements of section 2634.605(b)(2) remain in effect. Reviewers must be reminded that their electronic signature constitutes a certification of the report, as required by that section of the regulation and as specified on the face of the form itself.

The third requested waiver seeks relief by OGE from section 2634.605(a) to the extent that it and other portions of subpart F require review and storage of paper copies of

confidential financial disclosure reports, so that electronic aids could be incorporated into the review process and so that reports could be stored electronically. We note that at least part of the suggested purpose for the proposed electronic review is to identify those reports with no change from the previous filing, which may partially be met by filers' use of the new OGE Optional Form 450-A, the certificate of no new interests. Moreover, as noted above, OGE's software package for completing the OGE Form 450 already contains a valuable review aid. Nonetheless, we are willing to permit a one-year test of additional electronic review aids and electronic storage of confidential disclosure reports, as outlined in the proposal, so long as it is conducted with appropriate administrative and security controls. All other requirements of section 2634.605(a) remain in effect. Note also that section 2634.604 continues to require storage of confidential disclosure reports for a period of six years after receipt.

As noted in your letter, one of the proposed test sites, [at a] Center [of the Department], is still in the process of rectifying certain deficiencies. Therefore, OGE is only approving the other three proposed sites for testing the computerized confidential financial disclosure methods discussed above.

We will want to monitor and review the conduct and results of this one-year test in order to determine the reliability and effectiveness of electronic filing, signature, certification, review, and storage of confidential disclosure reports, as well as any problems encountered. Critical to the test's success will be the methods outlined in your letter to measure results, including savings of time and expense, as well as the satisfaction of filers and reviewers.

As your letter noted, OGE has encouraged automating and simplifying the confidential financial disclosure system over the past four years. We conducted a single issue audit and two

brown bag lunches in 1994, and subsequently amended the regulation to eliminate reporting of certain types of accounts and Government securities, revised the OGE Form 450 to make it more user-friendly, developed electronic software for completing that form, prepared a review guide for the OGE Form 450, and developed an optional certificate of no new interests. Additionally, we have issued DAEOgrams encouraging reduction of the number of confidential disclosure filers, seeking ethics community input, providing relief for special Government employee reporting due dates, and offering practical filing and review guidance. We hope that the one-year test which [the Department] will be conducting can further advance the utility of the confidential financial disclosure system. Please coordinate with us, and we look forward to the results of this test program.

Sincerely,

Stephen D. Potts
Director