

05 x 2(1)

Letter to a Designated Agency Ethics Official
dated February 10, 2005

This is in response to your letter of January 12, 2005, in which you sought our advice as to whether a [top official of your agency] would violate 18 U.S.C. § 205 if he were to authorize the filing of a registration statement with the Securities and Exchange Commission (SEC), while he is serving as an unpaid board director/trustee for an outside organization.

Section 205 makes it unlawful for an officer or employee to act as agent or attorney for anyone before a Department, agency, or court in connection with a particular matter in which the United States is a party or has a direct and substantial interest. Although the term "acts as agent or attorney" is not defined in the statute, it generally includes communications to the Government on behalf of another where there is "some degree of control by the principal over the agent who acts on his or her behalf." OGE Informal Advisory Memorandum 00 x 10. Also, the communication to the Government must be designed to influence and be made in connection with some matter in which there is some controversy or at least a potential for divergent views. OGE Informal Advisory Letters 96 x 6 and 94 x 15.¹

¹ This interpretation is supported by regulations issued by this Office in a similar context, regarding post-employment representational activities barred by 18 U.S.C. § 207. Examples in those regulations explain that a former SEC employee would not be barred from preparing and transmitting to the SEC a client's annual disclosure report, and that a former SEC employee who is now an officer of a corporation would not be barred from signing registration filings required to be transmitted to the SEC. See Examples 2 and 3 following 5 C.F.R. § 2637.204(e). The reasoning behind those examples is that in neither case would there be any appreciable element of actual or potential dispute or attempt to influence.

The registration statement that would be submitted to the SEC in this case is used to collect information from investment companies about their policies, organization, and operations. 15 U.S.C. § 80a-8(b). According to the SEC, "the primary purpose of the registration process is to provide disclosure of financial and other information to investors and potential investors for the purpose of evaluating an investment in a security." 63 *Fed. Reg.* 46814 (Sept. 2, 1998). Thus, as you put it in your letter, the registration statement is a "submission of facts without advocating that the facts should be interpreted in a particular way." Accordingly, its submission would not be representational for purposes of 18 U.S.C. § 205.²

We note the conclusion in your letter that the [agency official's] service as a board director/trustee for the outside organization in question would not be barred by 18 U.S.C. § 208. As you understand, section 208 could be violated if the [agency official] in question were to participate personally and substantially in a particular matter at the [agency] affecting the financial interests of an outside organization he is serving as a director or trustee. As explained in your letter, the duties of the [agency official] are not such that he would be called upon to participate in such matters. Accordingly, we have no reason to question your conclusion regarding 18 U.S.C. § 208.

We also note that in your letter you stated "[a]ll [agency officials at this level] . . . are considered covered noncareer employees for purposes of the outside earned income limitation set out in 5 C.F.R. §§ 2635.804(b) and 2636.303(a)(4)." Those regulations identify executive branch employees who are subject to the outside earned income and compensated outside activities restrictions in title V of the Ethics in Government Act, 5 U.S.C. app. Your letter did not seek our advice on the question of whether [agency officials at this level] are covered noncareer employees for this purpose, and we will not directly address that question here. However, we are enclosing for your

² Another issue raised by your inquiry is that there could be a question whether, under certain circumstances, authorizing another to contact the Government would violate 18 U.S.C. § 205. In this case, the [agency official] would be authorizing another person to file the registration statement with the SEC. However, as noted above, its filing would not be done in an effort to influence the Government. Therefore, authorizing another person to file it would not violate section 205.

information a copy of OGE Informal Advisory Letter 04 x 10, which will soon be published. In that letter, we concluded that an employee--who appears to have been similarly situated to [your agency officials at this level]--was not covered by the regulation you cited as a basis for determining that [agency officials at this level] are covered noncareer employees, 5 C.F.R. § 2636.303(a)(4). If you would like to discuss this issue with us after reviewing the enclosed advisory letter, please do not hesitate to do so.

Thank you for your request for our advice.

Sincerely,

Marilyn L. Glynn
Acting Director