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General Counsel's Office Executive Office for United States Attorneys

In This Issue

In Tribute

Claudia Jeanne Flynn, a career U.S. Department of Justice attorney, died Saturday, October 14, 2006, at her home in Bethesda, Md., after an extended illness. She was 52 and recently retired as the Director of the Department's Professional Responsibility Advisory Office (PRAO).

In 1984, she became an Assistant U.S. Attorney for the District of New Jersey, and, in 1989, Deputy Chief of that office's Criminal Division. Ms. Flynn left the U.S. Attorney's Office in 1992 to become an Associate Independent Counsel at the Office of Independent Counsel, Washington, D.C., which conducted the investigation and prosecutions relating to the Department of Housing & Urban Development in the 1980s.

She returned to the U.S. Attorney's Office in New Jersey in 1994 as Chief of the Criminal Division. In 1996, she left New Jersey for the Department of Justice in Washington, D.C., where she served as Chief of Staff to the Assistant Attorney General, Criminal Division, and as Senior Counsel to the Director, Executive Office for United States Attorneys.

Ms. Flynn was known as a person of tremendous character, a true leader, a coalition builder, and a marvelous spokesperson for the Department of Justice. Her reputation led to her selection as Director of the Department's PRAO, which was established in 2000. While serving in this capacity, she established an office that responded quickly and concisely to important and difficult legal ethics questions from the more than 9,000 lawyers representing the United States throughout the nation. She led this small, service-oriented office of nine attorneys in its mission to provide the most up-to-date ethics advice and training to all Department attorneys. The Department's trust in her leadership was well rewarded. She established programs to serve the needs of Department attorneys representing the United States, provided training and guidance to those attorneys, ensured that attorneys in the field had access to information and prompt responses to their questions, and built strong partnerships with state and national bar associations. She retired as PRAO director in October 2005.

In November 2005, she was awarded the Attorney General's Mary C. Lawton Lifetime Service Award by Attorney General Alberto Gonzales, the Department's highest honor for a career civil servant.

Any government—and any government office—is only as good as the people within it. PRAO and the entire Department were fortunate to have had her as a leader and as a person whose dedication to justice, fairness, and integrity, was manifested in the work she performed.

She was a devoted parishioner and choir member of Our Lady of Mercy Church, and a member of the board of directors of the Fox Foundation, an organization committed to the artistic development of theatre actors as a strategy to strengthen live theatre.

She is survived by her husband Robert P. Warren, son Robert (Robin) Peel Patrick Warren, and daughter Linneen Clements Warren; father, W. Paul Flynn, Sr., (Hernando, Florida); sister Deirdre T. Flynn (Chicago, Illinois); brother W. Paul Flynn, Jr. (Everett, Massachusetts); and several aunts, uncles, cousins, nieces, and nephews.

An Overview of the General Counsel's Office of the Executive Office for United States Attorneys

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I. Introduction

On behalf of the men and women who work in the General Counsel's Office (GCO) of the Executive Office for United States Attorneys (EOUSA), I am pleased to have this opportunity to showcase the work that they do. Many of the employees of the United States Attorneys' Offices (USAOs) have few occasions to interact with EOUSA, much less with GCO. However, GCO provides assistance to the USAOs in a number of areas, and I hope that this article and this publication will serve to encourage all employees to contact GCO when issues arise on which they can provide some assistance. At GCO, the mantra is "be responsive." The goal is to respond to questions from the USAOs in a timely manner. GCO is a service organization. They take seriously the obligation to assist the USAOs in the most effective way possible, so that the issues that may impede the ability of your office to represent the United States are resolved quickly and in a manner consistent with the appropriate laws, regulations, and policies.

The attorneys at GCO have contributed articles to this issue of the *USA Bulletin* that will delve into many of the areas with which they are involved. This article will provide a general overview of GCO and a brief description of the subject matter areas that fall within its realm. I encourage you to reach out to GCO with any question(s) you may have, even if you just need to know which component of EOUSA or the Department of Justice (Department) addresses the subject matter of your inquiry.

A. The structure of the General Counsel's Office

The General Counsel's Office has a staff of eighteen attorneys, two paralegals, two management analysts, five legal assistants, and an office manager. The attorney staff includes twelve permanent Assistant General Counsels and six Assistant United States Attorneys (AUSAs) on detail. The General Counsel position and one of two Deputy General Counsel positions have historically been occupied by detailees, while the other Deputy General Counsel is a permanent EOUSA attorney. The mix of permanent attorneys and AUSA detailees assures that GCO maintains subject matter expertise while also benefitting from experienced AUSAs who are familiar with the operations of the USAOs. The paralegals at GCO handle litigation tasks, draft ethics opinions, conduct legal research, draft responses to citizen mail, and solicit responses to various Department audits, among other things. The management analysts receive and review the public financial disclosure forms submitted by USAO and EOUSA management, and also receive and review the confidential financial disclosure forms submitted by various EOUSA personnel with contracting authority. The legal assistants provide valuable support to all of the above. The office manager does everything from handling nonfederal travel requests and information requests from the Office of the Attorney General and EOUSA, to managing the legal assistants, to overseeing the budget, to just about anything GCO needs to remain operational.

Each day, one of the lawyers at GCO serves as the duty attorney and intakes, and then assumes responsibility for, all of the new matters that arise that day. In 2006, GCO opened over 4,209 matters and closed 4,403 matters. Although individual attorneys handle specific matters, GCO follows a team approach, and the attorneys in the office consult regularly with each other, and with their supervisors, to assure that advice provided is consistent and accurate. GCO files are paperless and searchable, so that any GCO employee can

search all case files to identify precedential opinions and, once again, facilitate consistent advice.

B. The subject matter areas that the General Counsel's Office handles

GCO handles a diverse portfolio of legal issues that confront the USAOs and includes the following, among others.

- Employment matters.
- Government ethics matters.
- Recusals.
- Representation requests.
- Procurement issues.
- A variety of issues that arise under the heading "General Matters."

The bulk of GCO time is spent on employment and ethics matters. GCO also represents the Department in administrative proceedings before the Merit Systems Protection Board (MSPB) and the Equal Employment Opportunity Commission. Finally, GCO responds to citizen letters addressed to the President, the Attorney General, or the Director of EOUSA, among others, that seek action regarding matters that are within the Department's purview. A brief description of the major subject matter areas within GCO's portfolio follows.

II. Employment issues

Employment matters generally arise as a result of alleged employee misconduct or poor performance. Federal regulations and Department policies provide specific guidance for addressing these issues. GCO assists the districts to assure that management actions are consistent with the regulatory scheme and that employees are afforded appropriate due process rights.

A. Misconduct

GCO frequently consults with and advises USAO management, in their efforts to address employee misconduct. The behaviors that constitute misconduct range from conduct unbecoming a federal employee to off-duty criminal conduct. While GCO's role in the employment arena deals with some of the more difficult issues within the USAO community, it is a comfort knowing that the number of employment matters handled is very small compared to the number of employees in the USAOs and EOUSA.

Federal statutes and regulations, and Department policies, create a system for adverse actions that defines the rights of management and employees alike. *See* 5 U.S.C. Chapter 75, 5 C.F.R. Part 752, DOJ Order 1200.1, and USAP 3-4.771.001. Generally, disciplinary action is warranted when an employee's actions negatively impact the efficiency of the service. 5 U.S.C. §§ 7503(a) and 7513(a). Discipline for misconduct can include anything from a written reprimand to removal from federal service. Disciplinary actions are either appealable or nonappealable. Written reprimands and suspensions of fourteen days or less are not appealable to the MSPB. Actions that are not appealable are grievable within the agency. *See* DOJ Order 1200.1 and USAP 3-4.771.001. Suspensions of more than fourteen days and removals are appealable to the MSPB, as are demotions and furloughs. The MSPB also has the authority to adjudicate complaints filed under the Whistleblower Protection Act, the Uniformed Service Employment and Reemployment Rights Act, and the Veterans Employment Opportunities Act.

The MSPB will typically make two separate determinations when assessing employee discipline. First, the Board will determine whether preponderant evidence supports the charge or charges that underlie the discipline. 5 U.S.C. § 7701(c)(1)(B). Second, the Board will assess the punishment to determine whether it is clearly excessive or arbitrary and capricious. *Douglas v. Veterans' Administration*, 5 M.S.P.B. 313 (1981). In making this latter determination, the Board will consider enumerated factors including whether the employee has been previously disciplined. For this reason, progressive discipline is generally required, although in some instances, the Board will sustain removal for a serious first offense.

The disciplinary procedure is a multistep process. In order to suspend or remove a federal employee, the agency must first provide the employee with a notice of proposed discipline (the proposal letter) that sets forth the alleged misconduct and the proposed discipline. The employee then has the right to respond to a deciding official, who will issue a decision letter. The deciding official can impose the discipline as recommended, mitigate the discipline to a lesser penalty, or decline to impose discipline at all. If the deciding official imposes a suspension of

fourteen days or less, the employee can grieve the suspension to the next level supervisor. If the deciding official imposes a suspension of more than fourteen days, a demotion, or removal, the employee can appeal to the MSPB. Generally, for nonattorneys, the first line supervisor can propose disciplinary action, and supervisors up the chain may act as the deciding and grieving officials. For attorneys, the First Assistant United States Attorney (FAUSA) can propose a suspension of fourteen days or less. In those instances, the United States Attorney (USA) acts as the deciding official, and any grievance is submitted to EOUSA. Only the USA can propose that an attorney be suspended for more than fourteen days or removed. In that case, the Director, Deputy Director, or Hearing Officer at EOUSA, acts as the deciding official. Written reprimands do not require the two-step process and can be issued by first line supervisors for nonattorneys, or the FAUSA for attorneys. Employees can grieve written reprimands, typically to the next supervisor in the chain of command.

The adverse actions procedures described above, and set forth in the cited provisions, do not apply to certain employees. A competitive-service employee who is serving a probationary period or who is on a temporary appointment of one year or less, is not covered. Similarly, an excepted-service employee who is on a temporary appointment of two years or less, or serving a trial period, is not covered. This rule varies with respect to individuals with veterans preferences. Preference eligible, excepted-service employees who have completed one year of continuous service are covered by the rules applicable to suspensions of more than fourteen days and removals. (For a detailed discussion of trial periods for attorneys, *see* USAP 3-4.213.007.) Noncovered employees can be disciplined or removed without appeal rights. In fact, 5 C.F.R. § 315.803 provides, "The agency shall utilize the probationary period as fully as possible to determine the fitness of the employee and shall terminate his services during this period if he fails to demonstrate fully his qualifications for continued employment." A competitive service employee who is removed during a probationary period can file an appeal with the MSPB only if he or she alleges that the removal was based on partisan political reasons or marital status. *Id*. § 315.806.

B. Performance

In addition to management consultations involving misconduct issues, GCO, in conjunction with EOUSA's personnel office, advises management on performance issues as well. Once again, federal statutes and regulations establish procedures for addressing unsatisfactory employee performance. *See* 5 U.S.C. § 4303 and 5 C.F.R. Part 432. In general, the law requires federal agencies to provide poor-performing employees notice of their deficiency and an opportunity to improve. This regulatory mandate is executed by implementation of a performance improvement plan (PIP). The agency should implement a PIP when an employee fails to perform satisfactorily on one or more of the critical elements of his or her work plan. The PIP usually involves a notification letter to the employee, advising him or her of the specifics of the poor performance, and setting forth the standards that must be attained in order to demonstrate successful performance. 5 C.F.R. § 432.104.

The PIP will also establish a time period within which the employee must demonstrate successful performance. During this time frame, typically sixty to ninety days, the employee will meet regularly with his or her supervisor to discuss the progress that the subordinate is making toward satisfactory performance. If the employee successfully completes the PIP, (demonstrates acceptable performance within the required time frame), then the PIP concludes, and the employee retains his or her job and grade. If a competitive-service employee fails the PIP by not demonstrating acceptable performance, then the employee can be demoted, reassigned, or removed from federal service. A Department attorney who fails a PIP can be reassigned or removed. Even if an employee successfully completes the PIP, he or she can be removed from federal service if, within one year of the implementation of the PIP, he or she again fails to perform satisfactorily on the same critical element addressed by the PIP.

An employee who is demoted or removed from federal service after failing a PIP can appeal to the MSPB. The Board, however, will affirm the action if the agency proves, by substantial evidence, that the employee failed to perform satisfactorily during the PIP period. 5 U.S.C. § 1201.56(a)(1). The regulations define "substantial evidence" as "[t]he degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to

support a conclusion, even though other reasonable persons might disagree. This is a lower standard of proof than preponderance of the evidence." *Id*. §1201.56(c)(1). Unlike in misconduct cases, the MSPB will not mitigate the action taken when the Department meets its burden of proving that the employee failed the PIP.

The regulations regarding performance apply to the same employees covered by the adverse actions regulations, with one notable exception. The regulations require that excepted-service employees (Department attorneys) who have served more than one year of current, continuous service must be afforded an opportunity to improve prior to being removed for performance reasons. However, excepted-service employees who are on temporary appointments, or on a trial period, do not have appeal rights for performance removals. This anomaly means that excepted-service employees who have served more than one year, but who are on a temporary appointment or trial period, are entitled to be placed on a PIP prior to being removed, but they are not entitled to contest the removal before the MSPB. Once again, this exclusion does not apply to preference eligible, excepted-service employees.

III. Government ethics

The General Counsel is EOUSA's Deputy Designated Agency Ethics Official (DDAEO), and thereby has authority to approve various activities of employees in the USAOs when those activities implicate government ethics regulations. *See* DOJ Order 1200.1, Chapter 11-1. The General Counsel's Office also provides ethics opinions to USAO employees who seek guidance regarding the applicability of the regulations.

The government ethics regulations (5 C.F.R. Chapter XVI, Subchapter B) are issued by the Office of Government Ethics (OGE) and supplemented by Departmental ethics regulations (5 C.F.R. Part 3801). Unlike the ethical restrictions imposed on attorneys as a result of their membership in various bar associations, or their practice before courts that have adopted those rules, the government ethics regulations apply to *all* government employees. Thus while the rules issued by the state bar associations or courts govern the way that AUSAs practice law, the government ethics regulations restrict the actions that all employees may take in the workplace and, in some instances, outside the workplace. Every USAO has an identified Professional Responsibility Officer (PRO) and an Ethics Advisor (EA). In some instances, the same person may hold both positions. However, all employees should know the identity of their office's PRO and EA and consult with them, as appropriate. The PRO provides guidance to attorneys regarding professional ethical obligations, and the EA provides guidance to all employees regarding the ethical obligations of government employees.

A. Overview of government ethics regulations

Title 5, Code of Federal Regulations, Part 2635, contains the Standards of Ethical Conduct for Employees of the Executive Branch. GCO relies on these standards of conduct when providing ethics opinions to the USAOs. The standards of conduct all emanate from the general principle underlying the oaths that we take when we are hired by the Department of Justice, as stated in 5 C.F.R. §2635.101(a): "Public service is a public trust." Each employee has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain." The standards of conduct include regulations pertaining to Gifts from Outside Sources (Subpart B), Gifts Between Employees (Subpart C), Conflicting Financial Interests (Subpart D), Impartiality in Performing Official Duties (Subpart E), Seeking Other Employment (Subpart F), Misuse of Position (Subpart G), and Outside Activities (Subpart H). All employees are encouraged to consult with their EA and, if necessary, with GCO, when they have concerns about whether their conduct implicates these regulations.

Many of the ethics questions that GCO fields involve requests for authority to participate in outside activities. There are several sources, other than the standards of conduct, that provide guidance regarding outside activities. First, the Department has issued a supplemental regulation on outside employment located at 5 C.F.R. § 3801.106. The regulation defines "employment" broadly to include "any form of employment, business relationship or activity, involving the provision of personal services whether or not for compensation, other than in the discharge of official duties. It includes, but is not limited to, services as a lawyer, officer, director, trustee, employee, agent, consultant, contractor, or general partner." 5 C.F.R. § 3801.106(a). The

Department's supplemental regulation categorically prohibits certain outside employment as follows.

> (i) The practice of law, unless it is uncompensated and in the nature of community service, or unless it is on behalf of himself, his parents, spouse, or children.
>
> (ii) Any criminal or habeas corpus matter, be it federal, state, or local.
>
> (iii) Litigation, investigations, grants, or other matters in which the Department of Justice is or represents a party, witness, litigant, investigator, or grant-maker.

Id. § 3801.106(b). Furthermore, the regulations require that an employee seek approval from the DDAEO for any outside employment that involves the practice of law or that involves a subject matter, policy, or program, that is in the employee's component's area of responsibility. *Id.* § 3801.106(c) and DOJ Order 1200.1, Chapter 11-1.

In addition to the Department's supplemental regulation, GCO also considers the directives in the Deputy Attorney General's Memorandum of May 19, 2000, regarding Approval for Participation in Outside Activities by Department of Justice Employees (http://www.usdoj.gov/jmd/ethics/memo/memo05192000.htm), and the Memorandum of the Director, EOUSA, regarding the Supplemental Regulation on Ethical Standards of Conduct and Outside Activities dated April 30, 1997. Together, these memoranda set forth a number of activities that do not require prior approval by the DDAEO. Both memoranda are available on GCO's website, as is a chart that sets forth the activities that require prior approval from either the DDAEO or the United States Attorney.

B. Criminal statutes regulating actions of current and former employees

Government employees must also be aware of the criminal statutes that restrict their participation in certain types of matters. For example, 18 U.S.C. § 208 prohibits government employees from participating in matters in which they have a financial interest. Of particular note, the statute provides that the financial interests of certain persons and entities are imputed to the employee, including those of a spouse, minor child, general partner, organization in which the employee serves as an officer or director, trustee, general partner, or employee, or any person or organization with whom the employee is negotiating or has any arrangement concerning prospective employment. This imputation rule means that AUSAs who are negotiating with law firms for prospective employment should be very careful not to take actions in matters in which the law firm represents a party, witness, or victim, because such action could result in *criminal* liability.

AUSAs should be familiar with forms GCO-1, GCO-2, and GCO-3, which are intended to assure that employees do not violate the provisions of § 208 or the broader provisions of 5 C.F.R. § 2635.502. These forms require each AUSA to affirm that he does not have a financial interest in the matter that he is handling. USAO managers file forms SF-278 setting forth their own financial interests, and the EA in each office conducts a conflicts review to assure that managers do not oversee matters in which they have a financial interest. While this process may seem bothersome to some, the goal is to comply with regulatory requirements and to assure that AUSAs do not run afoul of the criminal restrictions on their participation in certain matters.

The United States Code also contains criminal provisions restricting post-employment activities of government employees (18 U.S.C. § 207) and prohibiting current employees from acting as an agent or attorney against the government in a matter in which the government is a party, or has a direct and substantial interest (18 U.S.C. § 205).

C. Political activities

Finally, statutes and Department policy restrict employees' participation in the political process. The Hatch Act, 5 U.S.C. §§ 7321-7326, does not preclude all participation in the political system, but prohibits certain activities, such as fundraising for a partisan candidate or running for office in a partisan election. While GCO provides guidance to USAO employees regarding Hatch Act issues, the Office of Special Counsel investigates Hatch Act violations and also provides advisory opinions pertaining to proposed political activities of government employees. The Department has also further restricted the activities of noncareer employees such as Presidential appointees and Schedule C employees. *See* Attorney General's Memorandum for All Department of Justice Non-Career Appointees regarding Restrictions on Political Activities, dated August 8, 2000. *Available at* http://www.usdoj.gov/jmd/ethics/docs/agpolactpol.html.

D. Summary

The comments above discuss only some of the ethical restrictions on government employees. The GCO works closely with these regulations and regularly provides guidance to employees whose conduct impacts the statutes, rules, and regulations, and also provides guidance to former employees regarding the applicability of 18 U.S.C. § 207. Employees should feel free to consult their EA and GCO to assure that their actions do not run afoul of their obligation to place loyalty to the United States above private gain.

IV. Recusals

GCO is also the point of contact for the USAOs when the United States Attorney or the USAO should be recused from a case. Individual AUSAs can be recused from matters with the approval of the USAO management. However, ultimate authority to recuse an office or a United States Attorney rests with Associate Deputy Attorney General (ADAG) David Margolis. The United States Attorney's Manual and the United States Attorney Procedures both set forth the procedure to follow when the USA, or the entire office, should be recused. *See* USAM §§ 3-2.170 and 3-2.171 and USAP 3-2.170.001.

Office recusal requests often arise when a USAO employee is a target, subject, witness, or victim, in a matter. USA recusals may also result from a prior business or personal relationship between the USA and a target, subject, or victim, in a matter. The USAO should send an e-mail request to GCO setting forth the facts of the case and the reason for any conflict or appearance of a conflict, when seeking recusal of the USA or the entire office. GCO will then forward the relevant information to the ADAG with a recommendation. If the ADAG approves the recusal of the entire USAO, GCO then seeks another USAO or Department component to handle the matter. When the ADAG approves the recusal of the USA, the FAUSA is typically named acting USA for the matter.

V. Conclusion

In addition to the responsibilities described above, the GCO also handles the following matters, and a myriad of other miscellaneous legal topics.

- Receives requests for representation and procurement questions.
- Acts as a liaison between the USAOs and the Office of Professional Responsibility and the Office of the Inspector General.
- Receives and approves requests for payment of official travel expenses by nonfederal entities.
- Provides advice on issues under the *Touhy* regulations.

In sum, GCO strives to be a full-service general counsel to the USAOs and to be available to answer your questions or find someone who can. You can contact GCO at 202-514-4024 or by e-mail at USAEO-Ethics.❖

ABOUT THE AUTHOR

❑**Scott Schools** is currently the United States Attorney for the Northern District of California. Prior to this appointment, he served as the General Counsel for the Executive Office for United States Attorneys and managed a staff of eighteen lawyers who provide employment and ethics advice to the ninety-four United States Attorneys' Offices throughout the country. Prior to becoming General Counsel, Mr. Schools was the First Assistant U.S. Attorney in the District of South Carolina from November 2001 to December 2004, and the interim United States Attorney for South Carolina from February 2001 to November 2001. Before being named interim U.S. Attorney, he had a total of eight years experience as an Assistant U.S. Attorney specializing in the prosecution of white collar and public corruption cases.✠

Primer on Public and Confidential Financial Disclosures

Jay Macklin
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I. Introduction

The Ethics in Government Act of 1978, 5 U.S.C. app. 4 (2002) (codified in scattered sections of 5 U.S.C. app. and 28 U.S.C. §§ 591-99) requires high-level officials in the executive branch to report certain financial interests publicly, to ensure that every citizen can have confidence in the integrity of the federal government. As a complement to this public financial disclosure reporting system, and in order to guarantee the efficient and honest operation of the government, in 1992 the Office of Government Ethics (OGE) issued regulations establishing a confidential financial disclosure system, which requires that other, less senior, executive branch employees confidentially report their financial interests. *See* 5 C.F.R. Part 2634. The Executive Office for United States Attorneys (EOUSA) received authority in 1992 to implement an alternative confidential financial disclosure system, which consists of three forms (GCO-1, GCO-2, and GCO-3) used by Assistant United States Attorneys (AUSAs). The Public Financial Disclosure Report (Standard Form (SF) 278); the Confidential Financial Disclosure Report (OGE Form 450); and the three alternative system forms, assist the Department of Justice (Department) in identifying potential financial conflicts of interest between a filer's official duties and his or her private financial interests and affiliations. These financial disclosure tools form the cornerstone of the Department's ethics program. Consequently, it is essential that employees in EOUSA and the United States Attorneys' offices (USAO) understand the importance and seriousness of the financial disclosure systems and how they can comply with their disclosure responsibilities.

II. The public financial disclosure system

The theory of public financial disclosure is rooted in post-Watergate concepts of "Government in the Sunshine," which aims to promote public confidence in the integrity of government officials. The implementing regulations issued by OGE and the SF 278 format reflect the law's mandates and its dual purpose of avoiding conflicts of interest through reviewer analysis and disclosures, as well as promoting public confidence in government. An understanding of these goals will help ensure the full cooperation of those whom the law requires to file SFs 278, so that their reports are accurate, complete, and timely.

A. Who must file

In general, employees in positions that require the exercise of significant policy-making and supervisory discretion must file the SF 278. For the USAOs, this includes all United States Attorneys (USAs), AUSAs who receive supervisory pay, Senior Litigation Counsels, Special Government Employees, and any Schedule C employee whose position is excepted from competitive service because of their confidential or policy-making character. For EOUSA, this includes all employees in senior positions, such as the Director, all employees serving in positions classified above GS-15, and all Schedule C employees.

B. Types of reports and filing deadlines

The Ethics in Government Act requires three types of reports; a new entrant or nominee report within thirty days of assuming a filing position, an incumbent report due annually on May 15th covering the previous calendar year, and a termination report due no later than the 30th day after leaving a covered position. Each of these reports is required only if the individual actually

served in the covered position for more than sixty days of the reported period. These filing deadlines are important because any official who files an SF 278 more than thirty days after it was due must pay the United States a $200 late filing fee.

C. Report contents

The SF 278 has a cover page, followed by Schedules A through D. The schedules cover the following areas.

- Schedule A–Assets and income.
- Schedule B–Transactions and gifts and travel reimbursements.
- Schedule C–Liabilities and employment agreements or arrangements.
- Schedule D–Positions held outside the U.S. Government, and sources of compensation over $5,000.

It is important to keep in mind that the SF 278 is not a net worth statement. Rather, it is designed solely to report financial information for the purpose of identifying and preventing financial conflicts of interest. Although employees may expect a right to privacy in their financial affairs, this privacy right has been overridden to the extent that Congress has explicitly deemed it necessary and the Constitution allows it.

D. The conflicts review process

The SF 278 financial conflicts review process is at the heart of the first stated purpose of avoiding financial conflicts of interest. The process starts with the submission of completed SFs 278 to each USAO's ethics advisor (EA). The EA should immediately time and date stamp each SF 278 to substantiate that the report was timely filed. Then, using the completed SFs 278 as a tool, each office conducts a financial conflicts review using one of four possible methods, discussed in more detail below.

- The Case List Method.
- The Financial Interests List Method.
- The Gatekeeper Method.
- The Hybrid Method.

Regardless of the method chosen, after the SFs 278 have been reviewed for any financial conflicts, all identified conflicts must be resolved and a screening mechanism implemented to prevent any conflicted employee from acting in the matter. Potential conflicts of interest may be resolved by disqualifying the attorney from the matter, requiring the attorney to divest the underlying financial interest, or, on rare occasions, issuing an 18 U.S.C. § 208 waiver or a 5 C.F.R. § 2635.502 authorization that will allow the attorney to remain on the case or matter, notwithstanding the identified conflict. Before an employee divests a conflicting financial interest, they should determine if he or she is eligible for a Certificate of Divestiture from OGE which will allow receipt of favorable tax treatment on the sale of the asset causing the conflict. Finally, the EA, or an appropriate manager, signs the SF 278 as the "other reviewer" and forwards it to General Counsel's Office (GCO) for a technical review.

The Case List Method begins at the line AUSA's level and works from the bottom of the USAO up to each of the SF 278 filers in the office. It begins when the EA returns the completed SFs 278 to the filers. At this same time, each filer receives a current list of all cases or matters that he or she is personally handling, as well as the cases or matters being handled by each one of his or her subordinates. The SF 278 filer then takes the case list and, using their personal knowledge of each of those listed cases, compares the financial interests listed on his or her SF 278 with the case list. It is unnecessary for the filer to obtain additional information, such as the names of every individual or entity possibly involved with each case. The filer identifies any of the cases or matters on the case list that appear to be in conflict with the financial interests identified on his or her SF 278, takes their individual SF 278 and the case list to his or her supervisor and/or the EA, and both discuss the possible conflicts. The SF 278 filer's supervisor signs in the "other reviewer" block, indicating that he or she has conducted the review for financial conflicts of interest, files a copy, and forwards the completed SF 278 to the EA.

If the supervisor and the filer determine that there is a financial conflict of interest, the EA is informed and screening mechanisms are implemented, within the office, to eliminate the conflict. The supervisor then adds his or her own cases to the case lists, reviews the combined case list, and completes the conflicts check process for his or her SF 278. This process repeats itself throughout the office, including the United States Attorney (USA). The USA's SF 278 and the case list for the entire office, can be reviewed by the First Assistant United States Attorney (FAUSA), an Executive AUSA, or perhaps the EA. After this

last conflicts review using the cumulative office case list, the EA must forward all of the completed and reviewed SFs 278 to GCO for a technical review. At this point, the process under the Case List Method is complete.

The Financial Interests List Method works from the USA down to the line AUSA's level. The first step in this method begins when the EA prepares a list of the SF 278 filers' financial interests using, and mirroring, all of the completed and collected SFs 278. As the title of this method suggests, the EA ends up with a complete list of the total financial interests for all of the SF 278 filers in the office. The list is disseminated throughout the entire office, and should not include names or dollar amounts associated with the listed financial interests. The EA then sends the financial interests list to each of the line AUSAs in the office. At that point, the AUSAs use their personal knowledge of their assigned cases and review the cumulative financial interests list to determine if any conflicts exist between their cases and the financial interests of any of the USAO's SF 278 filers. Once completed, the AUSAs either e-mail the EA that no conflicts are identified, or conversely, identify the financial interest from the list and the case with which it potentially conflicts. The EA identifies the SF 278 filer with the conflicting financial interest and establishes a screening mechanism to prevent that individual from having any further contact with the case. The EA reports to the USA, or other designee in the office, that all identified conflicts of interest have been resolved and that individual signs all SFs 278 as "other reviewer." The reviewed SFs 278 are forwarded for technical review to GCO.

When the Gatekeeper Method is used, employees are designated as "gatekeepers." The staff assigned this duty are aware of each supervisor's financial interests and screen any cases that are brought before him or her, to ensure there are no financial conflicts of interest. This method is used infrequently, but may be appropriate for very large USAOs where individual line attorneys are generally accompanied by their Division Chief when they discuss a particular case with the USA, or in situations where the Financial Litigation Unit has a very large number of cases. The FAUSA, Criminal, or Civil Chiefs review the USA's SF 278 for any financial conflicts of interest and, thereafter, act as a gatekeeper for any conflicts in matters brought to the USA's attention. In either of these situations, the USA completes the SF 278, has it time and date stamped, and gives it to the FAUSA to perform the required annual conflict of interest check, using either of the methods discussed above. Thereafter, the FAUSA will be aware of the USA's financial interests and, in the event that a case intended to be discussed with the USA conflicts with a financial interest held by the USA, the FAUSA uses screening mechanisms to keep the case from going before the USA. The remainder of the staff uses some form of the other two methods to perform the conflicts check for all of the other SF 278 filers.

Finally, the Hybrid Method uses one or more of the previously described methods for different sections of the office.

- The Criminal Section may use the Financial Interests List method to perform the conflicts check, since it likely has a large number of cases involving individual defendants.
- The Appellate Section may use the Case List Method, since its case load will likely not be as high.
- The USA might use an Executive AUSA as a gatekeeper.

Essentially, the Hybrid Method allows a USAO to use whatever combination of methods works best to enable the office to perform a thorough review of the SFs 278, and thereby ensure that no financial conflicts of interest exist.

III. The confidential financial disclosure system

The Confidential Financial Disclosure Form, OGE Form 450, is patterned after the SF 278. It differs, however, in that it is shorter, requires less detail, and is not available for public inspection. The basic purpose of the confidential financial disclosure system is to assist employees, and their agencies, in avoiding conflicts between official duties and private financial interests or affiliations. In 1992, pursuant to the recommendation from the Attorney General's Advisory Committee, the Director of EOUSA received permission from OGE for AUSAs to use an alternative system to the OGE Form 450, a Certification of No Conflict of Interest Form that was to be completed and placed in every case file by all attorneys handling a case. In 2004, EOUSA upgraded the existing alternative system by developing an improved version, which consists of the following forms.

- GCO-1–A modified Certification of No Conflict of Interest Form that has more detailed information concerning the certifications being made.
- GCO-2–A form to use when a potential conflict of interest has been identified.
- GCO-3– A form to be used at least semiannually, normally in conjunction with regular case reviews, to review open cases for any potential financial conflicts of interest.

A. Who must file

Those employees in EOUSA and the USAOs who participate personally and substantially in decisions, or the exercise of significant judgment in contracting or procurement, administering or monitoring grants, regulating or auditing any nonfederal entity, or other duties directly and substantially affecting nonfederal entities, are required to complete an OGE Form 450. Typically, this includes contracting officers, procurement specialists, and budget officers. An employee may complete the OGE Form 450 electronically through OGE's website using Adobe Acrobat, or through the National Finance Center's website using an online program. With regard to the alternative system, all line AUSAs, including any supervisors who do not receive supervisory pay, are required to use the three GCO forms developed by EOUSA.

B. Filing deadlines

OGE Form 450 filers must file a form when entering into the covered position and annually thereafter. The OGE Form 450, covering the previous calendar year, must be filed no later than February 15 of each year. The alternative system filers must complete a GCO-1 form whenever they receive a new case or matter, or make an appearance on behalf of the United States. They complete a GCO-2 form whenever they identify a potential financial conflict of interest that might affect their ability to continue participating in the case or matter. Finally, they complete and file a GCO-3 form, with their assigned case list attached, semiannually in conjunction with the normal periodic case review.

C. The OGE Form 450 conflicts review process

The OGE Form 450 conflicts review process is supervisory driven. Once completed, the filer gives the form to his or her supervisor. The supervisor will review the form carefully for completeness and for actual or potential financial conflicts of interest. If a report is incomplete or raises a conflict of interest issue, the supervisor will contact the filer and ask for additional information. The supervisor will note on the OGE Form 450 any additional information provided by the filer, with a statement that the corrections were made pursuant to a conversation with the filer, and give the report to the USAO EA (or to GCO for EOUSA employees). EAs should retain the reports in a secure area for six years and ensure that supervisors consider the contents of the reports when making assignments.

D. The alternative system conflicts review process

The GCO-1 form (Certification of No Conflict of Interest Form) must be attached to each case file by an AUSA, unpaid supervisor, or Special Assistant United States Attorney, in every matter in which they enter an appearance on behalf of the government. Every attorney must complete a GCO-1 form for each matter or case they are handling, by reading the appropriate conflicts language on the form, checking the appropriate boxes, and signing the form in the specified places. Remember also that if a matter or case is reassigned, the new attorney to whom it is assigned must also complete a GCO-1 form for the file. The importance of the GCO-1 form is twofold. First, it enables attorneys to determine whether they have a financial conflict of interest and, if so, to take appropriate corrective action. Secondly, it informs them that participation in a matter in which they, or someone with whom they have a covered relationship, have a financial conflict of interest may subject them to criminal penalties.

There are four parts to the GCO-1 form.

- The first part is administrative. The attorney provides the case name, the matter number, and/or the USAO number.
- The second part is a determination and certification whether the attorney has a statutory financial conflict of interest under 18 U.S.C. § 208. After initialing or marking each of the sections in part two, certifying an understanding of the principles set forth in each of them, the attorney signs, dates, and prints his or her name. This indicates that the attorney has reviewed that particular matter in light of his or her financial interests or those imputed to him or her and, to the best of his or

her knowledge using the principles set forth in this part, no financial conflict of interest exists.

- The third part is a determination and certification whether the attorney has a conflict of interest under the slightly broader regulatory rules found at 5 C.F.R. § 2635.502, often called the impartiality rule. This part prohibits attorneys from working on cases that they know will affect the financial interests of a member of their household, or where someone with whom they have a covered relationship is, or represents, a party, and the circumstances would cause a reasonable person with knowledge of the relevant facts to question their impartiality in the matter. This part also contains a list of the people or entities that are included in the term "covered relationship."
- Finally, the fourth part is a certification in which attorneys acknowledge that they have an ongoing responsibility to be aware of the potential for financial conflicts of interest, including the appearance of any conflicts, and to disclose any financial or personal interests that could be affected by the matter as soon as any are known. If the attorney does not understand any of the requirements, or cannot certify to them because of a potential financial conflict of interest, he or she should cease taking any action on the case and immediately contact the office EA for assistance.

The GCO-2 form is used when the attorney identifies a potential financial conflict of interest. In that event, the attorney should cease any further action and contact his or her supervisor and EA to determine if an actual conflict exists. The GCO-2 form is merely a tool to assist in seeking this determination from the EA. The supervisor and EA review the matter, contact EOUSA GCO for consultation and advice, determine if a conflict or the appearance of a conflict actually exists, and then decide on an appropriate corrective course of action. As the form reflects, the corrective action includes disqualification of the attorney from the matter, divestiture of the underlying financial interest, or, on rare occasions, an 18 U.S.C. § 208 waiver or a 5 C.F.R. § 2635.502 authorization that will allow the attorney to remain on the case or matter, notwithstanding the identified conflict. Before an employee divests, he or she should find out if he or she is eligible for a Certificate of Divestiture from OGE which will allow receipt of favorable tax treatment on the sale of the asset. When completed, the EA should file the form in a central location.

The final form in the alternative confidential financial disclosure system is the GCO-3 form, (Confidential Conflict of Interest Certification Semiannual/Periodic Review), that will be filed at a minimum of twice yearly. Supervisors will conduct this periodic financial conflicts review with all AUSAs and unpaid supervisors, using the attorney's list of assigned cases, as a part of the normal periodic case reviews. The GCO-3 is divided into four parts.

- Part one is a review and acknowledgment of the requirements set forth on the GCO-1 form. The attorney reads the paragraphs, checks each box, and then signs and dates it.
- Part two requires the attorney to certify that there are no 18 U.S.C. § 208 financial conflicts of interest that prevent his or her handling of any of the matters on the attached case list, or alternately, that some appropriate corrective course of action has been taken.
- Part three of the form requires the same certification by the attorney with regard to the prohibitions listed in 5 C.F.R. § 2635.502. As in part two, the attorney lists any other course of action that has been taken.
- Finally, in part four of the form, the attorney's supervisor signs and dates the form indicating that the review has been conducted. If, as a result of this periodic review, the attorney's supervisor finds a conflict, the supervisor, acting in conjunction with the EA, decides on a remedy for resolution, including the same possible remedies listed above (disqualification, divestiture, or a waiver/authorization).

IV. Conclusion

Each Department employee must remember that public service is a public trust and carries a responsibility to ensure that every citizen has complete confidence in the integrity of the federal government. Employees can fulfill this responsibility by respecting and adhering to the principles of ethical conduct, including the foundational requirement that they do not participate in any matters in which they hold a personal or imputed financial interest. The financial disclosure reports discussed here are intended to be the primary vehicles used to identify and eliminate any potential or actual

financial conflicts of interest. While filing either a public or confidential financial disclosure report, or completing one of the three GCO forms in the alternative confidential system, is surely an inconvenience, responding to requests from ethics officials, managers, and investigators for more information on a potential criminal conflict of interest may be an even greater inconvenience. The procedures established in these financial disclosure systems, if followed, should reduce either the likelihood of follow-up inquiries, or the overall time spent responding to such inquiries. ❖

ABOUT THE AUTHOR

❑**Jay Macklin** currently serves as Acting General Counsel. Prior to joining the General Counsel's Office, Mr. Macklin was an employment litigator for three years for a Fortune 50 Company. From 1987 to 2000, he served in a variety of positions in the U.S. Army Judge Advocate General's Corps, including serving as General Counsel for a $600 million transportation organization; as Deputy General Counsel, managing a legal office of over forty attorneys and legal staff; as a Special Assistant U.S. Attorney in the Civil Division in the Eastern District of Virginia for one year; as an employment litigator for three years; and as a criminal prosecutor. ✠

Issues Concerning Financial Conflicts of Interest Under Criminal Statutes and Federal Regulations

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I. Introduction

Conflicting financial interests often require the disqualification of an employee, or obtaining a waiver to allow the employee to participate in a particular matter despite the conflict. The rules governing this area are contained both in criminal laws and federal regulations. These statutes mandate specific procedures for dealing with conflicting financial interests in order to prevent an employee from allowing personal interests to affect performance of official actions and to maintain the integrity and impartiality of government processes. 18 U.S.C. § 208 (2006); 5 C.F.R. § 2635.401 (2006); *see also* Robert G. Vaughn, Conflict-of-Interest Regulation in the Federal Executive Branch 12-13 (D.C. Heath and Company) (1979). The Supreme Court explained the purpose of the rules when it stated

> In this conflict of interest, the law wisely interposes. It acts not on the possibility that, in some cases, the sense of that duty may prevail over the motives of self-interest, but it provides against the probability in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominate influence, and superseded that of duty.

U.S. v. Carter, 217 U.S. 286, 309 (1909).

The law dictates that an employee is prohibited from participating, personally and substantially, in a particular matter in which there is any personal or imputed financial interest, if the particular matter will have a direct and predictable effect on that interest. 18 U.S.C. § 208 (2006); 5 C.F.R. § 2635.401 (2006). An employee is also prohibited from personal participation in matters involving specific parties which are likely to affect the employee's financial interests, or the interests of a person in the same household, if a reasonable person with knowledge of the relevant facts would question the employee's impartiality in the matter. 5 C.F.R. § 2635.501, 502 (2006).

This is not a prohibition on owning financial assets or interests, but rather establishes procedures for dealing with conflicts that may arise in the course of employment. There are multiple paths that an employee can take to avoid any violation of the criminal statute or federal regulations, including exemption, disqualification, divestiture, or obtaining a waiver.

II. Understanding the terms

There are several terms within the criminal law and the federal regulations that must be defined before it can be determined if an employee has a financial conflict of interest. It is helpful to examine the legal definitions and application of these terms in order to understand what behavior is prohibited and when that behavior is prohibited.

First, "personally and substantially" means that an employee is participating directly, either through his own work or through the supervision of a subordinate, and the involvement is of some significance to the matter. 5 C.F.R. § 2635.402(b)(4) (2006). Although the regulation does not state specifically what is or is not permitted, it is universally recommended that, if an employee is disqualified from a particular matter, further participation, even in a minor way, should not be allowed because this could lead to sanctions.

Second, "a particular matter" means one that involves deliberation, decision, or action focused on the interests of a specific person or a discrete identifiable class of people, including a judicial or other proceeding, an application, a request for a ruling or determination, a contract or claim, or an accusation or arrest. 5 C.F.R. § 635.402(b)(3) (2006). "Particular matters" extend to all of these and others, but the term does not encompass broad policy actions or decisions that affect a large and diverse group of people. For example, the Internal Revenue Service's amendment of its regulations to change the manner in which depreciation is calculated is not a particular matter, but consideration of regulations establishing safety standards for trucks on interstate highways by the Interstate Commerce Commission (ICC) does involve a particular matter. *Id.* The IRS does not focus on the interests of a specific person or a discrete and identifiable class of people, but rather would be making a broad policy that affects a diverse group of people. In contrast, the ICC consideration focuses specifically on safety standards for trucks, which does classify as deliberation focused on the interests of a discrete and identifiable group of people. The Office of Government Ethics (OGE) clarified the meaning of "particular matters" in a memorandum issued in October 2006. Memorandum from the OGE Director Robert I. Cusick to Designated Agency Ethics Officials, DO-06-029, *available at* http://www.usoge.gov/pages/daeograms/dgr_files/2006/do06029.html. Specifically, the OGE noted that not every matter involving government action is a particular matter. *Id.*; *see also* Susan Kavanagh, *OGE Explains the Meaning of Phrases Regarding "Particular Matters,"* 13 FEDERAL ETHICS REPORT 10, 10-11 (Nov. 2006). A particular matter only arises when deliberations or actions become focused on a certain individual or a discrete and identifiable class of persons. Kavanagh, *"Particular Matters,"* 13 FEDERAL ETHICS REPORT at 10-11 (Nov. 2006).

Third, "imputed interests" are those that the employee does not hold, but that are attributed to the employee. Financial interests that are imputed to an employee include those of (1) a spouse or minor child, (2) a partner, (3) an organization in which officership, directorship, trusteeship, partnership, or employment exists, (4) a person or organization with which negotiation or any arrangement concerning prospective employment exists. *Id.* As an example, assume that an employee serves without compensation on the board of directors of a nonprofit corporation that engages in good works. If the nonprofit organization applies for a grant, the employee cannot participate in the review of that grant as part of his government service, even though personal finances are not affected, because the finances of the nonprofit organization are affected and those interests are imputed to the employee as a member of the board of directors. *Id.* For the purposes of potential financial conflicts of interest, the interests of the above-mentioned parties are treated the same as the interests of the employee.

Lastly, but potentially the most important determining factor in financial conflict situations, a "direct and predictable effect" is defined as a close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest. 5 C.F.R. § 2635.402(b)(1)(i) (2006). For example, an employee cannot participate in matters that include reviewing contractor proposals, if the employee or his family own a majority of the

stock in the company that is submitting a proposal. This would have a direct and predictable effect on the employee's financial interests. In contrast, an employee can participate in the same situation if the company in which stock is held does not submit a proposal. Any effect on the employee's financial interests as a result of awarding or not awarding the competing business with the contract would be merely indirect and speculative. *Id.* There must be a real, not speculative, possibility that the matter will affect the financial interests of the employee. It does not matter how much the potential loss or gain could be, nor does it matter if there is an actual loss or gain. 5 C.F.R. § 2635.402(b)(1)(ii) (2006).

III. Exemptions

Specific exemptions are provided in the criminal statute and the federal regulations that allow federal employees to participate in particular matters, regardless of a potential financial conflict of interest. 18 U.S.C. § 208(b)(2) (2006); 5 C.F.R. § 2640.201 (2006). The OGE determined that the situations described below are too remote or too inconsequential to disqualify an employee from participation.

First, an employee is not considered to have a financial conflict of interest if a matter affects his holdings in a diversified mutual fund, even if those holdings would otherwise cause a conflict. 5 C.F.R. § 2640.201(a) (2006). Second, an employee is not considered to have a financial conflict of interest if a matter affects his holdings in a sector mutual fund where the affected holdings are not invested in the sector in which the fund concentrates, and the financial interest arises from the ownership of an interest in the fund. 5 C.F.R. § 2640.201(b)(1) (2006). In other words, if an employee holds a mutual fund focused primarily in utility companies, but also owns stock in bank holding companies that would be affected by the particular matter, the employee is not disqualified because the fund is not concentrated in the bank holding companies. An employee is also exempt from a financial conflict of interest if the disqualifying interest in the matter arises from holdings in a sector mutual fund, and the aggregate market value of interests in any sector fund does not exceed $50,000. 5 C.F.R. § 2640.201(b)(2) (2006).

Additionally, an employee may participate in matters affecting the holdings of the federal government's Thrift Savings Plan, a state or local government pension plan, or other diversified employee pension plan. 5 C.F.R. § 2640.201(c) (2006). An employee may also participate in any matter in which the disqualifying financial interest arises from the employee's ownership of securities issued by one or more entities affected by the matter if, (1) they are publicly traded or are long-term federal government securities or are municipal securities, and (2) the aggregate market value of such securities held does not exceed $15,000. 5 C.F.R. § 2640.202(a) (2006). In calculating the aggregate market value, the employee's interests in the securities must be combined with any interest of a spouse and minor children. Therefore, if the total aggregate market value after adding these interests together is greater than $15,000, the employee must take steps to resolve the conflict. In matters affecting nonparties to the litigation, the rule is identical to the previous exemption, except that the limit on the aggregate market value increases to $25,000. 5 C.F.R. § 2640.202(b) (2006). If any of these specific exemptions apply, the criminal statute does not preclude the employee's participation in the matter.

IV. Resolving financial conflicts of interest

A. Disqualification

Disqualification, or recusal, is the most common resolution to financial conflicts of interest. Recusal is required when an actual or apparent conflict of interest exists that would raise a question concerning the involvement of the United States Attorney (USA), an Assistant United States Attorney (AUSA), or the United States Attorney's office (USAO). *See United States Attorneys' Procedures* (USAP) 3-2.170.001. The Deputy Attorney General has the ultimate authority to grant or deny recusal of a USA or USAO, and the General Counsel's Office is the appropriate point of contact for all such requests. *Id.* The USAO management can authorize recusal of an AUSA, and generally such recusal does not require recusal of the USAO. USAM 3-2.220; *United States Attorneys' Procedures* (USAP) 3-2.170.001. If recusal is authorized, both the employee and supervisor must take steps to prevent involvement in any way, regardless of how minor, in the matter. The employee must be recused from decision-making responsibility, and should not review any status reports or other documents regarding the

particular matter. This method is *required* if the employee is not exempt from the statute and has not obtained a waiver or divested the financial interest. An employee is not required to keep a formal statement or record of disqualification, but should maintain a record of actions. This can be accomplished by providing written notice to the supervisor or other appropriate officials. Attorneys in the United States Attorneys' offices can provide this notice by utilizing the GCO forms referenced in the prior article.

Note that even if a financial conflict of interest does not exist under 18 U.S.C. § 208, an appearance of a conflict of interest may nevertheless exist under the regulatory rules found at 5 C.F.R. § 2635.502. As mentioned in the previous article, this part prohibits attorneys from working on cases that they know will affect the financial interests of a member of their household, or where someone with whom they have a covered relationship is, or represents, a party, and the circumstances would cause a reasonable person with knowledge of the relevant facts to question their impartiality in the matter. An employee should resolve an appearance of a conflict of interest by disqualification. However, the General Counsel, as agency designee, "may authorize the employee to participate in the matter based on a determination, made in light of all relevant circumstances, that the interest of the government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations." *See* 5 C.F.R. § 2635.502(d). The attorney, acting in conjunction with the supervisor and the Ethics Advisor (EA), may request that the General Counsel grant an authorization to participate in the matter. The request must address the regulatory factors considered in making this determination: (1) the nature of the relationship involved; (2) the effect that resolution of the matter would have upon the financial interests of the person involved in the relationship; (3) the nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter; (4) the sensitivity of the matter; (5) the difficulty of reassigning the matter to another employee; and (6) adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality. *Id*.

B. Divestiture

The second option for an employee with a financial conflict of interest is for the employee to sell or otherwise divest the financial interest. An employee may either voluntary divest the financial interest or can be directed to do so if the continued holding of the financial interest is prohibited by a statute, an agency regulation, or if it is determined that the financial interest and the employee's duties or mission of the agency cause a substantial conflict. 5 C.F.R. § 2635.402(e) (2006). If an employee divests a financial interest that would otherwise cause disqualification from a particular matter, participation in that matter is allowed.

Divestment of holdings that exceed $15,000 can be achieved through a standing order with the employee's broker to sell the assets when the value of the stock reaches that amount. Department of Justice, Executive Office for U.S. Attorneys (EOUSA), *Conflicts of Interest Primer*, *available at http://www. usa.doj.gov/staffs/lc/ conflictsofinterest.htm*. However, it is important to remember to consult with your office's EA in order to document the transaction properly and to comply with special procedures for this type of sale that become unavailable after the sale is completed. For example, if assets are sold before a certificate of divestiture is obtained, an employee will no longer be eligible for special tax treatment which he or she could have received as a result of the directed divestiture. 5 C.F.R. § 2635.402(e)(3) (2006).

C. Waiver

The third option for an employee is to obtain a waiver that permits participation in a matter without divestiture or, obviously, disqualification. A general waiver is synonymous with the regulatory exemption described above. An individual waiver can be obtained when the employee's interest is determined to be so insubstantial or inconsequential that it will not impact the integrity or impartiality of employment with the government. 5 C.F.R. § 2635.402(d) (2006). If the agency deems the disqualifying financial interest of the employee so insubstantial as to be unlikely to affect the integrity of employment, then the agency may waive the employee's disqualification.

The employee must comply with specific steps in order to be granted an individual waiver. First, the employee must advise the government

official who has the authority to issue a waiver, or the official to whom such authority has been delegated, about the nature and circumstances of the particular matter. 5 C.F.R. § 2635.402(d)(2) (2006). The Department of Justice (Department) Ethics Office (DEO) and the Department's Professional Responsibility Advisory Office (PRAO) work closely with the GCO in deciding whether to grant individual waivers. In addition, the GCO will consult with the OGE about the granting of individual waivers. 5 C.F.R. § 2635.402(d)(4) (2006). Full disclosure of the nature and extent of the employee's disqualifying financial interest must be made to the official with the power to grant a waiver. That official must make a determination, in writing, that the employee's financial interest is insubstantial and therefore unlikely to affect the integrity of the services which will be performed. 5 C.F.R. § 2635.402(d)(2) (2006). The waiver should describe the employee's situation, including the financial interest, the facts of the particular matter, and any involvement limitations. Additionally, it must be issued before the employee takes any action in the matter. 5 C.F.R. § 2640.301 (2006). If these steps are followed, the agency may waive the employee's disqualification, notwithstanding the financial interest, and permit the employee to participate in the matter. It should be noted, however, that obtaining an individual waiver can be time consuming due to the consultations the GCO must conduct with the DEO, PRAO, and the OGE.

V. Examples

Stock ownership in a company that is a party, witness, subject, or victim, in a case, is one common example in which employees experience direct financial conflicts of interest. In addition to this, it is important to remember that an employee's financial interest in or with a nonparty may also be relevant. For example, if an employee owns stock in a subsidiary, affiliate, or parent, of a corporation that is a party to litigation, there can also be a direct and predictable effect on that financial interest. 5 C.F.R. § 2635.402(b) (2006). Often by consulting with the appropriate EA, and then the GCO, matters like these will be resolved through disqualification, exemptions, or waiver.

Employees can be found criminally liable for violating the financial conflict of interest statutes when the appropriate procedures are not followed. 18 U.S.C. § 208. Although the sanctions for these violations are frequently periods of probation and payment of restitution, it is possible to receive prison sentences as well. The OGE compiled its annual survey of prosecutions of criminal conflict of interest violations by executive branch employees and released it in July 2006. The information is provided by the Public Integrity Section of the Criminal Division of the Department of Justice and U.S. Attorneys who prosecute these cases. It covers settlements and guilty pleas in twelve cases that were prosecuted during 2005, seven of which were conflict of interest violations. Memorandum from the OGE Director Robert I. Cusick to Designated Agency Ethics Officials, DO-06-022, *available at* http://www.usoge.gov/pages/daeograms/dgr_files/2006/do06022.html. The following are examples of cases from the OGE survey in which employees violated the conflict of interest statutes and were found criminally liable for those violations.

A former employee for the Department of Homeland Security (DHS) pled guilty to a misdemeanor violation of 18 U.S.C. § 208. *Id.* The employee worked as the Chief of the Headquarters Support Branch (HSB) within the U.S. Immigration and Customs Enforcement (ICE) sector of DHS. The HSB reviewed and recommended private companies to be awarded federal contracts. While serving as the Chief of the HSB, the employee was engaged in employment discussions, and was a candidate for a position, with a private company. *Id.* The employee appropriately contacted the ICE ethics officer about the potential conflict of interest and it was determined that, in order to avoid the appearance of a financial conflict of interest, the employee should not participate in any acquisitions that would involve the private company. Instead, a senior contract specialist would handle those particular matters. *Id.* The employee, however, then proceeded to participate in the handgun acquisition, knowing that the private company held a financial interest. She directed her subordinate to include a requirement in the Request for Information that all prospective bidders register and use the private company during the procurement. Additionally, she continued to participate in discussions about the contract and its terms. In December 2005, the employee pled guilty and was sentenced to twelve months of probation and ordered to pay a $1,000 fine. *Id.*

A Department of Justice employee arranged training seminars for a U.S. Attorney's office, and his wife operated a seminar planning business. *Id.*

The employee recommended, selected, and hired a contractor that would use his wife's services. He pled guilty to violating 18 U.S.C. § 208 and was sentenced to three years of probation and 200 hours of community service, and he was ordered to pay a $5,000 fine. *Id.*

In one case, an employee in the training branch of the Department of the Treasury used her position to award over 100 training contracts to companies run by her husband. *Id.* Both the employee and her husband were prosecuted for violating 18 U.S.C. § 208, and each received twelve months and one day in prison, three years of supervised release, and were ordered to pay $54,500 in restitution. *Id.*

A Department of Defense employee pled guilty to violating 18 U.S.C. § 208, as well as conspiracy to defraud the government, wire fraud, and subornation of perjury. *Id.* The employee was an acquisition official for the Defense Information Systems Agency and participated in awarding contracts to a company in which he held a partnership interest. The employee was sentenced to 120 months in prison, two years of supervised release, and he was ordered to pay a $10,000 fine. *Id.*

These examples demonstrate the consequences of violating conflict of interest statutes and the serious nature of such offenses. The statute applied to all of them because the employees participated personally and substantially in matters in which they, or someone whose interests were imputed to them, possessed financial interests that were directly and predictably affected by the particular matters. Situations like these can be avoided if employees follow proper procedures and are disqualified or obtain a waiver that would allow participation.

VI. Conclusion

Financial conflict statutes and regulations were created to ensure the impartiality and objectivity of government employees as they perform their duties. Thus, it is imperative that an employee contact his EA and the General Counsel's Office immediately when he learns that he is personally and substantially involved in a matter, and he holds a financial interest that will be impacted by the matter. If proper procedure is followed, employees can avoid violations of the financial conflict of interest statute. Although the conflict frequently results in the disqualification of the employee from the particular matter, there are exemptions from the rule. The affected financial interest may be excluded from consideration by virtue of the exemptions, and if it is not, divestiture or waiver are options as well. An employee may voluntarily divest the financial interest that would be affected by the particular matter, and thereafter participate in the matter. Waivers, though rare, can also be obtained if the relevant officials determine that the interest is so insubstantial that it will not affect the integrity of the employee's government service. Serious consequences, including criminal charges and punishment, can result from financial conflict of interest issues that, in reality, can be resolved with one of these solutions. ❖

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Seeking Employment and Post-Employment Restrictions For Federal Employees

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I. Introduction

Not everyone spends an entire career with the federal government, and the ethics laws and regulations that apply to an executive branch employee do not prohibit, or even discourage, seeking employment in the private sector. When a federal employee seeks post-government employment, there are important ethics laws and regulations to consider. These may govern what assignments the employee is permitted to work on during the job search, and, after leaving the government, restrictions that may limit the employee's activities in the new job.

This article will discuss the most common issues that arise when seeking employment and post-employment restrictions. There are many issues in these particular statutes, (trade and treaty negotiations, Indian tribal matters, representation of foreign governments and entities), not covered here. This article also does not discuss employee responsibilities under the procurement integrity laws. When considering the responsibilities under these laws and regulations, often the best advice is to consult an ethics official for guidance.

II. Seeking employment

The basic provisions governing seeking employment are contained in the Standards of Ethical Conduct, 5 C.F.R. § 2635.604. This section implements not only the criminal restrictions in 18 U.S.C. § 208, but also the broader restrictions found in Executive Order 12674, § 101(j). Section 208 provides, in pertinent part, that an executive branch employee may not participate personally and substantially in any particular matter in which, to his or her knowledge, "any person or organization with whom he [or she] is negotiating or has any arrangement concerning prospective employment, has a financial interest." Section 101(j) of the Executive Order provides: "Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities." Finally, 5 C.F.R. § 2635.604(a), provides that an employee "shall not participate personally and substantially in any particular matter that, to his [or her] knowledge, has a direct and predictable effect on the financial interests of a prospective employer with whom he [or she] is seeking employment." If an employee is in this position, the employee must recuse and do no further work on the case or matter.

"Seeking employment" includes not only the kinds of bilateral employment negotiations that would implicate § 208, but also certain unilateral expressions of interest in employment. Specifically, in addition to actual negotiations, as described in § 2635.603(b)(1)(i), seeking employment also includes unsolicited communications regarding possible employment, § 2635.603(b)(ii), and any response, other than rejection, to an unsolicited overture from a prospective employer. *See* 5 C.F.R. §§ 2635.603(b)(1)(ii), 2635.603(b)(1)(iii). This is subject, however, to two important exceptions. The employee has not commenced seeking employment if the communication is solely for the purpose of requesting a job application. Likewise, it is not seeking employment if the employee submits a proposal to a person affected by the employee's duties only as part of an industry or distinct class. *See* 5 C.F.R. §§ 2635.603(b)(1)(ii)(A), (B). Note that the regulations do not contain any special exception for the "mass mailing" of resumes, as this suggestion was expressly rejected in the preamble to the final rule. *See* 57 Fed. Reg. 35006, 35029 (Aug. 7, 1992).

It is important to remember that the regulations cover not only direct communications between an employee and the prospective employer, but also include communications through an agent or intermediary, such as a headhunter. *See* 5 C.F.R. § 2635.603(c).

In addition, if an employee is "just testing the waters" or "not really serious about the job" the recusal obligations under the rules are unaffected by such subjective factors. The Department of Justice (Department) prosecuted an employee, under § 208, who believed she was merely testing the waters, even though she ultimately declined the offer of employment. Finally, remember that once employment discussions result in an actual agreement or arrangement for prospective employment, the employee must continue to recuse from matters in which the prospective employer has a financial interest. *See* 18 U.S.C. § 208(a); 5 C.F.R. § 2635.606(a).

Employees occasionally receive unsolicited overtures from prospective employers. This is not considered seeking employment within the meaning of the rules. The employee is deemed to be seeking employment, however, if any response "other than rejection" is made to an unsolicited communication from a prospective employer. 5 C.F.R.§ 2635.603(b)(1)(iii).

What sort of response is sufficient to constitute "rejection?" The regulations say that "a response that defers discussion until the foreseeable future does not constitute rejection of an unsolicited employment overture, proposal, or resume [or] rejection of a prospective employment possibility." *See* 5 C.F.R. § 2635.603(b)(3). The regulation gives two related examples to illustrate the distinction between a rejection of employment and a mere deferral of discussions to the foreseeable future:

- An employee with the Health Care Financing Administration is asked by a State Health Department official to call if she is ever interested in leaving federal service. The employee states she is happy with her job and is not interested in another job, but will remember the official's interest if she ever decides to leave the government. This employee has just rejected the unsolicited employment overture and is not seeking employment. *See* 5 C.F.R. § 2635.603(b), Example 1.
- The same employee states she cannot discuss future employment while working on the States's health care funding, but would like to discuss employment when the project is over. At this point the employee has deferred future employment discussions, and is considered seeking employment. *See* 5 C.F.R. § 2635.603(b), Example 2.

There are no required "magic phrases" that can and should be used in all circumstances. "If the employee makes it clear to the prospective employer that he or she has no interest in considering the employment overture at the present time and has no plans for such consideration in the foreseeable future, the employee may couch his or her rejection in whatever language the circumstances and etiquette require." *See* 57 Fed. Reg. 35029 (Aug. 7, 1992).

In addition to using the examples found in the regulation, the employee might consider politely, but firmly, communicating rejection with responses along the lines of, "All my time and attention right now are devoted to my government job, and I am not in a position to discuss employment," or "I am not really planning on leaving government in the near future but I will keep you in mind in case I ever change my mind." An employee may prefer simply to cite ethics considerations as a reason for rejecting employment discussions, which is perfectly acceptable, provided that they do not merely defer the discussions until the completion of some assignment affecting the prospective employer, as explained in example 2 following § 2635.603(b). Thus, responses such as the following, would be appropriate: "The ethics rules do not permit me to discuss possible employment with you while I am working on your case/contract/etc., so I am afraid my answer has to be 'no.'"

If an employee is "seeking employment," as described above, any recusal obligations under § 208 and the ethics regulations must be complied with by avoiding participation in any particular matter in which the prospective employer has a financial interest. Frequently employees ask whether they must advise supervisors or other agency personnel about employment contacts and any resulting recusal obligations. This can be a sensitive area and many employees do not want to alert supervisors unnecessarily or prematurely to a job search. At the same time, the Department has legitimate interests in regulating the flow of work among its employees and preventing situations that could result in actual or apparent conflicts of interest. These questions are addressed in 5 C.F.R. § 2635.604(b). Under this provision, if an employee becomes aware of the need to recuse from a matter affecting a prospective employer, he or she "should notify the person responsible for [your] assignment." If an employee is responsible for his or her own assignments, he or she "should

take whatever steps are necessary to ensure that he [or she] does not participate in the matter." *Id*.

These provisions fall short of a mandatory notification duty, but point the employee in the direction of common sense. Note that in certain circumstances, a Department ethics official may require written documentation of a recusal, and such documentation also may be required as written evidence of compliance with an ethics agreement under 5 C.F.R. part 2634. *See* 5 C.F.R. § 2635.604(c).

> While there is no requirement that an employee notify a supervisor or other agency official of the need to be disqualified from assignments affecting a prospective employer, notification permits a supervisor to minimize any disruption of the agency's mission by arranging assignments accordingly. Moreover, an employee may, as a practical matter, have to explain his [or her] avoidance of certain duties.

U.S. Office of Government Ethics Informal Advisory Letter 95 x 7.

Where employment negotiations have resulted in an actual agreement or arrangement for future employment, employees also may have financial disclosure obligations. If a Standard Form (SF) 278 (public financial disclosure report) or Form 450 (confidential financial disclosure report), is filed, the employee must disclose any such agreement or arrangement in existence at any time during the reporting period. *See* 5 C.F.R. §§ 2634.306(a); 2634.907(a)(5). SF-278 filers should remember that such information is required on termination reports as well.

Questions sometimes arise concerning whether an employee may be permitted to participate in a particular matter affecting a prospective employer, even though recusal is required. There are two different mechanisms that may apply: (1) a "waiver" under 18 U.S.C. § 208(b), if the employment contacts have already reached the stage of bilateral negotiations or have resulted in an arrangement for prospective employment, within the meaning of the criminal statute; and (2) an "authorization" under 5 C.F.R. § 2635.605(b), if the contacts fall short of actual negotiations, but still amount to "seeking employment." Requests for waivers or authorization involve complicated analyses. In addition, such requests require consultation with the Ethics Advisor (EA), General Counsel's Office (GCO) in the Executive Office for United States Attorneys (EOUSA), the Departmental Ethics Office in Justice Management Division, and, in many cases, the Office of Government Ethics (OGE). Waivers and authorizations are rarely granted.

III. Post-employment restrictions

There are several important post-employment restrictions that an employee needs to be aware of when starting a new nonfederal job. The most commonly applicable ones are found in 18 U.S.C. § 207. This section places restrictions on communications that a former federal employee may make to the U.S. Government, while on the new job. It does not bar employment with any particular employer. Former federal employees may still obtain guidance from ethics officials regarding the applicability of the postemployment restrictions in § 207 (the Professional Responsibility Advisory Office does not advise former employees). *See* 5 C.F.R. § 2637.102(c)(8). [Note: This section is applicable only to employees who terminated federal service before January 1, 1991. *See* "Note" to § 2637. OGE has proposed new regulations that would continue an agency's "primary responsibility to provide oral or written advice concerning a former employee's post-employment activities." 68 Fed. Reg. 7844, 7872 (Feb. 18, 2003). Although this has not yet been published as a final rule, agencies have continued the practice of advising former employees on § 207.]

Three restrictions are particularly relevant.

- The first restriction is found in 18 U.S.C. § 207(a)(1) and is a "lifetime" ban that prohibits a former employee from communicating or appearing before a federal official, agency, or court, with the intent to influence, on behalf of someone other than the United States, in connection with a particular matter involving specific parties, in which he or she participated personally and substantially while with the government.

  The important point to remember about § 207(a)(1) is that its ban applies to the *lifetime* of the matter, even if the matter is now before another federal agency or court. The matter in question must pertain to parties, (a claim, grant, contract, case, investigation), but it does not apply to general policy matters. The matter must be one that the employee actually worked on, or made some decision or recommendation concerning, even if it was at

a preliminary or informal stage. The ban is on communications or appearances with the intent to influence, whether orally or in writing, or even by being physically present, although silent. This includes conveying information through an intermediary with the intent that the information be attributed to the former employee. The ban applies whether or not the former employee was paid for the representation. This ban applies to *all* former employees, without regard to grade level or special government employee status. It does not, however, prohibit "behind the scenes" work. (Attorneys need to be aware that bar rules may prohibit participation in any way, including behind the scenes, in a matter worked on while with the government.) The ban allows the former employee to request factual information that is publicly available, or to make purely social contact, since these are not done with the intent to influence. The former employee may represent himself or herself, but not a company in which he or she holds an ownership stake. Finally, the ban does not apply to appearances before, or communications with, members of Congress or their staffs.

- The second restriction is found in 18 U.S.C. § 207(a)(2) and is a "two-year" ban that prohibits a former employee from communicating or appearing before a federal official, agency, or court, with the intent to influence, on behalf of someone other than the United States, a particular matter involving specific parties, that he or she knows was pending under his or her official responsibility during the last year of his or her government service.

  This "two-year" ban is similar to, and triggered by, the same circumstances as the lifetime ban, but with certain important exceptions. It pertains to particular matters with which the former employee was *not* personally and substantially involved, but for which he or she was "officially responsible." Official responsibility means "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government actions." 18 U.S.C. § 202(b). Even absent hands-on involvement, it applies if the former employee knew, or should have known, that the matter was pending. The restriction is for two years after leaving the Department, rather than the lifetime of the matter, and it applies only to those matters that were pending during the last year of government employment. Remember that this two-year ban applies even to matters from which the employee was recused.

- The third restriction is found in 18 U.S.C. § 207(c) and is the "one-year" ban or so-called "cooling-off" period for certain senior level (and executive level) employees. It generally prohibits representation of anyone before the Department, or certain parts of it, for one year. Because this section sweeps so broadly, if it applies, it is often the most important postemployment restriction. The main thing to remember about § 207(c) is that it is driven solely by the employee's salary. There is a complicated formula used to determine what that salary is, but for CY 2006 it was $142,898 and in CY 2007 it will be $145,320. This amount will change every year. Note that locality pay is *not* counted, and § 207(c) applies if this amount or more is earned as base pay.

  The one-year clock begins at the time the employee no longer occupies a "senior" position, which may occur before employment with the Department actually ends. Unlike § 207(a), the restriction in § 207(c) is not confined to matters existing at or before the time the employee left, but rather applies to representations to the agency in connection with *any* matter, including new matters, in the year following departure. Unlike § 207(a), it applies *only* to representations before the employee's agency (Department), not other federal agencies (but see the discussion below as to which components of the Department the ban applies). The ban does not prohibit representation on behalf of a state or local government, an accredited college or university, a federal or state candidate or political party, or a hospital or medical research organization. It is important to remember that, as with the restrictions in § 207(a), this section still allows the former employee to request publicly available factual information, or make purely social contact, since these are not done with the intent to influence. Like the lifetime ban, a former employee may represent himself or herself,

but not a company in which an ownership interest is held. The ban does not prohibit "behind-the-scenes" work, but only direct representational work (Attorneys are still subject to bar rules.) Finally, the ban does not apply to appearances before, or communications with, members of Congress or their staffs.

Former executive level employees are barred from the *whole* Department for the one-year period (these are employees generally at the Assistant Attorney General level and above). Former senior employees who were employed in a designated separate component pursuant to 18 U.S.C. § 207(c)(2)(c) are barred *only* from their former component for the one-year period. *See* 5 C.F.R. § 2641.101 and § 2641.102. How the ban operates with respect to designated components can be confusing, but for the purposes of EOUSA and the U.S. Attorneys' offices, it can be simplified as follows. Each U.S. Attorney's office is designated *separate* from every other U.S. Attorney's office, but EOUSA is *not* designated separate from the USAOs. *See* 5 C.F.R. § 2641, Appendix A, footnote 2. ("[EOUSA] shall not be considered separate from any [USAO] for a judicial district, but only from other designated components of [DOJ.]") What this means is, if the former employee is subject to § 207(c) and works at a USAO, the employee may *not* contact his or her USAO after leaving, but may contact another USAO. If the former employee works at EOUSA, however, and is subject to § 207(c), he or she may not contact EOUSA or any of the USAOs.

IV. Conclusion

The reach and implications of the seeking employment and postemployment restrictions can be very complicated and require substantial analysis. The consequences for not complying can be serious— remember that §§ 207 and 208 are criminal statutes. As is often the case, whether an employee needs to be recused from a matter when seeking employment, or whether a former employee may contact his or her former office after leaving government employment, can be very fact-specific. Ethics officials often advise employees, "When in doubt, find out." Employees who are in any of the positions discussed in this article should seek advice from the District's EA and the GCO.❖

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The Use and Misuse of Your Government Computer: Rules and Penalties

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I. Introduction

While I was writing this article on the appropriate and inappropriate uses of government computers, it dawned on me that my sister's birthday was three days away and I had not yet gotten her a gift. Knowing my sister would not be understanding if her big day was overlooked, and because it was close to my lunchtime break anyway, I pushed my work aside for just a moment to do some virtual shopping. Thankfully, my sister is extremely easy to shop for, so I clicked onto the Internet from my work computer and went to her favorite on-line store. After browsing the Web site for about five minutes, I found the perfect gift. I

typed in my credit card number and, just like that, my shopping was done. Pleased with my purchase, I returned to the business at hand—namely writing this article.

As many people would likely assume, the above-mentioned purchase is an example of a permissible use of a government computer since it was done during the lunch hour and did not interfere with official business. *See* Department of Justice (DOJ) Order 2740.1. Consistent with the Standards of Ethical Conduct for Employees of the Executive Branch, (ethics regulations) set forth at 5 C.F.R. Part 2635, employees may use the Internet for unofficial purposes, such as making a private purchase from an Internet retailer. Generally, the use of a government computer for personal matters is permitted in instances where the time spent is short, does not interfere with work, and there is negligible cost to the government. DOJ Order 2740.1. The policy allowing employees some limited use of their government computer for personal purposes is subject to the requirements set forth in the ethics regulations, which must be adhered to at all times.

The ethics regulations set forth several general principles to which every federal government employee is required to adhere. These principles include, in pertinent part, the following.

- Employees shall put forth honest effort in the performance of their duties.
- Employees shall protect and conserve federal property and shall not use it for other than authorized activities.
- Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or applicable ethical standards.

5 C.F.R. § 2635.101(b).

Notwithstanding the general principles outlined in the ethics regulations, as well as Department of Justice (Department) policy allowing for some limited personal use of the government computer by employees, there are express prohibitions and limitations placed on an employee's personal use of the government computer. Department employees are expressly prohibited from using their government computer to engage in activities such as viewing pornography, gambling, fund-raising, and participating in political activity. DOJ Order 2740.1.

DOJ Order 2740.1 discusses the use and monitoring of Department computers and computer systems. The Order establishes that the following activities are prohibited on Department computers and computer systems during working or nonworking hours, except when conducting legitimate departmental business with the express prior permission of the employees' supervisor:

- Use of Internet sites that result in an additional charge to the government.
- The obtaining, viewing, or transmitting of sexually explicit material, contraband, or other material inappropriate to the work place.
- Use for other than official governmental business that results in operational slowdowns or delays in conducting Departmental business (mass mailings or sending or downloading large files, such as programs, pictures, video files, or games).
- Any otherwise prohibited activity, such as sending out solicitations or engaging in prohibited political activity.

The Order further instructs against downloading and/or installing any program, software, or executable file on Department computers unless in accordance with component Information Technology (IT) security policy, or using the computer in a way that infringes any copyright, patent, trademark, trade secret, or other proprietary right of any party. DOJ Order 2740.1.

This article will discuss some of the activities Department employees are expressly prohibited from engaging in on a government computer, including viewing sexually explicit material, gambling, fund-raising, and political activity.

II. Pornography

Viewing or disseminating sexually explicit material on a work computer is expressly prohibited, and may subject an employee to disciplinary action or other sanctions. DOJ Order 2740.1.

Although a prohibition against viewing sexually explicit materials at work is seemingly common sense, every year employees from across the federal government are disciplined for engaging in such behavior. Many employees operate under the false assumption that, as long as no one sees them viewing pornography or other inappropriate material on their computer, no one will ever know. The reality is, however, that as a

federal government employee, there is no reasonable expectation of privacy when it comes to activities done while on duty and from the government computer. *United States v. Simons*, 206 F.3d 392, 398 (4th Cir. 2000) (concluding that a government employee had no legitimate expectation of privacy in files downloaded from the Internet when government employer had a policy explicitly limiting the scope of privacy in the computer).

Computer activity such as web browsing, and electronic communications such as e-mail and blogging, are not private when done while on and from a government computer. DOJ Order 2740.1. Department policies serve as a reminder to employees that such activity and communications can be viewed and traced to the employee. The Department has no intention of monitoring an employee's e-mail or web browsing activity just for the sake of snooping. However, because government-provided access to the Internet and Intranet systems is intended for official and authorized purposes, the Department is permitted to access government computers used by employees. *United States v. Simons*, 206 F.3d at 398.

All communications made by a Department employee through either the Internet or the Department Intranet system may be identified or traced as originating from that employee. When an employee accesses the Internet using certain "browsers," a technique involving "cookies" facilitates the gathering and distribution of information. As a result, most web activity, including the viewing of inappropriate Web sites, e-mail forwards, and video clips, is stored and can be easily traced to the employee engaging in such activity.

The ability to trace computer activity to a specific employee is particularly relevant when discussing the issue of viewing pornography from a government computer. Unfortunately, there are Department employees who, either infrequently or chronically, view pornography while at work, from their government computer. Because the behavior is often done behind a closed office door, those employees believe that the activity is going on undetected. Indeed, people who choose to violate Department policy and view pornography from a government computer often believe that, with tens of thousands of Department employees, no one could possibly be monitoring a few anonymous keystrokes. The reality is, however, that many federal agencies, including the Department, have mechanisms in place to ensure that viewing inappropriate Web sites, including, but not limited to, pornographic sites, comes to the attention of the appropriate officials.

The Department utilizes an IT Intrusion Detection System that alerts the Information Systems Security Staff to potential problems that may compromise the security of the network. DOJ Order 2740.1. Oftentimes, accessing pornographic Web sites, and the like, exposes the network system to potential viruses. Such activity triggers an alert identifying the computer from which the high-risk web-browsing behavior is coming. The Intrusion Detection System tracks web browsing in order to prevent viruses and other problems that could stall the network, or worse, compromise the sensitive information that is maintained by the Department computer systems. *Id*.

If the Intrusion Detection System identifies a problem to the IT security staff, the IT office may obtain authorization from the appropriate component head or Department official to monitor or access an employee's computer usage, including, but not limited to, internet activity, e-mail messages, documents, and electronic files. DOJ Order 2740.1.

Although some of the Intrusion Detection System alerts may come from an employee accessing Web sites without sexual content, many of the alerts received by the IT security staff are a result of employees accessing pornographic Web sites. From a security standpoint, the reasons for the prohibition against accessing sexually explicit materials on the work computer are simple. Such access can expose the network to viruses and make the computer system vulnerable to intrusion and less effective in securing sensitive information.

It goes without saying that the express prohibitions on viewing, creating, sending, or receiving sexually explicit materials on the work computer also include child pornography. In addition to being a violation of the DOJ Order, viewing, creating, sending, or receiving child pornography may also violate certain criminal statutes. Employees found to be viewing child pornography may not only be subject to stiff administrative action, up to and including removal and/or the revocation of a security clearance, but may also face criminal sanctions, including incarceration.

The Department takes the offense of child exploitation very seriously. Attorney General

Alberto R. Gonzales has repeatedly stressed the Department's commitment to protecting children from on-line sexual exploitation crimes. *See* www.projectsafechildhood.gov. Indeed, Attorney General Gonzales announced a nationwide initiative, Project Safe Childhood, which involves efforts by federal, state, and local law enforcement officials, and is aimed at combating the proliferation of technology-facilitated sexual exploitation crimes against children. *Id*.

The Department prohibition against viewing sexually explicit material on a government computer is widely known and consistent with policies in place throughout the federal government. Employees who engage in such behavior not only risk compromising the security of the Department's computer network, but also expose themselves to possible disciplinary action, up to and including removal from federal service.

III. Gambling

While gambling in this country is legal in limited venues, federal regulations expressly prohibit gambling at work. 5 C.F.R. § 735.201. The Standards of Conduct outlined in 5 C.F.R. § 735.201 provide that, while on government-owned or leased property, or while on duty for the government, an employee shall not conduct, or participate in, any gambling activity, including the operation of a gambling device, conducting a lottery or pool, taking part in a game for money or property, or selling or purchasing a numbers slip or ticket.

There are many Web sites that allow participants to bet on sporting events, place real bets in a virtual poker game, or pick lottery numbers. Not only might such activity be illegal in certain jurisdictions, but engaging in such activity while at work and from a government computer is in direct violation of Office of Personnel Management (OPM) regulations. 5 C.F.R. § 735.201.

In contrast, numerous Web sites contain virtual games that allow participants to play without having to make an actual wager of money. Generally, such activity would not be considered gambling as prohibited under 5 C.F.R. § 735.201. Employees should keep in mind, however, that even if an on-line game is not expressly prohibited under 5 C.F.R. § 735.201, the standards of conduct requiring employees to "put forth honest effort in the performance of their duties" still apply. 5 C.F.R. § 2635.101(b).

IV. Fund-raising/solicitation

Many federal employees are active members of service organizations that rely on the generous donations of the public to carry out their mission. Involvement in such organizations by federal employees is absolutely permissible. Employees are allowed to participate in fund-raising in a personal capacity (outside the office and not in an official capacity), provided the employee does not personally solicit funds or other support from a subordinate or from a prohibited source, or use or permit the use of the employee's official title, position, or any authority, to further the fund-raising effort. 5 C.F.R. § 2635.808(c). Conversely, federal employees may not fund-raise in their official capacity unless specifically authorized to do so. 5 C.F.R. § 2635.808(b). Moreover, employees are prohibited from fund-raising or sending out solicitations for monetary or in-kind donations at work or from a government computer. *See* 5 C.F.R. §2635.808; *see also* DOJ Order 2740.1.

Fund-raising is defined, by regulation, as the solicitation of funds or sale of items. 5 C.F.R. § 2635.808(a)(1)(i). Fund-raising is also defined as participation in the conduct of an event by an employee, where any portion of the cost of attendance or participation may be taken as a charitable tax deduction by a person incurring that cost. 5 C.F.R. § 2635.808(a)(1)(ii). Therefore, activities such as selling Girl Scout cookies, taking up a monetary collection for a church group, or selling tickets to a benefit concert sponsored by a nonprofit organization, are considered fund-raising under the regulations, and are generally prohibited in the federal workplace. Employees may not solicit contributions for a charity by e-mail, going office-to-office, or distributing flyers asking for contributions to a cause.

An exception to the prohibition against fund-raising in the federal workplace and on the work computer relates to the Combined Federal Campaign (CFC). 5 C.F.R. § 2635.808; 5 C.F.R. 950 Subpart A. OPM regulations set forth that CFC is the only authorized solicitation of employees in the federal workplace on behalf of charitable organizations. 5 C.F.R. § 950.102. The regulations also provide that OPM may grant permission for solicitation of federal employees, outside the CFC, in support of victims, in cases of emergencies and disasters occurring in any part of the world. 5 C.F.R. § 950.102. For example, OPM

authorized federal employees to engage in fund-raising in the workplace to assist in the relief effort for Hurricane Katrina. Outside of the limited instances outlined by regulation, federal employees are prohibited from soliciting and engaging in fund-raising while on duty. They are also prohibited from using government resources, including computers and official e-mail accounts, to raise funds.

V. Political activity

The Hatch Act is the federal statute that establishes guidelines regarding the political activity of Executive branch employees. The Hatch Act prohibits federal employees from, among other things, engaging in political activity while on duty. 5 U.S.C. §§ 7321–7326. Political activity is defined as "an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group." 5 C.F.R. § 734.101. Examples of on-duty political activity that is prohibited by the Hatch Act include preparing campaign literature on a government computer, soliciting or recruiting campaign volunteers, inviting individuals to a political event, or disseminating favorable or unfavorable information about a partisan political candidate.

The Hatch Act does not purport to prohibit all discourse by federal employees on political subjects or candidates while in a federal building and on duty. 5 U.S.C. § 7321. In fact, it explicitly protects the rights of federal employees to express their opinions on political subjects and candidates, both publicly and privately. 5 U.S.C. § 7323(c).

Recently, e-mail has provided a fast and convenient vehicle for individuals wishing to get out a political message to countless people with a few clicks of a mouse. Of significant note, during the 2004 presidential election season, it was widely reported that campaigns were successfully using the internet and e-mail to fund-raise, mobilize supporters, and spread their campaign message. Jim Drinkard and Jill Lawrence, *Online, Off and Running: Web a New Campaign Front*, USA TODAY, July 14, 2003, at A1.

Prior to the 2004 election, and in anticipation of widespread use of campaigning via e-mail and other electronic means, the U.S. Office of Special Counsel (OSC)—an independent federal agency that investigates and prosecutes violations of the Hatch Act—issued an advisory opinion entitled "Use of Electronic Messaging Devices to Engage in Political Activity." The stated purpose of the OSC Advisory was to alert employees covered by the Hatch Act to the fact that use of government e-mail to transmit political messages implicates the Act's prohibitions. *See* Use of Electronic Messaging Devices to Engage in Political Activity, Office of Special Counsel Advisory Opinion (2002) (OCS Advisory), *available at* http://www.osc.gov/documents/hatchact/federal/fha-29.htm. The Advisory Opinion warns that e-mails provide employees with a means to disseminate their opinions on political subjects and candidates to a much wider audience than is possible in casual face-to-face conversation or a phone call. Electronic message technology, such as e-mail, enable employees to engage in a form of electronic leafleting or "electioneering" at the work site that may constitute prohibited political activity. *Id*.

In order to determine whether an e-mail communication falls under the Hatch Act's prohibition against on-duty political activity, OSC identified the following three considerations.

- The content of the email message (that is, whether its purpose is to encourage the recipient to support a particular political party or vote for a particular candidate for partisan political office).
- Its audience (for example, the number of people to whom it was sent, the sender's relationship to the recipients).
- Whether the message was sent in a federal building (and presumably from a government computer), or when the employee was on duty.

OSC Advisory, *available at* http://www.osc.gov/documents/hatchact/federal/fha-29.htm.

Notwithstanding the guidance articulated in the OSC Advisory, OSC has received numerous complaints of federal employees engaging in prohibited political activity via their work computers. Indeed, OSC has brought at least two cases before the Merit Systems Protection Board (MSPB) petitioning for disciplinary action, up to and including removal from federal service, for distributing political e-mails while on duty. For example, OSC filed separate complaints for disciplinary action with the MSBP against two employees of the Small Business Administration—Leslye Sims and Michael Davis. *Special Counsel v. Sims*, 102 M.S.P.R. 288 (2006).

The facts of the *Sims* complaint are instructive. On October 25, 2004, just a couple of weeks before the 2004 presidential election, while at work and from a government computer, Sims forwarded an e-mail entitled "Why I am Supporting John Kerry for President." to twenty-two people. *Id*. at 290. The e-mail contained a letter purported to be written by John Eisenhower, son of former President Dwight Eisenhower, that stated, among other things, Mr. Eisenhower's intention to vote for the Democratic Presidential candidate. *Id*. at 296-97, Appendix A. The e-mail stated, in part, that "Senator Kerry has demonstrated ... that he is courageous, sober, competent ...." *Id*. Prior to forwarding the above-referenced e-mail, Sims added the statement, "Some things to ponder …." *Id*. at 290.

One of the recipients of this e-mail was fellow agency employee, Michael Davis. On that same day, Davis forwarded an e-mail from his work computer entitled "Your Vote" to twenty-seven recipients. *Id*. at 291. The e-mail stated, among other things, "our votes should be for the party that stands firm on morally and ethically correct issues as written in the [B]ible … Kerry claims he has morals and ethics … American society under Kerry's command is frightening to even think about." *Id*. at 297, Appendix B. The e-mail then instructs recipients to pass along the "I vote the Bible" button and includes a small picture of a button with a picture of President Bush in front of an American flag. *Id*. OSC determined that both e-mails represented violations of the Hatch Act because they were sent while on duty and from a government building, and advocated for the election or defeat of a political candidate. *Id.* at 290.

The above-referenced example demonstrates how simply forwarding an e-mail that advocates for the election or defeat of a political candidate may implicate the Hatch Act. In addition to e-mail correspondence, working on a political campaign, creating political fliers, or other activity that is geared toward the election or defeat of a political candidate, may not be done while on duty, in a government building, or from a government work computer. To avoid possible prosecution by the OSC for violating the Hatch Act, employees are cautioned against sending political e-mails of any kind while at work and from the government computer.

VI. Penalties

When employees fail to heed the prohibitions described above, and are caught engaging in such activity, management may impose stiff penalties. Federal case law and MSPB precedent are clear that such abuses will not be tolerated and that management may take action to stop them.

The MSPB has upheld a wide range of penalties for various inappropriate uses of a government computer. For example, in *Muller v. Department of Energy*, 101 M.S.P.R. 91 (2006), the Board upheld the removal of an employee for sending sexually explicit e-mails to individuals inside and outside the office over the course of several years. Similarly, the MSPB upheld the demotion of a federal management official for spending an excessive amount of official time on the internet and for storing sexually explicit and/or sexual oriented materials on his hard drive. *Morton v. Department of Transportation,* 103 M.S.P.R. 153 (2006). In *Bross v. Department of Commerce***,** 94 M.S.P.R. 662 (2003), the MSPB upheld the removal of an employee who downloaded child pornography on his work computer.

The MSPB has also upheld penalties based on gambling and Hatch Act violations. For instance, in *Landreth v. Tennessee Valley Authority***,** 20 M.S.P.R. 359 (1984), the MSPB found that removal was appropriate, based on a charge of gambling, where the activity was conducted at the employee's duty station and during work hours. Also, the MSPB remanded, for further consideration, a complaint brought by OSC seeking a penalty of a thirty-day suspension to removal against an employee who forwarded a political e-mail advocating for a particular presidential candidate to over twenty recipients. *Sims*, 102 M.S.P.R. at 295.

VII. Conclusion

The Department recognizes that employees will, from time to time, use a government computer for personal purposes, such as purchasing a last minute gift on-line. Generally speaking, brief, infrequent occurrences that do not interfere with work, and incur only negligible cost to the government, are permitted. Nevertheless, reason must be exercised in these instances, as employees are obligated to put forth an honest effort in the performance of their duties and should not spend time or resources for anything other than handling government business. The

activities discussed above, however, are prohibited at all times while on duty and using a government computer. The vast majority of employees understand the necessity for such prohibitions and modify their behavior accordingly. Unfortunately, there are instances where employees fail to abide by the regulations and subject themselves to the possibility of disciplinary action.❖

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Requesting Reasonable Accommodations under the Americans with Disabilities Act

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I. Introduction

In 1990, when Congress passed the Americans with Disabilities Act (ADA), there were approximately 43,000,000 disabled Americans. 42 U.S.C. § 12101. The ADA, along with § 501 of the Rehabilitation Act of 1973, 29 U.S.C. § 791, requires employers, including federal government agencies, to provide reasonable accommodations to qualified individuals with disabilities, in order to enable those individuals to perform the essential functions of their positions, or to enjoy the privileges and benefits of employment. (For purposes of this article, the ADA and the Rehabilitation Act will be used interchangeably.) Agencies are also required to provide accommodations to qualified job applicants with disabilities.

There are several steps and decisions involved before an agency decides what, if any, accommodation to grant an employee making a reasonable accommodation request. For instance, the agency may ask the employee for medical documentation to support the request, and will often sit down with the employee and engage in an open, honest conversation to determine what arrangement would be most beneficial for both parties. The agency must make a number of legal determinations. This article will explore the steps and decisions an agency needs to make during the reasonable accommodation process.

II. Hypothetical employee

Tom Fickett is a criminal Assistant United States Attorney (AUSA) in the United States Attorney's Office for the Northern District of Anywhere (USAO), a small USAO. Tom is a long-time sufferer of severe allergies, and his condition has recently worsened. He believes that the air quality in his metropolitan area is exacerbating his illness.

III. Disability defined

Tom cannot walk or stand for a long period of time without having trouble breathing. He takes the train to work, and often needs long rest periods during his walk from the train station to the office. If he is unable to get a seat on the train, he gets exhausted, and often needs fifteen or twenty minutes when he arrives at the office in order to regain his breath and begin working.

An individual has a disability if he has a physical or mental impairment that substantially limits one or more major life activity, has a record of such an impairment, or is regarded as having such an impairment. "Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 29 C.F.R. § 1630.2(h)(2)(i). Equal Employment Opportunity Commission (EEOC) guidance provides that concentrating, interacting with others, and sleeping, are also major life activities. EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Difficulties, question and answer number 3 (Mar. 25, 1997), *available at* http://www.eeoc.gov/policy/docs/psych.html. The EEOC generally interprets the ADA more broadly than federal courts.

To be "substantially limited" in a major life activity means the individual cannot perform a major life activity that an average person can perform, or the individual is significantly restricted as to the condition, manner, or duration, of performing a major life activity. 29 C.F.R. § 1630.2(j). With respect to the major life activity of working, an individual is substantially limited in his ability to work if the individual is significantly restricted in the ability to perform a broad range of jobs, as opposed to a single, particular job. *Id.*; *see also Toyota Motor Mfg., Ky., Inc., v. Williams*, 534 U.S. 184 (2002).

In the example, Tom is likely substantially impaired in the major life activity of breathing. In addition, Tom believes that he is substantially impaired in the major life activity of working. He believes that because of the poor air quality in the metropolitan area, his ability to work in the area is impaired.

IV. Requesting an accommodation

Tom's physician, Dr. Osteo, is concerned that subjecting Tom to a long commute every day increases the amount of time that he is outside, and therefore dramatically worsens his ability to breathe properly. Dr. Osteo memorializes his concerns in a letter to the USAO. The letter recommends that the USAO management team consider transferring Tom to a different office with better air quality. In the alternative, the letter asks that Tom be allowed to work from home four days a week, in order to substantially reduce the negative effects of the atmosphere on Tom when commuting.

A relative, friend, doctor, or coworker, can request an accommodation on behalf of an individual. The request can be made orally or in writing, and can be sent to a supervisor or other management official, as well as the Human Resources Department. It does not need to use the term "reasonable accommodation," or mention the ADA, and can be written in "plain English." For example:

> An employee's spouse phones the employee's supervisor on Monday morning to inform her that the employee had a medical emergency due to multiple sclerosis, was hospitalized, and requires time off. This discussion constitutes a request for reasonable accommodation.

See EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, question and answer number 2 (Oct. 17, 2002) (EEOC Enforcement Guidance), *available at* http://www.eeoc.gov/policy/docs/accommodation.html. Thus, when Dr. Osteo sends a letter to the USAO making specific requests on Tom's behalf, the letter constitutes a request for a reasonable accommodation.

V. USAO's responsibilities

On July 26, 2000, President Clinton issued Executive Order 13164, which requires each federal agency to implement its own policy for processing reasonable accommodation requests. In response to the Executive Order, on October 17, 2002, Attorney General John Ashcroft issued the Department of Justice's Manual and Procedures for Providing Reasonable Accommodations (Department's Manual), which is now utilized by all United States Attorneys' offices, as well as the Executive Office for United States Attorneys (EOUSA).

Each Department of Justice (Department) component has a designated Accommodation Coordinator. Coordinators are responsible for maintaining documentation, coordinating logistics for accommodations granted, and acting as points of contact.

Under the Department's Manual, if an employee requests an accommodation orally, or if Department management believes that an employee is asking for an accommodation, management will generally ask the employee to fill out a formal request for accommodation. The

Department utilizes a specific document, DOJ Form 100A, for formal accommodation requests. Generally the agency is required to respond to accommodation requests as expeditiously as possible.

Once an employee or applicant has made a request, if the reason for the disability or the accommodation request is not obvious, Department management may seek supporting medical documentation. For instance, the Department management team can request that an employee sign a waiver allowing a doctor, chosen by the agency, to speak with the individual's physician. In the alternative, the agency can provide the individual with a written questionnaire to submit to the employee's physician. Failure to comply with a reasonable request for medical documentation may obviate the agency's responsibility to accommodate the individual. *See* Department's Manual; EEOC Enforcement Guidance, question and answer number 6 ("If an individual's disability or need for reasonable accommodation is not obvious, and s/he refuses to provide the reasonable documentation requested by the employer, then s/he is not entitled to reasonable accommodation."), *available at* http://www.eeoc.gov/policy/docs/accommodation.html.

In Tom's case, the USAO management staff is generally aware that he has medical problems, but does not know the exact nature, duration, or severity, of his condition. Accordingly, once the USAO receives the letter from Tom's physician, management has several available options. In cases involving small requests, such as minor equipment purchases (wheeled laptop cases or ergonomic keyboards) or slight schedule modifications (request to arrive late once a week for physical therapy), the district *may* grant the request without further inquiry, even if the need for the accommodation is not obvious.

With more substantial requests, such as the physician's recommendation that Tom be transferred to another district, the USAO management team will likely want more medical information. The team can seek to have a doctor of its choice discuss Tom's condition with his physician, or can submit questions to Tom's doctor. If the team chooses the latter, they will likely submit a questionnaire to Tom's doctor asking about the nature and severity of the condition, the prognosis, the effects the condition has on Tom's ability to do his job, and an explanation of how any recommended accommodations would help Tom in the workplace. Once the district receives this information, the management team will determine whether to grant an accommodation and, if so, what accommodation to allow.

VI. The interactive process

Regardless of whether the agency decides that it needs more information before responding to an accommodation request, "[a] request for reasonable accommodation is the first step in an informal, interactive process between the individual and the employer." EEOC Enforcement Guidance, question and answer number 1, *available at* http://www.eeoc.gov/policy/docs/accommodation.html. According to the Department's Manual:

> The interactive process may include (1) an analysis of the particular job to determine its purpose and essential functions, (2) a consultation with the employee to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation, (3) an identification of potential accommodations and, in conjunction with the employee, an assessment of the effectiveness of those accommodations in enabling the employee to perform the essential functions of the job, (4) consideration of the preference of the employee and selection and implementation of the accommodation that is appropriate for the employee and the employer and (5) the overall needs of the office.

In other words, the USAO staff and the employee requesting an accommodation should sit down and have an open, honest discussion about what the employee needs and how best to achieve those needs while still fulfilling the agency's mission. The goal (and often the result) of such conversations is to address the employee's needs, thereby avoiding an adversarial situation and preventing future litigation.

VII. The agency's obligation to provide accommodations

Agencies are only required to provide an accommodation to a *qualified individual with a disability*. A qualified individual is someone who can perform the essential functions of his or her position with or without accommodation. An essential function is one that is required of all

individuals serving in a particular position, and can be evidenced by a position description, performance work plan, or daily functions of a person in that position. If the question of what is an essential function is the subject of litigation, it can also be demonstrated by coworker or supervisor testimony. The essential functions of a criminal AUSA, for instance, are likely to include (but are certainly not limited to) the ability to assist criminal investigations, conduct legal research and writing, and appear and argue in court.

Accordingly, an agency will grant a request for accommodation, such as Tom's, only if the accommodation requested will enable the employee to perform the essential functions of his position. For instance, the appendix to the ADA regulations explains that employers are obligated to provide accommodations that address job-related disabilities, not general health conditions.

> [The obligation to provide reasonable accommodations] does not extend to the provision of adjustments or modifications that are primarily for the personal benefit of the individual with a disability. Thus, if an adjustment or modification is job-related, e.g., specifically assists the individual in performing the duties of a particular job, it will be considered a type of reasonable accommodation. On the other hand, if an adjustment or modification assists the individual throughout his or her daily activities, on and off the job, it will be considered a personal item that the employer is not required to provide.

29 C.F.R. § 1630.9, App. § 1630.9. In other words, "if [the] complainant is able to do the essential functions of the job without accommodation, the agency is not required to give the person additional accommodation." *Brown v. Dep't of Defense*, 2002 EEOPUB LEXIS 752 (Feb. 13, 2002).

The EEOC has upheld the principle that agencies are not obligated to provide accommodations relating to the general health of the employee. For instance, in *Ruggiero v. Dep't of the Interior*, 2001 EEOPUB LEXIS 4997 (July 7, 2001), the EEOC held that the agency was not required to pay for the complainant's physical therapy to help slow the progression of her arthritis because:

> [r]easonable accommodation is aimed at removing workplace barriers unique to the workplace, not personal barriers found both on and off the job. . . . The complainant . . . is seeking physical therapy for her general well being on and off the job. Accordingly, the agency is not required to pay for physical therapy as a reasonable accommodation . . . .

Id. (citing EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Difficulties, question and answer 28 (Mar. 25, 1997)). When an agency determines that it is obligated to provide an accommodation for an individual, the accommodation must be effective, but need not be the exact accommodation requested. EEOC Enforcement Guidance, question and answer 9, *available at* http://www.eeoc.gov/policy/docs/accommodation.html.

In Tom's situation, the USAO management staff decides to request more medical information, and asks Tom's physician to respond to a questionnaire about the nature and severity of Tom's condition, and how the requested accommodation will help Tom in the workplace. In response, management receives detailed medical documentation from Tom's physician. It shows that Tom suffers from severe breathing difficulties due to his allergies, and explains in detail how his overall health will benefit from living in a different climate.

It is unclear whether Tom would be considered a "qualified" individual with a disability under the ADA. While, as noted above, he has likely established that he is substantially impaired in the major life activity of breathing, in this case, the more difficult question is whether he can perform the essential functions of his position with or without accommodation.

While Tom historically has been effective as an AUSA, his deteriorating health may prohibit him from being able to perform certain tasks, such as arguing in court. Thus, the question presented to the USAO management staff is whether an accommodation exists that will enable Tom to perform the functions of his job.

VIII. Defenses

Certain circumstances exist that will eliminate the need for the agency to provide an accommodation. For instance, an agency is not required to provide a reasonable accommodation if doing so would create an "undue hardship." In determining whether an undue hardship would exist, agencies consider the nature, cost, and

impact, of providing a particular accommodation. For instance, if implementing an accommodation will cost an agency several hundred thousand dollars, it will likely be considered an undue hardship. *See Taylor v. Dep't. of Commerce*, 1997 EEOPUB LEXIS 2184 (June 20, 1997) (finding that the likely $500,000 cost of building a bridge to connect two buildings would be an undue hardship). Conversely, agencies are required "to undertake measures that would involve more than a de minimis cost" on behalf of disabled employees. *Feris v. Environmental Protection Agency*, 1995 EEOPUB LEXIS 3933 (Aug. 10, 1995) (citations omitted) (finding that "the cost of hiring the full-time staff interpreter . . . would not be an undue hardship.").

Moreover, agencies are not required to provide accommodations if the requesting employee is considered a "direct threat" to himself or others. In other words, if the employee poses a significant risk to the health or safety of others, and no accommodation exists that will eliminate that threat, the agency is not obligated to accommodate the employee.

Agencies are not required to withhold disciplinary actions against an employee with a disability or an employee seeking an accommodation. If an employee engages in misconduct, the agency may discipline that employee, provided that the agency would impose the same discipline on an employee without a disability.

In the hypothetical, Tom's doctor believes that transferring Tom to a USAO in a climate with better air quality would help Tom's breathing, thus enabling him to do his job. The USAO may argue that it does not have the funds or authority to fill Tom's position; thus, such a transfer would create an undue hardship.

IX. Reassignment

Reassignment is considered "the accommodation of last resort." EEOC Enforcement Guidance, question and answer 24, *available at* http://www.eeoc.gov/policy/docs/accommodation.html. When all other attempts to accommodate a qualified individual with a disability have failed, the agency is required to look into the possibility of reassigning the employee to a vacant, funded position. The agency is not obligated to create a new position, and the employee must otherwise be qualified for the vacant position.

In Tom's case, the accommodation request is to transfer positions. If an agency cannot find an accommodation that would enable a qualified individual with a disability to perform the essential functions of his position, it is required to search for other positions for which the individual may be qualified. The agency is not obligated to promote an individual in these circumstances, but the employee can choose to accept a voluntary downgrade if a lower graded position is available.

X. Conclusion

In Tom's case, it is arguable whether the USAO has an obligation to transfer him to another district. The USAO could contend that Tom's request actually seeks to address an overall health issue, rather than one that enables him to perform his job duties. Moreover, it may be an undue hardship for a smaller USAO to lose a full-time employee position. In addition, any transfer to another USAO would have to be coordinated with the other USAO, as well as EOUSA, and the staffing and budget needs of the receiving USAO would have to be taken into account. If there were a funded AUSA position available in a climate with better air quality, and it would not cause undue hardship for the district to lose Tom, the USAO could choose to transfer him.

Tom's alternate request is to work at home four days a week. The USAO would have a strong claim that Tom could not perform his essential duties, for example, arguing in court, while telecommuting most of the week. An agency can, but is not required to, remove an essential function from an employee's position. Thus, if the USAO had a backlog of appellate briefs, it could grant Tom's request by allowing him to work at home and assign him duties that did not require court appearances.

Neither Tom, his physician, nor his supervisor are ADA experts. However, each of them will play a vital role in determining whether an accommodation is ultimately granted and, if so, what that accommodation will be. Agencies are often faced with the difficult legal questions of whether they are required to provide an accommodation in a specific instance, and whether any given accommodation satisfies their obligations under the ADA. Districts are encouraged to comply with the letter and spirit of the ADA, as the federal government is charged with being a "model employer" of individuals with disabilities. *See* 29 C.F.R. § 1614.203(a).

These obligations are considered in the context of the actual condition of the employee and the employee's ability to perform his or her job functions. In more difficult cases, employees may choose to litigate issues involving determinations of whether an agency has an obligation under the ADA to provide an accommodation. In an ideal situation, these issues will be resolved quickly and effectively through the use of the reasonable accommodation interactive process. We encourage all USAOs to contact the General Counsel's Office to help navigate the steps and decisions that need to be made during this process.❖

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The Equal Employment Opportunity Process: Past, Present, and Future

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I. Introduction

Federal laws, such as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Equal Pay Act, and the Rehabilitation Act, protect federal employees from discrimination on the basis of race, color, national origin, religion, gender, age, and disability. These protections also extend to former employees and applicants for employment. The Equal Employment Opportunity Commission (EEOC) maintains responsibility for enforcing these protections. The federal sector equal employment opportunity (EEO) process has been the subject of dissatisfaction from both agencies and aggrieved individuals practically since its inception in 1972.

In 1995, the General Accounting Office (GAO) called the redress system for federal employees, including the EEO process, "inefficient, expensive, and time-consuming." *Federal Employee Redress: An Opportunity for Reform* (GAO/T-GGD-96-42, Nov. 29, 1995), *available at* http://archive.gao.gov/papr2pdf/155680.pdf. GAO also noted that the system's "protracted processes and requirements divert managers from more productive activities and inhibit some of them from taking legitimate actions in response to performance or conduct problems." *Id*. While various efforts have been made over the years to reform the process, it is still burdened by perceptions of bias and inefficiency. This article will address three main topics: the current state of the federal sector EEO process, past attempts at reform, and new reform efforts currently underway.

II. The EEO process today

Before examining the various efforts to reform the EEO process, it is helpful to have an overview of the process as it functions today. The EEO process is governed by the regulations at 29 C.F.R. § 1614, which were most recently amended in 1999. The process provides for the agency that is the subject of a complaint to handle all aspects of the processing of the complaint, until the point at which the individual either requests a hearing before an EEOC Administrative Judge or files a civil action in federal district court. This means the agency is responsible for counseling, accepting, investigating, and potentially issuing a decision, on EEO complaints against itself.

The regulations require that an individual, who wishes to file a complaint of discrimination, complete an informal process before filing a formal complaint. During the informal process, an EEO counselor is assigned to the matter. These counselors may be full-time EEO counselors or

employees serving as counselors as a collateral duty. The counselor's role is to advise the individual of the EEO process, determine the claims and bases raised by the potential complaint, speak directly with the aggrieved individual and the agency officials involved, and attempt to resolve the matter at the lowest possible level. The counselor will also advise the aggrieved individual of the agency's alternative dispute resolution (ADR) process. If the individual opts to participate in ADR, it replaces the usual counseling process. According to EEOC's Annual Report on the Federal Work Force Fiscal Year 2005, the most recent data available, approximately 54% of all instances of counseling in that year were resolved or withdrawn prior to the filing of a formal complaint. EEOC's Annual Report on the Federal Work Force Fiscal Year 2005, *available at* http://www.eeoc.gov/federal/fsp2005/index.html#resolution.

If the complaint is not resolved informally through counseling or ADR, the counselor will issue a Notice of Final Interview report. The individual then has the right to file a formal complaint with the agency within fifteen days of receiving the Notice of Final Interview. The agency can accept or dismiss the complaint, based on information provided by the individual or included in the counselor's report. The complaint may be dismissed for a number of reasons specified in 29 C.F.R. § 1614.107, including untimely filing, failure to state a claim, or mootness. A dismissal of a complaint in its entirety may be appealed directly to the EEOC's Office of Federal Operations. A dismissal of only a portion of the complaint, however, may not be immediately appealed.

If the complaint is accepted for processing, it is referred to an investigator employed by the agency. The investigators may be agency employees working on a full-time or collateral duty basis, or may be contractors. The investigator's primary role is to obtain written statements from relevant witnesses and collect documents to be placed in the investigative file. While the regulations require that the file be completed within 180 days of the filing of the complaint, this rarely happens. 29 C.F.R. § 1614.108. In 2005, for example, the average time to complete an investigation was 237 days. EEOC Annual Report, *available at* http://www.eeoc.gov/federal/fsp2005/index.html#lowest. This was a significant improvement over 2004, when the average processing time was at its all time high of 280 days. *Id*.

Once the investigation is complete and the file has been assembled, the individual usually has two options for proceeding with the complaint.

- The employee may request that a final agency decision be issued, based on the information contained in the report of investigation.
- The employee may request a hearing before an EEOC Administrative Judge (AJ).

If a final agency decision is requested, the agency is required, by regulation, to issue a decision within sixty days. 29 C.F.R. §1614.110(b).

A "mixed case" is one in which an individual believes there has been discrimination with regard to a matter which is appealable to the Merit Systems Protection Board (MSPB). Most often, these cases involve a serious disciplinary action, such as removal, downgrade, or suspension of more than fourteen days. If that matter is pursued through the EEO process, the employee has no right to a hearing before an EEOC AJ, and thus the complaint would be sent forward for a final agency decision. 29 C.F.R. §1614.302. The employee may, however, opt to pursue the matter with the MSPB, and can raise the allegations of discrimination in that forum. *Id*.

In the Department of Justice (Department), responsibility for issuing final agency decisions lies with the Complaint Adjudication Office, in the Civil Rights Division. Agencies, including the Department, are rarely able to meet the sixty-day time frame established by the regulations. Government-wide, only about 59% of final agency decisions without a hearing were timely issued in 2005. EEOC Annual Report, *available at* http://www.eeoc.gov/federal/fsp2005/index.html#lowest.

If the individual requests a hearing before an EEOC AJ, the agency forwards the complete file to the appropriate EEOC office. Generally, cases are assigned to an AJ in the EEOC office having jurisdiction over the geographic area in which the complaint arose. The EEOC hearing process resembles a trial in that parties conduct discovery, file motions, and present witness testimony, and the AJ ultimately issues a decision in favor of one of the parties. However, EEOC AJs are not administrative law judges, and the Federal Rules of Civil Procedure and Rules of Evidence are not strictly applied (for example, hearsay evidence is admissible). Furthermore, after an AJ issues a

decision, the agency must still take the final action on the complaint by either fully implementing the AJ's decision or filing an appeal of the decision to EEOC's Office of Federal Operations. 29 C.F.R. § 1614.110(a). The regulations do not dictate specific time frames for holding hearings or for AJs issuing decisions after hearings, and the average processing time for cases referred to a hearing in 2005 was 249 days. The EEOC Annual Report, *available at* http://www.eeoc.gov/federal/fsp2005/index.html#hear. This again represents a significant improvement, as in 2004 the average processing time for a hearing was 355 days. *Id*.

If either a final agency decision or an AJ's decision is adverse to the individual, an appeal may be filed by the individual with EEOC's Office of Federal Operations. If the AJ's decision is adverse to the agency and the agency does not intend to implement that decision, the agency *must* file an appeal. 29 C.F.R. § 1614.110(a). In 2005, 5.4% of all AJ decisions on the merits of a complaint found discrimination; 1.32% of final agency decisions without a hearing found discrimination. EEOC Annual Report, *available at* http://www.eeoc.gov/federal/fsp2005/index.html#hear. Agencies appealed just over 30% of all cases where the AJ made a finding of discrimination. EEOC has not established a time frame for processing appeals in its regulations, and the average processing time for appeals in 2005 was 194 days. EEOC Annual Report, *available at* http://www.eeoc.gov/federal/fsp2005/index.html#app. If an individual has filed an EEO complaint on a matter which is appealable to the MSPB, they may choose to appeal the final agency decision on their complaint to the MSPB, rather than the EEOC. 29 C.F.R. §1614.302.

An individual, but not the agency, also has the option to file a civil action in federal district court after receiving a decision on a complaint. In fact, the right to file a civil action accrues 180 days after the complaint is filed, regardless of whether the complaint has been investigated or a decision issued. 29 C.F.R. § 1614.407-409. This right essentially gives individuals a "second bite at the apple"; an opportunity to relitigate their complaints from the beginning, since the matter is tried de novo in court. The parties may engage in the discovery process again, file new motions, and proceed with a trial, regardless of the outcome of the administrative process.

The process described herein has been largely unchanged since 1999, the date of the last significant reform in this area.

III. Past attempts at EEO reform

Over the course of the past decade, there have been innumerable articles, announcements, meetings, task forces, and reports, regarding various efforts at reforming the federal sector EEO process. Only a few have resulted in actual, concrete steps towards improving the process. A few of the more notable efforts will be highlighted below.

The most substantial changes to the EEOC process, in recent years, came as a result of the EEOC regulations published in the Code of Federal Regulations on July 12, 1999, which went into effect on November 9, 1999. 29 C.F.R. § 1614. According to guidance published on EEOC's Web site, the regulations were issued as part of EEOC's "ongoing effort to improve the effectiveness of its operations." Questions and Answers: Final Federal Sector Complaint Processing Regulations 29 C.F.R. Part 1614, *available at* http://www.eeoc.gov/federal/1614-qanda.html. Before publishing these regulations, EEOC consulted with representatives of both agencies and employees, and solicited public comments on the proposed rule. The 1999 regulations made some significant changes to the way in which federal sector EEO cases were processed.

Unlike prior EEOC regulations, the 1999 regulations required that agencies establish ADR programs, which would be available during both the formal and informal processes. 29 C.F.R. § 1614.102. The goal was to increase the number of cases resolved and, therefore, reduce the number of formal complaints, hearings, and final agency decisions. While the total number of complaints filed has decreased since the regulations were effected (there were 5,284 fewer complaints filed in FY 2005 than FY 2000), the percentage of formal complaints resulting from counseling contacts has remained relatively stable (47% in FY 2000 versus 44% in FY 2004). EEOC Annual Report, *available at* http://www.eeoc.gov/federal/fsp2005/index.html#resolution. Thus, the decrease in the number of complaints may simply be a result of fewer individuals initiating the EEO process, rather than increased success in resolving complaints.

Other modifications to the process, resulting from the 1999 revisions, include the following.

- Allowing individuals to amend pending complaints.

- Eliminating interlocutory appeals in cases where only a portion of the complaint is dismissed.
- Discontinuing the practice of allowing AJ's to remand cases to agencies for counseling, investigation, or other processing.
- Allowing agencies to dismiss "spin-off" complaints that allege dissatisfaction with the processing of complaints.

One of the most important provisions of the new regulations addressed agencies' final action on decisions issued by EEOC AJs. In the past, agencies were free to accept or reject an AJ's decision, which was merely "recommended." Questions and Answers, *available at* http://www.eeoc.gov/federal/1614-qanda.html. Not surprisingly, this resulted in agencies rejecting or modifying about two-thirds of cases in which the AJ found for the complainant. *Id*. Under the 1999 regulations, agencies are required to either implement an AJ's decision in full, or to appeal the decision to EEOC's Office of Federal Operations, as described in the preceding section.

Shortly before the 1999 regulations were published, the EEOC announced that it was joining forces with the National Partnership for Reinventing Government (NPR) to establish the EEOC-NPR Interagency Task Force on the Federal Sector. In a press release issued in August 1999, then Director of EEOC, Ida Castro, touted the task force as "the ideal forum for piloting innovative approaches and sharing best practices to improve every aspect of the process–from preventive measures to the cost-effective use of resources dedicated to addressing federal employee EEO complaints." *Available at* http://www.eeoc. gov/press.html. While the EEO community anticipated a report that would highlight best practices and solicit participation in pilot programs to test new approaches, the Task Force did not issue any published findings or recommendations.

By the spring of 2002, the EEOC had a new Chair, Cari Dominguez, who had fresh ideas about how to reform the federal sector process. Chair Dominguez spoke of transforming the federal sector process into one which more closely mirrored the private sector process. As detailed in the American Federation of Government Employees' (AFGE) talking points on the EEOC proposal, the plan would have substantially limited the options available to federal employees filing complaints of discrimination. *Available at* http://www.afge.org/Documents/ACF3A17.doc.

The 2002 plan would have maintained the existing counseling and ADR processes for purposes of attempting to resolve the complaints. Unlike the existing process, however, if the complaint was not resolved, the individual would be presented with following two options.

- File an appeal with a local EEOC office.
- File in federal district court.

Appeals to the EEOC would be handled through an intake process that would assign complaints an A, B, or C rating. That rating would determine how the complaint would be processed. Complaints with a C rating would be dismissed, while complaints rated A or B would receive a decision from the EEOC. This process would eliminate both the investigation and the hearing to which individuals are currently entitled. *Id*.

This plan met with great opposition by organizations representing the interests of government employees, including unions, plaintiff's law firms, and various civil rights organizations. More than two dozen of these organizations sent a letter to Chair Dominguez expressing their concerns that the proposal was "extremely harmful to federal employees," and objecting to the possibility that the EEOC would implement such changes without any public rulemaking or input from interested parties. AFGE July 22, 2002 letter, *available at* http://www.afge.org/Index.cfm?Page=WhatsNew&File=2002_07_22.htm.

The EEOC ultimately held a public hearing on the question of federal sector EEO reform in November 2002, during which the Commission heard from various outside stakeholders, including complainants in EEO cases, EEO executives for federal agencies, EEOC officials, representatives of the plaintiff's bar, and other interested organizations. Commission Meeting on Federal Sector Reform, *available at* http://www.eeoc.gov/abouteeoc/meetings/11-12-02/index.html. After that meeting, Chair Dominguez announced that a plan for the overhaul of the federal sector EEO process would be completed by September 2003. Her announcement offered no details about the proposed plan, and no plan ever materialized.

The next substantive change to the way EEOC handles complaints came in March 2004, when EEOC's Washington Field Office (WFO) unveiled

an assessment program for hearing cases. Under the new plan, two high-ranking managers (*not* administrative judges) in the WFO, vet incoming cases and recommend dismissal, summary judgment, or a hearing. The goal, said WFO Director Dana Hutter, is "to speed processing of easy-to-resolve claims that normally would take months to decide, thus allowing the agency's administrative judges to focus on the toughest cases." Shawn Zeller, *Justice Delayed*, GovExec.com, June 15, 2004, *available at* http://www.govexec.com/features/0604-15/0604-15s6.htm. This system is clearly reminiscent of the 2002 plan to rate incoming cases as A, B, or C, and process them accordingly; however, it is still only in very limited use at the Commission. This plan has also come under fire from civil rights groups and unions because of fear it may prejudice AJs' view of cases before they have the opportunity to review them, and take away AJs' authority to decide the merits of cases. *Id*.

In November 2005, Congress joined the debate about how to reform the EEO process, with the House Subcommittee on the Federal Workforce and Agency Organization holding a hearing entitled "Justice Delayed is Justice Denied: A Case for the Federal Employees Appeals Court." *Justice Delayed is Justice Denied: A Case for a Federal Employees Appeals Court: Hearing Before the Subcomm. on the Federal Workforce and Agency Operations of the H. Comm. On Gov't Reform,* 109th Cong. (2005). The Federal Employees Appeals Court, which was initially proposed to the subcommittee by the Senior Executives Association (SEA) in 2003, was envisioned as a federal court under Article I of the Constitution. The subcommittee expected the court to be a "one-stop-shop" for employee appeals, combining the functions of the EEOC, MSPB, and Federal Labor Relations Authority (FLRA). The hope was that such a court would eliminate the current problem whereby employees are free to forum shop, or even litigate the same matter a second time in a new forum, if they are dissatisfied with the outcome of the process they initially elected to pursue. In its testimony before the subcommittee, SEA suggested that the court could also handle matters currently under the jurisdiction of the Office of Personnel Management and the Office of Special Counsel (OSC). *Id.* (Testimony of William Bransford, General Counsel, Senior Executives Association). The subcommittee also heard testimony from the Chairs of the MSPB, FLRA, and EEOC, and the Presidents of the National Treasury Employees Union and American Federation of Government Employees. All expressed serious concerns about the proposed Federal Employees Appeals Court and encouraged the subcommittee to consider other options for improving the process. *Id.* The hearing did not result in any proposed legislation, and the idea of Federal Employees Appeals Court appears to have lost any momentum it may have once had.

The past few years have brought much discussion of EEO reform, but little large-scale change. Nevertheless, both the EEOC and Congress have recently undertaken new efforts to improve the EEO process.

IV. What's next in EEO reform

On July 11, 2006, the House Subcommittee on the Federal Workforce and Agency Organization held another hearing, this time entitled "Establishing a Commission to Recommend Improvements to the Federal Employees Appeals Process." *Establishing a Commission to Recommend Improvements to the Federal Employees Appeals Process: Hearing Before the Subcomm. on the Federal Workforce and Agency Operations of the H. Comm. On Gov't Reform,* 109th Cong. (2006) . During this hearing, the subcommittee heard testimony regarding a draft of a bill that would establish a Federal Employees Appeals Commission. Testimony was heard from EEOC, MSPB, FLRA, OSC, AFGE, NTEU, SEA, and the Federal Managers Association. In the draft legislative proposal, the Commission would be comprised of ten members, including representatives from each of the stakeholder agencies and organizations. Under the proposal, the Commission would be charged with conducting a study to determine the following.

- The subject areas within the jurisdiction of the MSPB, FLRA. EEOC, and the OSC.
- The nature, extent, and ramifications, of any overlap in the responsibilities or authorities of these agencies.
- The current average processing time for cases before these agencies.
- The current impediments to the fair and timely resolution of cases before these agencies.

Id.

The Commission would then have one year, from its first meeting, to report its findings to

Congress and make recommendations addressing the following concerns.

- What changes are necessary to improve the efficiency, effectiveness, and fairness of the current federal employees appeals system?
- Would the interests of federal employees and the public be better served by consolidating any part of the operations or procedures of two or more agencies?
- Would it be more efficient for an independent agency to conduct the initial investigation of an equal employment opportunity complaint?
- How can processing times for appeals, arbitration, and complaints, be reduced?
- How can procedures for " mixed case " complaints and appeals be consolidated or improved?
- How can the use of alternative dispute resolution procedures in the system be increased?
- How can the quality of reports and other information made available to the public and the Congress, with respect to processing of complaints, be improved?

To date, Congress has not introduced any legislation on this subject, and it remains to be seen whether the Federal Employees Appeals Commission will materialize. *Id*.

Under the leadership of new EEOC Chair, Naomi Earp, who took over on August 31, 2006, EEOC is still pursuing ways to improve the federal sector EEO process. On September 7, 2006, EEOC held an open meeting on the issue of federal sector EEO investigations. The EEOC heard from three separate panels, which focused on the following three areas:

- The timeliness of agency investigations.
- The quality of investigations.
- The perceived conflict of interest issues that arise in agencies investigating themselves.

Commission Meeting of September 7, 2006, *available at* http://www.eeoc.gov/abouteeoc/index.html. The panel members included representatives from federal agencies, unions, employee associations, civil rights groups, contracting firms that perform federal EEO investigations, and an EEOC AJ. The panels testified about a number of problems plaguing the investigative process, including long processing times, inadequately trained investigators, and the inherent conflict of interest presented by agencies conducting the investigations. At the end of the meeting, Chair Earp announced that EEOC would be convening working groups to "analyze the strengths and weaknesses of the current process, and to come up with working solutions to continue to improve the timeliness and quality of federal sector investigations." *Id*. She also noted that this would be a "time-consuming process," and there is no way to tell when, if ever, the results of this effort will be published, or what they may be.

V. Conclusion

There are many varying opinions about how the federal sector EEO process should work. The various stakeholders, including agencies, managers, and employees, each have different interests and expectations. What seems to be unanimous, however, is that the existing process is not the most effective or efficient means of handling EEO complaints and that some kind of reform is necessary. Many reform proposals have been promised or made in the past several years, yet few have resulted in a substantive change in the manner in which EEO cases are counseled, investigated, litigated, decided, or appealed. These reform efforts will likely continue, but it remains to be seen whether there is any practical solution that will appease all of the interested parties.❖

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Attorney-Client Privilege

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I. Introduction

Is this conversation protected? That is the question this article seeks to address while considering the attorney-client privilege and its application to communications between the General Counsel's Office (GCO) of the Executive Office for United States Attorneys (EOUSA) and the United States Attorneys' Offices (USAOs). Among other things, the GCO advises and, in some respects, represents the USAOs vis-a-vis complaints to the Equal Employment Opportunity Staff (EEO) or the Office of Special Counsel, and/or appeals to the Merit Systems Protection Board (MSPB). It is in these contexts that we examine the applicability of the attorney-client privilege to GCO-USAO communications.

This article generally reviews the underlying principles of the attorney-client privilege and then considers how the privilege applies to the communications between GCO attorneys and USAO officials and employees —whether they be managers, supervisors, attorneys, administrators, or support personnel. Part II briefly discusses the historical background of the attorney-client relationship. Part III examines how the attorney -client privilege applies to attorney-client communications in a corporate or government setting where the client is an "inanimate entity," as termed by the Supreme Court in *Upjohn v. United States*, discussed *infra*. Part IV considers the attorney-client privilege's application to GCO-USAOs communications in the context of administrative proceedings.

II. Brief historical overview of the attorney-client privilege

The attorney-client privilege dates back to the sixteenth century as the oldest of the privileges in the attorney-client relationship, and was initially created for the purpose of protecting the oath and honor of the attorney. *See Upjohn v. United States*, 449 U.S. 383, 389 (1981); *Galarza v. United States*, 179 F.R.D. 291, 295 (S.D. Cal. 1998). *See also* Patricia E. Salkin, *Eliminating Political Maneuvering: A Light In The Tunnel For the Government Attorney-Client Privilege*, 39 IND. L. REV. 561, 562 (2006). Over time, the policy reasons for the privilege have changed such that, in its contemporary form, the attorney-client privilege is considered necessary to ensure freedom of consultation between client and attorney. *See Upjohn*, 449 U.S. at 389; Salkin, *supra* at 562-63 (quotation omitted).

Under modern rationale, the attorney-client privilege "encourages full and frank communication between attorneys and their clients", enabling an attorney to optimallly represent a client because the client is more likely to disclose all relevant facts. *Upjohn*, 449 U.S. at 389. Perhaps the most compelling justification for the attorney-client privilege is that it "promote[s] broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client." *Id.*

Along with this modern conception of the privilege evolved certain requirements that, in order to preserve the privilege, all communications between the attorney and the client must be made and maintained as confidential and sought for the purpose of obtaining legal advice. In his seminal treatise on evidence, John Henry Wigmore organized the privilege into the following eight requisite elements:

- Where legal advice, of any kind, is sought
- from a professional legal adviser in his capacity as such
- the communication relating to that purpose
- made in confidence
- by the client
- are at his instance permanently protected
- from disclosure by himself or by the legal adviser,
- except the protection may be waived.

8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290, at 542 (McNaughton rev. 1961).

These elements prompt certain clarifying questions about the circumstances in which the attorney-client privilege may apply, especially where the client is an inanimate entity like a corporation or a government agency. For example, (1) must the communication be made "by the client"?; (2) must legal advice be sought in every communication for each to be protected by the attorney-client privilege?; and (3) what makes a communication "confidential"?

The Supreme Court's 1981 decision in *Upjohn* answered many of these questions, as discussed in Part IV, below.

III. The privilege's applicability to inanimate entities like government agencies

Initially, it is well-settled that the attorney -client privilege applies to inanimate entities, like corporations and government agencies. *See Upjohn*, 449 U.S. at 390; *Tax Analysts v. Internal Revenue Service*, 117 F.3d 607, 618 (D.C. Cir. 1997). In a government setting, moreover, the client may be a specific agency, a branch of government, or the government as a whole. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 101 cmt. b (2000) (discussing the relevant factors for determining government client identification). Additionally, the attorney may be an agency lawyer. *Tax Analysts*, 117 F.3d at 618.

Where the GCO represents "the Agency" in an administrative forum (that is, the EEOC or the MSPB), the GCO lawyer's organizational client is the Department of Justice. *Cf.* 29 C.F.R. § 1614.104 (2004) (each agency must adopt procedures for processing EEO complaints); 5 C.F.R. § 1201.4(e) (2006) (defining "party" as "[a] person, an agency, or an intervenor, who is participating in a [MSPB] proceeding"); 5 C.F.R. § 1201.25 (2006) (delineating the content of an agency response in a MSPB appeal). Indeed, an agency is a "client" under federal law. *See Galarza*, 179 F.R.D. at 295 n.4 (citation omitted).

IV. The attorney-client privilege applied to GCO-USAO communications

The Supreme Court, in *Upjohn*, broadened the scope of the communications covered by the attorney-client privilege in circumstances where the client is an entity, such as a government agency. Indeed, courts have determined that the government functions through its employees much like a corporation. *See Galarza*, 179 F.R.D. at 295 ("[The Government] lives or dies by the acts of its employees."). Thus, an agency requires the same full and frank disclosure from its employees that a corporation does in order to obtain the crucial legal advice it needs. *See id.*

A. Elements of the attorney-client privilege

Under contemporary case law, the following elements must apply in order to successfully assert a claim of attorney-client privilege.

- The asserted holder of the privilege is, or seeks to become, a client.
- The person to whom the communication is made is a member of a bar of the court, or his or her subordinate, and in connection with this communication is acting as a lawyer.
- The communication concerns a fact related to the attorney by the client, without the presence of strangers, for the purpose of securing primarily either an opinion on the law, legal services, or assistance in a legal proceeding, and not for the purpose of committing a crime or tort.
- The privilege is claimed, and not waived, by the client.

See Upjohn, 449 U.S. at 391-92; *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 920 (8th Cir. 1997); *In re Allen*, 106 F.3d 582, 600 (4th Cir. 1997); *United States v. Network Software Assoc.*, 217 F.R.D. 240, 244 (D.D.C. 2003); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 600 (N.D. Tex. 1981).

Fundamentally, the attorney-client privilege only applies to communications; it protects the communication, not the underlying facts themselves. *See Upjohn*, 449 U.S. at 395-96 ("[t]he privilege only protects disclosures of communications"(emphasis added)); *Galarza*, 179 F.R.D. at 295 n.5. Thus, fact documents prepared for an attorney by a client—or a client's factual communications to an attorney—generally are privileged, but the underlying information is otherwise discoverable. *See Upjohn*, 449 U.S. at 395-96; *In re Allen*, 106 F.3d at 604.

B. Communications with whom are privileged?

As Parts II and III above indicate, the attorney-client privilege protects confidential communications made by the client for the purpose of seeking legal advice. *See Tax Analysts*, 117 F.3d at 618. This principle, the *Upjohn* Court

held, does not sufficiently address the realities of the attorney-client relationship in situations where the client is an entity, especially when the information needed is not available from upper -echelon management who may stand in the shoes of the "client." *See Upjohn*, 449 U.S. at 394.

The Court went on to say that:

> Middle-level—and indeed lower-level—employees can, by actions within the scope of their employment, embroil the corporation in serious difficulties, and it is only natural that these employees would have relevant information needed by corporate counsel if he is to adequately advise the client with respect to such actual or potential difficulties.

Id. at 391.

The Court further reasoned that, in order not to frustrate the purpose of the attorney-client privilege, these communications must be protected to prevent "discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client . . .". *Id*. at 392. It explicitly stated that corporate counsel, faced with a corporation's legal difficulties, necessarily must interview lower-echelon employees involved in the day-to-day operations of the corporation in order to obtain the information necessary to assess the corporation's problems. *Id*.

For such communications between counsel and an entity's lower-level employees to be privileged, the *Upjohn* Court held that the communication must be made for the purpose of seeking legal advice. *Upjohn* requires both that communications between an entity's counsel and lower-level employees must pertain to matters within the employees' official duties and that such employees must be "sufficiently aware that they were being questioned in order that the [entity] could obtain legal advice." *Id*. at 394.

As for attorneys' communications to their clients, such communications are privileged so long as the communications "rest on confidential information obtained by the client." *Tax Analysts*, 117 F.3d at 618 (*quoting In re Sealed Case*, 737 F.2d 94, 98-99 (D.C. Cir. 1984)). Indeed, the *Upjohn* Court observed that an attorney's advice frequently will be more significant to lower-level employees than to those who officially sanction the advice, especially because those lower-level employees will likely be putting the advice into effect and, consequently, they are the ones who most need full and frank legal advice. *Upjohn*, 449 U.S. at 392. Thus, the attorney-client privilege exists not only to protect attorney communications to the client when providing advice, but also to protect the communications attorneys must make with the client's employees when gathering the information necessary to render advice. *Id*. at 390.

Accordingly, a represented entity may assert the attorney-client privilege with respect to its employees' communications with its attorneys under the following circumstances.

- The particular employee or representative of the entity must have made a communication of information which was reasonably believed to be necessary to the decision-making process, concerning a problem for which legal advice was sought.
- The communication must have been made for the purpose of securing legal advice.
- The subject matter of the communication, to or from the employee, must have related to the performance, by the employee, of duties in his or her employment.
- The communication must have been a confidential one.

See Upjohn, 449 U.S. at 394-95; *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 377, 384-86 (D.D.C. 1978); *In re LTV Sec. Litig.*, 89 F.R.D. at 601-04; *United States v. Premera Blue Cross*, No. C01-476P, slip op., 2006 WL 3733783, at *6-7 (W.D. Wash. Dec. 15, 2006); *Smithkline Beecham Corp. v. Apotex Corp.*, 193 F.R.D. 530, 538-39 (N.D. Ill. 2000).

C. Confidential communications

As stated above, the attorney-client privilege protects communications from client to attorney that were intended to be confidential and that were made for the purpose of obtaining legal advice. *See In re Grand Jury Proceedings*, 5 F. Supp. 2d 21, 30 (D.D.C. 1998) (*citing Tax Analysts*, 117 F.3d at 618), *aff'd by In re Lindsey*, 148 F.3d 1100 (D.C. Cir. 1998). On the other hand, communications from attorney to client are protected only if such communications "rest on confidential information obtained from the client." *In re Grand Jury Proceedings,* 5 F. Supp. 2d at 30.

For information to be considered confidential, the person in possession of the information must be reasonably careful both to identify the

information as confidential at the time it was prepared or provided and to protect the information from general disclosure outside the agency. *See Coastal Corp. v. Duncan*, 86 F.R.D. 514, 521 (D. Del. 1980). Information is deemed "confidential" for the purposes of the attorney -client privilege if one can say that the person who communicated it reasonably believed that it would not be disclosed. *See Evans v. Atwood*, 177 F.R.D. 1, 5 (D.D.C. 1997).

V. Conclusion

As the discussion above indicates, there are various nuances to the applicability of the attorney-client privilege to communications between the GCO and USAO personnel. The foregoing illustrates the value of jointly coordinating these issues in the course of the advice and counsel the GCO provides the USAOs in order to establish and preserve attorney-client privilege protections. Most specifically, USAO officials and employees and the GCO should make efforts to confirm that their communications are made in the context of GCO's confidential fact-finding efforts for the purpose of either assisting and representing the agency in administrative proceedings or otherwise providing legal advice.

Of course, it is always prudent to consult your local Professional Responsibility Officer and/or the Professional Responsibility Advisory Office, should there be a need to obtain specific advice about any given situation.❖

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Potential Ethical Issues in Parallel Proceedings

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Over the past two decades, it has become increasingly common for matters opened as possible federal criminal cases to also be under active investigation by federal or state regulatory agencies, or even by private civil counsel. Such "parallel investigations" or "parallel proceedings" present opportunities and risks for federal prosecutors. On the one hand, cooperation from regulatory attorneys and investigators who have specialized expertise in complex and often unfamiliar fields can be of enormous assistance to federal prosecutors. However, if a court finds that prosecutors and regulatory agency personnel have worked together improperly, the consequences can be severe—ranging from the suppression of statements or evidence obtained from defendants, to the dismissal of particular charges, or, in the worst case, to complete dismissal of a criminal indictment.

This makes it vitally important for federal prosecutors conducting parallel proceedings to be familiar with the key ethical principles governing such investigations. This need is especially acute because of two recent federal district court decisions—*United States v. Scrushy*, 366 F. Supp. 2d 1134 (N.D. Ala. 2005) and *United States v. Stringer*, 408 F. Supp. 2d 1083 (D. Or. 2006). *Scrushy* was a high-profile corporate fraud prosecution involving Richard M. Scrushy, the founder and Chief Executive Officer (CEO) of HealthSouth Corporation. The district court dismissed three perjury charges against Scrushy, based upon testimony he gave at a deposition taken by the Securities and Exchange Commission (SEC), because the court believed there were improper consultations between Department of

Justice (Department) attorneys and the SEC investigators in advance of his deposition. In *Stringer*, another corporate fraud case, the district court dismissed the charges against two defendants because it found that the government had improperly concealed the existence of a pending criminal investigation while an SEC investigation was underway involving the same defendants and subject matter.

The *Stringer* case is not over. At present, briefing is under way before the Ninth Circuit Court of Appeals. Scrushy's subsequent acquittal at trial on all the remaining charges against him, however, meant that the district court's decision dismissing the perjury charges escaped testing before an appellate court. Thus, even if the Ninth Circuit ultimately reverses the district court's decision in *Stringer*, in whole or in part, *Scrushy* will remain on the books.

Because defense attorneys are now more sensitized to this issue, federal prosecutors can expect frequent motions in the future as defense attorneys attempt to explore the precise relationship between the government's criminal and regulatory lawyers during the course of their respective investigations. *See, e.g.*, *United States v. Luce*, 2006 WL 2850478, at *5 (N.D. Ill. Sept. 29, 2006) (denying defense motion to compel the government "to disclose all communications between the U.S. Attorney's Office and the SEC").

There are only a handful of federal court decisions dealing with parallel proceedings, of which the two most important are *United States v. Kordel*, 397 U.S. 1 (1970) and *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368 (D.C.Cir. 1980) (en banc). In *Kordel*, the Food & Drug Administration (FDA) commenced an investigation of a company for possible violations of the Food, Drug and Cosmetic Act. At the FDA's request, the U.S. Attorney's Office for the Eastern District of Michigan (USAO) filed an *in rem* seizure action, and served interrogatories on the company in connection with this litigation. Less than two weeks after the interrogatories were served, the FDA, in compliance with a provision in the Food and Drug Act, notified the company that it was contemplating a criminal referral of the matter to the Department, and offered the opportunity for a hearing before it did so.

The company responded by moving to either stay the civil proceedings or allow it to defer answering the interrogatories until after the conclusion of any criminal case. The district court denied this motion, and one of the company's vice-presidents then answered the interrogatories. This vice-president and the company's Chief Executive Officer were subsequently indicted and convicted, in part based upon evidence derived from the civil interrogatory answers.

On the appeal of their criminal convictions, the company officers argued that the use of information derived from the civil investigation in the criminal prosecution was unfair. The Supreme Court disagreed, noting that the public interest often demands that regulatory agencies move expeditiously with remedial civil proceedings, particularly when the safety of food or drugs is at issue. 397 U.S. at 11. The Court stressed that regulatory agencies should not be forced to choose between recommending criminal prosecution and proceeding with appropriate civil investigative and enforcement efforts.

In *dicta*, however, the Supreme Court identified certain circumstances under which a defendant's due process rights might be violated if they were compelled to produce evidence during a civil enforcement proceeding that preceded the filing of criminal charges. These included instances where the government pursued the civil action solely to obtain evidence for a criminal prosecution or where the government failed to advise the defendant it was contemplating criminal prosecution. *Id.* at 11-12.

In *Dresser Industries*, Dresser sought to quash a subpoena issued by the SEC on the grounds that it was already facing a federal grand jury investigation into the same subject matter (questionable foreign payments). The court's en banc decision in *Dresser* stressed that "[e]ffective enforcement of the securities laws requires that the SEC and Justice be able to investigate possible violations simultaneously," 628 F.2d at 1377, and it accordingly held that absent a showing of "substantial prejudice," parallel proceedings "are unobjectionable under our jurisprudence." *Id.* at 1374.

The *Dresser* en banc court also rejected a limitation the original three-judge panel had imposed on enforcement of the SEC's subpoena. The panel prohibited the SEC from providing any information received or learned as a result of the subpoena to the Department once it made "the decision to prosecute." *Id.* at 1385. The en banc court found there was no support for such a restriction in the relevant statutes or legislative history, noting that the various securities acts all

authorized the SEC to transmit evidence to the Department for its use in deciding whether criminal proceedings were merited, and did not impose any time limitation on when such referrals of information could occur. *Id.* at 1385. Citing the Supreme Court's decision two years earlier in *United States v. LaSalle National Bank*, 437 U.S. 298, 312 (1978), the en banc court concluded that

> A bad faith investigation . . . is one conducted solely for criminal enforcement purposes. Where the agency has a legitimate noncriminal purpose for the investigation, it acts in good faith under the *LaSalle* conception even if it might use the information gained in the investigation for criminal enforcement purposes as well.

Dresser Indus., 628 F.2d at 1387.

Kordel and *Dresser*, therefore, established three basic principles regulating the conduct of parallel investigations. First, parallel proceedings are generally proper so long as both the civil and criminal authorities have a legitimate reason to investigate arising out of their respective statutory mandates. Second, there need not be a complete "Chinese Wall" between the civil and criminal authorities. While Federal Rule of Criminal Procedure 6(e) limits the ability of criminal prosecutors to share information developed by means of the grand jury with their civil counterparts, no comparable restriction applies to evidence developed during a legitimate, non-pretextual civil investigation. Third, individuals or corporations that find themselves the subject of a regulatory investigation or enforcement proceeding have no blanket right to stay the civil proceeding pending the initiation and conclusion of any criminal proceedings.

The district court decisions in *Scrushy* and *Stringer*, however, go beyond these core principles in ways that are unexpected and troubling, but that—depending in part on the appellate court's ultimate decision in *Stringer*—will need to be borne in mind by prosecutors conducting parallel investigations in the future.

In the fall of 2002, the SEC began investigating Scrushy to determine whether he had violated insider trading rules when selling a substantial quantity of HealthSouth stock. In early February 2003, the FBI publicly announced that it had also opened a criminal investigation of the alleged violation of insider trading rules.

The SEC issued a notice scheduling Scrushy's deposition at its Atlanta District Office on March 14, 2003. Scrushy's and HealthSouth's attorneys, however, requested that the deposition be moved to Birmingham, where Scrushy lived and HealthSouth was headquartered.

On March 12, 2003, however, federal prosecutors in the U.S. Attorney's Office in Birmingham called the SEC's attorneys and accountants in Atlanta and advised them that they had just learned of the existence of a huge accounting fraud at HealthSouth extending back many years, in which Scrushy, himself, had been directly implicated. The prosecutors requested the assistance of the lead accountant on the SEC's investigation, at further interviews of a former and current Health South executive that were scheduled later that week in Birmingham.

Upon learning of the need for the accountant to be at Scrushy's deposition, the prosecutors asked if the deposition could be moved to Birmingham so the accountant could attend their witness interviews afterwards. The AUSAs further noted that if the deposition was moved to Birmingham, and Scrushy lied during it, they would have jurisdiction to bring perjury charges against him. The AUSAs also asked the SEC's investigators to limit their questioning in certain areas to avoid tipping Scrushy off to the expanded scope of the government's criminal investigation. The AUSAs planned to use a cooperating witness to discuss these matters with Scrushy during an interview the following week.

The SEC investigators agreed that they would assent if Scrushy's attorneys again raised the issue of moving the deposition to Birmingham. Scrushy's attorneys did renew their request, and the deposition was moved and conducted at HealthSouth's own offices in Birmingham. Scrushy attended the deposition accompanied by five lawyers, two of whom were nationally-known, white-collar criminal specialists.

At the start of the deposition, the SEC investigators provided Scrushy with a copy of Form 1662, which advises all witnesses in SEC depositions that their testimony is subject to the penalties of the false statements (18 U.S.C. § 1001) and perjury (18 U.S.C. § 1621) statutes. Form 1662 further advises witnesses that any information they provide can be used against them in future civil or criminal proceedings.

The SEC staff did not inform Scrushy, at the deposition, about its recent contacts with the prosecutors at the Birmingham U.S. Attorney's Office, or the broadened range of the government's criminal investigation. The SEC's accountant also limited his questioning as requested by the AUSAs. Following the deposition, the SEC's accountant participated in the further debriefings of the two HealthSouth witnesses by the U.S. Attorney's Office.

When the SEC's accountant testified about these matters during Scrushy's criminal trial, however, U.S. District Court Judge Karon Bowdre ordered an evidentiary hearing to determine whether the Department and SEC investigations had improperly "merged." Following the hearing, the court ruled that the government's conduct in connection with Scrushy's deposition had "clearly" departed from "the proper administration of criminal justice" when the U.S. Attorney's office called the SEC, gave it "advice or 'preferences' regarding the content of the deposition and its location, and recruited [the SEC's accountant] to participate in the interviews" of the two cooperating HealthSouth executives. *Scrushy*, 366 F. Supp.2d at 1137.

Judge Bowdre held that Scrushy could not seek relief if he gave false answers in response to questions that related "to a *legitimate, parallel* investigation" (emphasis in original). Nevertheless, she somewhat surprisingly stated that she "could find no controlling authority"on the question of "what distinguishes a legitimate, parallel investigation from an improper one." *Id.*

To resolve that question, Judge Bowdre ultimately relied upon *United States v. Parrott*, 248 F. Supp. 196, 202 (D.D.C. 1965), a forty-year-old case cited by the defense, which stated that "the Government may not bring a parallel civil proceeding and avail itself of civil discovery devices to obtain evidence for subsequent criminal prosecution." The court also looked to *United States v. Handley*, 763 F.2d 1401 (11th Cir. 1985), a case in which the Eleventh Circuit found no barrier to the Department's use of depositions taken in a civil action in a subsequent criminal prosecution of several Ku Klux Klansmen for civil rights violations—even though the depositions were originally taken, in part, for the purpose of developing evidence to support a criminal indictment. The Eleventh Circuit in *Handley* noted in passing that the Department "had no advance notice of any of the depositions and no input into their conduct," *id.* at 1403, and it further observed that "the civil case was not filed *solely* to obtain evidence for the criminal prosecution and is viable wholly apart from any criminal connotations." *Id.* at 1405 (emphasis added).

The *Scrushy* court ignored the latter consideration, however, instead applying only *Handley*'s "notice and input" language to the circumstances before it. The court found that the Department "had both notice and direct input" into the conduct of Scrushy's deposition, and that the SEC accountant had "crossed over to the criminal investigation," and concluded that the government had acted improperly. "To be parallel," the court asserted, "by definition, the separate investigations should be like side-by-side train tracks that never intersect. By contrast, as of March 12, 2003, at 3:30 p.m., the S.E.C. civil investigation merged with the Justice Department criminal investigation." 366 F. Supp. 2d at 1138-39.

The court further rejected the government's argument that it had not deceived Scrushy by leading him to believe that there was no criminal investigation or that he had immunity for his testimony. The court stated that it "cannot take such a limited view of bad faith," and held that the SEC should have advised Scrushy of everything that transpired between its attorneys and investigators and the Department prosecutors in the two days preceding his deposition. *Id.* at 1140

The Birmingham U.S. Attorney's Office initially filed a notice of appeal of the court's decision dismissing the three perjury counts, but that appeal was dismissed after the criminal trial ended in acquittals on all remaining counts of the indictment three months later. Consequently, the *Scrushy* decision stands— as the view of one district judge concerning the proper conduct of parallel proceedings. Standing alone, however, the district court's decision in *Scrushy* is not especially persuasive, which raises hopes that its impact may be limited.

The central problem with *Scrushy* was the court's heavy reliance on the forty-year-old district court decision in the *Parrott* case, together with its failure to consider more recent, and seminal, authorities discussing parallel proceedings. The district court's analysis in *Parrott* proceeded from its fundamental belief that when there were parallel civil and criminal proceedings, "the criminal matter should first be disposed of, certainly prior to the taking of civil depositions." 248 F. Supp. at 202. Five years after *Parrott*,

however, the Supreme Court, in *Kordel*, recognized that a regulatory agency's mandate to protect the public often requires it to immediately institute civil enforcement proceedings, whereas the graver consequences and greater burden of proof in criminal proceedings may appropriately require "consideration of a fuller record" developed over a longer period of time. 397 U.S. at 11.

The continued validity of the district court's decision in *Parrott* was further undermined ten years later by the en banc D.C. Circuit's holding in *Dresser Industries* that, absent some specific and unfair prejudice to the parties involved, there was nothing objectionable about the simultaneous conduct of parallel proceedings. 628 F.2d at 1374. Indeed, *Dresser* noted that the principal securities statutes and the Foreign Corrupt Practices Act (FCPA) all contemplated the sharing of information between the SEC and the Department from "the earliest stage of any investigation," and ongoing "close cooperation" thereafter. *Id*. at 1386. *Dresser,* therefore, held that "it would be impractical for us to attempt to screen the agencies from each other when they are investigating the same sort of offense." *Id.*

Other cases since *Dresser* have similarly recognized that active cooperation between regulatory agencies or authorities and the Department "is specifically permitted by statute and has repeatedly been approved by the courts." *SEC v. First Jersey Securities, Inc.*, 1987 WL 8655, at *3 (S.D.N.Y. Mar. 26, 1987) (unpublished). Courts have approved Department lawyers meeting with SEC staff attorneys and taking notes from nonpublic documents obtained by the SEC, *SEC v. Horowitz & Ullman*, 1982 WL 1576, at *2 (N.D.Ga. Mar. 4, 1982) (unpublished); cross-designating an attorney from the Commodity Futures Trading Commission who negotiated a consent decree with a company as a Special Assistant U.S. Attorney, so he could assist with a subsequent criminal prosecution arising from the same facts, *United States v. Mady*, 2005 WL 2290712 (E.D. Mich. Sept. 20, 2005); or even utilizing the services of attorneys and examiners employed by the National Association of Securities Dealers (NASD) Criminal Prosecution Unit to assist in federal securities investigations. *D.L. Cromwell, Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 157-58 (2d Cir. 2002).

The district court's decision in *Scrushy* also overlooked the *LaSalle National Bank/Dresser* principle that the key characteristic of an illegitimate regulatory investigation is that it is conducted "solely" for the purpose of advancing a criminal prosecution. *See also, e.g., Handley*, 763 F.2d at 1405 (where civil proceeding was not filed solely to develop evidence to support a criminal prosecution, any misconduct in taking civil depositions could not be attributed to the government); *United States v. Shvarts*, 90 F. Supp. 2d 219, 222-23 (E.D.N.Y. 2000) (party opposing the enforcement of a civil enforcement subpoena must prove it was not issued in a good faith, honest pursuit of the agency's goals); *United States v. Gel Spice Co.*, 601 F. Supp. 1214, 1218 (E.D.N.Y. 1985); *Horowitz & Ullman*, 1982 WL 1576, at *5 (N.D. Ga. Mar. 4, 1982) (where regulatory agency continues to pursue its own investigation, "its investigation is in good faith even if some of its information is used for criminal enforcement purposes as well, so long as there is no other indicia of bad faith"). In *Scrushy*, the SEC clearly had substantial independent regulatory interests that were appropriately advanced by its investigation.

The *Scrushy* decision also overlooked the requirement that there must be a showing of "substantial prejudice" before finding that the conduct of parallel proceedings violates due process. In *United States v. Fields*, 592 F.2d 638, 647 (2d Cir. 1978), for example, the district court found that SEC attorneys acted improperly when, in the face of statements by defense counsel expressing their hope that their acceptance of a consent decree would avoid a criminal referral, the SEC attorneys failed to disclose that they had already contacted the U.S. Attorney's office to urge criminal prosecution. The Second Circuit reversed the district court's decision dismissing most of the indictment, however, pointing out that the SEC did not obtain any evidence from the defendants in reliance on its apparent commitment not to make a criminal referral. Rather, the defendants "had long since disclosed enough facts to the SEC to enable the government to marshal the evidence and to proceed both civilly and criminally against them." Under these circumstances, the "most drastic remedy of dismissal" was not appropriate. *See also United States v. Serlin*, 707 F.2d 953, 956 (7th Cir. 1983) (to secure suppression of statements made to IRS agents, defendant must "produce clear and convincing evidence that the agents affirmatively misled him as to the true nature of the investigation," and that this misinformation was material to his decision to speak).

The district court in *Scrushy* did not ask how the defendant was seriously or improperly prejudiced by the Department's and SEC's actions. His deposition was held in Birmingham, rather than Atlanta, but his lawyers requested that change. The change in venue made it possible to add perjury charges to the subsequent criminal indictment, but that risk was certainly foreseeable to his attorneys. The fact that the SEC chose *not* to ask certain questions at the request of the AUSAs could not unfairly prejudice Scrushy, since it did not induce him to make statements based on misleading assurances from the government.

While *Scrushy* is not, therefore, particularly persuasive, it has recently been followed by another district court decision, *United States v. Stringer*, 408 F. Supp. 2d 1083 (D. Or. 2006), dismissing a criminal indictment because of a supposed violation of the rules governing parallel proceedings. In *Stringer*, the SEC and the U.S. Attorney's Office for the District of Oregon (USAO) independently opened investigations of possible corporate fraud at a company called FLIR in mid-2000. The USAO promptly requested and received extensive materials relating to the SEC's investigation, and the district court believed the record demonstrated that the USAO decided early on that it was likely to bring criminal charges. According to the district court, however, the SEC investigators and the criminal prosecutors made the decision to "abate" the criminal investigation in the hope that certain of FLIR's executives would give statements to the SEC. The SEC continued to actively investigate FLIR from late 2000 until late 2002. The USAO took little action in connection with the criminal probe until early 2003. 408 F. Supp. 2d at 1085-87.

During the approximate two-year period when the USAO was not actively pursuing a grand jury investigation, Kenneth Stringer, one of the FLIR executives, was subpoenaed, appeared, and testified, at a deposition conducted by the SEC. Stringer was given the standard SEC Form 1662, which apprised him of the penalties applicable to false statements and the possible uses that could be made of his testimony, including criminal prosecution. In response to a preliminary series of questions from his attorney about whether Stringer was "the target of any aspect of the investigation" or whether "the SEC is working in conjunction with any other department of the United States, such as the U.S. Attorney's Office in any jurisdiction, or the Department of Justice," the SEC attorney gave what the district court deemed "evasive and misleading" answers. Specifically, she stated that "the SEC does not have targets in this investigation." She directed the attorney's attention to the "routine uses" section of the Form 1662 and responded that Stringer's attorney could contact "the other agencies you mentioned." She refused to identify any particular U.S. Attorney's office to which Springer's attorney could direct his inquires. *Id.* at 1087. The district court also cited evidence that an SEC investigator made a note to remind court reporters not to tell FLIR's attorney about the prosecutor's interest in the case, and that SEC personnel suggested that a prosecutor not attend interviews where company counsel would be present. *Id.* at 1086.

The district court in *Stringer* found that the USAO acted improperly when it "elected to gather information through the SEC instead of conducting its own investigation." *Id.* at 1087. Alternatively, the court suggested that if the USAO's actions could be considered a parallel proceeding, it was improper for the government to take steps to conceal the USAO's interest in the investigation. *Id.* at 1089. Because the court felt that the government had improperly lulled one defendant into appearing and testifying at his deposition, and another into making a submission to the SEC outlining his potential defenses, it ordered the indictment dismissed or, in the alternative, the defendants' statements and all evidence obtained from them suppressed. *Id.* at 1090.

Because *Stringer* is currently on appeal, it is too soon to tell whether all, some, or none of the district court's analysis will survive the Ninth Circuit's review. Staffing constraints, the unfamiliarity of the subject matter, or the complexity of the underlying statutory context often encourage criminal prosecutors to take a "wait and see" approach to the outcome of a regulatory agency's investigation. It raises troubling questions if such an approach may be treated as tantamount to deliberate concealment. Likewise, it will be important to see whether the Ninth Circuit accepts the district court's view that answers to a defense attorney's questions that sidestep a direct response about the existence of a criminal investigation can be equated to "affirmatively misleading" conduct.

Bearing in mind that the ultimate outcome in *Stringer* is still uncertain, what principles and practice pointers should criminal prosecutors keep

in mind when conducting a parallel proceeding? The first and most fundamental rule is that a regulatory agency or a private plaintiff (as in *Handley*) must have a valid, independent objective of its own when it commences an investigation or litigation. A civil agency or litigant cannot act *solely* for the purpose of developing evidence for criminal prosecution, although that may permissibly be one of its reasons for initiating an investigation or filing a lawsuit. A prosecutor, therefore, cannot encourage a regulatory agency (or a private plaintiff) to open an investigation or commence litigation for no other purpose than to advance a subsequent criminal prosecution.

Second, government attorneys or investigators (whether in a prosecutor's office or a regulatory agency) should not induce individuals or parties to civil proceedings to take action, or to supply information, based on misleading assurances that no criminal case is contemplated. *See, e.g., United States v. Rodman*, 519 F.2d 1058, 1059 (1st Cir. 1975) (indictment dismissed where the defendant was encouraged to provide self-incriminating information based on the SEC's representation that it would "strongly recommend" to the U.S. Attorney that he not be prosecuted, but it then failed to do so); *United States v. Rand*, 308 F. Supp. 1231, 1234 (N.D. Ohio 1970) (indictment dismissed where defendant claimed that he was induced to testify in a related civil proceeding by representations that he would have immunity from criminal prosecution); *United States v. Hrdlicka*, 520 F. Supp. 403, 404-06 (W.D. Wisc. 1981) (evidence resulting from a search of defendants' business was suppressed where an agency investigator falsely represented that his requested inspection was merely part of a routine, area-wide examination).

Third, issues about the proper conduct of parallel proceedings are most likely to arise when the ultimate targets of the criminal prosecution can claim either that they were wholly ignorant of the criminal investigation, as in *Stringer,* or ignorant about its actual scope, as in *Scrushy*. If the Department's criminal investigation is open and overt, defendants ordinarily have little success complaining that they were misled, and it is unlikely that defense complaints about the interactions between prosecutors and regulatory attorneys will have any traction. *See Luce*, 2006 WL 2850478, at *6.

There are, of course, times when criminal investigations *need* to be covert. In such circumstances, however, the district court decisions in *Scrushy* and *Stringer* suggest that prosecutors must exercise extraordinary care in dealing with their opposite numbers in the regulatory agency. While receiving information and benefitting from the regulatory agency's expertise is permissible, *Scrushy* demonstrates that even the most apparently innocuous and reasonable requests to regulatory investigators—whether to take action, or to refrain from taking it—may prove troubling to some judges. Thus, if a federal criminal investigation is covert and needs to remain that way, prosecutors must be highly sensitive to the potential for trouble in dealing with their regulatory counterparts. In particular, any suggestions or conduct that can be construed as calculated to lull prospective targets into not asserting their Fifth Amendment rights are fraught with the potential for complications.

It is also important to realistically assess the benefits likely to result from keeping a Department investigation under wraps while a civil investigation proceeds openly. Once defendants are aware that *any* investigation is in the offing, they are likely to be far more cautious in the statements they make, whether to coworkers, undercover agents and cooperating witnesses, or to representatives of the SEC. The tape the Birmingham U.S. Attorney's Office obtained from its cooperator's interview with Scrushy, for example, while it was compelling to many outside observers of his criminal trial, was apparently less effective with the jury.

At the same time, the assumption that knowledge of a criminal investigation will automatically cause potential targets to clam up may likewise be misplaced. High-ranking corporate officers are often reluctant to assert the Fifth Amendment, as Enron CEO Jeffrey Skilling's pre-indictment testimony before both Congress and the SEC demonstrates. District courts are also frequently reluctant to assent to defense requests for a complete stay of a regulatory agency's investigation when no criminal indictment has yet been returned. *See, e.g.*, *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir. 1995); *SEC v. Sandifur*, 2006 WL 1719920, at *2-*3 (W.D. Wash. June 19, 2006) (unpublished); *In re Worldcom, Inc. Securities Litig.*, 2002 WL 31729501, at *4 (S.D.N.Y. Dec. 5, 2002) (unpublished); *In re Mid-Atlantic Toyota Anti-trust Litig.*, 92 F.R.D. 358 (D. Md. 1981).

Accordingly, as long as a prosecutor's office, regulatory agency, or private litigant, has an independent, good-faith basis for proceeding with their own investigation or litigation; government representatives do not affirmatively mislead the subjects of civil proceedings concerning the uses to which their evidence can be put, or the likelihood that a criminal prosecution will follow; prosecutors comply with the secrecy restrictions of Federal Rule of Criminal Procedure 6(e); and both the regulatory agency and the Department make independent decisions about the course of their respective litigation proceedings, parallel proceedings can benefit both the Department and its regulatory counterparts, without becoming an ethical minefield for the attorneys involved.❖

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Notes

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