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# Ethics Newsgram

## Guidance Issued on Defined Benefit Pension Plans

OGE issued a DAEOgram (D0-99-015 of April 14, 1999) which updates and refines previous guidance on how to analyze, under 18 U.S.C. § 208, matters which affect the sponsor of an employee's defined benefit pension plan. In OGE Formal Advisory Letter 83 x 1, OGE stated that although the facts of each situation must be examined separately, the typical pension plan is so closely linked to the sponsoring organization that a Government employee with a vested interest in the plan has a financial interest under section 208 in matters affecting the sponsoring organization unless the employee demonstrates otherwise.

Over the years, questions have arisen about the validity of the original advice in 83 x 1. In September 1995, OGE published a proposed regulation, which was reviewed and approved by the Office of Legal Counsel at the Department of

Justice. The preamble to the proposed rule discussed the applicability of section 208 to employee pension interests. The DAEOgram summarizes the discussion in the preamble regarding employee pension interests and clarifies the appropriate analysis of sponsors of defined benefit pension plans under section 208.

When analyzing pension plan interests under section 208, there may be a concern about an employee's participation in a matter that could affect the sponsor of the plan. Generally, this concern arises with defined benefit plans rather than defined contribution plans because the sponsor of a defined benefit plan is

obligated to fund the plan. The sponsor of a defined contribution plan, on the other hand, is not obligated to fund the employee's pension plan.

With defined benefit plans, the sponsor may be so closely linked to the pension plan and the particular matter may be so significant, that the matter affecting the sponsor of the plan will also affect the sponsor's ability or willingness to pay the employee's pension. For example, an employee may participate in litigation that would result in the dissolution of the sponsor organization and its subsequent  
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## 1999 Annual Ethics Conference

The 1999 Government Ethics Conference will be held September 13-16, at the Williamsburg Marriott in Williamsburg, Virginia. The two and a half-day conference will begin with check-in on Monday evening, September 13. That evening, an informal reception will be held for all attendees. The formal program will begin on Tuesday morning, September 14, and continue through noon on Thursday, September 16.

Some highlights for this year's conference include concurrent sessions on privatization and contracting; the **Sun-Diamond Growers** case; travel issues; and introductory and intermediate ethics training courses. Leon Panetta, former White House Chief of Staff and current Director of the Panetta Institute, has tentatively agreed to appear as a guest speaker.

An official conference announcement was sent to all Designated Agency Ethics



Officials (DAEO) in May that provided information and conference registration forms. The conference registration deadline was July 9. You may access the OGE Web site at [www.usoge.gov](http://www.usoge.gov), under "What's New in Ethics?" or contact Sheila Powers, Event Coordinator, at 202-208-8000, ext. 1104, or via E-mail at [sapowers@oge.gov](mailto:sapowers@oge.gov), for further information.

# Director's Column

The administrative standards of conduct have been, and must continue to be, a solid cornerstone of the executive branch ethics program. These standards state the general principles that apply to public service and set forth specific rules that clearly describe the ethical obligations of executive branch employees. It is crucial that employees have a correct understanding of their obligations under these standards. And it is just as critical that the standards be properly enforced in order to maintain their credibility and effectiveness.

A recent decision of the U.S. Supreme Court in the **Sun-Diamond Growers** case has created some confusion about the administrative standards on acceptance of gifts from outside sources. It is important that all executive branch employees understand that this decision, which involved an interpretation of the criminal illegal gratuities statute, does not have any legal effect upon the administrative rules on gifts.

Employees need to understand that they remain subject to the prohibition on acceptance of gifts from persons or organizations that do business with, are regulated by, seek official action from, or otherwise have interests that could be affected by an employee's agency. The



rules also continue to bar acceptance of gifts that are given because of the employee's official position. At the same time, the limited exceptions which permit acceptance of gifts under certain circumstances also continue to apply and are unaffected by the Supreme Court's decision.

In addition, it is important that the administrative standards in general, and the rules on gifts in particular, continue to be

diligently and energetically enforced. Ethics officials need to be proactive and work closely with their Inspectors General, their personnel offices and other agency staff who are involved in enforcement and employee discipline. The viability of the standards and respect for the ethics program require us to follow through with enforcement. The effectiveness of the administrative standards as a preventive measure depends in large part upon the fact that they are backed by disciplinary sanctions.

Certainly we do not want any individual employee to get into trouble because the standards of conduct were not correctly understood. Nor do we want the ethics program to suffer harm because the standards were not vigorously enforced. I want to encourage everyone in the ethics community to address this issue head on. If we take this opportunity to do so, we will advance the reputation of the standards as a fair and consistently applied set of rules and strengthen the executive branch ethics program.

## Benefit Pension Plan

*Continued from page 1*

inability to pay the employee's pension. In such cases, the employee's interest would be a disqualifying financial interest under section 208.

Most matters in which an employee would participate, however, are unlikely to have a direct and predictable effect on the plan sponsor's ability or willingness to pay the employee's pension. For example, an employee may participate in a decision to deny a contract to a large company with which the employee has a defined benefit plan. Even though the matter affects the company, the matter will probably not affect the company's ability or willingness to pay the employee's pension. As a result, the employee's interest in the pension would not be a disqualifying interest in section 208.

In the DAEOgram, OGE recommends that agencies not automatically presume that employees have a conflict of interest in matters affecting the sponsor of their



defined benefit plans. Furthermore, ethics officials need not routinely issue waivers or require recusals for matters affecting the sponsors of defined benefit plans. Instead, ethics officials should examine on an individual basis whether a particular matter in which an employee is assigned to participate that affects the sponsor of the employee's defined benefit plan will have a direct and predictable effect on the sponsor's ability or willingness to pay the employee's pension benefit.

## Government Ethics Newsgram

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We welcome any news and information related to Government ethics that you wish to bring to the attention of OGE and the executive agencies as well as your candid critiques and suggestions. Quoting or reprinting materials contained in this publication is strongly encouraged and may be done without seeking OGE permission.

The Director of the Office of Government Ethics has determined that the publication of this periodical is necessary to the transaction of the public business of OGE, as required by law.

# PRD Year-End Summary

The year-end summary of the Program Review Division's (PRD) accomplishments for 1998 produced a number of interesting findings about the effectiveness of agency ethics programs. Overall, the summary indicates that a majority of agencies that underwent program reviews are maintaining strong ethics programs. Several of these agencies have strengthened their programs since their previous program reviews.

A total of 44 program review reports were issued in 1998. Of those, 28 reports had no recommendations. This development continued the upward trend over the past two years in the percentage of reports containing no recommendations.

An equally encouraging development in the last year was the drop in the number of agencies that received notices of deficiency from five in 1997 to none in

1998. Only one of the five notices of deficiency issued in 1997 remains in effect.

In 1998, a total of 92 recommendations were issued, whereas 98 recommendations were issued in 1997. While the number of recommendations decreased overall, the average number of recommendations per report rose from 4.6 in 1997 to 5.75 in 1998.

Problems in the financial disclosure area warranted the largest number of recommendations, followed by ethics training. These two areas amounted to 91% of all recommendations issued. The most common problem in the area of financial disclosure involved timeliness of filing and collection of reports. Thirty-three percent of all recommendations concerning financial disclosure fell in this category. Other problems in the financial disclosure area included review and certification of reports, totaling 26% of the recommendations, and tracking systems, totaling 18% of the recommendations.

Fewer follow-up reviews were conducted in 1998 than in 1997. While 30 follow-up reviews were conducted in 1997, only 26 were conducted in 1998. At the end of 1998, eight follow-up reports had recommendations yet to be closed, one more than in 1997.

In summary, the increasing number of agencies demonstrating compliance with OGE guidelines represents a positive development in the ethics community.

The data indicates that a significant number of agencies have improved upon, or have maintained, strong ethics programs within the last year, as shown by the significant increase in the percentage of reports without recommendations and the lack of notices of deficiency issued.

OGE is committed to assisting agencies that receive recommendations to make the changes necessary in order to bring their ethics programs into full compliance with statutory responsibilities.

## CD Guidance Issued

OGE distributed a DAEOgram (DO-99-019 of April 26, 1999) which compiles responses to frequently asked questions about the Certificate of Divestiture (CD) program. The memorandum covers basic information describing CDs and the objectives of the CD program as well as more complex and specific issues in a user-friendly question and answer format. The areas that are addressed include eligibility, special situations affecting eligibility, procedures for making a request and steps to follow once a CD is issued.

Along with the frequently asked questions document, OGE issued a pamphlet which ethics officials can duplicate and distribute to employees and prospective employees who are considering divestiture of certain assets to avoid a conflict of interest. The pamphlet provides an overview of the CD program and is not intended to be a substitute for counseling. Unlike the frequently asked questions document which discusses the relevant regulations in detail, the pamphlet introduces employees to the CD program in a general way and answers some basic questions.

## Recusal Obligations and Screening Arrangements

OGE issued a DAEOgram (DO-99-018 of April 26, 1999) providing guidance on recusal obligations as well as some practical tips regarding screening arrangements to help ensure that a commitment to recuse is carried out effectively.

A recusal obligation may arise either under the criminal conflict of interest statute at 18 U.S.C. § 208 or the impartiality standard at 5 C.F.R. § 2635.502.

A good process within an agency for implementing a recusal begins with accurate and adequate advice to an employee regarding the scope of an employee's obligation to recuse. The DAEOgram provides some practical tips to consider whenever providing advice to employees in connection with their commitments to recuse.

The DAEOgram also provides some practical suggestions that ethics officials may wish to raise with employees in connection with any discussion of screening arrangements.

The DAEOgram also includes as an attachment a model memorandum which may be used by an employee who is providing a written notification of the commitment to recuse.

### Newsgram on the Web

**Don't rely on "snail mail" to get your *Newsgram*! Get it faster from the Web! If you have Internet access, you can download the *Newsgram* from OGE's Web site at [www.usoge.gov](http://www.usoge.gov). Look under "What's New in Ethics?" or "OGE Publications."**

### Address Changes?

**Please E-mail the *Newsgram* editor at [dmcencer@oge.gov](mailto:dmcencer@oge.gov) or call 202-208-8000, ext. 1188, with address changes or to be removed from the mailing list. Thank you for helping us keep our records up to date.**

# Be Our Guest: Paula J. Desio

**B**e Our Guest appears as a periodic feature in the **Government Ethics Newsgram**. We invite you to be our guest and share with the ethics community your innovative ideas, anecdotes, helpful hints, perspectives on implementing ethics programs or on other ethics issues. Contact the editor of the **Government Ethics Newsgram** at 202-208-8000, ext. 1188, if you have ideas, articles, or other submissions that you wish to be considered for publication.

Our guest for this edition is Paula J. Desio. Ms. Desio is Deputy General Counsel to the United States Sentencing Commission (the Commission) in Washington, DC, where she is responsible for economic crime and organizational sentencing and compliance issues under the Federal Sentencing Guidelines. Prior to joining the Sentencing Commission in January 1997, Ms. Desio was Of Counsel to the Washington, DC law firm of Crowell & Moring, where for ten years she specialized in internal investigations and the defense of businesses involved in Federal criminal and agency enforcement proceedings and Congressional hearings. While in private practice, she represented companies and organizations in the health care, construction, transportation, aerospace and electronics industries, and authored a number of articles relating to procurement fraud and evidentiary privileges.

## A Brief History of Federal Sentencing Guidelines

Disparity in sentencing, certainty of punishment, and crime control have long been issues of interest for Congress, the criminal justice community, and the public. Before guidelines were developed, judges could give a defendant a sentence that ranged anywhere from probation to the maximum penalty for the offense. After more than a decade of research and debate, Congress decided that: (1) the previously unfettered sentencing discretion accorded Federal trial judges needed to be structured; (2) the administration of punishment needed to be more certain; and (3) specific offenders (*e.g.*, white collar and violent, repeat offenders) needed to be targeted for more serious penalties.

Consequently, Congress created a permanent commission charged with formulating national sentencing guidelines to define the parameters for Federal trial judges to follow in their sentencing decisions. The Commission's ongoing responsibilities include evaluating the effects of the sentencing guidelines on the criminal justice system, recommending to Congress appropriate modifications of substantive criminal law and sentencing procedures, and establishing a research and development program on sentencing issues.

The Commission has the authority to submit guideline amendments each year to Congress between the beginning of a regular Congressional session and May 1. Such amendments automatically take effect 180 days after submission unless a law is enacted to the contrary.



## Innovations under the Guidelines System

- ◆ Structured judicial discretion
- ◆ Appellate review of sentences
- ◆ Reasons for sentence stated on the record
- ◆ Determinate or "real time" sentencing
- ◆ Abolition of parole

## An Overview of the Organizational Guidelines

Organizations, like individuals, can be found guilty of criminal conduct, and the measure of their punishment for felonies and Class A misdemeanors is governed by Chapter Eight of the sentencing guidelines. While organizations cannot be imprisoned, they can be fined, sentenced to probation for up to five years, ordered to make restitution and issue public notices of conviction to their victim and exposed to applicable forfeiture statutes. Data collected by the Commission reflects that organizations are

sentenced for a wide range of crimes. The most commonly occurring offenses (in order of decreasing frequency) are fraud, environmental waste discharge, tax offenses, antitrust offenses, and food and drug violations.

The organizational sentencing guidelines (which apply to corporations, partnerships, labor unions, pension funds, trusts, nonprofit entities, and governmental units) became effective November 1, 1991, after several years of public hearings and analyses. These guidelines are designed to further two key purposes of sentencing: "just punishment" and "deterrence." Under the "just punishment" model, the punishment corresponds to the degree of blameworthiness of the offender, while under the "deterrence" model, incentives are offered for organizations to detect and prevent crime.

## Effective Compliance Programs

Criminal liability can attach to an organization whenever an employee of the organization commits an act within the apparent scope of his or her employment, even if the employee acted directly contrary to company policy and instructions. An entire organization, despite its best efforts to prevent wrongdoing in its ranks, can still be held criminally liable for any of its employees' illegal actions. Consequently, when the Commission promulgated the organizational guidelines, it attempted to alleviate the harshest aspects of this institutional vulnerability by incorporating into the sentencing structure the preventive and deterrent aspects of systematic compliance programs. The Commission did this by mitigating the potential fine range—in some cases up to 95 percent—if an organization can demonstrate that it had put in place an effective compliance program. This mitigating credit under the guidelines is contingent upon prompt reporting to the authorities and the non-involvement of high level personnel in the actual offense conduct.

## Seven key criteria for establishing an "effective compliance program":

- ◆ Compliance standards and procedures reasonably capable of reducing the prospect of criminal activity

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## District Court Decides *van Ee Case*

- ◆ Oversight by high-level personnel  
Due care in delegating substantial discretionary authority
- ◆ Effective communication to all levels of employees
- ◆ Reasonable steps to achieve compliance, which include systems for monitoring, auditing, and reporting suspected wrongdoing without fear of reprisal
- ◆ Consistent enforcement of compliance standards including disciplinary mechanisms
- ◆ Reasonable steps to respond to and prevent further similar offenses upon detection of a violation

The organizational guidelines criteria embody broad principles that, taken together, describe a corporate “good citizenship” model, but do not offer precise details for implementation. This approach was deliberately selected in order to encourage flexibility and independence by organizations in designing programs that are best suited to their particular circumstances.

### Sharing “Best Practices” Ideas

The innovative approach put forward in the sentencing guidelines has spawned complementary efforts by a number of regulatory and law enforcement authorities, executive agencies such as the Environmental Protection Agency, the Department of Health and Human Services, and the Department of Justice’s Antitrust Division have developed, or are developing model compliance programs, programs for self-reporting, and programs for amnesty—all of which are modeled after some aspect of the organizational sentencing guidelines. Industry and peer organizations are forming to share ideas on “best practices” for compliance training and ethics awareness.

The Commission will continue to study the effectiveness of these efforts to implement the compliance criteria of Chapter Eight. In particular, the Commission is interested in assessments of the viability of its efforts to encourage organizations—from large corporations to nonprofit organizations to governmental units—to develop institutional cultures that discourage criminal conduct.

Further information about the Commission can be found on its Web site at [www.ussc.gov](http://www.ussc.gov).

On May 12, 1999, the United States District Court for the District of Columbia issued its decision in **van Ee v. Environmental Protection Agency and Office of Government Ethics**. The court rejected the plaintiff employee’s claims regarding the construction and constitutionality of 18 U.S.C. § 205(a)(2), the criminal conflict of interest provision that prohibits employees from acting as agent or attorney for private interests before Federal departments and agencies in connection with certain covered matters in which the United States is a party or has a direct and substantial interest.

The court also upheld, against the employee’s challenge, the appearance principle set forth at 5 C.F.R. § 2635.101(b)(14) insofar as it requires

**The district court upheld the statute against this First Amendment challenge.**

employees to endeavor to avoid actions creating the appearance that they are violating section 205. However, on May 17, the employee filed a notice of appeal and an emergency motion for injunction pending appeal that would allow him to speak on behalf of the Nevada Outdoor Recreation Association at a Bureau of Land Management meeting on May 25, 1999. On May 24, the United States Court of Appeals for the District of Columbia Circuit granted his motion.

The plaintiff in the case, an employee of the Environmental Protection Agency (EPA), is seeking, in his private capacity, to represent certain environmental organizations before agencies and departments other than EPA on issues unrelated to his work for EPA. He intends to act without compensation and most of the representations would take place at public hearings, meetings, or in other less formal settings. The employee has been informed that many of his proposed communications on behalf of the organizations would run afoul of section 205.

The employee claims that his communications would not violate section 205

because he would not be acting as an “agent” for the organizations and would not be addressing “covered matters.” He argues that section 205 only prohibits formal legal or quasi-legal representation in formal adversarial proceedings. The district court rejected his arguments and, in so doing, upheld OGE’s regulatory definition of “particular matter” at 5 C.F.R. § 2635.402(b)(3).

The employee also claims that, if section 205 does cover his proposed communications, then the statute is an unconstitutional restriction on free speech. The district court, however, upheld the statute against this First Amendment challenge. Applying the balancing test used in **United States v. National Treasury Employees Union**, and **Sanjour v. Environmental Protection Agency**, the court noted that the harm to the plaintiff is limited because he is only prohibited from representing the organizations before Federal agencies.

He can still represent them in other forums. He can participate in the organizations and can aid in the preparation of statements to be presented by others, even to Federal agencies. Also, he can communicate on his own behalf before Federal agencies. On balance, the district court held that when the limited restriction on the employee’s speech is weighed against the Government’s interest in addressing harm to the integrity of Government processes caused by Federal employees representing the interests of private organizations before the Government, the Government’s interests prevail.

Finally, the district court also rejected the employee’s challenge to the appearance principle. The employee argues that it would be impermissible for the Government to discipline him for “appearing” to violate section 205, in contravention of 5 C.F.R. § 2635.101(b)(14), as might be the case, for example, if he purported to represent only himself but submitted arguments to a Federal agency on organization letterhead. According to the district court, however, the Government’s legitimate interest in maintaining public confidence in the integrity of the Federal service clearly supports its regulation of appearances of impropriety, even in the absence of actual injury to the United States.

# Kudos in the Ethics Community

For this **Newsgram** edition, we invited one of the newest members of the ethics community, John Surina, the United States Department of Agriculture's (USDA) Designated Agency Ethics Official (DAEO), to discuss one of his first major accomplishments as DAEO—the development and implementation of the USDA Ethics Web site. Mr. Surina offers us a candid look at the practical considerations USDA faced in developing an ethics Web site and shows us that “the new kid on the block” sometimes has the technological edge.

## USDA Ethics Web Site Energizes Program

Last summer, Department of Agriculture Secretary Dan Glickman established a Departmental Office of Ethics. The mission of the unit was to enhance the Department's ethics program both at headquarters and throughout its diverse and far-flung operations. The Secretary's support of this initiative was personal and high profile.

In order to secure quickly a meaningful presence within this behemoth Department and not to break faith with the Secretary's commitment, the Office had to make a rapid, credible and lasting impression on its sister units and upon the covered staff. The Internet's World Wide Web provided the natural vehicle to do so. Why the Web? A number of reasons argued for this upstart office to seize on the Internet as the primary means to reach USDA employees. Some of the reasons flow from practical economic and technical considerations; others are based more on marketing considerations.

The first concern was the operating environment. The Department of Agriculture is huge with over a hundred thousand employees worldwide, some 17,500 of whom have either a confidential or a public financial disclosure filing obligation. The Department has a presence in virtually every community in the United States and in hundreds of U.S. embassies and consulates overseas. There are many different computing environments supporting this staff, but they all share one common feature—they all have access to the Internet. Regardless if one does his or her computing on a laptop at

home over a telephone line, or at work on a sophisticated local area network, the Internet provides a common communication link through which they can be reached.

The second concern was the diversity of the USDA's missions—scientific research, loans and loan guarantees, regulatory oversight, public health and safety inspection, environment and recreation, foreign trade, firefighting and police work, nutritional assistance and education. Many of these component elements have their own authorizing statutes and have developed their own operating cultures. This compartmentalization has enabled each component to have its own esprit and be well-focused on its service mission, but it also tends to impede departmentwide and governmentwide management initiatives. Trying to propagate the Executive Branchwide Standards of Conduct to a confederation of parochial organizations required that we be able to reach each employee in a direct and unfiltered manner.

The third concern was finding the most effective vehicle to get covered staff to embrace the ethics program's educational

**This is not a *Field of Dreams* fantasy. There is no “if you build it, they will come” guarantee.**

and reporting requirements. The Internet's graphical interface—the World Wide Web—affords a more engaging means to reach staff. The entertainment capabilities of the Web seem to expand monthly. Furthermore, the informal culture of the Web encourages less stuffy and more conversational communications. Most public employees are already ethical by inclination and many view their annual training and reporting requirements as unwarranted distractions from their day-to-day obligations. Some employees take offense at the implication that they need ethics training and others question the intrusiveness of having to disclose their financial holdings. The Web site attempts to get around the off-putting appearance of lecturing (or worse, preaching) by speaking in breezier prose and putting the customer in control. The end-user determines when he or she logs on, where he or she logs on (i.e., from

work or home) and self-navigates him or herself around the site.

The fourth practical consideration was cost. The office budget is predictably small; but the Internet's infrastructure is already well-established and essentially all covered employees already have PCs for other purposes. The incremental cost of throwing up a Web site is pocket change compared to the preexisting capital investment in computers and telecommunications. The office considered developing the site in-house using one of the increasingly friendly Web-design and maintenance programs. It was decided, however, to use the services of a vendor in order to save time, get a professional appearance, and to assure that the first attempt would fly. A \$24,000 task order was issued to a small business contractor handling one of the computer help-desk operations. Time and money were also saved by borrowing heavily from the prior developmental work of other agencies—particularly the Department of Interior, for the training modules, and the Federal Deposit Insurance Corporation and Department of Energy, for the computer formatted financial disclosure reports (to which a couple more format options were added). To establish credibility, it was also very important to make a splash early on. From the date of task order award, it took only three months of design, development and testing to launch version one.

On the other hand, this is not a *Field of Dreams* fantasy. There is no “if you build it, they will come” guarantee. A two-prong approach was employed to get clientele to the site—a lot of promotion and a little compulsion. First, every available means was used to publicize the Web site's launch; a broadcast E-mail to all employees, a notice on the biweekly pay stub and a shameless puff piece in the Departmental newsletter *USDA News*. The second prong was to tell the clients that they were obliged to use the site to fulfill their obligations. A targeted E-mail, with an explicit return-receipt feature, was sent to 600+ public filers announcing that paper versions of the SF 278 would not be mailed out and directing those high-level clients to the Web site for the form they needed to fulfill their May reporting requirements. Several E-mail reminders followed, with the last being sent on the Friday before the Monday, May 17 due date. Interestingly, filers did not resent, *Continued on page 7*

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## Records Management Recognized

but rather expressed appreciation for, the repeated messages. Calendar year 1999 classroom training for public filers started early and included a live demonstration on how to use the site for reporting. Mission Area ethics advisors were instructed to direct their confidential filers to use the training modules for self-instruction and to employ the reporting page to pull down their OGE Form 450 and 450-A. It seems to be catching on—in its first five months of operations, the site is averaging over 11,000 “hits” a week.

All this is not to say the project was executed flawlessly. First, not all clientele appreciated being pushed into what they considered the deep end of the Information Technology pool. Many frustrated “untechies” were, however, turned around by office staff (and their allies among the many USDA help-desks) being sympathetic and patiently stepping them through the browsing process. Second, presenting filers with four separate computer formats for reporting makes for a really ugly page, in the parlance of Web designers. In the initial version, however, this was a necessary concession to the fact that the USDA does not have a departmentwide standard suite of software on its PCs.

Three popular spreadsheet formats plus Adobe Acrobat™ had to be present to make sure that every filer had at least one format compatible with his or her computer. In version two, the goal is to use a singular, simple and secure Web-based system for reporting. Planning is underway with the Department’s National Finance Center in New Orleans to host this system, and OGE’s involvement on that project has been sought. Finally, the content of the borrowed Web-based training modules was not sufficiently massaged for USDA. The technical approach of allowing users to play the games on-line (rather than having to download a program) will be retained, but the scripts will be refined and new topical scripts are under development.

Readers are invited to call up [www.usda.gov/ethics](http://www.usda.gov/ethics) and browse around for a while. Suggestions and critical comments are also welcomed and may be E-mailed to the Webmaster. As with any viable Web site, it is a work in progress, or in Web-speak, always under construction.

In 1992, upon recently separating from the Office of Personnel Management, OGE began an initiative, with assistance from the National Archives and Records Administration (NARA), to update and revitalize our records management program. OGE’s commitment to promoting the management of ethics records at OGE and throughout the executive branch of the Federal Government has remained strong since it became an independent agency. Director Stephen Potts has affirmed that the “effective implementation of standards for the creation and management of ethics records plays an important role in preventing conflicts of interest and ensuring an efficient Government ethics program overall.”

To this end, OGE was recently recognized by NARA with a Best Practices Award

presented at the annual Records Administration Conference on May 20, 1999 in Washington, DC. OGE Records Management Officer, Michael Lewandowski discussed OGE’s recent efforts to develop and disseminate records management guidance to ethics officials throughout the executive branch. He described a currently developing joint initiative between OGE, NARA, and agency ethics officials to update and expand guidance for the management of routine administrative ethics records in the General Records Schedules. Ethics officials interested in learning more about this initiative should contact Mr. Lewandowski at 202-208-8000, ext. 1185. A records management session will be held at the upcoming Annual Government Ethics Conference, September 13-16, 1999 in Williamsburg, Virginia.

## Ethics in Action

OGE frequently receives questions from agency ethics officials about whether agency employees can accept gifts of free attendance to widely attended gatherings. Amendments to the gift exception for these types of events became effective September 16, 1996, and can be found at 5 C.F.R. § 2635.204(g) of the executive branch Standards of Ethical Conduct regulation.

**Q. I’ve heard that there is a 100-person threshold associated with the widely attended gatherings gift exception. Can you explain what it is about?**

**A.** The specific 100-person threshold only applies to *nonsponsor* gifts, that is, where a nonsponsor pays for the cost of the employee’s attendance at a widely attended gathering. 5 C.F.R. § 2635.204(g)(2). The rationale for the 100-person threshold for nonsponsor gifts of free attendance is that the larger, generally more public events are subject to greater potential press and public scrutiny, which will serve as additional protection against any apparent conflict situation. In combination with the \$250 free attendance gift value limitation, these two requirements will protect against the possibility that a nonsponsor donor will offer lavish entertainment or an opportunity to attend an event made highly

exclusive by virtue of the admission price.

**Q. When does the \$250 ceiling on gifts of free attendance apply?**

**A.** The \$250 ceiling applies to *nonsponsor* gifts of free attendance. 5 C.F.R. § 2635.204(g)(2). The threshold ensures that any gift of free attendance that an employee is permitted to accept from a nonsponsor is in the best interest of the agency concerned and does not involve an appearance of undue influence or favoritism or loss of impartiality by, among other considerations, prohibited sources providing lavish entertainment.

If the offer of free attendance from the nonsponsor is offered to a guest, it must be from the same person paying for the employee’s attendance, where such attendance has been authorized by the agency. Moreover, in such cases, the value of the guest’s free attendance must be aggregated with the value of the employee’s attendance in applying the \$250 threshold for nonsponsor gifts. 5 C.F.R. § 2635.204(g)(4). If the total value of the gift of free attendance from the nonsponsor for both the employee and the guest exceeds \$250, then the guest’s attendance cannot be authorized.

Q&A

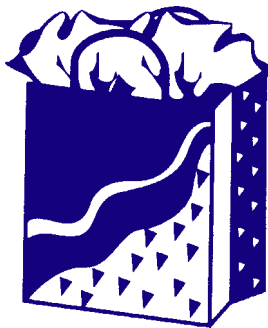
## Public Contest Prizes and the Gift Exclusion

The standards of ethical conduct regulation's general gift prohibition (subpart B of 5 C.F.R. part 2635) excludes from the definition of a "gift" certain prizes received in contests and drawings that are open to the public. See 5 C.F.R. § 2635.203(b)(5). An OGE DAEOgram discussed typical fact patterns and issues that have arisen under this gift exclusion, particularly while the employee is in an official duty status (DO-99-017 of April 26, 1999).

In order for a contest prize to qualify under this gift exclusion, the first requirement is that the contest must be open to the general public. This condition, fundamental to the exclusion's application, reduces the likelihood that either the donor or the donee stands to gain improperly, or appears to do so. If a contest or drawing, such as one held at a vendor's booth, occurs at an event (a conference or trade show, for example) where a fee is charged

or attendance is otherwise restricted, then it is not open to the public. Entry into such contests or drawings would have to be extended beyond the confines of the event to any other interested persons, in order to be considered open to the public.

The second fundamental prerequisite for this gift exclusion is that the employee's entry into the public contest or drawing must not be required by, or otherwise related to, his official duties. As with the



first requirement, this condition helps reduce the opportunity for improper gain. Thus, an employee cannot retain a prize in a contest that he entered incident to official duty or as a consequence thereof, such as a door prize at a conference that he is attending officially; or a reward for evaluating an event in which he participated officially; or a prize from a contest where entry was based on official purchases of supplies in a specified quantity or on an official team's performance.

An employee's entry into a contest is not, however, considered to be "required by or related to duty" where mere presence and opportunity to enter the contest occurs during or because of an official duty assignment. Thus, an employee could enter a contest in his personal capacity at a vendor's booth, even though he is on official assignment attending a public trade show.

## Ethical Considerations in Privatization

OGE issued a DAEOgram on the ethical issues and obligations arising out of privatization (DO-99-020 of April 28, 1999). Its purpose was to renew ethics awareness concerning both the privatization process itself and any subsequent partnering with the private sector, as the pace of transferring Government functions to outside entities quickens.

During the process of privatizing, executive branch employees face numerous potential conflicts, particularly under 18 U.S.C. § 208, when they participate in decisions that may eliminate or otherwise affect their Federal positions or transfer work to a prospective private employer. These and related conflict of interest concerns were discussed previously in an article in the Summer 1995 **Government Ethics Newsgram** (Vol. 12, No. 2, pp. 1-3), which was reprinted as OGE informal advisory opinion 95 x 10. That guidance attained added importance a few weeks later, when OGE issued a regulatory provision interpreting § 208 (with concurrence of the Department of Justice).

The rulemaking addressed one of the major issues raised in the opinion by clearly establishing that financial interests

arising from Government salary and employment are legally encompassed by section 208. See 5 C.F.R. § 2640.203(d) and the explanation at 60 Fed. Reg. 44707 of August 28, 1995. In the same regulatory provision, OGE used its authority under 18 U.S.C. § 208(b)(2) to exempt some of those otherwise disqualifying financial interests, such as where a Government matter in which the employee participates does not affect his Government employment individually or specially, or where his participation falls short of a determination.

After the process of privatizing has been completed, Government employees may face additional ethical challenges. Partnering and interactive work with private companies often engender questions about accepting gifts, future employment negotiation, impartiality, use of Government resources, preferential treatment, and a number of other matters. The established rules in the standards of ethical conduct regulation and the conflict of interest statutes remain applicable in resolving these issues.

In addition to reemphasizing the application of existing ethics principles, this DAEOgram seeks to open a dialogue

with the ethics community, as together we face continuing developments and challenges of privatization.

### Announcements

#### Advisory Letters Issued for Second Half of 1998

OGE recently placed its informal advisory letters for the second half of 1998 on its Web site. These new letters and memoranda represent the final installment of 1998 guidance and may be viewed or downloaded at [www.usoge.gov/opinions/opinlib.html](http://www.usoge.gov/opinions/opinlib.html). The on-line search capability for this 1998 guidance is now available.

#### Web Site Hyperlinks

OGE will resume its former electronic bulletin board practice of posting its Federal Register issuances on its Web site. The new Web postings will include hyperlinks to the actual issuances.



## Ethics News Briefs

### Final Rule on Minor Amendments to Subpart F of the Standards

OGE has adopted as final, without change, the minor amendments it proposed last summer to certain provisions in subpart F (on seeking other employment) of the standards of ethical conduct regulation as codified at 5 C.F.R. part 2635. See 64 Federal Register 13063-13064 (March 17, 1999), effective April 16, 1999. For details on the amendments, see the prior article on the proposed rule on page 8 of the Fall 1998 issue of the **Government Ethics Newsgram** (OGE determined not to adopt the proposed amendment to a provision in subpart H in the final rule).

### Semiannual Regulatory Agenda

OGE's most recent semiannual regulatory agenda was published in the Spring as part of the Unified Agenda of Federal Regulatory and Deregulatory Actions. See 64 Federal Register 22118-22124 (part XXXIV) (April 26, 1999).

### GSA Raises Foreign Gifts "Minimal Value" — Impact on Ethics Reports

The General Services Administration has raised the "minimal value" under the Foreign Gifts and Decorations Act,

5 U.S.C. § 7342, to \$260 or less for the period 1999-2001. The prior value, for 1996-1998, was \$245 or less. See 64 Federal Register 13700-13701 (March 22, 1999), amending 41 C.F.R. § 101-49.001-5. This change affects the thresholds for the reporting of gifts and travel reimbursements on both public (SF 278) reports and confidential (OGE Form 450) reports for executive branch officials, which are tied



to any such increase. The new gifts/reimbursements thresholds for ethics reports are "over \$260" for the aggregate level for reportability, with an exception for any gifts of "\$104 or less" which do not need to be counted for aggregation purposes. The higher thresholds apply to gifts or reimbursements received on or after January 1, 1999.

### Paperwork Approval Granted for Revised OGE Form 450

This past Spring, the Office of Management and Budget (OMB) granted approval for an additional three years under the

Paperwork Reduction Act of a slightly revised OGE Form 450 Executive Branch Confidential Financial Disclosure Report. Late last winter, OGE had published a "second round" paperwork notice of its request for approval to OMB. See 64 Federal Register 10151-10153 (March 2, 1999). OGE has distributed the new 4/99 edition of the OGE Form 450 for use by departments and agencies. It is also available on the OGE Web site and will be included in future editions of The Ethics CD-ROM. The new edition incorporates the higher thresholds for reporting of gifts and travel reimbursements (over \$260 aggregate and \$104 or less "de minimis" exception).

### OGE Publishes Final Amendments to its FOIA Regulation

This past Spring, OGE issued a set of final amendments to its internal Freedom of Information Act (FOIA) regulation at 5 C.F.R. part 2604, mostly to codify revisions implementing the Electronic FOIA Amendments of 1996. See 64 Federal Register 280890-28091 (May 25, 1999), effective June 24, 1999. As noted in the Spring 1999 issue of the **Government Ethics Newsgram**, OGE had published proposed amendments in December 1998 with a request for public comments. No comments were received, and OGE adopted as final the proposed changes to its FOIA regulation, subject to a few minor clarifying changes of its own.

## Rule Change Proposed on Waiver of Gift Reporting

OGE has published a proposed rule that would revise the provision at 5 C.F.R. § 2634.304(f) that permits the waiver of the requirement for public disclosure of gifts.

The proposed rule would amend the regulation which authorizes the Director to grant a waiver of certain gift disclosure requirements for filers of the public financial disclosure report form, SF 278. One of the proposed amendments would permit the Director to grant a waiver, in appropriate cases, if the basis of the relationship between the grantor and

grantee of a gift and the motivation behind a gift are personal. Another proposed amendment would clarify that if the Director approves a waiver request, in whole or in part, the cover letter requesting the waiver will be publicly available.

Additionally, the proposed amendments would expressly require that a description of the gift and its value be included in a waiver request. Finally, the proposed changes would explicitly require that when a gift has multiple donors, the information required to be in a waiver request pertaining to the donor must include the



necessary information for each donor. The proposed rule was published in the Federal Register on May 13, 1999 at 64 Fed. Reg. 25849-25851.

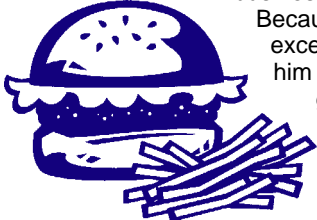
# Rules Limit Gift Acceptance by Executive Branch Employees

The Standards of Ethical Conduct for Employees of the Executive Branch are published at 5 C.F.R. 2635.

Subpart B of the regulation contains standards that prohibit an employee from accepting a gift from a "prohibited source" or that is given because of an employee's official position. Meals, entertainment, transportation, or other things of monetary value may be accepted, however, if they are excluded from the definition of a "gift" or if acceptance is permitted by one of several exceptions. The following examples illustrate the application of the gifts rules in a number of common situations.

◆ Reggie Regulator routinely deals with various reps from the information technology industry. One of these "prohibited sources" offers to give Reggie a \$36 ticket to an NBA game. Although Reggie may not accept the free ticket, he may purchase the ticket from the rep for its face value of \$36 since it would then not be considered a "gift."

◆ Reggie Regulator has a busy schedule and often finds it convenient to conduct business over lunch.



Because an exception permits him to accept gifts of \$20 or less per source, per occasion, Reggie may accept a

telecommunications company executive's offer to pick up his \$18 tab at a cafe. On a separate occasion, he may also accept a \$20 book from the same executive. However, Reggie's use of the exception is limited by a \$50 per source per calendar year cap, so he may not accept a subsequent offer of a \$14 river cruise from that executive or another individual at that telecommunications company.

◆ Reggie Regulator attends various trade shows occasionally, on his own time. When various exhibitors from different companies that are seeking to do business with his agency offer him free promotional items including a \$10 mug from one, a \$4 luggage tag from another, and a \$12 appointment calendar from a third, Reggie may accept each of these items because they do not exceed \$20 per source, even though they total more than \$20 at this single occasion. Reggie must keep in mind

that he is limited by the \$50 per source per calendar year cap.

◆ Like Reggie Regulator, Pam Purchasing Agent also likes to discuss business during lunch. Pam may not, however, arrange to be treated by a different corporate rep each day of the week. Even if each lunch is worth less than \$20, she may not solicit gifts nor accept gifts on so frequent a basis that it will appear that she is using her public office for private gain.

◆ Pam Purchasing Agent sometimes deals with a corporate rep, an old schoolmate friend, who was the maid of honor at her wedding. The two continue to be close friends. Pam may attend a birthday party and accept a ski sweater and hat valued at \$90 paid for by her friend if the circumstances indicate that the gifts were motivated by friendship and not business.

◆ Billy Bureau is assigned by his agency to make a speech about agency programs at a conference. If Billy's agency assigns him to make a presentation at a particular corporation's annual Information Management Conference in San Francisco, Billy

may accept the corporation's offer to waive the registration fee and may enjoy the meal that will be served to conference participants following his speech. (Billy's agency may determine that it can accept the corporation's offer to fund Billy's official travel to San Francisco.)

◆ Teresa Technical makes an effort to keep up on all of the latest technological developments in her field. She has been invited by a telecommunications industry association to attend a conference on recent developments relating to high definition television. The conference will be attended by a large number of organizations representing broadcasting industries. If her agency decides that she should attend, Teresa may accept the sponsoring association's offer to waive the registration fee since employees may attend certain "widely attended gatherings" at the expense of the sponsor.

Questions concerning the gifts rules may be directed to the designated agency ethics official at the relevant agency or to the U.S. Office of Government Ethics at 202-208-8000.

## Guidance on Collective Bargaining

In April, OGE issued a DAEOgram (DO-99-014 of April 12, 1999) advising agencies about their obligation during collective bargaining where union proposals concern matters that are addressed by OGE's ethics regulations. An agency's duty to bargain in good faith with its union does not extend to bargaining about union proposals that are inconsistent with any Governmentwide rule or regulation.

A number of provisions in OGE's regulations call for an agency to make some determination, to come to some conclusion, to grant or deny approval, or otherwise to exercise judgment in connection with implementing the regulations. Those provisions confer sole and exclusive authority on the agency with regard to those determinations. In conferring sole and exclusive authority to the agency for these actions, the regulations may refer to

the agency specifically or will specify an individual such as the head of the agency or the designated agency ethics official.

Union proposals that seek to prescribe those agency determinations, or that seek to provide for their review outside the agency (e.g., through arbitration), are inconsistent with those Governmentwide ethics regulations and, therefore, are not subject to the duty to bargain. Examples of those matters where agencies are not subject to the duty to bargain include identification of employees who must file confidential financial disclosure reports and determinations about conflicting financial interests.

Agency ethics officials should share the DAEOgram with the labor relations staff at their agencies and should contact OGE's Office of General Counsel when an OGE regulation is the subject of a union proposal. OGE can assist in assessing any unresolved negotiability issues and may, in appropriate cases, seek to participate as *amicus curiae* where the negotiability of a proposal concerning an ethics regulation is appealed to the Federal Labor Relations Authority.

# Accomplish Training via Satellite

Are your ethics training dollars limited? Are you seeking a user-friendly and cost-efficient way to deliver your ethics training sessions? You can train your trainers, managers, and employees by Satellite Broadcast provided by the Department of the Interior (DOI), in partnership with the Department of Agriculture, Department of Commerce, Department of Veterans Affairs, General Services Administration, Nuclear Regulatory Commission, Office of Government Ethics, and the Office of Special Counsel. A series of live satellite broadcasts presented by experienced ethics officials will help agencies in satisfying their annual ethics training requirements for executive branch employees. All of these courses are **free!**

Two remaining half-day "train the trainer" satellite broadcasts, to be held on August 5 and August 26, 1999, will guide ethics officials through various aspects of an agency ethics program and provide them resources to find answers to their questions. A one-hour session on **September 30, 1999**, will be broadcast for all Federal employees and will **meet the annual requirement for live training**. All of the broadcasts are produced in cooperation with the U.S. Fish and Wildlife Service and will be uplinked from the National Conservation Training Center (NCTC) in Shepherdstown, West Virginia.

## Remaining "Train the Trainer" Sessions:

### Session 3—Standards of Conduct I August 5, 1999

An intensive half-day of reviewing various subparts of the *Standards of Conduct for Employees of the Executive Branch* and other regulations that influence employee conduct. Students will be exposed to ethics issues that employees regularly confront. During the instruction, students will:

- ◆ be introduced to criminal statutes 18 U.S.C. §§ 202-209 and Executive Order 12674
- ◆ become familiar with appearances of conflicts of interests
- ◆ to be introduced to misuse of position and title
- ◆ to be introduced to fundraising limitations
- ◆ to be introduced to gambling prohibitions

- ◆ to become familiar with limitations on the use of Government equipment
- ◆ to become familiar with lobbying prohibitions
- ◆ become familiar with outside work request procedures
- ◆ to become familiar with the approval process for third party travel
- ◆ to be introduced to frequent flier restrictions

### Session 4—Standards of Conduct II August 26, 1999

This half-day session picks up where Standards of Conduct I left off. It covers other topics essential to counseling employees who have ethics questions. Following instruction, students will be able to:

- ◆ explain the limitations on political activity (Hatch Act)
- ◆ explain the limitations on accepting gifts from outside sources
- ◆ explain the limitations on gifts between employees
- ◆ explain the limitations on accepting gifts from foreign governments
- ◆ explain the limitation on seeking

and negotiating for non-Federal employment

- ◆ identify post-employment limitations
- ◆ participate in an exercise on partnerships

## General Training Session for Employees:

### Statutes and Standards September 30, 1999

A lively, interactive one-hour session encompassing a broad overview of the criminal statutes the *Standards of Conduct for Employees of the Executive Branch*. This session satisfies OGE's annual ethics training requirement for all executive branch employees.

All broadcast sessions will be recorded, and videotapes will be available at no cost through the NCTC. Sessions in June and July covered the administrative aspects of an ethics program and how to run a financial disclosure system. For more information, including how to register for the remaining sessions, contact Arthur Bennett, DOI, at 202-208-3387, or by E-mail at [Arthur\\_Bennett@ios.doi.gov](mailto:Arthur_Bennett@ios.doi.gov).

## Web Sites Offer Training Materials

In addition to OGE's Web site at <http://www.usoge.gov>, the **Newsgram** provides the following list of Web sites offering ethics training materials and other ethics resources. OGE cannot accept responsibility for or guarantee the accuracy of the legal/substantive content of the materials found on these sites.

- ◆ Air Force Materiel Command Wright Patterson  
<http://www.afmc.wpafb.af.mil/public/HQ-AFMC/JA/lo/lojaf/ethics/index.htm>
- ◆ Defense Information Systems Agency Ethics Training  
<http://www.disa.mil/ethics/html/train.html>
- ◆ Department of Agriculture  
<http://www.usda.gov/ethics/>

- ◆ Department of Defense Standards of Conduct Office (SOCO)  
[http://www.defenselink.mil/dodgc/defense\\_ethics/index.html](http://www.defenselink.mil/dodgc/defense_ethics/index.html)
- ◆ Department of Interior Ethics Office  
<http://www.ios.doi.gov/ethics/ethics.html>
- ◆ Department of Justice, Ethics Training Program  
<http://www.usdoj.gov/jmd/ethics/>
- ◆ National Archives and Records Administration, General Counsel Staff-Ethics  
<http://nara.gov/gc/ethics/ethics.html>
- ◆ Department of Health and Human Services, National Institutes of Health  
<http://ethics.od.nih.gov>
- ◆ U.S. Army, Fort Sill  
<http://sill-www.army.mil/jag/admin/main/welcom>



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