



United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

November 6, 2008
DO-08-037

TO: Designated Agency Ethics Officials

FROM: Don W. Fox
General Counsel

SUBJECT: Recent legislative activity affecting the executive branch ethics program

As part of our newly enhanced efforts to keep you apprised of relevant legislative activity, the Office of Government Ethics (OGE) brings to your attention three new public laws that affect the executive branch ethics program. Specifically, these new provisions affect supplementation of salary restrictions, certain contractor ethics safeguards, and post-employment restrictions for certain Senior Level (SL) and Scientific and Professional (ST) Federal employees of the executive branch.

Supplementation of Salary

The College Opportunity and Affordability Act, Pub. L. No. 110-315, 122 Stat. 3078 (2008), allows current and former students of institutions of higher education who go to work for the Federal Government to participate in such an institution's loan forbearance or repayment programs without violating 18 U.S.C. § 209 or the gift rules if certain conditions are met. These programs are often called Loan Repayment Assistance Programs or LRAPs. Section 209 prohibits a Government employee from receiving and anyone other than the Government from giving payment for performing Government duties, i.e., a supplementation of salary. Subpart B of the Standards of Ethical Conduct for Employees of the Executive Branch prohibits a Government employee from accepting gifts from outside sources given because of his or her official position.

The following criteria must be met in order to avoid violation of Section 209:

- The LRAP exemption is effective *January 1, 2008*.
- Payments may be made only from the Government employee's institution of higher education.
- LRAP must be provided in accordance with an institution of higher education's written and published loan policy.
- The institution's policy must have been in place before the employee ceased to be a student at the school.

Contractor Ethics

Section 841 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, includes Governmentwide ethics safeguards addressing conflicts of interest for certain Federal Government contractors. The legislation contains specific policy requirements applicable to contractor employees who are performing “acquisition functions closely associated with inherently governmental functions” for or on behalf of a Federal agency or department. Additionally, the Act requires the Administrator for Federal Procurement Policy, in consultation with the Director of OGE, to determine whether revision of the Federal Acquisition Regulations (FAR) is needed to address personal conflicts of interests by contractor employees for other functions being performed by contractors. The Act also requires the Administrator, in consultation with OGE, to develop and maintain a repository of best practices for the prevention and mitigation of organizational and personal conflicts of interest in Federal contracting.

The specific elements of the new policy for Government contractors performing “acquisition functions closely associated with inherently governmental functions” will be implemented through clauses currently being developed by the Administrator for Federal Procurement Policy for inclusion in solicitations and contracts (and task or delivery orders). The Act requires identification, screening for, and prevention of personal conflicts of interest for contractor employees performing such functions. Additionally, any conflicts of interest violations must be reported to contracting officers or their representatives, and appropriate disciplinary action must be taken. It also prohibits contractor employees from using non-public information for personal gain when the information was obtained while performing acquisition functions closely associated with Government functions. Contractors are required to maintain effective oversight to verify compliance with these new personal conflicts of interest safeguards. This provision applies to any contract for an amount in excess of the simplified acquisition threshold.

Post-Employment

The Senior Professional Performance Act of 2008, Pub. L. No. 110-372, raises the cap on base pay for SL and ST Federal employees and eliminates locality pay for these senior level positions. The law also provides that no SL or ST employee will experience a reduction in pay (defined to include any locality adjustment being received by the employee). This legislation brings the pay system for SL and ST employees into line with that for Senior Executive Service (SES) employees. A consequence of this pay system revision is that the new base salary of SL and ST employees may meet the salary threshold for coverage by the one-year post-employment restriction on former senior employees at 18 U.S.C. § 207(c).

In guidance issued by OGE on December 8, 2003, OGE had explained that locality pay should not be counted as part of basic pay for any non-SES position which was still eligible for locality pay for purposes of 18 U.S.C. § 207(c)(2)(A)(ii). Locality pay was eliminated for SES employees by Section 1125 of the National Defense

Authorization Act for Fiscal Year 2004. The one-year post-employment restriction on former senior employees applies to individuals whose rate of basic pay exceeds 86.5 percent of the rate for level II of the Executive Schedule. 18 U.S.C. § 207 (c)(2)(A)(ii). During 2008 that amount was \$148,953 and will increase slightly for 2009. Because SL and ST basic pay was previously capped at Level IV of the Executive Schedule, the one-year post-employment restriction did not apply to most SL and ST employees. Under the new law, many more SL and ST employees will be covered by the one-year post-employment restriction as the locality pay they were previously receiving will now be part of their basic pay.

Conclusion

The current Congress considered and passed several ethics-related provisions that have become law, the three most recent of which are discussed above. OGE brings them to your attention as part of our initiative to keep you apprised of relevant legislative activity. OGE will periodically provide you with similar legislative activity updates. OGE also may be in communication with you directly about agency-specific legislative proposals and provisions that may affect your ethics program as they come to our attention. If you would like to discuss this or other legislative matters, please contact OGE's Associate Director for Legislative Affairs, Shelley Finlayson, at 202-482-9314.