



United States
Office of Government Ethics
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MEMORANDUM

TO: Designated Agency Ethics Officials, General Counsels
and Inspectors General

FROM: Marilyn L. Glynn
General Counsel

SUBJECT: Office of Legal Counsel Opinion on 18 U.S.C. § 208

The Office of Legal Counsel (OLC), Department of Justice, issued an opinion last week concerning the application of 18 U.S.C. § 208, the financial conflict of interest statute. Memorandum of Steven G. Bradbury, Acting Assistant Attorney General, OLC, for Marilyn L. Glynn, General Counsel, Office of Government Ethics, January 11, 2006, available on the OLC website at <http://www.usdoj.gov/olc/11106nonprofitboards.pdf>. The opinion was issued in response to a request from the Office of Government Ethics for guidance concerning the question of whether a nonprofit organization has a financial interest in a particular policy matter because the organization spends money on advocacy in connection with the particular matter.

OLC concluded that a nonprofit organization does not have a financial interest in a particular matter on which it spends funds to advocate its policy position, solely by virtue of such expenditures. Consequently, Federal employees who serve as officers or directors of such organizations are not disqualified, under 18 U.S.C. § 208, from participating in particular matters with respect to which those organizations are spending funds on advocacy. The OLC opinion supersedes any suggestion in OGE Informal Advisory Letter 97 x 2 that a nonprofit organization has a financial interest in a particular matter, under section 208, whenever that matter would prompt the organization to expend resources on advocacy.

The opinion does, however, contain certain caveats. First, the opinion expressly does not apply to for-profit entities that

engage in advocacy on behalf of themselves or their clients. Id. at 3 n.3. Similarly, the opinion expressly does not apply to any entity (whether for-profit or nonprofit) that receives or expects to receive payment specifically for its advocacy. Id. Thus, for example, the opinion is not intended to address the possible financial interests of law firms or lobbying firms in particular matters about which the firms are engaged in advocacy. Furthermore, the opinion recognizes that a nonprofit organization can have a financial interest in a particular matter if the organization "formally intervenes to assert the financial interests of its members," i.e., "with the organization standing in the shoes of the members" whose financial interests are affected. Id. at 15.

Finally, the opinion points out that agencies and employees need to take into account any potential "appearance" concerns, even if the criminal conflict of interest statute does not apply. This includes a consideration of possible appearances that an employee may be violating the duty to act impartially and not give preferential treatment to a private organization, which is a basic principle in 5 C.F.R. § 2635.101(b)(8), implemented more specifically by 5 C.F.R. § 2635.502. The OLC opinion observes, consistent with past OGE guidance, that such appearance problems generally are best left to the agency and the employee, based on the particular facts. The opinion does note certain factors that may have a bearing on these appearance questions: whether the particular matter is identified as a significant priority by the organization; whether the organization is devoting significant resources to advocacy with respect to the matter; whether the organization is communicating directly with Federal agencies; and the importance of the particular employee's role in the matter. OGE also would advise agencies to consider any other relevant factors set out in 5 C.F.R. § 2635.502(d) to determine whether the Government's interest in an employee's participation in a matter outweighs any impartiality concerns.