

GOVERNMENT ETHICS YEAR IN REVIEW

Tuesday, September 13, 2011 (10:30 a.m. – 12:00 p.m.)

1. Introduction

Walter Shaub

2. Proposed Outside Board Exemption

Rick Thomas

Since a series of opinions in the mid-1990s from the Office of Legal Counsel, 18 U.S.C. § 208 has been interpreted as prohibiting employees from serving in their official capacities as officers, directors or trustees of nonprofit organizations. In the intervening years, some agencies have granted individual waivers under section 208(b) to permit such service, but many agencies have declined to grant waivers for this purpose. In May of this year OGE issued a *proposed* rule that would create a new regulatory exemption under section 208(b)(2) permitting employees to serve in such positions as an official duty activity. The exemption will not become effective until OGE issues a final rule.

- 18 U.S.C. § 208
- OLC Opinion, "Service on the Board of Directors of Non-Federal Entities," November 19, 1996, <http://www.justice.gov/olc/fbimem.2.htm>
- OGE, Report to the President and to Congressional Committees on the Conflict of Interest Laws (January 2006)
- Memorandum from Director of the Office of Science and Technology Policy, "Scientific Integrity," December 17, 2010
- OGE Proposed Regulatory Exemption, 76 Fed. Reg. 24816 (May 3, 2011)

3. Proposed Lobbyist Gift Ban Rule

Rick Thomas

Executive Order 13490 imposed a ban on gifts from registered lobbyists and lobbying organizations on full-time political appointees as part of President Obama's "Ethics Pledge." The same Executive Order directs OGE to promulgate regulations to apply the lobbyist gift ban to all executive branch employees. After more than two years of experience in applying the

lobbyist gift ban to political appointees, OGE developed a proposed rule to extend the ban to all employees, taking into account the needs and circumstances of career employees.

- Executive Order 13490, sec. 1 & sec. 4(c)(3)(ii)-(iv)
- DAEOgram DO-09-007, "Lobbyist Gift Ban Guidance," February 11, 2009

4. 2010 Report on Executive Order 13490: A Pledge Report Update

Leigh Francis

Executive Order 13490, known as the Ethics Pledge, requires certain full-time, non-career political appointees to abide by heightened ethics restrictions, such as increased post-employment restrictions and a ban on receiving gifts from registered lobbyists or lobbying organizations. The Ethics Pledge also requires that the Office of Government Ethics provide an annual report on the administration of the Pledge. Last month, OGE issued its second annual report, accessible from OGE's new website. There are some significant findings within the Report which will be of interest to all ethics officials.

- Executive Order 13490
- 2010 Report on Executive Order 13490: Ethics Commitments by Executive Branch Personnel

5. Highlights of Ethics-Related Legislation during the 112th Congress

Shelley Finlayson

- Presidential Appointments and Senate Confirmation: S. Res. 116, S. 679
- Financial Disclosure: H.R. 203, H.R. 1148, H.R. 1866, H.R. 1950, H.R. 2340, S. 973
- Conflicts of Interest: H.R. 1315, H.R. 1458, H.R. 1468, H.R. 1793, H.R. 1823, H.R. 1923, H.R. 1973, H.R. 2162, H.R. 2572, S. 401, S. 782, S. 917, S. 995, S. 1261, S. 1449
- Ethics—Generally: H.R. 2524, H.R. 2596, H.R. 2625, S. 132
- Gifts: H.R. 1892, S. 1458
- Standards of Ethical Conduct: H.R. 1870
- Federal Advisory Committees: H.R. 1144, H.R. 2521
- Contractor Ethics: H.R. 1262, H.R. 1540, H.R. 2136, H.R. 2219, H.R. 2309, S. 353, S. 1145

6. OGE's role in OFPP's and FAR Council's PCI rule-making process and participation in the ACUS study recommendations regarding ethical standards for government contractor employees

Emory Rounds

OGE attorneys provided their expertise and experience regarding personal conflict of interest (PCI) issues to the Federal Acquisition Regulatory Council regarding the proposed rule that would, in part, provide a new clause to be used in contracts to prevent PCIs for contractor employees who perform acquisition functions for a Federal agency.

OGE attorneys also assisted the Administrative Conference of the United States as it undertook its Government Contractor Ethics project to evaluate whether and to what extent the government ethics rules should be expanded to government contractor employees.

- Proposed Rule: Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 74 Fed. Reg. 58584 (November 13, 2009)
- Proposed Rule: Organizational Conflicts of Interest, 76 Fed. Reg. 23236 (April 26, 2011)
- Government Contractor Ethics Final Recommendation adopted by the Administrative Conference, <http://www.acus.gov/research/the-conference-current-projects/government-contractor-ethics/>

7. Nominee Financial Disclosure Program Highlights

Deborah Bortot

A discussion of the following initiatives:

A. Sector Mutual Fund Exemption

OGE recently issued a proposed rule clarifying the exemption on sector mutual funds at 5 C.F.R § 2640.201(b).

- 76 Fed. Reg. 24816 (May 3, 2011)
- 5 C.F.R § 2640.201(b)

B. OGE Form 278

OGE replaced the Standard Form 278 (SF 278) with the OGE Form 278, effective December 17, 2010.

- DAEOgram DO-10-020 (December 17, 2010)
- C. Disclosure of Ethics Agreements

OGE will post to the OGE website ethics agreements of nominees for, and appointees to, positions requiring Senate confirmation when the position also requires the individual to file a public financial disclosure report. Ethics agreements for nominees who file public financial disclosure reports need to contain the following language:

“I have been advised that this ethics agreement will be posted publicly, consistent with 5 U.S.C. § 552, on the website of the U.S. Office of Government Ethics with other ethics agreements of Presidential nominees who file public financial disclosure reports.”

- 76 Fed. Reg. 24489 (May 2, 2011)

8. Public Access to Ethics Records

Elaine Newton

Many of the ethics-related records that are maintained by agencies are publicly available. However, it is important to understand that not all of these records are available under the Freedom of Information Act (FOIA). Because there are different legal authorities that allow the public access to these records, agencies must pay special attention to the requirements that govern the release of each record. At the end of this handout is a guide to assist agencies in determining which laws govern the release of some of the more common ethics-related records.

9. 18 U.S.C. § 209 after Consideration of United States v. Project on Gov’t Oversight

Allison George

In 1998, Robert Berman, a former economist at the Department of Interior, accepted a monetary award from the Project on Government Oversight (POGO) for his work related to a *qui tam* action involving oil extracted on public lands and underpaid oil royalties owed to the Government. The United States sued, claiming that the award violated 18 U.S.C. § 209, which prohibits the supplementation of a Government employee’s salary by an outside source. In 2008, a jury found that POGO and Berman had violated section 209, but on appeal, the Court of Appeals for the District of Columbia Circuit concluded that because intent is a required element of a 209 violation, the trial court failed to properly instruct the jury on that element. Thus, the

Court reversed the 209 charge and remanded for a new trial, but did confirm that section 209 prohibits lump-sum payments as well as periodic, salary-like payments.

- United States v. Project on Gov't Oversight, 616 F.3d 544, 392 U.S. App. D.C. 363 (D.C. Cir. 2010)
- 18 U.S.C. § 209(a)

10. "Preview" of the New Outside Activity Legal Advisory

Allison George

OGE recently issued Legal Advisory LA-11-06 that analyzes whether, under 5 C.F.R. § 2635.802 ("Conflicting outside employment and activities"), an agency may issue an across-the-board policy that an employee may not run for or hold nonpartisan elective office because election to that office may have the potential to create the appearance of misuse of the employee's federal position. In the Advisory, OGE analyzes the numerous ethics issues implicated by an employee who engages in local nonpartisan political activity, and concludes that the agency - because of the potentially fundamental constitutional rights involved - should not categorically deny its employees the right to participate in local political activity.

- 5 C.F.R. § 2635.802
- LA-11-06

11. The OGE Supplemental Agency Regulation Process

Seth Jaffe

During the last year, largely based on agency requests for assistance in this area, OGE prepared comprehensive guidance on the OGE supplemental regulation process. The resulting Legal Advisory addresses whether an agency needs a supplemental ethics regulation to accomplish its goals, the appropriate subject matter areas to include in a supplemental ethics regulation, and includes a summary of OGE's role in assisting agencies in this process. This presentation will focus on the typical issues encountered by agencies that lead to the preparation of the Legal Advisory.

12. Financial Disclosure Guidance for Presidential Candidates

Seth Jaffe

In the year prior to a Presidential election year, OGE receives a large volume of inquiries from potential Presidential candidates, good government groups, and the media concerning

financial disclosure requirements for Presidential candidates. In anticipation of the 2012 Presidential election, OGE issued Legal Advisory LA-11-03 addressing these requirements. This presentation will discuss how the legal advisory developed and recount relevant aspects of the consultation process OGE went through with the Federal Election Commission prior to publication.

- LA-11-03

13. OGE's New Website

Amy Braud

Last week, OGE launched a new website with numerous improvements beyond the mere appearance of the website. Among the enhancements are a subject matter index to the substantive ethics guidance on the website and a new search engine for the website. Future improvements include a plan to provide immediate access to certified public financial disclosure reports from the OGE website and a new interactive module to assist public financial disclosure filers in completing their reports.

In addition to this Year in Review preview, OGE is offering a conference session about the new website on Wednesday.

Public Access to Ethics Records

Ethics Record	Authority	Key Points
Public Financial Disclosure Reports (OGE/SF 278)	Ethics in Government Act of 1978 (EIGA), 5 U.S.C. app. § 105	<p>Must be made available to the public in accordance with § 105 of EIGA -- not FOIA (<u>Church of Scientology v. IRS</u>, 816 F. Supp. 1138, 1152 (W.D. Tex. 1993)).</p> <p>OGE Form 201 was created to simplify the § 105 process.</p>
Confidential Financial Disclosure Reports (OGE 450)	Ethics in Government Act of 1978, 5 U.S.C. app. § 107	Not publicly available under EIGA or FOIA (<u>Meyerhoff v. EPA</u> , 958 F.2d 1498, 1500-02 (9 th Cir. 1992)).
18 U.S.C. § 208(b)(1) and 18 U.S.C. § 208(b)(3) waivers	18 U.S.C. § 208(d)(1)	<p>Must be made available to the public by the agency that issued the waiver (not OGE) and the agency must follow the EIGA § 105 procedures.</p> <p>Also, 18 U.S.C. § 208(d)(1) allows agencies to withhold information under one of the FOIA exemptions. However, OGE advisory opinion 93 x 34 reminds agencies that determining whether to release certain information requires a balance between the public interest and certain private financial/privacy interests.</p>
<u>Other Records:</u> ethics compliance documents (such as written recusals, screening arrangements), advisory opinions, ethics program reviews, cover letters, etc.	5 U.S.C. § 552 (Freedom of Information Act) and 5 U.S.C. § 552a (Privacy Act)	When determining whether to release ethics records that are covered by FOIA and/or the Privacy Act, OGE strongly encourages agency ethics officials to work with their agency FOIA and Privacy Act staff.