

NOTE: The guidance in this advisory regarding 18 U.S.C. § 205 was clarified in Legal Advisory LA-20-08.

OFFICE OF GOVERNMENT ETHICS

01 x 9

**Letter to the Executive Director of a Federal Agency
dated October 25, 2001**

This is in response to your letter of October 17, 2001. You indicate that you are the Executive Director of [an agency], an independent agency within the executive branch. You have requested a "ruling" from the Office of Government Ethics (OGE) concerning your proposed involvement in the establishment and management of a nonprofit organization, which would be called [an] Institute.

Ordinarily, we advise employees first to seek the advice of the Designated Agency Ethics Official (DAEO) for their agency if they have questions concerning the permissibility of a proposed outside activity. Because OGE is not completely familiar with the mission and operations of your agency, we would refer you to your DAEO, who is copied below, for more specific advice concerning your situation. Nevertheless, we can provide the following general outline of some of the restrictions on outside activities that your question may involve.

As an executive branch employee, you are subject to 18 U.S.C. § 208, which prohibits you from participating in any particular matter that would affect your financial interests or those of any organization you serve as officer, director, trustee, or employee. If you serve the Institute in any of these capacities at a time when you still remain [an agency] employee, you will need to consider whether your [agency] duties might require you to participate personally and substantially in any matter in which the Institute has an interest. From your brief description of both the [agency] and the Institute, we are not in a position to rule out the possibility that there could be some potential for overlap between the work of your agency and the interests of the outside organization. You indicate, for example, that both the [agency] and the Institute are involved in research activities pertaining to [a certain subject], but the information is not sufficient for us to determine whether any particular matter at the [agency] could have a direct and predictable effect on the interests of the Institute. Your DAEO would be in a much better position to assess any potential issues under section 208, given his familiarity with the range of potential matters at the agency. In this connection, you should note that, under certain circumstances, an agency may prohibit an employee from engaging in outside activities that substantially conflict with the performance of official duties. See 5 C.F.R. §§ 2635.403(c)(2); 2635.802.

Another provision of law, 18 U.S.C. § 205, prohibits you from representing another person, including a nonprofit organization, before the Federal Government, in particular matters in which the United States is a party or has a direct and substantial interest. Section 205 not only would prohibit you from representing the

Institute in contacts with the [agency], but would also prohibit you from representing the Institute before any other Federal agency; thus, for example, you would not be permitted to represent the Institute before the Internal Revenue Service in connection with an effort to obtain tax exempt status.

Because your letter makes explicit reference to your proposed solicitation of funds for the Institute, we want to point out that any such activities would be governed by 5 C.F.R. § 2635.808, a regulation covering fundraising by Federal employees. You indicate that your activities will be performed in a personal, rather than official, capacity, and therefore the following three restrictions would be applicable, under section 2635.808(c): (1) you may not personally solicit funds or other support from an official subordinate in your agency; (2) you may not personally solicit funds or other support from a person whom you know to be a "prohibited source";¹ and (3) you may not use or permit the use of your official title, position or any authority associated with your public office to further a fund-raising effort.²

Several other related regulatory provisions govern misuse of official position. See 5 C.F.R. part 2635, subpart G. In general, you may not use your public office for the private gain of yourself or any organization with which you are affiliated in a private capacity, 5 C.F.R. § 2635.702. Depending on the circumstances, for example, you and your DAEO may need to consider whether your outside work with the Institute is so related to your official duties that there would be an appearance that you are using your official position to obtain outside compensation opportunities. See 5 C.F.R.

¹For these purposes, prohibited source means any person who:

- (1) Is seeking official action by the employee's agency;
- (2) Does business or seeks to do business with the employee's agency;
- (3) Conducts activities regulated by the employee's agency;
- (4) Has interests that may be substantially affected by performance or nonperformance of the employee's official duties; or
- (5) Is an organization a majority of whose members are described in paragraphs (d)(1) through (4) of this section.

5 C.F.R. § 2635.203(d).

² Because you propose to solicit funds for an outside organization that may have certain interests and operations that overlap with the mission of your agency, you also may want to discuss any non-ethics issues with your DAEO or other agency officials. For example, we have encountered situations in the past where agency employees proposed to work with nonprofit organizations that essentially carry on activities, including fundraising, for the benefit of the agency, thus raising issues under appropriations law. See OGE Informal Advisory Letter 95 x 8.

§ 2635.802 (example 2). Among other things, you also should be aware that you may not use or permit the use of your official position to suggest that the Government endorses or sanctions your personal activities or those of another. See 5 C.F.R. § 2635.702(b). Note also that there are restrictions on use of official property and official time (including the time of subordinates) for unauthorized purposes. See 5 C.F.R. §§ 2635.704, 2635.705.³

Finally, since you indicate that you eventually may terminate your position with the [agency] and work full-time for the Institute, you should be aware of the various restrictions on post-employment activity. After terminating your Government position, you are permanently prohibited from representing another person, including the Institute, before the Federal Government in connection with any particular matter involving specific parties in which you participated personally and substantially for the Government. See 18 U.S.C. § 207(a)(1). Similarly, you are prohibited for two years after terminating your position from representing another person in connection with any particular matter involving specific parties that was pending under your official responsibility during your last year of Government service. See 18 U.S.C. § 207(a)(2). Another restriction prohibits former "senior employees" from representing anyone before their former agency, in connection with any matter in which they seek official action, for one year after terminating their senior position, 18 U.S.C. § 207(c); this one-year "cooling off period" applies only to those senior positions specified in section 207(c)(2), and your DAEO can assist you in determining whether your current position at the [agency] is covered. There are several other post-employment restrictions that may be applicable, depending on the circumstances, and, again, your DAEO can explain any that may be relevant to your situation.

I hope this has been helpful.

Sincerely,

Marilyn L. Glynn
General Counsel

³ You should be aware that additional restrictions on outside activities and earned income apply to certain "covered noncareer employees," as defined in 5 C.F.R. § 2636.303(a). You have provided no information that would indicate to us whether you are a covered noncareer employee, but your DAEO should be able to assist you and explain any applicable restrictions.