

UNITED STATES OFFICE OF
GOVERNMENT ETHICS



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PROGRAM ADVISORY

TO: Designated Agency Ethics Officials and Inspectors General

FROM: Dale A. Christopher, Jr.
Deputy Director for Compliance

SUBJECT: Updated Procedures for Notifying the Office of Government Ethics of Conflict of Interest Referrals to the Department of Justice

The U.S. Office of Government Ethics (OGE) is updating its procedures associated with referrals to the Department of Justice (DOJ) of possible violations of criminal conflict of interest laws. In developing these new procedures, OGE sought and considered input from the Council of the Inspectors General on Integrity and Efficiency (CIGIE), of which OGE's Director is a statutory member. This Program Advisory describes the updated procedures, announces a revised OGE Form 202 (Notification of Conflict of Interest Referral), provides instructions for the office making the referral to DOJ ("referring office"), and provides instructions for the Designated Agency Ethics Official (DAEO) of the agency that employs the individual who is the subject of the referral ("employing agency").

I. Revised OGE Form 202

In accordance with the Ethics in Government Act, 5 U.S.C. appendix §§ 101-505, as amended, OGE's regulations require concurrent notification of OGE's Director when any matter involving a potential violation by an executive branch employee of 18 U.S.C. §§ 203, 205, 207, 208, or 209 is referred, pursuant to 28 U.S.C. § 535, to DOJ. *See* 5 U.S.C. app. § 402(e)(2); 5 C.F.R. § 2638.603(b).¹ Under these regulations, OGE has long used the OGE Form 202 (Notification of Conflict of Interest Referral) to collect these notifications and information regarding the disposition of the matter.²

¹ This statutory and regulatory notification requirement is inapplicable when disclosure of the information is prohibited by law. *Id.*

² Yesterday, OGE issued a final rule replacing the prior 5 C.F.R. part 2638. The new regulation will become effective on January 1, 2017, but it will continue to require referral and disposition notifications through the filing of an OGE Form 202. *See* Executive Branch Ethics Program Amendments, 81 Fed. Reg. 76,271, 76,778 (Nov. 2, 2016) (to be codified at 5 C.F.R. pt. 2638). The new citation for these requirements will be 5 C.F.R. § 2638.206.

Recently, OGE collaborated with CIGIE to revise the OGE Form 202. CIGIE and OGE share a common interest in ensuring that agencies actively consider taking corrective action when DOJ has declined to pursue criminal or civil penalties against an employee but an Inspector General has, nonetheless, made an adverse finding related to government ethics requirements. CIGIE and OGE also share a common interest in protecting the investigative process with regard to potential violations of conflict of interest laws applicable to executive branch employees. The revised OGE Form 202 will continue to provide OGE with the information it needs in order to confirm that the employing agency has followed through in actively considering corrective action in appropriate cases. At the same time, the revised form will no longer require the referring office to provide substantive information regarding the referral to DOJ prior to the conclusion of any related investigation.

The revised OGE Form 202, available in the “Forms Library” section of OGE’s website (www.oge.gov), comprises three distinct parts. Parts 1 and 2 are to be completed by the referring office, and Part 3 is to be completed, when applicable, by the DAEO of the employing agency.³ Each of these parts, as well as the process for status updates, is described in more detail below.

II. Part 1 of the OGE Form 202 (Filed by the Referring Office)

Part 1 is submitted when the referral is made to DOJ. The requirement to submit this part applies whether the referral is made in writing or orally. Part 1 collects information about:

- The name of the referring office;
- The point of contact at the referring office;
- The identity of the DOJ component to which the referral was made (*i.e.*, the Public Integrity Section, the U.S. Attorney’s office for a particular district, or another DOJ component);
- The date of the referral; and
- The tracking or investigation number assigned by the referring office.

Part 1 no longer requires the referring office to include in the initial submission any information regarding the substance of the referral (*e.g.*, the subject employee’s name or title, the component of the employing agency in which the employee serves, the legal authorities implicated by the alleged conduct, etc.). Upon receipt of Part 1 of the OGE Form 202, OGE’s Program Manager for Justice Referrals (Program Manager) will assign an OGE tracking number to the notification. OGE will then confirm receipt of the referral and inform the referring office of the internal OGE tracking number assigned.

III. Quarterly Status Updates Prior to Filing Part 2 (Provided by the Referring Office)

Following receipt of Part 1 of the OGE Form 202, OGE’s Program Manager will contact the referring office on a quarterly basis for status updates. When contacted by the Program Manager for a status update, the referring office may provide a concise response

³ The referring office is not responsible for completing Part 3, unless the referring office is supervised by the DAEO of the employing agency.

sufficient to describe the status of the matter, such as any of the following non-exclusive examples:

- Awaiting response from DOJ;
- DOJ declined prosecution, investigation pending;
- DOJ declined prosecution, investigation concluded (adverse ethics-related findings against the subject);
- DOJ declined prosecution, investigation concluded (no adverse ethics-related findings against the subject);
- DOJ initiated a criminal prosecution;
- DOJ initiated an action for civil penalties; or
- DOJ resolved the matter by agreement with the subject.

IV. Part 2 of the OGE Form 202 (Filed by the Referring Office)

Part 2 is submitted to OGE by the referring office after both of the following events have occurred or, in the sole discretion of the referring office, sooner:

- (1) DOJ has (a) declined prosecution; (b) initiated prosecution or taken other legal action that is a matter of public record; or (c) settled the matter through formal agreement;

and

- (2) Investigation of the matter has concluded.⁴

This part collects information about:

- The identity of the subject employee;
- The name of the employing agency and component;
- The relevant legal authorities implicated by the alleged conduct;
- Actions taken, or determinations made, by DOJ; and
- Other information deemed pertinent by the referring office.⁵

If the referring office has made an adverse finding related to the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) or agency supplemental standards of conduct, the referring office is encouraged—but not required—to provide OGE with a copy of either the report of investigation or a summary of the referring office’s findings.⁶ This

⁴ If a report of investigation is issued, investigation of the matter will normally be considered “concluded” upon release of the report to the employing agency. If a report of investigation is not issued, however, investigation of the matter will normally be considered “concluded” when the referring office closes or otherwise terminates the investigation.

⁵ If some or all of this information cannot be disclosed, the referring office should discuss the reason for nondisclosure with OGE’s Program Manager for Justice Referrals or OGE’s Deputy Director for Compliance.

⁶ The referring office may redact the report of investigation to the extent deemed necessary or appropriate.

information will facilitate OGE's efforts to confirm that the agency has actively considered taking corrective action against the employee on the basis of the referring office's findings.

V. Part 3 of the OGE Form 202 (Filed by the DAEO or the DAEO's Designee)

If the referring office indicates, in Part 2 of the OGE Form 202, that it has not made an adverse finding related to the Standards of Conduct or agency supplemental standards of conduct, OGE's Program Manager will normally close OGE's tracking of the matter. Part 3 of the OGE Form 202 is applicable only when:

- (1) DOJ has (a) declined prosecution; (b) initiated prosecution or taken other legal action that is a matter of public record; or (c) settled the matter through formal agreement;
- (2) Investigation of the matter has concluded; and
- (3) The referring office has made an adverse finding regarding the employee involved related to the Standards of Conduct or agency supplemental standards of conduct.

If the above-stated criteria have been met, the Program Manager will complete the boxes in the "OGE use only" section at the top of Part 3 of the OGE Form 202.⁷ The Program Manager will then provide the form to the employing agency. The DAEO or the DAEO's designee is required to ascertain: whether disciplinary or other corrective action has been initiated or taken against the employee who is the subject of the adverse finding; if no disciplinary or other corrective action has been initiated or taken, whether an official with authority over the employee actively considered whether such action was warranted; and, if not, the reason that the official did not actively consider whether corrective action was warranted. Then, the DAEO or the DAEO's designee is required to complete, sign, and submit Part 3 to the Program Manager. Normally, the Program Manager will require that the signed and completed Part 3 be submitted to OGE within 30 days.

VI. Additional Information

Questions regarding either these procedures or the revised OGE Form 202 may be directed to Ciara Guzman, Program Manager for Justice Referrals, at (202) 482-9241 or cmguzman@oge.gov.

⁷ If the employee who is the subject of the adverse finding is the head of an agency, the Program Manager will not complete Part 3 of the OGE Form 202. Instead, the Program Manager will notify the Director of OGE through the Deputy Director for Compliance.

NOTIFICATION OF CONFLICT OF INTEREST REFERRAL PART 1: INITIAL NOTIFICATION

(to be filed by the referring office)

File Part 1 of this form with the U.S. Office of Government Ethics (OGE) upon any referral made to the U.S. Department of Justice (DOJ), pursuant to 28 U.S.C. § 535, involving:

- (1) A possible violation under section 203, 205, 207, 208, and/or 209 of title 18, United States Code;
- (2) A civil or criminal matter related to the filing or non-filing of a financial disclosure report under applicable legal authorities (*e.g.*, 5 U.S.C. app. § 104 or 18 U.S.C. § 1001); or
- (3) A civil matter involving outside earned income under 5 U.S.C. app. § 501 or outside activities under 5 U.S.C. app. § 502.

Submit this form via email to referrals@oge.gov. OGE will confirm receipt and notify the referring office of the OGE tracking number assigned.

1. Federal office referring the matter to the Department of Justice:	2. Date of referral:
3. Point of contact at the referring office:	
Name:	Title:
Telephone:	Email:
4. Tracking/investigation number assigned by the referring office:	
5. Department of Justice office to which the matter was referred:	
Public Integrity Section, Criminal Division	
U.S. Attorney (<i>specify district</i>)	
Other DOJ office (<i>specify office</i>)	

OGE use only

OGE tracking number:	
	Date received:

NOTIFICATION OF CONFLICT OF INTEREST REFERRAL PART 2: DISPOSITION OF REFERRAL

(to be filed by the referring office)

File Part 2 of this form with the U.S. Office of Government Ethics (OGE) following the referral made to the U.S. Department of Justice (DOJ), pursuant to 28 U.S.C. § 535, after both of the following have occurred:

- (1) DOJ has (a) declined prosecution; (b) initiated prosecution or taken other legal action that is a matter of public record; or (c) settled the matter through formal agreement; **and**
- (2) Investigation of the matter has concluded.

Submit this form via email to referrals@oge.gov. OGE will confirm receipt.

1. Federal office referring the matter to the Department of Justice:

2. Point of contact at the referring office:

Name:

Title:

Telephone:

Email:

3. Tracking/investigation number assigned by the referring office:

4. OGE tracking number:

5. Statutes involved in the matter (*mark all that apply*):

18 U.S.C. § 203

18 U.S.C. § 1001 (*in connection with financial disclosure or other ethics documents only*)

18 U.S.C. § 205

5 U.S.C. app. § 104 (*financial disclosure*)

18 U.S.C. § 207

5 U.S.C. app. § 501 (*outside earned income*)

18 U.S.C. § 208

5 U.S.C. app. § 502 (*outside activities*)

18 U.S.C. § 209

Other (*specify*):

6. Disposition of the referral to DOJ:

7. Has there been an adverse finding regarding the employee involved related to the Standards of Ethical Conduct for Employees of the Executive Branch (5 C.F.R. part 2635) or agency supplemental standards of conduct?

yes (*complete boxes 8-12 below*)

no (*do not complete the rest of this form*)

If the response in box 7 is “yes,” complete boxes 8-12, below.

8. Name and title of the employee or former employee involved:

9. Agency component where the employee/former employee is/was employed:

10. Has the employing agency considered taking corrective action against the employee?

yes

no

unknown

11. Have you elected to attach either a report of investigation or summary?

yes

no

12. (*optional*) Provide any other information you consider pertinent:

NOTIFICATION OF CONFLICT OF INTEREST REFERRAL PART 3: CONSIDERATION OF CORRECTIVE ACTION

(to be filed by the DAEO of the employing agency or the DAEO's designee)

File Part 3 of this form with the U.S. Office of Government Ethics (OGE) following the referral made to the U.S. Department of Justice (DOJ), pursuant to 28 U.S.C. § 535, after all of the following have occurred:

- (1) DOJ has (a) declined prosecution; (b) initiated prosecution or taken other legal action that is a matter of public record; or (c) settled the matter through formal agreement;
- (2) Investigation of the matter has concluded; **and**
- (3) The referring office has made an adverse finding regarding the employee involved related to the Standards of Ethical Conduct for Employees of the Executive Branch or any agency supplemental standards of conduct.

Submit this form via email to referrals@oge.gov. OGE will confirm receipt.

OGE use only

Referring office tracking/investigation number:		OGE tracking number:	
Name of agency employee involved:		Agency:	
Name of Designated Agency Ethics Official:		Telephone:	
Name of OGE point of contact:		Telephone:	

1. Whether or not action is warranted, provide the name and title of the agency official who has authority to take disciplinary or correction action with regard to the employee involved.

Name:

Title:

2. Has disciplinary or other corrective action been either initiated (*e.g.*, advance written notice issued pursuant to 5 U.S.C. § 7513) or taken?

yes (*describe action below, then skip to box 4*)

no

Describe any disciplinary action or other corrective action initiated or taken:

3. If disciplinary or other corrective action has not been initiated or taken, did the official identified in box 1, above, actively consider whether such action was warranted before affirmatively deciding not to take action?

yes

no (*explain why not below*)

If the response in box 3 is “no,” explain why not:

Mark this box if additional sheets or documents are attached.

Attachments

4. Name, title and contact information of DAEO or DAEO’s designee signing this form:

Name:

Title:

Telephone:

Email:

5. I certify that I have exercised due diligence in gathering the requested information and that the information provided in this form is accurate and complete to the best of my information and belief.

Signature

Date