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LEGAL ADVISORY

TO: Designated Agency Ethics Officials

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SUBJECT: Understanding the Recusal Obligations of Employees Affiliated with State and Local Government Entities

The U.S. Office of Government Ethics (OGE) is issuing this Legal Advisory to clarify the recusal obligations for employees with outside employment interests with state and local government entities under the primary financial conflict of interest law, 18 U.S.C. § 208, and the impartiality rule, 5 C.F.R. § 2635.502.¹ Consistent with OGE’s prior guidance, employees with employment interests with most state agencies have recusal obligations only to that discrete agency,² and this Advisory explains that this analysis applies to local agencies as well.³ These recusal obligations include the whole of any larger agency in which the discrete agency is situated. However, employees with employment interests with certain high-level state and local entities—such as the Governor’s Office, the Mayor’s Office, the state legislature, the city legislature, and the state’s highest court—have recusal obligations extending to the whole state or local government, including all of its agencies. Similarly, under the impartiality rule, attorneys affiliated with a State Attorney General’s Office have a party matter recusal obligation extending to the entire state government due to their service as an “attorney” to the state as a whole.⁴

¹ In the context of 18 U.S.C. § 208, the term “employment interest” includes serving as an “officer, director, trustee, general partner or employee” as well as “negotiating or hav[ing] any arrangements concerning prospective employment.” See 18 U.S.C. § 208(a). In the context of 5 C.F.R. § 2635.502, the term “employment interest” includes serving within the last year “as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee.” See 5 C.F.R. § 2635.502(b)(1)(iv).

² See OGE DAEOgram DO-07-006, at 20 (Feb. 23, 2007).

³ A recusal obligation arises under the impartiality rule only after the employee or agency designee has determined a reasonable person with knowledge of the relevant facts would question the employee’s impartiality in the matter. See 5 C.F.R. § 2635.502(a), (c).

⁴ See *id.* § 2635.502(b)(1)(iv) (including in the definition of “covered relationship” persons for whom an individual served as an “attorney” within the past year).



I. Identifying the Relevant “Organization” Under the Primary Financial Conflict of Interest Law, 18 U.S.C. § 208, for State and Local Entities

In order to determine the scope of an employee’s recusal obligations under the primary financial conflict of interest law,⁵ ethics officials must identify the relevant state or local “organization” whose interests are imputed to them.⁶ As OGE has advised in the past in relation to state entities, generally only the discrete agency with which an employee is affiliated is considered the relevant “organization,”⁷ and this same analysis applies to local entities. However, if the state or local entity is considered to be “at a relatively high level in a state [or local] office,” an employee will have a recusal obligation to the whole state or local government, including all of its agencies.⁸ Generally, only state and local entities vested with the primary executive, legislative, and judicial power of the entire state or local government are considered to be “high level.” These entities include the Governor’s Office, the Mayor’s Office, the state legislature, the city legislature, and the state’s highest court.⁹ Individuals with employment interests with these high-level state and local entities have an imputed interest under 18 U.S.C. § 208 to the whole state or local government.

Example 1: An employee of a locality’s Mayor’s Office will be going on detail to U.S. Agency X under the Intergovernmental Personnel Act (IPA). As part of their work at U.S. Agency X, they will review a regulation that would create new requirements for localities in disposing hazardous waste products. The regulation would impact the operations of local agencies responsible for waste management. Although the employee is not employed with the locality’s Department of Waste Management, because they are an employee of the Mayor’s Office, the financial interests of the local government as a whole—including all of its agencies—are imputed to the employee. Therefore, they would have a disqualifying financial interest in this particular matter under 18 U.S.C. § 208, and absent a waiver under 18 U.S.C. § 208(b)(1), they may not participate in review of the regulation.

⁵ 18 U.S.C. § 208.

⁶ Under 18 U.S.C. § 208(a), Federal employees may not participate in particular matters that would affect their own financial interests or those of others imputed to them, including those of any “organization in which [they are] serving as officer, director, trustee, general partner or employee” as well as any “organization with whom [they are] negotiating or ha[ve] any arrangement concerning prospective employment.” Under 18 U.S.C. § 18, “organization” is defined as “a person other than an individual.” OGE’s regulations implementing 18 U.S.C. § 208 track the language of the statute in imputing to employees the financial interests of “[a]n organization or entity which the employee serves as officer, director, trustee, general partner or employee.” *See* 5 C.F.R. § 2640.103(c)(4). The regulations at 5 C.F.R. part 2640 do not define the term “organization.”

⁷ *See* OGE DAEogram DO-07-006, at 20; *see also* OGE Formal Adv. Op. 82 OGE 1, at 3 (Feb. 12, 1982) (explaining that “a state’s higher education system and/or institutions need not invariably be joined with the rest of the state governmental structure into one ‘organization’ for the purposes of section 208(a)”). Note that while 82 OGE 1 suggested that the analysis of the term “organization” may differ when applied to state-level agencies outside the higher education context, that interpretation was not necessary to the conclusions reached in 82 OGE 1. To the extent that 82 OGE 1 suggests that all state agencies and departments are part of the same “organization” for purposes of 18 U.S.C. § 208, OGE DAEogram DO-07-006 and this Legal Advisory clarify that guidance.

⁸ *See* OGE DAEogram DO-07-006, at 20.

⁹ Because district-level courts are ultimately part of the state court system and defer to the state’s highest court on matters of state law, there is not a local judicial equivalent to the state’s highest court for which an employee would have a locality-wide recusal obligation.

Example 2: An employee of a locality’s Department of Parks and Recreation is also going on detail to U.S. Agency X under the IPA. Like the employee in Example 1, they will review the regulation creating new requirements for localities in disposing hazardous waste products. Because the employee is employed with the locality’s Department of Parks and Recreation, they have a financial interest in particular matters having a direct and predictable effect only on the locality’s Department of Parks and Recreation, not the local government as a whole. Since the Department of Parks and Recreation is not responsible for waste management and will not be directly and predictably affected by the regulation, the employee may participate in review of the regulation.

As illustrated by Example 2, for employees with employment interests in lower-level state and local government agencies, the discrete agency will usually be considered the relevant “organization” rather than the state or local government as a whole. In some instances, however, the discrete agency may be part of a larger state or local entity. In those instances, consistent with the treatment of Federal agencies under the post-government employment laws, the term “organization” includes the whole of any larger agency in which the discrete agency is situated.¹⁰

Example 3: An employee of U.S. Agency X has an arrangement for future employment with State A’s Unemployment Agency. As part of their duties for U.S. Agency X, the employee is asked to participate in an investigation involving State A’s Department of Human Services. After review, the ethics official finds that State A’s Unemployment Agency is a component of State A’s Department of Human Services. Because of this, the ethics official determines that the employee’s arrangement is with State A’s Department of Human Services. As such, the employee has a disqualifying financial interest in the investigation under 18 U.S.C. § 208 and may not participate absent a waiver under 18 U.S.C. § 208(b)(1).

II. Identifying the Relevant “Person” Under the Impartiality Rule, 5 C.F.R. § 2635.502, for State and Local Entities

In order to determine the scope of an employee’s recusal obligations under the impartiality rule,¹¹ ethics officials must identify the relevant state or local organization with whom the employee has a “covered relationship.”¹² Consistent with the approach described in

¹⁰ See 5 C.F.R. § 2641.204(g)(2) (interpreting the post-government employment conflict of interest statute at 18 U.S.C. § 207). If it is unclear whether a state or local entity is part of a larger agency, and therefore whether a larger agency will constitute the employing organization for purposes of 18 U.S.C. § 208, ethics officials should consult the relevant enabling legislation in state or local laws as appropriate.

¹¹ 5 C.F.R. § 2635.502.

¹² Under 5 C.F.R. § 2635.502, employees are required to refrain from participating in a particular matter involving specific parties if a “person” with whom they have a “covered relationship” is or represents a party to the matter, and the employee determines that the circumstances would cause a reasonable person to question their impartiality in the matter. Among those with whom an employee has a “covered relationship” is “[a]ny person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee.” *Id.* § 2635.502(b)(1)(iv). The term “person” is defined for purposes of the Standards of Conduct as “an individual, corporation and subsidiaries it controls, company, association, firm, partnership, society, joint stock company, or any other organization or institution, including any officer, employee, or agent of such person or entity...The term is all-inclusive and applies to commercial ventures and nonprofit organizations as well as to

Part I, for employees with employment interests with most state and local entities, the relevant “person” with whom they have a “covered relationship” is typically the discrete state or local agency in which they have served, including the whole of any larger agency in which the discrete agency is situated. However, where an employee is or was affiliated with an entity that is “at a relatively high level in a state [or local] office”¹³—such as the Governor’s or Mayor’s Office, the state or city legislature, or the state’s highest court—the whole state or local government, including all of its agencies, is the relevant “person.”¹⁴ As explained above, this scoping reflects that these high-level offices serve as the heads of the executive, legislative, and judicial branches of government and hold final decision-making authority for their respective functions within a state or local government.

Example 4: An employee of U.S. Agency Y left their position at State X’s Department of Labor six months ago. The employee is asked to review a claim involving whether State X’s Department of Transportation engaged in employment discrimination. In this case, the employee would be correct in concluding that they do not have a covered relationship with State X or State X’s Department of Transportation by virtue of their previous employment with State X’s Department of Labor.

For employees who serve or have served as an attorney with a State Attorney General’s Office, ethics officials should note that the impartiality rule could require broader recusals than those required under 18 U.S.C. § 208—specifically when a state is or represents a party to a matter. While an individual with an employment interest with a State Attorney General’s Office has an imputed financial interest under 18 U.S.C. § 208 only to that office, an employee who serves or has served as an attorney in a State Attorney General’s Office has a “covered relationship” with the state as a whole. The term “covered relationship” under the impartiality rule includes not only those persons for whom an individual was an employee, but also persons for whom an individual has served as an attorney within the last year.¹⁵ Because State Attorney General’s Offices typically serve as the attorneys for all of a state’s agencies and their primary client is the state itself, employees who serve or have served as an attorney with a State Attorney General’s Office have a “covered relationship” with the entire state.¹⁶

Example 5: An employee of U.S. Agency Z left their position as an Assistant Attorney General in State B’s Attorney General’s Office four months ago. While working at U.S. Agency Z, a case arises before the employee in which State B is a named party. In this case, the employee would be correct in concluding that they have a covered relationship with State B, including all of its agencies. Therefore, if the employee determines that a

foreign, State, and local governments. . .” *Id.* § 2635.102(k) (to be recodified at 5 C.F.R. § 2635.102(j) as of Aug. 15, 2024).

¹³ See OGE DAEOgram DO-07-006, at 20.

¹⁴ Even when the prohibitions of § 2635.502(a) do not apply, an employee’s supervisor may still decide not to assign certain work to an employee if the employee’s participation would otherwise raise appearance concerns because of, for example, the nature of the employee’s previous work or position with a state or local entity.

¹⁵ See 5 C.F.R. § 2635.502(b)(1)(iv).

¹⁶ This same analysis applies, for example, to employees who serve or have served as an attorney with a city attorney’s office. As the primary client of the city attorney’s office is the city itself, such an employee would have a “covered relationship” with the city as a whole.

reasonable person with knowledge of the relevant facts would question their impartiality in the case involving State B, they should not participate unless they receive authorization to participate from the agency designee pursuant to 5 C.F.R. § 2635.502(d).

III. Conclusion

As described above, under the primary financial conflict of interest law and the impartiality rule, employees with employment interests in most state and local agencies have recusal obligations only to that discrete agency, including the whole of any larger agency in which the discrete agency is situated. However, employees with employment interests with certain high-level state and local entities—such as the Governor’s Office, the Mayor’s Office, the state legislature, the city legislature, and the state’s highest court—have recusal obligations extending to the whole state or local government, including all of its agencies. Additionally, attorneys affiliated with a State Attorney General’s Office have recusal obligations under the impartiality rule extending to the entire state government due to their service as an “attorney” to the state as a whole. Ethics officials with questions about this guidance should contact their OGE Desk Officer.