Office of Government Ethics

99 X 10

**Memorandum dated April 28, 1999,
from Stephen D. Potts, Director,
to Designated Agency Ethics Officials
Regarding Ethical Challenges of
Privatization and Partnering**

The Clinton Administration's efforts to "reinvent" Government have led to a surge in the privatization of Federal functions over the past six years. Variously termed partnering, out-sourcing, contracting out, downsizing, devolution, cooperative agreements, integrated process teams or other similar descriptions, the common characteristic entails transfer of a Government function to the private sector. Both the privatization process itself and any resulting arrangements which involve interactive partnering between Government employees and the private sector work force raise challenging ethical considerations for executive branch employees and ethics officials.

The purpose of this memorandum is to remind ethics officials, who in turn should counsel employees, about our legal obligations under those existing ethics principles, which still remain a viable, controlling framework for official involvement in transferring Government functions to the private sector and in any resulting Government-private interactive work performance.

THE PRIVATIZATION PROCESS

The Office of Government Ethics (OGE) has previously addressed the types of legal issues that typically arise during the process of privatizing. *See* OGE Informal Advisory Memorandum 95 x 10, originally printed as an article in the *Government Ethics Newsgram* (Summer 1995, vol. 12, no. 2, pp. 1-3), entitled "Privatization Issues Affect Federal Employees." The issues examined therein concerned the potential for conflict under 18 U.S.C. § 208 when employees involved in the devolution process have a financial interest because their jobs might be eliminated and transferred to the private sector, or because they are part of an Employee Stock Ownership Plan (ESOP) that seeks to perform the privatized function, or because they are negotiating or have an arrangement with an outside entity to perform the privatized function. Additionally, that opinion addressed restrictions under 18 U.S.C. § 203 and § 205 on representational activities to the Government on behalf of private entities, procurement integrity considerations, and post-employment restrictions under 18 U.S.C. § 207.

Subsequent to the publication of Informal Advisory Memorandum 95 x 10, OGE issued a regulatory provision now codified at 5 C.F.R. § 2640.203(d), which had the effect of modifying the analysis in footnote 1 of that opinion regarding 18 U.S.C. § 208, though the result may be the same, in most cases. Footnote 1 had concluded that participation in a particular matter affecting only an employee's Federal salary was not encompassed by the statutory bar. Discussion at 60 *Fed*. *Reg*. 44707 (August 28, 1995) in the preamble to the new regulation (as first published on an interim basis) modified that position. As indicated therein, because of somewhat conflicting interpretations over the years, and after further consultation with, and concurrence of, the Department of Justice, it was decided to treat financial interests that arise from Government salary and employment as disqualifying under section 208, but to exempt most of those financial interests by the accompanying regulation, as permitted by 18 U.S.C. § 208(b)(2).

With that caveat, OGE's Informal Advisory Memorandum 95 x 10 remains a seminal guide concerning ethics matters that arise in connection with the process of privatization. Of course, as that opinion suggests, the issues must necessarily be examined on a case-by-case basis, because the particular underlying facts will vary.

The regulatory exemption at 5 C.F.R. § 2640.203(d) itself adds considerably to the body of OGE guidance concerning privatization. It permits an employee to fully participate in particular matters affecting his Government position, salary and benefits, so long as those matters do not affect him individually or specially, and so long as they do not affect his interests beyond those arising from Government employment (such as the creation of a private employment position through an ESOP, contract or other arrangement). These principles are well enunciated by Examples 7 and 8 following section 2640.203(d), as further explained in the preamble to the final rule at 61 *Fed*. *Reg*. 66838 (December 18, 1996). Even with regard to matters individually or specially affecting an employee's own Government position, salary and benefits, she may make requests and recommendations, but not determinations, as illustrated by Example 10.

WORK PERFORMANCE INTERACTION WITH THE PRIVATE SECTOR

It has become increasingly apparent that the ethics issues facing Government employees go well beyond the concerns associated with the process of privatization, extending to the partnering arrangements that may result from privatization whereby Government employees work side-by-side with private company employees or interact with them in performing a function that was previously the primary province of the Government. Some Government employees have assumed, because of the political direction toward privatization and partnering, that the established ethical rules and conflict of

interest statutes may have been overridden or are subject to special exceptions in those circumstances. Employees need to be reminded, however, that the existing ethics statutes and regulations continue to apply in both the privatization process and any resulting arrangements that involve partnering, and that these rules help ensure the integrity of Government operations and prevent employee ethical violations.

Agencies are encouraged to integrate relevant examples into their ongoing employee training programs, based on their particular experiences, so as to strengthen awareness that privatization does not alter the governing ethical restrictions on employee behavior during privatization and subsequent interaction with private entities that perform Government-related functions. In addition to the conflict of interest statutes cited above, the Standards of Ethical Conduct for Employees of the Executive Branch at 5 C.F.R. part 2635 should be emphasized, especially in these areas:

- Gifts from outside sources, such as entertainment, meals, awards, transportation, and parties or receptions celebrating employee achievements;

- Outside financial interests that conflict with the performance of official duties, such as employment of a spouse or children, investments, and seeking future employment (based largely on 18 U.S.C. § 208);

- Adverse appearances arising from participation in official matters where the employee has a covered relationship under section 2635.502 that would cause a reasonable person with knowledge of the facts to question his impartiality;

- Misuse of Government resources, including travel funds, transportation, equipment, and information; and

- Endorsements and preferential treatment of private entities.

As specific fact patterns arise, OGE will continue to provide guidance through oral and written advice. *See*, for example, OGE Informal Advisory Letter 98 x 8 (June 25, 1998) on the use of contractor-provided transportation.

The key point is that the statutes and regulations collectively referred to as Government ethics rules remain unchanged by privatization.