

Growing Old Together

Inspector General and Ethics Counsel Changing Environments & Challenges

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Both the Inspector General Act and the Ethics in Government Act date from 1978, an important year for "good government," with the concurrent creation of the Merit Systems Protection Board and the office of special counsel.¹ The past thirty-three years have given inspector general counsels and designated agency ethics officials the opportunity to work together and iron out some of the problems we noted in our article of 1995.² Nevertheless, questions continue to arise because of the different roles each plays. The purpose of this article is to revisit basic issues and report on the legal and practice changes that have occurred in the intervening years. Our goal is to provide an update, overview, and some suggestions for best practices regarding the IG counsel/DAEO relationship and respective roles. In addition to identifying relevant statutes and policies, we intend to clarify misunderstandings and restate our common objectives.

The IG Counsel Develops

The Inspector General Act of 1978 mandated only three positions within each Office of Inspector General: the Inspector General and Assistant Inspectors General for Auditing and Investigations.³ Neither the original statute, nor its first major amendment in 1988, mentioned the role of counsel within an OIG. Indeed, many IGs initially received legal advice and representation from attorneys working in their agency's Office of General Counsel.⁴ However, because independence is the cor-

nerstone of the OIGs, independence of counsel was a recurring issue.

While some IGs initially relied on OGC counsel, they began to recognize the value of having their own counsel. Since the IG Act gave IGs broad authority to hire employees, contract with persons with appropriate knowledge and skills, and organize their own offices, in the decades following the IG Act's passage, many IGs eventually shed their assigned OGC attorneys and hired attorneys to work exclusively as part of the OIG staff.⁵

Congress Considers Independent IG Counsel

The Federal Acquisition Streamlining Act of 1994 was a key turning point leading to IG Act amendments requiring presidentially appointed IGs to have independent counsel.⁶ Section 6007 of the FASA directed the comptroller general to review the independence of legal services provided to presidentially appointed IGs.

GAO Reports on IG Legal Services

Consistent with the FASA's requirement, the Government Accountability Office issued GAO Report GAO/OGC-95-15, "Inspectors General: Independence of Legal Services Provided to IGs," in March 1995.⁷ In this report to Congress, GAO compared the independence of legal services provided to IGs by attorneys located in agency OGCs with those provided by attorneys hired by and located in OIGs. GAO asked whether agency attorneys could provide the independent legal services necessary for an official who is statutorily required to review independently that agency's programs and operations.

GAO reviewed the premise of federal IG functions from the IG Act, as amended, reporting that the intent was to establish OIGs in departments and agencies to consolidate the audit and investigative functions of those departments and agencies in an independent office under the leadership of a senior official, the IG.

1) IG Act, 5 U.S.C. App., Pub. Law No. 95-452, 92 Stat. 1101 (1978), as amended; Ethics in Government Act, 5 U.S.C. App., Pub. Law No. 95-521, 92 Stat. 1824 (1978), as amended. The Merit Systems Protection Board and the Office of Special Counsel were created by the Civil Service Reform Act of 1978, Pub. Law No. 95-454, 92 Stat. 1111-1227 (1978).

2) The substance of this article was presented in lectures given to ethics attorneys at the Interagency Ethics Council on May 4, 1995, and at the Office of Government Ethics Annual Conferences in 1995 and 1996 in, respectively, Philadelphia and Williamsburg, Virginia. The original article, which sought to provide a comprehensive description of statutory and regulatory rules that define the roles of federal government attorneys serving in ethics and Office of Inspector General counsel positions, was published as "The Role of Inspectors General in Ethics: Inspector General Counsel and Ethics Counsel Interface" (without copyright restrictions) in the August 1995 edition of the Federal Ethics Report. A second publication, essentially a restatement of the original, was published as "Legal Eagles: Ethics" in the Spring 1996 edition of the *Journal of Public Inquiry*.

3) IG Act, 5 U.S.C. App., §. 3(d).

4) GAO/OGC-95-15, March 1, 1995, "Inspectors General-Independence of Legal Services Provided to IGs," Appendix IV, pp. 19-20.

5) 5 U.S.C. App., §. 6(a)(7), (9).

6) Pub. Law No. 103-355.

7) GAO/OGC-95-15, p. 12.

Based on a survey of 27 OIGs, and interviews with five IGs whose legal advisors were located in the OGC and seven whose legal advisors were on the OIG staff, GAO concluded that there was no evidence that the composition and duties of the legal staffs of the IG Offices reviewed for their report were significantly different based on their organizational location.⁸ Further, GAO reported that it was the preference of the individual IGs that influenced the functions and activities of their counsel. Finally, GAO found no indication that attorneys located in agency OGCs were less able than those within OIGs to provide independent legal services.⁹ So with that result, no changes were made to the status of IG counsel.

The Homeland Security Act of 2002 Gives IGs Independent Law Enforcement Authority

The structure and authority of the OIGs received a major boost in 2002 with the second major IG Act amendment.¹⁰ The Homeland Security Act of 2002 amended Section 6 of the IG Act to allow the Attorney General, after an initial determination of need (for certain IGs not exempted), to authorize full law enforcement powers for eligible personnel of each of the various offices of presidentially appointed IGs.¹¹ As required by the Homeland Security Act, the attorney general issued guidelines governing the exercise of such law enforcement powers.¹² The guidelines provide that OIGs have "primary responsibility for the prevention and detection of waste and abuse, and concurrent responsibility [with the Department of Justice] for the prevention and detection of fraud and other criminal activity within their agencies and their agencies' programs."¹³

Prior to enactment of the Homeland Security Act, the IG Act had not provided firearms, arrest, or search warrant authority for IG investigators. Rather, the IGs of the various executive agencies relied on a Memoranda of Understanding that "provided temporary grants of law enforcement power through deputations. As the volume of investigations warranting such police powers increased, deputations were authorized on a blanket or [OIG] office-wide basis."¹⁴ Nevertheless, today, certain IGs, such as the IG for the Department of Defense, en-

joyed – and today continue to enjoy – specific grants of statutory authority under which they exercise law enforcement powers.¹⁵

Congress Mandates Independent IG Counsel

In 2008, it was the lawyers' turn. The third major IG Act amendment, the IG Reform Act of 2008, addressed a number of matters related to enhancing the independence and prestige of the IGs.¹⁶ Among them was a provision for an independent counsel to support IGs. Section 6(a) of the Reform Act amended Section 3 of the IG Act to add:

"(g) Each Inspector General shall, in accordance with applicable laws and regulations governing the civil service, obtain legal advice from a counsel either reporting directly to the Inspector General or another Inspector General."

With this provision, IGs no longer had to rely, for confidential legal advice, on attorneys employed by and reporting to someone else – the general counsel. This provision gave each IG a dedicated IG counsel whose job, job assignments, and professional loyalty belonged exclusively to the IG.

In his signing statement, President Bush addressed the different roles of the agency and IG counsel as follows:

It is important that inspectors general have timely and accurate legal advice. It is also important that agencies have structures through which to reach a single, final authoritative determination for the agency of what the law is. This determination is subject to the authority of the attorney general with respect to legal questions within, and the president's authority to supervise, the executive branch and, of course, the courts in specific cases or controversies. To this end, the "rule of construction" in Section 6 ensures that, within each agency, the determinations of the law remain ultimately the responsibility of the chief legal officer and the head of the agency.¹⁷

With these words, the president emphasized that even though the OIG is independent, the IG does not determine law for the agency; nor does the IG counsel. The IG counsel's role is to advise and represent only the IG. The

8) *Id.*
9) *Id.*

10) Pub. Law No. 107-296, Section 812 of the Homeland Security Act amended Section 6 of the IG Act to provide full, statutory law enforcement powers.

11) Section 812(a), Homeland Security Act; 5 U.S.C. App. § 6(e)(1)-(2). The OIGs listed in Section 6(e)(3) of the IG Act are exempt from this requirement of an initial determination of need.

12) Section 812 of the Homeland Security Act; 5 U.S.C. App. § 6(e)(1), (4); Attorney General Guidelines for Offices of Inspector General with Statutory Law Enforcement Authority (hereinafter "Guidelines"), Dec. 8, 2003.

13) *Id.*, p. 1.
14) *Id.*

15) *Id.*

16) IG Reform Act of 2008, Pub. Law No. 110-409, 122 Stat. 4302.

17) Statement on Signing the Inspector General Reform Act of 2008, 44 Weekly Compilation of Presidential Documents 1345 (Oct. 14, 2008).

agency general counsel is the sole attorney with authority to interpret the agency's law.

Independence of the IG

In addition to the aforementioned amendments that enhanced IG independence, the IG Act contains other provisions designed to ensure that IGs carry out their responsibilities independently. For example, IGs do not report to those directly responsible for carrying out the programs and activities subject to audit and investigation. Rather, they report to, and are under the general supervision of, the agency head or the official next in rank, if such authority is delegated.¹⁸ OIGs have their own hiring authority, as well as the authority to enter into contracts and to structure their offices and perform their mission as they see fit. With few exceptions, neither the agency heads nor subordinates are to prevent or prohibit IGs from initiating, carrying out, or completing any audit or investigation or from issuing any subpoena.¹⁹ Further, IGs may not accept cash awards or bonuses from the agency head.²⁰ Presidentially appointed IGs must be appointed by the president with the advice and consent of the Senate "without regard to political affiliation and solely on the basis of integrity and demonstrated ability" in fields critical to OIG functions.²¹ They may be removed from office only by the president, who is required to inform both Houses of Congress not later than 30 days before the removal.²² In addition, all IGs are required to report at least semiannually to Congress (and some IGs are required to report quarterly),²³ but Congress cannot order or prohibit the IG from conducting an investigation, audit, or other review, or from issuing a subpoena, except through legislation. OIGs are prohibited from carrying out agency programs and operations so that they can objectively and independently

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18) 5 U.S.C. App., Sec. 3(a).

19) 5 U.S.C. App., Sec. 3(a). Under the IG Act, the heads of only six agencies – the Departments of Defense, Homeland Security, Justice, and the Treasury, plus the U.S. Postal Service and the Federal Reserve Board – may prevent from the IG from initiating, carrying out, or completing an audit or investigation, or issuing a subpoena. These agency heads may only exercise this authority for specific reasons, including to protect national security interests or ongoing criminal investigations.

20) 5 U.S.C. App., Sec. 3(f).

21) *Id.*

22) 5 U.S.C. App., Sec. 3(b).

23) 5 U.S.C. App., Sec. 5.

audit and investigate such programs and operations.²⁴ Moreover, OIGs in the establishments have a separate budget authority that the agency head must submit to the president.²⁵ Finally, the IG Reform Act established the the Council of Inspectors General on Integrity and Efficiency.²⁶ The integrity committee was established under CIGIE as a receiver to review and refer for investigation allegations of wrongdoing made against an IG or designated OIG employees.²⁷ In short, all of these provisions were intended to ensure that IGs are able to fulfill their mission without interference from senior officials, such as general counsels and management.

DAEO's Role

Title 5 of the Code of Federal Regulations, Part 2600 implements 5 U.S.C. App., the Ethics in Government Act of 1978, as amended, the statute that created the Office of Government Ethics, the overseer of ethics regulation in the executive branch.²⁸ As the agency responsible for directing ethics programs in executive departments and agencies, OGE issues rules, directives, and advisory opinions on ethics matters. It partners with executive branch agencies and departments to prevent conflicts of interest on the part of executive branch employees and resolves the conflicts of interest that occur. Pursuant to the authority granted under Title 5 of the Ethics in Government Act, OGE directs the administration of agency ethics programs and agency DAEOs. Title 5 of the C.F.R., Section 2638.201, *et. seq.*, mandates that each agency shall have a DAEO (and alternate DAEO) to coordinate and manage the agency's ethics program and provide liaison with the OGE regarding such ethics program. The director of OGE and agency DAEOs have different roles from that of the IG and the IG counsel. With noteworthy exceptions, the director of OGE directs, and the agency DAEO and deputy DAEOs implement, the Ethics in Government Act. The DAEO's mission is to provide ethics advice and preventive legal assistance to agency employees. Specifically, as described in 5 C.F.R. 2638.203, the DAEO's duties include liaison with OGE, review of financial disclosure reports (one of the most unappreciated and tedious tasks in government), initiation and maintenance of ethical education and training programs, and monitoring of administrative actions and sanctions.

Like IGs and their counsel, the functions and authorities of OGE and agency DAEOs have grown in

24) 5 U.S.C. App., Sec. 9(a).

25) 5 U.S.C. App., Sec. 6(f).

26) 5 U.S.C. App., Sec. 11.

27) 5 U.S.C. App., Sec. 11(d)(1).

28) 5 U.S.C. App., Pub. Law No. 95-521, 92 Stat. 1824.

scope and prestige since 1978. For example, while requiring executive branch appointees to sign an ethics pledge is not new, DAEOs now have more discretion in implementation. To illustrate, recently issued Executive Order 13,490, "Ethics Commitments by Executive Branch Personnel," requires every full-time political appointee appointed on or after January 20, 2009, to sign an Ethics Pledge, committing the appointee to comply with seven ethics obligations generally involving lobbying, employment actions and post-employment.²⁹ Following the model in the Ethics in Government Act, the OGE director is charged with providing government-wide guidance as to how DAEOs and their agency heads should implement the EO. In addition to recounting ethics restrictions applicable to the appointees and the procedural steps for oversight and enforcement, Section 3(a) of the executive order vested waiver authority with the director of the Office of Management and Budget, in consultation with the counsel to the president.³⁰ Shortly thereafter, however, a DAEOgram informed agencies that OMB had authorized DAEOs of each executive agency to exercise waiver authority in consultation with the counsel to the president.³¹ As a result, DAEOs' authority grew to include a new authority – to waive the ethics pledge requirement for certain executive employees.³²

DAEOs Provide Written Ethics Advice

As part of a program of formal advice to all agency employees, one of the DAEO's most critical functions is to develop and provide counseling on ethics and standards of conduct. Most ethics restrictions are found in Sections 202 to 209 of Title 18 of the U.S. Code and in EO 12,674 as modified by EO 12,731.³³ The standard, found at 5 C.F.R. Part 2635, cover the basic ethical obligations of public service, including rules regarding gifts from outside sources and between employees, conflicting financial interests, impartiality in performing official duties, outside employment and activities, post-employment, and misuse of position.³⁴ The regulations require the DAEO to keep records on advice rendered "when

appropriate."³⁵ To ensure a productive relationship with the OIG, however, a DAEO should strive to record and maintain consistent written advice to employees and communicate promptly regarding administrative actions.

Written records evidencing the facts conveyed by an employee, and limitations and restrictions identified in the ethics advice given by the DAEO in response to those facts, play a vital role in ethics investigations. This is because OIG investigators and DOJ attorneys rely on them in prosecution, as may an employee in his or her defense.

DAEOs Have a Special Relationship with the IG

The federal ethics regulations recognize a special relationship between DAEOs and IGs. In carrying out their agency ethics programs, DAEOs are required by the standard to review information developed by the OIG and other auditors.³⁶ The purpose of such review can be to determine whether there is a need for revising the agency's supplemental standard or taking corrective action to remedy actual or potential conflict of interest situations. Thus, if an OIG audit identifies a recurring conflict situation unique to the agency, and it is not addressed by the standard, then the DAEO might consider a curative supplemental regulation. If an OIG investigation finds that an agency contracting officer has violated the standards by, for instance, purchasing stock in a firm with which the agency contracts, the DAEO might be asked by management to recommend appropriate remedial or corrective action.



DAEOs are in an excellent position to refer to the IG allegations of criminal, civil, or administrative ethics violations that they encounter in their daily work, including violations of the standard. When employees

29) Executive Order 13,490 was issued on January 21, 2009. For example, registered lobbyist-appointees are required to recuse themselves for two years after appointment from any particular matter lobbied during the two years prior to appointment, and all appointees must agree not to lobby certain executive branch officials for as long as President Obama is in office. Notably, former President Clinton required every senior appointee to sign a stricter ethics pledge. For instance, Clinton mandated five-year restrictions on lobbying on all appointees, not just lobbyists, as well as a permanent bar from participating in an activity on behalf of a foreign government or political party.

30) Executive Order 13,490, Sec. 3.

31) DAEOgram DO-09-008, "Authorizations Pursuant to Section 3 of Executive Order 13490," February 23, 2009. A DAEOgram is an OGE memorandum to the DAEOs starting in January 2011. "OGE Advisories" replaced DAEOgrams.

32) *Id.*

33) The executive order is implemented by regulations at 5 C.F.R. 2635.

34) 5 C.F.R. 2635, et. seq., standard of Ethical Conduct for Employees of the Executive Branch.

35) 5 C.F.R. 2638.203(b)(8).

36) 5 C.F.R. 2638.203(b)(11).

come to the DAEO for prospective ethics advice, there is usually no need to refer the matter to the IG. However, the DAEO might choose to discuss proactively concerns with the IG; after all, disclosures made by an employee to an agency ethics official are not protected by an attorney-client privilege.³⁷ When agency employees inform the DAEO of past transgressions, or explain what prospective mischief they are planning, however, the DAEO is obligated to make sure that "prompt and effective action" is taken to remedy the potential or actual violation.³⁸ The best thing that the DAEO can do at this point is to refer all information, documentary and otherwise, to the IG, pursuant to the standards and the agency's own regulations. This is because, first, the DAEO is required to use the services of the agency's OIG, including the referral of matters to and acceptance of matters from the OIG.³⁹ Second, an agency's internal investigative authority resides with the IG, and the IG must be given the opportunity to investigate.

DAEOs Refer Investigations to the IG Through the Agency Head

The law regarding the OGE director's responsibilities provides that when the OGE director believes an employee is in violation of a conflict of interest or standard regulation, he or she may recommend that the agency head investigate possible violations and take disciplinary action.⁴⁰ Section 403(a) of the Ethics in Government Act states that the director has the authority to request assistance from the inspector general to conduct ethics investigations. In these cases, the usual practice for an agency head in receipt of such a request is to ask the OIG to investigate.

This is for two main reasons. First, even though the OGE director is authorized to undertake administrative investigations of ethics violations, the Ethics in Government Act prohibits the director or any designee from finding that any provision of Title 18 of the U.S. Code or any U.S. criminal law has been or is being violated.⁴¹ Most of the ethics rules on which the standards are based are located in Title 18 U.S.C. Sections 201, *et seq.*, and are criminal violations, although rarely prosecuted as such. Accordingly, while an ethics violation may constitute a regulatory violation, it could also be a crime and require a criminal investigation. Neither the OGE director nor agency DAEOs are, or have on their

staff, internal criminal investigators. This is the exclusive province of the OIG and outside the jurisdiction and scope of employment of a DAEO.

What Does The IG Investigate?

The IG Act authorizes IGs to conduct criminal, civil, and administrative investigations. This broad investigative authority is the same for the presidentially appointed IGs generally at the larger departments and agencies, and agency head-appointed IGs at the generally smaller "designated federal entities" and "federal entities."

The IGs' investigative authority is found in several places in the IG Act. First, Section 2(1) of the IG Act authorizes IGs "to conduct and supervise audits and investigations relating to the programs and operations of [their agencies]." Section 7(a) provides that an IG may receive and investigate complaints or information from employees about an array of activities. These are described as activities that could constitute, "a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to the public health and safety."⁴²

Section 4(d) of the IG Act requires the IGs to report "expeditiously" to the attorney general when they have reasonable grounds to believe that there is a violation of federal criminal law. IGs interpret this section to mean referrals for prosecution. Thus, an IG may, although may not always choose to, undertake significant investigative work to determine whether an allegation can be substantiated before presenting evidence of a violation of federal criminal law to the DOJ or an assistant U.S. attorney for prosecution. The attorney general and the Federal Bureau of Investigation have authority to investigate any violation of federal criminal law, including those involving government officers and employees.⁴³

To carry out their investigative authority, IGs are given some helpful law enforcement tools. For example, Section 6(a)(1) of the IG Act permits IGs to access all records, reports, documents, etc., available to the agency relating to the programs and operations for which the IG has responsibility.⁴⁴ IGs interpret this section to mean that anything the agency can access, the IG can access also. If the agency does not have the material, then the IG can subpoena it if it is held privately.⁴⁵ If the record is in the custody of another federal entity, the IG may not issue a subpoena, but may request and expect to receive the information.⁴⁶

37) 5 C.F.R. 2635.107(b).

38) 5 C.F.R. 2638.203(b)(9).

39) C.F.R. 2638.203(c)(12).

40) 5 U.S.C. 402(f)(2)(A)(i)(i). If the employee involved is the agency head, however, any such recommendation must be submitted to the president.

41) 5 U.S.C. 402(f)(5).

42) 5 U.S.C. App., Sec. 7(a).

43) 28 U.S.C. 535.

44) 5 U.S.C. App., Sec. 6(a)(1).

45) 5 U.S.C. App., Sec. 6(a)(4).

46) 5 U.S.C. App., Sec. 6(a)(3).

With one exception, IGs do not yet have testimonial subpoena authority. Thus, IGs may require agency employees to speak with them about official matters within the confines of the constitutional privilege against self-incrimination, but, except for the Department of Defense OIG, they cannot subpoena a private citizen to speak with OIG agents.⁴⁷ Section 6(a)(2) of the IG Act allows IGs "to make such investigations and reports relating to the administration of the programs and operations of the applicable establishment as are . . . necessary and desirable."⁴⁸ As investigations are completed, IGs may issue reports and make recommendations for prosecution, administrative discipline, systemic internal controls, or anything else that would help the agency improve operations, prevent or detect fraud, or save money.

What Constitutes an Investigation?

Agency counsel and DAEOs may justifiably assert that they correctly understand the requirement to refer criminal allegations to the OIG, and to request approval to undertake administrative investigations when the IG decides not to pursue an investigation. The agency counsel and DAEOs also may argue that, based on the information before them, they cannot always determine whether an allegation rises to a criminal level or is simply a management issue. The DAEO or OGC attorney then might interview witnesses, request documents, and do other things an IG investigator might do, and later decide whether to refer to the IG.

This can present problems for an OIG if the allegation is eventually referred to or discovered by the OIG after an agency lawyer has gathered evidence and talked with witnesses. The IG investigator may find witnesses tainted, documents altered or destroyed, and confidentiality nonexistent. Moreover, agency attorneys' gathering evidence rarely provide the employee the necessary and proper warnings, and they likely are not as skilled at using the tried-and-true investigative techniques that professional law enforcement employs. Accordingly, some agency OIGs have endeavored to specify in internal policies exactly what should be referred to the IG and when. Others use a rule of thumb, such as if the OGC attorney needs to talk with more than one other person to substantiate an allegation, then he or she should refer the matter to the OIG.

47) The National Defense Authorization Act for Fiscal Year 2010, Pub. Law No. 111-84, enacted on October 28, 2009, at Title X, Subtitle D, Section 1042, amended Section 8 of the Inspector General Act to grant the Defense Department IG testimonial subpoena authority.

48) 5 U.S.C. App., Sec. 6(a)(2).

What Happens When IGs Do Not Investigate Allegations

On occasion, IG investigators do not investigate allegations of administrative ethics violations in order to pursue solely criminal violations, sometimes based on the advice of the U.S. Attorney's office. In such cases, if no one is investigating, the DAEO should be advised at the right time, so he or she can pursue administrative remedies and inform the director of OGE. *This does not mean that the DAEO can undertake an investigation on his or her own, as discussed above, however, without the IG's approval.* A DAEO may be able to use the IG's evidence to recommend administrative action against an employee, e.g., discipline or counseling. If the issue is one that affects many agency employees, the DAEO can ensure that training and written advice address the troublesome issues.

It might be hard to determine immediately the effects of an unexplored allegation of an ethics violation. At the least, however, failure to deal with such allegations and to administer appropriate discipline when they are substantiated, runs counter to the purpose of the Ethics in Government Act and may diminish the overall ethical culture that DAEOs try to foster. Furthermore, it could hurt national security and significantly harm government operations. For example, if an employee in a "public trust position" commits a certain ethics violation, and the violation is not taken seriously and investigated, that employee – and the government – might not recognize the potential harm until it is too late. The employee may be encouraged by the lack of oversight to commit another violation, or lackadaisically or unwittingly create vulnerabilities. A public trust position includes those involved in policymaking, major program responsibility, public safety and health, law enforcement, fiduciary responsibilities, or "other duties demanding a significant degree of public trust, and positions involving access to or operation or control of financial records, with a significant risk for causing damage or realizing personal gain."⁴⁹ An employee in such a position is particularly able to cause harm through continued access to or control of critical systems, records, and information. No matter the reason for the possible violation, failing to investigate could lead to serious national security consequences. Therefore, it is not only in the OIG's and agency's best interest to explore all potential violations, but also it protects national security.

49) 5 C.F.R. § 731.106(b).

"Agency counsel and DAEOs may justifiably assert that they correctly understand the requirement to refer criminal allegations to the OIG, and to request approval to undertake administrative investigations when the IG decides not to pursue an investigation."

IGs Should Cooperate With DAEOs

Communications cannot be a one-way street. The DAEO is required by regulation to be aware of all ethics infractions, and must maintain a list of all situations that have resulted or may result in noncompliance with ethics laws and regulations.⁵⁰ This list must be published within the agency and made available to the public. Thus, the IG must inform the DAEO of all ethics infractions the IG has verified to enable the DAEO to fulfill his or her regulatory obligations.

This does not mean the IG must notify the DAEO immediately each time he opens an investigation involving a violation of the standard, nor must the IG advise the DAEO at any particular point in an investigation. Nevertheless, the quality standard for federal OIGs (October 2003) state that the OIG "should make a special and continuing effort" to keep the DAEO informed about OIG activities, including "the results of investigations and allegations of ethical misconduct where appropriate, that relate to the ethics official's responsibilities for the agency's ethics program."⁵¹ When an IG investigation uncovers an ethics violation, the DAEO may serve as a consultant for OIG investigators on technical issues of ethics law. OIG investigators and counsel might both consult the DAEO, within the confines of the Privacy Act, about what constitutes a violation, whether a violation has occurred, and what remedy or corrective action is usual within the agency.

IGs also may refer to DAEO's audit or investigative findings regarding the agency's ethics program, e.g., which employee grades and classifications are required to submit financial disclosure forms, which employees are not receiving their confidential forms or whether an employee is not filling them out properly or in a timely manner.

50) 5 C.F.R. 2638.203(b)(5).

51) Quality standard for Federal Offices of Inspector General, President's Council on Integrity and Efficiency, October 2003, pp. 30-31.

IG Counsels May Serve As Deputy DAEOs

In many large agencies, DAEOs delegate deputy DAEO authority to attorneys in various agency sub-components, including the OIG, pursuant to 5 C.F.R. 2638.204(a). A deputy DAEO in the OIG who is aware of the OIG's special needs and mission can help the DAEO implement the agency's ethics program. Having a deputy DAEO in-house might appear to enhance an IG's independence. Further, OIG employees may feel more comfortable seeking advice from the OIG deputy DAEO than with the DAEO, and this comfort may encourage employees to seek advice, and as a result, have a preventive effect.

The first consideration that an OIG must make in implementing an agency's ethics program in-house, however, is whether this authority is officially delegated. Based on the regulations, each agency has only one primary DAEO and one alternate DAEO, and deputy DAEOs must receive their authority through delegation. The DAEO must keep a list of persons to whom delegations have been made to provide to OGE upon request.⁵² OIGs that have deputy DAEOs in-house serving without a delegation may lack the support of the Ethics in Government Act.

Second, because of the nature of the DAEO's duties, OIGs with deputy DAEO functions in the IG counsel's office might risk at least a perceived conflict of interest. When and if IG counsel adopt this role, they must be cautious. IG counsels may give ethics advice to IG employees, which may provide a "safe harbor." The regulations state that disciplinary action for violating ethics rules "will not be taken against an employee who has engaged in conduct in good faith reliance upon the advice of an agency ethics official, provided that the employee, in seeking such advice, has made full disclosure of all relevant circumstances."⁵³ However, if an IG counsel were to give a "safe harbor" opinion to an IG employee, and that employee relied on the advice to commit an act later investigated by the IG, the deputy DAEO must be careful to recuse himself or herself from any ensuing investigation. If not, not only could the investigation be jeopardized, but also the attorney risks violating rules of professional conduct. Accordingly, the soundest way to prevent conflicts of interest within the OIG is for IG counsel not to accept the deputy DAEO role or to undertake the responsibilities, but limit advice to informal ethics advice and communicate the limits of such advice to the employee. Additionally, the IG counsel deputy DAEO should recuse himself or herself

52) 5 C.F.R. 2638.203(b)(13).

53) 5 C.F.R. 2635.107(c).

from any investigations involving matters in which he or she gave advice. Finally, when the OIG's deputy DAEO faces a novel or complex issue, or when an employee requires a written opinion, he or she should refer it to the agency's DAEO.

Reporting Requirements

Reporting requirements are imposed on both OIGs and DAEOs. In accordance with 5 U.S.C. App. §402 (b)(2), the director of OGE, in consultation with the attorney general and the Office of Personnel Management, promulgated regulations pertaining to conflicts of interest in the executive branch. The regulations require agencies to notify the OGE director when any matter involving an alleged violation of federal conflict of interest laws is referred to the Attorney General in accordance with 28 U.S.C. §535.⁵⁴ This is usually accomplished by OIG submission of OGE Form 202 (7/94), "Notification of Conflict of Interest Referral," at the time formal referral is made to the DOJ. The form indicates that it is to be used in cases involving possible violation of 18 U.S.C. §203, 205, 207-209 by current or former executive branch employees. As discussed above, under §4(d) of the IG Act, OIGs are required to report violations of federal criminal law to the attorney general.

OIGs and DAEOs Can Work Together Better

To summarize, the federal OIG and ethics communities have flourished, making important contributions to government integrity. Employees dedicated to ethics issues have earned high degrees of respect and deference as valued experts within their individual agencies and as the source of high-level insights at the federal level. As the DAEOgram discussing the DAEOs' new waiver authority of the president's ethics pledge stated, "This designation reflects the high degree of trust and confidence with which the experience and professional judgment of the DAEOs is viewed."⁵⁵ OIG's and OGE's combined efforts and achievements have been individually recognized by statutory and executive enhancements to their responsibilities and authorities. Together, IG counsel and DAEOs can continue to improve government by adopting or maintaining the following best practices.

⁵⁴ 5 C.F.R. 2638.603(b).

⁵⁵ DAEOgram Do-09-008, Authorizations Pursuant to Section 3 of E.O. 13490, "Ethics Commitments by Executive Branch Personnel," Feb. 23, 2009.

IG Counsels and DAEOs Should Maintain Ongoing Communications

It may be trite, but it is true – regular communication can solve many problems. When IG counsel and DAEOs build and maintain strong relationships, problems can be resolved by informal discussion before they blossom into full-fledged headaches. IG counsels can keep DAEOs informed of the progress of relevant ethics investigations and whether documents and/or testimony may be requested. For their part, DAEOs can consult with IG counsel and refer potential ethics violations to the IG for investigation.

IG Counsels & DAEOs Should Do Joint Training

DAEOs are required to provide annual ethics training, and many IGs present integrity awareness briefings. Combining the two provides agency employees with the continuum from ethics education and advice to investigation and prosecution of violations. Such cooperation fosters a stronger ethical culture, which in turn breeds employees who care about doing the right thing, whether the action is guided by a standard or not. IGs can publish internal Web newsletters highlighting recurring issues and reminding agency staff of common pitfalls. DAEOs can write articles for their agency Web and social networking sites to make agency employees aware of current ethics issues. OGE has always graciously invited IGs and IG counsels to participate and present at annual OGE conferences. This cooperation is valuable to everyone and should be continued.

DAEOs Should Promptly Document Ethics Advice

Friction between IGs and DAEOs can be avoided when written records of advice relevant to an allegation are available. In these cases, disputed testimony about whether the DAEO's advice indicated the activity was permitted or prohibited, can be eliminated and potential for prosecution can be preserved.

DAEOs Should Refer Investigations to the OIG

DAEOs can potentially complicate OIG investigations if they undertake their own investigations without OIG approval and before referring allegations to the OIG. By exposing confidential information, they can inadvertently allow wrongdoers to destroy evidence, fabricate

stories, and taint testimony. Thus, DAEOs should *always* refer investigations to the OIG.

IG Counsels Should Be Cautious if Acting as DepDAEOs

IG counsel and DAEOs roles are not the same, so when an IG counsel is confronted with an unusual, complicated, or novel ethics issue that could be referred to the OIG for investigation, he or she should also refer it to the agency DAEO.

IG Counsel Should Consult with DAEOs on Ethics Investigations

Recognizing that DAEOs are ethics experts, IG counsel assisting with investigations involving ethics violations should consult with and exchange information with DAEOs. IG counsel can be a bridge between OIG investigators and the DAEO. Through training and education targeting specific problems, IG counsel can further the



Nancy Eyl

Nancy Eyl is assistant counsel to the inspector general at the Department of Homeland Security, where she works on new media legal issues, among other areas. She began her legal career at the Special Inspector General for Iraq Reconstruction. Before entering the legal profession,

Ms. Eyl trained to teach Russian and other Slavic languages and literatures at the university level. She taught Russian at Indiana University Bloomington and Russian, German, and the literary genre of autobiography at Tulane University.

As an academic, she received numerous awards, fellowships and scholarships, including a Fulbright to Ukraine, an award for outstanding achievement by Harvard University's Ukrainian Summer Institute, and grants supporting independent research in Germany, Ukraine, and Eastern Europe.

Ms. Eyl graduated from Georgetown University Law School and is a member of the New York bar. She received a master's degree in Slavic languages & literatures from Indiana University Bloomington, where she was a chancellor's fellow, and a B.A., magna cum laude, in German and Russian from Loyola University New Orleans, where she was a presidential scholar.

DAEO mission, even without being formally delegated DepDAEOs. Moreover, by sharing information with the DAEO, an OIG ensures that no ethics violation will go unnoticed. Such vigilance serves not only to promote an ethical culture, but also can protect national security. **EO**



Maryann Lawrence Grodin

Maryann Lawrence Grodin is general counsel to the inspector general at the U.S. Nuclear Regulatory Commission. Prior to assuming this senior level service position, she was a supervisory attorney with the Navy Office of the General. She served on active duty and as a re-

serve officer in the Navy Judge Advocate General's Corps and retired as a captain in 2010.

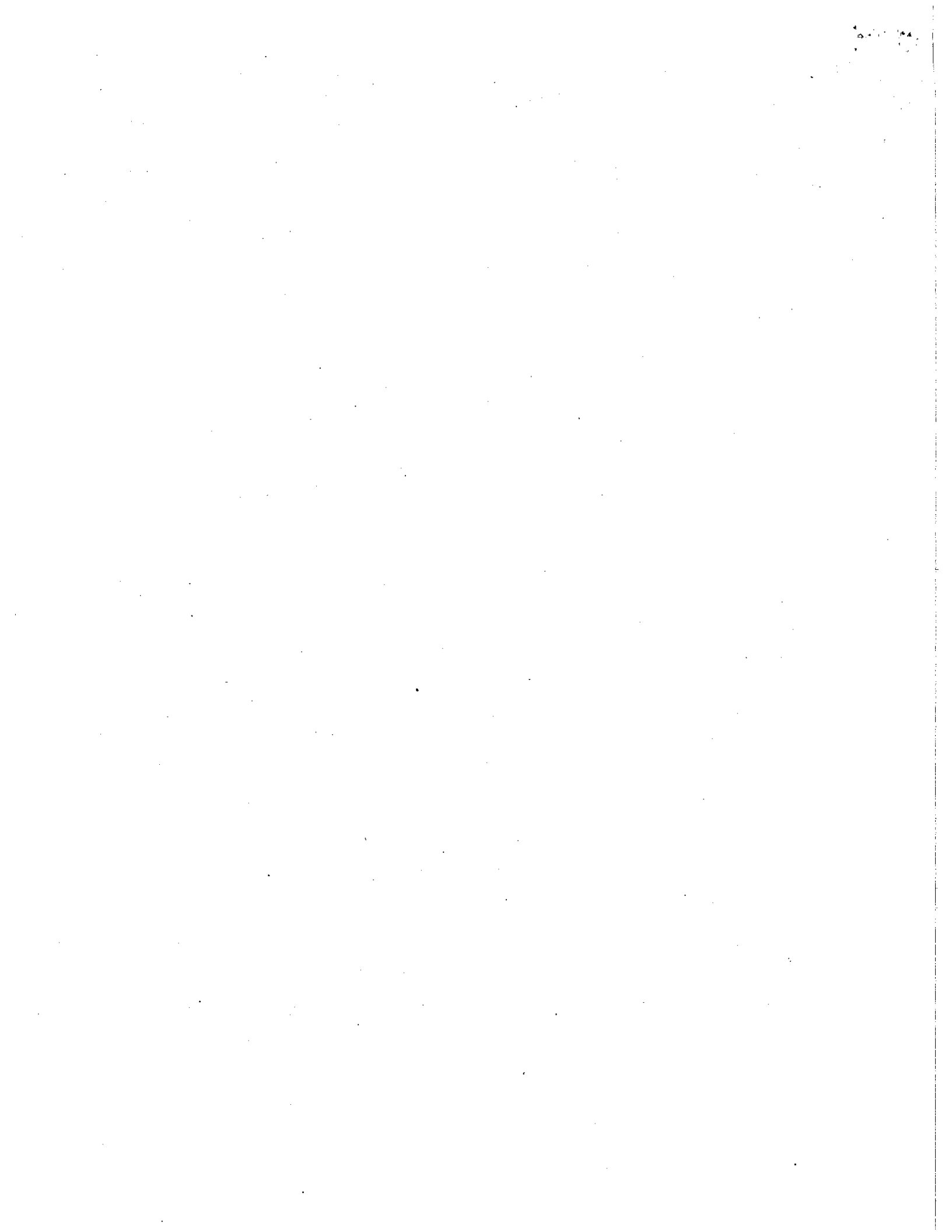
Ms. Grodin received a B.A., cum laude, with departmental honors in political science from Stony Brook University and a J.D. from California Western School of Law in San Diego, California. She is a member of the California Bar and admitted to practice before the U.S. Supreme Court.

In addition to authoring agency publications, her writing has been published in the Federal Bar Journal, the Judge Advocate General Journal, the Federal Ethics Report, as well as the Journal of Public Inquiry, where she served as an editor. She has served as a faculty instructor and is a frequent public speaker and has appeared at venues including the Office of Government Ethics Conference.



Alexandra Keith

Alexandra Keith is senior counsel in the Office of General Counsel of the Special Inspector General for Iraq Reconstruction. Prior to serving in that position, she worked as counsel to the inspector general of the Corporation for Public Broadcasting, deputy counsel to the inspector general of the Environmental Protection Agency, counsel and assistant inspector general for investigations of the National Credit Union Administration, deputy inspector general for the Peace Corps, and counsel to the inspector general of the Department of the Treasury. She has also served as an administrative law judge and prosecutor in the District of Columbia government, a foreign service officer with the U.S. Department of State, and a Peace Corps volunteer. Ms. Keith holds a B.A. from the College of Wooster, Ohio, a master's degree in international relations from the Fletcher School of Law and Diplomacy and J.D. from the Georgetown University Law Center.



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:	
<input type="checkbox"/> Public Integrity Section, Criminal Division	
<input type="checkbox"/> U.S. Attorney (<i>specify district</i>)	
<input type="checkbox"/> 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)*:

- | | |
|--|---|
| <input type="checkbox"/> 18 U.S.C. § 203 | <input type="checkbox"/> 18 U.S.C. § 1001 <i>(in connection with financial disclosure or other ethics documents only)</i> |
| <input type="checkbox"/> 18 U.S.C. § 205 | <input type="checkbox"/> 5 U.S.C. app. § 104 <i>(financial disclosure)</i> |
| <input type="checkbox"/> 18 U.S.C. § 207 | <input type="checkbox"/> 5 U.S.C. app. § 501 <i>(outside earned income)</i> |
| <input type="checkbox"/> 18 U.S.C. § 208 | <input type="checkbox"/> 5 U.S.C. app. § 502 <i>(outside activities)</i> |
| <input type="checkbox"/> 18 U.S.C. § 209 | <input type="checkbox"/> Other <i>(specify):</i> |

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:

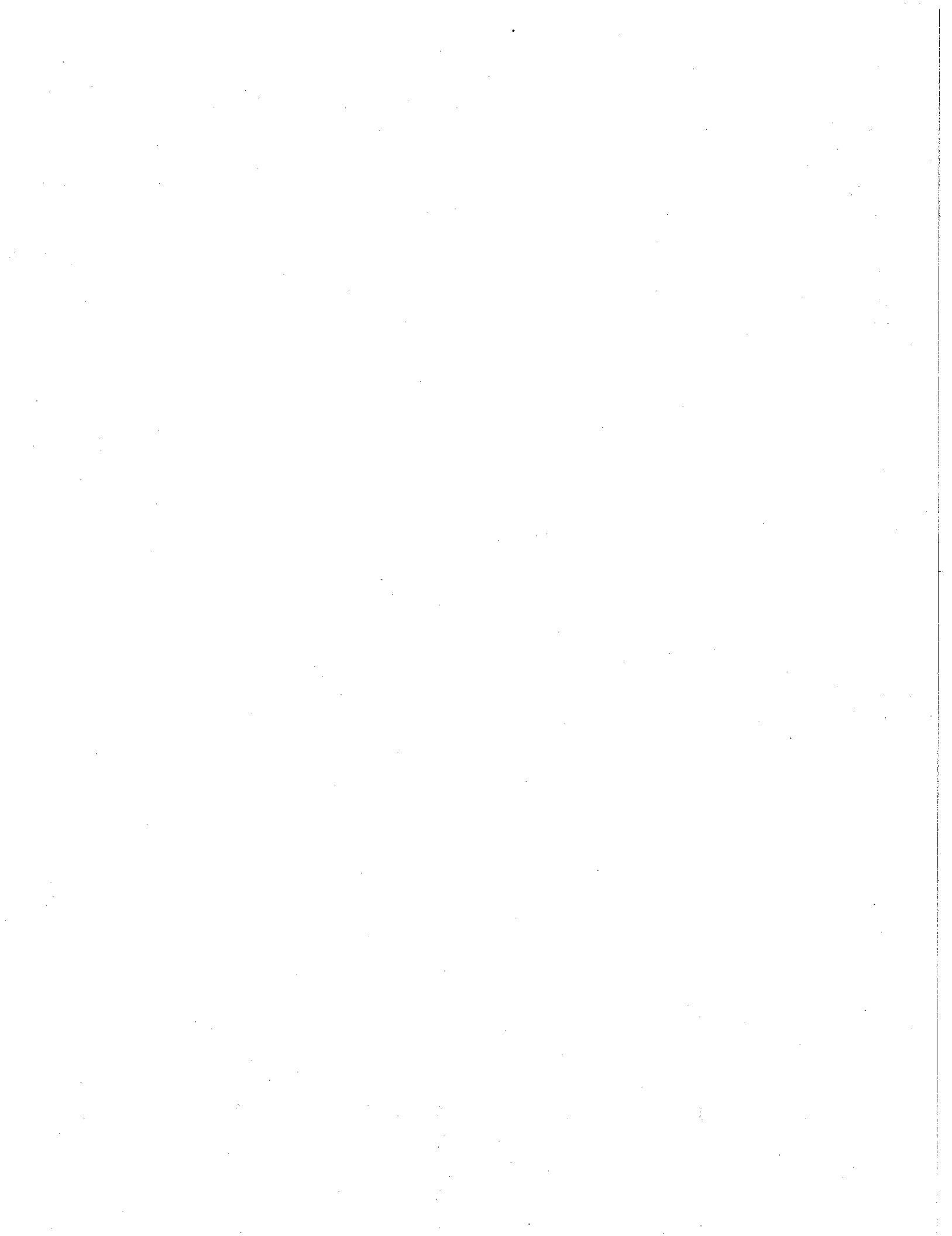
Telephone:

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



Standards of Conduct Summary*
5 CFR Part 2635

A Quick Reference Guide

Subpart	This subpart contains...
A - General Provisions	Provisions on an employee's basic obligation of public service and his responsibility to safeguard the public's trust by adhering to general principles of ethical conduct as well as specific ethical standards found in the other subparts.
B - Gifts from Outside Sources	Standards that prohibit an employee from soliciting or coercing the offering of gifts. Also prohibits accepting any gifts from a prohibited source or given because of the employee's official position, unless an exception applies.
C - Gifts between Employees	Standards that prohibit an employee from giving, donating to, or soliciting contributions for a gift to an official superior and from accepting a gift from an employee receiving less pay, unless an exception applies.
D - Conflicting Financial Interests	Two provisions relating to financial interests. One is a disqualification requirement and the other is a prohibition on acquiring or continuing to hold certain financial interests.
E - Impartiality in Performing Official Duties	Two provisions designed to ensure that an employee takes appropriate steps to avoid an appearance of loss of impartiality in the performance of his official duties.
F - Seeking Other Employment	A disqualification requirement that applies to an employee who is seeking employment outside the government with someone whose financial interests would be affected by government matters in which the employee participates.
G - Misuse of Position	Provisions relating to the proper use of official time and authority, and of government information and resources.
H - Outside Activities	Provisions relating to outside employment, outside activities, and personal financial obligations of employees.

* This aid is only a summary. When conducting an investigation, always consult the complete set of laws, rules, and opinions that apply to the particular situation.

Conflict of Interest Statutes*

A Quick Reference Guide

Statute	Brief Summary
18 U.S.C. § 201 Bribery and Gratuities	Prohibits a public official from accepting bribes or gratuities to influence his government actions. <i>(Only the Department of Justice interprets this statute.)</i>
18 U.S.C. § 202 Definitions	Defines a special government employee who is a temporary or intermittent employee subject to special provisions of the conflict of interest statutes.
18 U.S.C. § 203 Representation of Others for Compensation	Prohibits an employee from accepting compensation for certain representations before the government.
18 U.S.C. § 205 Representation of Others with or without Compensation	Prohibits an employee from prosecuting a claim against the U.S. or representing another before the government in matters where the U.S. is a party or has an interest.
18 U.S.C. § 207 Post-employment Restrictions	Places certain restrictions on an employee's activity before the government after he leaves federal service.
18 U.S.C. § 208 Conflicting Financial Interests	Prohibits an employee from participating in government matters that would affect his own financial interests or the interests of certain other individuals with whom the employee has ties outside the government.
18 U.S.C. § 209 Supplementation of Salary	Prohibits an employee from being paid by someone other than the U.S. for doing his government job.

* This aid is only a summary. When conducting an investigation, always consult the complete set of laws, rules, and opinions that apply to the particular situation.