Notes: **(1)** The guidance in Question 3 of this DAEOgram has been modified. Specifically, employees who file public financial disclosure reports are now subject to notification requirements under the STOCK Act, Pub. L. No. 112-105, § 17(a), 126 Stat. 291, 303 (2012), as implemented by 5 C.F.R. § 2635.607.
(2) Among other changes to the Standards of Conduct effective August 15, 2024:
-*Regarding .502*: the "catch-all" scenario describing what employees should do if there are circumstances other than those specifically covered in 2635.502 is now discussed in 2635.502(a)(3); previously, it was set out in 2635.502(a)(2).
-*Regarding .503*: (a) a payment covered by 2635.503 is now referred to as a "covered payment," not an "extraordinary payment"; and (b) payments received after the start of Government service may implicate 2635.503 (previously, only payments received prior to Government service were covered by this provision). Updated regulatory language also places limits on what constitutes a "qualifying program" pursuant to which payments can be made.
-*Regarding .808*: the restrictions on soliciting from prohibited sources described in .808(c)(1)(i) & (ii) do not apply if "circumstances make clear that the solicitation is motivated by a family relationship or personal friendship that would justify the solicitation." *See* 89 FR 43686 and LA-24-06.

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Office of Government Ethics
1201 New York Avenue, NW., Suite 500
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August 9, 2006
DO-06-023

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: Ethics and Working with Contractors—Questions and Answers

Government contracting processes long have influenced Federal ethics law and policy. Concerns about conflicts of interest in Federal procurement not only have shaped many of our ethics laws, but have been a particular focus in the enforcement of those laws. In our latest annual Conflict of Interest Prosecution Survey, for example, 75% of the prosecutions involved contract-related misconduct. Office of Government Ethics (OGE) DAEOgram DO-06-022, https://www.oge.gov/Web/oge.nsf/Resources/DO-06-022:+2005+Conflict+of+Interest+Prosecution+Survey. Moreover, in recent years, the increasing use of contractors, particularly in the Federal work space, has raised questions about whether the ethics rules adequately protect the integrity of Government operations. OGE, Report to the President and Congressional Committees on the Conflict of Interest Laws Relating to Executive Branch Employment 38-39 (January 2006) at www.oge.gov. At a minimum, the increased use of contractors has reinforced the need for Government employees to understand the ethical rules for interaction with contractors and their personnel.

This guidance is intended to provide agency ethics officials with basic information about some common issues that arise in the procurement context. We decided to present the information in a Question and Answer format, with illustrative examples. We hope this format will aid in your understanding of the ethical principles being discussed.

As will be apparent below, this guidance pertains not only to employees serving in formal "procurement" or "contracting" positions. Important ethical requirements—particularly the criminal conflict of interest laws and the OGE

standards of conduct regulations—apply also to a wide range of other employees who have input in contracting processes or work with contractors and their personnel. For example, the criminal conflict of interest laws, such as 18 U.S.C. §§ 207 and 208, can cover the conduct of high level officials who give instructions or recommendations to procurement officials. Similarly, these laws apply to program staff who do not have any formal contracting responsibilities but nevertheless provide significant input on programmatic or performance issues concerning a contract. Moreover, some of the issues discussed below, such as the gift questions, can affect employees who simply work alongside contractor personnel in a "mixed workplace."

Finally, some of the Q&As refer to provisions of law beyond the ethics statutes and regulations within OGE's primary area of responsibility. For example, several of the items below pertain to the Procurement Integrity Act, 41 U.S.C. § 423. These provisions are discussed mainly because they overlap with other legal requirements that are within OGE's jurisdiction, such as the criminal conflict of interest statutes in chapter 11 of title 18 of the United States Code, or the OGE standards of ethical conduct in chapter 2635 of title 5 of the Code of Federal Regulations. One purpose of this memorandum is to emphasize that compliance with provisions such as the Procurement Integrity Act does not necessarily equate to compliance with related, but different, provisions in the ethics laws and regulations.

Attachment

ETHICS AND WORKING WITH CONTRACTORS
QUESTIONS AND ANSWERS

CONTENTS

IV. Gifts

V. Miscellaneous Ethics Questions

I. Revolving Door Questions

These Q&As begin with a discussion of several aspects of "the revolving door," i.e., the movement of personnel between the Government and Government contractors (and those who represent them). The revolving door in the contracting area has been the subject of a fair amount of attention, both historically and also more recently, for example, with the prosecutions arising from the Druyun matter involving Air Force procurement.

As set out below, the revolving door Questions are divided into three subgroups: current Government employees seeking future employment with contractors; former Government employees working for or on behalf of contractors; and former contractor employees now working in the Government.

A. Seeking Future Employment

Employees who work on contract matters or who have contact with contractor employees sometimes may consider the possibility of going to work for a contractor. There are several laws and rules that govern employees who seek future employment, or receive employment overtures from, contractors: 18 U.S.C. § 208, OGE implementing regulations at 5 C.F.R. §§ 2635.601 - 2635.606, and the Procurement Integrity Act. This is an area that has received considerable attention recently, not only from the media and Congress but also from Federal prosecutors. See OGE DAEOgram DO-04-029, available at https://www.oge.gov/Web/oge.nsf/Resources/DO-04-029:+Seeking+Employment. Employees should be made aware of the seriousness of these issues and encouraged to seek timely advice from agency ethics officials about their own specific situations.

1. What are the criminal restrictions that relate to looking for future employment with a contractor?

Under 18 U.S.C. § 208, an employee may not participate in any particular Government matter that would affect the financial interests of any contractor (or other person) with which the employee is negotiating, or has an arrangement, for future employment. Although it may be possible for an employee to receive a waiver of this prohibition, OGE gives heightened scrutiny to proposed waivers in this situation, and waivers for employment negotiations should be issued only in compelling circumstances. See DAEOgram DO-04-029, at 7-8.

It is important to remember that this criminal prohibition applies to all particular matters that would have a direct and predictable effect on the financial interest of the

prospective employer. In contrast, as discussed below, related provisions of the Procurement Integrity Act apply only to certain kinds of procurements and certain specific kinds of official activities in connection with those procurements. The restrictions in section 208 apply whether or not the Procurement Integrity Act applies, as long as the employee is participating in a particular matter.

It is also important to remember that the employee's level of participation in the particular matter need only be "personal and substantial" in order to violate section 208; the employee need not be the final decisionmaker on any contract matter and need not serve in any specifically designated role (such as contracting officer) or perform any specifically designated procurement function (such as preparing specifications and solicitations or evaluating bids). As discussed below, the Procurement Integrity Act uses similar language concerning personal and substantial participation, but that language has a narrower meaning than in section 208.

> *Example: A contractor provides engineering support services for an agency program. An agency employee involved in this program periodically provides information to the contracting officer concerning the quality of the contractor's performance. The employee begins discussing the possibility of going to work with the contractor. Under 18 U.S.C. § 208, he must immediately recuse himself from any further participation in the evaluation of this contractor's performance or any other issue arising under the contract.*

2. Do the OGE implementing regulations add anything to the criminal restriction?

Yes. The OGE implementing regulations do not cover only employees who are actually negotiating or have an agreement to work for a prospective employer. They also require recusal by those who are merely "seeking" employment by making unsolicited contacts about possible employment, such as sending a resume to a firm on whose contract or bid the employee is working. Likewise, the OGE regulations require recusal if an employee makes any response other than rejection to a contractor's unsolicited overtures about possible employment.

> *Example: The employee in the previous example to Question 1 has not actually begun discussions with the contractor, but has simply submitted a resume with a cover letter indicating his interest in working for the company. Even though he has heard no response from the company, he has begun seeking employment under the OGE rule, and must recuse himself from working on matters arising under the contract. If two months elapse and the employee still has received no indication of interest on the part of the contractor, the employee no longer will be deemed to be seeking employment with the contractor. Likewise, if the contractor tells the employee that it is not interested and there*

is no further discussion of possible employment, the employee no longer will be deemed to be seeking employment with that contractor.

3. Do the OGE regulations require employees to notify anyone that they have begun seeking employment or are recused from certain matters?

The OGE regulations do not require any particular notification. Employees comply with any recusal obligations under section 208 and the OGE regulations simply by avoiding participation in any particular matter in which the prospective employer has a financial interest. However, the regulations add that an employee "should" notify the person responsible for his assignment of the need to recuse from a particular matter; while this is not a mandatory notification duty, it does point employees in the direction of common sense. Moreover, an agency ethics official may require written documentation of a recusal, and such documentation also may be required as evidence of compliance with an ethics agreement. Note, furthermore, that the Procurement Integrity Act and the Federal Acquisition Regulation do impose certain mandatory notification procedures, as discussed in Question 4 below.

4. Beyond the criminal law and the OGE regulations, what additional requirements are there under the Procurement Integrity Act concerning employment contacts?

The Procurement Integrity Act imposes additional requirements on employees who are participating personally and substantially in a procurement (i.e., the acquisition of goods or services by using competitive procedures and awarding a contract) in excess of the simplified acquisition threshold. 41 U.S.C. § 423(c). For purposes of the Procurement Integrity Act, personal and substantial participation is limited to certain specific functions involving: the specification or statement of work; the solicitation; the evaluation of bids or proposals, or selecting a source; negotiation of price or terms and conditions of the contract; or the review or approval of the award of a contract. 48 C.F.R. § 3.104-1. Employees who are participating in these ways in a covered procurement have the following obligations if they contact, or are contacted by, a bidder or offeror regarding possible employment:

- Promptly report the employment contact, in writing, to both the employee's supervisor and the Designated Agency Ethics Official (or designee); and

- Either--

  (a) reject the possibility of employment, or

  (b) recuse from the procurement until the agency has authorized the employee to resume participating (in accordance with 18 U.S.C. § 208 and applicable regulations) on the ground that the prospective employer is no longer a bidder or offeror, or on the ground that all employment discussions have terminated without an agreement or arrangement.

Note additionally that the Federal Acquisition Regulation requires—in addition to the written report on employment contacts discussed above—a written disqualification notice, which must be submitted to the contracting officer, the source selection authority, and the employee's immediate supervisor. 41 C.F.R. § 3.104-5(a).

Also, keep in mind that, even though section 208 and the Procurement Integrity Act use similar language concerning personal and substantial participation, section 208 covers activities and functions beyond those listed in the Federal Acquisition Regulation at 41 C.F.R. § 3.104-1. For purposes of the Procurement Integrity Act, the FAR has interpreted personal and substantial participation more narrowly than OGE interprets the language in section 208 and the OGE implementing regulations.

B. <u>Post-Employment Restrictions</u>

Employees who are involved in contracting matters or who work with contractors and contractor personnel need to be aware that certain restrictions may apply to their activities even after they leave Government. It is also important for employees to remember that the procurement-specific provisions of the Procurement Integrity Act, 41 U.S.C. § 423, are not the only post-employment restrictions about which they must be concerned: the criminal post-employment law, 18 U.S.C. § 207, contains different, and in some respects broader, requirements.

5. What are the restrictions under the Procurement Integrity Act for employees who leave Government after working on matters relating to a Government contractor?

An employee who has served in specific contracting roles, or performed specific contracting functions, on certain contract matters over $10,000,000, generally is prohibited for one year from receiving compensation from the contractor for service as

an employee, officer, director, or consultant. The specific contracting roles and functions are as follows:

- serving as program manager, deputy program manager, or administrative contracting officer for a contract over $10,000,000;
- making a decision to award a contract, subcontract, modification of a contract or task or delivery order over $10,000,000;
- making a decision to establish overhead or other rates for a contract or contracts for a particular contractor over $10,000,000;
- making a decision to issue payments over $10,000,000 to a particular contractor;
- making a decision to pay or settle a claim over $10,000,000 with a particular contractor. 41 U.S.C. § 423(d).

This prohibition does not prevent an employee from going to work for a division or affiliate of the contractor that does not produce the same or similar products or services as the entity of the contractor responsible for the contract in which the employee was involved. 41 U.S.C. § 423(d)(2).

Note also that a current or former Government employee may not disclose contractor bid or proposal information or source selection information before the award of the procurement contract. 41 U.S.C. § 423(a).

> *Example: An agency employee served as administrative contracting officer on a $25,000,000 contract with ABC Company. Shortly after he retired from Government, ABC approached him about working as a consultant on a different contract with a different agency. Even though his duties for the company would not involve any contact with his former agency, the former employee may not accept compensation as a consultant for ABC for one year after he last served as administrative contracting officer on the ABC contract.*

6. If a former employee did not serve in any of the specific contracting roles or perform any of the specific contracting functions described above, is he free from any post-employment restrictions?

No. Quite apart from the Procurement Integrity Act, there is a criminal statute, 18 U.S.C. § 207, that imposes several restrictions that could apply to a former employee who worked on contract matters but did not actually serve in any of the contracting roles or perform any of the contracting functions designated in the Procurement Integrity Act.

Example: An employee participated in evaluating the performance of a contractor, but did not serve in any of the positions or perform any of the functions or make any of the decisions described in 41 U.S.C. § 423(d). The employee is barred by 18 U.S.C. § 207(a)(1) from representing the contractor (or any other person) before the Government concerning this same contract.

7. Which restrictions in 18 U.S.C. § 207 apply most frequently to employees who have been involved in contracting matters or have worked with contractors?

Although section 207 has seven separate prohibitions applicable to executive branch employees, three provisions tend to come up most frequently. (For a full description of all of the restrictions and exceptions in section 207, see OGE DAEOgram DO-04-023, available at https://www.oge.gov/Web/oge.nsf/Resources/DO-04-023:+Summary+of+18+U.S.C.+§+207.) Each of these three applies to representing another person before the Government, i.e., making a communication or appearance with the intent to influence the Government. They do not, however, apply to behind-the-scenes work for a contractor or other person.

A lifetime ban on representing any other person before the Government on the same "particular matter involving specific parties," such as a contract, in which the former employee participated for the Government; the former employee may have participated personally and substantially in a contract, under this provision, without actually serving in any of the specific contracting roles or performing any of the specific functions or decisions designated in the Procurement Integrity Act.

Example: See the Example following Question 6 above.

Section 207 also has a two-year ban on representing another person before the Government on the same contract (or other particular matter involving specific parties) that was pending under the official responsibility of the former employee during his last year of Government service; the former employee need not have participated at all in the contract, so long as the matter was in his chain of supervision.

Example: The head of a division at an agency was not involved in any particular contract. However, every contract that was pending in his division, even if handled by subordinates several levels below the division head, was under his official responsibility. Consequently, for two years after he leaves Government, he could not represent anyone on any contract that was pending in his division during his last year of service.

The third major prohibition is a one-year "cooling-off" period for any matter involving the employee's former agency; this provision is applicable only to senior

employees, e.g., commissioned officers at 0-7 and above and civilian employees with a rate of basic pay equivalent to 86.5 % of Executive Level II ($142,898 in 2006); the ban can apply even to new contracts, as well as to broader procurement policy matters that don't even focus on specific contracts.

> *Example: A member of the Senior Executive Service was paid at a rate of $150,000 in 2006, when he left his agency for a position with a contractor. The contractor wants him to call his former agency about a potential new contract. This matter was not pending in the agency when the former employee was employed there. Nevertheless, the former employee may not represent the contractor before the agency on this (or any other) matter for one year after terminating his senior position with the agency.*

8. Does section 207 apply when a former employee is simply performing work under a Government contract?

It depends. If the former employee is able to remain "behind-the-scenes," he will not violate any of the three main prohibitions discussed in Question 7. Note that the less frequently applicable provisions in section 207(b), (f) and (l) do cover certain behind-the-scenes activities.

If the former employee's work under the contract requires communication with the Government, these prohibitions in section 207 may apply. Employees sometimes assume, incorrectly, that section 207 applies only to communications about the award or modification or other major business aspects of a contract. However, section 207 also can apply to communications that a former employee makes while performing work under the contract, even if the contract specifically requires contractor personnel to communicate with the Government. Of course, certain routine or ministerial communications would not be covered, for example, making routine factual statements that are not potentially controversial. However, many communications made while the former employee is performing the contract may involve the intent to influence the Government, because the contractor and the Government have potentially differing views or interests on the matter being discussed. (For further discussion of this issue, see OGE Informal Advisory Letters 99 x 19, 03 x 6, and 05 x 3.)

> *Example: A Government economist participated personally and substantially in a contract that required the contractor to perform certain econometric studies. The contractor would like to hire him to work on performing further research under the same contract. The job would require the individual to meet frequently with agency personnel to answer any questions concerning the research that has been performed and to obtain instructions for further research. It is expected that these discussions sometimes may involve questions about the adequacy of research already performed or alternative*

approaches to performing future research. Such discussions, even though required under the contract, potentially could involve disputes between the contractor and the agency. The employee should be advised that section 207 could prevent him from meeting with agency employees as intended.

C. Relationship with Former Private Employer

Ethics questions can arise not only when a Government employee moves to the private sector, but also when a private sector employee moves to the Government.

9. Are there criminal conflict of interest restrictions that especially affect personnel coming into Government after working for a Government contractor?

Yes. Although individuals are subject to a number of criminal conflict of interest laws after they leave a contractor and go to work for the Government, issues are most likely to arise under 18 U.S.C. § 208 and, possibly, 18 U.S.C § 209.

Former employees of Government contractors may have continuing financial interests in their former employer. These could include stock, stock options, different types of pensions and deferred compensation arrangements, or other miscellaneous benefits. Depending on the circumstances, any of these interests could give the employee a continuing financial interest in contracts and other particular matters that affect the contractor. Under 18 U.S.C. § 208, a Government employee must recuse himself from any particular matter in which he has a financial interest, absent a waiver or applicable regulatory exemption. Therefore, any continuing interest in a former employer must be examined to determine whether it requires the individual to be recused from contract matters affecting the former employer. In some cases, it may be necessary for the employee to divest the conflicting interest. See 5 C.F.R. § 2635.403.

Example: An individual worked for many years for a computer company. He has acquired over $100,000 in the company's stock as a result of various profit-sharing benefits. The individual joins the IT office at an agency that does substantial business with the company. Absent a waiver, he may not participate in any contracts involving the company. If the agency does not believe a waiver would be appropriate, and recusal would prevent the employee from performing critical duties, the agency may require the employee to divest the stock.

Occasionally, issues also may arise under 18 U.S.C. § 209 if payments or other benefits are given to an employee by a former employer who is a Government contractor. Section 209 prohibits employees from receiving any supplementation of their Federal salary as compensation for their services to the Government. Section 209

may apply if a former employer makes a payment to a Government employee and there is an indication that the payment is intended to compensate the employee for doing his Government job, rather than to compensate the person for past services to the former employer or for some other reason unrelated to Government service. For a comprehensive discussion of section 209, see DAEOgram DO-02-016, available at https://www.oge.gov/Web/oge.nsf/Resources/DO-02-016:+18+U.S.C.+§+209+Guidance. Note that section 209 does not apply to a payment made before the individual actually starts as a Government employee; in such cases, however, the employee may be subject to recusal obligations described in Question 10 below.

10. If an employee has divested all interests in a former employer who is a Government contractor, is that sufficient to comply with all ethical obligations?

Not necessarily. There are two provisions in the OGE standards of conduct that may require an employee to recuse, for a certain period of time, from working on contracts and certain other matters involving a former employer.

Under 5 C.F.R. § 2635.502, an employee must recuse, for one year after leaving a former employer, from any contract or other particular matter in which the former employer is a party (or represents a party), if either the employee or an agency designee determines that a reasonable person with knowledge of the circumstances would question the employee's impartiality. This recusal obligation may be lifted only by an authorization from an agency designee.

> *Example: An agency, which is responsible for certain emergency management operations, has a contract with a company to provide a range of support services in a particular location. An individual, who had been working as an employee of the contractor, now has been hired directly by the agency. The employee will have a covered relationship with the contractor for one year. Before the employee is assigned to work on any contract involving the company, the employee and the agency need to consider impartiality concerns and determine whether the employee should be recused or authorized to participate in the matter.*

Under 5 C.F.R. § 2635.503, an employee must recuse, for two years after receiving an "extraordinary payment" from a former employer, from any contract or other particular matter in which the former employer is a party (or represents a party). An extraordinary payment means a payment (1) in excess of $10,000, (2) determined after the former employer knew that the individual was being considered for a Government position, and (3) not pursuant to the former employer's established compensation program.

Example: The employee in the previous example was given a $15,000 severance payment after the company learned that he was being considered for a position with the agency. According to the company, the severance payment was intended to honor the individual for his hard work and contribution to the mission of the company. This individual was the first person ever awarded such a payment by the company, and the company had no written policy or contract establishing the benefit. This is an extraordinary payment, and the employee would be recused for two years from working on any contract involving the company, absent a waiver.

11. Can there be impartiality concerns even where it has been more than one year since an employee terminated from a contractor?

Possibly. As noted above, if the employee received an extraordinary payment from a contractor, impartiality concerns are addressed for two years under the recusal requirements of 5 C.F.R. § 2635.503. Even if the employee did not receive an extraordinary payment and more than a year has transpired since the employee left the contractor, there still may be impartiality concerns if the employee is assigned to participate in contracts involving the former employer. Section 2635.502(a)(2) provides a "catch-all" mechanism for employees and agencies to address impartiality concerns arising in circumstances that are not specifically covered in the rule.

Example: An individual was the director of a university laboratory, where he was responsible for the lab's contract with an agency to perform research on a new communications technology for an agency system. Then the agency hired him. Two years later, the lab made a claim for payment, which the agency is considering denying on the ground that the lab has not completely performed certain required work. The program manager would like to use the employee to review the adequacy of the lab's work, in light of his significant expertise with the technology. Given the employee's past level of involvement with this same contract on behalf of the contractor, as well as the sensitivity of the performance dispute, it would be reasonable for the agency and the employee to conclude that the employee should not participate in this decision.

II. Other Financial Conflicts

Questions 1 and 9 above deal with various aspects of 18 U.S.C. § 208, which prohibits employees from working on contracts and other particular matters affecting their personal or imputed financial interests. In addition to those situations discussed above, the following Questions explore some of the more common scenarios involving section 208 and contractors.

12. Is an employee always prohibited from participating in a contract if he owns stock in the contractor?

Not always. OGE has issued regulations exempting certain de minimis amounts of publicly traded securities. An employee can work on a contract as long as he owns no more than $15,000 of publicly traded stock in the contractor. The $15,000 limit applies to the sum of all stock owned by the employee, the employee's spouse and the employee's minor children, in all companies affected by the same contract (including subcontractors and competing offerors). It is important to remember that this exemption applies to publicly traded stock, not to stock or any other ownership interest in a privately held company. (Note that this exemption does not apply to stock that would be a prohibited holding for the employee, for example, under an agency-specific statute or regulation.) Also, in some cases, an agency may grant an employee an individual waiver under 18 U.S.C. § 208(b)(1), to permit participation where the employee owns more than $15,000 in stock.

> *Example: An employee's spouse owns $10,000 of stock in a private company that has submitted a bid on a small contract with the employee's agency. The de minimis exemption does not apply to this non-publicly traded stock, and the employee may not participate in the procurement, absent an individual waiver. On the other hand, if the company's stock were publicly traded, the employee could participate. However, if the employee also owned another $10,000 in the stock of a competing bidder on the same contract, he would exceed the $15,000 limit and would have to recuse, absent a waiver.*

13. Are interests in subcontractors covered?

Yes. Section 208 applies to an employee's financial interest in a subcontractor involved in a Government contract.

> *Example: An employee's spouse owns a controlling interest in a private company. A bidder on a Government contract plans to use this company as a subcontractor on the contract. The employee may not participate in the procurement.*

14. Does section 208 affect an employee who "moonlights" for a contractor as an outside activity?

Yes. Under section 208, an employee may not participate in any contract or other particular matter in which his outside employer has a financial interest. A Government employee who moonlights for a contractor must recuse from particular matters affecting that contractor. Outside employment with a contractor is discussed in more detail in Question 32 below.

Example: An agency has a contract with a medical testing company to provide certain diagnostic services to beneficiaries under an agency health program. An agency doctor orders tests for patients pursuant to the contract. The doctor may not participate in these decisions if he takes an outside job with the company, absent a waiver.

15. How does section 208 apply if a Government employee is married to an employee of a Government contractor?

Section 208 prohibits an employee from working on contracts and other particular matters affecting a spouse's financial interests. The need to recuse could arise in various situations.

Example: An employee works on a contract for his agency. His spouse is hired by the contractor to work on the same contract. The spouse's continued employment and possible advancement with the company depend on the firm's success with this particular contract. Section 208 would apply, even if the Government employee does not personally review the work of the spouse or even participate in the same part of the contract in which the spouse is involved.

Example: An employee's spouse works for an agency contractor. She participates in the company's stock purchase program and also receives periodic cash bonuses tied to firm profitability. Therefore, she has a financial interest in any contract that her company has with the agency, even if her own work does not involve the particular contract and she does not work in the same division of the company that is performing the contract. The employee may not participate in any contract with the company, absent a waiver.

Example: The spouse of an employee is a partner at a law firm that is representing a disappointed bidder in a bid protest against the agency. As a partner, the spouse has a financial interest in all particular matters in which her firm is representing a client, including matters in which she herself is not providing services. The employee may not work on the bid protest, without a waiver.

In some cases, however, the spouse will not have any financial interest in a Government contract.

Example: An agency employee is assigned to work on a contract involving his spouse's employer. The contractor is a large company with many different contracts and business operations. The spouse works in an area of the company's business that is unrelated to the contract with the employee's agency. Moreover, the spouse receives a straight salary from the company, without any equity or profit-sharing interests. Section 208 would not prohibit the employee from participating in this contract.

Even if the spouse does not have a financial interest in the contract on which the Government employee is working, there still may be impartiality issues, as described in Question 16.

III. Other Impartiality Issues

OGE's impartiality rule, 5 C.F.R. § 2635.502, is discussed in Questions 10 and 11 above. In addition to the situations described in those Questions, various other relationships and interests can raise concerns about an employee's impartiality. A few of the more common scenarios are described in Questions below.

16. If an employee's spouse works for a contractor, could there be any impartiality concerns, even if 18 U.S.C § 208 does not apply?

Yes. A Government employee has a "covered relationship" with his spouse's employer, under 5 C.F.R. § 2635.502(b) (1) (iii), even if his spouse does not have a financial interest in a particular Government contract. This rule would require an employee to recuse from any contract involving a spouse's employer, if either the employee or an agency designee determines that a reasonable person with knowledge of the circumstances would question the employee's impartiality. In some cases, the agency might authorize the employee to work on the contract in any event.

> *Example: The employee in the last Example following Question 15 above has a covered relationship with the contractor that employs his spouse. Because of his significant experience in the subject matter, the employee is the most qualified person in his office to work on the particular matter, and it would be difficult to find another employee to perform the same duties. In light of the size of the company, the variety of its business activities, and the fact that the spouse is employed in a totally different area of the company's operations, the agency might determine that a reasonable person would not question the employee's impartiality in this matter. Alternatively, the agency might determine that any impartiality concerns are outweighed by the agency's need for the employee's services on the matter, in which case the employee could participate in the contract pursuant to an authorization under 5 C.F.R. § 2635.502(d). Depending on the circumstances, the agency might want to impose certain conditions, such as limits on the kinds of decisions the employee can make without review or approval by supervisors.*

17. What if the Government employee is dating a contractor employee?

Under the impartiality rule, an employee does not have a "covered relationship" with a person he is merely dating or with the employer of a person he is dating. However, the impartiality rule provides a mechanism for employees and agencies to evaluate impartiality concerns, even in situations not involving a covered relationship. See 5 C.F.R. § 2635.502(a) (2).

> *Example: An agency employee begins dating a contractor employee with whom he works. One of his duties involves reviewing the work of the contractor, including the contractor employee he has begun dating. The employee's impartiality in reviewing the work could reasonably be questioned under these circumstances, and the employee and the agency should use the procedures in section 2635.502 to determine whether, or under what conditions, he should be permitted to continue participating in the matter.*

Note that there would be additional considerations if the Government employee and the contractor employee were residing together. 18 U.S.C. § 208 would prohibit a Government employee from working on a contract that affects the contractor employee's ability to pay any shared living expenses. In any case, the impartiality rule expressly covers situations in which an employee participates in a contract that affects the financial interest of "a member of his household." 5 C.F.R. § 2635.502(a). Similarly, the Government employee would have a covered relationship with a person who is a member of his household. 5 C.F.R. § 2635.502(b)(ii). For all of these reasons, a Government employee should not participate in a contract if a contractor employee, with whom he resides, is working on the same contract, unless the employee and his agency first have resolved any potential financial conflict of interest under section 208 and any impartiality concerns under section 2635.502.

18. Can an employee award a contract to a personal friend or a company owned by a personal friend?

It depends. An employee does not have a covered relationship with someone merely because that person is a personal friend. However, it is clear that employees should consider any potential impartiality questions before participating in a decision to give a contract to a personal friend, and the procedures set out in 5 C.F.R. § 2635.502(a)(2) will facilitate the review of all relevant circumstances. Allegations of favoritism can, and sometimes do, arise when Government contracts are awarded to a friend, so agencies and employees should be particularly alert to any impartiality concerns.

Example: An employee has long been friends with someone who is a healthcare consultant. They periodically meet for lunch and also occasionally get together with their families. The agency needs to acquire healthcare consulting services about a subject on which the employee knows his friend is an expert. Before recommending that his agency consider giving a contract to his friend, the employee should follow the process described in section 2635.502.

IV. Gifts

A common issue, particularly among employees who work closely or share office space with contractor personnel, is how to deal with gift-giving between contractor employees and Government employees. Employees should know that the ethics rules generally forbid them from accepting gifts from "prohibited sources," which clearly includes any contractor working for the employee's agency. 5 C.F.R. § 2635.203(d). It is important to remember that, regardless of the working relationship between Government and contractor personnel, contractor personnel remain employees of the contractor. As such, they are deemed "prohibited sources," under the OGE gift rules, to the same extent as the contractor that employs them. See 5 C.F.R. § 2635.102(k) (definition of person includes not only an entity but also any employee of that entity).

19. May an agency employee ever accept a gift from a contractor or an employee of a contractor?

Yes. The OGE gift rules have several exceptions that would permit gifts from a prohibited source, including an agency contractor or an employee of an agency contractor. See 5 C.F.R. § 2635.204. (In addition, there are certain items that a Government employee may accept from a prohibited source because those items are not considered gifts. See 5 C.F.R. § 2635.203(b)(1)-(9).) Questions 20-27 discuss some of the exceptions that may be applicable in common situations involving contractors and contractor personnel.

20. May an employee use the $20 de minimis exception to accept gifts from various employees of the same contractor?

Possibly. Under 5 C.F.R. § 2635.204(a), an employee may accept noncash gifts from a prohibited source, if the gifts from a particular source have a value of no more than $20 per occasion and $50 per calendar year. A contractor and an employee of a contractor are considered the same source under the OGE rules. Therefore, an agency

employee could accept gifts from multiple contractor employees, but such gifts could not exceed the applicable limits for one source.

> *Example: On his birthday, an agency employee receives a birthday gift valued at $20 from a contractor employee with whom he works in a shared office space. Later in the year, during the holiday season, the same agency employee receives a $15 gift from another employee of the same contractor. The employee could accept these gifts. However, if a third contractor employee offered to pick up a $20 lunch check for the agency employee the next day, the agency employee would have to decline the gift, as this would exceed the $50 annual limit per source.*

21. Are there limits on the frequency with which employees can accept gifts from contractors and contractor employees under the gift exceptions?

Yes. An employee may not use any of the gift exceptions, including the de minimis exception, to accept gifts from the same or even different sources so frequently that a reasonable person would believe the employee is using his public office for private gain.

> *Example: An agency employee works in an office along with personnel from several different support contractors, and she has responsibility for providing feedback on the performance of all of these contracts. She could not make a practice of going to lunch nearly every week at the expense of one or another of these contractors or their employees, even if the gifts from any one contractor fell within the de minimis limits for one source.*

22. May an employee use the exception for gifts based on a personal relationship to accept gifts from a contractor employee with whom he has developed a friendship on the job?

Maybe. Under 5 C.F.R. § 2635.204(b), an employee sometimes may accept a gift from a prohibited source with whom the employee has a personal friendship. However, it must be clear from the circumstances that it was the friendship, and not the employee's official position, that motivated the gift. Relevant factors include the history of the relationship and whether the gift was actually paid for by the friend (as opposed to, for example, the contractor who employs the friend). Although it is certainly possible that an agency employee could develop a personal friendship with a contractor employee on the job—especially given the close working conditions in some mixed workplaces today—caution is advised. Particular care should be exercised to evaluate whether the nature of the relationship really justifies a particular gift. Where the relationship developed on the job, a gift rarely would be justified if the Government

employee were actually in a position to oversee the work of the contractor employee or to participate in decisions affecting the interests of the contractor.

> *Example: An employee has a pleasant, but relatively short, job-centered relationship with a contractor employee. The contractor employee offered a free weekend away at his beach house. Based on the history and nature of the relationship, one reasonably would question whether the motive for the offer was related to the Government employee's official position.*

23. If an employee's spouse works for an agency contractor, may the employee accept gifts from the contractor?

Possibly. Under 5 C.F.R. § 2635.204(e)(1), an employee may accept gifts from his spouse's employer under certain circumstances. The employee may accept meals, lodgings, transportation, or other benefits that result from his spouse's business or employment activities, but it must be clear that the benefits have not been offered or enhanced because of the employee's official position.

> *Example: An agency employee could accept free attendance at an annual retreat offered by a contractor to the families of all contractor employees. However, an employee could not accept if the same benefit were not extended to the families of similarly situated contractor employees who were not married to an agency employee.*

24. May an agency employee accept ground transportation from a contractor or contractor employee?

It depends. The definition of "gift" in the OGE rules expressly includes "transportation" and "local travel." 5 C.F.R. § 2635.203(b). However, in order to determine whether such a gift would violate the ethics rules, it would be necessary to determine whether the transportation is duty-related or for the personal benefit of the individual.

If the transportation is provided in connection with the performance of the employee's official duties, there would be no gift to the employee personally, but rather a service provided to the agency. As described more fully in OGE Informal Advisory Letter 98 x 8, such benefits must be analyzed under fiscal law considerations, not the OGE ethics rules.

> *Example: An employee is offered ground transportation by a contractor to travel between two work sites during official site visits. This is a benefit provided to the agency, not the*

employee personally, and therefore does not implicate the OGE gift rules. The agency would have to determine whether it has authority to accept this benefit.

However, if the transportation was for the personal benefit of the employee, then it would constitute a gift to the employee under the OGE gift rules.

Example: A contractor offers to allow an employee to use the contractor's shuttle bus as part of his daily commute to the office. This is a gift to the employee personally and may be accepted only if one of the gift exceptions applies. For example, if the employee were only going to use the shuttle service for two days while he was on a special assignment, and it could be determined that the value of the service for that limited time period fell within the $20 de minimis amount, then the employee could accept the offer.

25. If agency employees work in the same office with contractor employees, may agency employees solicit contractor employees for voluntary contributions for gifts to be given to certain agency employees on special occasions, such as marriage or retirement?

No. While the OGE rules permit the solicitation of voluntary contributions for certain gifts to official superiors on special occasions, see 5 C.F.R. § 2635.304(c), the rules allow only solicitation of other Government employees. Therefore, the provisions governing gifts between Government employees do not apply to gifts from contractor employees to Government employees.

Furthermore, there is no exception in the OGE gift rules that would permit an agency employee to solicit a gift from a prohibited source for the benefit of another agency employee. See 5 C.F.R. §§ 2635.202(c)(2)(gift exceptions may not be used to solicit gifts); 2635.203(f)(soliciting indirect gifts for another person). An agency employee may accept an unsolicited gift from a contractor employee, if permitted by any of the gift exceptions, but there is no specific exception focusing on gifts for special occasions, such as marriage or retirement.

Example: An agency employee is organizing a dinner in honor of her supervisor's upcoming retirement and would like to invite several contractor employees who share the same workplace. The agency employee may not solicit a contribution from the contractor personnel for a retirement gift. Any contractor personnel who attend the dinner may contribute their appropriate share for the cost of their own meals, which would not be a gift at all. Moreover, all employees of the same contractor may give the retiree a single, unsolicited gift valued at $20.

26. May an employee accept free attendance at a conference or similar event sponsored by an agency contractor?

It depends. Under 5 C.F.R. § 2635.204(g)(2), an employee may accept free attendance at a widely attended gathering of mutual interest under certain circumstances. The event must be truly widely attended (see the Example following Question 27), and the agency must make a determination that the employee's attendance would be in the agency's interest. If the employee is actually working on matters that affect the particular contractor who made the offer, then the agency would have to make a written determination that the agency's interest outweighs the concern that the gift could improperly influence the employee in the performance of his duties. Note that free attendance, under this rule, does not include travel expenses.

> *Example: An agency employee is one of several employees who are involved in the ongoing evaluation of work performed by a contractor that provides certain IT services. The contractor is co-sponsoring (along with a university) a one-day conference on security threats to IT systems. The contractor has extended an offer of free attendance to the agency employee. The event will include speakers from academia, industry and government and will not focus on any particular company's own products and services. The agency may authorize the acceptance, in writing, based on a determination that the agency's interest in the employee learning about IT security threats at this substantive event outweighs any concern that the offer of free attendance will affect the performance of the employee's official duties.*

In some cases, the agency may choose to send the employee to the event on official duty. In those instances, free attendance would be a gift to the agency, rather than to the employee personally. Such gifts might be accepted under an applicable agency gift acceptance statute or, if the employee would be on official travel, under 31 U.S.C. § 1353. If the contractor were a 501(c)(3) nonprofit organization, the gift also might be accepted under 5 U.S.C. § 4111.

27. May an agency employee accept free attendance at a holiday party sponsored by an agency contractor?

Maybe. The definition of "gift" in the OGE rules covers any item having monetary value, including, among other things, "entertainment," "hospitality" and "meals." Although the definition of gift excludes "modest" refreshments (such as soft drinks, coffee and donuts, as long as they are not part of a meal), most holiday parties are not confined to such items. Accordingly, free attendance at a contractor party would be permitted only pursuant to an applicable gift exception.

Example: A contractor invites agency employees to a holiday party. The party will be attended only by contractor personnel who work in a particular office. If the value of the food and any entertainment were determined to be no more than $20, the employees could accept. However, the employees could not use the widely attended gathering exception to accept this gift, because the event would not be attended by a large number of persons with a diversity of views or interests.

28. May an employee use an agency contractor to perform personal work?

It depends. Certainly, an employee could not have a contractor perform private work under the agency's own contract. At the very minimum, this would violate 5 C.F.R. § 2635.704. However, if the employee entered into an agreement to hire the contractor, and paid the full market value for any goods and services, there would not be a prohibited gift. 5 C.F.R. § 2635.203(b)(9). Nevertheless, the employee should be particularly careful to make sure that he actually pays market value, which is defined as what the employee would have to pay, at retail cost, for similar goods or services of like quality: it must be clear that it is an arm's length transaction, under standard terms. Additionally, if the employee is actually working on an agency contract involving the contractor, the employee needs to be careful not to create the appearance that he is in anyway using his authority over the contractor to induce or coerce the contractor into providing services or favorable treatment. 5 C.F.R. §§ 2635.702(a); 2635.202(c)(2). Furthermore, if the personal work involves anything other than a routine consumer transaction, the employee will have a "covered relationship" with the contractor that could require the employee's recusal from agency matters involving the contractor under 5 C.F.R. § 2635.502(a); other circumstances also could raise impartiality concerns under 5 C.F.R. § 2635.502(a)(2). For all of these reasons, employees should exercise great care if they want to hire an agency contractor for outside personal business.

Example: An agency employee works in a large office that receives IT support under an agency-wide contract. The employee does not place task orders under the contract and does not have any other procurement duties. He occasionally receives support from contractor employees when he reports computer problems to the executive officer for his office. On one occasion, he asks a contractor employee whether his company does any residential work, and the contractor employee gives him a telephone number for the residential services division of the company. The employee calls this number and arranges for a technician to do some private work on the employee's home computer, for which he pays the standard residential rate. This arrangement would not violate 5 C.F.R. 2635, Subpart B, nor does it appear to be impermissible under Subpart G. Moreover, because the relationship with the contractor involves a routine consumer transaction, the employee would not have a "covered relationship" under Subpart E.

Example: In the preceding example, the employee is the contracting officer. He has been having problems with his daughter's laptop computer and brings it into the office. He asks one of the contractor employees with whom he works if he has any time to look at the laptop. The contractor employee takes the laptop home and in a few minutes fixes what he determines to be an easy problem. He says it was "no big deal" and tells the employee not to worry about paying anything. The employee has received a gift from a prohibited source. Moreover, given the contracting officer's authority over the contractor and the circumstances in which he asked for help, there could be an appearance that he used his official position to induce or coerce the contractor employee to provide this service. If the employee had actually used the agency contract to have this personal work done, at a minimum, he would have violated 5 C.F.R. § 2635.704.

V. Miscellaneous Ethics Questions

The Questions below deal with various subjects that can arise in connection with employees who work on contract matters or work closely with contractor personnel.

29. May an agency employee raise funds for his favorite charity from a contractor employee with whom he works?

No. Employees may engage in personal fundraising, with certain limitations. One limitation is that employees may not personally solicit funds or other support for a charity from a prohibited source, including an agency contractor or its employees. See 5 C.F.R. § 2635.808(c). (An employee does not violate this rule, however, if the solicitation is made to a large group through the media, oral remarks, or mass mailings, as long as the solicitation is not targeted at prohibited sources.) The prohibition includes even fundraising on the employee's own time and outside the Federal workplace.

Example: An agency employee is assigned to work at a contractor's site. He has become quite friendly with several contractor employees, with whom he has daily interactions and discusses various personal and professional issues. He is active in a local historic preservation society, which is conducting its annual fund drive. He knows that one contractor employee has a particular interest in historic preservation issues. The agency employee may not ask the contractor employee if he would like to make a donation.

Note that some agencies have authority to engage in "official" fundraising, and there is no general prohibition on official solicitation of prohibited sources by agency employees carrying out their authorized official duties. See 5 C.F.R. § 2635.808(b).

However, individual agencies may have policies or practices limiting official solicitation of prohibited sources.

30. Are there limits on the kinds of official information a Government employee may share with a contractor or contractor employee?

Yes. A Government employee may not allow the improper use of nonpublic information to further the private interest of another person, including a contractor or contractor employee. 5 C.F.R. § 2635.703. This includes any information about a contract that the employee gains through his job and that he reasonably should know has not been made available to the public. Additionally, the Procurement Integrity Act has restrictions covering specific types of procurement information: contractor bid or proposal or source selection information prior to the award of an agency procurement contract; the disclosure of such information is subject to criminal as well as civil penalties, and also can result in various administrative actions. 41 U.S.C. § 423(a), (e). In some situations, other laws may prohibit the disclosure of certain information. E.g., 18 U.S.C. § 1905 (Trade Secrets Act); 5 U.S.C. § 552a (Privacy Act).

> *Example: An employee has nonpublic information that his agency is deliberating the termination a particular contract. The employee has become friends with a contractor employee who would be affected if the contract were terminated. The agency employee would like to share this information with the contractor employee so he can start making new career plans. The agency employee is prohibited by 5 C.F.R. § 2635.703 from doing so.*

31. Are there limits on an employee's ability to benefit personally from information pertaining to a contract or potential contract?

Yes. A Government employee may not use nonpublic information to engage in any financial transaction or otherwise to further his own private interest. 5 C.F.R. § 2635.703.

> *Example: An agency employee has access to nonpublic information concerning the likely award of a large contract to a company. He may not rely on this information to buy stock in the company or advise others (such as family or friends) to do likewise. Apart from the ethics rules, such conduct also could violate Federal securities statutes.*

32. May an employee "moonlight" for an agency contractor?

Maybe. As discussed in Question 14 above, an employee may not participate personally and substantially in any contract or other particular matter in which his outside employer has a financial interest. 18 U.S.C. § 208. In some cases, the necessary recusal would impair the employee's ability to do his job or the agency's ability to accomplish its mission. In such cases, the agency may prohibit the outside employment. 5 C.F.R. §§ 2635.802(b); 2635.403(b).

> *Example: An agency employee is the contracting officer's technical representative (COTR) on a particular contract. Service as COTR on this contract is the primary duty of the employee's position. The employee also happens to be a certified public accountant, and he is always looking for opportunities to stay current with his accounting skills. He learns that the contractor is looking for a part-time accountant to work on a totally different contract involving a private sector client. The agency determines that the employee could not engage in this outside employment because the necessary recusal would make it impossible for him to continue as the COTR.*

Even if any employee does not have official duties involving a particular agency contractor, there may be some limitations on his outside activities. Employees may not engage in outside activities that create the appearance that they are using their public office for private gain. 5 C.F.R. §§ 2635.702; 2635.801(c); see OGE DAEOgram DO-04-011, https://www.oge.gov/Web/oge.nsf/Resources/DO-04-011:+Awards+and+Outside+Consulting+Activities.

> *Example: An employee is an expert on his agency's procurement policies and practices and is generally familiar with the typical procurement needs of various offices. A company would like to hire him as a consultant to help develop a business plan for marketing products to his agency. Even though the employee's official duties do not involve any current contract with this company, he may not accept this offer. The circumstances would create the appearance that the employee obtained this outside employment opportunity because of his official position and would be using his position for the private advantage of the company.*

Employees also must be aware that criminal statutes, 18 U.S.C. §§ 203 and 205, prohibit them from representing any contractor in dealings with the Government. For the reasons discussed above in Question 8, these prohibitions can extend even to certain communications made during the course of performing work under the Government contract.

> *Example: An employee of the Environmental Protection Agency (EPA) has taken a part-time job with a Navy contractor. The outside job does not involve any interaction with*

EPA, and it does not even involve the same subject matter as the employee's EPA duties. Nevertheless, the employee may not make any representational contacts with the Navy on behalf of the contractor.

Finally, some agencies have supplemental standards of conduct regulations pertaining to outside employment with certain entities. In some cases, agency supplemental regulations may prohibit certain outside employment with an agency contractor (or potential contractor). E.g., 5 C.F.R. §§ 6901.103(c)(1) (NASA); 5501.106(c)(1)&(2) (HHS). Employees also must follow any agency prior approval requirements for outside activities; even if the agency has no such prior approval requirements, usually it would be prudent for an employee to seek advice from an ethics official prior to engaging in outside employment for an agency contractor.

33. May an employee contract with the Government or own businesses that do?

Generally no. The general policy under the Federal Acquisition Regulation (FAR) prohibits a contracting officer from awarding a contract to a Government employee "or to a business concern or other organization owned or substantially owned or controlled by one or more Government employees." 48 C.F.R. § 3.601. (Somewhat lesser restrictions apply to contracts with special Government employees.) Although this is not an OGE ethics rule, it is clear that the FAR provision is intended to avoid any employee "conflict of interest" as well as "the appearance of favoritism or preferential treatment by the Government toward its employees." Id. An exception may be granted by the agency head or a designee no lower than the head of the contracting activity, "only if there is a most compelling reason to do so, such as when the Government's needs cannot reasonably be otherwise met." 48 C.F.R. § 3.602.

Additionally, it is important to remember that criminal statutes, 18 U.S.C. §§ 203 and 205, may prohibit an employee from communicating with the Government about a contract. These statutes do not prohibit self-representation, so an employee acting strictly as a sole proprietor could freely communicate with the Government about a contract. However, in many cases, an employee may have formed a separate business entity, such as a corporation, partnership or limited liability company (LLC); in such cases, the employee would be prohibited from representing the entity in connection with a Government contract.

Example: A Government employee wants to submit a proposal to another agency to provide certain consulting services. He would be submitting the proposal on his own behalf as an individual. Sections 203 and 205 would not prohibit him from doing so. He

is also considering establishing his own consulting company as a corporation. He may not personally submit a proposal to the Government or make any other representational contact on behalf of the corporation. The corporation may communicate with the Government through other persons, such as its employees or an attorney, provided that the communication is not intended to attribute any information to the Government employee. In any case, the Federal Acquisition Regulation may prevent the contracting officer from awarding the contract to the Government employee or his corporation.

34. May an employee provide a letter or other statement discussing the quality of a particular contractor's performance?

Maybe. The OGE rule on endorsements, 5 C.F.R. § 2635.702(c), generally prohibits an employee from using his official position, title or authority to endorse any product, service or enterprise. Therefore, statements commending the performance of a contractor or a contractor's products generally are not permissible. However, the rule does not prohibit an employee from making a simple factual statement that the contractor's work satisfied the Government's requirements. (Note also that OGE does not view its endorsement rule as applying to authorized agency actions; rather, the prohibition generally is focused on the personal, unauthorized conduct of individual employees who abuse their position to make endorsements.) In addition to section 2635.702, there may be other policies or procedures, such as agency procurement or public affairs policies, that limit the situations in which an employee may make statements about a contractor's performance. Therefore, employees should consult with the contracting officer or an agency ethics official.

Example: A contractor asks an employee for a letter stating that the contractor performed all its work under a particular contract. After consulting with the contracting officer, the employee provides a statement indicating that the contractor met all benchmarks, submitted all reports, and delivered a fully operational product to the agency. This would not be a prohibited endorsement, even if it is anticipated that the contractor will share the letter with prospective customers.