Note: Among other changes to the Standards of Conduct effective August 15, 2024, 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). *See* 89 FR 43686 and LA-24-06.

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Letter to the President and Chief Executive Officer of a Corporation dated June 9, 1994

This is in response to your June 2, 1994, letter in which you make four points regarding the subject matter of our letter of March 30, 1994, to [the Acting Assistant Secretary of a Department].

First, you state that the [Department] attorney knew or should have known that his brother's financial interests were at stake in the [Corporation A] hearings. I refer you to page 2 of the Office of Government Ethics (OGE) March 30, 1994, letter where we quoted the language of 5 C.F.R. § 2635.502(a) and stated:

> The Inspector General found that the [Department] attorney's brother was not a member of his household. Thus, to reach the conclusion that the [Department] attorney improperly failed to obtain authorization to participate in [Corporation A] proceedings, the Inspector General would have to have concluded that the attorney's brother either was a party to the [Corporation A] proceedings or represented a party to the proceedings. The Report of Investigation contains no such finding, and it is apparent from the record provided that the brother had no role in the [Corporation A] proceedings.

Thus, even under the assumption that the employee's brother had a financial stake in the [Corporation A] proceedings, whether by virtue of his membership in [an] Association or as an employee of [Corporation A's] potential competitor, the facts would not require application of the reasonable person analysis of section 2635.502(a).

The section 2635.502(a) analysis is not required simply because a person with whom the employee has a covered relationship has a financial interest in a matter. Only when a household member has a financial interest in a matter is the employee required by section 2635.502(a) to undertake the reasonable person analysis. Note, as indicated in the implementing regulations at 5 C.F.R. § 2635.402, that 18 U.S.C. § 208 imputes the financial interests of certain persons to employees for disqualification purposes. The financial interests of an employee's brother are not imputed to the employee by this criminal conflict of interest statute. Lastly, and again as explained in OGE's March 30, letter, section

2635.502(a)(2) recognizes that impartiality issues can arise in a number of circumstances. Pursuant to that provision, an employee may elect to use the section 2635.502 decisionmaking process to address circumstances which he is concerned would raise questions about his impartiality. The election not to use that process cannot appropriately be considered to be an ethical lapse.

Your second point is that the employee's brother is a member of [an Association], which is an unincorporated association. From these facts you argue that the brother is a "party" to the matter. Whether an organization is incorporated or unincorporated under a particular state's corporate law is of no relevance to the issue of whether an individual member of the organization is a party to a particular matter involving specific parties within the meaning of section 2635.502(a). For purposes of application of criminal conflict of interest laws or the Standards of Ethical Conduct, membership in an organization does not mean that an employee shares an identity with the organization. "Mere membership in an organization is not within the [disqualifying financial interest] prohibition of 18 U.S.C 208. . . ." See The Informal Advisory Letters and Memoranda and Formal Opinions of the United States Office of Government Ethics, 88 x 16. Likewise, OGE did not intend that mere membership in an organization trigger application of the section 2635.502(a) reasonable person analysis.

The intent of this Office is reflected by the language of section 2635.502 which addresses impartiality concerns arising when an organization is a party or represents a party to a particular matter. Section 2635.502(b)(1)(v) states that an employee has a covered relationship with an organization in which the employee is an active participant. The section 2635.502(a) analysis is required where the employee is himself an active participant in the organization and the organization is or represents a party. The view that the section 2635.502(a) analysis is required where a sibling or other relative of an employee is a member of an organization is incorrect.

Third, you claim that our letter "mischaracterizes the initial allegations of [Corporation A] concerning the subject attorney's participation in the [Corporation A] matter." For reasons that are not clear to us, you further state that "[Corporation A] has never claimed to the [Department] that the subject attorney exhibited bias and prejudice against [Corporation A]." Our March 30, 1994, letter makes no mention of a claim of bias or prejudice, but states merely that "the Inspector General's investigation was the result of allegations by [Corporation A] counsel that the [Department] attorney's participation had tainted the

fitness proceedings." Assuming this sentence is the one to which you refer as mischaracterizing, we can only express our surprise. This sentence accurately reflects the allegations contained in your counsel's December 23, 1993, letter that the integrity of the proceeding had been "destroyed" and that "the proceeding has been tainted beyond repair."

The fourth point you make is that our March 30, 1994, letter did not address an entire line of ethical inquiry with respect to the [Department] attorneys: whether the [Department] attorneys abided by the [Department] Rules of Practice and professional standards required of members of the bar. We were only asked by [the Acting Assistant Secretary] to review the Inspector General's report to see if it "properly analyzes and interprets the applicable Office of Government Ethics' regulations." Whether [Department] attorneys acted in accordance with professional standards expected of attorneys or with [Department] Rules of Practice is not an issue addressed by OGE regulation and is not a subject that falls within this Office's authority as prescribed by statute and Executive order. It is for these two reasons that we did not address the collateral issues in our letter. The [Department] is best equipped to address issues relating to the application of its own rules of practice.

We hope this letter will help you in understanding OGE's jurisdiction and the Standards of Ethical Conduct.

Sincerely,

Stephen D. Potts
Director