Office of Government Ethics
95 x 10 -- (Vol. 12, no. 2, pp. 1-3)

Article in the Government Ethics Newsgram of Summer 1995 entitled "Privitization Issues Affect Federal Employees." (Vol. 12, no. 2, pp. 1-3)

Reinvention. Privatization. Devolution. Franchising. Public/private partnerships. Contracting out.

While many of these terms were unfamiliar to employees just a few years ago, they are now part of most employees' everyday vocabulary. At virtually every Department and agency, federal functions and operations are being reviewed to determine whether they should be performed in the same way or, indeed, whether they should continue to be performed by the Federal Government at all. The trend appears irreversible --current agency programs and operations increasingly will be transferred to the private sector.

What does this new emphasis on "reinventing" or "privatizing" Government mean for ethics officials who advise employees engaged in these activities? What issues are they likely to confront?

In 1993 Vice President Gore launched the National Performance Review (NPR) with the aim of making Government more responsive to the needs of the public and empowering Government employees to perform their jobs more efficiently. Subsequently, in December of 1994, President Clinton initiated Phase II of the NPR, calling for an overall downsizing of the Federal Government. Since that time, departments and agencies have been generating a large variety of proposals for reducing Government operations.

Some of these proposals simply involve terminating a particular service; others involve more elaborate methods for eliminating or reducing Federal involvement in a particular Government function, while ensuring that the function continues to be carried out, perhaps by a State or local government, by a quasi-government corporation, by a Government contractor, or even by an employee-owned corporation. And because many of the proposals may be implemented by employees who currently perform the functions and operations under review, questions concerning the applicability of the criminal conflict of interest and procurement

integrity statutes naturally arise. Increasingly, agency ethics officials are being asked whether employees may participate in so-called "privatization" activities.

The first thing that employees involved in privatizing Government functions need to understand is that the conflict of interest restrictions contained in title 18 of the United States Code and the procurement integrity provisions in U.S.C. title 41 may apply to their activities. Even though downsizing agency operations may be a top priority, employees involved in implementing a proposal to privatize a certain agency function must comply with the requirements of these provisions.

The following is a brief discussion of situations where issues may arise. Of course, ethics officials should be aware that there may be any number of other cases where problems can develop and that questions concerning privatization necessarily must be examined on a case-by-case basis.

18 U.S.C. § 208

A fundamental conflict might arise when an agency's decision to privatize a certain function would have a direct and predictable effect on an employee's financial interest. This might happen, for example, where an agency decides to contract out a particular agency function and the prospective contractor would be required to hire the Government employees whose Federal positions would be eliminated by the contracting out. In the absence of a waiver, section 208 of 18 U.S.C. would generally bar an affected employee from participating in such a matter.(1)

Similarly, an employee who is part of an association that is establishing an ESOP (Employee Stock Ownership Plan) to secure a contract to perform a Government service would have a disqualifying financial interest in the agency's decision to contract out the function.(2) In both cases, the employees affected by the privatization plan would have a financial interest in the new positions to be established for them in the private sector.

Section 208 would also be implicated where an employee has an arrangement for future employment, or is negotiating for employment with a person or entity who is seeking to contract with the Government, or to purchase a franchise from the Government, or to establish any other relationship with the Government to perform a function that is being

privatized. In cases where an employee is negotiating, or has an arrangement for future employment with a prospective contractor, franchisee, or other similar firm, section 208 would bar the employee's participation in matters affecting the firm regardless of whether the employee's position would be eliminated or otherwise affected by privatization.(3)

18 U.S.C. §§ 203 and 205

Although section 208 is likely to pose the most significant problem for employees involved in privatization activities, in some cases sections 203 and 205 might also raise issues. These provisions bar an employee from representing another, with or without compensation, before any department, agency or court in connection with a particular matter in which the United States is a party or has a direct and substantial interest.

Section 205, for example, would bar a current employee from making any oral or written communication to the Government on behalf of another individual, or on behalf of any corporation, partnership or other similar entity, to obtain a contract or other arrangement to perform a Government function that is being privatized. Thus, an employee could not submit a proposal to the Government on behalf of a group of employees who are seeking to obtain a contract to perform a privatized Government function through an employee-owned company or ESOP. The restriction would apply whether or not the employee's position would be eliminated because the function was being privatized.(4) Employees who wished to submit such a proposal would have to retain a non- employee to represent them in this matter.

Procurement Integrity

Procurement officials involved in privatization activities would be required to comply with additional restrictions on their conduct. The procurement integrity provisions found at 41 U.S.C. § 423 bar a procurement official from discussing employment with a competing contractor, soliciting or receiving gratuities from a competing contractor, or making an unauthorized disclosure of proprietary or source selection information. In addition, 41 U.S.C. § 423 prohibits a former procurement official from engaging in certain post-employment activities.

For procurement officials involved in privatization activities, the restriction on discussing future employment with a competing contractor

has particular relevance. Such an employee could not, for example, negotiate a position with a newly formed corporation that expects to bid on the Government contract that will be awarded. By contrast, under the prohibition in 18 U.S.C. § 208, a non-procurement official employee involved in a similar privatization activity would simply have to disqualify himself from acting in Government matters affecting the corporation.(5)

Similarly, a former procurement official would face more stringent post-employment restrictions than a non-procurement official employee involved in the same matter. For example, the procurement official described in the hypothetical situation above could not, for two years, participate in the performance of the contract awarded to the private corporation.

On the other hand, it is also significant that certain actions can be taken by employees involved in privatization activities without triggering procurement official status. Thus, an employee would not generally become a procurement official solely by participating in management studies or by taking certain action in connection with a procurement conducted under the procedures of OMB Circular A-76. See 48 C.F.R. § 3.104.

18 U.S.C. § 207

The majority of the post-employment restrictions that would be applicable to former employees whose positions have been eliminated through privatization are contained in 18 U.S.C. § 207. Of the statute's substantive restrictions, three are most likely to impact former employees who move to the private sector as a result of the transfer of Government functions. Each of these three restrictions prohibits former employees from communicating to or appearing before the Government on behalf of another, with the "intent to influence" the Government concerning certain matters.

The first two of these restrictions, 18 U.S.C. § 207(a)(1) and 207(a)(2), prohibit any former employee from representing another person or entity before any Federal department, agency, or court concerning certain "particular matters" involving "specific parties" -- like contracts, grants, or lawsuits -- in which the individual participated or over which he had official responsibility as a Government employee. If the matter was under the individual's official responsibility during his last year of Government service, the restriction lasts for two years. The restriction is permanent if the individual participated personally and substantially in the matter as a Government employee.

The restrictions of sections 207(a)(1) and (a)(2) might apply where certain Government matters are transferred in process to a private contractor to complete, and the former Government employee who worked on the matter would now work on the same matter for his new employer (the private contractor).

For example, if an agency contracted out the responsibility for performing safety inspections of certain public utilities, a former employee who now works for the private contractor may not represent the contractor back to his former agency in connection with a safety inspection report he worked on while he was an agency employee and which he is now completing for his new employer. In this hypothetical case, the former employee would be permanently barred from representing anyone back to the Government on that inspection.

The one-year restriction of 18 U.S.C. § 207(c) prohibits a former "senior" employee from communicating to or appearing before an employee of his former agency to seek action on any matter. This prohibition applies even if the former senior employee was never involved in the matter as a Government employee.(6)

As a general matter, section 207 will not restrict an employee involved in the privatization process from accepting employment with any particular employer. The provisions can, however, serve to limit a former employee's ability to interact with the executive branch as he performs functions that in the past were accomplished by Government employees. Nevertheless, depending upon the duties performed by the employee while in Government, 18 U.S.C. § 207(a)(1) and (a)(2) may not limit a former employee's contacts with current executive branch employees at all.(7)

Conclusion

In most cases, the various conflicts of interest restrictions should not obstruct privatization initiatives. However, agencies should be aware that they will have to be flexible in developing strategies for privatizing, and, where appropriate, may have to consider issuing waivers, reassigning certain employees or using the expertise of persons outside of an affected office to facilitate the privatization of Government operations and functions. Officials involved in implementing privatization programs, along with the agency ethics officials who advise

them, must take all steps possible to ensure that employees affected by privatization activities do not inadvertently violate any applicable statutes or regulations.

Endnotes:

(1) Participation in particular matters that affect only an employee's Federal salary is not barred under section 208, because salary is not a disqualifying financial interest within the meaning of section 208. See Memorandum for Stephen Potts, Director, Office of Government Ethics, from Walter Dellinger, Acting Assistant Attorney General, Office of Legal Counsel, Re: Ethics Issues Related to the Federal Technology Transfer Act of 1986 (September 13, 1993). The precise scope of the term Federal "salary" has never been delineated.

Editor's Note: The statement in footnote 1 concerning interests in Federal salary is no longer correct. In an interim regulation dealing with exemptions from section 208 for personal financial interests, an employee's interest in Government salary and benefits is treated as disqualifying under section 208(a)(1), although most such interests have been exempted under the regulation. See 60 Fed. Reg. 44706 (August 28, 1995).

(2) Certain preliminary discussions about whether a specific agency function should be privatized may not have a direct and predictable effect on an employee's financial interests because the possible effect of the matter on the employee's interest would be too speculative. For example, a preliminary review of an agency function made with the intent of determining whether the function should continue to be conducted by the agency or should be eliminated altogether, or transferred to another agency or to a State or local government, or privatized in some way is not likely to have a direct and predictable effect on an employee's financial interest. Thus, section 208 would not bar an employee's participation in the preliminary discussions.

(3) The Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635.601 et seq., generally bar an employee from participating in particular matters that would affect the financial interests of someone with whom the employee is "seeking employment." While the term "seeking employment" includes an arrangement or negotiation for employment as described in 18 U.S.C. § 208, it also includes a broader array of activities such as simply sending a resume to a prospective

employer or making a similar unsolicited communication about possible employment. Employees engaged in privatization activities must ensure that their conduct is consistent with part 2635.

(4) Although section 205 would permit an employee to represent himself to the Government in an attempt to obtain a contract to perform a Government function that is being privatized, a provision in the Federal Acquisition Regulations prohibits the Government from awarding a contract to a Government employee except for compelling reasons. See 48 C.F.R. § 3.601.

(5) A very limited category of procurement officials may receive special permission to discuss future employment with a competing contractor, provided they are disqualified from further participation in the pending procurement. See 41 U.S.C. § 423(c).

(6) Certain senior employees may communicate to or appear before components of their former agencies if those components have been designated as separate agencies or bureaus by OGE. In addition, the applicability of section 207(c) can be waived altogether as to certain senior employee positions of categories of positions.

(7) Regardless of duties, the interaction of former senior employees with current Government employees is restricted by 18 U.S.C. § 207(c) for one year.