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Memorandum dated October 19, 2006,
from Robert I. Cusick, Director,
to Designated Agency Ethics Officials
Regarding Intergovernmental Personnel Act Summary

The Office of Government Ethics (OGE) recently amended the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) to clarify that all of the Standards of Conduct provisions apply to individuals serving on detail to Federal agencies under the Intergovernmental Personnel Act (IPA), 5 U.S.C. §§ 3371-3376.¹ This amendment to the Standards of Conduct provides an occasion for OGE to remind you about the kinds of ethics issues that can arise in connection with IPA assignments.

BACKGROUND

The IPA authorizes the head of a Federal agency, under certain conditions and restrictions, to arrange for the temporary assignment of an employee of his agency to one of several types of non-Federal entities. The IPA also permits the temporary assignment of an employee of such a non-Federal entity

¹ Specifically, OGE has amended the definition of "employee" at section 2635.102(h) to indicate that the term includes IPA detailees. See 71 *Fed. Reg.* 45735 (August 10, 2006). OGE also has amended section 2635.105 of the Standards of Conduct in order to enable agencies to amend their supplemental regulations to provide that some or all of their provisions also apply to IPA detailees. *Id.* OGE's determination that the Standards of Conduct apply to IPA detailees is based upon a 2001 amendment to the IPA that deemed them to be Federal employees for purposes of the Ethics in Government Act of 1978. National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 101-107, § 1117, December 28, 2001; 5 U.S.C. § 3374(c)(2). While there had been some uncertainty about whether, and to what extent, the Standards of Conduct applied to IPA detailees, the amendment to the IPA and the subsequent amendments to the Standards of Conduct eliminated any doubt that the Standards of Conduct apply to them.

to a Federal agency.² In either case, such assignments are intended to be for work of mutual concern to the agency and to the State or local government³ that the agency head determines will be beneficial to both. 5 U.S.C. § 3372(a). A Federal employee, on an outgoing IPA assignment, may either be *detailed*, as a regular work assignment, or work for the receiving organization while on leave without pay from his agency. 5 U.S.C. § 3373(a). Similarly, an employee of a non-Federal entity may receive an IPA assignment to a Federal agency either through appointment or detail. 5 U.S.C. § 3374(a). An IPA assignment may be made for up to two years, and may be extended for up to an additional two years. 5 U.S.C. § 3374(a). Under OPM regulations,⁴ before an IPA assignment can be made, the Federal agency, the non-Federal entity, and the employee must enter into a written agreement recording the obligations and responsibilities of the parties. 5 C.F.R. § 334.106.⁵

A Federal employee who is assigned under the IPA to a non-Federal entity, whether on *leave without pay* or on *detail*, remains a Federal employee. 5 U.S.C. § 3373(a). Therefore, the employee continues to be subject to all Federal ethics laws and

² The IPA allows for the detail of an employee to or from a: State government, government of a United States territory or possession, local government, Indian tribal government, non-profit educational organization including an institution of higher education, metropolitan organization representing member State or local governments, association of State and local public officials, and Federally funded research and development center. 5 U.S.C. §§ 3371-3374. Office of Personnel Management (OPM) regulations, 5 C.F.R. part 334, contemplate an even broader body of potential participants.

³ In the IPA, the term "State or local government" includes all of the entities listed in footnote 2. In this memorandum, these entities will be referred to, collectively, as "non-Federal entities" or "receiving organizations."

⁴ Executive Order 11589 (April 1, 1971) delegated to OPM the authority to prescribe regulations for the administration of the Intergovernmental Personnel Act.

⁵ The written agreement should contain information regarding, *inter alia*, the length of the assignment, the responsibility to pay the employee's salary, and the employee's prospective duties.

regulations while working for the non-Federal entity. A non-Federal employee who is *appointed* to a Federal position under the IPA is considered a Federal employee for virtually all purposes, including all applicable ethics provisions. 5 U.S.C. § 3374(b). As discussed in greater detail below, however, a non-Federal employee who is *detailed* to a Federal agency is deemed to be a Federal employee only for limited purposes including many specified ethics provisions. 5 U.S.C. § 3374(c).

**NON-FEDERAL EMPLOYEES ASSIGNED TO
FEDERAL POSITIONS UNDER THE IPA**

Although, as noted above, a non-Federal employee's IPA assignment may be effectuated through either a detail or a Federal appointment, our understanding is that IPA assignments to Federal agencies are virtually always accomplished through details. Thus, our discussion about the application of the various ethics provisions to incoming IPA assignees will be limited to those questions that arise for non-Federal employees who are *detailed* to Federal positions.

The IPA, as amended, specifies that during the period of an IPA assignment, a non-Federal employee who is detailed to a Federal agency is deemed to be an employee of the agency for purposes of: 5 U.S.C. Chapter 73 (employment limitations, political activities, foreign gifts and decorations, gifts from prohibited sources, gifts between employees, certain kinds of misconduct, and drug and alcohol abuse); the Ethics in Government Act (financial disclosure and outside earned income limitations), section 27 of the Office of Federal Procurement Policy Act (procurement integrity), 18 U.S.C. §§ 203, 205, 207, 208, and 209 (the criminal conflict of interest statutes);⁶ 18 U.S.C. §§ 602, 603, 606, 607, 643, and 654 (political contributions, accounting for public money, and conversion of property); 18 U.S.C. §§ 1905 and 1913 (disclosure of confidential information and lobbying with appropriated moneys); and 31 U.S.C. §§ 1343, 1344, and 1349(b) (passenger motor vehicle and aircraft purchase and use).

⁶ An IPA detailee who is assigned for not more than one hundred and thirty days during any period of three hundred and sixty-five consecutive days is subject to the provisions of these statutes only to the extent that they apply to special Government employees (SGEs). See 18 U.S.C. § 202.

A. *Restrictions on Representation:* Sections 203 and 205 of title 18 of the U.S. Code impose related restrictions on the outside activities of Federal employees, particularly activities involving the representation of others before the Federal Government. Section 203 prohibits an employee from receiving, agreeing to receive, or soliciting compensation for representational services, rendered either personally or by another, before any court or Federal agency or other specified Federal entity, in connection with any particular matter in which the United States is a party or has a direct and substantial interest. Section 203 applies not only to representational services provided by the employee personally, but also to services provided by another person, when the employee shares in the compensation for such services, for example, through partnership income or profit-sharing arrangements. See 4B Op. O.L.C. 603 (1980).

Section 205 prohibits an employee from personally representing anyone before any court or Federal agency or other specified Federal entity, in connection with any particular matter in which the United States is a party or has a direct and substantial interest. See 18 U.S.C. § 205(a)(2). Unlike section 203, the prohibition in section 205(a)(2) applies whether or not the employee receives any compensation for his representational activity. Furthermore, section 205(a)(1) prohibits an employee from representing anyone in the prosecution of a claim against the United States, or from receiving any gratuity, or share or interest in a claim, as consideration for assistance in prosecuting the claim.

These prohibitions can limit the permissible activities of a non-Federal employee detailed to a Federal position under the IPA. University professors, for instance, often work on research projects funded by Federal grants. Thus, the question often arises whether such an individual, while on an IPA detail to a Federal agency, properly could continue to serve as such a grant's "principal investigator," a position that could require the kind of representational duties that are prohibited by

section 205.⁷ Because section 205 prohibits only *representing* a third party before a Federal agency or court, it would not necessarily prohibit the detailee from continuing to serve as the principal investigator. Although the detailee would not be permitted to, for instance, sign and submit a grant application to a Federal agency, the detailee could prepare the application, and could be listed on it as principal investigator, if it were signed and submitted by a co-investigator who is not a Federal employee or detailee.⁸ See, e.g., Example 1 to 5 C.F.R. § 2637.201(b)(6).

This prohibition particularly may be limiting for a part-time IPA detailee who, while also continuing to work part-time for his non-Federal employer, is prohibited from representing this entity before any Federal agency during the course of his IPA detail. Nevertheless, the part-time detailee would have to structure his duties to his home institution in order to avoid such representational activities. This prohibition, however, would be substantially less onerous for a part-time IPA employee who is detailed for 130 days or less during any period of 365 consecutive days because 18 U.S.C. §§ 203 and 205 would apply to such a detailee only to the extent that they apply to SGEs.⁹

⁷ The principal investigator is the head of the project or grant. On occasion, he may have one or more "co-principal investigators" who share with him responsibility for the project's performance.

⁸ An agency may choose, when negotiating an IPA agreement for the services of an individual who also serves as a principal investigator on a Government grant, to request that the non-Federal entity designate a co-investigator to perform any necessary representational services. Conversely, an agency may choose to prohibit, in an IPA agreement, the continued service of a detailee as a contract's principal investigator or co-investigator.

⁹ These statutes would only prohibit the participation of an SGE IPA detailee in a particular matter involving a specific party or parties in which he has participated as a Government employee. If the IPA detailee has served in the Federal position for more than 60 days, but less than 130 days, these statutes also prohibit his participation in particular matters involving a specific party or parties that are pending before

B. *Financial Conflicts of Interest:* A non-Federal official who is detailed to a Federal agency also is subject to 18 U.S.C. § 208, which prohibits an employee from participating personally and substantially in any particular matter that would have a direct and predictable effect on his own financial interests, or on the financial interests of, among others, any organization which he serves as officer, director, trustee, general partner or *employee*; or any person or organization with which he is negotiating for, or has any arrangement concerning, future employment.

Section 208 issues often arise because, as noted above, an IPA detailee continues his employment status with his home institution. Thus, absent a waiver, an IPA detailee must not take any official action that will directly and predictably affect the financial interests of his home institution. For instance, absent a waiver, a university employee who is detailed to supervise a Federal research project, and who recognizes the need for additional work to be done, cannot recommend or select his home institution to perform the additional work.¹⁰

A regulatory exemption published by OGE provides some relief from the restrictions of section 208 for certain IPA assignees. An employee on a leave of absence from an institution of higher education may participate in any particular matter of *general applicability* affecting the financial interests of the institution from which he is on leave, provided that the matter will not have a special or distinct effect on that institution other than as part of a class. 5 C.F.R. § 2640.203(b). This exemption, however, would not apply to an IPA detailee who continues to serve his home institution part-time because such an employee actually would not be "on leave" from his university.

the agency at which he is employed. See 18 U.S.C. §§ 203(c), 205(c).

¹⁰ Further illustrating this problem, a December 2005 GAO report concluded that the Department of Homeland Security needed to improve its management controls to help IPA detailees from the national laboratories guard against conflicts of interest when participating in determining the direction of research and development projects. "DHS Needs to Improve Ethics-Related Management Controls for the Science and Technology Directorate," GAO-06-206.

Where the matter in question is *not* one of *general applicability* (or is one of general applicability to which the regulatory exemption at 5 C.F.R. § 2640.202(c) does not apply), the agency sometimes may decide to waive the imputed financial conflict of interest pursuant to section 208(b)(1). Some agencies, for example, have issued waivers in situations where non-Federal officials are assigned, while on IPA details, to manage Federal grants that involve their home institutions, but that are wholly unrelated to the detailees' own past or future work there. Other agencies decline to issue waivers under these circumstances, arguing that the detailee's perceived primary loyalty to his home institution makes it difficult to determine that the conflict of interest is "insubstantial." Because assessing the appropriateness of issuing a waiver to an IPA detailee is complicated, agencies should consult with OGE. See 5 C.F.R. § 2640.303.

When an IPA detailee holds a direct financial interest that would be affected by the Government matter to which he is assigned, normally he will either seek a waiver or recuse. Although he also may choose to divest the interest in order to participate, this is an unusual choice of remedy for an IPA detailee. It is important to note that an IPA detailee who divests a conflicting financial interest in order to participate in a particular matter is not eligible to receive a certificate of divestiture (CD).¹¹ In contrast, an employee who is *appointed* to a Federal position under the IPA would be eligible to receive a CD.

¹¹ A CD may be issued only to an employee (other than an SGE), an employee's spouse or minor child, or a trustee holding property in a trust in which one of these individuals has a beneficial interest in principal or income. See 5 C.F.R. § 1003. The version of the National Defense Authorization Act for Fiscal Year 2002 that was originally passed by the House in 2001 (S. 1438) included, in its amendments to 5 U.S.C. § 3374(c)(2), the authority to issue certificates of divestiture to IPA detailees. See 147 Cong. Rec. H7072 (October 17, 2001). This provision, however, was removed from the bill that ultimately passed both houses and became law. See National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 101-107, sec. 1117, December 28, 2001; H. Conf. Rep. 333, 107th Cong., 1st Sess., December 12, 2001, 2001 U.S.C.C.A.N. 1021, 1139.

C. *Post-Employment Restrictions:* The criminal post-employment statute, 18 U.S.C. § 207, imposes a number of different restrictions on the activities of former Federal Government employees. They include: (1) the lifetime prohibition on representing others in connection with the same particular matter involving specific parties in which the former employee participated personally and substantially, 18 U.S.C. § 207(a)(1); (2) the two-year prohibition on representing others in connection with the same particular matter involving specific parties that was pending under the employee's official responsibility during the last year of Government employment, 18 U.S.C. § 207(a)(2); (3) the one-year prohibition on representing, aiding, or advising others about certain ongoing trade or treaty negotiations on the basis of certain nonpublic information, 18 U.S.C. § 207(b); (4) the "one year cooling off period" that prohibits a former "senior employee" from representing anyone before his former agency or department in connection with any matter for one year after terminating his senior position, 18 U.S.C. § 207(c); and (5) the restriction on certain post-employment activities with foreign entities, 18 U.S.C. § 207(f). Generally, all of these provisions apply to IPA detailees.¹² Section 207(a)(1), for example, would prohibit a former IPA detailee from negotiating the terms of a grant application, on behalf of any institution or organization, if he participated personally and substantially in evaluating applications for the grant during his Federal detail.¹³

Section 207(c) also may apply to an individual serving as a senior employee pursuant to the IPA. Based on advice that OGE has received from the Office of Legal Counsel (OLC), such individual is considered a senior employee if his total pay, from both Federal and non-Federal sources, is equal to or greater than 86.5 percent of the rate of basic pay payable for

¹² As noted above, the IPA specifically provides that an individual serving on detail to a Federal agency "is deemed an employee of the agency for purposes of . . . 203, 205, 207, 208, and 209 . . . of title 18." 5 U.S.C. § 3374(c)(2).

¹³ Additionally, because the Procurement Integrity Act, 41 U.S.C. § 423, also applies to IPA detailees, a former detailee who is a "covered official" would be prohibited from accepting compensation from a contractor, for one year from the detailee's last involvement in specific contract actions, on a contract of \$10 million or more.

level II of the Executive Schedule (excluding Federal reimbursement of a non-Federal employee's share of non-salary benefits) **and** either: (1) the individual served in a Federal position ordinarily compensated at this rate; (2) the individual's non-Federal employer received Federal reimbursement in an amount equal to or greater than this rate; or (3) the individual received a direct Federal payment pursuant to 5 U.S.C. § 3374(c)(1) that, when added to the salary that he received from his non-Federal employer, totals an amount equal to or greater than this rate.

D. Supplementation of Government Salary: 18 U.S.C. § 209 prohibits a Federal employee from receiving any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch, from any source other than the United States Government. Although this provision applies to an IPA detailee, section 209(a) permits the acceptance of "compensation contributed out of the treasury of any State, county, or municipality." This provision applies to all payments from State and local governments, and a payment from a state university is considered a payment from the state. See generally, OGE Informal Advisory Letter 93 x 29. Additionally, the IPA itself provides that a sending organization may pay some or all of the individual's salary. See 5 U.S.C. § 3374(c). Thus, according to informal advice that OGE has received from OLC, section 209 does not prohibit other sending organizations from paying some or all of a detailee's salary because such a prohibition would be inconsistent with the IPA statute's specific authorization of such fee splitting arrangements.

Section 209 could be relevant where an IPA detailee is seeking to receive compensation for writing. To the extent that the material in question was written as part of the detailee's Federal Government duties, section 209 would prohibit the receipt of compensation for its publication. On the other hand, a part-time IPA detailee who was able to show that he wrote the material in question entirely on his own time, or during the hours in which he worked for his home institution, and that the writing was not otherwise part of his official Government duties, would not be barred by section 209 from receiving this compensation. Of course, section 2635.807 of the Standards of Conduct would still bar his receipt of compensation if the writing "relates to his official duties."

E. Financial Disclosure: As noted above, in December 2001, Congress amended section 3374(c)(2) of the IPA, as part of the National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107 (2001), to specify that an IPA detailee to a Federal position is a Federal employee for purposes of the Ethics in Government Act. This provision subjects certain IPA detailees to the obligation to file Public Financial Disclosure Reports (SF 278s). It is the position, rather than the individual, that controls the public financial disclosure reporting requirement. Thus, an IPA detailee who is assigned to an established designated public filer position, and who reasonably is expected to perform the duties of that position for more than 60 days in a calendar year, must file an SF 278 under 5 U.S.C. app. § 101(f)(3).

An IPA detailee who is "given a set of ad hoc, unclassified duties, relevant only to the specific assignment project" is not required to file an SF 278. See OGE Informal Advisory Memorandum 02 x 11. Such IPA detailees do not have clearly defined positions and many of them retain their non-Federal salaries, which may not reflect the level of responsibility of their Government duties and often may be higher than the salaries paid to other Government employees for similar work. However, in particular cases, under section 101(f)(3), an agency may request that OGE issue a determination that the detailee must file because his position is of equal classification to those required to file SF 278s.

Any IPA detailee who is not required to file an SF 278 may be required to file a Confidential Financial Disclosure Report (OGE Form 450) if his duties and responsibilities meet the criteria set forth at 5 C.F.R. § 2634.904(a)(1). See December 9, 2002 OGE Memorandum to Designated Agency Ethics Officials (reprinted as OGE Informal Advisory Memorandum 02 x 11).

**FEDERAL EMPLOYEES ASSIGNED TO
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A Federal employee remains an employee of his agency during an IPA assignment, whether he is on detail or on leave without pay. 5 U.S.C. § 3373(a). Thus, all applicable ethics laws and standards continue to apply to him. See 5 C.F.R. § 2635.104(c). Although this is fairly straightforward, several particular ethics issues may arise for outgoing IPA assignees.

A. *Restrictions on Representation:* Generally, 18 U.S.C. § 205 would be implicated if an employee on an IPA assignment were to represent the interests of the non-Federal organization to which he is assigned back to the Federal Government. However, section 205 does not apply to representation undertaken by a Federal employee in the discharge of his official duties. Thus, if such representation were "integral to the statutory scheme administered by" his home agency, it would not be statutorily prohibited. See 4B Op. O.L.C. 498, 503 (1980); Informal Advisory Letter 94 x 15. Moreover, where the Federal agency head determines that work of "mutual concern" to the Federal agency and to the non-Federal entity includes such representational contacts with the Federal Government, and the IPA agreement explicitly authorizes such representation, the contact would not violate section 205. See Memorandum from OLC to the Federal Bureau of Investigation (FBI) dated January 11, 1999, available at http://www.justice.gov/sites/default/files/olc/opinions/1999/01/31/op-olc-v023-p0025_0.pdf

B. *Financial Conflicts of Interest:* Section 208 of title 18 of the U.S. Code prohibits a Federal executive branch employee from participating personally and substantially, in an official capacity, in a particular matter in which he has, or certain others (whose interests are imputed to him under the statute) have, a financial interest. An organization or entity that he serves as an employee is one whose financial interests are imputed to him. As noted above, although an employee assigned to a non-Federal entity under the IPA remains a Federal employee during his assignment, he also is in an employment relationship with the non-Federal entity to which he is assigned. Thus, the employee's participation in a particular matter that would affect the non-Federal entity's financial interests would seem to present a financial conflict of interest. However, because the IPA provides explicit statutory authority for a Federal employee to serve the Government and a non-Federal entity simultaneously, section 208 would not be violated.¹⁴

¹⁴ In a 1996 opinion, OLC determined that the financial conflict of interest that results from an employee's outside service to a non-Federal entity can be relieved by the existence of statutory authority for such official outside service. See Memorandum for Howard M. Shapiro, General Counsel, FBI, from Beth Nolan, Deputy Assistant Attorney General, OLC (November 19, 1996).

Another common issue is that a Federal employee who is assigned to a non-Federal entity may wish to seek permanent employment with that receiving organization.¹⁵ Section 208 prohibits the personal and substantial participation of a Federal employee in any particular matter that would directly and predictably affect the financial interests of anyone with whom he is negotiating for employment. Because, as noted above, an IPA assignment essentially is *ex officio*, and the employee's primary loyalty remains to the United States, all of his actions while on assignment constitute participation in Federal Government matters. Thus, it would be inconsistent, under section 208, for the employee to negotiate for employment with a non-Federal organization to which he is currently assigned under the IPA while at the same time working on matters that affect the receiving organization's financial interests. Although the issuance of a section 208(b)(1) waiver would resolve this conflict, agencies should consider carefully whether the issuance of a waiver is appropriate under these circumstances, and should consult with OGE before issuing such a waiver.

C. *Post-Employment Restrictions:* Because a Federal employee's IPA assignment to a non-Federal entity is considered *ex officio*, the matters in which he participates while on assignment are considered official duties and fall within the purview of the post-employment restrictions. Thus, the lifetime prohibition set out at 18 U.S.C. § 207(a)(1) would prohibit a former Federal employee from making, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of anyone other than the United States, in a particular matter involving specific parties in which he participated personally and substantially while serving a non-Federal entity on an IPA assignment. For example, an employee who assisted in the performance of a contract while on an IPA assignment to a non-

¹⁵ Generally, the IPA requires that a Federal employee agree, as a condition of accepting an IPA assignment, to serve in the Government upon the completion of the assignment for a period of time equal to the length of the assignment. 5 U.S.C. § 3372(c)(1). Failure to abide by this requirement makes the employee liable to pay back all of the expenses of the assignment, excluding salary. 5 U.S.C. § 3372(c)(2). The agency head, however, may waive this liability "for good and sufficient reason." *Id.*

Federal entity, could not subsequently make a communication to or appearance before the Government regarding that same contract, on behalf of another.

CONCLUSION

Although this memorandum discusses the ethics issues that arise most commonly for individuals serving under IPA assignments, it is not exhaustive. Thus, in addition to considering these issues, we urge agency ethics officials to be sensitive to the possibility that other concerns may arise in particular cases. OGE would be happy to help you parse through such concerns, should they arise.