



September 9, 2019

The Honorable Adam Smith  
Chairman  
House Armed Services Committee  
United States House of Representatives  
2216 Rayburn House Office Building  
Washington, DC 20515

The Honorable Mac Thornberry  
Ranking Member  
House Armed Services Committee  
United States House of Representatives  
2216 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Smith and Ranking Member Thornberry:

I write to advise you of concerns the U.S. Office of Government Ethics (OGE) has with legislation to amend title 10, United States Code, to establish a public-private exchange program for the Department of Defense acquisition workforce. This legislation, which would add a new section 1749 at the end of subchapter IV of chapter 87 of title 10, United States Code, passed the House of Representatives as section 842 of H.R. 2500 and was introduced as H.R. 2944.

OGE recognizes the importance of innovative and flexible human capital options for increasing Federal recruitment and retention. OGE is concerned, however, that public-private exchange programs such as the one contemplated by the proposed section 1749 task detailed private sector personnel with work in which there is an enhanced risk of conflicts of interest that are adverse to the public interest. This includes a heightened risk of financial conflicts of interest arising from continued outside employment and divided loyalties arising from the continued payment of their salary by the private sector. Such risks are particularly troublesome in relation to the acquisition workforce, given the history of high-level and high-value procurement related scandals.<sup>1</sup>

Although certain provisions of the proposed section 1749 purport to deal with those risks, in OGE's experience these provisions are not enough to secure public integrity. Accordingly, OGE recommends that the proposed section 1749 and any similar program include, at minimum, the following safeguards to reduce conflict of interest risks: (1) the implementing agency or component should be

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<sup>1</sup> As OGE stated in a 2006 legal opinion, “[c]oncerns about conflicts of interest in Federal procurement not only have shaped many of our ethics laws, but also have been a particular focus in the enforcement of those laws.” See OGE Legal Advisory 06x7 (August 9, 2006). In OGE's latest annual Conflict of Interest Prosecution Survey, a majority of the prosecutions and settlements involved contract-related misconduct. See OGE Legal Advisory LA-18-09 (July 17, 2018). We note as well that procurement scandals, including those related to “Operation Ill Wind,” led to specific conflict of interest and post-employment laws for acquisition officials under the Procurement Integrity Act, 41 U.S.C. §§ 2101-2107.



required to consult with OGE regarding the structure of the program; (2) procedures should be included to avoid financial conflicts of interest under 18 U.S.C. § 208, without need to resort to waivers; and (3) the impact of allowing private sector detailees to be paid by their for-profit employers for government services should be considered, and the application of 18 U.S.C. § 209 to such payments should be clarified. These safeguards are discussed in detail below.

### **Consultation with OGE Regarding the Structure of the Program**

In OGE's experience, public-private exchanges are likely to pose novel and precedential questions regarding the ethics laws. As the supervising ethics office of the executive branch,<sup>2</sup> OGE believes that the formal consultation between the Secretary of Defense and OGE is necessary to ensure uniform implementation of the ethics laws to temporary detailees in the executive branch. Accordingly, OGE recommends that proposed section 1749(a), entitled "Assignment Authority," direct the Secretary to consult with OGE to develop policies and procedures for the program aimed at ensuring that such authority is exercised in a manner consistent with all relevant ethical constraints and principles, including the avoidance of any prohibited conflict of interest or appearance of impropriety.

### **Procedures to Avoid Financial Conflicts of Interest**

Given the purpose of the legislation and the fact that detailees' expertise often relates to the activities of their for-profit employers, OGE is concerned that personnel assigned from for-profit organizations will have a heightened risk of conflicts of interest arising from their continued employment. The criminal prohibition at 18 U.S.C. § 208(a) states, in relevant part, that a government official may not participate in any particular matter that will have a direct and predictable effect on the financial interests of an outside organization of which the official is an "employee." As OGE said in 2006, section 208 issues often arise with detailees under the existing Intergovernmental Personnel Act exchange program,<sup>3</sup> and these issues have at times been the subject of scrutiny.<sup>4</sup> Concerns regarding conflicts of interest are only exacerbated when the outside entity has a profit motive and competitive interest in the very work to be accomplished by the detailee.

As a result, many of the activities that might be contemplated by the legislations drafters might violate the criminal conflict of interest law. At the same time, waivers of such conflicts would be extremely hard to justify under the statutory standard set forth in 18 U.S.C. § 208(b)(1) and under the appearance standards set forth in 5 C.F.R. § 2635.502(d).<sup>5</sup> Absent extraordinary facts, OGE would therefore anticipate objecting to the issuance of any waiver permitting a detailee to participate in a particular matter that would affect the financial interests of the detailee's for-profit employer.<sup>6</sup>

To help mitigate this enhanced risk of financial conflicts of interest, OGE supports an explicit provision restricting the Secretary of Defense from assigning private sector employees to particular matters in which their private sector employer has a financial interest.<sup>7</sup> Even with that language, as a practical matter, conflicts of interest under 18 U.S.C. § 208 can be difficult to identify. Therefore, agency

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<sup>2</sup> See 5 U.S.C. app. §402.

<sup>3</sup> See OGE Legal Advisory 06x10 (October 19, 2006).

<sup>4</sup> See Government Accountability Office, *DHS Needs to Improve Ethics-Related Management Controls for the Science and Technology Directorate*, GAO-06-206 (2006).

<sup>5</sup> See also OGE Legal Advisory 07x4 (February 23, 2007).

<sup>6</sup> *Id.*

<sup>7</sup> Language could be included to the effect that private sector employees "shall not be assigned to participate in any particular matter in which the private-sector organization from which such employee is assigned has a financial interest."



ethics officials will need to be consulted prior to a detailee's appointment and on an ongoing basis as the detailee is assigned work. To further mitigate these potential conflicts of interest, OGE believes that strict policies would be needed to ensure that the Department of Defense develops strategies to assess potential risks on the front end to avoid appointing detailees from for-profit companies to positions that would involve work with, or otherwise have an effect on, those companies.

### **Clarity About the Application of 18 U.S.C. § 209**

OGE is also concerned that the proposed program turns government activities over to individuals who are paid by for-profit, private interests.<sup>8</sup> Generally, outside entities are barred from paying federal officials' salaries pursuant to 18 U.S.C. § 209. The reason for this prohibition is to ensure that government officials are not serving "two masters to the prejudice of [their] unbiased devotion to the interests of the United States."<sup>9</sup> OGE believes that these types of arrangements directly implicate the concerns motivating the rule. As the Supreme Court stated in *Crandon v. U.S.*, "First, the outside payor has a hold on the employee deriving from his ability to cut off one of the employee's economic lifelines. Second, the employee may tend to favor his outside payor even though no direct pressure is put on him to do so. And, third, because of these real risks, the arrangement has a generally unwholesome appearance that breeds suspicion and bitterness among fellow employees and other observers."<sup>10</sup>

The primary way to remedy this issue would be to eliminate the provision allowing private sector detailees to continue to receive pay and benefits from the private sector organization from which they are assigned. If, however, the legislation intends for detailees to receive salary payments from their for-profit employers without violating 18 U.S.C. § 209, the language should explicitly state this exception. To this end, OGE recommends clarifying the language that exempts payments provided by private employers of federal detailees, while leaving section 209 applicable to all other supplementations of government salary.<sup>11</sup>

### **Additional Concerns**

In addition to the concerns discussed above regarding 18 U.S.C. §§ 208 and 209, we note that this type of program potentially raises issues under other criminal conflict of interest statutes, including 18 U.S.C. §§ 203, 205, and 207. Moreover, it also raises a number of potential issues under the Standards of Conduct for Employees of the Executive Branch, such as the use of nonpublic information and the receipt of gifts from outside sources. Finally, OGE notes that the provisions regarding the status of government employee detailees to private sector organizations could be further clarified.<sup>12</sup>

### **Conclusion**

As noted above, OGE recognizes the important human capital concerns animating section 842 of H.R. 2500 and H.R. 2944. OGE believes that addressing the above concerns would help diminish, though not extinguish, the possibility of conflicts of interest that are inherent in the program contemplated by the

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<sup>8</sup> See proposed 10 U.S.C. § 1749(f)(1).

<sup>9</sup> See 33 Op. Att'y Gen. 273 (1922).

<sup>10</sup> *Crandon v. U.S.*, 494 U.S. 152, 165 (1990) (quoting *Association of the Bar of the City of New York, Conflict of Interest and Federal Service* 211 (1960)).

<sup>11</sup> Accordingly, OGE recommends that proposed section 1749(f)(2)(B) be amended to read, "(b) sections 201, 203, 205, 207, 208, 209, 603, 606, 607, 643, 654, 1905, and 1913 of title 18, except section 209 does not apply to any salary, or contribution or supplementation of salary made pursuant to paragraph (1) of this subsection."

<sup>12</sup> OGE also raises whether it is appropriate for detailees to conduct inherently governmental functions.

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legislation. OGE is happy to offer technical assistance regarding the implementation of any of the above safeguards.

The Office of Management and Budget has advised OGE that, from the perspective of the Administration's program, there is no objection to submission of this letter. If you have questions please do not hesitate to contact Shelley K. Finlayson, OGE's Chief of Staff and Program Counsel, at (202) 483-9314.

Sincerely,

Emory A. Rounds, III  
Director

cc: Chairman Elijah Cummings  
Ranking Member Jim Jordan  
House Committee on Oversight and Reform