



---

## Memorandum

June 8, 2004

**TO:** Honorable Ron Wyden  
Attention:

**FROM:** Legislative Attorney  
American Law Division

**SUBJECT:** Potential Conflicts of Interest of Private Attorney Entering Federal Employment in a Regulatory Agency Concerning Former Private Clients

---

This memorandum is submitted in response to your request for information on any potential conflict of interest issues or concerns under Federal law or regulation that may be raised when an attorney enters into an appointive Federal office in a regulatory agency, when that attorney has worked for private corporate clients who may be subject to various regulatory actions and/or policies of that employing agency.<sup>1</sup> The questions involve a nominee to the Federal Trade Commission who reportedly has acted as outside legal counsel for the ChevronTexaco Corporation.<sup>2</sup>

**Current Economic Interests.** As a general matter, the statutory conflict of interest provisions under Federal law concern only *current* economic or financial interests of a federal official, and of those close enough to the official to have their financial interests “imputed” to that official.<sup>3</sup> Thus, if the nominee retains financial ties to or interests in a

---

<sup>1</sup> This memorandum addresses federal law and regulation, and does not analyze a particular jurisdiction’s Bar rules applicable to attorneys, *note, e.g.* ABA Model Rules of Professional Conduct, Rules 1.11, 1.7 and 1.9.

<sup>2</sup> Maureen Lorenzetti, *Oil and Gas Journal Online*, “White House’s FTC Nomination Stalled in US Senate Over Fuel Prices,” June 4, 2004.

<sup>3</sup> 18 U.S.C. § 208, the principal, general conflict of interest provision under federal law, requires an official’s disqualification from a particular governmental matter in which the officer, his or her spouse or dependent “*has* a financial interest,” or where there is affected a financial interest of an outside entity “in which he [the Government official] *is* serving” as an employee, officer or director, or with whom he “*is* negotiating or *has* an arrangement” for future employment. The statutory language is thus stated in the present tense and is directed only to current financial interests and existing arrangements or current understandings for future employment, and does not require disqualification on a matter because of a past affiliation or previous economic interest. *CACI, Inc.*-

(continued...)

private corporation, such as in the form of stock options or other equity interests, or if the official's spouse or dependent children have such interests, then the nominee as a federal official, absent an express waiver, would have to recuse himself or herself from any official "particular matter" that would have a direct and predictable impact on the financial interests of that corporation.<sup>4</sup> A "particular matter" under the statutory recusal requirement is defined by the Office of Government Ethics to include matters that involve deliberation, decision or action, such as agency rulemaking, when those matters are "focused upon the interests of specific persons, or a discrete and identifiable class of persons" or entities.<sup>5</sup> As an adjunct to the statutory recusal requirement for existing financial interests of the official, and the interests of those persons or entities which may be imputed to him or her, regulations of the Office of Government Ethics may also require recusal when certain narrower official matters ("particular matters involving specific parties") affect the current interests of a somewhat broader range of persons or entities with whom the employee is said to have a "covered relationship."<sup>6</sup>

**Past Associations: One-Year Regulatory Recusal Requirement.** In addition to the statutory and regulatory recusal requirements for *existing* interests, there exist also regulatory requirements for disqualification for other financial interests and connections which may apply in certain circumstances to *past* employment, representational or business associations. The regulations of the Office of Government Ethics provide this regulatory disqualification provision to help assure the avoidance of "an appearance of loss of impartiality in the performance of" official duties by a federal employee.<sup>7</sup> The regulations provide, in effect, that a federal official should recuse or disqualify himself or herself from working on a particular governmental matter "involving specific parties" if that matter "is likely to have a direct and predictable effect" on the financial interests of an entity or person with whom the official has a "covered relationship," including specifically any "person for whom the

---

<sup>3</sup> (...continued)

*Federal v. United States*, 719 F.2d 1567, 1578 (Fed. Cir. 1983); *Center for Auto Safety v. F.T.C.*, 586 F. Supp. 1245, 1246 (D.D.C. 1984).

<sup>4</sup> 18 U.S.C. § 208; 5 C.F.R. § 2635.402(a),(b). Note exceptions from recusal requirement for certain interests in diversified or sector mutual funds, and *de minimis* interests in equities of particular companies. 5 C.F.R. §§ 2640.201 (mutual funds), 2640.202 (securities in companies).

<sup>5</sup> 5 C.F.R. § 2635.402(b)(3). A "particular matter," however, does not apply to "the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons."

<sup>6</sup> 5 C.F.R. §§ 2635.501, 2635.502 Persons or entities with whom an employee has a "covered relationship" include those with whom the employee seeks a business, contractual or other financial relationship; a member of the employee's household, or a relative with whom the employee has a close personal relationship; a person or entity with whom the employee's spouse, child or parent is serving or seeks to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee; or an organization (other than a political party) in which the employee is an active participant. 5 C.F.R. § 2635.502(b)(1).

<sup>7</sup> 5 C.F.R. § 2635.501(a).

employee has, within the last year, served as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee ...”<sup>8</sup>

Even if covered by this particular regulatory provision, there are circumstances in which the employee may still be authorized by his or her agency to participate in the particular matter when warranted.<sup>9</sup> The regulation requires a Government employee in the Executive Branch to recuse himself or herself from a “particular matter involving specific parties” when the employee knows that the matter will have a direct and predictable effect on the financial interests of an entity with whom the employee has a “covered relationship,” and where the employee believes that his or her impartiality may be questioned, unless the employee first advises his or her agency about the matter and receives authorization to participate in the matter.<sup>10</sup> As noted, former employers and clients are expressly considered within the regulation to be persons with whom the employee has a “covered relationship” for a one-year period.<sup>11</sup>

Although the range of private interests potentially affected by an official’s governmental actions are broadened in the regulation, as compared to the statutory provision, the *regulatory* recusal provision is more narrowly focused than the *statutory* provision as to those particular governmental “matters” covered. The statutory disqualification requirement applies merely to any “particular matter” on which the official may work personally and substantially, and thus need not be a matter involving specific or identified parties.<sup>12</sup> As such, the statute may apply to any “discrete and identifiable matter,” such as “general rulemaking” or proposed regulations affecting a particular business sector or industry.<sup>13</sup> The regulation, however, applies only to particular governmental matters “involving specific parties,” such as a contract or grant, or a particular investigation, and therefore would not cover such “particular matters” as general policymaking or drafting regulations affecting an entire economic or business sector.<sup>14</sup>

For example, a federal official in a regulatory agency could not participate in the drafting of or policy decisions concerning regulations or enforcement policies affecting an entire industry or business segment, such as oil refineries, if that official has *current* economic or financial interests in a firm in that industry, when those regulations will directly and predictably effect the financial interests of that firm. However, that same official, barring any particular ethics agreement to the contrary, could participate in the drafting of or decisions concerning such regulations or policies affecting a particular industry or business segment when that official had merely a *past* employment or representational association with a firm in the industry.

**Two-Year Disqualifications for Extraordinary Payments.** In addition to the one-year recusal requirement for particular matters involving specific parties which may affect

<sup>8</sup> 5 C.F.R. § 2635.502(a), (b)(1)(iv).

<sup>9</sup> 5 C.F.R. § 2635.502(c),(d).

<sup>10</sup> 5 C.F.R. § 2635.502(a).

<sup>11</sup> 5 C.F.R. § 2635.502(a), and (b)(1)(iv).

<sup>12</sup> Compare to 18 U.S.C. § 207(a),(b), and 5 C.F.R. § 2635.502(a); see 2 O.L.C. 151, 153-154 (1978).

<sup>13</sup> 2 Op.O.L.C. 151, 153-154 (1978); 5 C.F.R. § 2635.402(b)(3).

<sup>14</sup> 5 C.F.R. §§ 2635.503(b)(3), 2635.2637.102(a)(7).

a former client, employer, firm, or business, the regulations of the Office of Government Ethics also provide for a two-year recusal requirement which bars an official in the executive branch from participating in a particular matter in which a “former employer” is “a party or represents a party,” when that former employer had made an “extraordinary payment” to the official prior to entering Government. An “extraordinary payment” is one in excess of \$10,000 in value made by an employer after the employer has learned that the employee is to enter Government service, and one which is not an ordinary payment, that is, is a payment other than in conformance with the employer’s “established compensation, benefits or partnership program.”<sup>15</sup> Since the restriction would apply only to a particular matter in which the former employer is a “party,” it would apply in the more narrow circumstances described above in the one-year regulatory recusal, and would not apply, for example, to the formulation, drafting or promulgation of regulations, even those directly affecting the former employer as one business in a particular sector governed by those regulations. This disqualification provision may be waived in writing by an agency head, or if the individual involved is the head of an agency, by the President or his designee.

**Ethics Agreements.** Concerning presidential nominees who are subject to Senate confirmation, such persons must file public financial disclosure statements with the agency or department in which they will serve. That agency or department conducts an expedited (“accelerated”) review of the disclosure report,<sup>16</sup> and where appropriate the reviewing official is to certify that there are no problems with the private financial interests of the nominee, that is, that there are “no unresolved conflict of interest” issues.<sup>17</sup> Where there are real or apparent conflict of interest problems revealed in the financial disclosure reports, the reviewing official, consulting with the reporting officer, must determine what “remedial action” is to be taken. “Remedial action” may include divestiture where appropriate, agreements to recuse, and the establishment of a qualified blind trust or a diversified trust.<sup>18</sup> Subsequently, a letter to the Director of the Office of Government Ethics [OGE] must be provided setting out the apparent or real conflicts of interest, the remedial measures taken to resolve those issues, and any “ethics agreements” entered into to resolve such conflicts.<sup>19</sup> Ethics agreements are specific agreements between the nominee or official and the agency, as approved by OGE, as to future conduct that the nominee or official will take, such as divestiture, recusal or resignation from an outside position, to resolve a conflict of interest problem.<sup>20</sup> If the Director of OGE is satisfied that all conflicts have been resolved, the Director signs and dates the report form, then submits the form and any ethics agreement, with a letter to the appropriate Senate committee expressing the Director's opinion that the nominee has complied with all conflict of interest laws and regulations.<sup>21</sup>

---

<sup>15</sup> 5 C.F.R. § 2635.503(b)(1).

<sup>16</sup> 5 C.F.R. § 2634.605(c).

<sup>17</sup> 5 C.F.R. § 2634.605(c)(2).

<sup>18</sup> 5 C.F.R. § 2634.605(b)(4) and (5).

<sup>19</sup> 5 C.F.R. § 2634.605(c)(2)(iii)(B).

<sup>20</sup> See, generally, 5 C.F.R. § 2634.801 *et seq.* Ethics agreements are monitored for future compliance by the agency and OGE. 5 C.F.R. § 2634.804; OGE Memoranda, DO-01-013, March 28, 2001, and DT-02-004, March 8, 2002, to Designated Agency Ethics Officials.

<sup>21</sup> 5 C.F.R. § 2634.605(c)(3).

All financial disclosure statements from presidential nominees who require Senate confirmation are forwarded to the committee of jurisdiction from the Office of Government Ethics. The nominee is also required to update the disclosure statement with respect to certain items within 5 days before nomination hearings. Committees of the Senate, because of the Senate's express constitutional power of approval of presidential nominations of officers of the United States,<sup>22</sup> are not limited or restrained by the disclosure forms as to the information that they may request from a nominee to assist in its constitutional "advice and consent" function; and may require any additional information from a nominee that they deem necessary or desirable. Furthermore, a Senate Committee, or the Senate, may require certain ethics agreements from the nominee as to the disposition of certain assets, or the intention to recuse oneself from certain governmental matters, even *beyond* any "ethics agreement" made between the nominee and agency or OGE officials.<sup>23</sup> It is therefore possible for the Senate committee, as a condition for approval of a nominee, to require a nominee to recuse himself or herself for a particular length of time from certain matters, such as from the drafting of, policy decision-making or other official input into regulations or enforcement policies that have a specific impact on the "discrete and identifiable" industry from which the nominee has recently come, even though such recusal might not be required either by statute or regulation.

### **Summary**

Current, existing financial interests in private corporations, businesses or other entities:

Must recuse from any "particular matter" which may directly and predictably impact an entity in which the official, the official's spouse or dependent children have a current financial interest.

This would include such "matters" as regulations and enforcement policies focused upon the interests of either specific persons, or upon the interests of a "discrete and identifiable class" of persons or entities, such as a particular industry.

This would not apply to "matters" such as broad policy options impacting the interests of "a large and diverse group of persons."

Past associations with private entities:

Should recuse from "particular matters involving specific parties" if official's impartiality may be questioned, when the official had represented or acted as the attorney for the private party during the previous one-year period.

Applies only to matters concerning specific parties, such as a "judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, [or] arrest" where the U.S. is a party or has a direct interest.

Does not apply to general regulations or policy matters, even those directed at or impacting a particular economic sector.

---

<sup>22</sup> United States Constitution, Article II, Section 2, clause 2.

<sup>23</sup> 5 U.S.C. app. § 101(b); see 5 C.F.R. § 2634.803(a)(2).

Shall also recuse for a two-year period from participation in a particular matter involving specific parties in which a “former employer is a party or represents a party,” when that former employer had made an “extraordinary payment” to the official prior to entering Government.