

The Office of Government Ethics occasionally is asked how the Federal ethics rules apply in the context of meetings conducted by high level Federal officials with representatives of private interests. In some instances, the question concerns certain persons' or organizations' apparent access to and influence with a particular public official. Often, the question has been raised because of some past business or political association between the official and the persons who are granted the meeting.

I am writing, therefore, to provide guidance on the application of the ethics rules to meetings. Beyond that, however, I also want to encourage ethics officials to make themselves available to help high level officials deal with some difficult issues that may transcend the ethics rules. Even where there is no ethics violation, meetings may create the potential for unwanted controversy, which can become an unfortunate distraction even for well-intentioned officials. This memorandum offers specific considerations that ethics officials and others may assess when addressing appearance concerns or the likelihood of public controversy, whether or not the decision to grant a particular meeting raises an issue under the ethics rules.

Meetings with outside persons sometimes can implicate certain ethics restrictions. Under 18 U.S.C. § 208, employees may not participate personally and substantially in a particular matter that has a direct and predictable effect on their own financial interests or the interests of certain others with whom they are associated. In some cases, a meeting with an outside person may include discussions about a particular matter, such as a pending enforcement action or a rulemaking proceeding that focuses on a particular industry. If the official has a disqualifying financial interest in the particular matter, then he or she is precluded from any personal and substantial participation, which could include discussions with affected persons about the merits or progress of the matter.¹

Even in cases where the subject of the meeting is not a particular matter—such as a meeting to discuss broad policy options directed to the interests of a large and diverse group of persons—OGE has recognized that the very decision to grant a meeting request can constitute a particular matter. See 5 C.F.R. § 2640.103(a)(1)(Example 2). In such instances, however, there would be no 208 violation unless the decision to grant the meeting itself had a direct and predictable effect on the relevant financial interest, which would involve relatively unusual circumstances, for example, where an employee's spouse or general partner is actually paid to arrange or attend the meeting. Id.

¹Employees may be eligible for a waiver or exemption permitting them to participate in a particular matter, notwithstanding an otherwise disqualifying financial interest. See 18 U.S.C. § 208(b); 5 C.F.R. part 2640, subparts B & C.

The decision to grant a meeting request also can implicate the impartiality provision of the administrative Standards of Ethical Conduct. See 5 C.F.R. § 2635.502. Absent an authorization under section 2635.502(d), an employee may not participate in a "particular matter involving specific parties" in which someone with whom the employee has a "covered relationship" is a party or represents a party, if a reasonable person would question the employee's impartiality in the matter.² Among other relationships specified in the rule, an official has a covered relationship with any person whom the official served during the previous year as "as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee." 5 C.F.R. § 2635.502(b) (1) (iv).

It should be remembered, however, that there is almost never a simple right or wrong answer with appearance questions. Accordingly, the impartiality rule provides significant flexibility so that all the factors in a given situation can be evaluated by employees and their ethics officials. In the first place, there must be a determination whether "the circumstances would cause a reasonable person with knowledge of the relevant facts" to question the employee's impartiality, an inquiry which calls for the exercise of judgment, based on the totality of the circumstances. 5 C.F.R. § 2635.502(a), (c). As a general rule, "appearances of impropriety" should not "be governed by standards which can be imputed only to the most cynical members of the public." Woods v. Covington Cty. Bank, 537 F.2d 804, 813 (5th Cir. 1976). Furthermore, an agency designee may authorize an employee to participate in a matter, notwithstanding any impartiality questions, based on a determination that the interest of the Government in the employee's participation outweighs the appearance concerns. 5 C.F.R. § 2635.502(d). Thus, an official is not invariably disqualified from meeting a person with whom he or she has a covered relationship, even if the meeting concerns a particular matter in which such person is a party or represents a party.

²There is also a provision in the impartiality rule which employees may use in their discretion if they have a concern that circumstances not expressly covered may raise a question about their impartiality. See 5 C.F.R. § 2635.502(a)(2). As we have observed on various occasions, however, the failure of an employee to invoke this process is not itself an "ethical lapse," e.g., OGE Informal Advisory Letter 94 x 10(2), and OGE anticipated that recusals under section 2635.502(a)(2) would be "more the exception than the rule." Electronic Mail Message of Amy L. Comstock to Designated Agency Ethics Officials, e al., February 2, 2002. Note additionally that officials sometimes enter into "ethics agreements," which can include, among other things, commitments to recuse under circumstances beyond those addressed expressly in section 2635.502 or 18 U.S.C. § 208. See generally 5 U.S.C. app. § 110; 5 C.F.R. part 2634, subpart H; DAEOgram DO-01-013 (March 28, 2001).

In many instances, moreover, the meeting may not concern a particular matter involving specific parties. For example, a meeting with a former employer or law client to discuss only rulemaking or policy matters of general applicability would not violate section 2635.502, since those matters do not involve specific parties. See 5 C.F.R. § 2637.201(c)(1).³ The same would be true with respect to "meet and greet" sessions, where the object of the meeting is for the official to become more familiar with representatives of important agency constituencies. The mere decision to grant a meeting does not itself constitute a particular matter involving specific parties, as long as the purpose is to discuss matters of general applicability or to become better acquainted; we would not characterize such a decision as "a specific legal proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identifiable parties." Id.; cf. United States v. Sun Diamond Growers of California, 526 U.S. 398, 407 (1999) (receiving guests or speaking to group about agency policy not "official act" under illegal gratuities statute).

Nevertheless, even where a meeting is not precluded by the ethics rules, there still can be some potential for public controversy. Therefore, I think it is appropriate for ethics officials to take an active role to assist high level employees in assessing the likelihood of controversy as a result of a given meeting decision. There is no question in my mind that agency ethics officials, as a group, have a wealth of experience in negotiating the hazards of official life in the "fishbowl" of Washington, D.C. I dare say that most ethics officials have handled complaints about access and influence in various forms over the years, and they are particularly sensitized to the kinds of situations that have raised questions historically. As appropriate, ethics officials should bring this valuable experience to bear on the decisionmaking process with respect to meeting requests.

Ethics officials might be involved in any number of ways. For example, in some agencies, ethics officials participate in regular "scheduling" discussions to review the calendar of the agency head. Ethics officials also may provide high level personnel with briefings or special written materials, such as this memorandum, that are focused on access issues. Sometimes, it may be helpful just to remind officials that the agency ethics office stands ready to assist in addressing issues arising in connection with proposed meetings. Of course, ethics officials can provide the most assistance if they are consulted in advance. Not only is prospective advice more effective than after-the-fact damage

³Section 2635.502 does not contain its own definition of "particular matter involving specific parties" but rather cross references the definition of the same phrase in 5 C.F.R. part 2637, which provides interpretive guidance concerning 18 U.S.C. § 207.

control," but often the mere fact that a meeting request was discussed in advance with an ethics official helps to dispel public questions.

In order to help ethics officials and others evaluate meeting requests, we have developed a nonexclusive list of questions to consider. Many of these are related to the factors that may be considered by an agency designee in authorizing an official's participation in a matter under section 2635.502(d), and to that extent the questions may be useful in resolving questions under the impartiality rule. As noted above, however, the inquiry is not always limited to situations expressly covered by section 2635.502, and we believe that the following questions will help agencies assess the potential for controversy, whether or not there is an issue under the ethics rules.

1. How much time has elapsed since the termination of the relevant relationship between official and the meeting requester? For example, one might expect less public criticism about a meeting with representatives of an official's former client or employer if that relationship terminated several years ago than if it terminated more recently. Of course, section 2635.502(b)(1)(iv) focuses only on persons whom an official served in the previous one year period, but we would observe that the risk of significant public criticism diminishes even further as the relationship becomes even more remote in time. Cf. Center for Auto Safety v. FTC, 586 F. Supp. 1245 (D.D.C. 1984) (official not permanently tainted by past business relationship as long as appreciable period of time following severance).⁴

2. How important is the relationship to the official? Even among "covered relationships," some are more important than others with respect to a given official. For example, a meeting with someone who was one of many former clients might be expected to raise fewer questions than a meeting with the official's former employer or primary client.

3. Is the subject matter of the proposed meeting something in which the official was personally involved prior to government service? In OGE's experience, questions about the propriety of a meeting arise more frequently in cases where the subject is a matter in which the official formerly was personally involved in a private capacity on behalf of the person requesting the meeting. This is particularly true where the matter involves specific

⁴Note also that certain covered relationships are ongoing, such as certain financial and family relationships, relationships with a spouse's current employer or client, and relationships with an organization in which the official currently is an active participant. See 5 C.F.R. § 2635.502(b)(1).

parties (see number 7 below), but sometimes even the official's prior involvement in a policy matter can raise questions.

4. How large and diverse is the group attending the meeting?

Obviously, it is neither desirable nor efficient for high level officials to conduct all meetings in a group setting. Nevertheless, it is clear that questions about special access arise most frequently in connection with audiences comprised of a single person or a relatively small group of persons representing the same entity or entities with the same interests. To the extent that it is not feasible to include a larger or more diverse group in the same meeting, a similar objective could be accomplished by conducting multiple meetings with different interest groups on the same subject.

5. How "public" is the meeting?

As with the previous question, it is clear that not all Government meetings can be conducted efficiently in an open setting. However, to the extent that it is possible to conduct discussions in a more or less public fashion—for example, in a meeting open to the public or an entire industry, or even with many agency staff members in attendance—the effect of "sunlight" can go a long way toward mitigating potential access controversies. A meeting behind closed office doors, or in a restaurant or other intimate setting, may raise more questions. We might add that the more open and widely attended a meeting is, the less opportunity there may be for public speculation about what was really discussed: in OGE's experience, the mere fact that a meeting is conducted in an intimate private setting often invites questions about the actual nature and substance of the meeting. As an alternative to conducting meetings in public, officials may want to adopt the practice of keeping some kind of record of the content of discussions—for example, having a contemporaneous notetaker in attendance at the meeting—in order to minimize factual disputes about matters discussed.

6. Are there any ground rules for the meeting (and is the official confident that attendees will honor those ground rules)?

Many agencies have found it useful to establish clear ground rules for attendees at meetings with high level officials. Usually, the starting point for such ground rules is any specific recusals the official has that would preclude him or her from participating in certain matters, but the agency also can include any other subjects that may be sensitive for other reasons. For example, the agency may want to limit the discussion exclusively to policy matters of general applicability and avoid all discussion of specific enforcement actions or other matters involving specific parties (see number 7 below). In any event, it is important that any limits on the agenda for the meeting be communicated clearly—and in writing, where feasible—to the person requesting the meeting and to all attendees. It is also important to realize, however, that meetings sometimes can stray from the pre-established agenda, often through no fault of the official. Where it is known that a given person is particularly anxious to discuss an issue that is "off

limits" for the official, discretion might dictate that the meeting be denied or assigned to another official. In the event that the ground rules are disregarded, officials may wish to terminate the meeting.

7. Is the meeting expected to deal with any particular matters involving specific parties? As reflected in section 2635.502 and several other conflict of interest statutes and regulations, particular matters involving specific parties often (but not always) pose a more significant appearance concern than broader matters of public policy. Where the person requesting a meeting seeks an official's intervention in a proceeding, contract, or other particular matter narrowly focused on the rights and interests of that person, there is a risk that the official may appear to be acting outside of the regular channels for the purpose of conferring a unique advantage on a party. For similar reasons, there are sometimes rules prohibiting ex parte communications in connection with formal agency proceedings, e.g., 5 U.S.C. § 557(d), but even where no such prohibition applies, officials should be aware that meetings to discuss matters involving specific parties may elicit heightened public scrutiny.

8. Is the meeting expected to deal with any matters that are "sensitive?" Whether or not the subject of the meeting is a particular matter involving specific parties, the subject may be particularly sensitive for any number of reasons. For example, the meeting may involve an important policy issue about which there is already significant public controversy. In such cases, officials should expect that persons who are already critical of agency policies and actions may question any access by opposing interests to agency decisionmakers. Allegations of inappropriate access and influence can displace meaningful discourse about the merits of an issue.

9. What is the importance of the matter to the requester? Where the requester has a significant financial stake in the matter to be discussed-as opposed to a more philosophical or ideological interest-there may be greater risk of controversy. OGE has provided, for example, that nothing in section 2635.502 "shall be construed to suggest that an employee should not participate in a matter because of his political, religious or moral views." 5 C.F.R. § 2635.502(b)(1)(v)(Note).⁵ By the same token, we recognize that meeting requests motivated primarily by ideological interests raise fewer legitimate concerns about inappropriate access.

⁵Similarly, although the definition of covered relationship in the impartiality rule includes organizations in which the employee is an "active participant," it expressly excludes political parties. 5 C.F.R. § 2635.502(b)(1)(v).

10. How important is the meeting to the Government? Sometimes, certain persons may have expertise, views or information not readily available from other sources, or they may be indispensable participants in the resolution of a controversy that requires the attention of a high level official. It may be necessary to consider whether declining to meet with such persons would have a negative impact on the quality of Government decision-making, notwithstanding any potential for controversy or appearance questions.

11. Is any discussion of partisan political activity anticipated? Officials should be briefed as to the relevant limits on partisan political activity applicable to themselves and to any staff members who are expected to be in attendance at a meeting. See, e.g., 18 U.S.C. chapter 29; 5 C.F.R. parts 733, 734.

These are just a few of the factors that officials and their ethics counselors may consider in deciding whether to grant a meeting request. No doubt, agency ethics officials and others can identify other considerations in a given case, based on common sense and experience in these matters.