



United States  
**Office of Government Ethics**  
1201 New York Avenue, NW., Suite 500  
Washington, DC 20005-3917

July 16, 2007

The Honorable Paul J. McNulty  
Deputy Attorney General  
Department of Justice  
950 Pennsylvania Avenue, NW.  
Washington, DC 20530-0001

Kevin Chapman  
Acting General Counsel  
Executive Office of Immigration Review  
Department of Justice  
5107 Leesburg Pike, Suite 2600  
Falls Church, VA 22041

Dear Messers. McNulty and Chapman:

I am writing concerning the recently proposed Codes of Conduct for immigration judges and Board members of the Board of Immigration Appeals. 72 Federal Register 35510 (June 28, 2007). In particular, I want to express concern that the proposed codes would appear to supplement the Standards of Ethical Conduct for Employees of the Executive Branch (Standards), without following the supplemental rulemaking requirements of Executive Order 12674, as implemented by 5 C.F.R. § 2635.105.

Section 201(a) of Executive Order 12674 directed the Office of Government Ethics (OGE) to "establish a single, comprehensive and clear set of executive-branch standards of conduct." The Executive order permits an agency to supplement these uniform Standards with "regulations of special applicability to the particular functions and activities of that agency," but only where the regulations are "prepared as addenda to the branch-wide regulations and promulgated jointly with the Office of Government Ethics . . . for inclusion in Title 5 of the Code of Federal Regulations." The Standards are found at 5 C.F.R. part 2635, which also includes a provision with specific criteria and procedures for issuing agency supplemental regulations, 5 C.F.R. § 2635.105. Under this provision, an agency must submit any supplemental regulations to OGE for

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concurrence, and such regulations shall be: "(1) In the form of a supplement to the regulations in this part; and (2) In addition to the substantive provisions of this part." 5 C.F.R. § 2635.105(a).

The proposed Codes of Conduct certainly acknowledge that immigration judges and Board members must follow the OGE Standards. See Canon II of each Code. Moreover, the official Commentary for each Code notes that the Codes do not "supersede" the "ethics rules" of the "Department of Justice and/or the United States government." Similarly, the Commentary states that the Code "does not affect the applicability or scope of the provisions of the Standards of Ethical Conduct for Executive Branch Employees."

Nevertheless, the Commentary does state that the Code "supplements" the ethics rules of the Department of Justice and the United States Government. Furthermore, as discussed below, our review of the substance of the proposed Codes indicates that certain provisions set additional and/or different ethical restrictions beyond those found in the OGE Standards. Equally important, because some of the ethical restrictions set out in the proposed Codes overlap with, yet differ from, the Standards, covered employees will be faced with the potentially confusing task of understanding how to conform their conduct to both sets of rules. The Executive Order required uniform executive branch standards, with agency supplemental standards closely monitored and approved by OGE, precisely to avoid such potential inconsistency and confusion.<sup>1</sup>

Although several of the proposed Code provisions touch on ethical issues, three of the Canons particularly illustrate our concerns.

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<sup>1</sup> When the Standards were first published, the Director of OGE stated: "For the past 26 years, employees of the executive branch have been governed by a jumble of differing and sometimes-conflicting agency-specific conduct regulations. I am very pleased to announce that the final regulation issued today will give all executive branch employees one source of written guidance for ethics questions that arise because of Federal service." Statement of Stephen D. Potts, Director, OGE, August 6, 1992.



Canon XI of each Code enunciates a standard for prohibited outside activities and financial interests that differs from, and is potentially more restrictive than, the provisions in the Standards. Canon XI prohibits, among other things, outside "financial and business dealings" that "tend[] to reflect adversely on impartiality." Under the OGE Standards, however, financial interests and outside activities are prohibited, rather than addressed by recusal or some other remedy, only if the agency meets specific criteria, not a standard as general and open-ended as "tends to reflect adversely on impartiality." See 5 C.F.R. §§ 2635.802; 2635.403. Special prohibitions on outside activities and the holding of financial interests are the very types of issues that should be addressed through agency supplemental regulations, with OGE review and approval. 5 C.F.R. §§ 2635.802(a); 2635.403(a). E.g., 5 C.F.R. § 3801(b) (DOJ supplemental regulation prohibiting certain outside employment).

Similarly, Canon XIII of each proposed Code prohibits the disclosure of nonpublic information under a standard that is different from, and may be more restrictive than, the OGE Standards. Canon XIII prohibits the disclosure or use of nonpublic information for "any purpose unrelated to adjudicatory duties." Under 5 C.F.R. § 2635.703, an employee is prohibited from disclosing or using nonpublic information to further a "private interest." It is not clear to us that every "purpose unrelated to adjudicatory duties," under Canon XIII, necessarily involves furthering a "private interest," under the OGE rule. Moreover, the OGE provision also permits "authorized" disclosures of nonpublic information, which is not addressed by the proposed Code. Of course, if the Department of Justice has independent statutory authority for "protecting categories of nonpublic information," then regulations or instructions implementing such protections need not be issued as supplemental regulations under the OGE rule. 5 C.F.R. § 2635.105(c)(3). Otherwise, provisions such as Canon XIII need to be reviewed for consistency with the Standards and issued, if at all, as an approved supplemental regulation.

The provisions on recusal, Canon XVI of each proposed Code, also pose the potential for inconsistency or confusion with the recusal requirements in the Standards, as well as with the conflict of interest statute applicable to executive branch employees. Canon XVI states that recusal decisions are to be

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based on "judicial precedent and agency policy regarding recusal." This is potentially misleading. Immigration judges and Board members with financial interests in any particular matter must recuse themselves in accordance with a criminal conflict of interest law, 18 U.S.C. § 208, and OGE implementing regulations at 5 C.F.R. part 2640 and 5 C.F.R. part 2635, subparts D and F. Likewise, immigration judges and Board members who would participate in official matters involving persons with whom they have certain "covered relationships" must follow the recusal provisions in 5 C.F.R. § 2635.502. To single out "judicial precedent" and "agency policy" as the sources of guidance in this area is to create a serious risk that employees will not attend to the specific recusal obligations created by the conflict of interest law and regulations. Moreover, the substance of "judicial precedent" in this context is unknown to us, so we cannot judge whether these judicial precedents are more or less restrictive than the applicable recusal obligations under the conflict of interest law and regulations. To the extent that "judicial precedent" is intended to include case law interpreting the various codes of judicial conduct that have been published and adopted in some jurisdictions, it is far from clear that the recusal obligations under those authorities would be consistent with 18 U.S.C. § 208 and the OGE regulations. E.g., Code of Conduct for United States Judges, Canon 3C, <http://www.uscourts.gov/guide/vol2/ch1.html#2>.<sup>2</sup>

Therefore, it appears to us that at least certain provisions in the proposed Code would have to be promulgated, if at all, as supplemental regulations, pursuant to the Executive Order and the Standards. This process would ensure that any provisions are fully reviewed by OGE and your Department's own Designated Agency Ethics Official (DAEO) for potential overlap and inconsistency with existing ethics laws and regulations. We have already advised the DAEO's office of our concerns about this matter and are copying that office on this letter. We ask that you coordinate with your DAEO's office about revisions to the proposed Codes and the development of any supplemental regulations, to address the concerns set out above. OGE, in turn, will work with your DAEO's office as necessary.

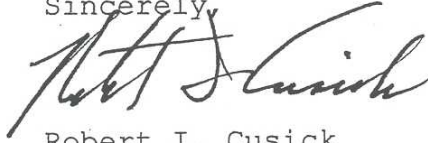
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<sup>2</sup> For similar reasons, OGE has rejected the proposal of another agency to adopt a version of a model code of judicial conduct for its administrative law judges.

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If you have any questions, please contact Marilyn L. Glynn,  
General Counsel, at 202-482-9292, or Richard Thomas, Associate  
General Counsel, 202-482-9278.

Sincerely,

A handwritten signature in dark ink, appearing to read "Robert I. Cusick", written in a cursive style.

Robert I. Cusick  
Director

cc: Lee J. Lofthus  
Assistant Attorney for Administration  
and Designated Agency Ethics Official