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Washington, DC 20548

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October 18, 2004

The Honorable Brian Baird
House of Representatives

Subject: *Legal Principles Applicable to Selection of Federal Advisory Committee Members*

Dear Mr. Baird:

This letter is in response to your September 1, 2004 request regarding a follow-up question on our report, *Federal Advisory Committees: Additional Guidance Could Help Agencies Better Ensure Independence and Balance* (GAO-04-328, April 2004), issued to you and Representative Johnson. Among other things, our report made recommendations designed to better ensure that federal agencies comply with independence and balance requirements when appointing advisory committee members. We did not make any judgments about whether conflicts of interest existed on any particular committee or whether any particular committee was properly balanced.

In connection with this report, you asked us whether federal agencies may inquire about and consider an individual's political affiliation in selecting members for their advisory committees. There are a number of provisions in federal personnel law that prohibit agencies from discriminating against employees or applicants for employment on the basis of political affiliation. As discussed in part I below, whether these provisions apply to a particular advisory committee candidate turns on the candidate's federal employment status (or what the candidate's status would be if selected)—specifically, whether the candidate is or would be a regular federal employee, a "special government employee" (SGE), or a non-employee. In addition to applicable personnel law provisions, as discussed in part II below, there are other statutory restrictions on agency use of political affiliation in the selection of members for certain specifically designated advisory committees. Determining whether a violation of either the personnel laws or the committee-specific statutory restrictions has occurred would require a thorough and nuanced examination of the particular facts and circumstances on a case-by-case basis.

You did not ask us to analyze, nor did we analyze, these issues with regard to the facts surrounding selection of members for any particular advisory committee. Instead, our analysis was designed solely to identify general legal principles that may apply to the selection of advisory committee members. Accordingly, this opinion

should not be construed as expressing a view about the activities of any particular agency or committee.

Analysis

I. Federal Personnel Laws Applicable to the Selection of Certain Types of Advisory Committee Members

A number of statutes prohibit the federal government from discriminating based on political affiliation. Some of these prohibit political-affiliation discrimination when selecting individuals for employment in specific positions.[1] In addition to these job-specific prohibitions, the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111, one of the principal personnel laws, prohibits discrimination based on political affiliation in certain circumstances, by designating actions as "prohibited personnel practices." As with all CSRA provisions, however, these provisions apply only to persons who are federal employees.[2] Before discussing how these prohibited personnel practice provisions may apply in the context of federal advisory committees, therefore, it is helpful to understand the different federal employment statuses of advisory committee members.

As discussed in our report, federal advisory committee members generally are either "representative members" or SGE members.[3] Representative members are "invited to appear at a department or agency in a representative capacity" and are not federal employees.[4] Their selection is therefore not subject to federal personnel or employment laws, including the CSRA. SGEs, by contrast, "serv[e] on a government advisory committee . . . in an independent capacity, rather than presenting the views of a particular organization . . . [and] must be formally appointed" to federal service.[5] According to officials at the General Services Administration (which has primary responsibility for overseeing the establishment of advisory committees), SGEs are appointed as "excepted service" employees, rather than competitive service

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[1] *See, e.g.*, 2 U.S.C. § 72a(a) (professional staff members for Senate committees "shall be appointed . . . without regard to political affiliation."); 2 U.S.C. § 130-2(c)(1) (Director of Interparliamentary Affairs of House of Representatives "shall be appointed . . . without regard to political affiliation."); 2 U.S.C. § 601(a)(2) (Director of Congressional Budget Office "shall be appointed . . . without regard to political affiliation."); 5 U.S.C. app. 3 § 3(a) (agency Inspectors General "shall be appointed . . . without regard to political affiliation."); 10 U.S.C. § 139(a)(1) (Department of Defense Director of Operational Test and Evaluation "shall be appointed without regard to political affiliation."); 16 U.S.C. § 554a (forest inspectors, fire patrol, and certain other Department of Agriculture employees "are to be hereafter appointed . . . without regard for their political affiliations.").

[2] If these CSRA prohibitions apply, they provide "the exclusive procedure for challenging federal personnel decisions." *Petrini v. Howard*, 918 F.2d 1482, 1485 (10th Cir. 1990).

[3] *See also* Office of Government Ethics, Memorandum 82X22, Members of Federal Advisory Committees and the Conflict-of-Interest Statutes, at 3-4 (July 9, 1982).

[4] *Id.*

[5] *Id.*

employees.[6] As federal employees, SGEs are covered by the CSRA. Regular federal employees also are occasionally named to federal advisory committees, and they, too, would be covered by the CSRA. According to officials at the Office of Personnel Management, regular federal employees in the competitive service would ordinarily maintain their competitive service status while serving on a committee.[7]

When selecting SGE or regular federal employee advisory committee members, the two principal CSRA prohibited personnel practices potentially relevant to consideration of political affiliation are 5 U.S.C. § 2302(b)(1)(E) and 5 U.S.C. § 2302(b)(10). These are discussed below.

A. Section 2302(b)(1)(E)

Section 2302(b)(1)(E) prohibits federal officials who are taking or recommending personnel actions "from discriminat[ing] for or against any . . . employee or applicant for employment . . . on the basis of . . . political affiliation, as prohibited under any [other] law, rule, or regulation." Because candidates for SGE or regular federal employee committee positions (but not representative positions) would be considered "employee[s] or applicant[s] for employment," and officials selecting them would be considered to be taking a personnel action, this provision could apply to prohibit consideration of political affiliation as a discriminating factor in selecting SGE or regular employee committee members.[8]

In practice, however, § 2302(b)(1)(E) is likely to have only limited application to the selection of advisory committee members. Section 2302(b)(1)(E) alone does not make it a prohibited personnel practice to discriminate based on political affiliation. Rather, a selecting official must have violated some *other* "law, rule, or regulation" barring political affiliation discrimination; that violation, in turn, would constitute a prohibited personnel practice. *See, e.g., Mitchell v. Espy*, 845 F. Supp. 1474, 1492 (D. Kan. 1994) (§ 2302(b)(1)(E) reflects general principle prohibiting discrimination based on political affiliation but principle "cannot be considered in the absence of a law, rule, or regulation alleged to have been violated."). Several "other" laws and regulations do prohibit political affiliation discrimination, but, to the best of our knowledge,[9] these principally apply to: (a) competitive service positions;[10] or

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[6] Letter from Raymond J. McKenna, General Counsel, General Services Administration, to Susan D. Sawtelle, Associate General Counsel, GAO (Sep. 15, 2004).

[7] Letter from Mark A. Robbins, General Counsel, Office of Personnel Management, to Susan D. Sawtelle, Associate General Counsel, GAO (Sep. 17, 2004) (OPM Letter).

[8] Taking, or failing to take, a personnel action is not necessary to find a prohibited personnel practice, but any discrimination found must be related to the authority to "take, recommend, or approve a personnel action" to be covered by § 2302(b)(1)(E). *See Special Counsel v. Russell*, 28 M.S.P.R. 162, 168-69 (1985). Under the CSRA, appointment of an applicant for a covered position is a personnel action. 5 U.S.C. § 2302(a)(2)(A)(i). With some exceptions, competitive service and excepted service positions are considered covered positions. 5 U.S.C. § 2302(a)(2)(B).

[9] It is possible that an agency may have a manual or some other guidance of which we are not aware that could qualify as a "law, rule, or regulation" prohibiting political affiliation discrimination.

[10] Under 5 C.F.R. § 300.103(c), for example, "[a]n employment practice shall not discriminate on the basis of . . . partisan political affiliation, or other nonmerit factor," but this applies only to employment

(b) positions on committees for which Congress has specifically prohibited the consideration of political affiliation (discussed in part II below).[11] Thus, in the context of selecting advisory committee members, § 2302(b)(1)(E) prohibits agencies from considering political affiliation in a discriminatory manner when evaluating regular federal employees for any advisory committee or when evaluating regular federal employees or SGEs for one of the statutorily designated committees.[12] It does not prohibit such inquiry of individuals being considered for a representative member position because, as noted, representative members are not federal employees covered by the CSRA. Moreover, even when § 2302(b)(1)(E) applies, proving that a particular advisory committee selection decision reflected discrimination on the basis of political affiliation would require specific factual evidence that the appointment decision depended on the candidate's political affiliation, which likely would present significant evidentiary challenges.[13]

B. Section 2302(b)(10)

The second CSRA prohibited personnel practice provision that on its face might apply to the selection of advisory committee members is 5 U.S.C. § 2302(b)(10). Whether this provision alone would prohibit agencies from considering political

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practices for the competitive service. *See also* 5 C.F.R. § 300.101 (purpose of the regulations is to establish principles to govern employment practices that "affect the recruitment, measurement, ranking and selection of individuals for initial appointment and competitive promotion in the competitive service"). Similarly, inquiries into and consideration of political affiliation are prohibited by 5 C.F.R. § 4.2, but again, only for positions in the competitive service. *See also* 5 C.F.R. § 720.901(a) ("In determining the merit and fitness of a person for competitive appointment or appointment by noncompetitive action to a position in the competitive service, an appointing officer shall not discriminate on the basis of the person's political affiliations, except when required by statute . . . .").

[11] The First Amendment has also been cited as a "law" the violation of which could form the basis of a § 2302(b)(1)(E) violation. *See Feit v. Ward*, 886 F.2d 848 (7th Cir. 1989). Similarly, § 2302(b)(10), discussed in part B below, could be another such "law." These interpretations could apply to both SGE and regular federal employee committee members. *See* footnotes 15-17 below and corresponding text.

[12] The same agency conduct that would constitute discrimination on the basis of political affiliation prohibited by a law, rule, or regulation under § 2302(b)(1)(E) likely also would violate 5 U.S.C. § 2302(b)(12). Section 2302(b)(12), establishing another prohibited personnel practice, prohibits personnel actions that violate any law, rule, or regulation implementing or directly concerning the CSRA's "merit system principles." As discussed in part C below, one of these merit system principles is that "[a]ll employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management *without regard to political affiliation* . . . and with proper regard for their privacy and constitutional rights." 5 U.S.C. § 2301(b)(2) (emphasis added).

[13] The MSPB, an independent quasi-judicial agency established to protect federal merit systems against partisan political and other prohibited personnel practices, has found that while inquiries concerning political affiliation may be cited as evidence of discrimination, such inquiries are only prohibited if they are actually shown to be "discriminatory in purpose or inherently coercive in the context in which they were made" and that "unlawful intent is not lightly to be inferred." *Acting Special Counsel v. Sullivan*, 6 M.S.P.B. 442, 458, 461 (1981). *See also Buckler v. Federal Retirement Thrift Investment Board,* 73 M.S.P.R. 476, 497 (1997) ("[A]n appellant may establish a prima facie case of prohibited discrimination by introducing preponderant evidence to show that he is a member of a protected group, he was similarly situated to an individual who was not a member of the protected group, and he was treated more harshly or disparately than the individual who was not a member of his protected group.").

affiliation, however, has not been squarely addressed either by the courts or the Merit Systems Protection Board (MSPB).[14] Furthermore, as discussed below, even if the provision applies, there likely would be practical difficulties of proof in demonstrating a violation of § 2302(b)(10) in a particular case.

Under § 2302(b)(10), it is a prohibited personnel practice for federal officials with personnel decisonmaking authority to discriminate for or against any applicant for employment on the basis of conduct that does not adversely affect either the employee's job performance or the performance of others. The legislative history of this provision indicates that Congress intended to prohibit discrimination against activities that have no bearing on job performance. The Conference Report stated:

> The conferees intend that only conduct of the employee or applicant that is related to the duties to be assigned to an employee or applicant or the employee's or applicant's performance or the performance of others may be taken into consideration in determining that employee's suitability or fitness.

H. Conf. Rep. No. 95-1717, at 131 (1978). The Court of Appeals for the District of Columbia Circuit, in looking to the CSRA's Findings and Statement of Purposes, has stated that § 2302(b)(10) "provides extensive protection from discrimination of all types, where that discrimination is unrelated to on-the-job conduct and performance." *Garrow v. Gramm*, 856 F.2d 203, 207 (D.C. Cir. 1988) (citing CSRA § 3, Pub. L. No. 95-454, 92 Stat. 1112).

In some circumstances, agencies deem political affiliation to be a relevant job qualification for advisory committee membership because by law, such committees must be balanced. [15] In those cases, a potential member's political affiliation could be relevant to committee job performance, and thus inquiry about it might not be a violation of § 2302(b)(10). In other circumstances, however, political affiliation may be irrelevant to committee job performance, in which case consideration of a potential member's political affiliation in a discriminatory manner might be a prohibited personnel practice under § 2302(b)(10). Even where inquiry into political affiliation is prohibited, however, proving that selection in a specific case was based on this prohibited factor, rather than on some other factor, likely would present evidentiary challenges. It would require establishing factual evidence that the

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[14] The MSPB has heard at least two cases involving violations of both sections 2302(b)(1)(E) and 2302(b)(10). However, neither decision addressed whether § 2302(b)(10) alone would prohibit political-affiliation discrimination. *See Special Counsel v. Dept. of Commerce,* 23 M.S.P.R. 561 (1984); *Acting Special Counsel v. Sullivan*, 6 M.S.P.B. 442 (1981).

[15] As discussed in our report, the Federal Advisory Committee Act requires that committee memberships be "fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee." 5 U.S.C. app. 2, § 5(b)(2). The political affiliation of members of particular committees has been deemed relevant in achieving such balance. *See, e.g.,* 47 U.S.C. § 303 note (certain Federal Communications Commission advisory committee must be "fairly balanced in terms of political affiliation"); United States Coast Guard, Commandant Instruction 5420.37, Attach. 3 at 1 and 3 (Sep. 23, 1993) (political affiliation information sought for purposes of balance). *See also* OPM Letter, above (achieving requisite committee member balance may be difficult in some circumstances without considering political affiliation or philosophical positions).

appointment decision specifically hinged on the candidate's political affiliation,[16] which is likely to be a difficult burden.[17]

C. Merit Systems Principles

Even if asking a potential SGE or regular federal employee advisory committee member about their political affiliation is not a prohibited personnel practice under the CSRA, it would, in many cases, be contrary to the CSRA's "merit system principles." The CSRA declares that federal personnel management "should be implemented consistent with the . . . merit system principles," one of which is that "[a]ll employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management *without regard to political affiliation . . .* and with proper regard for their privacy and constitutional rights." 5 U.S.C. § 2301(b)(2)(emphasis added). The MSPB has found this merit system principle "in effect, make[s] political discrimination in federal employment contrary to federal personnel policy." *Acting Special Counsel v. Sullivan*, 6 M.S.P.B. 442, 444 (1981).

Yet both the courts and the MSPB have ruled that these merit systems principles are advisory only, providing guidance to, but not imposing requirements on, federal agencies.[18] The principles therefore do not "provide [an] independent basis for action by either the agency or an employee," *Middleton v. Dep't of Justice*, 23 M.S.P.R. 223, 227 n.6 (1984).

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[16] *See* footnote 13 above.

[17] If it can be demonstrated that an agency established party affiliation as a factor for federal employee committee membership but that political affiliation is not, in fact, relevant to job performance, arguably this also might implicate the First Amendment. The Supreme Court has stated that "the ultimate inquiry . . . is whether the [government] hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti v. Finkel*, 445 U.S. 507, 518 (1980). While *Branti* addressed the discharge of public employees, the Supreme Court has also afforded First Amendment protections to hiring decisions based on party affiliation. *See Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990). On the other hand, the Court of Appeals for the Seventh Circuit has questioned, in *dicta*, whether patronage hiring for temporary positions would be afforded the same First Amendment protections. *Vickery v. Jones*, 100 F.3d 1334, 1339-40 (7th Cir. 1996). Thus, it is not altogether clear what First Amendment protections would be afforded to potential advisory committee members who have temporary duties.

[18] *See, e.g., Lien v. Metzler*, 152 F.3d 948 (Fed. Cir. 1998) ("The merit systems principles set forth in section 2301 are only intended to furnish guidance to federal agencies."), *cert. denied,* 525 U.S. 966 (1998); *Neal v. Dep't of Human Health and Serv.,* 46 M.S.P.R. 26, 28 (1990) ("The merit systems principles are intended to furnish guidance to Federal agencies . . . ."); *Parton v. FCC*, 7 M.S.P.B. 236, 239 (1981) ("[T]he Merit Systems Principles are not self-executing in that they cannot be the basis of an action unless they are implemented by a law, rule, or regulation, but according to the legislators' statement of purposes in enacting them, the Principles are 'expressly stated to furnish guidance to Federal agencies in carrying out their responsibilities in administering the public business.'"). In concluding that the merit principles are only advisory, the courts and the MSPB have relied in part on the fact that the statute says federal personnel management "should be"—not "shall be" or "must be"—consistent with the merit systems principles. CSRA's legislative history is consistent with this interpretation. *See* H.R. CONF. REP. NO. 95-1717, at 3 (1978) (merit system principles are "expressly stated to furnish guidance to Federal agencies in carrying out their responsibilities in administering the public business").

II. Additional Statutes Applicable to the Selection of Members of Specific Advisory Committees

In addition to the general personnel law restrictions described above, there are a number of federal advisory committees for which consideration of political affiliation in member selection is specifically prohibited by statute, irrespective of the federal employment status of the candidate (non-employee, SGE, or regular federal employee) or the type of advisory committee position being filled. If these statutory prohibitions are violated, the violation also could form the basis, for regular federal employee or SGE committee members, of a prohibited personnel practice under 5 U.S.C. § 2302(b)(1)(E), as discussed in part I above.

Some of these statutes prohibit political affiliation consideration by specific committee name. Members of the Commercial Fishing Industry Vessel Safety Advisory Committee, for example, must be selected without regard to political affiliation. *See* 46 U.S.C. § 4508(b)(2). *See also, e.g.,* 19 U.S.C. § 2155(b)(1) (requiring the establishment of an advisory committee for trade policy and negotiations and stating that appointments shall be made without regard to political affiliation).

Congress also has prohibited agencies from using political affiliation in selecting members for advisory committees established under three health-related statutes: the Public Health Service Act, 42 U.S.C. §§ 201 *et seq.*, the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963, 42 U.S.C. §§ 2689 *et seq.*, and the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, 42 U.S.C. §§ 4541 *et seq.* All such appointments "shall be made without regard to political affiliation." *See* 42 U.S.C. § 217a-1, codifying section 1001 of the Health Research and Health Services Amendments of 1976, Pub. L. No. 94-278, 90 Stat. 401. Thus, for example, political affiliation may not be a factor in naming members to committees established under the Public Health Service Act, a universe which includes a number of Department of Health and Human Services (HHS) advisory committees.[19] Among these committees are the National Advisory Council on Drug Abuse,[20] the Food and Drug Administration's Advisory Committee on Reproductive Health Drugs,[21] and the National Advisory Council for Human Genome Research, [22] as well as four of the committees we reviewed in our report.[23] Again, we

[19] As noted in our report, HHS entities sponsor 26 percent of all federal advisory committees and 36 percent of all scientific and technical advisory committees.

[20] *See* Charter for the National Advisory Council on Drug Abuse (citing 42 U.S.C. § 284a, section 406 of the Public Health Service Act). Some individuals being considered for membership on this council have alleged that they were asked whether they voted for President Bush. *See*, *e.g.,* Barton Reppert, *Politics in the Lab Hits U.S. Scientific Integrity*, CHRISTIAN SCIENCE MONITOR, Jan. 6, 2004, at 11; Aaron Zitner, *Advisors Put Under a Microscope*, LOS ANGELES TIMES, Dec. 23, 2003, at A1; Union of Concerned Scientists, *Scientific Integrity in Policy Making* (July 2004)(Union of Concerned Scientists) at 28. As noted above, we did not analyze the facts and circumstances surrounding the selection of these or any other advisory committee members.

[21] *See* Charter for the Advisory Committee on Reproductive Health Drugs (citing 42 U.S.C. §§ 217a, 241, 242, 242a, 262, and 264, sections 222, 301-303, 351, and 361 of the Public Health Service Act).

did not analyze the facts and circumstances regarding selection of members for these committees or any other particular committee.

Conclusion

Agencies are prohibited under the federal personnel laws from discriminating on the basis of political affiliation when considering regular federal employees in the competitive service for membership on advisory committees. Such discrimination is deemed to be a prohibited personnel practice under 5 U.S.C. § 2302(b)(1)(E). Federal advisory committee members generally are representative or SGE members, however, rather than regular federal employees, and § 2302(b)(1)(E) generally allows agencies to ask about and consider political affiliation when selecting representative or SGE members. Under a second prohibited personnel practice provision, 5 U.S.C. § 2302(b)(10), agencies may be barred in particular facts and circumstances from discriminating on the basis of political affiliation when selecting regular federal employees or SGEs for committees. Finally, although Congress has enacted merit system principles prohibiting consideration of political affiliation in all aspects of federal employee personnel management, the courts and the MSPB have uniformly ruled that these principles are not legally enforceable prohibitions.

In addition to these personnel law restrictions, and irrespective of the federal employment status of the candidate, Congress has prohibited consideration of political affiliation for a number of specifically designated advisory committees. When selecting members for those designated committees, inquiring about or considering political affiliation would violate the committee-specific restrictions. In addition, where the candidate for a designated committee happens to be a federal employee, inquiring about or considering political affiliation could also constitute a prohibited personnel practice under the personnel laws.

Whether a violation of any of the foregoing prohibitions has occurred in a particular instance would depend on a fact-specific investigation and analysis on a case-by-case

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[22] *See* Charter for the National Advisory Council for Human Genome Research (citing 42 U.S.C. § 284a, section 406 of the Public Health Service Act). Some individuals nominated to serve on this council have alleged that they were asked "leading political questions" that they believed were a "political litmus test." *See, e.g.,* Maggie Fox, *U.S. Science Policy Swayed by Politics, Says Group*, REUTERS, July 9, 2004. *See also* Union of Concerned Scientists, above, at 26-28 (stating that two individuals reported being asked questions about their political views during their appointment process). Again, we did not analyze the facts and circumstances surrounding the selection of these or any other advisory committee members.

[23] The four committees we reviewed in our report which are covered by this limitation are: (1) the National Human Research Protections Advisory Committee, *see* Charter for the National Human Research Protections Advisory Committee (citing 42 U.S.C., § 217a, section 222 of Public Health Service Act); (2) the Center for Disease Control and Prevention's Advisory Committee on Childhood Lead Poisoning Prevention, *see* Charter for the Advisory Committee on Childhood Lead Poisoning Prevention (citing 42 U.S.C. § 217a, section 222 of Public Health Service Act); (3) the Scientific Advisory Committee on Alternative Toxicological Methods, *see* Charter for the Scientific Advisory Committee on Alternative Toxicological Methods (citing 42 U.S.C. § 285l, section 463A of Public Health Service Act); and (4) FDA's Food Advisory Committee, *see* Charter for the Food Advisory Committee (citing, among other things, 42 U.S.C. §§ 217a, 241, 242, 242a, 262, and 264, sections 222, 301-303, 351, and 361 of the Public Health Service Act).

basis. Our analysis was designed solely to identify relevant legal principles, however; we did not conduct an examination of the facts and circumstances surrounding the selection by any particular agency of the members of any particular advisory committee.

Please contact Susan D. Sawtelle, Associate General Counsel, at (202) 512-6417, Karen Keegan, Assistant General Counsel, at (202) 512-8240, or Amy Webbink, Senior Attorney, at (202) 512-4764, if you have any questions concerning this opinion.

Sincerely yours,

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General Counsel