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Memorandum dated February 23, 2007,  
from Robert I. Cusick, Director  
to Designated Agency Ethics Officials  
Regarding Waivers Under 18 U.S.C. § 208

Attached is a memorandum that provides guidance on issues you should consider when deciding whether to grant a waiver under 18 U.S.C. § 208(b)(1) or (b)(3). Because agencies have a variety of attitudes about issuing conflict of interest waivers, it is not possible to have complete consistency throughout the executive branch in this area. However, we hope this guidance will give you some basic information on waiver practices that the Office of Government Ethics (OGE) finds acceptable.

Also, this memorandum should serve as a reminder that agencies are required by Executive Order 12674 to consult, when practicable, with OGE about proposed waivers. You may call your desk officer or an OGE attorney for this consultation. In addition, please remember to forward to OGE copies of all waivers you issue, as required by the Executive order.

Attachment

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## GUIDANCE ON 208 WAIVER CONSULTATIONS

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### I. INTRODUCTION

The criminal conflict of interest law at 18 U.S.C. § 208 prohibits an employee from participating in an official capacity in a particular matter in which he has a financial interest. The law is intended to be prophylactic, and its scope is quite broad. In order to mitigate the impact of section 208, Congress included two provisions that permit an agency to issue a waiver of the prohibition in individual cases. OGE already has published regulations for you to follow in issuing such waivers. See 5 C.F.R. § 2640.301 *et seq.* This memorandum provides additional guidance to consult when you are considering whether a waiver is warranted. The guidance is based on OGE's experience in consulting with agencies on waivers, and on our experience in interpreting section 208<sup>1</sup>.

Under Executive Order 12674, agencies have the responsibility of consulting "when practicable" with OGE prior to issuing a waiver under section 208. Moreover, agencies are required to send OGE copies of any waivers they issue. However, the final decision of whether to grant a waiver is yours; OGE's role is to advise you what considerations should be weighed in reaching a decision, and to ensure that statutory requirements are met. Because the statute places the authority to grant waivers in the

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<sup>1</sup>This guidance is focused on the issues to consider before issuing a waiver under 18 U.S.C. § 208(b)(1) or (b)(3). It does not contain in depth interpretations of the prohibition in section 208(a). For additional information about OGE's interpretation of 208(a), you should consult 5 C.F.R. § 2640, and the Preambles that accompanied our proposed publications of part 2640. See 60 *Fed. Reg.* 47207-47233 (September 11, 1995) and 60 *Fed. Reg.* 44705-44709 (August 28, 1995). Additionally, you can find numerous OGE advisory opinions and DAEOgrams dealing with section 208 on OGE's website ([www.oge.gov](http://www.oge.gov)). Opinions of the Office of Legal Counsel at the Department of Justice can be found at [www.justice.gov/olc/opinions](http://www.justice.gov/olc/opinions); over the years, OLC has also issued many opinions interpreting section 208.

hands of agency officials, not OGE, our role is to provide advice, and we do not concur in any waiver determinations.

It is important to remember that a waiver analysis usually requires the consideration of several competing factors. In some cases, it may be clear that one particular factor is most significant. But often the analysis is not that simple. You may be presented with several factors that seem to favor issuing the waiver, and one or two other factors that seem to weigh in the opposite direction. In addition, appearance concerns can sometimes militate against issuing a waiver even where the statutory standard arguably is met. Because each waiver is so fact-specific and the factors you are evaluating may be subjective, the decision to grant or deny a waiver can be difficult. One way that OGE can help in this regard is to advise you about waiver practices at other agencies.

It would be impossible for OGE to anticipate every factor and issue that might come up when you are considering granting a 208 waiver. Although this document covers several of the more common scenarios, at one time or another you will probably confront situations different from those described in this guidance. Nevertheless, we hope this guidance will help you proceed through the steps of analyzing: (1) whether a waiver is necessary, (2) whether a waiver is warranted, (3) what is required for an effective waiver, (4) what factors to consider in your analysis, and (5) what to include in a fully documented waiver.

You also should remember when using these guidelines that the discussion is limited to section 208. Even so, you should always take into account any applicable portions of the Standards of Ethical Conduct for Employees of the Executive Branch (5 C.F.R. part 2635). As stated in the Note in 5 C.F.R. § 2635.501(b): where an employee complies with all the terms of a 208 waiver, the granting of a waiver will be deemed to constitute "a determination that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of agency programs and operations." Thus, appearance concerns will always play an important role in your decision about whether to go forward with a waiver. Also, a waiver issued under section 208 will not eliminate any prohibitions that may apply because

of an agency organic statute or other statutory restriction.

Additionally, remember to take into account any section 208 exemptions that already have been promulgated by OGE at subpart B of 5 C.F.R. part 2640. These exemptions are self-executing, and will eliminate the need for an individual waiver in many cases.

Finally, you sometimes may be considering a waiver for an employee who has already participated in a particular matter in which he has a financial interest. As will be discussed in the guidance, waivers may be issued only for prospective participation. In addition, in such cases you have a responsibility to refer the matter to the Department of Justice or your Office of Inspector General in accordance with 28 U.S.C. § 535. Where an employee has already participated in a particular matter in which he has a financial interest, we strongly recommend that you discuss the situation with your IG or DOJ before issuing a waiver for any continuing participation.

## **II. PRELIMINARY MATTERS**

Section 208 contains two provisions that permit waiver of the general prohibition at section 208(a) on an individual basis. The two provisions are found at 18 U.S.C. §§ 208(b)(1) and 208(b)(3); therefore, waivers issued under these provisions are commonly referred to as "208(b)(1) waivers" and "208(b)(3) waivers." The regulations implementing these statutory provisions are found in subpart C of 5 C.F.R. § 2640. Each waiver provision will be discussed individually in this guidance; however, there are several preliminary matters that apply to both types of 208 waivers, as addressed below.

### ***Is a waiver really necessary?***

Sometimes you may want to issue a 208 waiver just to "be on the safe side" or "in an abundance of caution" when it is not clear that a waiver is necessary. Although this approach sometimes is warranted, remember that 208 waivers need not be issued in situations where a regulatory exemption clearly applies (see subpart B of 5 C.F.R. § 2640), or where there is no real likelihood that the employee will participate in particular matters that will

have a direct and predictable effect on his financial interests. Or, if you believe section 208 is inapplicable based on the facts, you might consider issuing an advisory opinion explaining how you concluded that section 208 does not bar the employee's participation in the Government matter.

So-called prophylactic waivers are used most commonly in situations where the employee is involved in broad policy matters that may not be "particular matters" at all. In such a case, you may be concerned that the matter will evolve into a "particular matter" and the employee may not recognize the distinction between a "matter" and a "particular matter." In this situation, a waiver can protect an employee from an inadvertent violation of section 208. The waiver document might specifically mention that the waiver would apply only in the event that a particular matter would be involved.

A prophylactic waiver also may be used where it is not entirely clear that a particular matter will have a "direct and predictable effect" on the employee's interest. In some cases, the very fact that it is unclear that the matter will have such a direct and predictable effect can be cited in support of determination that the financial interest is not likely to affect the employee's official services.

***Can the employee recuse?***

One of the first questions you should consider is whether a recusal would resolve the conflict. If the employee's duties can easily be adjusted to avoid a waiver, the need for the waiver is more questionable. On the other hand, there may be no reason to consider recusal if the financial interest is clearly insubstantial.

***Is divestiture of the conflicting financial interest a reasonable option?***

Sometimes a waiver may be considered if circumstances demonstrate that the conflict cannot readily be resolved through divestiture. This can occur, for example, when the conflicting assets are held in a trust or in a limited partnership. In such cases the employee sometimes has no control over the investments in the trust or partnership. He may not be able to sell his partnership interest, or it

would be unreasonable to ask him to renounce his interest in the trust.

Also, a waiver may be considered when an employee has agreed to divest, but divestiture cannot be completed immediately. For example, an employee may have accumulated non-public corporate stock through the stock ownership plan of a former employer that buys back its corporate shares only on a periodic basis. Or, immediate divestiture might violate insider trading laws. In such cases, a temporary waiver may be a good solution, especially where limitations on the waiver can eliminate participation in obviously problematic matters. The appropriate length of a temporary waiver will depend on the circumstances, and OGE can provide guidance based on experience in handling a variety of situations.

***What if OGE thinks the waiver is inappropriate?***

Occasionally, OGE may disagree with an agency's decision to grant a waiver. This sometimes happens when the agency is giving weight to irrelevant factors, or is failing to take important factors into consideration. In other cases, OGE may simply disagree that the facts support a conclusion that a waiver meets the statutory standard. OGE's disagreement with an agency's analysis does not mean that the waiver is ineffective. However, you should be aware that OGE's records will indicate that the agency was advised against issuing the waiver. Moreover, keep in mind that OGE's advice is based on its experience and familiarity with waivers issued by other agencies. Typically, agencies will want their waiver practices to be within the norm of practices in the executive branch.

***Is an employee entitled to receive a waiver?***

No. An employee does not have any entitlement to a waiver. The decision to issue a waiver is within the discretion of the agency, based on its own practices and its analysis of all the relevant facts. Many agencies rarely issue waivers and tend to rely more heavily on requiring recusal, divestiture, or resignation.



### III. STATUTORY REQUIREMENTS FOR WAIVERS

#### *Requirements common to all 208 waivers*

Once a decision has been made that a waiver is necessary, section 208 requires that the following three conditions be met for all 208 waivers. If these conditions are not met, an employee acting in reliance on the waiver risks violating section 208.

1. All waivers must be issued in writing by the person responsible for the employee's appointment or someone to whom that authority has been delegated. In many agencies, this authority is delegated to the DAEO.
2. All waivers must be issued before the employee participates in a particular matter covered by the waiver. Waivers cannot be issued for past conduct.
3. All waiver documents must make clear that the waiver is based on the applicable statutory standard. Note that the waiver standard in 208(b)(1) is different from the standard in 208(b)(3).

#### *Additional requirements for all 208(b)(1) waivers*

Section 208(b)(1) contains the following two additional requirements:

1. The employee must disclose the disqualifying financial interest and the nature and circumstances of the particular matter to the official with the authority to grant the waiver. Failure to make full disclosure of all relevant information can jeopardize the validity of the waiver.
2. The waiver must be based on a written determination that the disqualifying financial interest is not so substantial as to be deemed likely to affect the integrity of the employee's services. This determination should be made without regard to the employee's good character.

**Additional requirements for all 208(b)(3) waivers**

Section 208(b)(3) contains the following three additional requirements:

1. The waiver must be for a special Government employee (SGE) who is serving on a committee established under the Federal Advisory Committee Act (FACA). The issue of whether a committee member is an SGE or not is discussed in detail in OGE Informal Advisory Memoranda 82 x 22, 04 x 9, and 05 x 4. You should not issue a waiver if the committee member is a representative because 18 U.S.C. § 208 applies only to employees, and representatives are not Government employees. Also, SGEs who are not members of a FACA advisory committee are not eligible for a waiver under section 208(b)(3).
2. The waiver must be issued after a review of the individual's financial disclosure report.
3. The waiver must certify in writing that the need for the employee's services outweighs the potential for a conflict of interest.

**IV. ADDITIONAL ELEMENTS THAT OGE STRONGLY RECOMMENDS BE INCLUDED IN ALL WAIVERS**

Although not required by section 208, there are several vital elements of the 208 waiver determination process that OGE recommends should be included in the written waiver. Excluding these considerations from the document will not make the waiver ineffective, but adding them will make the waiver much more defensible. Further, OGE recognizes that some agencies include the analysis of these elements in a decision memorandum that accompanies the waiver:

1. Description of the interest. An adequate description of the interest involved should include not only the type of interest (stock, mutual fund, outside employment, etc.), but also an approximation of the value of the interest (e.g., current market value of stock or other investment holding, or annual salary from outside employment).

2. Description of the particular matter and the employee's role in the matter. Be sure to include an adequate description of the particular matters to which the waiver applies and the employee's role in the matters. In other words, the waiver should explain in enough detail the types of matters in which the employee is likely to participate that might affect the financial interest concerned, and the potential effect those matters might have on the relevant financial interests. The specificity of such information can vary greatly from waiver to waiver. It may be as broad as including any particular matter affecting the financial interest or as limited as describing only a single particular matter. However, if the waiver will apply to all particular matters under an employee's responsibility, you should include a reasonably detailed description of these responsibilities.
3. Limitations. If applicable, the waiver must include any limitations on the employee's ability to act in the particular matters involved. This might include limits on the particular matters to which the waiver applies or limits on the work an employee is authorized to do on a particular matter. For example, an employee may have a waiver that allows participation in matters related to a particular contract, but specifically excludes any contract negotiations or formal evaluations. Another common limitation is that the employee may be prohibited from working on particular matters where a conflicting entity is a party, but may work on broader policy matters affecting the entity as part of a class or group. Also, a waiver can be time-limited, e.g., until the disqualifying interest is divested. Limitations tailored to an individual's specific circumstances can demonstrate that your agency has used its best efforts to address and resolve potential conflicts.
4. Additional factors taken into consideration. Agencies normally take a variety of other factors into consideration when issuing either a (b)(1) or (b)(3) waiver. These factors are discussed in more detail in Sections V and VI.

**V. FACTORS TO WEIGH IN MAKING  
THE SUBSTANTIALITY DETERMINATION**

In determining whether a disqualifying financial interest is sufficiently substantial to be deemed likely to affect the integrity of the employee's services to the Government, OGE regulations at 5 C.F.R. § 2640.301 *et seq.*, implementing section 208(b)(1), provide that the responsible official may consider the following factors:

1. The type of interest that is creating the disqualification. Some types of interests are easier to waive than others. For example, it would be easier to waive an interest arising from ownership of publicly traded stock than a financial interest in a new job an employee is seeking.
  
2. The identity of the person whose financial interest is involved; and if the interest is not the employee's, the relationship of that person to the employee. There are situations where the employee may not have a direct financial interest in a matter, but has an imputed interest in the matter. Where the imputed interest is somewhat remote from the employee's own financial interest, a waiver may be easier to justify. In such cases, the interest may be less likely to affect the integrity of the services the Government could expect from the employee than if the employee's own interests were affected. Some examples might include:
  - A financial interest of a general partner that is held outside of the partnership and that is not used as collateral for the partnership.
  
  - A subsidiary of an employee's outside employer that does work wholly unrelated to the employee's work for that company.

3. The dollar value of the potential gain or loss that may result from participation in the particular matter. Although an important factor to consider, the value of the potential gain or loss often may be only an estimate. Furthermore, depending on the type of interest affected, it may be difficult to estimate. For example, it would be simpler to estimate the value of the potential gain that a decision to award a \$1 million contract would have on a relatively small company, compared to the impact of the same award on a Fortune 500 company. Of course, the greater the potential gain or loss, the more unlikely it is that a waiver can be justified.

4. The value of the financial instrument or holding from which the disqualifying financial interest arises and its value in relationship to the individual's assets. A factor weighing in favor of a 208 waiver might be that the disqualifying financial interest is small relative to the value of the employee's assets. This factor is often relied upon in waivers for interests in publicly traded stock. For a further discussion of this subject, see the section **Stocks** beginning on p. 15.

If a financial interest meets most of the de minimis amounts in a regulatory exemption, an individual 208 waiver may be easy to justify. An example of this might be ownership of publicly traded common stock with a value only \$5,000 over the regulatory exemption limit allowed in 5 C.F.R. § 2640.202.

5. The nature and importance of the employee's role in the matter. Section 208 applies even in situations where the employee's role in the particular matter does not directly affect his financial interest. Section 208 applies as long as the employee participates personally and substantially in the overall particular matter that affects his interest. However, the nature and extent of an employee's participation in a particular matter, and how his own participation could affect his financial interest, can be relevant in determining whether a waiver is appropriate. Sometimes the employee's role in the matter may have little or no effect on his financial interest or the financial interest attributed to him. Examples include situations where an employee's role

is relatively limited or where the employee's work will be subject to substantial review before any action is taken. On the other hand, where the employee's own participation will clearly affect his financial interest, justifying a 208 waiver may be more difficult.

6. The sensitivity of the matter. This frequently is an important consideration. Where the particular matter is very controversial or sensitive, the wisdom of granting a waiver can be questionable. People dissatisfied with whatever action the Government takes may point to the waived financial interest as evidence that the ultimate decision was wrong or ethically suspect. (See also the discussion of appearance concerns under **MISCELLANEOUS CONSIDERATIONS** on page 26.)
7. The need for the employee's services in the particular matter. This consideration was discussed in the preliminary section of this guidance, but it should be revisited once all the other factors have been considered, especially if there is still concern that the justification for the waiver would be questioned. In some cases, an employee may be the only person with a certain needed expertise. Or an employee may have been working on the matter for some time before the conflict arose (for example, in the case of financial interests acquired through a new marriage). Such situations may sometimes weigh in favor of a waiver.
8. Adjustments that may be made in the employee's duties to address appearance concerns. For example, an employee might be limited to giving *advice* about a matter rather than making a *decision* about that matter; or he might be allowed to participate in policy matters affecting an industry, but not a party-specific matter involving a particular entity.

#### **VI. FACTORS TO WEIGH IN MAKING A DECISION TO ISSUE A 208(B)(3) WAIVER**

In general, because a 208(b)(3) waiver requires a determination that the need for the employee's services outweighs the potential for a conflict of interest, the substantiality of the otherwise disqualifying financial

interest is not as important a factor as it is in a 208(b)(1) waiver analysis. Therefore, a substantiality analysis of the financial interest might be somewhat less detailed.

Also, for 208(b)(3) waivers, make sure that you have considered the exemption at 5 C.F.R. § 2640.203(g), which allows FACA committee members to give advice on certain particular matters of general applicability affecting their non-Federal employers. If this exemption will not resolve a conflict that arises from a committee member's non-Federal employment, a waiver may still be warranted.

Further, because 208(b)(3) waivers are applicable only to SGEs serving on FACA advisory committees, an important point to remember when considering whether a waiver is justified is that the services provided by a FACA committee member are only advisory and many advisory committee meetings are open to the public. Some agencies require that any bias a member may have due to his financial interests be revealed and taken into consideration by the committee and the agency. Moreover, because a committee consists of several members providing advice, a consensus is usually required before any recommendation goes forward.

In determining whether the need for an individual's services on an advisory committee outweighs the potential for a conflict of interest created by the disqualifying financial interest, the responsible official should consider the factors enumerated below. Many of these factors are identical to the factors to be considered for 208(b)(1) waivers, but may apply somewhat differently in the advisory committee context:

1. The type of interest that is creating the disqualification. It is not unusual for an SGE serving on a FACA advisory committee to have a conflict of interest arising from his non-Federal employment. In fact, the employment relationship that creates the conflict may also be a justification for allowing the employee's participation, *i.e.*, his expertise gleaned from his outside employment.
2. The identity of the person whose financial interest is involved; and if the interest is not the employee's, the relationship of that person to the employee.

This factor may be especially relevant when considering a 208(b)(3) waiver because advisory committee members usually have board memberships or employment outside the Federal Government. Considerations in such cases might include limiting participation in certain committee matters that are likely to specifically affect the member's outside affiliations. Additionally, as mentioned previously, some agencies may have specific statutory authority requiring committee members to publicly disclose conflicts of interest. This public disclosure is thought by some to mitigate the potential for bias.

3. The uniqueness of the individual's qualifications. The importance of the perspective or expertise the member brings to the committee may be the most important factor in justifying a waiver under section 208(b)(3). This factor often is relied on heavily when the SGE has extremely specialized education or experience, or when there are a limited number of experts in a certain field.
4. The difficulty of locating a similarly qualified individual without a disqualifying financial interest to serve on the committee. Even if a committee member's qualifications are not unique, the need for his services still may outweigh the potential for a conflict if other qualified people would likely have the same or similar conflict. This may not be an unusual situation, because often the people who are qualified to serve on an advisory committee have ties to the entities that are most likely to be affected by, or interested in, the particular matters that will come before the committee.
5. The dollar value of the potential gain or loss that may result from participation in the particular matter(s). (See previous discussion of this factor on page 10.)
6. The value of the financial instrument or holding from which the disqualifying financial interest arises and its value in relationship to the individual's assets. (See previous discussion of this factor under on page 10.)



7. The extent to which the disqualifying financial interest will be affected individually or particularly by the actions of the advisory committee. In some cases it may be appropriate to limit a 208(b)(3) waiver to matters of general applicability, especially if the committee rarely is involved in particular matters involving specific parties. However, if it is anticipated that a committee will be advising on particular matters involving specific parties such as grants and such a limitation would not be advisable, you should specifically address in the waiver what types of party-specific matters are covered and why the need for the SGE's participation in those matters outweighs any conflict concerns. Generally, it would be hard to justify a waiver for an SGE to participate in a "party" matter specifically involving his non-Federal employer, such as consideration of a grant application submitted by his employer.

Further, because some policy matters can be targeted to, or affect, only a few organizations, some agencies also limit their 208(b)(3) waivers by excluding such matters from them. However, it is not always easy to know whether a policy would have a special and distinct effect on only a few organizations. If an agency wishes to limit its waiver in this way, you should ensure that it is clear to the employee what types of policy matters are outside the scope of the waiver.

Generally, agencies have been more flexible in issuing waivers under 208(b)(3) than under 208(b)(1). One reason for this is that the 208(b)(3) waiver standard is easier to meet. The other reason is that divestiture of conflicting assets and resignation from conflicting outside positions may not be practical alternatives for advisory committee members. It is unlikely that a FACA advisory committee member would be willing to make substantial personal financial changes in order to serve on a committee that meets a few times a year.

And finally, remember that waivers for other SGEs who do not serve on FACA committees are subject to the stricter standard at section 208(b)(1). For a further discussion of this topic, see the last question on page 29.

## VII. ISSUES RELATING TO SPECIFIC TYPES OF FINANCIAL INTERESTS

Conflicts of interest can arise from many different types of interests. Most of the cases we see, however, involve financial instruments such as stocks and bonds, or outside employment relationships and other outside positions. The following is a discussion of the most common types of interests and relationships encountered.

### ***Stocks***

Section 208 applies much more broadly to stock ownership than simply to particular matters affecting the stock price itself. Because a stock interest is an ownership interest in the company, section 208 prohibits an employee from participating in particular matters that have an effect on the financial interests of an entity in which he (or anyone whose interests are imputed to him) owns stock. Nevertheless, when considering a 208 waiver to resolve a conflict arising from the ownership of stock, both the value of the employee's stock and his overall investment portfolio will be relevant considerations. Your analysis should cover at least the following three areas:

- The potential effect the particular matters would have on the company;
- The potential effect, if any, the particular matters may have on the stock value; and
- The relative value of the stock holding when compared to the value of the employee's entire investment portfolio.

As discussed in the section addressing 208(b)(1) waivers generally, if the value of publicly traded stock is very close to the regulatory exemption level, it may require little additional analysis to justify a 208 waiver. In contrast, for very large holdings of stock, granting a 208 waiver may create an appearance concern, even where the likelihood of an effect on the value of that holding appears remote, or even if the employee has other substantial holdings. And, as discussed previously, it may be less problematic to issue a waiver for participation in a policy matter affecting an industry or other large group of entities than it would be to issue a waiver to

participate in a party-specific matter like a contract, litigation, or other matter involving only one or a small number of entities.

However, generally it is the combination of various factors that will dictate whether a waiver is appropriate. For example, an employee who has significant holdings in a large computer company may be able to receive a waiver to participate in the decision to buy a few computers from that company, because the effect on the company will be minimal. Conversely, it may be a bad idea for an employee who owns a moderate amount of stock in a computer company to participate in a decision to purchase a new multi-million dollar computer system from that company. In such a case, the effect on the company would be more substantial, and a waiver would be harder to justify.

One rule of thumb that a few agencies have used when stock interests are involved is that, if the value of the stock is less than 10% of the employee's investment interests, a waiver may be appropriate.<sup>2</sup> On the other hand, many other agencies use a significantly lower percentage value, more in the range of 1-5% of the employee's investment portfolio. OGE's view is that no particular percentage is appropriate in all cases. Other factors, such as the likely affect of the Government matter on the value of the stock, or the nature of the employee's participation, will affect your decision to issue the waiver. OGE believes that agencies should not issue waivers for stock on a *pro forma* basis without considering all relevant factors.

In addition, a few agencies have compared the value of the disqualifying financial interest to the employee's total net worth. OGE believes that this comparison sometimes could be misleading because it would include the value of an employee's personal residence, which is often a major component of net worth.

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<sup>2</sup> This rule of thumb would never be appropriate to apply in cases other than those involving publicly traded stock. For example, it would not be appropriate to issue a waiver to allow an employee to award a Government contract to a company he owns on the theory that the value of the contract is less than 10% of his investment portfolio.

Stock that is not publicly traded presents a different set of problems from stock in large, public companies. The value of stock in a non-public company may be more likely to be directly affected by a Government matter than the stock of a public company whose value is subject to the vagaries of the marketplace. Accordingly, waivers in such cases should be evaluated very carefully. Moreover, the appearance concerns that arise in cases where the stock is not publicly traded are likely to be greater than cases involving public companies.

Occasionally, OGE is asked to consult on a waiver for a class of stock other than common stock, e.g., preferred stock. Sometimes the attributes of these different classes of stock may make a waiver more or less desirable, so we strongly recommend that you consult with OGE before proceeding.

Finally, sometimes you may consider using a waiver for ownership of a stock option. These waivers can pose difficult questions, partly because of the difficulty of determining the true value of the option. Moreover, the issue can be even more complicated if the option is to purchase the stock in a non-public company. Waivers in such cases may be difficult to justify.

### ***Corporate financial obligations and other debts***

In the case of bonds and similar debt obligations, the employee's financial interest is limited to whether the matter would affect the organization's ability or willingness to fulfill its financial obligations, or affect the market value of the obligation (e.g., the bond). Therefore, the test for whether section 208 applies in the first place is not whether a particular matter will affect the organization, but whether the matter is of such magnitude or importance to the organization that it would affect its liquidity or financial stability, or would actually affect the marketability of its securities, or would otherwise affect the organization's willingness to fulfill its financial obligations. In the normal situation, this might be a fairly high standard to meet. Typical interests that create these types of obligations include:

- defined benefit retirement plans
- promissory notes

- accounts receivable
- corporate or other bonds
- severance payment agreements
- installment payments

Of course, if the particular matter is truly one that would affect the organization's ability or willingness to fulfill its financial obligations, or would affect the marketability of the securities held by the employee, the "substantiality" issue would need to be addressed. In cases where it is clear that the debtor's ability to fulfill its financial obligation to the employee would be impacted, it is unlikely that a waiver could be justified unless the gain or loss would be truly insubstantial. For example, if an employee with investment interests valued at \$20 million owns corporate bonds valued at \$20,000, it might be possible to issue a waiver for participation in a particular matter that would affect the market value of the bonds. (Also, note the exemption relating to employee benefit plans found in 5 C.F.R. § 2640.201(c)).

### ***Negotiating for employment***

Two issues are important when analyzing conflicts arising from an employee's outside employment negotiations. First, for purposes of section 208, the financial interests of an entity with which an employee is negotiating for employment are imputed to the employee. Therefore, the employee is prohibited from participating in any particular matter affecting the prospective employer's financial interests, not just matters affecting the employee's own specific employment opportunity.

Second, for purposes of determining whether a waiver is justifiable, the employee's interest in the outside employment opportunity must also be considered. Obviously, one major concern is that the employee might try to ingratiate himself with his prospective employer by taking a favorable action on a particular matter.

Section 208 waivers allowing an employee to participate in particular matters affecting a prospective employer should be issued only in compelling circumstances. Therefore, when such waivers are issued, OGE encourages a much more detailed explanation as to why the waiver is justifiable. Examples might include a waiver to participate in an agency policy that is going to have a

very limited potential effect on a small portion of the potential employer's business or where the effect would be clearly *de minimus*, such as participating in a small purchase order from a large public company. But generally, a waiver for participation in a matter in which the prospective employer is a party would almost always be difficult to justify, as would a waiver for participation in a policy matter that would clearly harm or benefit the prospective employer. (For further guidance on this subject, see DAEOgram DO-04-029 issued September 20, 2004 [Informal Advisory Memorandum 04 x 13].)

Further, it is not entirely clear how section 208 would apply to a Federal employee who is negotiating for outside employment as an independent contractor. See OGE Informal Advisory Letter 94 x 16. OGE advises that it would be prudent for a Federal employee who wishes to negotiate for outside employment as an independent contractor to interpret section 208 as applicable in such situations. Accordingly, the employee would have to be recused from particular matters having a direct and predictable effect on that entity, or seek a waiver. The standards for issuing such a waiver would be the same as described above.

Finally, when considering a waiver for a Presidential appointee negotiating for employment, you should make sure that your agency has consulted with the White House Counsel's Office as required by the White House. See Memorandum for the Heads of Executive Departments and Agencies of January 6, 2004, from Andrew H. Card, Jr. (January 6, 2004).

### ***Outside employment and positions as officer or director***

When considering a 208 waiver for outside employment or other non-Governmental positions, you should consider two issues. First, for purposes of section 208, the employee will have an imputed interest in the entire company or organization with which he is employed or holds an outside position as officer, director, trustee or general partner. Therefore, section 208 prohibits the employee from participating in any particular matter that has a direct and predictable effect on that entity.

If the effect on the entity is significant or substantial, a waiver would be hard to justify even if the matter does not affect the employee's own position with that organization. Moreover, in some cases, appearance concerns would militate against issuing a waiver. For example, a waiver that would allow an employee to participate in a regulatory policy matter affecting the industry in which his outside employer is a member would usually be inappropriate.

Second, it is important to consider the potential effect the particular matter will have on the employee's own outside employment or position. For example, the matter may increase the likelihood that he will have a continued position with the outside employer, or it might increase his expected income from the outside employment. It would be unlikely that you could justify a waiver if a particular matter directly relates to the employee's outside position.

It is important to note that section 208 applies when a Government employee also serves as an *employee* of an outside entity, but not when he serves as a true independent contractor to the entity. Of course, 5 C.F.R. § 2635.502 will apply in cases where an employee has an outside consulting or contractor position, and would typically require recusal from official matters affecting someone for whom the employee is a consultant or contractor. If you are considering authorizing an employee to participate in a Government matter affecting someone for whom he is a consultant or contractor, you should follow the authorization procedures under 5 C.F.R. § 2635.502(d). But, as noted above, if the particular matter would affect the employee's consulting/contractor *position*, then

section 208 would apply and a waiver would be difficult to justify.

Generally, if an employee has an outside employment interest in a state agency, 18 U.S.C. § 208 would prohibit the employee from working on official matters having a direct and predictable effect only on that state agency, not the entire state or any other agencies of that state. If the employment interest is at a relatively high level in a state office, the prohibition might very well extend to the entire state, including all its agencies. Waivers in such cases might be difficult to justify.

***Service on the board of directors of a non-Federal entity in an official capacity***

The Office of Legal Counsel (OLC) at the Department of Justice has concluded that the prohibition of section 208 extends to a Federal employee's service on the board of directors of a non-Federal entity where such service is performed in the employee's official capacity. (See OLC opinion dated November 19, 1996, and subsequent DAEOgram DO-97-015, issued April 2, 1997.) Accordingly, unless an employee is serving in an *ex officio* capacity pursuant to statutory authority or certain other factors are present, agencies generally must issue a 208(b)(1) waiver to permit the employee to serve.

Waivers for these situations are often issued based on the fact that the interests of the Government and the board on which the employee will be serving are parallel, thus justifying a determination that the disqualifying financial interest, although arguably substantial, is not so substantial as to be deemed likely to affect the integrity of the services the Government may expect from the employee. Such waivers also are justified by some agencies on the ground that the employee remains subject to agency supervision on the outside board and may be directed to resign in the event of a real conflict between the interests of the agency and the organization.

Nevertheless, you usually will want to limit what an employee may do in carrying out his duties as a member of the board. For example, most agencies will not permit an employee to fundraise for the non-Federal entity, nor to request Federal funds on the entity's behalf. In addition, most agencies will not permit an employee to award



Government grants or contracts to an entity if he sits on the entity's board in an official capacity.

One common question that arises in this situation is whether the employee who serves with the non-Federal organization may solicit speakers from the Government for a conference or meeting sponsored by the organization. Some agencies limit this type of activity.

Also, be aware that some agencies do not, as a matter of practice, issue waivers for official service on outside boards.

### ***Spousal (or a minor child's) employment***

Unlike an employee's own outside employment relationship, the financial interests of a spouse's or minor child's employer are not imputed to the employee under section 208. Rather, the disqualifying interest is the employment interest of the spouse or minor child. This could arise, for example, if an employee were to participate in a Government contract with his spouse's employer, and the spouse's job involved the very same contract.

However, it also is important to keep in mind when considering employment relationships of a spouse or minor child that often other financial interests in the employer accompany the employment, including stock ownership plans, compensation plans based on company profits, bonus plans, and various savings and/or pension plans. If such financial interests exist, they should be addressed accordingly, depending on the type of additional financial interest involved.

Because employment interests are generally deemed to be substantial financial interests, a 208 waiver allowing an employee to participate in an official matter affecting the employment interest of his spouse or minor child would be unlikely. A factor to consider might be whether the company has a practice of shifting employees from project to project without adversely affecting their pay, or whether a project is so large that the spouse's role is completely divorced from the part of the project in which the employee would be involved.

Also, when a spouse or minor child has an ownership interest in a business or is a partner, remember that the interests of the business will be treated as the interests of the spouse. Accordingly, in such cases section 208 will apply to matters affecting the entire business, and any waiver would have to address the interests of the business. (In particular, see the discussion of **Law firms**, beginning on page 23.)

### ***General partnerships and financial interests of general partners***

For purposes of section 208, the interests of an employee's general partner(s) are imputed to the employee. It is important to remember that the imputed financial interests of any general partners cover not only the interests in the general partnership, but also *all of the general partners' financial interests of which the employee is aware.*

There are two exemptions in 5 C.F.R. § 2640.202(f) for the financial interests of general partners:

- Publicly traded securities, long-term Federal Government securities, or municipal securities held by a general partner, if those securities are not related to the partnership and the value does not exceed \$200,000; and
- Any interest of a general partner, if the employee's relationship to the general partner is as a limited partner in a partnership that has at least 100 limited partners.

When considering whether to issue a 208 waiver for other interests not covered by these exemptions, you should take into account the identity of the general partner. For example, a waiver where the general partner is a large organization may be easier to justify than one for the interests of an individual, especially if the individual is a close personal friend, relative, or business associate of the employee.

### ***Law firms***

When an employee is severing his partnership in a law firm, several additional issues should be considered in

relation to the law firm and the other general partners. These typically include continuing investment or real estate partnerships with other partners of the firm and the severance package the employee may receive from the firm. A former law firm partner may retain several partnership relationships with partners of the firm other than the firm partnership itself. Retaining such interests can be troublesome, because the employee would still have a recusal obligation in connection with matters affecting the firm's partners. Among other things, the partners of a law firm will have a financial interest in any particular matter in which the firm is providing representation. When considering a 208 waiver for such circumstances, a waiver for particular matters affecting the financial interests of the general partners may be justified if the Government matter involves the law firm's representation of a client. If the matter actually affects the real estate or investment partnership, a waiver would be much more difficult to justify.

Where a severance package is concerned, section 208 would prohibit an employee from participating in a matter that would affect the firm's ability or willingness to pay money it owes him. Waivers in such cases would be hard to justify.

Considerations in addition to those included in the previous discussion of **Spousal employment** arise when an employee's spouse is a *partner* in a law firm. If the spouse's partnership share is based on all the firm's billings, any matter affecting the firm's financial interest will also affect the spouse's interests. If the spouse is personally involved in a particular matter, it is easier to see that his/her financial interests would likely be affected by the particular matter and a waiver would be unlikely.

In situations where the spouse is completely uninvolved in the particular matter under consideration at your agency, a waiver might be considered. In a large firm with many partners, it may be possible to conclude that one relatively small case would only have a *de minimus* effect on the spouse's partnership share. On the other hand, in a small firm with only a few partners, most of the firm's cases will likely have a more substantial impact on the spouse's interest and thus a waiver would be unlikely.

In cases where a firm has frequent business before the employee's agency, a waiver would normally be hard to justify. Sometimes in these cases, the spouse becomes a salaried employee of the firm. In other cases, the firm may take steps to exclude income from matters before the employee's agency when calculating the spouse's partnership share.

If an employee's spouse is employed by a law firm as an *associate* rather than as a partner, the discussion relating to general spousal employment beginning on page 22 will be applicable. In other words, only a particular matter that would have a direct and predictable effect on the spouse's position with the firm would be a conflict of interest for purposes of section 208, unless the spouse had other financial interests in the firm that may be directly tied to the overall profit of the firm, such as a bonus plan. Further, as stated previously, a 208 waiver allowing an employee to participate in an official matter affecting the employment interest of a spouse is rarely justifiable.

#### ***Limited partnerships and trusts***

When considering a waiver for interests held in a limited partnership, the most important factor to consider would be the overall effect the particular matter will have on the partnership and the employee's financial interest in the partnership. Although for purposes of section 208 the interests of an employee's limited partners are not imputed to the employee, the financial interests of the limited partnership's general partner are. Therefore, the financial interests of the general partner should be treated as discussed in the previous section entitled ***General partnerships and financial interests of general partners***, beginning on page 23.

Similarly, an employee has a financial interest in the underlying holdings of a trust for which he serves as a trustee, or in which he has a vested beneficial interest. (See DAEOgram DO-01-029 [Informal Advisory Memorandum 01 x 12], December 19, 2001.) When considering a 208 waiver for particular matters affecting the underlying holdings of a trust for which the employee is a trustee, one factor to consider might be that the employee has no beneficial interest in the trust's holdings, assuming he receives no payment based on the performance of the trust's portfolio. Nevertheless, appearance considerations might counsel

against issuing a waiver in such a case if the particular matter will clearly affect trust assets.

Where the employee does have a vested beneficial interest in the trust, a waiver should consider the overall effect the particular matter will have on the employee's financial interest in the trust assets. Where the trust has been established by another individual, sometimes a waiver is the only practical way that a conflict of interest can be resolved. Nevertheless, the appropriate statutory standard for a waiver must still be met. For more on this topic, see the discussion on page 4, ***Is divestiture of the conflicting financial interest a reasonable option?***

#### **VIII. MISCELLANEOUS CONSIDERATIONS IN DECIDING WHETHER A 208 WAIVER MAY BE APPROPRIATE**

***What effect will a change in the value of the holding have on the waiver?***

When basing a waiver on the value of a holding, you should insure that the waiver will remain effective even if the value of the asset changes, as it almost inevitably will, for example, through appreciation or dividend reinvestment. There are several approaches to this. Some agencies simply give the waiver for "your holdings in X," without specifying any limits. This is probably the most common approach, but it could be subject to abuse, for example, if the employee goes out and acquires substantially more stock, or if the value of the holding otherwise increases.

Other agencies put parameters on the waiver, such as limiting its validity to a maximum value or percentage of the employee's net worth or total investments. Another alternative is to limit the waiver to the employee's current holdings plus any appreciation and reinvested income.

***What if the disqualifying financial interest is held as part of a larger investment?***

Where a financial holding is held by a limited partnership or other form of a pooled investment fund, the focus of the waiver determination is on the employee's share of the conflicting asset rather than on the value of his

total holdings in the fund. For example, if an employee held \$1 million of Sector Fund X, and 6% of the fund was invested in conflicting stock, the value of the interest creating the conflict would be 6% of the total \$1 million, or \$60,000.

A factor in favor of issuing a 208 waiver for financial holdings like this is the difficulty the employee may have in divesting the asset creating the conflict. For example, in situations where the financial interest is held with other investors in a larger pool, it may be difficult for the fund's manager to simply divest the item creating the conflict, or it may not be realistic to expect the manager to divest. Also see the discussion of divestiture on page 4.

***What if a particular matter will affect only a subsidiary of a larger corporation in which the employee has a financial interest?***

If an employee holds stock in a parent company that owns a subsidiary, a waiver to participate in a particular matter affecting the subsidiary may be appropriate if the subsidiary accounts for a small percentage of the parent's business. On the other hand, if the subsidiary accounts for a substantial portion of the parent's business, a waiver would be harder to justify.

If an employee owns stock in the subsidiary, and he is expected to work on a matter involving the parent company, whether the interests of the parent company should be treated the same as those of the subsidiary will depend on the facts of the specific situation. For example, if the parent company's activities are closely tied to those of the subsidiary, then it would be reasonable to conclude that particular matters having a direct and predictable affect on the parent company would also have a direct and predictable affect on the subsidiary. Another factor to take into account might be whether the subsidiary is a wholly-owned, majority-owned, or minority-owned subsidiary of the parent. If it is unclear whether participation in matters affecting the parent company would also affect its subsidiary, it might be prudent to consider a waiver out of an abundance of caution. In any case, in evaluating whether a waiver would be appropriate, you should focus on the impact the matter is expected to have on the entity in which the employee owns stock.

***Are the interests of the Government and the conflicting entity adverse?***

Sometimes agencies ask whether it is relevant if the interests of the Government and the entity in which the employee has a disqualifying financial interest are adversarial or parallel. Where the interest of the Government and the entity are parallel, in unusual cases it may be appropriate to take this into account. For example, this is often the justification for an employee to sit on the board of directors of an organization in his or her official capacity. (See previous discussion entitled ***Service on the board of directors of a non-Federal entity in one's official capacity*** beginning on page 21.)

On the other hand, we generally reject the argument that the interests of a Government contractor are the same as those of the Government, because how a Government contract is performed can create ample opportunity for adversarial or conflicting positions. And where the interests of the Government and the outside entity are clearly adverse (e.g., litigation, investigations, or audits) appearance concerns would militate against issuing a waiver.

***Once a 208 waiver is issued, should you make a separate "appearance" determination under 5 C.F.R. § 2635.502?***

As mentioned in the Introduction to this guidance, a note to 5 C.F.R. § 2635.501 provides that when an employee acts in accordance with a statutory waiver, the waiver will also constitute a determination under section 2635.502 that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of agency programs and operations. Therefore, you should not issue a waiver if you believe there are insurmountable appearance problems. Once a waiver is issued, however, you do not need to make a separate "appearance" determination under section 2635.502. For example, it would be inadvisable to issue a 208 waiver to a Government employee assigned to investigate a company in which he holds stock valued at slightly above the regulatory exemption threshold, even though the value of his entire investment portfolio is \$300,000, if doing so would place the integrity of the investigation into question.

***May you issue "blanket" waivers to groups of employees involved in the same particular matter?***

OGE believes that so-called "blanket" waivers are inappropriate. Section 208 is a criminal statute that applies to employees individually, based on their specific conflicting financial interests. Sections 208(b)(1) and (b)(3) both require that the official issuing the waiver consider the circumstances of the employee's particular situation. For example, section (b)(1) requires the employee to make full disclosure of his financial interest and receive an advance written determination that the financial interest is "not so substantial." Similarly, section (b)(3) requires the waiving official to review the employee's financial disclosure report to determine if the Government's need for the employee's services outweighs the conflict. It is very rare that multiple employees will have identical financial interests in a matter such that one waiver will suffice for all employees involved. And in any event, each individual employee who receives a waiver must have a written document addressed to him that contains the appropriate statutory determination.

***Should you use "templates" for the waivers you issue?***

Using templates that recite the basic provisions of section 208 certainly is acceptable. However, because the wisdom of granting a waiver will vary in each individual case based on the facts, the pro forma use of one template for a certain type of waiver (e.g., one for interests in stock, or one for interests in a trust) generally is not workable. For example, an agency would not normally issue identical waivers for any employee who owns stock in a company affected by regulations the agency is developing. The affect of the particular regulation on the company, the employee's role in the matter, and other similar factors may dictate whether a waiver is appropriate in a particular case, and these various factors would normally be discussed in the waiver. In other words, while standard waiver language may be appropriate, waivers still should reflect individualized consideration of the facts of each case.



***May you apply a more relaxed standard for waivers for Special Government Employees (SGEs)?***

Section 208(a) applies to SGEs to the same extent that it applies to regular, full-time employees. As discussed earlier, waivers issued to SGE members of Federal Advisory Committees must comply with the standard set forth in 18 U.S.C. § 208(b)(3), which tends to be somewhat easier to meet than the standard in section 208(b)(1). For other SGEs, not serving on FACA advisory committees, however, the applicable standard is in section (b)(1), *i.e.*, that the financial interest "is not so substantial as to be deemed likely to affect the integrity" of the employee's services. If the employee is a temporary expert or consultant, or part-time member of a Federal commission, a waiver of the prohibition in section 208(a) must be able to meet the "not so substantial" standard.

Sometimes agencies tend to be somewhat more flexible in how they interpret the (b)(1) standard for SGEs, particularly as to interests in trusts and partnerships and similar investment vehicles. Also, because many temporary experts or consultants have purely advisory, rather than decisionmaking authority, a waiver might be justified more readily based on their limited role and lack of unreviewed discretion. Nevertheless, OGE recommends that you be cautious particularly in issuing waivers for SGEs in cases where the Government matter at issue would clearly affect the SGE's non-Governmental employer, his spouse's employment, and outside organizations he serves as officer, director or trustee. In many of these situations, there is no legal justification for issuing a waiver to an SGE that would not be issued to a regular employee.