

# **Office of Government Ethics**

**96 x 10--04/25/96**

## **Letter to a Federal Employee dated April 25, 1996**

By letter of April 8, 1996, you requested, in your individual capacity as an employee of [a component agency] that we review a decision by your agency requiring your wife to divest seventeen securities. That decision was based on a [component agency] regulation describing prohibited holdings for employees who are assigned duties such as yours. You were initially advised by the [component agency's ethics office] on December 4, 1995, that divestiture was required. You contested that decision, but it was upheld on February 28, 1996, by the [Department's ethics office] and reaffirmed by the [component agency's ethics office] on April 1, 1996.

The Office of Government Ethics (OGE) does not ordinarily serve as an appellate body for agency decisions regarding the necessity for divestiture or the case-by-case application of an agency's prohibited holdings regulation. Our role is to assist agency ethics officials with complex or unique ethics issues, but they retain primary responsibility to interpret and apply the regulatory standards of conduct and the criminal conflict statutes in specific fact situations. We note, however, that your ethics officials have suggested contacting us, and that your questions relate to fundamental conflict issues, OGE's role in approving agency supplemental standards of conduct regulations, and the effect of an agency's determination that a spouse's financial interests are prohibited. Therefore, we will offer the following guidance.

### **Background**

Based on your letter and its enclosures, we understand that the securities which you have been told to divest are owned solely by your wife or by a trust of which she is the beneficiary. You maintain no control, direction, or custody over these assets, nor do you expect to derive any benefit from them, by reason of a 1992 prenuptial agreement providing that your property and that of your spouse will remain separate. The [component agency] has, nonetheless, indicated that these assets should be divested, based on its prohibited holdings regulation at [citation deleted]. You contend that, because you did not acquire ownership or control over your wife's financial interests, they cannot present a conflict for you under 18 U.S.C. § 208, and that she should therefore be permitted to keep them. You also contend that the [component agency's] regulation does not

specifically include spousal financial interests in its prohibition, nor do you believe that it could include them without OGE approval as a supplemental regulation to the Governmentwide Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct).

### **Conflict of Interest Under 18 U.S.C. § 208**

The divestiture order in your case was based on a prohibited holdings regulation. Therefore, the question that you first raise of how an actual conflict under 18 U.S.C. § 208 could exist between your spouse's financial interests and your duties is not determinative of whether your spouse must divest. Prohibited holdings regulations may be based on appearances of conflict and ensuring the integrity of agency programs, as discussed below. Nonetheless, we believe the following preliminary comments concerning 18 U.S.C. § 208 are relevant to an understanding of the general scheme of conflict identification and resolution.

We do not agree that a spouse's financial interests cannot present a conflict of interest with a Government employee's duties when the spouse's interests are effectively beyond the control of the Government employee. The criminal conflict statute, 18 U.S.C. § 208, establishes the status of marriage, not shared control and ownership of assets, as the prerequisite for imputing a spouse's financial interests to a Government employee, to the extent that he has knowledge of those interests. The Standards of Conduct regulation at 5 C.F.R. § 2635.402 offers guidance for this statute and amplifies the concept of imputed interests, as interpreted by the Department of Justice.

What these authorities establish is not a rebuttable presumption that the Government employee will benefit from his spouse's financial interests, as you contend. The issue is whether the Government employee will be participating in matters that could directly and predictably affect his spouse's financial interests, which the statute imputes to the employee. A real possibility that a Government employee's spouse will gain or lose based on matters in which the Government employee participates is sufficient to establish a conflict, by operation of law.

Depending on the circumstances, the resulting conflict may be resolved by various means, such as waiver under 18 U.S.C. § 208(b)(1), recusal, or divestiture. Based on the statute, your agency could make an individual determination, under 5 C.F.R. § 2635.403(b), that your spouse's interests should be divested because they would require your disqualification from matters so central or critical to the performance of your official duties that the ability to function in your position would be materially impaired or would adversely affect the efficient accomplishment of agency mission.

This was suggested in the memorandum which you enclosed from [the Department's ethics office] as a possible alternate basis for divestiture in your case, because of your duties and the investments that your wife holds in [component agency]-regulated entities.

### **Prohibited Holdings Regulations**

Some agencies have established prohibited holdings regulations, which apply even absent a conflict under 18 U.S.C. § 208 or a divestiture determination in an individual case under 5 C.F.R. § 2635.403(b). Such a regulation was the basis for the [component agency's] divestiture notification to you. Prohibited holdings regulations recognize that certain financial interests will routinely present actual or apparent conflicts for an entire class of employees, and would require disruptive and frequent recusals or would otherwise cause a reasonable person to question the impartiality and objectivity with which agency programs are administered.

The [component agency's] regulation at [citation deleted] prohibits employees involved in regulatory activities from holding financial interests in entities that are significantly regulated by the [component agency]. Although that regulation has not been reviewed and approved by OGE under the new Government wide Standards of Conduct, it remains grand fathered and currently effective, at least until August 7, 1996, while the [component agency] and [the department] continue to develop a replacement. See the note following 5 C.F.R. § 2635.403(a), which has been amended to extend the initial grace period, most recently at 60 Fed. Reg. 66857 (December 27, 1995).

Even though the [component agency] regulation does not explicitly define prohibited financial interests to include those of a spouse, such interests apparently are included, as the regulation specifically lists acquisition of financial interests occurring by marriage as a possible basis for the [component agency head] to grant an exception. Based on the meaning of financial interest in 18 U.S.C. § 208, as discussed above, an employee could acquire a financial interest either directly or by imputation from his spouse's separate holdings. Additionally, the letter which you attached from [the department's ethics official] indicates long-standing precedent for such an interpretation of the [component agency] regulation. Against that background, we believe the [component agency] regulation does reasonably include spousal interests within its prohibition. Concerning your question about whether your agency's interpretation complies with the requirements of the Administrative Procedure Act, OGE offers no comment, as that is a matter outside our purview.

## Effect of Ordering Spousal Divestiture

The effect of an agency order for a spouse to divest financial interests, whether based on an agency's prohibited holdings regulation or an individual determination under 5 C.F.R. § 2635.403(b), is to place an employee on notice that divestiture is required in order for him to continue performing his duties. If his spouse is unwilling or unable to divest the financial interests in question, the ordering agency may take appropriate corrective or disciplinary action against the Government employee. This could include administrative reassignment, restructuring of duties to more readily permit recusals, or disciplinary action.

The discussion by OGE in the preamble to the regulatory provision in 5 C.F.R. § 2635.403(a) recognizes that the success of disciplinary action against an employee whose spouse holds a financial interest prohibited by an agency regulation is likely to turn on the nexus between the prohibition and the efficiency of the service. See 57 Fed. Reg. 35025 (August 7, 1992). Whether a sufficient nexus exists under this grandfathered [component agency] regulation is a matter to be decided initially by your agency, and subsequently by appropriate reviewers of adverse personnel actions.

You may wish to pursue the option of requesting an exception from the [component agency head], as discussed in the memorandum to you from the [component agency's ethics office], which you enclosed. The [component agency] regulation offers criteria for requesting such an exception, including certain cases when acquisition of the financial interest occurred by marriage.

If your spouse does decide to divest, she may wish to seek a certificate of divestiture (CD) from OGE prior to divesting, as discussed in the memoranda which you enclosed from your ethics officials. For those assets that qualify, a CD may be used to establish nonrecognition of capital gain for income tax purposes.

Sincerely,

Stephen D. Potts  
Director