Office of Government Ethics
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Letter to a Presidential Appointee dated April 1, 1987

This is in response to your letter of March 27, 1987, concerning your prospective service as [a presidential appointee to a Senate-confirmed position]. Your letter raises various issues with respect to the steps which may be appropriate for assuring compliance with applicable laws and regulations relating to conflicts of interest and standards of conduct.

In analyzing a situation such as yours involving extensive interests in listed securities the restrictions of 18 U.S.C. § 208 (relating to acts affecting a personal financial interest) are a major focus. At the present time with five qualified trusts outstanding, your only conflicts exposure relating to the portfolios of those trusts is with respect to the original portfolios of the four qualified blind trusts to the extent that you have not been notified by the trustees that the original assets of those trusts have been rolled-over. See 5 U.S.C. App.4 § 202(f)(4)(A). If the trusts were to be decertified, the entire portfolios of all five trusts would become financial interests for section 208 purposes. This has several implications with respect to your contemplated position.

Under the statutory scheme of section 208, it is necessary to consider the financial nexus a Government employee has with an entity which may be affected by a governmental matter, even if the nexus is such that the financial impact on that entity will not be passed through directly to the employee. It is well understood that section 208 does not have a de minimis threshold limitation. The Office of Legal Counsel at the Department of Justice ["DOJ"] has interpreted section 208 to apply to "rule-making proceedings or advisory committee deliberations of general applicability where the outcome may have a direct and predictable effect on a firm with which the Government employee is affiliated, even though all other firms similarly situated will be affected in a like manner."**b** See 5 C.F.R. § 737.11(d) (contains discussion of term "particular matter" in context of 18 U.S.C. § 207(c)). In United States v. Gorman, No. 85-3361 (6th Cir., December 23, 1986) (to be reported at 807 F.2d 1299), the court stated that a financial interest exists "where there is a real possibility of gain or loss as a result of

developments in or resolution of a matter." Citing Office of Government Ethics Formal Advisory Opinion 83 OGE 1, the court stated that "gain or loss need not be probable for the prohibition against official action to apply. All that is required is that there be a real, as opposed to a speculative, possibility of benefit or detriment." Accordingly, section 208 would apply to the extent that you as [a Government official] would participate in consultations or other activities concerning matters which might affect entities in which you were considered to have a financial interest under that provision without regard to your percentage of ownership or a demonstration that share prices would be affected.

The waiver provisions of subsection (b)(1) of section 208 afford some amelioration of the prohibitions imposed by subsection (a) of that section. The subsection provides that the waiver of the otherwise applicable restrictions of subsection (a) may be granted upon written determination that the disqualifying interest of the employee is "not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect" from the employee. [Emphasis added.] This standard clearly anticipates the exercise of meaningful discretion and personal judgment by the appointing official. This Office has adopted the DOJ view that the standard for a waiver as set forth in the statute suggests two lines of inquiry, focusing on -- (1) the financial interest involved, and (2) the services expected of the employee. We have deemed it appropriate to consider any factors that develop either of these lines of inquiry when reaching a final determination of the waiver issue. We have always stressed, as has DOJ, that it is inappropriate to focus on the reputation for personal integrity of the employee or his spouse. The integrity factor is extremely subjective and section 208 was enacted, in part, to eliminate such subjective judgments from the disqualification process. Reliance upon an official judgment of the employee's personal integrity will detract from the public acceptance of the waiver process, as well as make it more difficult to deny waivers because of the possible negative implication of a denial with respect to the integrity of the employee.

As I have discussed with both you and [your assistant], this Office recognized a special difficulty under the Ethics in Government Act of 1978 prior to the 1983 amendments to section 202(f)(7) (relating to qualification of pre-existing irrevocable trusts as blind trusts -- Pub. L. 98-150). Prior to the

amendments, rare situations were encountered in which officials simply could not secure qualification of some trust arrangements which had been previously established in their families. In those circumstances if rigorous pre-conditions otherwise prevailed, this Office did not consider it an abuse of discretion for appointing officials to issue a waiver under section 208(b) treating the trust portfolios, in effect, as tantamount to common trust funds maintained by a bank. One of the pre-conditions was that there was an institutional trustee which was indeed a bank. This is the type of waiver you received with respect to [a particular family trust]. With the amendments to subsection (f)(7), virtually all trust arrangements are susceptible to qualification; and consequently, we have not permitted the former waiver practice to continue.

There are many alternatives available to you. Several of the possibilities would remove conflict of interest concerns from restraining your activities as [a Government official]. For example, you could place your funds into a common trust fund maintained by a bank. If you choose to continue to invest through portfolios individually managed for you, and you remove the insulation you now derive from qualified trust treatment, the situation caused by the linkage you will have to private sector entities will cause a detailed and extensive recusal to be required. It would specifically have to include your commitment to refrain from participation in matters where the outcome may have a direct and predictable effect on the entities in which you hold securities, even though all other firms similarly situated might be affected in a like manner. The [agency in which you will serve in your new position] has been asked to work as quickly as possible to determine the number of entities from which you may have to recuse in your present portfolios if they were to be decertified. I do not know when their analysis will be completed. We will consult with them on their conclusions and advise you as to the general situation. However, under the blind trust rules, we may not divulge specific information. Perhaps specific listings, such as Standard & Poor's 500 companies to avoid, can be developed by [your agency] for your situation, but a definitive prohibition list is not available.

If you do wish to pursue decertification of your trusts subject to the Director's approval, a listing of the final assets must be included with your financial disclosure report which we will transmit to the Senate after review by [your agency] and this Office.

Please note that Senate confirmation committees, pursuant to Senate practices, are considered to have continuing jurisdiction over nominees during their Government service. Because of the provisions of the Ethics Act, section 202(f)(4)(B)(ii), if you elect to seek decertification after assuming office, permission of the [confirmation committee] will be considered necessary.

Sincerely,

[OGE Staff Attorney]

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1 2 Op. Off. of Legal Counsel 151, 155 (1978).