

Office of Government Ethics

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**Letter to a Designated Agency Ethics Official
dated April 7, 2000**

Your letter of March 9, 2000, requested advice from the Office of Government Ethics (OGE) on the meaning of 18 U.S.C. § 208(b)(4).¹ That provision provides an exemption to the statutory ban in 18 U.S.C. § 208(a) on participation by a Government employee in matters where he has a financial interest, either directly or imputed through others such as an organization that he serves as a director. For the reasons indicated below, OGE finds that this exemption is limited by its terms to factual circumstances where the employee holds a financial interest by birthright, and that even then, it could not operate to exempt imputed financial interests of an organization which the employee serves as a director.

The exemption at 18 U.S.C. § 208(b)(4) provides, in pertinent part, that the participation ban in section 208(a) shall not apply:

. . . if the financial interest that would be affected by the particular matter involved is that resulting solely from the interest of the officer or employee, or his or her spouse or minor child, in birthrights --

(A) in an Indian tribe, band, nation, or other organized group or community, including any Alaska Native village corporation as defined in or established pursuant to the Alaska

¹ Your letter requested a formal advisory opinion under 5 C.F.R. part 2638, noting the absence of controlling case law or legislative history on the issues presented, a likelihood of inconsistent interpretation by different agencies, and the potential effect of these issues on all Native Americans in the executive branch. These factors could suggest an "important matter of first impression," under the criteria for formal opinions in 5 C.F.R. § 2638.303. However, having weighed the requirements of 5 C.F.R. §§ 2638.301(c) and 2638.308(a) for consultation with interested parties and the Office of Legal Counsel at the Department of Justice prior to issuing a formal opinion, along with all other factors, including your countervailing request for an immediate response to resolve this matter as soon as possible, OGE has decided to respond with this informal advisory letter.

Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, . . . if the particular matter does not involve . . . the Indian tribe, band, nation, organized group or community, or Alaska Native village corporation as a specific party or parties.

We understand from your letter that the [Government official] at the [agency] administers various programs for American Indian tribes, Alaska Native corporations, and related Indian and Alaska Native groups, involving grants, loan guarantees, and technical assistance. In a private capacity, this [Government official] is being considered for a position on the board of directors of [a Corporation], an Alaska Native regional corporation established under the Alaska Native Claims Settlement Act (ANCSA) of 1971. She would earn a fee for her services as a director, but she is willing to forgo that compensation. ANCSA's purpose is to settle Alaska Native land claims. [The Corporation] is one of thirteen regional corporations created under ANCSA² and authorized to purchase land and issue shares of stock to certain tribes of Alaska Natives. The [Government official] is a member of a qualifying Alaska Native tribe entitled to those shares, and therefore she holds a stock interest in [the Corporation]. Only shareholders in an Alaska Native regional corporation are eligible to serve on its board of directors.

According to your letter, [the Corporation] is not likely to be an applicant or party under the [agency] programs that the [Government official] administers, because it has chosen not to be a participant, or because it is currently ineligible under [agency] regulations, based on the existence of an eligible regional tribe. Nonetheless, [the Corporation] could be affected generally by matters involving those [agency] programs, even though not a party. Additionally, the [Government official] participates in matters of apparent general applicability to the thirteen corporations, such as testimony before Congress on funding and administration for current [agency] programs, and on proposed new programs. Further, she serves as a liaison for her office with Indian tribal and non-reservation organizations, national advocacy organizations for

² In addition to the thirteen regional corporations, the Native residents of each village covered by ANCSA are organized into village corporations.

Native American [interests], and similar groups, which may involve matters that could affect [the Corporation].

As you indicated, the [Government official's] status as a shareholder in [the Corporation] results solely from her birthright as a tribal member, so the exemption at 18 U.S.C. § 208(b)(4) may provide relief in that regard. We do not agree, however, that this exemption also provides relief for either the interests of [the Corporation] or her own financial interests that would derive from her service as a member of its board of directors. While only Alaska Native corporate shareholders are eligible to serve on a regional corporation's board of directors, service on one of those boards is not itself a birthright, using that term's ordinary meaning.

Having considered the plain meaning of the statutory language, we understand that the § 208(b)(4) exemption was not intended to reach beyond those financial interests to which an Indian or Alaska Native is entitled by reason of birth. Furthermore, the terms of the exemption specifically limit its coverage to financial interests resulting solely from the interests of the employee, his spouse, or his minor child, and therefore would not include the interests of an organization that he serves as a director, even assuming that service as a director was determined to be a birthright. As you have indicated, there is no controlling case law and no written legislative history surrounding the § 208(b)(4) exemption to contradict this conclusion.

Therefore, our opinion is that, by the terms of 18 U.S.C. § 208, the [Government official] could not, absent an individual waiver, participate in particular matters at [the agency] which would directly and predictably affect [the Corporation] while simultaneously serving on its board of directors, regardless of whether [the Corporation] is a specific party to those matters. Likewise, to the extent that any compensation she might receive as a director of [the Corporation] be would be similarly affected by [agency] matters in which she participates, the exemption would not apply.³

³ Your letter indicated that the [Government official] "currently serves in a career position." If, however, she is actually a noncareer employee, as defined at 5 C.F.R. § 2636.303(a), she would be barred from receiving any compensation for service as a member of an outside board, by reason of 5 U.S.C. app. § 502(a)(4). See also 5 C.F.R. § 2636.306.

You have also asked whether we believe that recusal might be a suitable method of avoiding a conflict under 18 U.S.C. § 208, based on the fact-pattern presented. We are unable to answer that question definitively, because we do not know the extent to which recusal would materially impair her services [in her position]. That issue can only be answered by [the agency]. We note, however, that she would have to recuse from all particular matters directly and predictably affecting [the Corporation], whether involving it as a specific party or not.

We have not consulted the Office of Legal Counsel at the Department of Justice in connection with our response herein. If you believe there are additional facts or background that would justify an inquiry to that office, we would be willing to facilitate that endeavor.

Sincerely,

Stephen D. Potts
Director