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LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: David J. Apol  
Acting Director and General Counsel

SUBJECT: Waivers Under 18 U.S.C. § 208(b)(1) for an Employee's Otherwise Disqualifying Financial Interest Arising from Intellectual Property Rights

The U.S. Office of Government Ethics (OGE) is issuing this Legal Advisory to advise agencies that OGE's previous guidance in OGE DAEOgram DO-07-006, "Waivers Under 18 U.S.C. § 208," may be used as a framework to analyze other types of financial interests not explicitly discussed in that guidance. Specifically, this Legal Advisory clarifies that, in some circumstances, agencies may consider waivers under 18 U.S.C. § 208(b)(1) for an employee's otherwise disqualifying financial interest arising from intellectual property rights.<sup>1</sup> This Legal Advisory also provides the attached template and sample language for agency consideration when drafting a waiver of an otherwise disqualifying financial interest arising from intellectual property rights.

OGE DAEOgram DO-07-006 provides guidance on issues to consider when deciding whether to grant a waiver under 18 U.S.C. § 208(b)(1) or (b)(3) for the most common types of financial instruments and relationships. Underlying that guidance is the requirement that agencies ensure waivers meet the statutory waiver standard, regardless of the type of otherwise disqualifying financial interest. *See* 18 U.S.C. § 208(b)(1); 5 C.F.R. § 2640.301 et seq. OGE DAEOgram DO-07-006 provides an analytical framework for ensuring that the financial interest is "not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee." 18 U.S.C. § 208(b)(1). OGE recognized at that time, however, that agencies "will probably confront situations different from those described in this guidance." OGE DAEOgram DO-07-006, at 2 (2007). Accordingly, that guidance may be used as a framework for analyzing whether a waiver is appropriate in other

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<sup>1</sup> "Intellectual property" includes, but is not limited to, the following: patents, inventions, novels, plays, movie scripts, other literary works, artistic works, symbols, names, images, designs, trademarks, copyrights, films, and musical works. Intellectual Property, U.S. OFF. GOV'T ETHICS: PUB. FIN. DISCLOSURE GUIDE, <https://www.oge.gov/Web/278eGuide.nsf/Content/Definitions~Intellectual+Property> (last visited June 19, 2018).



situations not specifically discussed, including when an employee's otherwise disqualifying financial interest arises from intellectual property.<sup>2</sup>

In many cases, a waiver may not be appropriate, such as where an employee is or anticipates receiving substantial income from intellectual property. However, in some cases, a waiver might be warranted if the financial interest is "not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee." 18 U.S.C. § 208(b)(1). For example, OGE did not object to a past waiver permitting a doctor to conduct Government research into the mechanisms of and treatments for a medical disorder. In that case, the doctor had invented a treatment for the disorder before entering Government service and retained a right to receive royalties should the treatment be commercialized or licensed. The doctor's Government research in that area had the potential to directly and predictably affect his financial interest by making the possibility of future royalties more or less likely. However, the agency included in the waiver, among other limitations, a provision requiring reevaluation of the waiver if the employee began to receive royalties above a certain amount.

Because each waiver is fact-specific and some of the factors set forth in 5 C.F.R. § 2640.301(b) are subjective, the decision to grant or deny a waiver can be difficult. Accordingly, this Legal Advisory provides the attached template and sample language for agency consideration when drafting a waiver of an otherwise disqualifying financial interest arising from intellectual property rights. However, waivers still should reflect individualized consideration of the facts of each case.

Attachment

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<sup>2</sup> OGE DAEOgram DO-07-006 also includes a discussion of preliminary matters to consider before deciding whether to grant a waiver under 18 U.S.C. § 208(b)(1). In many cases, other remedies such as recusal or divestiture will more readily resolve the conflict of interest. Additionally, a regulatory exemption to section 208(a) may eliminate the need for an individual waiver in certain cases. For example, "Technology Transfer Act payments" made to employees by the federal Government fall within the scope of the regulatory exemption for an employee's financial interests arising from federal Government employment at 5 C.F.R. § 2640.203(d). *See* Certain Miscellaneous Exemptions Under 18 U.S.C. 208(b)(2) (Acts Affecting a Personal Financial Interest), 60 Fed. Reg. 44,706, 44,706-07 (interim Aug. 28, 1995, to be codified at 5 C.F.R pt. 2640).

## Sample Waiver Template for an Otherwise Disqualifying Financial Interest Arising from Intellectual Property Rights

This document provides a template for organizing waiver memoranda and sample language for agency ethics officials to consider including in waivers issued under 18 U.S.C. § 208(b)(1) for an employee's otherwise disqualifying financial interest arising from intellectual property rights. The template includes several paragraphs labeled "if appropriate." Agencies should use the "if appropriate" paragraphs only if those paragraphs are determined to be appropriate based on the facts of the specific waiver.

[Date]
MEMORANDUM FOR [EMPLOYEE], [POSITION]
FROM: [APPOINTING OFFICIAL] <sup>i</sup>
SUBJECT: [LIMITED] <sup>ii</sup> WAIVER PURSUANT TO 18 U.S.C. § 208(b)(1)
<p>This memorandum provides you with a waiver, pursuant to 18 U.S.C. § 208(b)(1), that[, subject to the limitations stated below,] will allow you to participate as [Position Title] in certain particular matters. This waiver is being issued based on full disclosure of your financial interests and consideration of the nature and circumstances of matters in which you may be involved as [Position Title].</p> <p>You have an otherwise disqualifying interest arising from your rights in intellectual property.[Description of Intellectual Property]. As [Position Title], you may need to participate in particular matters affecting this financial interest. [Description of Particular Matters].</p> <p>The criminal conflict of interest statute, 18 U.S.C. § 208(a), prohibits an executive branch employee from participating personally and substantially in any particular matter in which the employee knows that he or she has a financial interest directly and predictably affected by the matter, or in which the employee knows that a person whose interests are imputed to the employee has a financial interest directly and predictably affected by the matter, unless the employee has received a waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualifies</p>

### *I. Introduction*

*a. Description of  
Otherwise  
Disqualifying  
Financial Interest*

*b. Statement of  
18 U.S.C. § 208(a)  
prohibition*

for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). For purposes of the criminal conflict of interest statute, the financial interests of the following persons are imputed to the employee: any spouse or minor child of the employee; any general partner of a partnership in which the employee is a limited or general partner; any organization in which the employee serves as officer, director, trustee, general partner or employee; and any person or organization with which the employee is negotiating or has an arrangement concerning prospective employment. The term “particular matter” includes only matters that involve deliberation, decision, or action that is focused on the interests of specific persons, or a discrete and identifiable class of persons. The term may include matters that do not involve formal parties and may extend to legislation or policymaking that is narrowly focused on the interests of a discrete and identifiable class of persons.

Under 18 U.S.C. § 208(b)(1), an agency may permit an employee to participate in a matter in which the employee has an otherwise disqualifying financial interest, if it is determined that the disqualifying financial interest is “not so substantial as to be deemed likely to affect the integrity of the employee’s services to the Government.”

Based on the totality of the circumstances, I have determined that the financial interests subject to this waiver are not so substantial as to be deemed likely to affect the integrity of your services to the Government. Therefore, I grant you this waiver under 18 U.S.C. § 208(b)(1), which authorizes you to participate in [Particular Matter(s)], subject to the limitations stated below].

In determining that a waiver is warranted under 18 U.S.C. § 208(b)(1), I have considered the following factors set out in 5 C.F.R. § 2640.301(b):

*c. Statement of 18 U.S.C. § 208(b)(1) waiver standard*

*d. Determination under 18 U.S.C. § 208(b)(1) waiver standard*

*II. Consideration of factors at 5 C.F.R. § 2640.301(b)*

[Discuss any of the following factors that are relevant:

- The type of financial interest creating the disqualification (*e.g.*, you have an [x] percent interest in [Intellectual Property] that entitles you to royalty payments; you have a contractual agreement with [Name of Party] that you will receive [Dollar Amount or Percentage Share] for [Licensed Activity]);
- The dollar value of the potential gain or loss that may result from participation in the particular matter (*e.g.*, the amount of royalties or payments received or anticipated from the intellectual property);
- The value of the payments received or anticipated to be received in relation to the individual's income (*e.g.*, the aggregate average of your yearly income from this intellectual property represents [x] percent of your household income);
- 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;
- The nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter; or
- Other factors including the sensitivity of the matter, the need for the employee's service in the particular matter, and adjustments that could be made in the employee's duties that would eliminate or reduce the likelihood that the integrity of the employee's services would be questioned by a reasonable person.]

[Discuss any other relevant factors, such as the following mitigating factors, if appropriate:

a. *List only the relevant factors and the agency's analysis of those factors as they relate to the facts*

b. *Other relevant factors*

You will not be making recommendations or decisions related to commercialization or further funding of research; rather, your Government work will be limited to continued research in the area of your intellectual property.

*If appropriate:  
Employee's role is limited to research*

Your Government work will be subject to review by [Person/ Department/Peer Review Committee] prior to any final decision being made by the Government. This oversight will serve to protect the procedural integrity of the Government's decision making and the integrity of your services.

*If appropriate:  
Employee is subject to oversight*

Your interest in [Intellectual Property] entitles you to receive royalty payments, but you are not actively involved in licensing, marketing, or commercial development of products derived from your [Intellectual Property], nor do you have financial interests in any entity undertaking such licensing, marketing, or commercial development.]

*If appropriate:  
Employee is not involved in commercialization of the IP and the only financial interest is royalties*

[Discuss any limitations, as appropriate:

### III. Limitations

Your average annual income from this intellectual property is [x] [and/or] [x percent of your household income]. You are responsible for monitoring the value of royalty payments received from sources outside of the Federal Government. Should you receive royalties from a source outside the Federal Government for the intellectual property in a calendar year in excess of [x] [and/or] [x percent of your household income], you must contact your agency ethics official to determine whether there is a need to reconsider the waiver analysis [include appropriate timeframe]. This waiver will remain in effect until you are notified of the determination made by the ethics official.

*If appropriate:  
Direct employee to seek additional ethics counseling when the amount of royalties received exceeds a certain amount*

Under this waiver, you may not voluntarily increase your financial interest in [Intellectual Property] or in any entity that owns an interest in [Intellectual Property] or undertakes the licensing, marketing, or commercial development of [Intellectual Property].]

*If appropriate:  
Waiver limits the employee from voluntarily increasing or acquiring a new disqualifying financial interest*

If any questions arise as to whether your participation in this particular matter or any other particular matter is permitted under this waiver, you should consult with your supervisor and agency ethics official, as appropriate. In accordance with 5 C.F.R. § 2640.303, I have consulted with the U.S. Office of Government Ethics prior to granting this waiver and a signed, final copy of this waiver will be forwarded to that Office.

*IV. Conclusion*

A copy of this waiver will be made available upon request to the public in accordance with the procedures described in 5 C.F.R. § 2640.304.

*a. OGE consultation statement*

*b. Statement of public availability*

*c. Signatures*

\_\_\_\_\_  
Appointing Official  
or his/her delegate

\_\_\_\_\_  
Employee

<sup>i</sup> The waiver must be issued by the Government official responsible for appointing the employee to his or her position (or other Government official to whom the authority to issue such a waiver for the employee has been delegated). 5 C.F.R. § 2640.301(a)(2).

<sup>ii</sup> Use this language if the waiver includes limitations, which most waivers include.