

Office of Government Ethics

92 x 10 -- 03/12/92

Letter to an Employee dated March 12, 1992

A copy of your letter of last September to the Office of Personnel Management was just received by the Office of Government Ethics on March 3, 1992. We regret that, through an apparent administrative oversight, we did not have it for response sooner.

Your letter relates the plight which you face because of what [your agency] has apparently determined to be a conflict of interest between your Government duties and the outside employment of your spouse. Although the factual basis is not fully developed in your letter, we understand that [the agency] has determined not to grant a waiver under 18 U.S.C. § 208(b)(1).

By the terms of section 208(a) of that criminal statute, a spouse's financial interests are imputed to the Government employee, who is prohibited from participating personally and substantially in Government matters where such financial interests could be directly and predictably affected. The granting of waivers of this prohibition is within the sole discretion of the Government employee's appointing official and can only occur where that official or a delegate has reviewed the facts and determined that the financial interest is not so substantial as to be deemed likely to affect the integrity of the Government employee's service. The statute does not provide for an appeal or review of the employing agency's discretion in this matter. There is no statutory right to a waiver of the criminal prohibition in 8 U.S.C. § 208(a).

It is often the case that nonwaivable conflicts under 18 U.S.C. § 208(a) can be resolved by some other means. For example, the Government employee may be able to recuse himself from participating in those particular matters which present a conflict with the outside financial interest. Where that is not feasible because of the broad nature of an employee's Government duties, agencies can sometimes find alternative assignments within their organization which the employee can perform, thereby avoiding the conflict. Another possible alternative is to explore whether the non-Government spouse's employment responsibilities can be restructured in some manner to help avoid the conflict.

Absent any of those remedies, a Government employee would risk criminal prosecution or agency disciplinary action where he continues to participate personally and substantially in Government matters which could directly and predictably affect his spouse's financial interests.

Sincerely,

Stephen D. Potts
Director