

Office of Government Ethics

91 x 30 -- 08/19/91

Letter to the Head of an Agency dated August 19, 1991

This is in response to your letter of August 5, 1991, seeking guidance from the Office of Government Ethics (OGE) concerning the issuance of waivers to members of [an agency] who it appears might otherwise be restricted from performing duties on behalf of the [agency] due to statutory conflict of interest provisions, including 18 U.S.C. § 208. Your letter also forwarded a copy of an "Ethics Policy Statement" developed for use at the [agency]. As discussed more fully below, we believe that your letter and the enclosed policy statement incorrectly assume that the waiver provisions of 18 U.S.C. § 208 can be used to mitigate the impact of a conflict of interest provision contained in the organic statute that created the [agency].

The [agency] is an independent establishment within the executive branch consisting of [a number of] members appointed by the President from among persons nominated by [a private non-profit organization]. Each person nominated to the [agency] is required to be "eminent in a [specific] field." The [agency] was created to evaluate the technical and scientific validity of [certain] activities undertaken by [a Cabinet level official].

Section 208 of title 18, United States Code, prohibits an employee of the [agency] from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he or any person whose interests are imputed to him under this statute has a financial interest, if the particular matter will have a direct and predictable effect on that interest. Imputed financial interests include those of the employee's spouse, minor child, general partner, or of an organization in which the employee serves as officer, director, trustee, general partner, or employee. Section 208 does not prohibit an employee from holding any particular financial interest or from being employed by any outside organization. However, unless the financial interest is divested or the employee terminates his employment relation with the outside organization, the statute requires that he not participate in particular matters that will have a direct and predictable effect on his financial interest or on the financial interest of the organization by which he is employed.

As a practical matter, an employee's ability to perform the duties of his Government position may be materially impaired as a consequence of being disqualified by section 208 from participating in certain official matters. When disqualification is not a workable solution, divestiture of the conflicting financial interest is the usual remedy. However, an employee may act in matters notwithstanding the continued holding of a conflicting financial interest if he qualifies for a waiver issued in accordance with 18 U.S.C. § 208(b). For purposes of the [agency], we will focus on the individual waivers that may be issued pursuant to 18 U.S.C. § 208(b)(1) and the general waivers that are authorized by 18 U.S.C. § 208(b)(2).

Many agencies have general regulatory waivers currently in effect. These are often incorporated into the particular agency's standards of conduct regulation. When 18 U.S.C. § 208(b) was amended by the Ethics Reform Act of 1989, the authority to promulgate general regulatory waivers was transferred to the OGE. When OGE publishes an executive branch wide regulation issuing these waivers, the new waivers will replace those currently in effect at some agencies. Even after OGE promulgates the new general waivers, however, agencies will continue to have authority to issue individual waivers pursuant to 18 U.S.C. § 208(b)(1). An individual waiver can be issued to an officer or employee--

if the officer or employee first advises the Government official responsible for appointment to his or her position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the 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.

Although individual waivers are not issued by OGE, section 301(d) of Executive Order 12674 provides that agencies shall--

[w]here practicable, consult formally or informally with the Office of Government Ethics prior to granting any exemption under section 208 of title 18, United

States Code, and provide the Director of the Office of Government Ethics a copy of any exemption granted.

In addition to 18 U.S.C. § 208, employees of the [agency] are subject to a conflict of interest provision contained in the statute that created the [agency]. That provision provides that--

[n]o person shall be nominated for appointment to the [governing body of the agency] who is an employee of--

- (I) [a specific] Department;
- (II) [a certain category of contractor of that Department]; or
- (III) an entity performing [specific] activities under contract with the Department.

This statute does not, however, include waiver provisions analogous to those contained in 18 U.S.C. § 208. While a member of your staff has indicated that the rigid application of this statute's conflict of interest provision may hinder the recruitment of qualified [agency] members, we know of no authority that would permit the waiver provisions of 18 U.S.C. § 208 to be used to avoid the restrictions contained in [the specified] title. The waiver provisions of 18 U.S.C. § 208 relate exclusively to that statute, offering an exemption from its criminal liability for official participation in certain agency matters. Waivers issued pursuant to 18 U.S.C. § 208(b) do not afford any exemption from the provision of your organic statute concerning prohibited employment.

Sincerely,

Stephen D. Potts
Director