

OFFICE OF GOVERNMENT ETHICS**5 CFR Part 2640**

RIN 3209-AA09

Certain Miscellaneous Exemptions Under 18 U.S.C. 208(b)(2) (Acts Affecting a Personal Financial Interest)**AGENCY:** Office of Government Ethics (OGE).**ACTION:** Interim rule with request for comments.

SUMMARY: The Office of Government Ethics (OGE) is issuing an interim regulation describing the circumstances under which certain financial interests arising from Federal Government employment in the executive branch are exempt from the prohibition in 18 U.S.C. 208(a). Section 208(a) generally prohibits employees of the executive branch from participating in an official capacity in particular matters in which they have a financial interest. It also bars employees from acting in particular matters in which certain other persons or entities, which are specified in the statute, have a financial interest. Section 208(b)(2) of title 18 permits the Office of Government Ethics to promulgate executive branch-wide regulations describing financial interests that are too remote or inconsequential to warrant disqualification pursuant to section 208(a). This interim regulation exempts, in certain circumstances, disqualifying financial interests that an employee may have in Federal salary and benefits, or in Social Security or veterans' benefits.

DATES: This interim regulation is effective August 28, 1995. Comments by agencies and the public are invited and are due by October 27, 1995.

ADDRESSES: Office of Government Ethics, suite 500, 1201 New York Avenue NW., Washington, DC 20005-3917. Attention: Ms. Glynn.

FOR FURTHER INFORMATION CONTACT: Marilyn Glynn, Office of Government Ethics, telephone 202-523-5757, FAX 202-523-6325.

SUPPLEMENTARY INFORMATION: Section 208(a) of title 18 of the United States Code prohibits Government employees from participating in an official capacity in particular Government matters in which, to their knowledge, they or certain other persons specified in the statute have a financial interest, if the matter would have a direct and predictable effect on the financial interest. Section 208(d)(2) directs the Office of Government Ethics, after consultation with the Attorney General, to adopt uniform regulations exempting

financial interests from the applicability of section 208(a) for all or a portion of the executive branch if it determines that such interests are either too remote or too inconsequential to affect an employee's services to the Government. Further, section 201(c) of Executive Order 12674, as modified by E.O. 12731, states that OGE is to obtain the concurrence of the Department of Justice for any section 208 regulations it promulgates. The Office of Government Ethics has obtained that concurrence for this interim rule. Finally, as provided in section 402 of the Ethics in Government Act of 1978, as amended, 5 U.S.C. appendix, OGE has consulted with the Office of Personnel Management on this interim rule.

The Office of Government Ethics will soon be issuing in the **Federal Register** a proposed regulation describing a variety of holdings or relationships that OGE has determined are either too remote or too inconsequential in value to be likely to affect an employee's consideration of any particular matter. That proposed regulation will also contain a more detailed analysis of section 208, and guidance on individual waivers of disqualifying financial interests that agencies may grant under 208 (b)(1) and (b)(3). The text of this interim regulation will be included in the appropriate place in the overall proposed section 208 regulation.

This interim regulation exempts disqualifying financial interests that arise from employment in the executive branch of the Federal Government. With certain exceptions, the regulation specifically exempts an employee's interest in his Government salary and benefits, and his interest in Social Security and veterans' benefits. It also exempts, with certain exceptions, the disqualifying financial interests that arise from the Federal Government employment interests of an employee's spouse, minor child, general partner, or anyone with whom he is negotiating or has an arrangement for prospective employment. As noted, it is anticipated that the exemption for salary and benefits in this interim regulation will be added to the larger group of exemptions that will be published as a proposed regulation, as described above.

I. Background

The question of whether an executive branch employee may have a disqualifying financial interest in his Government salary and benefits has been addressed a number of times, but has never been definitively resolved. An opinion issued by the Office of Legal Counsel (OLC) of the Department of Justice in 1993 concluded that section

208 did not apply to payments made to employees under section 7 of the Technology Transfer Act, 15 U.S.C. 1501-1534, because such payments "are indistinguishable for these purposes from salary, benefits, and other payments such as performance awards." Memorandum for Stephen D. Potts, Director, Office of Government Ethics, from Walter Dellinger, Acting Assistant Attorney General, Office of Legal Counsel, Re: Ethics Issues Related to the Federal Technology Transfer Act of 1986 (September 13, 1993). The opinion stated that section 208 was intended to cover only "outside" financial interests and therefore would not bar an employee from participating in matters that would affect his Government compensation.¹ A copy of this OLC memorandum is available from OGE (see the **FOR FURTHER INFORMATION CONTACT** block above).

The notion that section 208 applies only to so-called "outside" financial interests has some support in the statute's legislative history. In 1962, section 208 replaced 18 U.S.C. 434 which barred employees from acting in an official capacity in the transaction of business with any business entity in which they were "directly or indirectly interested in the pecuniary profits or contracts." The Senate Report on the bill that became section 208 described the provision as follows:

The disqualification of the subsection embraces any participation on behalf of the Government in a matter in which the employee has an outside financial interest, even though his participation does not involve the transaction of business.

S. Rep. No. 2213, 87th Cong., 2d Sess. 12 (1962).

Practical considerations might also favor interpreting section 208 to conclude that an employee does not have a disqualifying financial interest in

¹In 1980, OLC also concluded that section 208 was inapplicable to financial interests which arise from Government employment and salary, where no outside financial interest was implicated. See Memorandum for Thomas Martin, Deputy Assistant Attorney General, Civil Division, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, Re: 18 U.S.C. § 208 and Pending Salary Adjustment Litigation (January 24, 1980). Subsequently, however, OLC questioned the correctness of the 1980 opinion in two other opinions dealing with section 208. See Memorandum for Richard K. Willard, Assistant Attorney General, Civil Division, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, Re: 18 U.S.C. § 208 and Participation of Departmental Attorneys in Debt Ceiling Litigation p. 2 at n.1 (December 6, 1985); Memorandum for the Solicitor of the Interior, from Samuel A. Alito, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Scope of the Term "Particular Matter" under 18 U.S.C. § 208 p. 9 at n.13 (January 12, 1987). Copies of all of these memoranda also are available from OGE.

his Government position and salary. Otherwise, an employee's routine performance of duties might be viewed as creating a disqualifying financial interest. For example, it may be argued that every time an employee strives to enthusiastically and conscientiously perform his duties, he increases the likelihood that he will receive a favorable performance rating and a subsequent bonus. Similarly, simply asking for a promotion or submitting an official request for travel reimbursement might be considered participating in a particular matter that would have a direct and predictable effect on the employee's financial interest.

On the other hand, it is arguable that since section 208 was intended to cover a broader range of activities than section 434,² it plainly encompasses actions affecting financial interests arising from Government employment. In *United States v. Lund*, 853 F.2d 242 (4th Cir. 1988), the court found that section 208 barred an employee from acting in matters affecting his spouse's Government employment interests.³ The court noted that the language of section 208(a), unlike that of its predecessor, is not restricted to conflicts of interest in matters involving outside entities, and nothing in the legislative history reveals a congressional intent to limit that broad language to less than its normal span. To the contrary, the legislative history indicates that Congress was fully aware of the potential breadth of the new statute * * * [t]hat the legislative history contains no specific mention of conflicts of interest in internal personnel matters cannot be taken as affirmative evidence that it did not intend the statute's sweeping language to reach them * * *.

Id. at 246.

Moreover, it is not difficult to envision examples of employee participation in matters relating to salary and benefits that would clearly appear to amount to a conflict of interest under section 208. For example, no one seriously doubts that it would be

² Unlike prior section 434, section 208 is applicable to matters that would affect the interests of an employee's spouse, minor child, general partner, and certain other persons or organizations with which the employee has a specified relationship. It also applies to a wider scope of Government activities than simply those that amount to the "the transaction of business." Instead, it applies to applications, contracts, judicial proceedings and other similar particular matters.

³ In *Lund*, the employee secretly married a subordinate and subsequently promoted her to another position, granted her pay increases, and recommended that the Government pay her tuition for a masters' degree program. The court's determination that section 208 applies to internal personnel matters may have been influenced by the fact that the marriage was concealed from agency officials.

improper for an employee to participate in Government matters that have a unique or individual impact on the employee's own salary or benefits, such as approving his own promotion or awarding himself a cash bonus for superior performance. It is generally acknowledged that it would be similarly inappropriate for an employee to approve his general partner's pay increase or performance bonus.

II. Need for Exemption

In light of the somewhat differing interpretations of section 208 that have been advanced, and in order to resolve continuing questions about the applicability of section 208 to Federal salary and benefits, the Office of Government Ethics, in consultation with and with the concurrence of the Department of Justice, has decided to treat financial interests that arise from Government salary and employment as disqualifying under section 208(a). This regulation, however, would exempt most of those financial interests from the disqualification provision of section 208(a).

Given the ambiguous nature of existing advice on and interpretations of section 208, OGE's decision to publish this exemption should not be construed as an indication that any particular activity in which an employee might have engaged prior to publication of this regulation was a violation of section 208. The exemption simply provides employees with reassurance that performance of the duties required by their positions does not amount to a violation of section 208. Additionally, the exemption and the illustrative examples describe the types of activities that are not covered by the exemption, and in which the employee may not engage in the absence of an individual waiver under section 208 (b)(1) or (b)(3).

The need for the exemption is particularly important at this time because a number of executive branch Departments and agencies are engaged in "reinvention" or "privatization" activities that will result in the elimination of Federal positions. In some cases, employee involvement in these activities necessarily will affect financial interests arising from Government salary and benefits. However, the exemption will permit an employee to engage in many of these activities, with certain limited exceptions described below.

III. Exemption for Interests Arising From Government Salary and Benefits or From Social Security or Veterans' Benefits

Section 2640.101 applies to executive branch employees whose activities affect Government salary or benefits, or veterans' or Social Security benefits. With two exceptions, the provision exempts all disqualifying financial interests that arise from Federal salary or benefits, or from Social Security or veterans' benefits. The exemption does not permit an employee to make (1) determinations that individually or specially affect his own financial interest in Government salary and benefits, or (2) determinations, requests, or recommendations that individually or specially relate to, or affect the Government employment-related financial interests of any other person specified in section 208, such as the employee's spouse, minor child, or general partner.

To the extent that the performance of everyday duties affects an employee's potential for promotion, for receiving a bonus or other similar benefit having monetary value, or even for being removed involuntarily from Federal service, the exemption at § 2640.101 applies to all employees. It also applies to employees who affirmatively ask for action on, or otherwise make requests or recommendations about, their own salary and benefits. The exemption would permit employees, for example, to ask for pay raises and promotions, for transfers to higher-paid positions, and for reimbursement of travel expenses. The exemption applies to employee participation in matters that would affect a panoply of interests that derive from Government employment, such as salary, premium pay, performance bonuses, recruitment and relocation payments, Technology Transfer Act payments, leave, compensatory time, pensions, health and life insurance, buyouts and early outs, payment of the costs of training or continuing education, disability payments, housing allowances, severance pay, unemployment compensation, authorized personal use of agency equipment, and Government day care facility expenses. The exemption does not permit employees to make determinations, such as approvals or disapprovals, that would have an individual or special effect on their financial interests. Thus, while an employee could request that his agency pay the cost of his tuition at a local university, the employee could not approve his own request.

The exemption does allow an employee to make a determination (as well as a request or recommendation) affecting his own financial interest (or that of anyone else specified in section 208), as long as that interest is not affected in an individual or special way. This aspect of the exemption has particular applicability to employees who administer employee benefit plans for their own agency, or for the executive branch as a whole. The responsibilities of these employees, of course, affect their own interests to the extent that they affect the interests of all employees. The exemption permits them to continue to perform their functions, provided the matters in which they act are not ones in which they, or any other person specified in section 208, have an individual or special interest. For example, the exemption permits employees of the Federal Retirement Thrift Investment Board to promulgate less stringent standards for borrowing from thrift accounts, even though the employees may participate in the thrift savings plan themselves and may borrow from their accounts. Similarly, the exemption permits an employee of the Federal Reserve (the "Fed") who participates in the Fed pension plan to administer the plan within the Fed.

The exemption also permits an employee whose agency is involved in "privatization" or "reinvention" activities to participate in certain of those activities even when his own position, salary, or benefits might be affected. As the provision specifies, an employee may participate in such activities provided that he does not make any determination that has a special or individual effect on his salary and benefits. Thus, for example, an employee could serve on an agency task force that makes a recommendation to the agency head to eliminate the agency component to which he is assigned. In the absence of an individual waiver under section 208(b)(1) or (b)(3), however, the employee could not be responsible for deciding which of two senior positions in the component should be eliminated—his own or that of another senior employee. If the matter would have a direct and predictable effect on the salary and benefits of a very small number of employees, including that of the employee charged with the responsibility to act, the employee should not participate without first receiving an individual waiver.

Moreover, matters that would affect an "outside" interest of the employee, such as his interest in obtaining a position with a contractor who will be

taking over a "privatized" Government function, are not governed by this exemption. For example, where an agency has decided to transfer certain agency functions to an employee-owned (or ESOP) corporation, an employee whose position will be transferred to the new corporation could not, absent an individual waiver, participate on an agency task force advising the independent trustee who is charged with creating the ESOP corporation. The new position is not a financial interest that arises from Federal salary or benefits. However, an employee who evidences her intent to retire from the Government when the agency function is transferred to the ESOP corporation may participate in task force activities since she has no financial interest in a new position in the new corporation.

The exemption does not permit an employee to make requests or recommendations, as well as determinations, in matters that would have an individual or special effect on the financial interests of anyone else specified in section 208.⁴ See § 2640.101(b). For example, this exemption does not permit an employee to recommend that his spouse receive an award for meritorious service. Nor does it permit an employee to determine that his general partner should receive compensatory time for work performed in excess of the normal tour of duty. The Office of Government Ethics believes that it would be inappropriate to exempt recommendations and requests (as well as determinations) in matters that would specifically affect the financial interests of other persons specified in section 208. The narrower exemption for matters affecting a person other than an employee specified in section 208 is warranted because the employee's relationship with that other person might not be generally known, and the employee's impartiality in such matters reasonably might be questioned. Making a request or recommendation in a matter affecting one's own position is on a different footing since the employee's potential bias is readily recognizable.

Within the limitations specified in § 2640.101 (a) and (b), the provision also permits employees whose duties

⁴ Of course, because only individual persons may become Government employees, the exemption has no relevance to matters affecting *organizations* the employee serves as officer, director, trustee, general partner, or employee, or those with which he is negotiating or has an arrangement for prospective employment. The persons specified in section 208 that are relevant for purposes of this exemption include the employee's spouse, minor child, general partner, or individual person with whom the employee is negotiating or has an arrangement for prospective employment, or for whom he serves as an employee in a position outside the Government.

concern Social Security and veterans' benefits to participate in matters affecting those benefits. Accordingly, an employee at the Social Security Administration could recommend and approve changes to certain procedures for applying for Social Security benefits even though her spouse is an applicant for benefits.⁵ However, the exemption would not permit her to approve her spouse's application for benefits. The exemption also would not permit an employee to take an action in violation of some other statutory or regulatory provision such as the prohibitions on nepotism in 5 U.S.C. 3110.

IV. Matters of Regulatory Procedure

Administrative Procedure Act

Pursuant to 5 C.F.R. 553 (b) and (d), I find that good cause exists for waiving the general requirements of notice of proposed rulemaking and 30-day delayed effective date for this interim rule. These requirements are being waived because this regulation grants certain exemptions under the applicable conflict of interest law, 18 U.S.C. 208. Moreover, it is in the public interest that this regulation take effect as soon as possible in order to clarify the permissible limits of employees' official actions when certain of their financial interests may be affected. Interested persons are invited to submit written comments to OGE on this interim regulation, to be received on or before October 27, 1995. The Office of Government Ethics will review all comments received and consider any modifications to this rule which appear warranted. This same provision will also be part of the overall proposed section 208 regulation which OGE will publish in a separate rulemaking document.

Executive Order 12866

In promulgating this proposed regulation, the Office of Government Ethics has adhered to the regulatory philosophy and the applicable principles of regulation set forth in section 1 of Executive Order 12866, Regulatory Planning and Review. This interim rule has also been reviewed by

⁵ As indicated in the Standards of Ethical Conduct for Employees of the Executive Branch at 5 C.F.R. 2635.402(b)(3), not all Government matters are sufficiently focused on the interests of a discrete and identifiable class of persons that they can be considered "particular matters" within the meaning of section 208. Example one accompanying § 2635.402(b)(3) makes clear that certain Social Security procedures are not "particular matters." This exemption applies to those Social Security matters that are focused on the interests of a discrete and identifiable class of persons, and therefore are considered "particular matters" for purposes of section 208.

the Office of Management and Budget under that Executive order.

Regulatory Flexibility Act

As Director of the Office of Government Ethics, I certify under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that this interim regulation will not have a significant economic impact on a substantial number of small entities because it primarily affects Federal employees.

Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply because this interim regulation does not contain information collection requirements that require the approval of the Office of Management and Budget.

List of Subjects in 5 CFR Part 2640

Conflict of interests, Government employees.

Approved: July 21, 1995.

Donald E. Campbell,
Deputy Director, Office of Government Ethics.

Accordingly, for the reasons set forth in the preamble, the Office of Government Ethics is amending title 5, chapter XVI, subchapter B of the Code of Federal Regulations by adding a new part 2640 to read as follows:

PART 2640—MISCELLANEOUS EXEMPTIONS UNDER 18 U.S.C. 208(b)(2) (ACTS AFFECTING A PERSONAL FINANCIAL INTEREST)

§ 2640.101 Exemptions for financial interests arising from Federal Government employment or from Social Security or veterans' benefits.

An employee may participate in any particular matter, whether of general applicability or involving specific parties, where the disqualifying financial interest arises from Federal Government salary or benefits, or from Social Security or veterans' benefits, except an employee may not:

(a) Make determinations that individually or specially affect his own Government salary and benefits, or Social Security or veterans' benefits; or

(b) Make determinations, requests, or recommendations that individually or specially relate to, or affect, the Government salary or benefits, or Social Security or veterans' benefits of any other person specified in section 208.

Note: This exemption does not permit an employee to take any action in violation of any other statutory or regulatory requirement, such as the prohibition on the employment of relatives at 5 U.S.C. 3110.

Example 1: An employee of the Office of Management and Budget may vigorously and energetically perform the duties of his position even though his outstanding performance would result in a performance bonus or other similar merit award.

Example 2: A policy analyst at the Defense Intelligence Agency may request promotion to another grade or salary level. However, the analyst may not recommend or approve the promotion of her general partner to the next grade.

Example 3: An engineer employed by the National Science Foundation may request that his agency pay the registration fees and appropriate travel expenses required for him to attend a conference sponsored by the Engineering Institute of America. However, the employee may not approve payment of his own travel expenses and registration fees.

Example 4: A GS-14 attorney at the Department of Justice may review and make comments about the legal sufficiency of a bill to raise the pay level of all Federal employees paid under the General Schedule even though her own pay level, and that of her spouse who works at the Department of Labor, would be raised if the bill were to become law.

Example 5: An employee of the Department of Veterans Affairs (VA) may assist in drafting a regulation that will provide expanded hospital benefits for veterans, even though he himself is a veteran who would be eligible for treatment in a hospital operated by the VA.

Example 6: An employee of the Office of Personnel Management may participate in discussions with various health insurance providers to formulate the package of benefits that will be available to Federal employees who participate in the Government's Federal Employees Health Benefits Program, even though the employee will obtain health insurance from one of these providers through the program.

Example 7: An employee of the Federal Supply Service Division of the General Services Administration (GSA) may

participate in GSA's evaluation of the feasibility of privatizing the entire Federal Supply Service, even though the employee's own position would be eliminated if the Service were privatized.

Example 8: Absent an individual waiver under section 208(b)(1), the employee in the preceding example could not participate in the implementation of a GSA plan to create an employee-owned private corporation which would carry out Federal Supply Service functions under contract with GSA. Because implementing the plan would result not only in the elimination of the employee's Federal position, but also in the creation of a new position in the new corporation to which the employee would be transferred, the employee would have a disqualifying financial interest in the matter arising from other than Federal salary and benefits, or Social Security or veterans' benefits.

Example 9: A career member of the Senior Executive Service (SES) at the Internal Revenue Service (IRS) may serve on a performance review board that makes recommendations about the performance awards that will be awarded to other career SES employees at the IRS. The amount of the employee's own SES performance award would be affected by the board's recommendations because all SES awards are derived from the same limited pool of funds. However, the employee's activities on the board involve only recommendations, and not determinations that individually or specially affect his own award. Additionally, 5 U.S.C. 5384(c)(2) requires that a majority of the board's members be career SES employees.

Example 10: In carrying out a reorganization of the Office of General Counsel (OGC) of the Federal Trade Commission, the Deputy General Counsel is asked to determine which of five Senior Executive Service (SES) positions in the OGC to abolish. Because her own position is one of the five SES positions being considered for elimination, the matter is one that would individually or specially affect her own salary and benefits and, therefore, the Deputy may not decide which position should be abolished.

Authority: 5 U.S.C. App. (Ethics in Government Act of 1978); 18 U.S.C. 208; E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

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