United States
Office of Government Ethics
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Washington, DC 20005-3917

December 23, 1996
DO-96-053

MEMORANDUM

TO: Designated Agency Ethics Officials, General Counsels and Inspectors General

FROM: Stephen D. Potts
Director

SUBJECT: Publication of Final Rule on 18 U.S.C. § 208

The Office of Government Ethics (OGE) published a final rule, Interpretation, Exemptions and Waiver Guidance Concerning 18 U.S.C. § 208 (Acts Affecting a Personal Financial Interest), in the Federal Register for December 18, 1996, with an effective date of January 17, 1997. A reprint of the final rule as published at 61 Fed. Reg. 66830-66851 (part III) is attached. The final rule describes the circumstances under which the prohibitions contained in 18 U.S.C. § 208(a) will be waived.

Section 208(a) of 18 U.S.C. prohibits employees of the executive branch from participating in an official capacity in particular matters in which they, or certain persons or entities with whom they have specified relationships, have a financial interest. Section 208(b) permits waivers of the prohibition in certain cases. First, section 208(b)(1) allows agencies to exempt employees on a case-by-case basis from the disqualification provisions of section 208(a). Similarly, section 208(b)(3) permits agencies to waive the disqualification requirement that would apply to special Government employees serving on Federal advisory committees. The new regulation provides waiver guidance as to both of these provisions. Moreover, under section 208(b)(2), OGE has the authority to promulgate executive branchwide regulations identifying financial interests that are too remote or inconsequential to warrant the disqualification required by section 208(a). Pursuant to the authority of section 208(b)(2), this final regulation identifies and describes those financial interests that are exempt from the prohibition of section 208(a). Finally, pursuant to the statute and section 201(c) of Executive Order 12674 (as modified by E.O. 12731), in this final rule, OGE is providing interpretative guidance on 18 U.S.C. § 208. OGE's authority under section 208(b)(2) to issue the executive branchwide regulatory exemptions contained in the final rule was established by the Ethics Reform Act of 1989 (Pub. L. No. 101-194), as amended (the Act). The Act amended 18 U.S.C. § 208(b)(2) to eliminate the authority of individual agencies to adopt agency- specific regulations exempting financial interests from the applicability of section 208(a). Pending the issuance of OGE's branchwide exemptions, "waivers" issued by agencies prior to November 30, 1989, have continued to apply. See 5 C.F.R. § 2635.402(d)(2) and new § 2640.206. Upon the effective date of the final regulation, all of the agencywide

exemptions issued pursuant to 18 U.S.C. § 208(b)(2) as in effect prior to November 30, 1989, will be superseded.

On September 11, 1995, OGE published for comment a proposed rule regarding exemptions under 18 U.S.C. § 208(b)(2), waivers under 18 U.S.C. § 208(b)(1) and (b)(3), and interpretation of section 208 generally. See 60 Fed. Reg. 47208-47233 (September 11, 1995). The Office also published an interim rule on August 28, 1995, which established a single exemption under 18 U.S.C. § 208(b)(2) for financial interests that arise from Federal Government salary and benefits or from Social Security or veterans' benefits. See 60 Fed. Reg. 44706-44709 (August 28, 1995). The exemption in the interim rule was also republished for consideration as part of the proposed rule on September 11, 1995. The proposed rule and the interim rule each provided a 60-day comment period and invited comments by agencies and the public. Timely comments on both the interim and proposed rules were received from 25 sources. After carefully considering the comments and making appropriate modifications, this consolidated final rule was published after consultation with the Office of Personnel Management and after OGE obtained the concurrence of the Department of Justice.

Subpart A of the final rule is comprised of general provisions including definitions and an explanation of the scope and application of the prohibition of 18 U.S.C. § 208(a). The interpretation of 18 U.S.C. § 208(a) contained in the final rule reiterates and amplifies that found in subpart D of the Standards of Ethical Conduct for Employees of the Executive Branch codified at 5 C.F.R. part 2635, which itself continues in effect.

Subpart B of the final rule contains three categories of exemptions pursuant to section 208(b)(2). First, the regulation contains exemptions relating to interests arising from the ownership of mutual funds, unit investment trusts, and interests in employee benefit plans. Second, the regulation contains exemptions arising from the ownership of interests in securities. Finally, it contains several miscellaneous provisions establishing exemptions that apply only in specific situations or only to employees of certain agencies.

Subpart C of the final rule provides guidance on the issuance by agencies of individual waivers pursuant to 18 U.S.C. §§ 208(b)(1) and (b)(3), on consultations with OGE regarding such waivers and on the public availability of such waivers.

OGE will soon be making available an easy to read pamphlet describing the exemptions and Section 208 generally. The pamphlet will be designed so that agencies can reproduce it to facilitate advice and training of executive branch employees. This Office will advise you when the pamphlets are available for distribution.

OFFICE OF GOVERNMENT ETHICS

5 CFR Part 2640

RIN 3209–AA09

Interpretation, Exemptions and Waiver Guidance Concerning 18 U.S.C. 208 (Acts Affecting a Personal Financial Interest)

AGENCY: Office of Government Ethics (OGE).

ACTION: Final rule.

SUMMARY: The Office of Government Ethics is issuing a final rule describing circumstances under which the prohibitions contained in 18 U.S.C. 208(a) would be waived. Section 208(a) prohibits employees of the executive branch from participating in an official capacity in particular matters in which they, or certain persons or entities with whom they have specified relationships, have a financial interest. Section 208(b) of title 18 permits waivers of these prohibitions in certain cases. First, section 208(b)(1) permits agencies to exempt employees on a case-by-case basis from the disqualification provisions of section 208(a). Similarly, section 208(b)(3) permits agencies to waive, in certain cases, the disqualification requirement that would apply to special Government employees serving on a Federal advisory committee. Finally, under section 208(b)(2), the Office of Government Ethics has the authority to promulgate executive branchwide regulations describing financial interests that are too remote or inconsequential to warrant disqualification pursuant to section 208(a). This final regulation describes those financial interests. It also provides guidance to agencies on the factors to consider when issuing individual waivers under section 208 (b)(1) or (b)(3).

EFFECTIVE DATE: January 17, 1997.

FOR FURTHER INFORMATION CONTACT: Marilyn L. Glynn, Office of Government Ethics, telephone: 202–208–8000, TDD: 202–208–8025; FAX: 202–208–8037.

SUPPLEMENTARY INFORMATION:

I. Rulemaking History

On September 11, 1995, the Office of Government Ethics (OGE) published for comment a proposed rule to establish exemptions under 18 U.S.C. 208(b)(2) from the prohibition in the conflict of interest statute at section 208(a). See 60 FR 47208–47233 (part II of the September 11, 1995 daily FR issue). In part, the proposed rule also provided guidance to agencies on issuing individual waivers of the conflict of interest prohibition under 18 U.S.C. 208(b)(1) and (b)(3), and on interpreting section 208 generally.

The proposed rule was issued pursuant to 18 U.S.C. 208(d)(2) which directs OGE, 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, and to provide guidance on the types of interests that may be waived on an individual basis. Prior to 1989, the authority to promulgate regulations implementing the previous version of section 208(b)(2) resided in the individual agencies as to their own respective employees. However, the Ethics Reform Act of 1989 (Pub. L. No. 101–194), as amended, amended 18 U.S.C. 208 to eliminate the authority of individual agencies to adopt agencywide regulatory exemptions and granted branchwide authority to OGE.

The Office of Government Ethics also published an interim rule on August 28, 1995 which established a single exemption under 18 U.S.C. 208(b)(2) for financial interests that arise from Federal Government salary and benefits or from Social Security or veterans' benefits. See 60 FR 44706–44709 (part IX of the August 28, 1995 daily FR issue). The interim rule, which became effective on the date of publication, was codified at that time at 5 CFR 2640.101. However, the exemption in the interim rule was also republished for consideration as part of the proposed rule at 5 CFR 2640.203(d) published on September 11, 1995. This single exemption is recodified in this final rule at 5 CFR 2640.203(d). Comments received on the interim rule were consolidated with, and considered along with comments received on the proposed rule.

The proposed rule and the interim rule each provided a 60-day comment period and invited comments by agencies and the public. Timely comments were received from 25 sources. After carefully considering all comments and making appropriate modifications, the Office of Government Ethics is publishing this final rule after consultation with the Office of Personnel Management and, pursuant to section 201(c) of Executive Order 12674, as modified by E.O. 12731, after obtaining the concurrence of the Department of Justice.

II. Summary of Comments

All of the comments received were from executive branch Departments and agencies, including two from agency Inspectors General. Many commented on several different sections of the proposed rule. The Office of Government Ethics has considered each comment submitted by each commenter and those determined to be significant are discussed below in the context of the particular subparts or sections to which they pertain. We have not specifically discussed comments that were either generally laudatory or generally critical, either of style or of substantive content, or that offered editorial suggestions or suggestions regarding format that would not affect meaning. In addition, we have not specifically discussed comments that were plainly unreasonable or that exhibited a clear misunderstanding of the purpose or language of the proposed regulation or of section 208. The following comments fall within these latter categories: assertions that certain types of interests (such as Government securities) do not raise section 208 implications for any Government employees; statements that certain exemptions insult Federal employees by suggesting that performance of official duties could violate a criminal law; and statements that section 208 applies only to particular matters involving specific parties. We have also not addressed comments that have been rendered inapplicable by changes to the regulation which have been made for other reasons, or that merely recommended revisions to examples describing agency programs. Finally, we have not addressed comments that call for a discussion of section 208 generally, but that are not related to any particular provision of the regulation.

A number of commenters were generally satisfied with the approach taken in the proposed rule in describing the exemptions. Most of these commenters indicated that the rule as proposed would resolve some long-standing issues and that it would address most of the situations in which agencies have been routinely issuing waivers under section 208(b)(1) or (b)(3). A fewer number of commenters were generally critical of the rule, citing its complexity and its attempt to devise exemptions that apply in situations that do not concern a majority of executive branch employees. To address these concerns, some of the exemptions were rewritten to simplify language. For example, in certain provisions, the term ''direct or beneficial ownership'' was deleted and replaced simply with the term ''ownership.'' In other exemptions, the term ''any particular matter, whether of general applicability or involving specific parties,'' was replaced with the term ''any particular matter.'' Changes

of this type have been made to make the rule easier to understand, and are not intended to change a provision's substantive meaning from that proposed.

In addition, a few proposed exemptions were eliminated to reduce the rule's complexity. The deleted exemptions would have been generally difficult to interpret and apply and did not appear to be relevant to a majority of employees. Each of these exemptions is discussed under the relevant subpart below.

Certain other proposed exemptions were retained in this final rule even though they are not relevant to a large number of employees. Because individual agencies no longer have authority to issue their own exemptions, this exemption rule, where possible, must address conflicts issues that affect employees of only a few agencies.

Finally, OGE, in adopting this final rule, has corrected a few typographical errors and made a few other minor clarifying revisions to the rule as proposed.

General Comments

Some agencies made suggestions, or raised issues, about matters that did not concern any specific subpart or provision of the regulation. One agency recommended that the rule address when, or under what circumstances, an employee may engage in transactions (such as buying or selling stock) involving a financial interest upon which a particular agency matter will have a direct and predictable effect. The Office of Government Ethics has not made any change in the regulation to address this comment. Each exemption applies whether or not an employee is engaged in a transaction that would involve a financial interest affected by an agency matter in which the employee is participating.

Another agency suggested that the Preamble accompanying the proposed rule be preserved as part of the final regulation and incorporated into the text of the regulation as published in the Code of Federal Regulations. The Office of Government Ethics has not adopted this suggestion since it would be inappropriate to incorporate narrative explanations of a rule into the text of the rule itself. However, agency ethics officials and others are free to consult the Preamble of the proposed rule when interpreting section 208.

One agency asked OGE to explain how the exemptions are intended to ''mesh'' with one another. The regulation permits an employee to apply or utilize all the exemptions that might be applicable in a particular situation. Thus, for example, an employee might be called upon to act in a particular matter affecting a certain company. He could act in the matter even if: (1) He owns $4,000 worth of stock in the company; (2) he owns two diversified mutual funds that are invested in the company; and (3) his general partner owns $100,000 worth of stock in the company.

The Office of Government Ethics did not adopt one agency's suggestion to add a provision clarifying that the impartiality provisions in subpart E of the Standards of Ethical Conduct for Employees of the Executive Branch may be applied even when a regulatory exemption is applicable under this regulation. As the note in 5 CFR 2635.501(b) indicates, the granting of a statutory waiver constitutes a determination that ''the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of agency programs and operations.''

Finally, one agency requested that the final rule become effective no sooner than three months after the date of publication so the agency has adequate time to inform employees of the rule's existence and to conduct training for employees. The Office of Government Ethics does not agree that the rule needs a three-month effective date. Agency programs and operations will not be harmed if employees are unaware of the rule's existence on the date it becomes effective. Employees who have not yet been informed of the exemptions that are applicable to them will simply continue to disqualify themselves from matters affecting their financial interests until they are advised of the rule's provisions. And, in any case, agencies will no doubt apprise their employees promptly of the final rule once it becomes effective.

Subpart A—General Provisions

Section 2640.102 Definitions

One agency objected to proposed definitions that cross-reference statutes unrelated to ethics considerations. The agency recommended keeping each definition self-contained so that employees do not have to consult other sources to determine if an exemption applies. The Office of Government Ethics has not adopted this recommendation. Reiterating the text of the cross-referenced statutes would complicate and lengthen the regulation considerably. On the other hand, paraphrasing the language of the statutes might create ambiguity about the meaning of certain definitions. Because this regulation establishes exemptions from a criminal statute, the exemptions need to be described with specificity.

An agency stated that the term ''institution of higher education'' did not need to be defined at § 2640.102(g) as renumbered because it has a commonly-understood meaning. The Office of Government Ethics disagrees. The exemptions relating to such institutions (§ 2640.203 (b) and (c)) are intended to apply in the case of colleges and universities, and other similar post-secondary institutions. Not all post-secondary institutions are encompassed by the definition referenced at § 2640.102(g). For example, profit-making post-secondary institutions are not included in the definition of ''institution of higher education'' at 20 U.S.C. 1141(a).

No changes have been made in this final regulation to address a concern expressed by one agency that the definition of ''publicly traded security'' at § 2640.102(p) as proposed inadvertently excludes securities issued by Government entities such as the Government National Mortgage Association. Most executive branch employees would not have a disqualifying financial interest in Government securities. In the case of employees who do have a disqualifying financial interest, however, the Office of Government Ethics could not determine that a regulatory exemption applicable to every such employee would be appropriate.

Technical corrections have been made to the proposed definitions of ''long-term Federal Government security'' and ''short-term Federal Government security'' at § 2640.102(i), as renumbered and § 2640.102(s). In addition, changes have been made in the proposed definition of the term ''diversification'' to reflect changes made in the exemptions at § 2640.201, discussed below. Finally, the term ''unit investment trust'' at renumbered § 2640.102(u) also has been revised to accommodate changes made in the definition of the term ''diversification.'' The revision, however, does not change the substantive meaning of the term ''unit investment trust.''

Section 2640.103 Prohibition

Two agencies questioned why the exemptions were not proposed to be added to 5 CFR 2635.402 of the Standards of Ethical Conduct for Employees of the Executive Branch, and why language from that provision is repeated in the exemption rule. The Office of Government Ethics considered consolidating the exemptions and

interpretations of section 208 in either part 2635 or part 2640. However, changes could not be made to part 2635 without significantly altering the integrity of that part. On the other hand, the language of § 2635.402 could not be repeated verbatim in part 2640 since much of it deals with the implementation of other parts of the Standards of Ethical Conduct. Accordingly, OGE decided to repeat in part 2640 as proposed and, as issued as a final rule in this rulemaking document, those parts of § 2635.402 that are relevant to the overall implementation of section 208. Where language between the two provisions varies, no differences in interpretation are intended. However, OGE intends to review the text of § 2635.402 to determine whether any language is substantively inconsistent with part 2640 and make any appropriate modifications.

One agency criticized OGE for describing in the proposed rule certain particular matters as ''particular matters of general applicability'' and stated that use of the term would needlessly confuse employees. On the other hand, the agency agreed that the term ''particular matters involving specific parties'' is an established and useful concept. Another agency stated that different exemptions for different types of matters (i.e. those involving parties and those without parties) are unnecessary. The Office of Government Ethics believes that, in certain circumstances, different exemptions are warranted for matters that do not involve specific parties. Agencies currently take these distinctions into account when issuing individual waivers under section 208(b)(1), and it is reasonable to establish somewhat broader regulatory exemptions for nonparty particular matters. To address concerns about the meaning of the term particular matter of general applicability, OGE has added a definition, at § 2640.102(m) of this final rule, describing such matters as those which are focused on the interests of a discrete and identifiable class of persons, but do not involve specific parties.

One agency noted that it has identified certain classes of matters that are not particular matters because they are not sufficiently focused on the interests of a discrete and identifiable class of persons, even though the matters may have some collateral effect on identified persons. The agency asked that OGE identify other matters that are not focused enough to be considered particular matters. In the absence of specific facts, OGE is unable to identify such matters. For example, although the agency asserted that basic research is not a particular matter, OGE believes that a grant to a university to conduct such research is a particular matter. Without sufficient specificity of this type, it would be misleading to state conclusively that certain Government activities or operations are not particular matters.

Several agencies commented on the examples in proposed § 2640.103 that illustrate various terms in section 208. One agency stated that Example 8 following § 2640.103(a)(1) incorrectly suggests that legislation can never constitute a particular matter; another suggested that a certain provision dealing with charges for prescription drugs that is in a larger piece of health care legislation is not a particular matter because it affects everyone in the United States. The Office of Government Ethics does not disagree that some legislation is narrowly focused on the interests of a discrete and identifiable class of persons, and would therefore be a particular matter. For example, where a particular provision in a larger piece of legislation focuses specifically on the regulation of prescription drug prices, the provision is focused on the interests of pharmaceutical companies, physicians, and pharmacies and would thus constitute a particular matter.

One agency asked that OGE revise Example 2, and eliminate Example 3, following § 2640.103(a)(3) as proposed. Because the requested revision would change the concept Example 2 was intended to illustrate, the Office of Government Ethics did not adopt this suggestion. For similar reasons, OGE did not eliminate Example 3. Although the commenting agency stated that the situation depicted in the example is not wholly realistic, OGE believes the example provides a reasonable illustration of the meaning of the term ''direct and predictable effect.'' At the suggestion of another agency, OGE revised Example 4 following § 2640.103(a)(3) to more clearly illustrate the concept that section 208 applies when the Government matter has a direct and predictable effect on the employee's financial interest.

The Office of Government Ethics did not adopt one agency's request that the regulation define the term ''general partner.'' The term ''general partner'' does not have a special or unique meaning for purposes of section 208. The term has a generally accepted meaning within the area of partnership law.

Finally, one agency suggested that OGE revise proposed § 2640.103(e) to include a statement noting that resignation from an outside position can end a disqualifying financial interest. The Office of Government Ethics has not revised the provision in this final rule because the current language of § 2640.103(e) encompasses divestiture of ''other interest[s]'' that cause disqualification from participation in a particular matter.

Subpart B—Exemptions Pursuant to 18 U.S.C. 208(b)(2)

Section 2640.201 Exemptions for Interests in Mutual Funds, Unit Investment Trusts, and Employee Benefit Plans

Common Trust Funds

As proposed, the regulation at § 2640.201(a) contained an exemption for diversified common trust funds. The term ''diversified'' was defined in reference to a regulation of the Office of the Comptroller of the Currency, 12 CFR 9.18, which required common trust funds maintained by State or national banks to be diversified. On December 21, 1995, the Office of the Comptroller of the Currency (OCC) published a proposed rule that would eliminate the diversification requirement for common trust funds. *See* 60 FR 66163, 66170. The Preamble to the proposed rule states that the ''* * * restrictions have at times interfered with optimal management of common trust funds * * *.'' *Id.* at 66170. If the revised regulation OCC becomes effective, there will no longer be any assurance that common trust funds will contain any particular number or types of assets. In the absence of any other standardized way of determining whether such funds will be even minimally diversified, the Office of Government Ethics cannot conclude, as a regulatory matter, that an employee's interest arising from a fund will be remote and inconsequential. Accordingly, the exemption for common trust funds has been deleted from this final rule.

Diversified Mutual Funds

Four agencies stated that the exemption for diversified mutual funds proposed at § 2640.201(a) was too complicated for the average employee to apply or for ethics officials to implement. As proposed, the exemption would have applied to mutual funds that are diversified management companies as defined in the Investment Company Act of 1940, 15 U.S.C. 80a–5(b)(1). Of the four commenters, one recommended simply leaving the term ''diversified'' undefined; the second advocated dropping any diversification requirement; the third recommended linking the definition of diversification

to sector mutual funds; and the fourth recommended that the exemption apply simply to publicly traded mutual funds.

Six agencies expressed particular concern that the proposed definition of diversified mutual fund (as well as the definition for diversified common trust fund, unit investment trust, and employee benefit plan) would not be consistent with the definition of Excepted Investment Fund (EIF), as that term is used for purposes of financial reporting. These agencies expressed the view that employees would be confused and frustrated by dealing with different definitions of diversification. Three of the agencies suggested that we modify EIF reporting requirements to make them consistent with the diversification standards in the exemption rule. Another agency suggested that the EIF standards be adopted in the exemption rule, while a third agency expressed no preference for either approach as long as the standards would be made consistent.

Based on these concerns, the Office of Government Ethics has decided to revise the definition of ''diversified'' as that term is used in § 2640.201(a) in connection with mutual funds. Accordingly, the term ''diversified'' in § 2640.102(b) of this final rule now states that ''diversified means that the fund * * * does not have a stated policy of concentrating its investments in any industry, business, single country other than the United States, or bonds of a single State within the United States.'' In other words, the exemption for diversified mutual funds applies to all mutual funds except sector funds. An agency employee or ethics official can determine if a fund is a sector fund by reading the prospectus, or by calling a broker or fund manager. Often, it is possible to learn whether a fund is a sector fund simply from the fund's name (i.e. Vanguard Specialized Portfolios: Healthcare). In any event, a fund's concentration policy, if any, is required under Securities and Exchange Commission (SEC) regulations to be described in the prospectus.

The Office of Government Ethics has not, however, revised the definition of the term ''mutual fund'' as proposed at § 2640.102(l) and which is now in renumbered § 2640.102(k)). In order for the exemption to apply, the mutual fund must still be a true fund, i.e. a management company registered under the Investment Company Act of 1940, as amended, 15 U.S.C. 80a–1 *et seq.* Informal collections of stocks, bonds and similar holdings, such as family trusts, are not mutual funds because they are not registered management companies.

The Office of Government Ethics has not adopted recommendations to make the definition of the term diversified mutual fund the same as the definition of Excepted Investment Fund (EIF) as that term is used in 5 CFR 2634.310(c) for purposes of financial reporting. As explained in the Preamble to the proposed rule, using the numerical standards of the EIF definition (no more than 5% of a fund's portfolio invested in any one issuer nor more than 20% in any particular economic or geographic sector) would be impractical and burdensome because mutual fund assets continuously change and because employee participation in particular matters typically occurs on continuing basis over time. Use of a numerical standard is not a problem for purposes of financial reporting because whether an asset is an EIF for those purposes is a determination that must be made only once a year. And, relying on the alternative definition of the term Excepted Investment Fund (i.e. that the fund is publicly traded) does not advance conflicts of interest concerns because publicly traded assets may still raise questions about conflicts of interest. The Office of Government Ethics has not yet determined whether it will seek to revise the definition of Excepted Investment Fund to correspond with the term diversified mutual fund as it is used in this regulation. Any such revision might require Congressional action, since the standards for determining whether a widely held investment fund is an Excepted Investment Fund are statutory. *See* 5 U.S.C. app., section 102(f)(8) of the Ethics in Government Act.

Two agencies objected to the fact that the exemption for diversified mutual funds was proposed to apply to employees of all agencies. One agency recommended that the rule permit individual agencies to decide whether to allow employees of their agencies to apply the mutual fund exemption. The other agency suggested that it be allowed to limit applicability of the exemption where the fund is an international regional fund (e.g. the Pacific Basin Fund) and the employee has duties focused on the region in question. The Office of Government Ethics has not revised § 2640.201(b) in this final rule in response to these comments. OGE believes it is inappropriate to permit certain agencies to limit the applicability of these exemptions. The exemptions are devised with the assumption that the financial interests described are ''remote or inconsequential'' in the case of all executive branch employees. Of course, particular agencies might want to consider whether they wish to prohibit the holding of certain sector funds by employees in their agency supplemental standards of ethical conduct regulations. See 5 CFR 2635.105.

Sector Mutual Funds

Six agencies commented on various aspects of § 2640.201(b) of the proposed rule dealing with sector mutual funds. Of these, one agency specifically endorsed the definition of ''sector mutual fund'' as that term is used in proposed § 2640.201(b). Another agency, however, characterized the proposed definition as too imprecise, and appeared to recommend that OGE devise a numerical standard for determining whether a fund concentrates in a particular sector. The Office of Government Ethics did not adopt this suggestion. Because fund managers often buy and sell holdings on a daily basis, it would be practically impossible for employees to determine the composition of a particular fund with any certainty on a particular date. Moreover, determining whether a fund meets the present definition of sector mutual fund should be less burdensome for employees because it does not require them to undertake any numerical calculations. Employees simply have to determine whether the fund has a policy of concentration. As discussed above, SEC regulations require a mutual fund manager to disclose such a policy, if any, in the fund's prospectus.

Two other agencies stated that sector mutual funds should be totally exempt from the prohibition in section 208. These agencies argued that the proposed exemption for sector funds is too difficult to administer and would effectively bar employees from investing in sector funds with holdings related to the activities of their agencies. Both agencies theorized that other agencies that disagreed with their proposed approach could simply bar employees, in their agency supplemental standards regulations, from holding sector funds. The Office of Government Ethics has not adopted these recommendations, since OGE cannot reasonably determine that the interests of every executive branch employee in the holdings of a sector mutual fund are remote and inconsequential for every particular matter in which he or she might participate. For example, an employee of an executive branch agency who invests in an energy-related sector fund might direct his staff to draft a regulation rescinding certain requirements relating to the disposal of hazardous waste materials. The effect of

the new regulation would be to significantly reduce outlays that utility companies have to make to comply with regulatory requirements. As a result, the companies' profits would increase, and the corresponding value of funds that invest in the companies would also increase. Under these circumstances, OGE could not say that the employee's interest would be remote or inconsequential. Of course, the section 208 issue would not arise if the holding was prohibited by an agency supplemental regulation. However, OGE cannot compel agencies to adopt, in their supplemental agency standards regulations, prohibitions on holding sector mutual funds. Moreover, many agencies do not choose to issue supplemental standards.

Employee Benefit Plans

A few agencies submitted comments on the proposed exemption for employee benefits plans at § 2640.201(c). The Office of Government Ethics did not adopt one agency's suggestion that the requirement for an independent trustee in § 2640.201(c)(1)(iii)(A) as proposed be eliminated. The Office of Government Ethics believes that a plan's trustee should be independent of the plan's sponsor, or at least be a registered investment advisor, to insure that investment selections are made without regard to the plan sponsor's relationship with the employee.

Two agencies objected to the inclusion of the Thrift Savings Plan for Federal employees in the list of employee benefit plans covered by the exemption at proposed § 2640.201(c). One of the agencies stated that the class of persons affected by a matter which involves the Thrift Plan is so large that any such matter could not be considered a particular matter. The Office of Government Ethics does not agree with this view. Employees who have invested in the Thrift Savings Plan are a discrete and identifiable class of persons for purposes of section 208. The agency alternatively argued, as did one other agency, that the Thrift Plan would be covered by the exemption for interests arising from Government salary and benefits at § 2640.203(d) as proposed. While OGE does not disagree that the Thrift Plan would be covered by the exemption at § 2640.203(d), to avoid any misunderstanding, OGE has not revised the regulation in this regard in adopting it as final. In particular, since the exemption at § 2640.201(c)(1)(i) applies specifically to the underlying holdings of the Thrift Plan, OGE would prefer to retain the exemption to resolve any questions employees may have on the issue.

Another agency requested that OGE add an exemption for a separate investment plan the agency maintains for its employees. A number of agencies have such investment plans. The Office of Government Ethics believes that it would be impractical to list all such plans, and considers them covered by the exemption at § 2640.203(d). In response to a question from the same agency, OGE confirms that employee benefit plans that meet the definition at § 2640.102(c) are covered by the exemption even if they are not covered by the Employee Retirement Income Security Act of 1974 (ERISA). Also, OGE confirms that participation in selecting trustees and investment managers does not constitute selection of plan investments for purposes of § 2640.201(c)(1)(iii)(A). Finally, the same agency asked OGE to establish a new exemption for the sponsors of defined benefit plans administered by an independent trustee and guaranteed by the Pension Benefit Guaranty Corporation (PBGC). The Office of Government Ethics did not add a new exemption in response to this request. First, where a plan sponsor has defaulted on pension payments, the PBGC may not pay employees the full amount due under the pension, and the payments employees do receive may be delayed, causing financial harm to the beneficiaries. Under the circumstances, OGE cannot conclude definitively that an employee's interest in payment of defined benefit is remote and inconsequential even when the pension is guaranteed by the PBGC.

Section 2640.202 Exemptions for Interests in Securities

De Minimis Exemptions for Interests of Employee, Spouse, and Minor Children

A total of thirteen agencies made a number of general comments about the de minimis exemptions at § 2640.202 (a)–(c), as proposed. One agency stated that the three-tiered system of exemptions was reasonable; two other agencies stated that three different de minimis exemptions would create confusion and recommended that OGE eliminate at least § 2640.202(b). Two agencies suggested that the de minimis amounts be raised. Of these, one agency emphasized that the de minimis amounts should be higher for special Government employees. Five agencies stated that the de minimis amounts should be lower. Of these, one recommended that the exemption for party matters at § 2640.202(a) be lowered to $1,000; a second agency suggested that OGE allow individual agencies to lower the de minimis amounts for employees who serve on procurement boards; a third agency made a suggestion for similar authority for regulatory agencies. A fourth agency suggested that the de minimis amounts be set on a sliding scale according to an employee's net worth and that the exemption for matters of general applicability in § 2640.202(c), as proposed, should be conditioned on the employee's interest not being affected in a disproportionate manner.

Four agencies objected to the fact that de minimis amounts proposed did not match the categories of value listed on the public financial disclosure statement (SF 278). Two of these agencies alternatively recommended that OGE revise the financial disclosure statement to correspond with the de minimis amounts. A fifth agency was satisfied with the de minimis amounts, but recommended that the SF 278 form be revised to add a box that employees could check indicating whether a particular holding was in excess of $5,000, $25,000, or $50,000. In general, the agencies that commented on the lack of uniformity between the SF 278 and the de minimis amounts proposed expressed concern about having to contact employees about the value of their holdings before certifying the disclosure form. In addition, one Office of Inspector General stated that the de minimis exemptions would interfere with the ability to conduct investigations because investigators would have to contact an employee early in the investigatory process to determine the value of his holdings before deciding to continue an investigation.

The Office of Government Ethics has carefully considered these comments, and has decided to make one change to the three basic de minimis exemptions as proposed at § 2640.202 (a)–(c). Section 2640.202(b), as proposed, would have established an exemption for employees participating in a particular matter involving specific parties where the financial interest arises from the ownership of securities issued by an entity that is not a party to the matter. After evaluating the comments concerning the overall complexity of the regulation, as well as comments on proposed § 2640.202(b) specifically, the Office of Government Ethics has deleted the separate exemption proposed for disqualifying financial interests arising from ownership of securities issued by nonparties. Accordingly, this final regulation contains two basic de minimis exemptions: A $5,000 de minimis exemption (at § 2640.202(a)) for

interests arising from the ownership of securities issued by an entity that is affected by a particular party matter; and a $25,000/$50,000 de minimis exemption (at § 2640.202(b)) for interests arising from the ownership of securities issued by an entity affected by a particular matter of general applicability. The latter exemption also contains a provision exempting interests arising from the ownership of no more than $50,000 of long-term Federal Government securities, discussed below.

The elimination of proposed § 2640.202(b) will address concerns that the rule's complexity prevents employees from determining when a particular exemption applies. It also avoids the problem of forcing agencies to determine when a specific entity becomes a party to a particular matter. Interests in non-parties will be addressed in the $5,000 exemption at § 2640.202(a), which has been revised to extend coverage to interests arising from ownership of securities issued by both parties and by non-parties. As revised, the exemption applies to security interests in entities that are ''affected by'' the particular party matter. Of course, individual waivers under section 208 (b)(1) or (b)(3) can be issued to address situations where interests in excess of $5,000 are appropriate subjects for a waiver.

The Office of Government Ethics has not adopted other agency recommendations to either raise or lower the de minimis amounts from the levels proposed. As the variety of the comments on this issue indicates, the appropriate level of a de minimis exemption is necessarily a subjective determination about which reasonable people can disagree. The amounts chosen are the maximum that OGE believes can reasonably be considered ''remote or inconsequential'' for any executive branch employee acting in a particular matter. As noted in the Preamble to the proposed rule, OGE will periodically review the specific dollar thresholds as well as other aspects of this regulation.

Moreover, although the comments indicate there is no consensus on the amounts that would be appropriate, or to whom the exemptions should apply, they demonstrate the need for uniform exemptions for all executive branch employees. Accordingly, in this final rule OGE has not revised the regulation as proposed to establish different exemption amounts based on the responsibilities of employees or on a particular agency's mission. In the absence of uniformity, reliance on an exemption by an employee might suggest that the employee is acting less impartially than another employee for whom the exemption is not available. In addition, establishing different exemption amounts for different groups of employees would only add to the rule's complexity.

The Office of Government Ethics did not agree with the suggestion that the exemption amounts should be higher for special Government employees (SGE). Like regular employees, special Government employees have a responsibility to act in the public's interest and to ensure that their participation in official Government matters is not influenced by their personal financial interests. Interests arising from the ownership of securities are likely to present as much of a conflict for SGEs as for regular employees. Moreover, individual waivers may be issued for SGEs serving on advisory committees under section 208(b)(3) or for any SGE under section 208(b)(1).

While OGE agrees it is unfortunate that the exemption amounts and the categories of value on the financial disclosure statement (SF 278) are not consistent, OGE does not have the authority to change the categories on the form, which are required by statute, to match the values of the exemption. Although the basic exemption amount at § 2640.202(a) could have been set to conform to a SF 278 category of value, the exemption would have to have been set at either $1,000 or $15,000. In OGE's view, the former amount is too low to be of much use to employees utilizing the exemptions, while the latter amount is too high to be considered ''remote or inconsequential'' in every case. Additionally, since the holdings of an employee, his spouse and child must be aggregated to determine whether the exemptions apply, it would be virtually impossible to have reconciled the de minimis amounts to the SF 278 categories. The same problem would arise in connection with the exemption at § 2640.202(b), as renumbered, because the employee's holdings in all affected entities must be aggregated to determine if the exemption applies. After the exemption rule has been in effect for long enough to permit agencies and employees to gain experience in applying the rule, OGE intends to evaluate any problems that might interfere with the efficient application of the rule. If warranted, at that time OGE will consider whether it should seek legislation to reconcile the financial reporting system and the exemptions.

Two agencies recommended that the exemptions proposed in § 2640.202 (a) and (b), as renumbered, be expanded to apply to not only the interests of the employee, his spouse and minor children, but to those of all persons listed in section 208 (such as the employee's general partner and person with whom he has an arrangement for future employment). The Office of Government Ethics has not adopted this recommendation. Other provisions in the rule provide broader exemptions for the interests of some of these persons (for example, § 2640.202 (c), (d) and (e)). It would complicate the rule to duplicate coverage for these persons in § 2640.202 (a) and (b), as renumbered, since employees would have to decide which, or how many, exemptions apply to the interests of those persons.

One agency complained that the rule as proposed did not provide clear guidance about what an employee should do when the value of his holdings rises above the de minimis amounts during the course of his participation in a particular matter. The agency suggested that an employee should be required to value his holdings once a year, and then have 45 days to take steps to resolve any disqualifying financial interest before having to disqualify himself from participation in particular matters. The Office of Government Ethics has not revised the rule to address this comment. Example 3 following § 2640.202(a) describes an employee's obligation once he knows the value of his holdings has risen above the de minimis levels.

Under §§ 2640.102(r) and 2640.202 of the rule, a mutual fund, including a sector mutual fund, is considered a publicly traded security for purposes of the various de minimis exemptions. The Preamble of the proposed rule indicated that for purposes of determining whether a de minimis exemption applies in the case of a mutual fund, the value of the employee's interest would be the value of his interest in the fund as a whole, not the pro rata value of any underlying holding of the fund. The Office of Government Ethics proposed this valuation method primarily because the holdings of most mutual funds change frequently and it would be infeasible for an employee to calculate the value of an affected holding at the point he might act in a particular matter. And moreover, in many cases an employee's interest in the sector as a whole is really a more accurate measure of his interest in the particular matter. However, three agencies objected to this proposed valuation method and stated that the value of the underlying holding should determine whether the de minimis amount is exceeded. The agencies pointed out that an employee,

consistent with the de minimis exemption at § 2640.202(a), could participate in a party matter affecting a company in which he owns $5,000 worth of stock, but would be barred from participating in the same matter if he owned $6,000 in a sector mutual fund whose proportionate holding in the same company is $50. The Office of Government Ethics agrees that the value of the affected underlying holding may sometimes be a more precise measure of whether an employee's financial interest is remote or inconsequential within the meaning of section 208, but remains concerned that an employee cannot accurately determine the value of an underlying holding at the time of his proposed participation because mutual fund assets are bought and sold so frequently. Moreover, interpreting the exemption to apply to the value of the fund as a whole is not inherently unfair since, in many cases, an employee's interest in the entire sector may be a more accurate measure of the value of his interest in the matter. Additionally, OGE is sensitive to concerns expressed by other commenters about devising exemptions that are unduly complicated. On balance, OGE believes the rule will be fairer and easier to implement if the $5,000 exemption applies to the value of the sector fund as a whole. Of course, individual waivers under section 208(b)(1) may be issued to employees whose mutual fund is in excess of $5,000. And, if agencies report difficulties in implementing the de minimis provisions as they apply to sector mutual funds, OGE will reconsider the issue.

Interests in Federal Government Securities

One agency questioned why there should be any distinction between long- and short-term Government securities for purposes of the exemptions. The Office of Government Ethics, in consultation with the Department of Justice, has concluded that employees whose duties concern setting interest rates or formulating monetary policy may have the potential for more significant gains or losses arising from the ownership of long-term Government securities. Therefore, the exemption for those securities is narrower than the exemption for short-term Government securities. At the request of another agency, OGE expanded the exemption at § 2640.202(b), as renumbered, for long-term Federal Government securities to $50,000. As requested by the same agency, OGE added an exemption for U.S. Savings bonds at § 2640.202(c), as renumbered. Corresponding changes to the definition of ''long-term Federal Government security'' have been added to § 2640.102(i), as renumbered, and a definition of ''U.S. Savings bond'' has been added at § 2640.102(v). Although interests in these Federal Government securities do not create a disqualifying financial interest for most employees, these exemptions will be available for those employees of the Department of the Treasury, the Federal Reserve, and similar other agencies where duties may create a disqualifying financial interest.

Interests of Tax Exempt Organizations

Four agencies commented on the exemption for the interests of tax exempt organizations in proposed § 2640.202(e), now renumbered as § 2640.202(d). One agency stated that the exemption should apply to the securities holdings of all companies, whether or not they are nonprofit; another thought it should apply to the interests of nonprofits that are tax exempt under other subparts of 26 U.S.C. 501(c), in particular section 501(c)(4). The Office of Government Ethics originally devised this exemption in response to requests from agencies who stated that they routinely issue individual waivers to employees serving on the boards of various nonprofits, particularly colleges and universities. Interests arising from the holdings of other types of companies the employee serves as officer, director, trustee or employee are better handled on an individual basis through a waiver under section 208 (b)(1) or (b)(3). However, OGE has revised the regulation to include nonprofit organizations that are tax exempt under either 26 U.S.C. 501 (c)(3) or (c)(4).

Two agencies objected to limiting the exemption proposed, at renumbered § 2640.202(d), to situations where the affected holdings amount to no more than 20% of the organization's portfolio. One of the agencies pointed out that an employee would have to be recalculating percentages during the course of his participation in a matter to ensure that the 20% limitation was not exceeded. The Office of Government Ethics agrees, and has accordingly revised the regulation in adopting it in final form.

One agency suggested that OGE delete the proposed requirement that an employee must be an unpaid officer, director, or trustee for the exemption to apply. OGE did not adopt this recommendation because it believes such situations should be handled on an individual basis under the waiver provisions at section 208 (b)(1) or (b)(3). However, OGE wishes to clarify that receipt of travel reimbursement (or reimbursement of other similar types of expenses) from an organization would not be considered a form of pay for purposes of this exemption. Finally, OGE disagrees with an agency which suggested that the exemption is an unnecessary change from past OGE practice in handling interests of organizations an employee serves as officer, director, or trustee. To the extent that OGE has not required recusal or individual waivers for such an employee, it has assumed that the employee had no knowledge of the organization's investments.

Interests of General Partners

The Office of Government Ethics did not adopt one agency recommendation to broaden the proposed exemption at § 2640.202(e), as renumbered, to include any interest of an employee's general partner as long as it is not related to the partnership. That approach would amount to eliminating the interests of general partners from coverage under section 208, which is a legislative function. For similar reasons, OGE also did not adopt an agency recommendation to exempt all the interests of an employee's general partner in cases where the employee is a limited partner. Finally, OGE does not agree with one agency's contention that section 208 has no applicability to an employee's general partners if the employee is only a limited partner. It also does not agree with the suggestion of that agency, and of one other agency, that an exemption should apply to all the interests of an employee's general partner where the employee is a limited partner in a partnership with more 15 limited partners. The Office of Government Ethics cannot say with any certainty that all such interests are ''remote or inconsequential'' enough to warrant automatic exemptions for all employees under this regulation.

Section 2640.203 Miscellaneous Exemptions

Hiring Decisions

Four agencies commented on proposed § 2640.203(a). Two agencies stated that § 2640.203(a) is unnecessary and confusing and should be omitted from the final rule. The Office of Government Ethics disagrees. The provision was included at the request of an agency that is routinely involved in hiring new employees with significant financial interests in corporations. Hiring in some of these cases significantly impacts the financial interests of the former private sector employer and the exemption will provide those employees involved in

the hiring with assurance that section 208 will not be violated.

One agency suggested that OGE define the term ''hiring decisions.'' The Office of Government Ethics decided not to define the term so that the provision, given the common understanding of the term, will be broad enough to cover various stages of the hiring process. One agency recommended that OGE define the term ''vested pension plan'' or delete the word ''vested.'' In order to simplify the provision, the Office of Government Ethics has decided to delete the word ''vested.''

Employees on Leave From Institutions of Higher Education

Two comments were received regarding § 2640.203(b) as proposed. One agency commented that the exemption will be very helpful to agencies that recruit a large number of noncareer appointees from the private sector. Another agency stated that many employees will benefit from the application of the exemption. Both agencies recommended that § 2640.203(b) be broadened. One recommended that the exemption include nonprofit employers such as medical institutions and other nonprofit entities. The other agency requested that the exemption also include State and local governmental entities. The Office of Government Ethics has not changed this provision. The exemption was proposed for inclusion primarily at the request of agencies who hire large numbers of persons whose principal employers are universities, which commonly grant leaves of absence. There is no indication that agencies must routinely address conflicts of interest questions involving employees who are on leaves of absence from other nonprofit entities or from State or local governments.

Multi-Campus Institutions of Higher Education

One agency commented on proposed § 2640.203(c). No changes have been made in the regulation to address the agency's concern that the exemption include participation in matters affecting the State that operates the institution. In a formal advisory opinion (82 OGE 1, February 12, 1982), as published in ''The Informal Advisory Letters and Memoranda and Formal Opinions of the United States Office of Government Ethics'' 851 (1979–1988), OGE stated that the interests of a university will not be imputed to the State that operates the institution. Accordingly, no exemption would be necessary. The same agency commented on the note which followed § 2640.203(c) as proposed. The agency questioned why it would be necessary to determine whether State institutions constitute a State ''system.'' To further simplify the rule, OGE has decided to eliminate the note.

Financial Interests Arising From Federal Government Employment or From Social Security or Veterans' Benefits

Thirteen comments were received concerning recodified and renumbered § 2640.203(d), which was published as an interim rule at § 2640.101 in the Federal Register on August 28, 1995 (60 FR 44706, 44709). One general comment, made by four agencies, expressed concern regarding the decision to treat financial interests that arise from Government salary and employment as disqualifying under 18 U.S.C. 208(a). The Office of Government Ethics understands these concerns. However, for reasons discussed in the Preamble of the interim rule, OGE has decided not to change the position adopted by this Office in consultation with the Department of Justice. Most of the potential adverse effects of treating these interests as disqualifying are mitigated by this regulation, which would exempt most of the financial interests from the disqualification provision of section 208(a).

One agency recommended that OGE emphasize that § 2640.203(d) does not preclude an employee from seeking improvements in his working conditions merely because a spouse's working conditions might also benefit from the change. Under § 2640.203(d), if the request is made on his behalf, rather than on behalf of his spouse, an employee may request that his working environment be enhanced even if the request results in an improved working environment for his spouse.

Three agencies commented on the phrase ''determinations that individually or specially affect their Government salary and benefits. The first agency commented that the phrase did not clarify the scope of the exemption. The Office of Government Ethics has not modified the regulation because the ten examples which follow the exemption help illustrate the scope of the exemption. This agency also questioned whether the exemption would permit an office director and her top management to decide what positions will be subject to a reduction in force without requiring them to obtain individual waivers. Example 10 following the exemption addresses a very similar issue.

A second agency questioned whether the adverbs ''individually or specially'' would modify both ''relate to'' and ''affect.'' ''Individually or specially'' modify both phrases. The third agency requested that the terms ''individually'' and ''specially'' be defined. The Office of Government Ethics believes that the examples which follow § 2640.203(d) illustrate the meaning of the terms ''individually'' and ''specially.'' Of course, in cases where an agency is uncertain whether an exemption applies, it is always free to issue an individual waiver under section 208 (b)(1) or (b)(3).

The third agency also recommended that the phrase ''make determinations'' be defined. Through the examples following § 2640.203(d), the Office of Government Ethics has illustrated what constitutes a determination. Generally, a determination involves an official Government decision whether intermediate or final.

Six agencies commented on Example 3 following § 2640.203(d). Generally, these agencies indicated that some high-level officials and senior personnel do not have a ''supervising official'' to approve travel authorizations or vouchers. To accommodate agency concerns, OGE inserted the following clause into the final sentence of Example 3 as adopted in this final rule: ''unless he has been delegated, in advance, authority to make such approvals in accordance with agency policy.'' Consequently, an employee may approve his own travel authorization or payment of his own travel expenses if, in advance, such authority has been delegated to him according to agency policy. For purposes of this exemption, an advance delegation of this type will be deemed to be a determination by the employee's agency rather than a determination by the employee. Another agency questioned whether the approval of an employee's travel voucher by both the ''approving official'' and the ''certifying official'' are ''determinations'' for purposes of § 2640.203(d). Both certification and approval are determinations within the scope of the exemption found at § 2640.203(d) of this final rule.

One agency stated that it was not clear that the situations described in Examples 4 and 6 following § 2640.203(d) present ''particular matters.'' The examples concern all Federal employees or a very large group of Federal employees. The Office of Government Ethics believes that the class of all Federal employees or a large group of Federal employees is a ''discrete and identifiable class of persons'' within the meaning of a ''particular matter'' found in this regulation at § 2640.103(a)(1).

One agency commented on Example 5 following § 2640.203(d). The agency argued that drafting a regulation that will provide expanded hospital benefits for veterans is not a ''particular matter'' and would not require an exemption. The Office of Government Ethics disagrees with this argument. According to § 2640.103(a)(1), a particular matter includes '' * * * matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons.'' Veterans are a discrete and identifiable class of persons; therefore, a regulation dealing with hospital benefits for veterans is a particular matter.

Another agency did not understand the distinction, if any, between Example 7 and Example 8 which follow § 2640.203(d). Example 7 allows an employee to participate in GSA's evaluation of the feasibility of privatizing the Federal Supply Service, even though the employee's own position would be eliminated if the decision to privatize were made. The employee may participate in the evaluation because according to the facts as described, he is merely studying whether it is feasible to privatize the Federal Supply Service. Ultimately, GSA may decide not to privatize. At this point, it cannot be said that the matter will have a direct and predictable effect on the employee's financial interest, and therefore, no exemption or waiver is needed to allow the employee to participate. Moreover, even if the employee was involved in the implementation of a decision to privatize the Federal Supply Service, the employee would not be making a determination that individually or specially affects his own Government salary. In Example 8, the employee may not participate in the implementation of the privatization plan to eliminate the employee's Federal position and create a new position in a private organization because the employee would be making determinations that affect interests other than those that arise from Government employment. The employee's interest in a position in the newly privatized corporation is not an interest that ''arises from Federal Government employment or from Social Security or veterans' benefits.''

One agency suggested that recodified § 2640.203(d) be broadened to cover the salary and benefits of employees of the Federal Reserve banks. The Office of Government Ethics revised the provision accordingly.

Three comments were received regarding privatization concerns. One agency recommended that the Office of Government Ethics assume a leadership role to facilitate privatization efforts through the development of solutions to potential ethics impediments to privatization. The Office of Government Ethics has addressed some privatization issues in the interim rule published in the Federal Register on August 28, 1995 (60 FR 44706). With some limitations, the exemption permits an employee to engage in many of the activities associated with privatization. Furthermore, OGE provides practical advice to agency officials involved in privatization. Another agency's comment requested that OGE adopt an exemption in the cases of salaries and benefits of employees of any Federal agency engaged in planning the transfer of all its assets, programs and employees to a successor nonprofit corporation in either the public or the private sector. A comprehensive regulatory exemption is not appropriate in such cases. The Office of Government Ethics cannot make a blanket determination that in all such situations the financial interests of all employees are too remote or too inconsequential to affect the integrity of their services. Therefore, no exemption has been adopted; however, the agency may issue individual waivers under section 208(b)(1) or (b)(3) where applicable to facilitate the transition to a nonprofit corporation. Finally, one person questioned whether § 2640.203(d) applies to union officials involved in privatization negotiations. The exemptions found at part 2640 apply to union officials to the same extent to which they apply to all other executive branch employees.

One agency questioned why interests arising from Social Security and veterans' benefits were exempted under § 2640.203(d), but financial interests arising from participation in programs such as Medicare, Medicaid, Food Stamps, Aid to Families with Dependent Children and Federal student loans were not exempted. Because interests in those programs are not derived from the individual's status as a Government employee, the exemption at § 2640.203(d) is not applicable.

Special Government Employees Serving on Advisory Committees

Four agencies responded positively to § 2640.203(g) of the proposed rule indicating that the exemption will make it easier for agencies to recruit special Government employees (SGE). One agency recommended that the exemption be expanded to cover investment interests in the special Government employee's area of expertise. The agency asserted that such interests do not pose any greater threat to the integrity of the SGE's services than employment interests. The Office of Government Ethics has not expanded the exemption to cover investment interests in a SGE's area of expertise because exemptions for certain investment interests are already available under § 2640.202. If the exemptions under § 2640.202 are not sufficient, then the employee may request a waiver under 18 U.S.C. 208(b)(3).

Another agency suggested that § 2640.203(g) apply to all non-Federal employers of the SGE, not just the SGE's ''principal employer,'' since many advisory committee members act as consultants to various different private sector entities. The Office of Government Ethics believes the exemption should apply only where the employee has an employee/employer relationship with the outside entity. Employees serving on advisory committees often are chosen because of their expertise in a certain field or because of their affiliation with certain interest groups. Because advisory committee meetings are open, employment interests are readily apparent to the public. Members and their employment affiliations are typically identified publicly. On the other hand, an SGE's bias because of an affiliation as a consultant may not be so evident and since such relationships may not be well known to the public. Therefore, the Office of Government Ethics has not changed this provision.

Another agency recommended that the exemption cover all SGEs, not just those serving on advisory committees. The Office of Government Ethics disagrees with the recommendation and is not adopting it in this final rule. As explained in the preamble of the proposed rule, the exemption at § 2640.203(g) is limited to special Government employees who are on Federal advisory committees because the public's interest in the integrity of advisory committee proceedings is protected by the nature of the proceedings themselves. Ordinarily, no one individual can control the recommendations of the committee. Moreover, the public interest in the employees' integrity is protected by the openness required by the Federal Advisory Committee Act, 5 U.S.C. app. Such safeguards are not present in the case of SGEs not serving on advisory committees.

One agency asked that OGE clarify the phrase ''special or distinct effect'' used in proposed § 2640.203(g). Because of the need for flexibility, the Office of Government Ethics did not define the

phrase. Example 1 following § 2640.203(g) explains that an SGE may participate in a matter on an advisory committee even though the recommendation by the advisory committee will affect his non-Federal employer as part of a class. However, it is not OGE's intent that the exemption apply only where the effect of the matter on members within a class is identical. Normally, the matter would have a ''special or distinct effect'' when its impact would be unique to the employee or his employer, or where the effect would be clearly out of proportion in comparison to the effect on other members of the class. Where it is difficult to determine if a ''special or distinct effect'' may occur, an agency has the option of issuing an individual waiver under section 208 (b)(1) or (b)(3).

Directors of Federal Reserve Banks

One agency commented on § 2640.203(h) of the proposed rule and questioned whether use of the exemption would preclude the use of other exemptions such as those for de minimis investments. The exemptions found in this final part 2640 regulation are intended to be used where applicable in particular situations with no restriction on the number of exemptions utilized by an employee. Therefore, application of one exemption does not preclude the application of another exemption.

Medical Products

One agency commented on § 2640.203(i) as proposed. The agency stated that § 2640.203(i)(1) should not be limited to matters involving the ''approval or classification'' of medical products, but should be broadened to cover ''Federal advisory committee matters concerning medical products * * * .'' The agency recommended eliminating the distinction between medical products and medical devices because in the industry ''medical products'' is a generic term used to describe all products and devices intended for therapeutic or diagnostic purposes. The Office of Government Ethics has adopted both recommendations in this final rule. The agency requested that the language of § 2640.203(i)(1) include ''use by or sale to its patients'' to reflect actual practice where hospitals have a pharmacy from which patients buy prescription products for use on an outpatient basis. The agency also recommended that proposed § 2640.203(i)(2) be changed to cover ''the use or prescription of medical products for patients.'' Based on the commenting agency's expertise, OGE has revised § 2640.203(i) to accommodate the agency's recommendations. The agency also requested that it should be noted that intellectual property rights are not covered by this exemption. The Office of Government Ethics has not incorporated this suggestion. To simplify the regulation, OGE has decided to describe only what interests are covered by the exemptions rather than what interests are not included.

The same agency recommended that proposed § 2640.203(i) should cover SGEs who are not serving on a Federal advisory committee, provided that the SGEs work no more than 60 days in any 365 day period and their services are advisory only. The safeguards of the Federal advisory committee process, as described above, are not present in situations involving SGEs not serving on advisory committees; therefore, the Office of Government Ethics has not expanded the exemption in the final rule.

Representative Members of FDA Advisory Committees

A new exemption has been added, at the request of the Food and Drug Administration (FDA), at § 2640.203(j) of the final rule for certain nonvoting representative members of technical advisory committees established by the FDA. The provision exempts any disqualifying financial interest the nonvoting member has in the class that he represents on the committee. The exemption continues, in part, an existing FDA exemption promulgated in 1976 when individual agencies had the authority to issue old section 208(b)(2) regulatory waivers.

Nonvoting members of FDA technical advisory committees may be appointed pursuant to one of several authorities, including 21 U.S.C. 394, 360c(b), or 360j(f)(3). Some of these statutory authorities require that certain members of the committees be appointed as representatives of consumer and industry groups and specify that these groups have the opportunity to nominate persons to serve in a representative capacity. Ordinarily, persons serving in a representative capacity would not be considered employees of the Government. *See* Office of Government Ethics (OGE) Informal Advisory Letter 82x22, ''The Informal Advisory Letters and Memoranda and Formal Opinions of the United States Office of Government Ethics'' 325, 329–31 (1979–1988).

Nevertheless, HHS has appointed these members as special Government employees because 21 U.S.C. 331(j) prohibits the FDA from disclosing trade secret information to persons who are not employees of HHS, and the members of these technical advisory committees need to have access to certain trade secret information in order to carry out the committees' activities. Therefore, in order to accomplish the work that Congress intended these committees perform, the representative members of these committees are appointed as special Government employees.

As a general proposition, OGE believes that representatives are not Government employees because they are not carrying out a Federal function on behalf of the Government. Accordingly, in OGE's view, representatives ordinarily would not be appointed as employees. Where members of FDA technical advisory committees are required by statute to be appointed as representatives and must have access to confidential information to carry out their duties as members of the committee, however, it is arguable that Congress envisioned that they would act as both representatives and as employees.

Regulations promulgated by the FDA that govern the activities of these representative members contain certain limitations designed to safeguard the integrity of the advisory committee proceedings. First, although the members are appointed as special Government employees, they are still under an obligation to represent the views of non-Federal industry and consumer groups, and this obligation is publicly disclosed. See 21 CFR 14.84(c). And although representative members participate in committee discussions, they are not permitted to vote on committee recommendations. 21 CFR 14.86(a)(1). Representative members are also subject to specific limitations on their participation in matters directly involving their employer, as well as general limitations on their advocacy. 21 CFR 14.86(c)(4)–(6). Failure to adhere to these limitations may result in removal from the committee. 21 CFR 14.86(d). Accordingly, in view of the limited nature of their services and the public expectation that they will act as representatives, there appears to be little risk that appointment of these representatives as special Government employees will impair the advisory committee process.

The exemption applies only to disqualifying financial interests that arise from the class which the employee represents. For example, an employee who represents the pharmaceutical industry may have disqualifying financial interests that arise from his employment with a pharmaceutical company and from ownership of stock

in the company. The employee's disqualifying financial interests arising from these relationships and assets are exempt under § 2640.203(j). On the other hand, ownership of stock in the same company by an employee who represents consumer groups does not create a disqualifying financial interest in the same class which the employee represents. In this case, the employee who represents consumer groups would need an individual waiver under section 208(b)(1) or (b)(3) before participating in advisory committee activities affecting the company in which she owns stock.

Employees of the Tennessee Valley Authority

Section 2640.203(k) of the final rule contains a new exemption applicable to employees of the Tennessee Valley Authority (TVA) who participate in developing or approving power rate schedules, or other similar matters, for the production of electric power within the TVA service area. The provision continues an existing exemption promulgated by the TVA at 18 CFR 1300.735 pursuant to its authority under 18 U.S.C. 208(b)(2) before the statute was amended in 1989. The exemption applies only to disqualifying financial interests arising from the use of electric power sold by the TVA.

Section 2640.204 Prohibited Financial Interests

One agency stated that 5 CFR 2635.403(b), which authorizes an agency to prohibit the holding of certain financial interests in individual cases, should have no applicability where a financial interest is covered by a regulatory exemption. The agency noted that situations arising under § 2635.403(b) are not analogous to situations where financial interests are prohibited under statute or supplemental regulation. The Office of Government Ethics did not make the recommended modification. Deleting the reference to 5 CFR 2635.403(b) would interfere with an agency's ability to make independent determinations about substantial conflicts. However, § 2640.204 has been revised to clarify that none of the exemptions apply to financial interests ''held or acquired by the employee, his spouse, or minor child in violation of a statute or agency supplemental regulation * * *.'' This clarifying revision is necessary to address the fact that a few agencies have supplemental regulations which prohibit spouses and minor children from holding or acquiring certain interests.

Section 2640.205 Employee Responsibility

One agency requested that the final sentence in this section as proposed, which referred in part to an employee's uncertainty about whether a waiver is applicable, should be changed to reference an ''exemption or waiver.'' The Office of Government Ethics has corrected that provision in the final rule to state, ''An employee who is unsure whether an exemption is applicable * * *.''

Two agencies made comments regarding employee reliance on agency advice. One agency thought it would be useful to encourage employees to rely on specific advice of their organization's ethics officials. Another agency recommended that OGE add a ''safe harbor'' provision under which the employee would not be subject to criminal prosecution or disciplinary action when relying in good faith on the advice of an agency ethics official with respect to the applicability of the exemptions. The Office of Government Ethics did not add a ''safe harbor'' provision. The correct standard concerning reliance on the advice of ethics officials is stated at 5 CFR 2635.107(b). That provision states that ''good faith reliance on the advice of an agency ethics official is a factor that may be taken into account by the Department of Justice in the selection of cases for prosecution.''

One agency stated that it supports the concept that employees have to take responsibility for determining whether an exemption applies in a particular case. A second agency, however, expressed concern that the regulation as proposed would not accomplish its stated purpose of lessening the burden on agency ethics officials since employees may not rely on a provision unless the interest is specifically exempt and employees will be forced to consult with an ethics official prior to taking action. The Office of Government Ethics understands this concern, but believes that most employees will be able to apply the basic exemption provisions once they take effect. In addition, because this regulation implements a criminal statute, it should be sufficiently precise so that employees have adequate notice of when they may act without fear of violating section 208. Naturally, when an employee is in doubt as to the application of a particular provision, he will have to consult with an ethics official. However, as addressed earlier in the Summary of Contents, OGE has attempted to make the regulations less complex by simplifying language and deleting some exemptions. These modifications should make the regulation somewhat easier for employees to understand and apply.

One agency complained about the burden on employees in complying with the regulation to the extent that they would have to obtain information about their investments to determine whether they meet with conditions set forth in the exemptions. The Office of Government Ethics does not believe this should be an onerous task. Most employees receive prospectuses and periodic updates about their investments. If they did not keep these materials, they can obtain information by calling the manager of the fund, trust or plan.

The same agency suggested the creation of a Governmentwide database listing investments (e.g., nonsector mutual funds and certain pensions) that do not create conflicts of interests and that could be updated quarterly and shared by all agencies and employees as a means of ensuring compliance. The Office of Government Ethics does not believe this would be a practical use of resources or staff. The number of investments that could be included would be so large that it would be nearly impossible to identify them all with any precision. Inevitably, some investments would be omitted, and the system would prove to be unreliable.

One agency suggested that OGE provide training resources for employees and ethics officials. The Office of Government Ethics anticipates developing training resources and materials concerning the new regulation.

Section 2640.206 Existing Agency Exemptions

An agency suggested that the regulation include a grandfather clause for those employees who currently have exempted interests under individual agency regulations, allowing the employee to continue to hold that exempted interest as long as the employee maintains the same duties. The Office of Government Ethics does not agree that a grandfather clause would be desirable. A grandfather clause would result in a complicated scheme for agencies to administer. Under such system, some employees would function under section 208(b)(2) agency exemptions in existence prior to these regulations, while others would function under the new exemptions. If an agency needs to continue a specific exemption not covered under these regulations, it should submit one to OGE for consideration. Alternatively, an agency can consider granting waivers on an individual basis under section

208(b)(1) to employees who have exemptions under current agency rules.

Subpart C—Individual Waivers

Section 2640.301 Waivers Issued Pursuant to 18 U.S.C. 208(b)(1)

One agency commented that subpart C of the part 2640 regulation as proposed should be deleted in its entirety, as it is duplicative and unnecessary since individual waivers are covered at 5 CFR 2635.402(d)(2). The Office of Government Ethics has not adopted this suggestion in this final rule. These new regulations contain more detailed requirements than those described in § 2635.402(d)(2), as well as a list of factors an agency may use in determining whether a disqualifying financial interest is sufficiently substantial to be deemed likely to affect the integrity of the employee's services to the Government.

A second agency responded with two observations. First, the agency assumed that describing the broad scope of duties encompassed by an employee's official duties will be sufficient to meet the requirement under § 2640.301(a)(3). Second, it stated that an appointing authority has discretion, but is not required to issue a waiver even if all of the enumerated requirements are met. The Office of Government Ethics agrees with the commenter on both points and has retained subpart C in its entirety in this final rule.

Another agency thought it would be helpful to add to proposed § 2640.301(b) another factor such as ''availability at the location of other persons qualified to perform the service in a timely fashion,'' in order to assist agencies that have small posts abroad where no one else can perform the employee's tasks. The Office of Government Ethics did not add this factor because consideration of such circumstances is implicit in the factor described at § 2640.301(b)(b)(6)(ii).

Section 2640.304 Public Availability of Agency Waivers

One agency requested that OGE add a requirement that advisory committee members file public financial disclosure statements or, alternatively, that OGE seek appropriate legislation modifying section 107(a)(2) of the Ethics in Government Act to require agencies to disclose publicly the identity of an individual's principal employment, positions held and contractual relationships, and investment interests that may be relevant to the purposes and functions of the advisory committee. This request is outside the scope of this regulation, which deals principally with exemptions from section 208.

III. Existing Agency Exemptions

As of the effective date of this regulation, regulatory exemptions issued by individual agencies under the authority of 18 U.S.C. 208(b)(2), as in effect prior to November 30, 1989, will no longer be effective.

IV. Matters of Regulatory Procedure

Executive Order 12866

In promulgating this final 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 Review and Planning. This regulation has also been reviewed by 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 final regulation will not have a significant impact on a substantial number of small entities because it primarily affects Federal executive branch employees.

Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply because this final 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: September 26, 1996.

Stephen D. Potts,

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 revising part 2640 to read as follows:

PART 2640—INTERPRETATION, EXEMPTIONS AND WAIVER GUIDANCE CONCERNING 18 U.S.C. 208 (ACTS AFFECTING A PERSONAL FINANCIAL INTEREST)

Subpart A—General Provisions

Sec.

Subpart B—Exemptions Pursuant to 18 U.S.C. 208(b)(2)

Subpart C—Individual Waivers

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.

Subpart A—General Provisions

§ 2640.101 Purpose.

18 U.S.C. 208(a) prohibits an officer or employee of the executive branch, of any independent agency of the United States, of the District of Columbia, or Federal Reserve bank director, officer, or employee, or any special Government employee from participating in an official capacity in particular matters in which he has a personal financial interest, or in which certain persons or organizations with which he is affiliated have a financial interest. The statute is intended to prevent an employee from allowing personal interests to affect his official actions, and to protect governmental processes from actual or apparent conflicts of interests. However, in certain cases, the nature and size of the financial interest and the nature of the matter in which the employee would act are unlikely to affect an employee's official actions. Accordingly, the statute permits waivers of the disqualification provision in certain cases, either on an individual basis or pursuant to general regulation. Section 208(b)(2) provides that the Director of the Office of Government Ethics may, by regulation, exempt from the general prohibition, financial interests which are too remote or too inconsequential to affect the integrity of the services of the employees to which the prohibition applies. The regulations in this part describe those financial interests. This part also provides guidance to agencies on the factors to consider when issuing individual waivers under 18 U.S.C. 208 (b)(1) or (b)(3), and provides an interpretation of 18 U.S.C. 208(a).

§ 2640.102 Definitions.

For purposes of this part:

(a) *Diversified* means that the fund, trust or plan does not have a stated policy of concentrating its investments in any industry, business, single country other than the United States, or bonds of a single State within the United States and, in the case of an employee benefit plan, means that the plan's trustee has a written policy of varying plan investments.

Note to paragraph (a): A mutual fund is diversified for purposes of this part if it does not have a policy of concentrating its investments in an industry, business, country other than the United States, or single State within the United States. Whether a mutual fund meets this standard may be determined by checking the fund's prospectus or by calling a broker or the manager of the fund. An employee benefit plan is diversified if the plan manager has a written policy of varying assets. This policy might be found in materials describing the plan or may be obtained in a written statement from the plan manager. It is important to note that a mutual fund or employee benefit plan that is diversified for purposes of this part may not necessarily be an excepted investment fund (EIF) for purposes of reporting financial interests pursuant to 5 CFR 2634.310(c). In some cases, an employee may have to report the underlying assets of a fund or plan on his financial disclosure statement even though an exemption set forth in this part would permit the employee to participate in a matter affecting the underlying assets of the fund or plan. Conversely, there may be situations in which no exemption in this part is applicable to the assets of a fund or plan which is properly reported as an EIF on the employee's financial disclosure statement.

(b) *Employee* means an officer or employee of the executive branch of the United States, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia. The term also includes a special Government employee as defined in 18 U.S.C. 202.

(c) *Employee benefit plan* means a plan as defined in section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(3), and that has more than one participant. An employee benefit plan is any plan, fund or program established or maintained by an employer or an employee organization, or both, to provide its participants medical, disability, death, unemployment, or vacation benefits, training programs, day care centers, scholarship funds, prepaid legal services, deferred income, or retirement income.

(d) *He, his,* and *him* include she, hers, and her.

(e) *Holdings* means portfolio of investments.

(f) *Independent trustee* means a trustee who is independent of the sponsor and the participants in a plan, or is a registered investment advisor.

(g) *Institution of higher education* means an educational institution as defined in 20 U.S.C. 1141(a).

(h) *Issuer* means a person who issues or proposes to issue any security, or has any outstanding security which it has issued.

(i) *Long-term Federal Government security* means a bond or note, except for a U.S. Savings bond, with a maturity of more than one year issued by the United States Treasury pursuant to 31 U.S.C. chapter 31.

(j) *Municipal security* means direct obligation of, or obligation guaranteed as to principal or interest by, a State (or any of its political subdivisions, or any municipal corporate instrumentality of one or more States), or the District of Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States.

(k) *Mutual fund* means an entity which is registered as a management company under the Investment Company Act of 1940, as amended (15 U.S.C. 80a–1 *et seq.*). For purposes of this part, the term mutual fund includes open-end and closed-end mutual funds and registered money market funds.

(l) *Particular matter involving specific parties* includes any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties. The term typically involves a specific proceeding affecting the legal rights of the parties, or an isolatable transaction or related set of transactions between identified parties.

(m) *Particular matter of general applicability* means a particular matter that is focused on the interests of a discrete and identifiable class of persons, but does not involve specific parties.

(n) *Pension plan* means any plan, fund or program maintained by an employer or an employee organization, or both, to provide retirement income to employees, or which results in deferral of income for periods extending to, or beyond, termination of employment.

(o) *Person* means an individual, corporation, company, association, firm, partnership, society or any other organization or institution.

(p) *Publicly traded security* means a security as defined in paragraph (r) of this section and which is:

(1) Registered with the Securities and Exchange Commission pursuant to section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*) and listed on a national or regional securities exchange or traded through NASDAQ;

(2) Issued by an investment company registered pursuant to section 8 of the Investment Company Act of 1940, as amended (15 U.S.C. 80a–8); or

(3) A corporate bond registered as an offering with the Securities and Exchange Commission under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*) and issued by an entity whose stock is a publicly traded security.

Note to paragraph (p): National securities exchanges include the American Stock Exchange and the New York Stock Exchange. Regional exchanges include Boston, Cincinnati, Intermountain (Salt Lake City), Midwest (Chicago), Pacific (Los Angeles and San Francisco), Philadelphia (Philadelphia and Miami), and Spokane stock exchanges.

(q) *Sector mutual fund* means a mutual fund that concentrates its investments in an industry, business, single country other than the United States, or bonds of a single State within the United States.

(r) *Security* means common stock, preferred stock, corporate bond, municipal security, mutual fund, long-term Federal Government security, and limited partnership interest.

(s) *Short-term Federal Government security* means a bill with a maturity of one year or less issued by the United States Treasury pursuant to 31 U.S.C. chapter 31.

(t) *Special Government employee* means those executive branch officers or employees specified in 18 U.S.C. 202(a). A special Government employee is retained, designated, appointed or employed to perform temporary duties either on a full-time or intermittent basis, with or without compensation, for a period not to exceed 130 days during any consecutive 365-day period.

(u) *Unit investment trust* means an investment company as defined in 15 U.S.C. 80a–4(2) that is a regulated investment company under 26 U.S.C. 851.

(v) *United States Savings bond* means a savings bond issued by the United States Treasury pursuant to 31 U.S.C. 3105.

§ 2640.103 Prohibition.

(a) *Statutory prohibition.* Unless permitted by 18 U.S.C. 208(b) (1)–(4), an employee is prohibited by 18 U.S.C. 208(a) from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he or any other person specified in the statute has a financial interest, if the particular matter will have a direct and predictable effect on

that interest. The restrictions of 18 U.S.C. 208 are described more fully in 5 CFR 2635.401 and 2635.402.

(1) *Particular matter.* The term ''particular matter'' includes only matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons. The term may include matters which do not involve formal parties and may extend to legislation or policy making that is narrowly focused on the interests of a discrete and identifiable class of persons. It does not, however, cover consideration or adoption of broad policy options directed to the interests of a large and diverse group of persons. The particular matters covered by this part include a judicial or other proceeding, application or request for a ruling or other determination, contract, claim, controversy, charge, accusation or arrest.

Example 1: The Overseas Private Investment Corporation decides to hire a contractor to conduct EEO training for its employees. The award of a contract for training services is a particular matter.

Example 2: The spouse of a high level official of the Internal Revenue Service (IRS) requests a meeting on behalf of her client (a major U.S. corporation) with IRS officials to discuss a provision of IRS regulations governing depreciation of equipment. The spouse will be paid a fee by the corporation for arranging and attending the meeting. The consideration of the spouse's request and the decision to hold the meeting are particular matters in which the spouse has a financial interest.

Example 3: A regulation published by the Department of Agriculture applicable only to companies that operate meat packing plants is a particular matter.

Example 4: A change by the Department of Labor to health and safety regulations applicable to all employers in the United States is not a particular matter. The change in the regulations is directed to the interests of a large and diverse group of persons.

Example 5: The allocation of additional resources to the investigation and prosecution of white collar crime by the Department of Justice is not a particular matter. Similarly, deliberations on the general merits of an omnibus bill such as the Tax Reform Act of 1986 are not sufficiently focused on the interests of specific persons, or a discrete and identifiable group of persons to constitute participation in a particular matter.

Example 6: The recommendations of the Council of Economic Advisors to the President about appropriate policies to maintain economic growth and stability are not particular matters. Discussions about economic growth policies are directed to the interests of a large and diverse group of persons.

Example 7: The formulation and implementation of the response of the United States to the military invasion of a U.S. ally is not a particular matter. General deliberations, decisions and actions concerning a response are based on a consideration of the political, military, diplomatic and economic interests of every sector of society and are too diffuse to be focused on the interests of specific individuals or entities. However, at the time consideration is given to actions focused on specific individuals or entities, or a discrete and identifiable class of individuals or entities, the matters under consideration would be particular matters. These would include, for example, discussions whether to close a particular oil pumping station or pipeline in the area where hostilities are taking place, or a decision to seize a particular oil field or oil tanker.

Example 8: A legislative proposal for broad health care reform is not a particular matter because it is not focused on the interests of specific persons, or a discrete and identifiable class of persons. It is intended to affect every person in the United States. However, consideration and implementation, through regulations, of a section of the health care bill limiting the amount that can be charged for prescription drugs is sufficiently focused on the interests of pharmaceutical companies that it would be a particular matter.

(2) *Personal and substantial participation.* To participate ''personally'' means to participate directly. It includes the direct and active supervision of the participation of a subordinate in the matter. To participate ''substantially'' means that the employee's involvement is of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. However, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to the matter, but also on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. Personal and substantial participation may occur when, for example, an employee participates through decision, approval, disapproval, recommendation, investigation or the rendering of advice in a particular matter.

Example 1: An agency's Office of Enforcement is investigating the allegedly fraudulent marketing practices of a major corporation. One of the agency's personnel specialists is asked to provide information to the Office of Enforcement about the agency's personnel ceiling so that the Office can determine whether new employees can be hired to work on the investigation. The employee personnel specialist owns $10,000 worth of stock in the corporation that is the target of the investigation. She does not have a disqualifying financial interest in the matter (the investigation and possible subsequent enforcement proceedings) because her involvement is on a peripheral personnel issue and her participation cannot be considered ''substantial'' as defined in the statute.

(3) *Direct and predictable effect.* (i) A particular matter will have a ''direct'' effect on a financial interest if there is a close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest. An effect may be direct even though it does not occur immediately. A particular matter will not have a direct effect on a financial interest, however, if the chain of causation is attenuated or is contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to, the matter. A particular matter that has an effect on a financial interest only as a consequence of its effects on the general economy does not have a direct effect within the meaning of this part.

(ii) A particular matter will have a ''predictable'' effect if there is a real, as opposed to a speculative, possibility that the matter will affect the financial interest. It is not necessary, however, that the magnitude of the gain or loss be known, and the dollar amount of the gain or loss is immaterial.

Example 1: An attorney at the Department of Justice is working on a case in which several large companies are defendants. If the Department wins the case, the defendants may be required to reimburse the Federal Government for their failure to adequately perform work under several contracts with the Government. The attorney's spouse is a salaried employee of one of the companies, working in a division that has no involvement in any of the contracts. She does not participate in any bonus or benefit plans tied to the profitability of the company, nor does she own stock in the company. Because there is no evidence that the case will have a direct and predictable effect on whether the spouse will retain her job or maintain the level of her salary, or whether the company will undergo any reorganization that would affect her interests, the attorney would not have a disqualifying financial interest in the matter. However, the attorney must consider, under the requirements of § 2635.502 of this chapter, whether his impartiality would be questioned if he continues to work on the case.

Example 2: A special Government employee (SGE) whose principal employment is as a researcher at a major university is appointed to serve on an advisory committee that will evaluate the safety and effectiveness of a new medical device to regulate arrhythmic heartbeats. The device is being developed by Alpha Medical Inc., a company which also has contracted with the SGE's university to assist in developing another medical device related to

kidney dialysis. There is no evidence that the advisory committee's determinations concerning the medical device under review will affect Alpha Medical's contract with the university to develop the kidney dialysis device. The SGE may participate in the committee's deliberations because those deliberations will not have a direct and predictable effect on the financial interests of the researcher or his employer.

Example 3: The SGE in the preceding example is instead asked to serve on an advisory committee that has been convened to conduct a preliminary evaluation of the new kidney dialysis device developed by Alpha Medical under contract with the employee's university. Alpha's contract with the university requires the university to undertake additional testing of the device to address issues raised by the committee during its review. The committee's actions will have a direct and predictable effect on the university's financial interest.

Example 4: An engineer at the Environmental Protection Agency (EPA) was formerly employed by Waste Management, Inc., a corporation subject to EPA's regulations concerning the disposal of hazardous waste materials. Waste Management is a large corporation, with less than 5% of its profits derived from handling hazardous waste materials. The engineer has a vested interest in a defined benefit pension plan sponsored by Waste Management which guarantees that he will receive payments of $500 per month beginning at age 62. As an employee of EPA, the engineer has been assigned to evaluate Waste Management's compliance with EPA hazardous waste regulations. There is no evidence that the engineer's monitoring activities will affect Waste Management's ability or willingness to pay his pension benefits when he is entitled to receive them at age 62. Therefore, the EPA's monitoring activities will not have a direct and predictable effect on the employee's financial interest in his Waste Management pension. However, the engineer should consider whether, under the standards set forth in 5 CFR 2635.502, a reasonable person would question his impartiality if he acts in a matter in which Waste Management is a party.

(b) *Disqualifying financial interests.* For purposes of 18 U.S.C. 208(a) and this part, the term financial interest means the potential for gain or loss to the employee, or other person specified in section 208, as a result of governmental action on the particular matter. The disqualifying financial interest might arise from ownership of certain financial instruments or investments such as stock, bonds, mutual funds, or real estate. Additionally, a disqualifying financial interest might derive from a salary, indebtedness, job offer, or any similar interest that may be affected by the matter.

Example 1: An employee of the Department of the Interior owns transportation bonds issued by the State of Minnesota. The proceeds of the bonds will be used to fund improvements to certain State highways. In her official position, the employee is evaluating an application from Minnesota for a grant to support a State wildlife refuge. The employee's ownership of the transportation bonds does not create a disqualifying financial interest in Minnesota's application for wildlife funds because approval or disapproval of the grant will not in any way affect the current value of the bonds or have a direct and predictable effect on the State's ability or willingness to honor its obligation to pay the bonds when they mature.

Example 2: An employee of the Bureau of Land Management owns undeveloped land adjacent to Federal lands in New Mexico. A portion of the Federal land will be leased by the Bureau to a mining company for exploration and development, resulting in an increase in the value of the surrounding privately owned land, including that owned by the employee. The employee has a financial interest in the lease of the Federal land to the mining company and, therefore, cannot participate in Bureau matters involving the lease unless he obtains an individual waiver pursuant to 18 U.S.C. 208(b)(1).

Example 3: A special Government employee serving on an advisory committee studying the safety and effectiveness of a new arthritis drug is a practicing physician with a specialty in treating arthritis. The drug being studied by the committee would be a low cost alternative to current treatments for arthritis. If the drug is ultimately approved, the physician will be able to prescribe the less expensive drug. The physician does not own stock in, or hold any position, or have any business relationship with the company developing the drug. Moreover, there is no indication that the availability of a less expensive treatment for arthritis will increase the volume and profitability of the doctor's private practice. Accordingly, the physician has no disqualifying financial interest in the actions of the advisory committee.

(c) *Interests of others.* The financial interests of the following persons will serve to disqualify an employee to the same extent as the employee's own interests:

(1) The employee's spouse;

(2) The employee's minor child;

(3) The employee's general partner;

(4) An organization or entity which the employee serves as officer, director, trustee, general partner, or employee; and

(5) A person with whom the employee is negotiating for, or has an arrangement concerning, prospective employment.

Example 1: An employee of the Consumer Product Safety Commission (CPSC) has two minor children who have inherited shares of stock from their grandparents in a company that manufactures small appliances. Unless an exemption is applicable under § 2640.202 or he obtains a waiver under 18 U.S.C. 208(b)(1), the employee is disqualified from participating in a CPSC proceeding to require the manufacturer to remove a defective appliance from the market.

Example 2: A newly appointed employee of the Department of Housing and Urban Development (HUD) is a general partner with three former business associates in a partnership that owns a travel agency. The employee knows that his three general partners are also partners in another partnership that owns a HUD-subsidized housing project. Unless he receives a waiver pursuant to 18 U.S.C. 208(b)(1) permitting him to act, the employee must disqualify himself from particular matters involving the HUD-subsidized project which his general partners own.

Example 3: The spouse of an employee of the Department of Health and Human Services (HHS) works for a consulting firm that provides support services to colleges and universities on research projects they are conducting under grants from HHS. The spouse is a salaried employee who has no direct ownership interest in the firm such as through stockholding, and the award of a grant to a particular university will have no direct and predictable effect on his continued employment or his salary. Because the award of a grant will not affect the spouse's financial interest, section 208 would not bar the HHS employee from participating in the award of a grant to a university to which the consulting firm will provide services. However, the employee should consider whether her participation in the award of the grant would be barred under the impartiality provision in the Standards of Ethical Conduct for Employees of the Executive Branch at 5 CFR 2635.502.

(d) *Disqualification.* Unless the employee is authorized to participate in the particular matter by virtue of an exemption or waiver described in subpart B or subpart C of this part, or the interest has been divested in accordance with paragraph (e) of this section, an employee shall disqualify himself from participating in a particular matter in which, to his knowledge, he or any other person specified in the statute has a financial interest, if the particular matter will have a direct and predictable effect on that interest. Disqualification is accomplished by not participating in the particular matter.

(1) *Notification.* An employee who becomes aware of the need to disqualify himself from participation in a particular matter to which he has been assigned should notify the person responsible for his assignment. An employee who is responsible for his own assignments should take whatever steps are necessary to ensure that he does not participate in the matter from which he is disqualified. Appropriate oral or written notification of the employee's disqualification may be made to coworkers by the employee or a supervisor to ensure that the employee is not involved in a matter from which he is disqualified.

(2) *Documentation.* An employee need not file a written disqualification statement unless he is required by part 2634 of this chapter to file written evidence of compliance with an ethics agreement with the Office of Government Ethics, is asked by an agency ethics official or the person responsible for his assignment to file a written disqualification statement, or is required to do so by agency supplemental regulation issued pursuant to 5 CFR 2635.105. However, an employee may elect to create a record of his actions by providing written notice to a supervisor or other appropriate official.

Example 1: The supervisor of an employee of the Department of Education asks the employee to attend a meeting on his behalf on developing national standards for science education in secondary schools. When the employee arrives for the meeting, she realizes one of the participants is the president of Education Consulting Associates (ECA), a firm which has been awarded a contract to prepare a bulletin describing the Department's policies on science education standards. The employee's spouse has a subcontract with ECA to provide the graphics and charts that will be used in the bulletin. Because the employee realizes that the meeting will involve matters relating to the production of the bulletin, the employee properly decides that she must disqualify herself from participating in the discussions. After withdrawing from the meeting, the employee should notify her supervisor about the reason for her disqualification. She may elect to put her disqualification statement in writing, or to simply notify her supervisor orally. She may also elect to notify appropriate coworkers about her need to disqualify herself from this matter.

(e) *Divestiture of a disqualifying financial interest.* Upon sale or other divestiture of the asset or other interest that causes his disqualification from participation in a particular matter, an employee is no longer prohibited from acting in the particular matter.

(1) *Voluntary divestiture.* An employee who would otherwise be disqualified from participation in a particular matter may voluntarily sell or otherwise divest himself of the interest that causes the disqualification.

(2) *Directed divestiture.* An employee may be required to sell or otherwise divest himself of the disqualifying financial interest if his continued holding of that interest is prohibited by statute or by agency supplemental regulation issued in accordance with § 2635.403(a) of this chapter, or if the agency determines in accordance with § 2635.403(b) of this chapter that a substantial conflict exists between the financial interest and the employee's duties or accomplishment of the agency's mission.

(3) *Eligibility for special tax treatment.* An employee who is directed to divest an interest may be eligible to defer the tax consequences of divestiture under subpart J of part 2634 of this chapter. An employee who divests before obtaining a certificate of divestiture will not be eligible for this special tax treatment.

(f) *Official duties that give rise to potential conflicts.* Where an employee's official duties create a substantial likelihood that the employee may be assigned to a particular matter from which he is disqualified, the employee should advise his supervisor or other person responsible for his assignments of that potential so that conflicting assignments can be avoided, consistent with the agency's needs.

Subpart B—Exemptions Pursuant to 18 U.S.C. 208(b)(2)

§ 2640.201 Exemptions for interests in mutual funds, unit investment trusts, and employee benefit plans.

(a) *Diversified mutual funds and unit investment trusts.* An employee may participate in any particular matter affecting one or more holdings of a diversified mutual fund or a diversified unit investment trust where the disqualifying financial interest in the matter arises because of the ownership of an interest in the fund or trust.

Example 1: An employee owns shares worth $100,000 in several mutual funds whose portfolios contain stock in a small computer company. Each mutual fund prospectus describes the fund as a ''management company,'' but does not characterize the fund as having a policy of concentrating its investments in any particular industry, business, single country (other than the U.S.) or bonds of a single State. The employee may participate in agency matters affecting the computer company.

Example 2: A nonsupervisory employee of the Department of Energy owns shares in a mutual fund that expressly concentrates its holdings in the stock of utility companies. The employee may not rely on the exemption in paragraph (a) of this section to act in matters affecting a utility company whose stock is part of the mutual fund's portfolio because the fund is not a diversified fund as defined in § 2640.102(a). The employee may, however, seek an individual waiver under 18 U.S.C. 208(b)(1) permitting him to act. Moreover, depending upon the value of the employee's interest in the fund and the type of particular matter in which he would participate, one of the exemptions at § 2640.202(a) or (b) for interests arising from publicly traded securities may be applicable.

(b) *Sector mutual funds.* An employee may participate in any particular matter affecting one or more holdings of a sector mutual fund where the affected holding is not invested in the sector in which the fund concentrates, and where the disqualifying financial interest in the matter arises because of ownership of an interest in the fund.

Example 1: An employee of the Federal Reserve owns shares in the mutual fund described in the preceding example. In addition to holdings in utility companies, the mutual fund contains stock in certain regional banks and bank holding companies whose financial interests would be affected by an investigation in which the Federal Reserve employee would participate. The employee is not disqualified from participating in the investigation because the banks that would be affected are not part of the sector in which the fund concentrates.

(c) *Employee benefit plans.* An employee may participate in:

(1) Any particular matter affecting one or more holdings of an employee benefit plan, where the disqualifying financial interest in the matter arises from membership in:

(i) The Thrift Savings Plan for Federal employees described in 5 U.S.C. 8437;

(ii) A pension plan established or maintained by a State government or any political subdivision of a State government for its employees; or

(iii) A diversified employee benefit plan, *provided:*

(A) The investments of the plan are administered by an independent trustee, and the employee, or other person specified in section 208(a) does not participate in the selection of the plan's investments or designate specific plan investments (except for directing that contributions be divided among several different categories of investments, such as stocks, bonds or mutual funds, which are available to plan participants); and

(B) The plan is not a profit-sharing or stock bonus plan.

Note to paragraph (a)(1): Employee benefit plans that are tax deferred under 26 U.S.C. 401(k) are not considered profit-sharing plans for purposes of this section. However, for the exemption to apply, 401(k) plans must meet the requirements of paragraph (c)(1)(iii)(A) of this section.

(2) Particular matters of general applicability, such as rulemaking, affecting the State or local government sponsor of a State or local government pension plan described in paragraph (c)(1)(ii) of this section where the disqualifying financial interest in the matter arises because of participation in the plan.

Example 1: An attorney terminates his position with a law firm to take a position with the Department of Justice. As a result of his employment with the firm, the employee has interests in a 401(k) plan, the assets of which are invested primarily in stocks chosen by an independent financial management firm. He also participates in a

defined contribution pension plan maintained by the firm, the assets of which are stocks, bonds, and financial instruments. The plan is managed by an independent trustee. Assuming that the manager of the pension plan has a written policy of diversifying plan investments, the employee may act in matters affecting the plan's holdings. The employee may also participate in matters affecting the holdings of his 401(k) plan if the individual financial management firm that selects the plan's investments has a written policy of diversifying the plan's assets. Employee benefit plans that are tax deferred under 26 U.S.C. 401(k) are not considered profit-sharing or stock bonus plans for purposes of this part.

Example 2: An employee of the Department of Agriculture who is a former New York State employee has a vested interest in a pension plan established by the State of New York for its employees. She may participate in an agency matter that would affect a company whose stock is in the pension plan's portfolio. She also may participate in a matter of general applicability affecting all States, including the State of New York, such as the drafting and promulgation of a rule requiring States to expend additional resources implementing the Food Stamp program. Unless she obtains an individual waiver under 18 U.S.C. 208(b)(1), she may not participate in a matter involving the State of New York as a party, such as an application by the State for additional Federal funding for administrative support services, if that matter would affect the State's ability or willingness to honor its obligation to pay her pension benefits.

§ 2640.202 Exemptions for interests in securities.

(a) *De minimis exemption for matters involving parties.* An employee may participate in any particular matter involving specific parties in which the disqualifying financial interest arises from the ownership by the employee, his spouse or minor children of securities issued by one or more entities affected by the matter, if:

(1) The securities are publicly traded, or are long-term Federal Government, or are municipal securities; and

(2) The aggregate market value of the holdings of the employee, his spouse, and his minor children in the securities of all entities does not exceed $5,000.

Example 1: An employee owns 100 shares of publicly traded stock valued at $3,000 in XYZ Corporation. As part of his official duties, the employee is evaluating bids for performing computer maintenance services at his agency and discovers that XYZ Corporation is one of the companies that has submitted a bid. The employee is not required to recuse himself from continuing to evaluate the bids.

Example 2: In the preceding example, the employee and his spouse each own 100 shares of stock in XYZ Corporation, resulting in ownership of $6,000 worth of stock by the employee and his spouse. The exemption in paragraph (a) of this section would not permit the employee to participate in the evaluation of bids because the aggregate market value of the holdings of the employee, spouse and minor children in XYZ Corporation exceeds $5,000. The employee could, however, seek an individual waiver under 18 U.S.C. 208(b)(1) in order to participate in the evaluation of bids.

Example 3: An employee is assigned to monitor XYZ Corporation's performance of a contract to provide computer maintenance services at the employee's agency. At the time the employee is first assigned these duties, he owns publicly traded stock in XYZ Corporation valued at less than $5,000. During the time the contract is being performed, however, the value of the employee's stock increases to $7,500. When the employee knows that the value of his stock exceeds $5,000, he must disqualify himself from any further participation in matters affecting XYZ Corporation or seek an individual waiver under 18 U.S.C. 208(b)(1). Alternatively, the employee may divest the portion of his XYZ stock that exceeds $5,000. This can be accomplished through a standing order with his broker to sell when the value of the stock exceeds $5,000.

(b) *De minimis exemption for matters of general applicability.* An employee may participate in any particular matter of general applicability, such as rulemaking, in which the disqualifying financial interest arises from the ownership by the employee, his spouse or minor children of securities issued by one or more entities affected by the matter, if:

(i) The securities are publicly traded, or are municipal securities, the market value of which does not exceed:

(A) $25,000 in any one such entity; and

(B) $50,000 in all affected entities; or

(ii) The securities are long-term Federal Government securities, the market value of which does not exceed $50,000.

(2) For purposes of this paragraph (b), the value of securities owned by the employee, his spouse, and minor children must be aggregated in applying the exemption.

Example 1: The Bureau of Export Administration at the Department of Commerce is in the process of formulating a regulation concerning exportation of portable computers. The regulation will affect all domestic companies that sell portable computers. An employee of the Department who is assisting in drafting the regulation owns $17,000 worth of stock in CompAmerica and $20,000 worth of stock in XYZ Computer Inc. Even though the employee owns $37,000 worth of stock in companies that will be affected by the regulation, she may participate in drafting the regulation because the value of the securities she owns does not exceed $25,000 in any one affected company and the total value of stock owned in all affected companies does not exceed $50,000.

Example 2: A health scientist administrator employed in the Public Health Service at the Department of Health and Human Services is assigned to serve on a Department-wide task force that will recommend changes in how Medicare reimbursements will be made to health care providers. The employee owns $10,000 worth of shares in a sector mutual fund invested primarily in health-related companies such as pharmaceuticals, developers of medical instruments and devices, managed care health organizations, and acute care hospitals. Because the fund is not a ''diversified mutual fund'' as defined in § 2640.102(a), the exemption at § 2640.201(a) is not applicable. However, because the fund is a ''publicly traded security'' as defined in § 2640.102(p), the exemption for financial interests arising from ownership of a de minimis amount of securities at paragraph (b) of this section will permit the employee to participate on the task force.

(c) *Exemption for certain Federal Government securities.* An employee may participate in any particular matter in which the disqualifying financial interest arises from the ownership of short-term Federal Government securities or from U.S. Savings bonds.

(d) *Exemption for interests of tax-exempt organizations.* An employee may participate in any particular matter in which the disqualifying financial interest arises from the ownership of publicly traded or municipal securities, or long-term Federal Government securities by an organization which is tax-exempt pursuant to 26 U.S.C. 501(c)(3) or (4), and of which the employee is an unpaid officer, director, or trustee, or an employee, if:

(1) The matter affects only the organization's investments, not the organization directly;

(2) The employee plays no role in making investment decisions for the organization, except for participating in the decision to invest in several different categories of investments such as stocks, bonds, or mutual funds; and

(3) The organization's only relationship to the issuer, other than that which arises from routine commercial transactions, is that of investor.

Example 1: An employee of the Federal Reserve is a director of the National Association to Save Trees (NAST), an environmental organization that is tax-exempt under section 501(c)(3) of the Internal Revenue Code. The employee knows that NAST has an endowment fund that is partially invested in the publicly traded stock of Computer Inc. The employee's position at the Federal Reserve involves the procurement of computer software, including software marketed by Computer Inc. The employee may participate in the procurement of software from Computer Inc. provided that he is not involved in selecting NAST's investments, and that NAST has no relationship to Computer Inc. other than as

an investor in the company and routine purchaser of Computer Inc. software.

(e) *Exemption for certain interests of general partners.* An employee may participate in any particular matter in which the disqualifying financial interest arises from:

(1) The ownership of publicly traded securities, long-term Federal Government securities, or municipal securities by the employee's general partner, *provided*:

(i) Ownership of the securities is not related to the partnership between the employee and his general partner, and

(ii) The value of the securities does not exceed $200,000; or

(2) Any interest of the employee's general partner if the employee's relationship to the general partner is as a limited partner in a partnership that has at least 100 limited partners.

Example 1: An employee of the Department of Transportation is a general partner in a partnership that owns commercial property. The employee knows that one of his partners owns stock in an aviation company valued at $100,000 because the stock has been pledged as collateral for the purchase of the commercial property by the partnership. In the absence of an individual waiver under 18 U.S.C. 208(b)(1), the employee may not act in a matter affecting the aviation company. Because the stock has been pledged as collateral, ownership of the securities is related to the partnership between the employee and his general partner.

Example 2: An employee of the Pension Benefit Guaranty Corporation (PBGC) has a limited partnership interest in Ambank Partners, a large partnership with more than 500 limited partners. The partnership assets are invested in the securities of various financial institutions. Ambank's general partner is Capital Investment Services, an investment firm whose pension plan for its own employees is being examined by the PBGC for possible unfunded liabilities. Even though the employee's general partner (Capital Investment Services) has a financial interest in PBGC's review of the pension plan, the employee may participate in the review because his relationship with his general partner is that of a limited partner in a partnership that has at least 100 limited partners.

§ 2640.203 Miscellaneous exemptions.

(a) *Hiring decisions.* An employee may participate in a hiring decision involving an applicant who is currently employed by a corporation that issues publicly traded securities, if the disqualifying financial interest arises from:

(1) Ownership of publicly traded securities issued by the corporation; or

(2) Participation in a vested pension plan sponsored by the corporation.

(b) *Employees on leave from institutions of higher education.* An employee on a leave of absence from an institution of higher education may participate in any particular matter of general applicability affecting the financial interests of the institution from which he is on leave, *provided* that the matter will not have a special or distinct effect on that institution other than as part of a class.

Example 1: An employee at the Department of Defense (DOD) is on a leave of absence from his position as a tenured Professor of Engineering at the University of California (UC) at Berkeley. While at DOD, he is assigned to assist in developing a regulation which will contain new standards for the oversight of grants given by DOD. Even though the University of California at Berkeley is a DOD grantee, and will be affected by these new monitoring standards, the employee may participate in developing the standards because UC Berkeley will be affected only as part of the class of all DOD grantees. However, if the new standards would affect the employee's own financial interest, such as by affecting his tenure or his salary, the employee could not participate in the matter unless he first obtains an individual waiver under section 208(b)(1).

Example 2: An employee on leave from a university could not participate in the development of an agency program of grants specifically designed to facilitate research in jet propulsion systems where the employee's university is one of just two or three universities likely to receive a grant under the new program. Even though the grant announcement is open to all universities, the employee's university is among the very few known to have facilities and equipment adequate to conduct the research. The matter would have a distinct effect on the institution other than as part of a class.

(c) *Multi-campus institutions of higher education.* An employee may participate in any particular matter affecting one campus of a State multi-campus institution of higher education, if the employee's disqualifying financial interest is employment in a position with no multi-campus responsibilities at a separate campus of the same multi-campus institution.

Example 1: A special Government employee (SGE) member of an advisory committee convened by the National Science Foundation is a full-time professor in the School of Engineering at one campus of a State university. The SGE may participate in formulating the committee's recommendation to award a grant to a researcher at another campus of the same State university system.

Example 2: A member of the Board of Regents at a State university is asked to serve on an advisory committee established by the Department of Health and Human Services to consider applications for grants for human genome research projects. An application from another university that is part of the same State system will be reviewed by the committee. Unless he receives an individual waiver under section 208(b)(1) or (b)(3), the advisory committee member may not participate in matters affecting the second university that is part of the State system because as a member of the Board of Regents, he has duties and responsibilities that affect the entire State educational system.

(d) *Exemptions for financial interests arising from Federal Government employment or from Social Security or veterans' benefits.* An employee may participate in any particular matter where the disqualifying financial interest arises from Federal Government or Federal Reserve Bank salary or benefits, or from Social Security or veterans' benefits, except an employee may not:

(1) Make determinations that individually or specially affect his own salary and benefits; or

(2) Make determinations, requests, or recommendations that individually or specially relate to, or affect, the salary or benefits of any other person specified in section 208.

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 unless he has been delegated, in advance, authority to make such approvals in accordance with agency policy.

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.

Note to paragraph (d): 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.

(e) *Commercial discount and incentive programs.* An employee may participate in any particular matter affecting the sponsor of a discount, incentive, or other similar benefit program if the disqualifying financial interest arises because of participation in the program, *provided:*

(1) The program is open to the general public; and

(2) Participation in the program involves no other financial interest in the sponsor, such as stockholding.

Example 1: An attorney at the Pension Benefit Guaranty Corporation who is a member of a frequent flier program sponsored by Alpha Airlines may assist in an action against Alpha for failing to make required payments to its employee pension fund, even though the agency action will cause Alpha to disband its frequent flier program.

(f) *Mutual insurance companies.* An employee may participate in any particular matter affecting a mutual insurance company if the disqualifying financial interest arises because of an interest as a policyholder, unless the matter would affect the company's ability to pay claims required under the terms of the policy or to pay the cash value of the policy.

Example 1: An administrative law judge at the Department of Labor receives dividends from a mutual insurance company which he takes in the form of reduced premiums on his life insurance policy. The amount of the dividend is based upon the company's overall profitability. Nevertheless, he may preside in a Department hearing involving a major corporation insured by the same company even though the insurance company will have to pay the corporation's penalties and other costs if the Department prevails in the hearing.

Example 2: An employee of the Department of Justice is assigned to prosecute a case involving the fraudulent practices of an issuer of junk bonds. While developing the facts pertinent to the case, the employee learns that the mutual life insurance company from which he holds a life insurance policy has invested heavily in these junk bonds. If the Government succeeds in its case, the bonds will be worthless and the corresponding decline in the insurance company's investments will impair the company's ability to pay claims under the policies it has issued. The employee may not continue assisting in the prosecution of the case unless he obtains an individual waiver pursuant to section 208(b)(1).

(g) *Exemption for employment interests of special Government employees serving on advisory committees.* A special Government employee serving on an advisory committee within the meaning of the Federal Advisory Committee Act (5 U.S.C. app.) may participate in any particular matter of general applicability where the disqualifying financial interest arises from his non-Federal employment or non-Federal prospective employment, *provided* that the matter will not have a special or distinct effect on the employee or employer other than as part of a class. For purposes of this paragraph, ''disqualifying financial interest'' arising from non-Federal employment does not include the interests of a special Government employee arising from the ownership of stock in his employer or prospective employer.

Example 1: A chemist employed by a major pharmaceutical company has been appointed to serve on an advisory committee established to develop recommendations for new standards for AIDS vaccine trials involving human subjects. Even though the chemist's employer is in the process of developing an experimental AIDS vaccine and therefore will be affected by the new standards, the chemist may participate in formulating the advisory committee's recommendations. The chemist's employer will be affected by the new standards only as part of the class of all pharmaceutical companies and other research entities that are attempting to develop an AIDS vaccine.

Example 2: The National Cancer Institute (NCI) has established an advisory committee to evaluate a university's performance of an NCI grant to study the efficacy of a newly developed breast cancer drug. An employee of the university may not participate in the evaluation of the university's performance because it is not a matter of general applicability.

Example 3: An engineer whose principal employment is with a major Department of Defense (DOD) contractor is appointed to serve on an advisory committee established by DOD to develop concepts for the next generation of laser-guided missiles. The engineer's employer, as well as a number of other similar companies, has developed certain missile components for DOD in the past, and has the capability to work on aspects of the newer missile designs under consideration by the committee. The engineer owns $20,000 worth of stock in his employer. Because the exemption for the employment interests of special Government employees serving on advisory committees does not extend to financial interests arising from the ownership of stock, the engineer may not participate in committee matters affecting his employer unless he receives an individual waiver under section 208(b)(1) or (b)(3), or determines whether the exemption for interests in securities at § 2640.202(b) applies.

(h) *Directors of Federal Reserve Banks.* A Director of a Federal Reserve Bank or a branch of a Federal Reserve Bank may participate in the following matters, even though they may be particular matters in which he, or any other person specified in section 208(a), has a disqualifying financial interest:

(1) Establishment of rates to be charged for all advances and discounts by Federal Reserve Banks;

(2) Consideration of monetary policy matters, regulations, statutes and proposed or pending legislation, and other matters of broad applicability intended to have uniform application to banks within the Reserve Bank district;

(3) Approval or ratification of extensions of credit, advances or discounts to a depository institution that has not been determined to be in a

hazardous financial condition by the President of the Reserve Bank; or

(4) Approval or ratification of extensions of credit, advances or discounts to a depository institution that has been determined to be in a hazardous financial condition by the President of the Reserve Bank, *provided that* the disqualifying financial interest arises from the ownership of stock in, or service as an officer, director, trustee, general partner or employee, of an entity other than the depository institution, or its parent holding company or subsidiary of such holding company.

(i) *Medical products.* A special Government employee serving on an advisory committee within the meaning of the Federal Advisory Committee Act (5 U.S.C. app.) may participate in Federal advisory committee matters concerning medical products if the disqualifying financial interest arises from:

(1) Employment with a hospital or other similar medical facility whose only interest in the medical product or device is purchase of it for use by, or sale to, its patients; or

(2) The use or prescription of medical products for patients.

(j) *Nonvoting members of standing technical advisory committees established by the Food and Drug Administration.* A special Government employee serving as a nonvoting representative member of an advisory committee established by the Food and Drug Administration pursuant to the requirements of the Federal Advisory Committee Act (5 U.S.C. app.) and appointed under a statutory authority requiring the appointment of representative members, may participate in any particular matter affecting a disqualifying financial interest in the class which the employee represents. Nonvoting representative members of Food and Drug Administration advisory committees are described in 21 CFR 14.80(b)(2), 14.84, 14.86, and 14.95(a).

Example 1: The FDA's Medical Devices Advisory Committee is established pursuant to 21 U.S.C. 360c(b), which requires that each panel of the Committee include one nonvoting industry representative and one nonvoting consumer representative. An industry representative on the Ophthalmic Devices Panel of this Committee has been appointed as a special Government employee, in accordance with the procedures described at 14 CFR 14.84. The special Government employee may participate in Panel discussions concerning the premarket approval application for a silicone posterior chamber intraocular lens manufactured by MedInc, even though she is employed by, and owns stock in, another company that manufactures a competing product. However, a consumer representative who serves as a special Government employee on the same Panel may not participate in Panel discussions if he owns $30,000 worth of stock in MedInc unless he first obtains an individual waiver under 18 U.S.C. 208 (b)(1) or (b)(3).

(k) *Employees of the Tennessee Valley Authority.* An employee of the Tennessee Valley Authority (TVA) may participate in developing or approving rate schedules or similar matters affecting the general cost of electric power sold by TVA, if the disqualifying financial interest arises from use of such power by the employee or by any other person specified in section 208(a).

§ 2640.204 Prohibited financial interests.

None of the exemptions set forth in §§ 2640.201, 2640.202, or 2640.203 apply to any financial interest held or acquired by an employee, his spouse, or minor child in violation of a statute or agency supplemental regulation issued in accordance with 5 CFR 2635.105, or that is otherwise prohibited under 5 CFR 2635.403(b).

Example 1: The Office of the Comptroller of the Currency (OCC), in a regulation that supplements part 2635 of this chapter, prohibits certain employees from owning stock in commercial banks. If an OCC employee purchases stock valued at $2,000 in contravention of the regulation, the exemption at § 2640.202(a) for interests arising from the ownership of no more than $5,000 worth of publicly traded stock will not apply to the employee's participation in matters affecting the bank.

§ 2640.205 Employee responsibility.

Prior to taking official action in a matter which an employee knows would affect his financial interest or the interest of another person specified in 18 U.S.C. 208(a), an employee must determine whether one of the exemptions in §§ 2640.201, 2640.202, or 2640.203 would permit his action notwithstanding the existence of the disqualifying interest. An employee who is unsure whether an exemption is applicable in a particular case, should consult an agency ethics official prior to taking action in a particular matter.

§ 2640.206 Existing agency exemptions.

An employee who, prior to January 17, 1997, acted in an official capacity in a particular matter in which he had a financial interest, will be deemed to have acted in accordance with applicable regulations if he acted in reliance on an exemption issued by his employing Government agency pursuant to 18 U.S.C. 208(b)(2), as in effect prior to November 30, 1989.

Subpart C—Individual Waivers

§ 2640.301 Waivers issued pursuant to 18 U.S.C. 208(b)(1).

(a) *Requirements for issuing an individual waiver under 18 U.S.C. 208(b)(1).* Pursuant to 18 U.S.C. 208(b)(1), an agency may determine in an individual case that a disqualifying financial interest in a particular matter or matters is not so substantial as to be deemed likely to affect the integrity of the employee's services to the Government. Upon making that determination, the agency may then waive the employee's disqualification notwithstanding the financial interest, and permit the employee to participate in the particular matter. Waivers issued pursuant to section 208(b)(1) should comply with the following requirements:

(1) The disqualifying financial interest, and the nature and circumstances of the particular matter or matters, must be fully disclosed to the Government official responsible for appointing the employee to his position (or other Government official to whom authority to issue such a waiver for the employee has been delegated);

(2) The waiver must be issued in writing by the Government official responsible for appointing the employee to his position (or other Government official to whom the authority to issue such a waiver for the employee has been delegated);

(3) The waiver should describe the disqualifying financial interest, the particular matter or matters to which it applies, the employee's role in the matter or matters, and any limitations on the employee's ability to act in such matters;

(4) The waiver shall be based on a determination 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. Statements concerning the employee's good character are not material to, nor a basis for making, such a decision;

(5) The waiver must be issued prior to the employee taking any action in the matter or matters; and

(6) The waiver may apply to both present and future financial interests, provided the interests are described with sufficient specificity.

Note to paragraph (a): The disqualifying financial interest, the particular matter or matters to which the waiver applies, and the employee's role in such matters do not need to be described with any particular degree of specificity. For example, if a waiver were to apply to all matters which an employee would undertake as part of his official duties,

the waiver document would not have to enumerate those duties. The information contained in the waiver, however, should provide a clear understanding of the nature and identity of the disqualifying financial interest, the matters to which the waiver will apply, and the employee's role in such matters.

(b) *Agency determination concerning substantiality of the disqualifying financial interest.* In determining whether a disqualifying financial interest is sufficiently substantial to be deemed likely to affect the integrity of the employee's services to the Government, the responsible official may consider the following factors:

(1) The type of interest that is creating the disqualification (e.g. stock, bonds, real estate, other securities, cash payment, job offer, or enhancement of a spouse's employment);

(2) 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;

(3) The dollar value of the disqualifying financial interest, if it is known or can be estimated (e.g. the amount of cash payment which may be gained or lost, the salary of the job which will be gained or lost, the predictable change in either the market value of the stock or the actual or potential profit or loss or cost of the matter to the company issuing the stock, the change in the value of real estate or other securities);

(4) The value of the financial instrument or holding from which the disqualifying financial interest arises (e.g. the face value of the stock, bond, other security or real estate) and its value in relationship to the individual's assets. If the disqualifying financial interest is that of a general partner or organization specified in section 208, this information must be provided only to the extent that it is known by the employee; and

(5) 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.

(6) Other factors which may be taken into consideration include:

(i) The sensitivity of the matter;

(ii) The need for the employee's services in the particular matter; and

(iii) Adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that the integrity of the employee's services would be questioned by a reasonable person.

§ 2640.302 Waivers issued pursuant to 18 U.S.C. 208(b)(3).

(a) *Requirements for issuing an individual waiver under 18 U.S.C. 208(b)(3).* Pursuant to 18 U.S.C. 208(b)(3), an agency may determine in an individual case that the prohibition of 18 U.S.C. 208(a) should not apply to a special Government employee serving on, or an individual being considered for, appointment to an advisory committee established under the Federal Advisory Committee Act, notwithstanding the fact that the individual has one or more financial interests that would be affected by the activities of the advisory committee. The agency's determination must be based on a certification that the need for the employee's services outweighs the potential for a conflict of interest created by the financial interest involved. Waivers issued pursuant to 18 U.S.C. 208(b)(3) should comply with the following requirements:

(1) The advisory committee upon which the individual is serving, or will serve, is an advisory committee within the meaning of the Federal Advisory Committee Act, 5 U.S.C. app.;

(2) The waiver must be issued in writing by the Government official responsible for the individual's appointment (or other Government official to which authority to issue such waivers has been delegated) after the official reviews the financial disclosure report filed by the individual pursuant to the Ethics in Government Act of 1978;

(3) The waiver must include a certification that the need for the individual's services on the advisory committee outweighs the potential for a conflict of interest;

(4) The facts upon which the certification is based should be fully described in the waiver, including the nature of the financial interest, and the particular matter or matters to which the waiver applies;

(5) The waiver should describe any limitations on the individual's ability to act in the matter or matters;

(6) The waiver must be issued prior to the individual taking any action in the matter or matters; and

(7) The waiver may apply to both present and future financial interests of the individual, provided the interests are described with sufficient specificity.

(b) *Agency certification concerning need for individual's services.* In determining whether the need for an individual's services on an advisory committee outweighs the potential for a conflict of interest created by the disqualifying financial interest, the responsible official may consider the following factors:

(1) The type of interest that is creating the disqualification (e.g. stock, bonds, real estate, other securities, cash payment, job offer, or enhancement of a spouse's employment);

(2) The identity of the person whose financial interest is involved, and if the interest is not the individual's, the relationship of that person to the individual;

(3) The uniqueness of the individual's qualifications;

(4) The difficulty of locating a similarly qualified individual without a disqualifying financial interest to serve on the committee;

(5) The dollar value of the disqualifying financial interest, if it is known or can be estimated (e.g. the amount of cash payment which may be gained or lost, the salary of the job which will be gained or lost, the predictable change in either the market value of the stock or the actual or potential profit or loss or cost of the matter to the company issuing the stock, the change in the value of real estate or other securities);

(6) The value of the financial instrument or holding from which the disqualifying financial interest arises (e.g. the face value of the stock, bond, other security or real estate) and its value in relationship to the individual's assets. If the disqualifying financial interest is that of a general partner or organization specified in section 208, this information must be provided only to the extent that it is known by the employee; and

(7) The extent to which the disqualifying financial interest will be affected individually or particularly by the actions of the advisory committee.

§ 2640.303 Consultation and notification regarding waivers.

When practicable, an official is required to consult formally or informally with the Office of Government Ethics prior to granting a waiver referred to in §§ 2640.301 and 2640.302. A copy of each such waiver is to be forwarded to the Director of the Office of Government Ethics.

§ 2640.304 Public availability of agency waivers.

(a) *Availability.* A copy of an agency waiver issued pursuant to 18 U.S.C. 208 (b)(1) or (b)(3) shall be made available upon request to the public by the issuing agency. Public release of waivers shall be in accordance with the procedures set forth in section 105 of the Ethics in Government Act of 1978, as amended. Those procedures are described in 5 CFR 2634.603.

(b) *Limitations on availability.* In making a waiver issued pursuant to 18 U.S.C. 208 (b)(1) or (b)(3) publicly available, an agency:

(1) May withhold from public disclosure any information contained in the waiver that would be exempt from disclosure pursuant to 5 U.S.C. 552; and

(2) Shall withhold from public disclosure information in a waiver issued pursuant to 18 U.S.C. 208(b)(3) concerning an individual's financial interest which is more extensive than that required to be disclosed by the individual in his financial disclosure report under the Ethics in Government Act of 1978, as amended, or which is otherwise subject to a prohibition on public disclosure under law.

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