

OFFICE OF GOVERNMENT ETHICS

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**MEMORANDUM dated December 19, 2001,
from Marilyn L. Glynn, General Counsel,
to Designated Agency Ethics Officials
Regarding Recent Office of Legal Counsel
Opinion Concerning Status of Trustees
of a Private Trust Under 18 U.S.C. § 208**

This is to bring to your attention a recent opinion issued by the Office of Legal Counsel (OLC), Department of Justice, concerning the application of 18 U.S.C. § 208 to individuals serving as trustees of a private trust. See Memorandum of Edward Whelan III, Acting Assistant Attorney General, to Marilyn L. Glynn, General Counsel, Office of Government Ethics (OGE), "The Nature of the Financial Interest of a Trustee of a Private Trust and the Scope of the Definition of Serving in an 'Organization' as a 'Trustee' under 18 U.S.C. § 208(a)," November 2, 2001, which may be obtained from OGE's Website, under the "Other Ethics Guidance" category in the "Laws and Regulations" section, at www.usoge.gov. The immediate practical consequence of this opinion is that, in many situations, employees will not be deemed to have a disqualifying financial interest in matters affecting the holdings of a trust in which the employee's spouse or minor child serves as a trustee. Nevertheless, consistent with a longstanding executive branch interpretation, employees still will be deemed to have a disqualifying interest in particular matters affecting the holdings of private trusts in which they themselves serve as trustees.

The opinion distinguishes carefully between "personal" and "organizational" financial interests under section 208. With respect to the former, the opinion concludes, with certain caveats, that a trustee generally does not have a personal financial interest in every particular matter that affects the holdings of a private trust. In this connection, OLC quotes the letter from OGE which requested the opinion:

If . . . the trustee has no beneficial interest, receives no fees affected by the performance of trust investments, and there are no facts suggesting any potential fiduciary liability as a direct and predictable result of the particular matter, then one would not necessarily find any real potential for gain or loss to the trustee personally.

Id. at 2 (quoting Letter of Marilyn L. Glynn to Daniel L. Koffsky, Acting Assistant Attorney General, March 30, 2001). The mere fact that a trustee is technically the "legal" owner of the trust

property, under the common law of trusts, does not give the trustee a personal financial interest in particular matters affecting the trust property. For example, if the spouse of an employee serves as trustee of a trust for the benefit of a neighbor, the spouse does not automatically have a financial interest in particular matters affecting the stock holdings of the trust; consequently, the employee would not invariably be disqualified from participating in particular matters that directly and predictably affect the holdings of the trust for which his or her spouse serves as trustee. Any suggestion to the contrary in prior OGE issuances is superseded. See, e.g., *Public Financial Disclosure: A Reviewer's Reference* 6-34 (1994).¹

Nevertheless, where it is the employee who serves as trustee, there will still be a disqualifying interest under section 208. That is because the interests of certain organizations are imputed to an employee under the statute. With respect to imputed organizational interests, the OLC opinion concludes that an employee who serves as a trustee of a private trust is a "trustee" of an "organization," within the meaning of section 208(a). Therefore, even where an employee does not have a personal financial interest in the property of a trust, the interests of a trust will always be imputed to an employee who serves as trustee of a private trust. It is important to remember, however, that the interests of a trust in which an employee's spouse or minor child serves as trustee are not imputed to the employee under the organizational interest provision of section 208(a).

¹ On a related matter, OGE expects to issue additional guidance shortly concerning the reporting of trust holdings on financial disclosure statements, as well as guidance concerning the reporting of assets of an estate for which a reporting individual serves as executor or of property with respect to which an individual has some control pursuant to a power of attorney.