

Office of Government Ethics
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Letter to a Designated Agency Ethics Official
dated May 5, 1987

This responds to your letter of April 20, 1987, in which you have asked us to address the issues raised by the draft waiver you sent to us on April 6.

The purpose of a restriction like that found in section 208(a) is to prohibit an employee from acting in a situation where he or she has a direct or derivative financial interest.¹ The restriction does not deal with the motive or good faith of the employee. Rather than judge the personal integrity of the employee in each action he or she might take involving a personal or derivative financial interest, Congress felt the Government was better served simply by prohibiting any such action. In doing so, however, it also recognized that there were going to be some situations where the size of the interest in relation to the action being taken was going to be so insubstantial that it would not affect the services of the employee. This decision, too, was to rest on the size of the interest and the specific kind of action to be taken, not on the personal integrity of the actual employee.

As my staff indicated to you as well as to [another agency employee], we believe that your proposed waiver introduces the element of good faith into defining the actions which are allowed and thus, changes the intent standard of the statute and its real purpose. To trigger the restrictions of section 208(a), two elements must exist: (1) at the time an employee participates in a matter, he or she must realize that he or she is participating in the matter and (2) that he or she had knowledge that a personal or derivative financial interest is involved in the matter. The intent of the employee in taking the action is not at issue. Your good faith test weaves into the restriction this second level of intent and that is an inappropriate way to thwart the purpose of section 208(a).

However, we fully believe that the element of good faith is one of many elements which goes into any prosecutorial decision. We cannot offer anyone an opinion regarding prosecutorial review by the Justice Department. As you know, the Inspector General is

monitoring the loaned manager and advisor program for us. In those instances where the Office of Inspector General feels that a loaned manager or advisor took an action outside of the Guidelines² (with or without a waiver), we will first look to determine whether the actions taken had a direct and predictable effect on the personal or derivative financial interests of that loaned employee. If not, there is no question as to a possible violation of section 208; there will be none. Second, if the actions might have an effect on the employee's personal or derivative financial interests, we will look closely at that effect as well as those actions. All of these factors will go into any determination by us to refer this to the Department of Justice for further review.

[The remaining portion of this letter did not involve an analysis of any statute or regulation and has been deleted for purposes of confidentiality.]

Sincerely,

David H. Martin
Director

1 For purposes of this letter, we are using the term derivative financial interest to mean the financial interests of a spouse, minor child, partner, organization in which the employee serves as an officer, director, trustee, partner, or employee, or any person or organization with whom the employee is negotiating or has any arrangement for prospective employment.

2 The Guidelines referenced here were developed in the fall of 1986 by [the agency] with the assistance of OGE for purposes of setting forth guidance for the activities by loaned managers and advisors so that they would not participate in actions that would violate or appear to violate the conflict of interest statutes or standards of conduct.