

Office of Government Ethics

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Letter to General Counsel for a Governmental Foundation dated November 23, 1988

You have asked for my opinion regarding the advisability of seeking a waiver under 18 U.S.C. § 208(b)(1) which would permit [the Director of the governmental foundation] to participate in matters involving [foundation]-funded centers in which [Company A] participates as an "industrial affiliate."

Subsection 208(b)(1) commits waiver decisions to the judgment of the appointing authority and vests sole discretion in that official. Under 3 C.F.R. § 100.735-32, the Counsel to the President has been delegated authority to grant subsection 208(b)(1) waivers to those who, like [the Director], hold Presidential appointments requiring advice and consent of the Senate. If the Counsel to the President were to ask for the views of this Office in regard to the proposed waiver for [the Director], I would feel obliged to express the concerns stated below.

Subsection 208(b)(1) provides for the granting of an individual waiver based on a determination that the disqualifying "interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect" from the officer or employee. The standard for waiver under section 208(b)(1) suggests two lines of inquiry, focusing on (1) the financial interest involved and (2) the services expected of the employee. The analysis set forth in your letter reflects that you have considered factors developing both of these lines of inquiry. Although a waiver granted on that analysis would meet the statutory standard and would protect the individual from prosecution under 18 U.S.C. § 208(a), there are considerations beyond criminal law that should enter into an agency's decision to seek a particular waiver.

[The Director's] proposed participation in awarding [foundation] funding to centers as to which [Company A] is an industrial affiliate would, in my opinion, raise an appearance of impropriety that cannot be overcome simply by using the waiver authority of 18 U.S.C. § 208(b)(1). I appreciated your view that

the financial consequences of any award for a research center are difficult to predict. It is difficult, no doubt, to project the consequence of much of the research to be undertaken. Nevertheless, I believe it would be inappropriate to disregard the substantial dollar value of [the Director and the Director's spouses's] holdings of [Company A] stocks. To be sure, from [Company A's] vantage, [the Director and the Director's spouse's] holdings are de minimus. The emphasis you place on this fact in no way detracts from the significance of their own interest in the profitability of [Company A].

Moreover, the significance of [the Director's] financial interest in [Company A] was taken into account in connection with his nomination for the position of Director. A letter [of a certain date] from the foundation's designated agency ethics official to this Office represents that "[the Director] will be insulated from any participation in matters involving [Company A] because of his continuing substantial interests in the stock of [Company A]." I assume that similar representations were made in connection with his confirmation hearings and that the proposed waiver would violate the understandings reached at that time.

Sincerely,

Frank Q. Nebeker
Director