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: Proposed rule.

SUMMARY: The Office of Government Ethics is issuing a proposed regulation 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. 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 proposed regulation describes those financial interests. It also proposes to provide guidance to agencies on the factors to consider when issuing individual waivers under section 208(b)(1) or (b)(3).

DATES: Comments by agencies and the public are invited and are due by November 13, 1995.

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

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

SUPPLEMENTARY INFORMATION: Section 208 of title 18 of the United States Code was enacted in 1962 as part of a general revision of the criminal statutes dealing with bribery, graft, and conflicts of interest. It was the successor to 18 U.S.C. 434, a statute enacted in the Civil War era, which prohibited a Government employee from transacting business for the Government with any business entity in which the employee held a financial interest. Since it became effective in 1963, 18 U.S.C. 208(a) has prohibited an employee of the executive branch from participating in an official capacity in any particular matter in which, to his knowledge, he or other specified persons or organizations, has a financial interest. As originally enacted, section 208(b) provided for certain exceptions to the disqualification mandated by section 208(a). Under 18 U.S.C. 208(b)(1), in individual cases a determination could be made by the official responsible for the employee's appointment that the employee could act in matters in which he or other specified individuals or entities had a financial interest because the interest was not so substantial as to be deemed likely to affect the integrity of the employee's services to the Government. Under 18 U.S.C. 208(b)(2), each agency had the authority to determine, by regulation, that certain financial interests were too remote or too inconsequential to affect the integrity of the services of that agency's employees. These regulatory ''waivers'' permitted all employees of the particular agency to act in Government matters in which their only financial interest was one of the type specified in the regulation.

The Ethics Reform Act of 1989 (Pub. L. No. 101–94), as amended, (''the Act''), amended 18 U.S.C. 208 to eliminate the authority of individual agencies to adopt agencywide exemptions from the applicability of section 208(a). Instead, section 208(d)(2) directs the Office of Government Ethics, after consultation with the Attorney General, to adopt uniform regulations exempting financial interests from the applicability of section 208(a) for all or a portion of the executive branch if OGE determines that such interests are either too remote or too inconsequential to affect an employee's services to the Government. The Office of Government Ethics has consulted with the Office of Personnel Management and the Department of Justice, and pursuant to section 201(c) of Executive Order 12674, as modified by E.O. 12731, has obtained the concurrence of the Justice Department.

The Office of Government Ethics is separately publishing in the **Federal Register** an interim regulation, effective upon publication, establishing a single exemption under 18 U.S.C. 208(b)(2) for disqualifying financial interests that arise from Federal Government salary and benefits or from Social Security or veterans' benefits. That exemption is being issued for codification on interim basis at § 2640.101 of 5 CFR. However, when this proposed overall section 208 regulation is ultimately issued as a final regulation, the exemption for certain Federal Government employment-related financial interests will be moved and placed with the miscellaneous exemptions described in § 2640.203. Therefore, the exemption being established in the separate interim regulation is also being republished as part of this proposed regulation for eventual codification at 5 CFR 2640.203(d). Section 2640.101 of this proposed regulation sets forth a general discussion of the purpose of the overall regulation.

Although individual agencies no longer have the authority to issue agency-specific general exemptions, previously issued agency regulatory ''waivers'' continue to apply until this proposed regulation is adopted as a final rule and becomes effective. When effective, this rule will supersede all agency regulatory waivers issued under 18 U.S.C. 208(b)(2) as in effect prior to November 30, 1989. *See* 5 CFR 2635.402(d)(2). As proposed, this regulation would protect employees who acted in reliance on such ''waivers'' issued by agencies prior to the effective date of the final regulation. Employees who acted in reliance on such an agency regulatory waiver in effect prior to the effective date of the final version of this regulation would be deemed to have acted in accordance with applicable authority.

This proposed regulation describes those holdings or relationships that give rise to financial interests that OGE has determined are either too remote or too inconsequential in value to be likely to affect an employee's consideration of any particular matter. Employees who have these disqualifying financial interests would be permitted, to the extent described in the regulation, to participate in matters affecting such interests notwithstanding the general prohibition in section 208(a).

Section 208, as amended, still authorizes agencies to issue individual waivers to employees on a case-by-case basis under section 208(b)(1). The determinations required by section 208 for issuance of an individual waiver are unchanged from previous statutory requirements. Section 208(b)(1) provides that an individual waiver may be issued if the official responsible for the officer's or employee's appointment determines that the interest in the matter ''is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee.'' This proposed regulation provides guidance to agencies in making such determinations by listing factors

agencies should consider before granting a waiver.

In addition, section 208, as amended, gives agencies specific authority concerning disqualifying financial interests held by special Government employees serving on, or being considered for appointment to, advisory committees within the meaning of the Federal Advisory Committee Act, 5 U.S.C. app. After reviewing the financial disclosure statement required by the Ethics in Government Act of 1978 to be filed by such an individual, the official responsible for the employee's appointment can ''waive'' the individual's disqualifying financial interest by certifying that the need for the individual's services on the advisory committee outweighs the potential for a conflict of interest created by the financial interest involved. This proposed regulation would describe the factors an agency is to consider in determining whether a waiver should be granted under section 208(b)(3).

Since section 208 became effective in 1963, agency ethics officials have often used the term ''waiver'' to describe exceptions to the prohibition authorized under either section 208(b)(1) or (b)(2). This proposed rule uses the term ''exemption'' to describe regulatory exceptions authorized by OGE under section 208(b)(2), and ''waiver'' to describe individual exceptions granted under section 208 (b)(1) or (b)(3). The Office of Government Ethics believes the term ''exemption'' more accurately describes the fact that section 208(b)(2) permits OGE to ''exempt'' certain financial interests from the prohibition in section 208(a).

I. Scope of 18 U.S.C. 208(a)

Section 208(a) prohibits an officer or employee of the executive branch, or an officer or employee of an independent agency of the United States, or a Federal Reserve bank director, officer or employee, or an officer or employee of the District of Columbia, including a special Government employee, from participating personally and substantially in an official capacity

> through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter, in which to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest * * *.

18 U.S.C. 208(a).

An employee has a financial interest in a particular matter ''when there is a real possibility that he might gain or lose as a result of developments in or resolution of the matter.'' 83 OGE 1, at 2 (Jan. 7, 1983), published in the Informal Advisory Letters and Memoranda and Formal Opinions of the United States Office of Government Ethics 1979–1988 (OGE Advisory Publication), pp. 859, 861. The statute does not require that the amount of gain or loss be of any particular size, or likelihood. ''All that is required is that there be a real, as opposed to a speculative, possibility of benefit or detriment.'' *Id.* Section 208(a) has long been interpreted as applying where the matter will have a ''direct and predictable effect'' on the employee's financial interest or on the financial interests of other persons or entities specified in the statute. *See, e.g.,* 2 Opinions of the Office of the Legal Counsel 151, 155 (June 29, 1978). In this regulation, the financial interests of the employee and of the other individuals and entities specified in section 208 would be referred to as the employee's ''disqualifying financial interests.''

The meaning of the term ''financial interest'' is sometimes misunderstood. As used in section 208, the term ''financial interest'' refers to the possibility of financial gain or loss as a result of action on a matter. For example, if an employee is owed money by a person who is a party to an agency matter, the loan itself is not a ''financial interest'' within the meaning of section 208. Instead, the employee's financial interest in the matter arises from the possibility that the matter may have an effect on the debtor's ability or willingness to honor his obligation to pay the debt owed to the employee. The loan would be a disqualifying financial interest under section 208 only if the agency matter would have a direct and predictable effect on the debtor's ability or willingness to repay the loan.

Similarly, an employee may have a savings account in a financial institution which conducts business at the employee's agency. While the employee ordinarily would be viewed as having a ''financial interest'' in the deposits in his savings account, the employee's involvement in agency matters affecting the financial institution would not necessarily affect his financial interest in the savings account. In fact, in most such cases, the employee would not have a disqualifying financial interest within the meaning of section 208 because the agency matter in which the employee would participate would not result in any gain or loss to his savings account. He would be disqualified from acting in matters affecting the financial institution only if the matter would have a direct and predictable effect on his financial interest in his savings account. Even in the unusual case where the matter would have a direct and predictable effect on the employee's savings account, a portion or all of many such accounts may be insured by the Federal Deposit Insurance Corporation or other similar governmental entity. In such cases, the employee's financial interest may not be the amount of the account itself, but the amount of interest paid on the account, or the amount above the level covered by the insurance. Where the matters in which the employee would act would have a direct and predictable effect on the bank's ability to maintain and pay interest on an account or to preserve the amount in the account above the insurance limit, the employee's participation in these matters should be examined by the appointing official on an individual basis.

In summary, because the meaning of the term ''financial interest'' under section 208 is not identical to its commonplace or conventional meaning, this proposed regulation does not contain exemptions for certain interests that may be commonly thought of as ''financial interests,'' but that are not affected by most Government matters so as to require disqualification under section 208. This would include, for example, deposits in bank accounts and interests arising from most insurance policies.

There may be situations in which there is some potential for an employee's financial holding to be affected by the outcome of a matter, but the employee would not have a disqualifying interest under section 208(a). For example, if an employee is a contingent beneficiary in a will executed by a still living relative, the employee's interest in the assets to be distributed under the will is merely speculative since he may never inherit them. For purposes of section 208(a), the employee would not be disqualified from participating in matters affecting those assets.

Another limitation on the scope of section 208(a) concerns the range of interests it covers. To be within the scope of the statute, the affected interest must be that of the employee, his spouse, his minor children, a general partner of the employee, an organization in which the employee serves as officer, director, trustee, general partner or employee, or an organization with which the employee is negotiating or has any arrangement concerning

prospective employment. Thus, section 208(a) prohibits an employee from acting in a particular matter that will have a direct and predictable effect on the financial interests of a company by which he is employed in his off-duty hours. On the other hand, section 208(a) does not necessarily bar an employee from acting in a matter affecting his *spouse's* employer. Because the financial interests of a spouse's employer are not specified as disqualifying financial interests under the statute, an employee is not disqualified from acting in matters affecting a spouse's employer unless the matter would have a direct and predictable effect on the *spouse's* financial interest. For example, where the spouse is a salaried employee, does not have an ownership interest in the employer, and the matter will not affect her continued employment or her benefits, the agency matter ordinarily would not have a direct and predictable effect on her financial interest. *See, e.g.*, OGE Informal Advisory Letter 84x6 (May 1, 1984), OGE Advisory Publication, p. 465. Under such circumstances, the employee would not be disqualified under section 208(a) from participating in the particular matter.

This does not mean, however, that an employee who concludes that a matter will significantly affect the financial interest of a person or entity with whom he has a close business or personal relationship should act on the matter because the financial interest is not within the scope of section 208(a). Even though section 208(a) is not applicable by its terms to a specific situation, administrative regulations might prohibit participation in particular circumstances. The Standards of Ethical Conduct for Employees of the Executive Branch contain procedures an employee should follow in cases where his impartiality might be questioned if he were to participate in a Government matter affecting financial interests that do not fall within the scope of section 208(a). *See* 5 CFR 2635.501 *et seq.* For example, under § 2635.502, an employee must consider whether his impartiality would be questioned if he were to participate in a particular matter involving specific parties in which his spouse's employer is a party, or represents a party.

It is important to note that section 208(a) applies only in cases where the employee knows that he, or any other person or entity specified in section 208, has a financial interest that will be affected. For example, an employee who is a general partner in a partnership is prohibited from acting in an official capacity in matters that would affect the financial interests of his general partners. If one of his general partners owns stock in a corporation that would be affected by an agency matter in which the employee would participate, the employee would be barred from participating only if he knows that his general partner owns stock in the corporation. Employees who are general partners should be alert to the fact that they will have actual knowledge of their partners' assets if they have reviewed copies of partners' financial statements or similar documents.

Section 208 prohibits employees from participating in a ''judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest,'' or certain other ''particular matters.'' The term ''particular matter'' is discussed in the regulation at proposed § 2640.103(a)(1). In general, a particular matter is one that is focused upon the interests of specific persons, or a discrete and identifiable class of persons. It may include rulemaking, legislation, or policymaking that is narrowly focused on the interests of a discrete and identifiable class of persons. It does not extend to broad policy options or considerations directed toward the interests of a large and diverse group of persons. Because the meaning of the term ''particular matter'' is often difficult to apply in specific situations, the proposed regulation contains a number of examples based on the opinions of the Office of Legal Counsel at the Department of Justice. In general, these opinions indicate that certain governmental matters having broad application to a large number of persons are not sufficiently focused on the interests of identifiable persons or classes of persons to be considered ''particular matters.'' However, such broad policy matters may later become particular matters when they are implemented in a way that the interests of specific persons or groups of persons are distinctly affected.

Some of the exemption provisions in this proposed regulation would apply to so-called ''particular matters involving specific parties''; others would apply to ''particular matters of general applicability not involving specific parties.'' The distinction between these two categories of ''particular matters'' is derived from concepts used in other criminal conflict of interest statutes, such as 18 U.S.C. 207. However, to avoid any misunderstanding about the meaning of the terms, the proposed regulation defines ''particular matter involving specific parties'' by restating a portion of the definition of that term as it is used in 5 CFR 2637.201(c)(1) for purposes of 18 U.S.C. 207.[1] A ''particular matter involving specific parties'' is one that typically involves a specific transaction affecting the legal rights of parties such as a contract, grant, or case in litigation. For purposes of this regulation, ''particular matters of general applicability not involving specific parties'' are those types of particular matters not encompassed by the description at 5 CFR 2637.201(c)(1). Examples of such matters are rulemaking and the formulation of policy directed to the interests of a discrete and identifiable class of persons. The regulation generally contains more expansive exemptions for participation in ''matters of general applicability not involving specific parties'' because it is less likely that an employee's integrity would be compromised by concern for his own financial interests when participating in these broader matters.

Before an employee decides that section 208 might prevent him from participating in a certain governmental matter, he should determine whether the matter is a ''particular matter'' or a ''particular matter involving specific parties.'' Once he decides that the matter is a ''particular matter'' or a ''particular matter involving specific parties,'' he should then decide whether the matter will have a direct and predictable effect on his financial interest.

Finally, it is important to note that the requirements of section 208, as well as the exemptions in this proposed regulation, apply not only to regular Government employees, but also to special Government employees as defined in 18 U.S.C. 202(a). The proposed regulation also contains an exemption at § 2640.203(g) applicable solely to special Government employees serving on advisory committees. In addition, waivers issued pursuant to 18 U.S.C. 208(b)(3) for members of Federal advisory committees specifically impact special Government employees, many of whom serve on Federal advisory committees. And, of course, the waiver authority of section 208(b)(1) may be used in individual cases where there is a conflict between the financial interests of a special Government employee and his official responsibilities.

[1] Section 207 was amended in part by the Ethics Reform Act of 1989, Pub. L. 101–194, and Pub. L. 101–280. The Office of Government Ethics expects to publish regulations interpreting section 207, as amended. The new regulations are expected to contain a similar definition of the term ''particular matter involving specific parties.''

II. Exemptions from the Prohibition of Section 208(a)

This proposed regulation contains three categories of exemptions from the prohibitions of 18 U.S.C. 208(a). First, the regulation contains proposed exemptions relating to interests arising out of the ownership of mutual funds, common trust funds, unit investment trusts, and employee benefit plans. Second, the regulation contains proposed exemptions arising out of the ownership of interests in securities. Finally, it contains several miscellaneous provisions which would establish exemptions that would apply only in specific situations or only to employees of certain agencies. It is expected that agencies may ask for additional exemptions applicable only to employees or groups of employees at those agencies, as they become aware of the need for them.

For the most part, the exemptions proposed in this regulation would apply to interests that are common to a large number of employees and that are relatively simple to identify, such as those arising from the ownership of mutual funds and securities. In general, the regulation as proposed does not contain exemptions for other potentially disqualifying financial interests which are not normally disqualifying for most employees, such as the interest of a policyholder of a life insurance policy. In most cases, it is unlikely that the typical Federal employee would be required to act in a matter which would affect an insurance company's ability to fulfill its obligation to pay a benefit upon the death of the insured or which would affect the cash value of the policy. Except in the case of interests arising from the purchase of insurance from a mutual insurance company where employees have more a direct interest in the operations of the company itself, interests such as this are not usually disqualifying financial interests under section 208. Those unusual cases where section 208 would bar an employee from acting in a particular matter are best handled on a case-by-case basis in accordance with the procedures for granting an individual waiver under section 208(b)(1) or (b)(3).

Additionally, there may be certain financial interests that create a problem under section 208 only for employees of a particular agency because of that agency's mission, but that are remote or inconsequential enough that an exemption under section 208(b)(2) would be appropriate. For example, the regulation at proposed § 2640.203(h) has an exemption that applies solely to the Directors of Federal Reserve banks. Although this regulation is an executive branchwide rule, OGE will consider including other exemptions which may have applicability only to employees of a particular agency if an exemption would be significant for a large number of the agency's employees and agency resources that would be utilized in issuing individual waivers under section 208(b)(1) would be better used elsewhere in implementing the agency's ethics program. For example, the proposed exemptions for short-term Government securities at § 2640.202(d) and commercial discount and incentive programs at § 2640.203(e) primarily benefit employees at a limited number of agencies. However, these agencies have a sufficient number of employees that can take advantage of the exemptions that it would be appropriate to include specific exemptions here. The Office of Government Ethics specifically requests suggestions for any such exemptions that should be established and asks that agencies making such suggestions provide proposed ''exemption'' language to facilitate consideration of the recommendations.

The definitions of some of the terms used in the exemptions proposed in this regulation may appear to be inconsistent with similar or related terms used in other regulations issued by OGE. In particular, the definitions of diversified mutual fund, common trust fund, unit investment trust, and employee benefit plan are not parallel to the definition of an excepted investment fund (EIF) as that term is used in connection with reporting assets on a financial disclosure form and which is defined in 5 CFR 2634.310(c)(2). For the reasons described in section A below, OGE has determined that it is impractical to adopt the definition of ''excepted investment fund'' for use in defining similar terms in this regulation.

Finally, the Office of Government Ethics has attempted to devise exemptions that can be understood and easily applied by the individual Government employees who have conflicting financial interests. The Office of Government Ethics believes that, to the extent possible consistent with the requirements of section 208, the exemptions in this proposed regulation should not be so complex and technical that a typical Government employee would need the advice and assistance of an agency ethics official to determine how to apply the regulation in his particular case. Because one of the purposes of these regulatory exemptions is to lessen the burden on agency ethics officials who may be issuing numerous individual waivers under section 208(b)(1) or (b)(3), OGE has tried to simplify the language of each proposed exemption. However, because section 208 is a criminal statute with significant penalties, the language of each exemption also must carefully delineate the scope of the exemption.

A. Exemptions for Mutual Funds, Common Trust Funds, Unit Investment Trusts, and Employee Benefit Plans

1. Diversified Mutual Funds, Common Trust Funds, and Unit Investment Trusts

For purposes of section 208, an employee who has an interest in a pooled fund such as a mutual fund, a common trust fund, or unit investment trust is deemed to have a financial interest in a matter that would affect the assets held by the fund or trust. In most cases, the holdings of such funds are diversified, with only a limited portion of the fund's assets placed in the securities of any single issuer. Moreover, a fund typically holds securities of issuers who are engaged in a variety of businesses or industries. Usually an employee's interest in any one fund is only a small portion of the fund's total assets. For these reasons, it is generally unlikely that an employee's official actions with regard to any one of the holdings of the fund in which he holds shares will have any consequential effect on the employee's financial interest. Accordingly, proposed § 2640.201(a) would permit an employee to participate in any particular matter affecting the holdings of a diversified mutual fund, diversified common trust fund, or diversified unit investment trust in which the employee, or any other person specified in section 208, has a direct or beneficial ownership interest. The term ''direct or beneficial ownership'' means that the employee's interest can arise either through his direct ownership of a share in the fund or trust, or as the beneficiary of a trust or an estate that holds such shares.

To ensure that the foregoing assumptions are satisfied, however, the proposed exemption described in § 2640.201(a) would apply only to the holdings of trusts or funds which meet the following criteria. First, if the fund is a mutual fund, it must be a diversified mutual fund that meets the requirements of section 5(b)(1) of the Investment Company Act of 1940, 15 U.S.C. 80a–5(b)(1), for a ''diversified company.'' Section 80a–5 specifies that, for at least 75% of its assets, a diversified company may not invest more than 5% of its assets in any one issuer nor hold more than 10% of the

outstanding voting securities of any issuer. Additionally, the proposed rule's definition of the term ''diversified'' at § 2640.102(b) requires that the fund 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. This would ensure, for example, that an employee of the Food and Drug Administration (FDA) would not be given an automatic waiver for investments in a mutual fund which limits its holdings to drug company stocks. Of course, an appropriate FDA official could grant an individual waiver under 18 U.S.C. 208(b)(1) or (b)(3) to an employee in a particular case if the agency determined that the employee's interest in a mutual fund specializing in the pharmaceutical industry was not so substantial that it would affect the integrity of his services.

The Office of Government Ethics decided to define ''diversified mutual fund'' by reference to the definition of ''diversified company'' contained in 15 U.S.C. 80a–5 to provide employees a simple way of determining whether the mutual funds they own are, in fact, ''diversified.'' Regulations issued by the Securities and Exchange Commission (SEC) governing the administration of mutual funds specifically require that each mutual fund prospectus contain a statement concerning the fund's investment objectives, including whether the fund is deemed to be diversified for purposes of securities law. In most cases, this requirement will be met by a statement that the fund or the company is a diversified management investment company. By locating this statement in the fund's prospectus, an employee can easily determine whether the fund is considered ''diversified'' under this section 208 regulation. Alternatively, if the employee cannot find the relevant statement or the prospectus is unavailable, the employee can simply call the fund's manager or the broker through whom he purchased the fund and ask if the fund is a diversified company.

The Office of Government Ethics considered using other standards to define the term ''diversified'', such as adopting the standard for ''excepted investment funds'' as that term is used in 5 CFR 2634.310(c) for purposes of financial disclosure. ''Excepted investment funds'' cannot have more than 5% of the value of the fund's portfolio invested in any one issuer and more than 20% in any particular economic or geographic sector. However, use of standards such as this would require employees to examine the fund's assets and perform lengthy mathematical calculations to determine whether the particular fund was diversified. Moreover, because mutual fund assets continuously change, it would be burdensome to determine whether the fund was diversified at all times after the initial calculations were made. Using a numerical standard such as the 5%/20% formula described above arguably would require an employee to recalculate the ratio of assets in the fund's portfolio prior to participating in particular matters that occur on a continuing basis.

In informal discussions concerning the draft regulation, some agency ethics officials recommended that OGE define the term ''diversified'' only in relation to whether investments are concentrated in a particular sector, and not whether the fund's assets are invested in any particular number of issuers. Another ethics official suggested that the term ''mutual fund'' should not be defined by referencing regulations issued by the Securities and Exchange Commission because the regulations are extremely technical and most employees could not really be sure whether their investment is a ''mutual fund'' or a ''diversified company'' as defined by the SEC. The thrust of these recommendations was that an employee who failed to determine whether his investment met the statutory definitions would be misled into violating section 208 by acting in matters affecting interests in an investment that appeared to be a mutual fund, but was in fact some other type of pooled investment vehicle that was not technically a ''mutual fund'' as defined in SEC regulations. Leaving the relevant terms undefined presumably would absolve employees of the responsibility of determining whether their investments were actually diversified mutual funds and would thus avoid inadvertent violations.

The Office of Government Ethics shares these concerns, but does not agree that employees would be better served by dropping the requirement for ''diversification'' or by leaving the terms ''diversified'' and ''mutual fund'' undefined. First, OGE believes it is essential that the exemption proposed for mutual funds apply to funds that are diversified as to the *number of holdings* in the fund, as well as the sectors in which the holdings are invested. Because OGE has the authority to promulgate exemptions only for financial interests that are too ''remote or inconsequential'' to affect an employee's services to the Government, it would be difficult to conclude that interests arising from a fund containing only a few holdings would be remote or inconsequential enough to warrant a total exemption under section 208(b)(2).

Moreover, employees would also be at risk of violating section 208 if the terms ''mutual fund'' and ''diversified'' were not defined in the regulation. With the increasing variety of complex financial instruments that are available to investors, employees certainly could become confused about whether their particular pooled investments are diversified mutual funds. The experience of OGE in reviewing public financial disclosure forms indicates that private limited partnerships invested in securities are sometimes mistaken for mutual funds even though the partnership has a limited number of investors and holdings, and even though the holdings may not be diversified as to either numbers or sector. It would be unfair to employees not to clarify that interests such as these private partnerships would not be considered mutual funds for purposes of the exemption as proposed.

On balance, OGE decided that proposing to define the term ''diversified mutual fund'' by reference to 15 U.S.C. 80a–5 would be the most convenient method for determining whether the investment vehicle is a fund and is diversified, since a quick perusal of the fund's prospectus, or a call to the fund's manager, will indicate whether the fund is a diversified management investment company. Employees must be expected to have some responsibility for determining whether their investments meet the criteria for application of the exemption provisions. Employees also deserve to receive guidance that is reasonably specific enough to give them adequate notice of what investments meet the criteria for an exemption.

Similarly, by examining the prospectus or calling the fund's manager, an employee can determine whether the fund has a stated policy of concentrating its investments in any industry, business, or country, or to bonds issued by a single State. For example, some funds clearly limit their investments to biotechnology stocks, energy stocks, precious metals and minerals, agricultural products, telecommunications stocks, or municipal bonds issued by a single State. Securities and Exchange Commission regulations require mutual fund sponsors to describe limitations of this type in the fund's prospectus. Additionally, limitations on the type of assets held by a mutual fund are often reflected in the name of the fund itself, e.g. Vanguard Specialized Portfolios: Health Care or Fidelity Spartan New York High Yield. These types of funds

are commonly referred to as ''sector'' funds.[2]

The Office of Government Ethics decided not to consider funds invested in broad geographical regions as ''sector'' funds. While funds limited to a single State or a single country (other than the United States) would be excluded from the definition of ''diversified'' under this proposed rule, OGE concluded that it is unnecessary to also exclude, for example, funds limited to investments in Europe or the Pacific region. The Office of Government Ethics specifically requests comments on whether such funds should be considered ''diversified.''

Because the term ''mutual fund'' at proposed § 2640.102(l) includes ''registered money market funds,'' money market mutual funds would also have to be diversified in accordance with the standards described at § 2640.102(b)(1) for the exemption proposed at § 2640.201(a) to be applicable. Registered money market funds may be offered by a mutual fund company or may be marketed through a bank. In either case, however, as with other mutual funds, the prospectus describing the fund will contain the information an employee needs to determine whether the fund is diversified. For purposes of this regulation, money market instruments are not considered a single industry or business, and therefore, money market mutual funds are not considered investments concentrating in a single business or industry. By contrast, however, funds which have a policy of investing only in bank stock, or in savings and loan institutions, or in financial services are clearly limited to a single business or industry and are not considered ''diversified'' for purposes of this proposed regulation.

Money market deposit accounts (as opposed to money market mutual funds) offered by banks are not included in the proposed definition of the term ''mutual fund'' as it is used in this regulation. Accordingly, the exemption for diversified mutual funds at § 2640.201(a) as proposed would not be applicable to bank money market deposit accounts. The inapplicability of the proposed exemption to money market deposit accounts is not a problem, however, because in most cases, an interest in such an account is not a disqualifying financial interest under section 208. Unlike a money market mutual fund, a bank money market account is a type of individual deposit account funded by the bank's investments. Just as in the case of a regular bank savings account, it is unlikely that an employee would have a disqualifying financial interest because of his account. First, an employee would rarely have knowledge of the bank's underlying investments. However, even in those unusual cases where the employee did have knowledge of those investments, it would be unlikely that a Government matter involving one of the investments would have a direct and predictable effect on the employee's ''financial interest'' in his deposit account.

On the other hand, employees whose official responsibilities require them to participate in matters affecting banks where they have money market or other deposit accounts may have to consider whether the Government matters in which they might participate would have a direct and predictable effect on the bank's ability to maintain, and pay the appropriate interest on, the accounts. In such cases, of course, the employee may have a disqualifying financial interest in whether the bank can continue to pay interest on his deposit account, rather than a disqualifying financial interest in the bank's investments.

In summary, to make a definitive determination whether a particular mutual fund is ''diversified'' for purposes of this proposed regulation, an employee simply has to find whether the prospectus states that the fund is a diversified management company, and whether it has a policy of concentrating its investments in a particular industry, business, single country (other than the United States) or in bonds issued by a single State. Because the SEC requires that this information be contained in the prospectus, employees may properly rely on the accuracy of the information. If the prospectus has the specified information, an employee is not required to make any independent determination concerning the fund's diversification. If the employee cannot find the relevant statement in his prospectus or does not have a prospectus, he may call the fund's manager or the broker who sells the fund and ask whether the fund is a ''diversified company.''[3]

The regulation, at § 2640.201(a), also contains a proposed exemption for participating in matters affecting the underlying assets of a diversified unit investment trust. A unit investment trust is ''diversified'' if it meets the definition of a ''regulated investment company'' at 26 U.S.C. 851(a)(1)(A). The standard set forth in section 851 requires that, for 50% of its assets, no more than 5% of the trust's assets may be invested in any one issuer and the trust may hold no more than 10% of any one issuer's outstanding voting securities. Additionally, no more than 25% of the trust's total assets may be invested in any one issuer, or in two or more issuers that the trust controls and which are engaged in the same or similar trades or businesses. An employee need not make an independent determination whether the unit investment trust in which he has invested meets these criteria. Instead, the employee should consult the prospectus describing the trust or the trust's sponsor to determine whether the trust is a ''regulated investment company.'' If it is so described, it satisfies this regulation's diversification requirements, provided the trust does not have a stated policy of concentrating its investments in any industry, business, or single country (other than the United States), or to bonds issued by a single State.[4]

The assets of a common trust fund will be ''diversified'' for purposes of this proposed regulation if the common trust fund meets the rules for ''diversification'' established by the Office of the Comptroller of the Currency at 12 CFR 9.18. These rules provide that no more than 10% of a fund's assets may represent one investor's interest, and that no more than 10% of the fund's assets may be

[2] Although a sector fund is not considered a ''diversified mutual fund'' for purposes of the exemption described at § 2640.201(a), a mutual fund (including a nondiversified mutual fund) is a ''publicly traded security'' for purposes of the de minimis exemptions described in § 2640.202. Accordingly, the proposed regulation would permit an employee to participate in certain matters affecting financial interests arising from the ownership of a de minims amount of nondiversified mutual funds. Also, proposed § 2640.201(b) would exempt interests arising from assets in a sector mutual fund which are not invested in the sector in which the fund concentrates.

[3] Although this proposed regulation would reference several definitions contained in statutes and regulations within the purview of the Securities and Exchange Commission, the Office of the Comptroller of the Currency, the Internal Revenue Service, and the Department of Labor, those agencies do not have any role in interpreting the provisions of this regulation. Inquiries concerning the meaning of terms used in those statutes and regulations, and the way those terms are used in this regulation, should be directed to OGE.

[4] A unit investment trust (or a mutual fund) comprised of bonds issued by a single State would not meet the diversification requirements of this regulation. However, the lack of an exemption would not be a problem for most Federal employees since they typically would not have a disqualifying financial interest arising from ownership of State bonds. Except in unusual cases, the official matters in which an employee would participate would not affect the bond's rating or the State's ability or willingness to honor its obligation to pay interest on the bond.

invested in any one issuer. This diversification standard applies explicitly to common trust funds maintained by national banks. It also applies to funds maintained under State law by State banks which are required by 26 U.S.C. 584(a) to adhere to rules established by the Office of the Comptroller of the Currency, including the rules for diversification of common trust funds. An employee may presume that any State bank maintaining a common trust fund adheres to these requirements. Of course, as with mutual funds and unit investment trusts, the bank maintaining the fund cannot have a policy of concentrating its investments in an industry, business, or country, or in bonds issued by a single State.

2. Sector Mutual Funds

Section 2640.201(b) would contain a provision permitting an employee to participate in any particular matter affecting the holdings of a sector mutual fund, provided the affected holding is not invested in the sector in which the fund concentrates. This provision would address the problem that might be encountered, for example, by an employee of the Federal Reserve who owns shares in a sector mutual fund that concentrates in biotechnology stocks, but which also has bank stocks in its portfolio. The proposed exemption would permit the Federal Reserve employee to participate in matters affecting banks whose stock is in the fund's portfolio without obtaining an individual waiver under section 208(b)(1).

The proposed regulation does not contain an exemption for holdings in a geographic sector mutual fund where an individual holding creates a section 208 conflict for an employee, but the sector as a whole does not create a conflict. This might occur, for example, when a Food and Drug Administration employee purchases a mutual fund which concentrates its investments in German businesses and the employee is involved in reviewing an application for a drug approval submitted by a German pharmaceutical company whose stock is a holding of the mutual fund. The Office of Government Ethics requests specific suggestions for language for an exemption that would be applicable in this situation.

3. Employee Benefit Plans

Proposed 5 CFR 2640.201(c)(1) (i), (ii) and (iii) would permit an employee to act in any particular matter affecting the *holdings* of the Federal Government's Thrift Savings Plan, a pension plan established or maintained by a State or local government, or other diversified employee benefit plan in which the employee participates. By participating in the plan, the employee has a financial interest in a matter that affects one or more assets held by the plan. The exemption would also apply in situations where any other person specified in section 208 participates in the plan.

In the case of State or local government pension plans, OGE's experience has been that the plans typically are comprised of a large number of varied assets managed by an independent agency or board. Therefore, the proposed exemption at § 2640.201(c)(1) would apply to an employee's disqualifying interest in the holdings of any State or local government pension.

For all other types of employee benefit plans, the exemption would apply only if the plan is (i) diversified; (ii) the plan's investments are administered by an independent trustee; (iii) the employee (or other person specified in section 208) does not participate in the selection of the investments except to direct that contributions be divided among several different types of investments (such as stocks, bonds or mutual funds) available to plan participants; and (iv) the plan is not a profit-sharing or stock bonus plan. Although this proposed provision would apply to all types of employee benefit plans as described in § 2640.102(d), for all practical purposes most of the plans covered by the provision are some form of employee savings or retirement plan that provides deferred income, typically after the employee has retired. Most often employees view these plans as pensions.

Most pensions (and similar employee benefit plans covered by this rule) are one of two types: A defined benefit plan or a defined contribution plan. A defined benefit plan is one that is designed to provide participants with a defined or specified benefit upon retirement, such as an annual income that is a specific percentage of the compensation received by the participant during a certain period of his employment. By contrast, a defined contribution plan is one that establishes an individual account for each participant. In the case of a defined contribution plan, the retirement benefit received by the employee is based upon the contributions to and any income generated by the account, and can vary depending upon the gains, losses, and expenses that are attributable to the account. Benefits to which a participant is entitled under a defined benefit plan may be insured by the Pension Benefit Guaranty Corporation (PBGC) or by private insurance contracts or annuities.

In most cases, an employee will not have a section 208 interest in the *holdings* of a defined benefit plan because payment of the specified benefit is ensured whether or not the plan holdings generate income sufficient to fund the benefit. Therefore, under most circumstances an employee would not need a waiver under section 208 (b)(1) or (b)(3) or an exemption under section 208(b)(2) to act in matters affecting the *underlying assets* of a defined benefit plan. In some cases, the employee may have a financial interest in the sponsor of the plan who has promised to pay the benefit upon retirement. Except as provided in § 2640.201(c)(2) as proposed, authority to act in matters affecting the sponsor of such a plan must be handled on an individual basis in accordance with the provisions of 18 U.S.C. 208(b)(1). As a practical matter, however, most governmental matters in which an employee would participate are unlikely to have a direct and predictable effect on the plan sponsor's ability or willingness to pay an employee's pension benefits. Accordingly, most employees will not have a disqualifying financial interest in either the holdings or the sponsor of a defined benefit plan.

On the other hand, employees would ordinarily have a financial interest in the holdings of a defined contribution plan since those holdings are the assets which will generate the employee's retirement or other income. Therefore, in the absence of an exemption or waiver, an employee cannot act in particular matters that would have a direct and predictable effect on those holdings. The proposed exemption at § 2640.201(c)(1) would permit an employee to act in particular matters affecting the holdings of an employee benefit plan only if the plan meets the criteria described below.

First, the plan must be administered by an independent trustee which is defined in § 2640.102(g) as either a trustee independent of the plan's sponsor and participants, or a registered investment adviser. Second, the proposed rule would not permit the employee to select his own investments. However, the prohibition on participation in selecting plan investments would not bar an employee from directing the division of employer or employee contributions among a variety of types of investments or among a group of specific investment vehicles chosen by the plan trustee or manager. For example, a pension plan may offer participants the opportunity to choose between a bond fund, a common stock

fund, or a government securities fund. Participants may choose to divide their investments among the various funds.

Additionally, as with mutual funds, common trust funds, and unit investment trusts, this regulation as proposed would require that the assets of the plan must be diversified. Unlike mutual funds, common trust funds, and unit investment trusts, however, there is no independent statutory or regulatory diversification requirement for employee benefit plans except that plan sponsors and managers have a fiduciary responsibility to diversify plan assets to reduce risk to the investors. *See* 29 U.S.C. 1104(a)(1)(C). Because there is no specific numerical standard for diversification that this proposed regulation could easily reference to assist employees in determining whether an individual plan is diversified, OGE had to consider whether it wanted to create a diversification standard similar to others referenced in the regulation. Alternatively, OGE considered whether to adopt the same diversification standard used by employees to determine whether they must report the underlying assets of certain funds or trusts on the public financial disclosure statement (SF 278), i.e. no more than 5% of a plan's assets can be invested in any one issuer and no more than 20% of the plan's assets can be invested in any one business, industry, or economic or geographic sector.

The problem with adopting any one of these diversification standards is that before an employee could decide whether the exemption would be applicable, he would be required to obtain a copy of the plan's portfolio and scrutinize it to determine how the plan's assets are invested, including what proportion of assets are invested in particular issuers and particular industries or sectors. The Office of Government Ethics believes that in many cases it is unrealistic to assume that employees can easily obtain an inventory of pension holdings and make accurate calculations about the percentage of holdings in various issuers and industries. The problem is especially exacerbated by the fact that the assets of many employee benefit plan portfolios are continually changing and it would be difficult to establish with any certainty the relative proportion of the plan's assets from day to day. This problem is not so significant for purposes of determining whether an employee benefit plan is an excepted investment fund (EIF) for purposes of financial disclosure because financial disclosure rules only require employees to determine whether the plan is diversified on the day the report is filed. Where section 208 is implicated, however, employees may be participating over a period of time in Government matters and presumably the plan would have to be diversified at all times when the employee would participate in the matter affecting the plan's assets. If OGE created a numerical diversification standard for employee benefit plans in this regulation, it would be nearly impossible for employees to know from day to day whether the plan continued to be ''diversified,'' and OGE's goal of issuing clear and easy-to-use exemptions would be severely undermined.

On the other hand, OGE is unwilling to permit an automatic exemption to apply to any employee benefit plan, whether or not it is diversified. Without a requirement for some type of diversification, employees would be free to act in matters affecting the holdings of a plan which could contain any amount of a single asset, thus increasing the possibility that the employee might significantly gain or lose as a result of the Government matter in which he would participate. This outcome would subvert the statute's clear intent to exempt only interests that are remote or inconsequential.

Because the majority of employee benefit plans are widely diversified in any case, OGE's concern may be somewhat theoretical. Nevertheless, OGE has decided to propose a requirement that, for the exemption to apply, employee benefit plans must be diversified, i.e. the plan trustee or manager must have a written policy of varying plan investments.

This diversification standard would simply require an employee to determine whether the plan trustee or manager has articulated a policy of diversifying plan assets. The diversification policy might ordinarily be stated in materials describing the benefit plan. For example, brochures describing the TIAA-CREF retirement plan for employees of educational and research institutions specifically state that the CREF Stock Account is a ''broadly diversified portfolio of U.S. stocks,'' and that the CREF Social Choice Account is ''diversified among stocks, bonds * * *.'' In the absence of such a statement, the employee could obtain a written statement from the plan manager or trustee indicating that he has a policy of diversification. In most cases, the manager or trustee will attempt to diversify plan investments in accordance with his or her fiduciary responsibilities under 29 U.S.C. 1104(a)(1)(C).

In addition, the proposed regulation would require that the plan not have a stated policy of concentrating its holdings in any business, industry, single country other than the United States, or bonds of a State within the United States. The provision does not require an employee to perform any mathematical calculation to determine whether a particular percentage of the plan's assets are invested in any industry or sector, but simply to ascertain whether the plan has a policy of making such investments.

Finally, the regulation at proposed § 2640.201(c)(1)(iii)(B) states that the plan may not be a profit-sharing or stock bonus plan. This limitation would ensure that the exemption would not allow an employee to participate in matters affecting the corporate sponsor of a plan. However, because profit-sharing plans which are tax-deferred under 26 U.S.C. 401(k) have become a common form of employee benefit, 401(k) plans would be excluded from the term ''profit-sharing plan'' for purposes of this regulation.

Section 2640.201(c)(2) as proposed contains a provision which would permit an employee to act in particular matters of general applicability affecting the *sponsor* of a State or municipal pension plan in which the employee, his spouse or minor child, or general partner, participates. As used in this regulation, the term ''pension'' means a plan, fund or program established or maintained by a State or municipality to provide retirement income for its employees or which results in a deferral of income by employees for periods extending to termination of covered employment or beyond.

As used in the regulation, the term ''sponsor'' means the State or municipality that established or maintains the plan, not any individual State or municipal agency, board, or panel that may administer the plan on behalf of the State or municipality. Of course, the restrictions of section 208 apply only when the particular matter in which the employee would act has a direct and predictable effect on his financial interest. In the vast majority of cases involving defined benefit plans, it would be unlikely that any particular matter would affect a government's ability or willingness to pay the employee's pension. However, in the event that the employee would be required to act in such a matter, this provision would allow an employee to act only in a particular matter not involving specific parties, such as a rulemaking.

If the matter in which the employee would participate affects the State or

municipal agency, board or panel which administers the plan on the State or local government's behalf, the employee would not be able to participate in the matter without first receiving an individual waiver in accordance with the terms of 18 U.S.C. 208(b)(1).

B. Exemptions for Interests in Securities

Because many Federal employees own shares of stock and other types of securities, the proposed regulation contains a number of provisions that describe exemptions for matters affecting financial interests arising out of ownership of securities. Some of the exemptions would apply when the employee owns the security directly; others would apply only when the security is owned by other persons specified in section 208, such as an organization in which the employee serves as officer or director. In addition, some of the exemptions would apply to participation in all types of particular matters, including those involving specific parties. Other exemptions would apply only to participation in particular matters of general applicability. In general, the type and extent of exemption depends on the type of matter involved, the amount of the employee's financial interest, and the likelihood that the employee's action will affect the entity issuing the securities.

As defined in the proposed regulation at § 2640.102(r), the term ''security'' has a somewhat expansive meaning including stock, bonds, mutual funds, long-term Federal Government securities, limited partnership interests, and municipal securities. However, for many of the exemptions to be applicable, the securities must be ''publicly traded securities'' as defined in the regulation at proposed § 2640.102(p). This means that in addition to being the type of security described in § 2640.102(r), the securities would have to be registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. 781) and listed on a national exchange or traded through NASDAQ, or be registered under the Investment Company Act of 1940 (15 U.S.C. 80a–8), or be a corporate bond issued by an entity whose stock meets the definition of a ''publicly traded security.'' In general, this requirement ensures that the securities which are the subject of an exemption are widely disseminated. In the case of corporate bonds, the definition of ''publicly traded security'' will ensure that many bonds which are not traded on a national exchange (but are instead sold over-the-counter) will still be covered by the exemption.

Although most of the securities owned by employees clearly will be ''publicly traded'' within the meaning of the definition, there may be some cases where the employee is not absolutely certain whether a security is ''publicly traded'' within the meaning of this regulation. In such cases, employees should discuss the matter with a broker or simply call the issuer.

An interest in stock can create a section 208 disqualifying financial interest in a number of ways. First, ownership of shares of stock in an entity normally represents an ownership interest in the entity itself. Therefore, Government matters that affect the financial interest of the entity have a concomitant effect on the financial interest of the person who owns stock in the entity. For purposes of section 208, the effect of the matter on the entity need not be reflected in a change in the price of the entity's stock. Section 208 is implicated if the matter affects the entity's financial interest in any measurable way, such as when a contract for computer maintenance services is awarded to a large corporation that develops, manufactures and maintains computers. Even if the contract amount is not significant enough to result in an increase in the value of the company's stock, the mere award of the contract has affected the company's finances, and an employee who owns stock in the company has a disqualifying financial interest in the award of the contract to the company. Of course, in some cases a Government matter may be so significant that the price of the company's stock rises or falls to reflect the financial market's reaction to the matter. In such cases, an employee who owns stock in the company would even more clearly have a disqualifying financial interest in the matter.

Corporate bonds and certain municipal and Government bonds are included in the definition of ''security'' for purposes of the proposed regulation. Of course, a bond is also a form of debt owed by the entity issuing the bond. Ordinarily, ownership of a corporate or municipal bond does not create a disqualifying financial interest unless the Government matter in which the employee participates would have a direct and predictable effect on the market value of the bond or the entity's ability to repay the debt. The proposed rule contains exemptions that would apply in cases where the bond's value or the issuing entity's ability to pay would be affected.

The term ''municipal security'' is defined in the proposed regulation at § 2640.102(k) to include only the direct obligations of, or obligations guaranteed as to principal or interest by, a municipal entity. Thus, certain industrial development bonds which are issued under municipal aegis, but which actually represent the obligations of a private organization, would not be deemed municipal securities for purposes of this regulation. Since the corporations which issue industrial development bonds are varied, including both public and nonpublic companies, a blanket waiver to cover interests in securities offered by such organizations is inappropriate.

The term ''long-term Federal Government security'' is defined in the proposed regulation at § 2640.102(j) to mean bonds or notes with a maturity of one year or more issued by the United States Treasury pursuant to 31 U.S.C. chapter 31. Because the value of these long-term securities can fluctuate widely, OGE has determined that it would be appropriate to exempt financial interests arising from the ownership of these Government securities to the same extent that financial interests arising from other securities are exempted. On the other hand, the value of short-term Federal Government securities (with maturities of less than one year) cannot be substantially affected by the actions of employees who participate in matters involving those securities. Therefore, the regulation would contain a separate exemption at § 2640.202(d) for interests arising from the ownership of short-term Federal Government securities. Of course, as a practical matter only employees involved in setting and implementing monetary policy or other similar governmental matters are likely to be participating in matters affecting financial interests in Government securities in any event.

The term ''Federal Government security'' does not include a security issued by any Federal entity other than the U.S. Treasury pursuant to 31 U.S.C. chapter 31. Accordingly, interests arising from the ownership of securities issued by the Government National Mortgage Association (GNMA), the Federal National Mortgage Association (FNMA), and other similar Government agencies and Government-sponsored entities are not automatically exempt from the requirements of section 208. Of course, in appropriate cases disqualifying financial interests arising from the ownership of Federal agency securities may be waived on an individual basis pursuant to 18 U.S.C. 208(b)(1).

Even though interests in diversified mutual funds, and certain interests in sector mutual funds would be totally exempted under § 2640.201 as proposed, the term ''mutual fund'' is included in the definition of ''security'' for the purpose of the de minimis exemptions. This means that nondiversified mutual funds would be exempt to the same extent, and under the same circumstances, that stocks, bonds and other ''securities'' are exempt. Thus, an interest in $5,000 worth of a biotechnology sector mutual fund would be exempt even though an employee would be participating in a particular matter involving a company whose stock was owned by the mutual fund. Similarly, proposed § 2640.202(c) would permit an employee to participate in a particular matter of general applicability even if he owned $25,000 worth of a sector mutual fund, one of whose holdings was a company affected by the matter in which the employee would participate. For purposes of the de minimis provisions, the value of an employee's interest in a mutual fund 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.

1. De Minimis Exemptions

The first exemption pertaining to ownership of securities at § 2640.202(a) as proposed would permit an employee to participate in any particular matter involving specific parties where the employee's financial interest arises from the direct or beneficial ownership by the employee, his spouse or minor child of publicly traded securities, long-term Federal Government securities, or municipal securities valued at no more than $5,000 where the entity issuing the security is a party to the matter. The term ''direct or beneficial ownership'' means that the employee's interest can arise either through his direct ownership of the securities, or as the beneficiary of a trust or an estate. The value of securities owned by the employee, his spouse, and his minor children must be aggregated to determine whether the exemption applies.[5] Thus, for example, if an employee owns stock in each of several companies which are parties to the particular matter, the provision at proposed § 2640.202(a) would not exempt him from the prohibition of section 208 unless the aggregate value of the stock he owns in all parties is no more than $5,000.

The Office of Government Ethics considered proposing to set the de minimis standard at no more than $1,000 because that is the minimum value for assets that must be reported on an employee's public financial disclosure statement (SF 278). Setting the de minimis level at $1,000 would have permitted agency ethics officials who review financial disclosure reports to counsel employees that section 208(b)(2) exempts all interests in securities they own whose values fall below the threshold for reporting on the SF 278 statement. However, the actual financial interest one might have in a matter because of the ownership of stock worth no more than $1,000 would have been a significantly lower amount than OGE believes can be considered ''inconsequential'' within the meaning of section 208(b)(2) and would have clearly limited the exemption's usefulness. After final adoption of this rule (with any modifications), OGE will periodically review this and other specific dollar thresholds as well as other aspects of this regulation.

Where an employee has an interest in a security issued by an entity which is not a party to the particular matter involving specific parties, but which is nonetheless affected by the matter, the employee may act in the matter if the value of the security does not exceed $25,000. *See* proposed § 2640.202(b). This might occur, for example, when one automobile manufacturer sues the Government to enjoin enforcement of a new regulation that will require all manufacturers to incur additional production expenses. A Government attorney involved in the litigation who owns stock in another auto manufacturer not a party to the litigation may continue to act in the case pursuant to this exemption if the value of his stock does not exceed $25,000. Of course, this proposed exemption would be relevant only in cases where section 208 was applicable to the matter at issue, i.e. the matter would have a direct and predictable effect on the employee's financial interest arising from the security.

Proposed § 2640.202(b) would not permit an employee to act in a particular matter if the aggregate value of affected securities owned by the employee, his spouse and minor children exceeds $25,000. For purposes of determining whether the $25,000 limitation is met, the value of securities exempted under § 2640.202(a) would have to be included. For example, if an employee owns $5,000 of stock in an automobile manufacturer which is a party to a case in litigation in which the employee is involved, and he also owns $22,000 of stock in another automobile manufacturer affected by, but not a party to the litigation, he may not rely on the exemptions at §§ 2640.202(a) and (b), as proposed, to participate in the matter. Because the aggregate market value of his holdings in the securities of all affected entities exceeds $25,000, he would have to disqualify himself from the matter, or divest at least $2,000 worth of securities in affected party or non-party entities, or seek an individual waiver under section 208(b)(1) prior to participating in the matter. The purpose of the aggregation requirement is to ensure that the application of more than one exemption to a single matter does not violate the statutory criterion that exemptions be issued only for interests that have been determined to be remote or inconsequential.

The proposed regulation at § 2640.202(c) would permit an employee to participate in any particular matter of general applicability not involving specific parties, where the employee's disqualifying financial interest arises from the ownership of publicly traded, long-term Federal Government, or municipal securities issued by one or more entities, *if* the value of the employee's holdings (including the aggregate holdings of his spouse and minor children) in any one affected entity does not exceed $25,000, and his holdings in all affected entities does not exceed $50,000. This proposed exemption would not permit the employee to participate in particular matters having specific parties whether or not the issuer of the securities is a party. This exemption, as well as the exemption proposed at § 2640.202(b) for cases where the issuer of the security is not a party to the matter, would allow an employee to participate in matters where his financial interest was relatively insubstantial, and where it is not likely that the interest would be affected in a manner disproportionate to other affected entities.

Finally, it should be understood that the amounts set forth in the de minimis provisions in proposed § 2640.202 do *not* establish a threshold over which waivers may not be granted on an individual basis under section 208(b)(1). Therefore, an appointing official may decide in an individual case to grant a waiver to permit an employee to participate in particular matters involving parties in cases where an employee owns more than $5,000 worth of stock in an affected party. Similarly,

[5] Some of the exemptions in proposed § 2640.202 apply to the interests of the employee, the employee's spouse and minor children, and the employee's general partner. Others apply to interests arising from the holdings of a general partner, or someone whom the employee serves as officer, director, trustee or employee. Still others apply to the interests of any one listed in section 208.

an appointing official may grant waivers in cases where an employee would participate in matters of general applicability or in matters where he owns stock in affected entities which are not parties, even where the amount of the employee's holdings exceeds the amounts set forth in § 2640.202(b) and (c) as proposed. The criteria an agency should consider in granting such waivers are described in §§ 2640.301 and 2640.302 of this proposed regulation.

2. Short-term Federal Government Securities

Proposed § 2640.202(d) would permit an employee to act in any particular matter affecting a financial interest arising from the ownership of ''short-term Federal Government securities'' by the employee, or any other person specified in section 208. The term ''short-term Federal Government security'' is defined in proposed § 2640.102(t) to mean a bill issued by the United States Treasury pursuant to 31 U.S.C. chapter 31, with a maturity of less than one year. This provision, for example, would permit employees of the Federal Reserve to act in matters that would affect changes in the interest rates paid on Treasury bills. The Office of Government Ethics believes that the exemption for short-term Federal Government securities is warranted because changes in the interest rates paid on Treasury bills occur in relatively small increments, and do not significantly enhance the value of these bills because of their short maturities.

3. Interests of Tax-Exempt Organizations

Unless he is personally involved in an organization's investment decisions, an employee often would not have knowledge of the investment interests of organizations in which he is an officer, director, trustee, or employee. However, because section 208 bars him from acting in matters in which these organizations have a financial interest, section 208 will be implicated if an employee acts in a particular matter which he *knows* will affect the holdings of an organization he serves as officer, director, trustee, or employee.

The concern about a conflict of interest in such cases is diminished, however, if the organization is nonprofit and tax-exempt under section 501(c)(3) of the Internal Revenue Code, and the employee has no involvement in making investment decisions for the organization. Examples of such organizations include child or animal welfare organizations, community service groups, and health or medical research organizations. Section 2640.202(e) of this proposed regulation contains a provision that would permit an employee to participate in any type of particular matter affecting an entity which issues publicly traded, municipal, or long-term Federal Government securities in which a tax-exempt organization invests, if the employee serves the 501(c)(3) organization as an unpaid officer, director, or trustee, or as an employee. The exemption would apply only if the employee plays no role in making investment decisions for the organization other than participating in the decision to invest in several different categories of investments, the organization's holdings in the entity are limited, and the organization is not related to the entity except as an investor, or through a routine commercial transaction. This proposed exemption is limited in scope and only allows an employee to participate in a matter which affects the tax-exempt organization's investments. It would not permit the employee to participate in matters that directly affect the tax-exempt organization, or matters that would also affect the employee's own financial interests.

4. Interests of General Partners

Section 208(a) prohibits an employee from acting in any particular matter that would affect the financial interests of his general partner. Of course, in many cases, an employee will not have knowledge of his partner's financial interests, so that section 208 will not limit the employee's ability to act in Government matters in which his partner has an interest.

On the other hand, where the employee does have knowledge of his partner's interests, it might often be inappropriate for the employee to act in a matter which would affect those interests. However, where the general partner's interest is derived solely from the ownership of publicly traded, long-term Federal Government, or municipal securities, proposed § 2640.202(f)(1) would permit an employee to act in any particular matter affecting the issuer of the securities, if the value of the securities does not exceed $200,000 and ownership of the securities is not related to the partnership between the employee and his general partner.

Proposed § 2640.202(f)(2) contains a provision that would permit an employee to act in all matters where the disqualifying interest would arise from any interest of an employee's general partner, but only if the employee's relationship to his general partner is that of a limited partner in a large partnership, i.e. one with at least 100 limited partners. OGE believes that, in most such cases, an employee would not have enough of a personal relationship with his general partner that his judgment on official matters affecting his partner would be impaired, or would be perceived to be impaired, by the public. In cases where an employee is a limited partner in a partnership with fewer than 100 limited partners, he would have to receive an individual waiver under section 208(b)(1) before he could participate in particular matters in which he knows his general partner has a financial interest.

C. Miscellaneous Exemptions

1. Hiring Decisions

Employees throughout Government are expected to participate in routine personnel matters that involve current employees of an entity in which they may have a financial interest, but the Government personnel matters are unlikely to have any significant effect on their financial interests. In most such cases, it would be difficult to conclude that the employee has a disqualifying financial interest within the meaning of section 208 in the hiring of an employee. In certain exceptional cases, however, an employee's participation in a hiring decision might affect his financial interests. For example, an employee may be called upon to participate in a decision to hire a new employee currently working for a company in which he owns stock. In the case of some highly paid executives, the executive's departure may cause the company to incur gains or losses, thereby creating a disqualifying financial interest. An exemption under section 208(b)(2) would permit the employee to carry out his duties without raising any serious conflict of interest concerns.

Section 2640.203(a) as proposed would permit an employee who owns publicly traded securities issued by a corporation, or who has a vested interest in a pension plan sponsored by a corporation which issues publicly traded securities, to participate in Government hiring decisions involving an applicant currently employed by the corporation. This exemption would allow an employee to continue participation in routine hiring procedures even when the matter might nominally affect his interest in the corporation. The exemption would also apply in cases where any other person specified in section 208 owns publicly traded securities issued by the corporation or participates in a pension plan sponsored by the corporation.

2. Employees on Leave from Institutions of Higher Education

Proposed § 2640.203(b) would permit an employee who is on a leave of absence from an institution of higher education (defined as an educational institution described in 20 U.S.C. 1141(a)) to participate in matters of general applicability which would affect the financial interest of the institution. Because of the tenure system, an employee who comes from an academic setting to work in the Federal Government often takes a leave of absence from his academic position rather than terminate the position entirely. Under these circumstances, in cases where the employee's involvement in a Government matter would affect the educational institutional only as part of a larger class of similarly affected institutions, the likelihood of a conflict of interest is sufficiently remote that an exemption permitting the employee to act is warranted.

The proposed exemption would permit the employee to act only in matters affecting the institution from which he is on leave, not his own direct financial interests. For example, an employee could participate in developing a research plan that is expected to result in a grant announcement soliciting proposals from researchers to study a particular medical procedure even if he knows that the university from which he is on leave may submit a proposal. On the other hand, the employee could not participate under this exemption in a Government decision to increase the current funding levels of a certain type of research conducted by a group of colleges and universities, including the school from which he is on leave, if his university salary when he returns will be paid from an affected research grant.

3. Multi-campus Institutions of Higher Education

18 U.S.C. 208 prohibits an employee, including a special Government employee, from acting in a Government matter which would have a direct and predictable effect on the financial interest of his employer. In the case of some employees, particularly special Government employees, the non-Federal employer may be a multi-campus State institution of higher education. Even though the employee may be employed by only one campus of the institution, his employer is the entire institution and he is therefore barred from acting in official matters which affect any of the institution's campuses.

To lessen the hardship that would result from the application of section 208 in many cases involving multi-campus institutions of higher education and to alleviate the need for numerous individual waivers, the exemption at proposed § 2640.203(c) would permit an employee to act in matters affecting one campus of a state multi-campus institution of higher education if the employee is employed in a position with no multi-campus responsibilities at a different campus of the same institution. Where an employee is employed on one campus of an institution, he is not likely to be involved with matters occurring on other campuses, and therefore his interests in those matters are sufficiently remote that a blanket waiver would be appropriate. The exemption would allow an employee to participate in matters affecting other campuses of the institution only if his responsibilities are confined to the one campus where he is employed; a person whose responsibilities cross more than one campus would not be able to participate in any particular matter involving any campus of the institution without first receiving an individual waiver under 18 U.S.C. 208(b)(1).

4. Employees Whose Official Duties Affect the Financial Interests of Government Employees

Section 2640.203(d) as proposed would restate the exemptive provision contained in interim rule § 2640.101 of 5 CFR, which is being separately published in the **Federal Register** by OGE, that applies to interests that arise from employment in the executive branch of the Federal Government. With two exceptions, the provision exempts all disqualifying financial interests in Government salary and benefits, and in Social Security and veterans' benefits. The exemption does not permit an employee to make (1) determinations that individually or specially affect his own financial interest in Government salary and benefits, or (2) determinations, requests, or recommendations that individually or specially relate to, or affect the Government employment-related financial interests of any other person specified in section 208, such as the employee's spouse, minor child, or general partner. Furthermore, a note following the section explains that the exemption does not permit an employee to take any action in violation of any other statutory or regulatory requirement.

5. Participation in Discount and Incentive Programs

The proposed exemption at § 2640.203(e) concerns benefits earned in discount, incentive and other similar programs. These benefits might include, for example, frequent flier mileage, upgraded seating on airplanes, free tickets for additional airplane flights, and discounted rates for rental cars and hotel rooms. Typically these programs are established by commercial entities to generate loyalty to a particular company. Often participants in the programs earn benefits based on the amount of the company's services they utilize during a specified period. Employees may participate in such programs in a personal capacity, and usually participation would raise no concerns under section 208. However, in unusual cases, the benefits may create a financial interest of the employee in certain types of matters. Employees who act in Government matters which affect an entity's ability or inclination to honor its commitment to provide benefits may have a disqualifying financial interest in those matters. The exemption proposed at § 2640.203(e) would permit an employee who participates in such a significant way in matters affecting one of these entities to participate in these agency matters even if he, or any other person specified in section 208, participates in the benefit program. In the case of frequent flier programs, for example, this might include employees of the Federal Aviation Administration, or the Pension Benefit Guaranty Corporation, or the Antitrust Division of the Department of Justice.

6. Mutual Insurance Companies

An employee's interest as a policyholder of life, health, automobile, house and other types of insurance does not often create a section 208 disqualifying financial interest because there are not many Government matters in which an employee could participate that would affect an insurance company's ability or inclination to continue the benefits to which the employee is entitled under the policy. In the unusual case where an employee were assigned to participate in such a significant matter, the employee should first obtain an individual waiver under section 208(b)(1).

In the case of mutual insurance companies, however, employees may have interests in the company other than those involving the continuation of benefits. Mutual insurance company policyholders may have an interest in the overall financial health of the

mutual insurance company because the amount of the policyholders' premiums are based upon the profitability of the company. In such cases, the policyholder would have a disqualifying financial interest in any particular matter that would affect the company's profitability or general financial health. The proposed exemption at § 2640.203(f) would permit an employee to participate in any particular matter, including a matter involving parties, that would affect the financial interest of the employee, or any other individual specified in section 208, as a mutual insurance policyholder.

The exemption would not apply, however, if the matter would affect the company's ability to comply with its obligation to pay claims under the policy or to pay the employee the cash value of the policy. The exemption would, for example, allow an employee to participate in Government matters where his mutual insurance company insures a party to the matter as long as the matter was not so significant that it would impair the company's ability to satisfy its obligation to pay claims under the policy or to pay the employee the cash value of the policy. The exemption also would not apply when an entity specified in section 208 (e.g. a corporation that the employee serves as officer or director) rather than the employee himself or other individual specified in section 208 is a policyholder. OGE decided not to extend the exemption to this situation because of concern whether the financial interest of a corporation or other large entity as a policyholder might be considerably greater than one which could be considered ''inconsequential'' under the statute.

7. Special Government Employees Serving on Advisory Committees

Federal agencies often utilize the services of outside experts by forming advisory committees under the Federal Advisory Committee Act, 5 U.S.C. app. These committees are organized specifically to obtain the advice and recommendations of persons with expertise in a particular field. Therefore, many of the persons serving on an advisory committee will likely be employed or have some type of business relationship with private sector organizations that may be affected by the matter under review by the committee. Many advisory committee members are appointed as special Government employees and are therefore subject to the requirements of section 208.[6]

When 18 U.S.C. 208 was amended in 1989, a new waiver authority was added concerning the interests of persons serving on advisory committees. This new authority, at section 208(b)(3), permits an agency to waive, on an individual basis, any disqualifying financial interest of a special Government employee (SGE) serving on an advisory committee if the need for the employee's services outweighs the potential for a conflict of interest. Nevertheless, agencies which utilize the services of a large number of special Government employees on advisory committees still have to prepare innumerable waivers, largely on a routine basis, for the disqualifying interests of these employees. To eliminate the need for some of these individual waivers, the proposed regulation at § 2640.203(g) would exempt the employment interests of special Government employees serving on advisory committees, permitting them to participate in any particular matter of general applicability not involving specific parties. The provision would specifically permit a covered employee to act in a particular matter affecting a financial interest created because of his employment status. This would include, for example, the interests of an SGE's principal employer in a regulatory matter applicable to all similarly situated entities. The exemption would not apply, however, if the matter would have a special or distinct effect on the person other than as part of a class.

The Office of Government Ethics believes that this special exemption for members of advisory committees can be justified because the public's interest in the integrity of advisory committee proceedings is protected by the nature of the proceedings themselves. The Federal Advisory Committee Act requires that advisory committee meetings be open to the public, except in unusual circumstances. Moreover, the membership of advisory committees must be balanced so that a variety of viewpoints will be represented. Both of these requirements will ensure that the public is aware of a committee member's ties to persons who may be affected by the committee's deliberations. Finally, the findings of an advisory committee are not binding on an agency, but merely constitute recommendations that can be adopted or rejected by the agency.

Limitations on the use of the exemption would further ensure the integrity of the advisory committee process. First, the exemption would apply only to matters of general applicability which would not have a special and distinct effect on the affected person. Thus, the exemption would not permit a special Government employee to act in a matter in which the affected person was a party, or the competitor of a party. Second, the exemption would apply only to the financial interests which arise from the special Government employee's non-Federal employment, such as the employee's salary or the overall financial well-being of the entity or person who employs the special Government employee. It would not apply to the employee's stockholding interest in his employer, although such an interest could be exempt under § 2640.202(c) of this proposed regulation or under § 2640.201(c) if stock is part of an employee benefit plan as defined in the proposed exemption. Moreover, a disqualifying financial interest arising from the ownership of stock by the special Government employee could be waived on an individual basis under section 208(b)(1) or (b)(3).

8. Directors of Federal Reserve Banks

Although the other conflict of interest prohibitions in title 18 do not apply to the Directors of the twelve Federal Reserve Banks throughout the United States, the Directors are subject to the requirements of section 208. Each of the twelve banks has nine Directors, three of whom represent the interests of that Bank's stockholding member banks, and six of whom represent the interests of the public, with due consideration to the interests of commerce, industry, services, labor and consumers. Because of their ties to the financial services industry and their communities, it is likely that at least some of the Directors will have financial conflicts with their duties. The proposed regulation at § 2640.203(h) would exempt the Directors from the application of section 208 for two primary activities: the role of Directors in establishing the interest rate to be charged on loans made by Reserve Banks, and the role the Directors may play in extending credit to healthy financial institutions or to financial institutions in hazardous

[6] In some cases, a person may be serving on an advisory committee in a representative capacity on behalf of a non-governmental organization, group or industry. Section 208 does not apply to committee members serving in a representative capacity because they are not considered special Government employees. Accordingly, a representative does not need a waiver or exemption as described in this proposed regulation in order to participate in committee matters. *See generally* OGE Informal Advisory Letter 82x22 (July 9, 1982), OGE Advisory Publication, p. 325.

condition. The exemptions, which were first issued by the Federal Reserve in 1978 and which are currently set forth in 12 CFR 264a.5, are necessary to resolve any possible conflict between the Directors' statutorily mandated representational function and the performance of their official duties.

In general, proposed § 2640.203(h) would permit a Federal Reserve Director to act in matters involving (1) the establishment of rates to be charged member banks for advances and discounts; (2) approval or ratification of extensions of credit, advances or discounts to depository institutions that are not in a hazardous financial condition; (3) approval or ratification of extensions of credit, advances or discounts to depository institutions that are in a hazardous condition as determined by the President of the Bank in accordance with 12 CFR 264a.3, but only when certain conditions are met; and (4) consideration of monetary policy matters, regulations, statutes, or other similar matters of broad applicability. As described above, these exemptions would simply continue existing regulatory exemptions for Reserve Bank Directors.

9. Medical Products and Devices

Section 2640.203(i) would contain an exemption for special Government employees who serve on advisory committees considering the approval or classification of medical products or devices. Often these special Government employees are employed by hospitals or other medical facilities that purchase these products or devices for use by their patients. Similarly, the special Government employees may prescribe the product or device for their own patients. In some cases, the employees may have a disqualifying financial interest in the matters under consideration by the committee because their employers' profits from providing these products or devices to patients by billing more than the cost of the item. In other cases, it is possible that a special Government employee with private patients could affect his own financial interest by, for example, deciding not to reclassify a drug to permit it to be sold over the counter, thereby resulting in a loss of patients who would otherwise have to seek a prescription from him.

The Office of Government Ethics believes that the types of financial interests described in the proposed exemption are inconsequential enough that special Government employees who serve on these types of advisory committees can be expected to act impartially. Of course, the exemption would apply only when the financial interest is of the type described in the regulation. Other types of financial interests, such as those arising from the ownership of stock in the manufacturer of the product or device, or employment by the manufacturer would not be not covered by this exemption. Such interests may be covered by other exemptions (such as proposed § 2640.202(a)) or an employee may obtain an individual waiver under section 208(b)(1) or (b)(3).

D. Prohibited Financial Interests

The provision at § 2640.204 of this proposed regulation would make clear that none of the exemptions apply to financial interests held or acquired in violation of a statute or agency supplemental regulation issued under 5 CFR 2635.105, or that are otherwise prohibited under 5 CFR 2635.403(b). This provision would prevent an employee who knowingly acquires a prohibited financial interest and who also participates in an agency matter affecting that interest, from asserting that the exemption provisions described in this rule preclude the Government from pursuing appropriate sanctions against him.

E. Employee Responsibility

Section 2640.205 as proposed states that each employee assigned to a matter which may affect a financial interest within the scope of section 208(a) is responsible for determining, prior to taking action, whether an exemption permits him to participate in the matter. If an employee is unsure whether an exemption is applicable in a particular situation, he should consult with the agency ethics official prior to taking action. As proposed, this regulation would be interpreted strictly, so that an employee who has a financial interest in a matter could not act in the matter in reliance on any provision in the regulation unless the interest were specifically exempted by the regulation. Alternatively, an employee may seek an individual waiver under 18 U.S.C. 208(b)(1) or (b)(3).

F. Existing Agency Exemptions

This proposed rule at § 2640.206 contains a provision designed to resolve questions concerning reliance on waivers issued by agency regulation prior to November 30, 1989, the effective date of the 1989 Ethics Reform Act revisions to 18 U.S.C. 208. The provision would make clear that an employee who, prior to the effective date of this regulation, participated in a matter in which he had a financial interest acted in accordance with applicable regulations if he acted in reliance on a regulatory waiver issued by his employing agency under 18 U.S.C. 208(b)(2) as in effect prior to November 30, 1989.

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

In some situations an employee may have a disqualifying financial interest which would not be exempted from the requirements of section 208(a) by this proposed regulation as being too remote or inconsequential. For example, some disqualifying financial interests are simply too difficult to define precisely enough in a regulation, while in other cases OGE is unable to describe with enough particularity the matters in which the exemptions would apply. In circumstances such as these, an agency may determine pursuant to section 208(b)(1) that an individual waiver should be granted to the employee. The determination required in these cases is that the employee's disqualifying interest in the matter is not so substantial as to be deemed likely to affect the integrity of the services which the Government expects from the employee. In short, the agency must determine whether the employee's interest in the matter is not so significant that the employee can be relied upon to act or appear to act impartially in the matter. While final determinations in these matters rest with the agencies, this proposed regulation at § 2640.301 would establish uniform procedural requirements for such waivers and would provide guidance to agencies in making the determinations necessary for the granting of waivers.

An agency granting a waiver pursuant to section 208(b)(1) should observe a number of procedural requirements. First, the financial interest involved, and the nature and circumstances of the particular Government matter or matters in which the employee would act must be fully disclosed to the Government official responsible for issuing the waiver. If the official decides to grant the waiver, it must be in writing and be issued by the person responsible for the employee's appointment (or by a person to whom the responsibility to issue such waivers has been delegated.) A waiver must be issued prior to any action on the matter by the employee. The waiver should describe the matter or matters to which it applies, the employee's role in these matters, and any limitations to be placed on the employee's involvement in them. There is no requirement in the rule as proposed that the disqualifying financial interest, the particular matter to which the waiver applies, or the

employee's role in the matter be described with any specific degree of particularity. This would, for example, permit the agency issuing the waiver to describe the employee's duties in a general way, or to describe a class of matters to which the waiver would apply. Of course, agencies should endeavor to formulate waivers with enough specificity that a member of the public would have a clear understanding of the circumstances to which the waiver applies. In addition, the waiver must be based on a determination that the employee's financial interest is not so substantial as to be deemed likely to affect the integrity of the employee's services to the Government. A waiver may apply to both present and future financial interests provided that the interests are described with specificity.

In granting a waiver, section 208(b)(1) specifically requires an agency to determine whether the employee's financial interest in the matter is not so substantial as to affect the integrity of the employee's services to the Government. In large part, this determination depends on the size of the financial interest, its importance to the employee, and the employee's ability to affect his own financial interest directly. Information concerning an employee's good character and past record are irrelevant in making the waiver determination and should not be relied upon as a basis for granting a waiver.

The proposed regulation at § 2640.301(b) lists five factors that an agency official may consider in judging the propriety of granting a waiver. First, the responsible official should consider the type of interest creating the disqualification, such as stock, bonds, or a job offer. Consideration should also be given to the identity of the person whose financial interest is involved. In particular, if the financial interest is not the employee's own, but is the interest of one of the other persons specified in section 208, the agency official should examine the relationship of the person to the employee. Employment interests often create ties stronger than mere stock ownership that might affect an employee's judgment. Moreover, the ethics official should consider the effect of the matter on the interests of the person specified in the statute, not just the ultimate effect, if any, on the interests of the employee. Next, the official should consider the dollar value of the disqualifying interest to the extent it is known or can be estimated, and the value of the financial instrument or holding which is creating the disqualifying interest. Finally, the responsible official should consider the nature and importance of the employee's role in the matter in which he would be allowed to act, including the extent to which he would have to exercise discretion. For example, the agency should consider whether the employee will play a primary role in dealing with an entity in which he has a financial interest, or contribute substantially to a decision affecting such an entity, or play a peripheral role in a matter involving the entity.

Agencies may also consider certain other factors when deciding whether an employee's financial interest is substantial enough to affect the integrity of his services. A responsible official may consider the sensitivity of the agency matter in which the employee would act, the need for the employee's services in the particular matter, and whether adjustments could 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. A decision by the responsible official to grant a waiver pursuant to section 208(b)(1) constitutes a determination under 5 CFR 2635.502 of the Standards of Ethical Conduct that the Government's interest in having an employee participate in a particular matter outweighs any questions concerning an employee's impartiality.

IV. Waivers Issued Pursuant to 18 U.S.C. Section 208(b)(3)

This proposed regulation would also address the authority of agencies to issue waivers pursuant to section 208(b)(3) for special Government employees who are members of an advisory committee established under the Federal Advisory Committee Act (5 U.S.C. app.) or nominees to such a committee if these individuals have a disqualifying financial interest. The basis for a determination to grant a waiver under section 208(b)(3) is somewhat different from that which underlies a waiver granted pursuant to section 208(b)(1). To allow an individual to participate in advisory committee matters from which he would otherwise be disqualified, the agency must balance the need for the individual's services against the potential for a conflict of interest created by the employee's disqualifying interest. After reviewing the financial disclosure statement filed by the individual pursuant to the Ethics in Government Act of 1978, the official responsible for appointing the individual to the committee must certify that the need for the individual's services outweighs the potential for conflict created by the financial interest involved.

In making this certification, § 2640.302(b) as proposed would instruct the responsible official to consider the uniqueness of the individual's qualifications and the difficulty of finding a similarly qualified individual to serve on the committee. As in the case of making a determination whether a waiver should be granted under section 208(b)(1), the official should also consider the type of interest that is creating the disqualification, as well as its dollar value to the extent it is known or can be estimated. Consideration should also be given to the identity of the person whose financial interest is creating the disqualification and that person's relationship to the employee. Finally, the official should consider the likelihood that the advisory committee will consider matters which will affect the individual's financial interests individually or particularly.

The regulation at proposed § 2640.302(a) also states that the agency should follow procedural requirements similar to those for granting individual waivers under 18 U.S.C. 208(b)(1). Waivers issued pursuant to section 208(b)(3) may be applicable only to special Government employee members or prospective members of advisory committees within the meaning of the Federal Advisory Committee Act.

V. Consultation and Notification Concerning Waivers

Proposed § 2640.303, in accordance with section 301(d) of Executive Order 12674, would require a responsible official, when practicable, to consult formally or informally with the Office of Government Ethics prior to granting a waiver under either § 2640.301 or § 2640.302 as proposed. The consultation need not take any particular form and may be done informally by telephone. While these waiver determinations are within an agency's discretion, consultation with OGE affords the agency official an opportunity to benefit from OGE's experience and knowledge as to how these provisions are generally interpreted and whether the agency's proposed solution is legally sufficient and is within the range of reasonable interpretations. After issuance of a waiver, a copy of the waiver must be transmitted promptly to OGE. *See* section 301(d) of E.O. 12674, as modified, and 5 CFR 2635.402(d)(4).

VI. Public Availability of Waivers

Agencies are generally required to make copies of waivers issued pursuant

to 18 U.S.C. 208(b)(1) or (b)(3) available to the public upon request. *See* 18 U.S.C. 208(d)(1) and proposed § 2640.304. The procedures to be used for providing access to these waivers are those which are used for public access to financial disclosure statements under the Ethics in Government Act. The procedures are described at 5 CFR 2634.603.

There are certain limitations on the public availability of waivers granted pursuant to 18 U.S.C. 208(b)(1) and (b)(3). Agencies may withhold from disclosure any information contained in a waiver which would be exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552. In addition, for waivers issued under section 208(b)(3), an agency must withhold any information in the certification concerning an individual's financial interest that is more extensive than what is required to be disclosed by the individual in his financial disclosure statement under the Ethics Act. Agencies should also withhold information in any waiver which is otherwise subject to a prohibition on public disclosure under law.

VII. Matters of Regulatory Procedure

Administrative Procedure Act

Interested persons are invited to submit written comments to OGE on this proposed regulation, to be received on or before November 13, 1995. The Office of Government Ethics will review all comments received and consider any modifications to this rule as proposed which appear warranted before adopting a final rule on this matter.

Executive Order 12866

In promulgating this proposed regulation, the Office of Government Ethics has adhered to the regulatory philosophy and the applicable principles of regulation set forth in section 1 of Executive Order 12866, Regulatory Planning and Review. This proposed rule 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 proposed regulation will not have a significant economic impact on a substantial number of small entities because it affects only Federal employees.

Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply because this proposed 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: August 9th, 1995.

Donald E. Campbell,

Deputy Director, Office of Government Ethics.

Accordingly, for the reasons set forth in the preamble, the Office of Government Ethics proposes to amend title 5, chapter XVI, subchapter B of the Code of Federal Regulations by adding a new 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. This regulation describes those financial interests. The regulation 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) *Common trust fund* means any fund as defined in 26 U.S.C. 584. A common trust fund is maintained by a bank exclusively for the collective investment and reinvestment of monies contributed to the fund in its capacity as trustee, executor, administrator, or guardian. Common trust funds are collections of individually established funds for which a bank acts as fiduciary. The bank pools the funds for investment purposes.

(b) *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:

(1) A mutual fund, means the assets of the mutual fund are sufficiently varied that it meets the requirements of section 5(b)(1) of the Investment Company Act of 1940, 15 U.S.C. 80a–5(b)(1), for a diversified company;

(2) A common trust fund, means the fund is subject to the rules regarding diversification established by the Office of the Comptroller of the Currency at 12 CFR 9.18;

(3) A unit investment trust, means the assets of the trust are sufficiently varied that it meets the requirements of section 851 of the Internal Revenue Code, 26 U.S.C. 851, for a regulated investment company; and

(4) An employee benefit plan, means that the plan's trustee has a written policy of varying plan investments.

Note: A mutual fund meets the requirements of Section 5(b)(1) of the Investment Company Act of 1940 if it is a ''diversified company.'' A unit investment trust is diversified in accordance with 26 U.S.C. 851 if it is a ''regulated investment company.'' An employee can determine if a fund or trust meets these standards by locating a description of the fund as a ''diversified company'' or the trust as a ''regulated investment company'' in the prospectus for the fund or trust or by calling a broker or the manager of the trust or fund. A common trust fund maintained by a national or State bank can be presumed to be diversified in accordance with the standards for diversification set by the Office of the Comptroller of the Currency. 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, unit investment trust, common trust fund, or employee benefit plan that is diversified for purposes of this regulation may not necessarily be an excepted investment fund (EIF) for purposes of reporting financial interests pursuant to 5 CFR 2634.311(c). In some cases, an employee may have to report the underlying assets of a fund, trust or plan on his financial disclosure statement even though an exemption set forth in this regulation would permit the employee to participate in a matter affecting the underlying assets of the fund, trust or plan. Conversely, there may be situations in which no exemption in this regulation is applicable to the assets of a fund, trust or plan which is properly reported as an EIF on the employee's financial disclosure statement.

(c) *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.

(d) *Employee benefit plan* means a plan as defined in section 3(3) of the Employee Retirement 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.

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

(f) *Holdings* means portfolio of investments.

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

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

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

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

(k) *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.

(l) *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 rule, the term mutual fund includes open-end and closed-end mutual funds and registered money market funds.

(m) *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.

(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. 781) 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. 781) and issued by an entity whose stock is a publicly traded security.

Note: National securities exchanges include the American Stock Exchange and the New York Stock Exchange. Regional exchanges include the 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 less than one year 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).

§ 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, the 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 part 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. Because 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, he has no disqualifying financial interest in the Government matter. 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 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 section 2640.202 of this part 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 must 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, common trust funds, unit investment trusts, and employee benefit plans.

(a) *Diversified mutual funds, common trust funds, and unit investment trusts.* An employee may participate in any particular matter, whether of general applicability or involving specific parties, affecting one or more holdings of a diversified mutual fund, a diversified common trust fund, or a diversified unit investment trust, where the disqualifying financial interest in the matter arises because of the direct or beneficial ownership by the employee, or any other person specified in section 208(a), of an interest in the trust or fund.

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 ''diversified management company.'' The employee may participate in agency matters affecting the computer company.

Example 2: An employee has owned shares in five different mutual funds for a number of years. Although each of the funds has numerous varied holdings, the employee is not sure whether the funds are actually ''diversified'' as defined in § 2640.102(b). After searching his records, the employee finds prospectuses for three of the funds. One of these prospectuses indicates that the mutual fund is a ''diversified company'' and a second states that the fund is a ''diversified management company.'' Neither indicates that the fund has a policy of concentrating its investments in a particular sector. Both funds are ''diversified'' mutual funds and the employee is not disqualified from acting in matters affecting the underlying holdings of the funds. For the remaining three funds, the employee calls the telephone number provided by the fund's sponsor for investor inquiries. After ascertaining that all three funds are ''diversified companies'' and none has a policy of concentrating investments in a particular sector, the employee is free to act in matters affecting the funds' holdings. Once this determination has been made, no further action is required and the employee may rely on the exemption in § 2640.201(a).

Example 3: An auditor at the Internal Revenue Service (IRS) is one of the beneficiaries of a trust established by her father to provide a life income for his children. The trust is managed by a bank as a common trust fund. The IRS auditor may assume that the trust's assets are diversified and may act in IRS matters that would affect the trust's underlying assets.

Example 4: 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 § 2640.201(a) 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(b)(1). 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)–(c) for interests arising from publicly traded securities may be applicable.

(b) *Sector mutual funds.* An employee may participate in any particular matter, whether of general applicability or involving specific parties, 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 the direct or beneficial ownership by the employee, or any other person specified in section 208, 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, whether of general applicability or involving specific parties, affecting one or more holdings of an employee benefit plan, where the disqualifying financial interest in the matter arises from membership by the employee, or any other person specified in section 208(a), 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: 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 § 2640.201(c)(1)(iii)(A).

(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 § 2640.201(c)(1)(ii) where the only disqualifying financial interest in the matter arises because of participation by the employee, or other person specified in section 208(a), 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 regulation.

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 all matters.* An employee may participate in any particular matter involving specific parties, in which the disqualifying financial interest arises from the direct or beneficial ownership by the employee, his spouse or minor children of securities issued by one or more entities which are parties to the matter, if:

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

(2) The aggregate market value of the holdings of the employee, his spouse and minor children in the securities of all parties 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 § 2640.202(a) 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).

(b) *De minimis exemption when issuer is not a party.* An employee may participate in any particular matter involving specific parties in which the disqualifying financial interest arises from the direct or beneficial ownership by the employee, his spouse, or minor children of securities issued by one or more entities that are not parties to the matter but that are affected by the matter, if:

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

(2) The aggregate market value of the holdings of the employee, his spouse and minor children in the securities of all affected entities (including securities exempted under paragraph (a) of this section) does not exceed $25,000.

Example 1: An attorney at the Department of Labor is handling litigation brought by Allied Chemical Corporation challenging a provision in the Department's health and safety regulations that apply to companies which manufacture certain types of ether. If the plaintiff is successful, all companies subject to this provision in the health and safety rules will be able to reduce expenditures required for complying with the regulations. The attorney does not own any stock in Allied Chemical Corporation, but does own $15,000 worth of stock in another company not a party to the litigation, but which is subject to the regulatory provision at issue in the litigation. The attorney may continue to handle the litigation.

Example 2: A second attorney at the Department of Labor is asked to assist in handling the same litigation brought by Allied Chemical Corporation, as described in the preceding example. However, this attorney owns $4,000 worth of stock in Allied Chemical, as well as $12,000 worth of stock in each of two other chemical companies which are not parties to the litigation, but which are subject to the regulatory provision at issue and which would be affected by the outcome of the litigation. Unless the attorney obtains an individual waiver pursuant to section 208(b)(1), or sells a portion of his stock, he may not participate in matters involving this litigation. The aggregate market value of his holdings in affected entities exceeds $25,000.

(c) *De minimis exemption for matters of general applicability.* An employee may participate in any particular matter of general applicability not involving specific parties, such as rulemaking, in which the disqualifying financial interest arises from the direct or beneficial 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 securities or municipal securities; and

(2) The aggregate market value of the holdings of the employee, his spouse and minor children in:

(i) Any one such entity does not exceed $25,000; and

(ii) All entities affected by the matter does not exceed $50,000.

Example 1: The Department of Commerce is in the process of formulating a regulation concerning unfair trade practices. The regulation will affect all foreign companies that sell automobiles in the United States. An employee of the Department who is assisting in drafting the regulation owns $10,000 worth of stock in one Japanese automobile manufacturer, $20,000 worth of stock in a German automobile manufacturer, and

$7,500 worth of stock in a Swedish automobile company. Even though the employee owns $37,500 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 Departmentwide 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(b), the exemption at § 2640.201(a) is not applicable. However, because the fund is a ''publicly traded security'' as defined in § 2640.102(q), the exemption for financial interests arising from ownership of a de minimis amount of securities at § 2640.202(c) will permit the employee to participate on the task force.

(d) *Exemption for short-term Federal Government securities.* An employee may participate in any particular matter, whether of general applicability or involving specific parties, in which the disqualifying financial interest arises from the direct or beneficial ownership by the employee, or any other person specified in section 208(a), of short-term Federal Government securities.

(e) *Exemption for interests of tax-exempt organizations.* An employee may participate in any particular matter, whether of general applicability or involving specific parties, 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), 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;

(3) The organization's holdings in one or more affected issuers represent no more than 20% of the organization's total investment portfolio; and

(4) 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 (about 10% of the endowment's value) 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.

(f) *Exemption for certain interests of general partners.* An employee may participate in any particular matter, whether of general applicability or involving specific parties, 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 by the employee, or any other person specified in section 208, of publicly traded securities issued by the corporation; or

(2) Participation by the employee, or any other person specified in section 208, 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, not involving specific parties, 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, whether of general applicability or involving specific parties, affecting one campus of a State multi-campus institution of higher education, if the employee's only disqualifying financial interest is employment in a position with no multi-campus responsibilities at a separate campus of the same multi-campus institution.

Note: Many State institutions and systems of higher education are sufficiently separate from each other that an exemption is not necessary to permit an employee to participate in matters affecting another State educational institution. Whether State institutions constitute a State ''system'' must be resolved on an individual basis by the agency employing the exemption.

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

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

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

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

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

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

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

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

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

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

Example 7: An employee of the Federal Supply Service Division of the General Services Administration (GSA) may participate in GSA's evaluation of the feasibility of privatizing the entire Federal Supply Service, even though the employee's own position would be eliminated if the Service were privatized.

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

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

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

(e) *Commercial discount and incentive programs.* An employee may participate in any particular matter, whether of general applicability or involving specific parties, affecting the sponsor of a discount, incentive or other similar benefit program if the only disqualifying financial interest arises because of the participation of the employee, or any other person specified in section 208, 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, whether of general applicability or involving specific parties, affecting a mutual insurance company if the only disqualifying financial interest arises because of the employee's interest or the interest of any other individual specified in section 208, 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 employee 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(a)(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, not involving specific parties, 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 provision, ''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 that the exemption for interests in securities at § 2640.202(c) 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 and devices.* 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 the approval or classification of medical products or devices if the disqualifying financial interest arises from:

(1) Employment by the special Government employee, or any other person specified in section 208(a), with a hospital or other similar medical facility whose only interest in the medical product or device is purchase of it for use by its patients; or

(2) The prescription of medical products and devices for patients by the special Government employee, or 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 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 a waiver 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 the effective date of this regulation, 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: 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;

(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.* Subject to the limitations in paragraph (b) of this section, a copy of an agency waiver issued pursuant to 18 U.S.C. 208(b)(1) or (b)(3) shall generally 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;

(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; and

(3) Shall withhold from public disclosure information in any waiver which is otherwise subject to a prohibition on public disclosure under law.

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