



United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

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MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Don W. Fox
General Counsel

SUBJECT: Guidance on Waivers under 18 U.S.C. § 208(b), Authorizations Under 5 C.F.R. § 2635.502(d), and Waivers of Requirements under Agency Supplemental Regulations

The Office of Government Ethics (OGE) has become aware of several situations in which ethics officials have issued waivers under 18 U.S.C. § 208(b), authorizations under 5 C.F.R. § 2635.502(d), or waivers under agency supplemental regulations after employees acted in particular matters from which they should have been recused, or otherwise engaged in conduct that was prohibited. These incidents have highlighted the need for OGE to address the obligations imposed on ethics officials and others involved in issuing waivers, as well as to clarify that waivers and authorizations must be issued prospectively in order to be valid. This guidance establishes no new requirements, but is a reminder of the existing rules.

Definition of Terms

Section 208 of Title 18 generally prohibits an employee from participating in a particular matter in which he has a personal or imputed financial interest. Section 208(b) contains specific provisions allowing waivers of the prohibitions contained in section 208(a), provided certain requirements are met. The procedures for granting waivers under section 208(b)(1) are set forth in OGE's regulations at 5 C.F.R. §§ 2635.402(d)(2), 2640.301, and 2635.605(a). The procedures

for granting waivers under section 208(b)(3) are set forth in OGE's regulations at 5 C.F.R. §§ 2635.402(d)(3) and 2640.302.¹

OGE regulations also speak to situations in which an employee's participation in a particular matter involving specific parties would not violate section 208, but would raise a question in the mind of a reasonable person about the employee's impartiality. In such situations, an agency designee must review the facts and circumstances presented and determine whether the employee's participation should be authorized. The procedures for granting such an "authorization" are set forth in detail in 5 C.F.R. §§ 2635.502(d) and 2635.605(b). Where agencies have supplemental regulations, specifically supplemental regulations that prohibit certain financial holdings or activities, there are also provisions which allow designated agency officials to evaluate given situations and issue written waivers.²

For purposes of this DAEOgram, the term "waiver" refers to waivers under 5 U.S.C. § 208(b) and 5 C.F.R. §§ 2635.402, 2635.605(a) and 2640.301 - .302 and agency supplemental regulations, as well as "authorizations" under 5 C.F.R. §§ 2635.502(d) and 2635.605(b). Although different terms are used to describe the processes under these various provisions, the analysis to be undertaken and the results achieved under each is identical: a review is performed to determine whether to permit an employee to engage in conduct that would otherwise be prohibited or questionable under conflict of interest laws or regulations. Therefore, unless otherwise indicated, the provisions discussed in this DAEOgram are collectively referred to as "waiver provisions."

Requirements for Granting Waivers

While the procedures for considering and granting waivers differ, for any waiver to be valid and therefore authorize participation by an employee that would otherwise be unlawful or questionable, certain basic requirements must be met. These requirements are set forth below.

¹ Waivers for certain special Government employees are authorized under 18 U.S.C. § 208(b)(3). The guidance in this DAEOgram is generally applicable to waivers under both § 208(b)(1) and (b)(3).

² See, e.g., 5 C.F.R. § 3101.103(c)(Department of Treasury supplemental regulations); 5 C.F.R. § 3201.102(e)(Federal Deposit Insurance Corporation regulations); 5 C.F.R. § 6701.103(c)(General Services Administration regulations). Because supplemental agency regulations must be consistent with 5 C.F.R. § 2635, OGE deems the requirement that waivers be issued in advance to be incorporated by reference even if such a requirement is not explicitly stated in the supplemental regulation.

1. Waivers must be granted before an employee engages in a potentially prohibited activity.

Although different kinds of waivers require different procedures and criteria for the granting officials, all such waivers have one thing in common: the waiver must be granted prior to the employee engaging in otherwise prohibited conduct. It is axiomatic that any of these waivers is a prospective grant of permission, not a retrospective grant of forgiveness. Even apart from the specific legal requirements discussed below, sound ethics policy demands that those who grant waivers should not be in the position of essentially exercising enforcement discretion by deciding which past violations should or should not be condoned. The subtle, or not so subtle, pressures that would be brought to bear on a granting official are all too plain, and it is difficult to imagine that a granting official could act in a dispassionate way to balance all the appropriate waiver criteria, if the waiver decision were made after the fact and that decision would have the practical effect of determining culpability.

The purpose of a waiver is to permit an employee, in limited circumstances, to engage in activities that would otherwise be conflicts of interest under 18 U.S.C. § 208, create the appearance of conflicts of interest as defined in 5 C.F.R. § 2635.502, or constitute violations of agency supplemental regulations. The waiver processes exist because the Congress, OGE and other agencies recognized that there are occasions when a conflict of interest or an appearance of a conflict of interest is de minimis, or is outweighed by the needs of the Government for an employee to act. The waiver processes permit a review of facts presented in a specific situation, and authorize someone other than the affected employee to make a reasoned determination as to whether a waiver is warranted. OGE wants to make clear that unless and until a waiver is granted, an employee is not authorized to engage in a prohibited activity.

Section 208(b)(1) of Title 18 specifically requires that a waiver be granted in advance of an employee engaging in conduct that would otherwise be a violation of 18 U.S.C. § 208(a). Under OGE regulations, waivers issued under section 208(b)(3) must be issued “prior to the individual taking any action in the matter or matters” for which the waiver is sought. 5 C.F.R. § 2640.302(a)(6). Similarly, 5 C.F.R. § 2635.501, which references the process for seeking a waiver under section 2635.502(d) in circumstances that do not rise to the level of a conflict of interest under 18 U.S.C. § 208, but potentially raise questions about an employee’s impartiality, requires that an employee use that process for a determination as to “whether he should or should not participate in a particular matter” and cautions that “unless he receives prior authorization,” an employee should not participate in such matters. Therefore, 18 U.S.C. § 208(b)(1) and 5 C.F.R. §§ 2640.302(a)(6) require, and 5 C.F.R. §§ 2635.501 and 2635.502 suggest, that waivers must be issued in advance in order to be valid.

OGE does not consider retroactive waivers to be valid as they are neither authorized nor contemplated by 18 U.S.C. § 208(b), or 5 C.F.R. §§ 2635.402(d), 2635.502(d) or 2640.302(a),

and OGE is unaware of any legal authority that permits the granting of retroactive waivers under agency supplemental regulations as well. In the event that a DAEO or ethics counselor learns that an employee may have acted without obtaining a necessary waiver under one of the above provisions, the matter must be referred to the appropriate office (*e.g.*, the agency's Office of Inspector General) to gather the information necessary to determine if an actual violation has occurred. This is particularly important in situations where potentially criminal conduct has occurred, in view of the requirements of 28 U.S.C. § 535.³

2. Waivers must be based upon a full disclosure by the employee of all relevant facts.

Under 18 U.S.C. § 208(b)(1) a waiver is not valid unless it is based upon "full disclosure" of the financial interest involved, and a specific determination has been made by an appropriate agency official that the employee's interest is not so substantial as to be deemed likely to affect the integrity of the services that the Government may expect. Likewise, under 18 U.S.C. § 208(b)(3), the agency official first must review the special Government employee's financial disclosure form before determining that a waiver is appropriate in light of the information disclosed by the employee. Similarly, under 5 C.F.R. § 2635.502(d), a waiver is to be based on a determination made "in light of all relevant circumstances" that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. With respect to agency supplemental regulations, there may not always be an express requirement that the employee make full disclosure prior to a waiver, but clearly, the omission or withholding of material information bearing on the waiver decision would be a serious matter and could be punishable in certain circumstances. *See, e.g.*, 18 U.S.C. § 1001(prohibiting false statements).

Obviously, such a determination requires that an employee seeking a waiver be forthcoming about the facts at issue in his particular circumstances.⁴ This analysis also requires that the agency official considering a waiver proactively seek information from the employee to ensure that the waiver determination is based upon consideration of all relevant facts, and that granting the waiver is in the Government's interest.

³ Section 535(b) of Title 28 specifically requires that criminal allegations involving Government officers or employees be reported to the Attorney General by the "head of the department or agency, witness, discoverer or recipient."

⁴ Indeed, 5 C.F.R. § 2635.502(a) requires an employee to self-report and to seek a waiver under the procedures set forth in section 2635.502(d). Similarly, under section 2635.502(c), an ethics official who becomes aware of a potential appearance problem is required to follow up with the employee and, where indicated, make a waiver determination under section 2635.502(d).

3. Conflict of interest waivers must be issued in writing.

The purpose of a waiver is to permit an employee to engage in an activity that would otherwise be a conflict of interest under 18 U.S.C. § 208, or pose an appearance problem under 5 C.F.R. § 2635 or an agency's supplemental regulations. The waiver process requires consideration of specific facts and circumstances and an actual determination by an agency official that a waiver is consistent with the relevant legal criteria. Section 208 waivers are required by statute to be in writing as are waivers issued under agency supplemental regulations.

Waivers under 5 C.F.R. § 2635.502(d) are issued in writing at the discretion of the agency designee or when requested by the employee. However, because of the significance of the waiver process and the fact that a waiver operates to shield an employee from administrative misconduct charges, OGE strongly recommends that appearance waivers be documented in some manner that allows the granting official to have a record of the facts considered and the rationale for the waiver decision, and the employee to have a record of the advice received.

4. OGE must be consulted about section 208(b) waivers and provided copies of those that are granted.

Agencies are reminded that, pursuant to 5 C.F.R. § 2640.303 and section 301(d) of Executive Order 12731, agency officials are required to consult with OGE prior to issuing a waiver under 18 U.S.C. § 208(b) "where practicable." This is a high standard requiring agencies to consult in all but the most exigent circumstances. Waiving a criminal conflict of interest statute is not to be taken lightly. Situations warranting waivers do arise, and OGE can be a valuable resource to help agencies shape and refine potential waivers. Further, the OGE Director must be provided with a copy of all waivers that are approved.

Although these requirements specifically pertain to conflict of interest waivers issued pursuant to section 208(b), desk officers at OGE are also available to consult regarding appearance waivers when circumstances warrant, for example, when agency ethics officials encounter novel or complex fact patterns.

Conclusion

Evaluating possible waivers is one of the more significant duties that ethics officials perform to ensure public confidence in the Government's operations and programs. Both the individual employee's interests and those of the Government are best served when this process is carried out in a careful and consistent manner.