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LEGAL ADVISORY

TO: Designated Agency Ethics Officials

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SUBJECT: CONTINUING WAIVER VALIDITY FOR TRANSFERRED EMPLOYEES

The U.S. Office of Government Ethics (OGE) occasionally receives inquiries concerning whether a waiver, issued pursuant to 18 U.S.C. § 208(b)(1), remains valid when an employee is transferred from one agency to another. As discussed below, a waiver issued by an employee's former agency will remain valid unless and until canceled by the employee's receiving agency.

Under section 208(a), title 18 of the United States Code, an employee is prohibited from participating personally and substantially in any particular matter in which, to his knowledge, the employee or any other person specified in the statute has a financial interest. *See also* 5 C.F.R. § 2640.103(a). Section 208(b)(1), title 18 of the United States Code, provides that an agency may waive the conflict of interest prohibition at 18 U.S.C. § 208(a) if an employee first makes a full factual disclosure to the appropriate Government official of both his duties and the disqualifying financial interest, and receives in writing a determination that the financial interest is not so substantial as to be deemed likely to affect the integrity of the employee's services to the Government. The question has been raised whether such a waiver continues to be effective when an employee moves from one agency to another because that employee's functions are transferred.¹

¹ Pursuant to 5 U.S.C. § 3503, when "a function is transferred from one agency to another, each competing employee in the function shall be transferred to the receiving agency for employment in a position for which he is qualified before the receiving agency may make an appointment from another source to that position." *See also* 5 C.F.R. § 351.301 et seq. Such a transfer may occur by statute, reorganization plan, or Executive order. *See* 5 C.F.R. § 351.301(a).

We first note that when an employee moves from one agency or department to another, the employee's new agency is not required to honor a previously issued waiver. *See* OGE Informal Advisory Letter 93 x 12. Further, it is fully within the receiving agency's discretion to determine whether to grant a new waiver or continue to honor an existing waiver. *See* 5 C.F.R. § 2640.301(a); 7 Op. O.L.C. 10, 11-12 (1983); OGE 93 x 12. Nonetheless, practical and equitable considerations militate toward allowing an employee's continued reliance on a waiver until his or her receiving agency has had the opportunity to consider whether the waiver is necessary or desirable. *Cf.* OGE DAEOgram DO-94-002 (stating, in relation to waivers of late filing fees, that employees who transfer between positions "should be allowed some latitude until they have been clearly apprised of the requirement to file reports in those positions.")

An agency determination that a waiver should be granted pursuant to 18 U.S.C. § 208(b)(1) is focused primarily on the employee's disqualifying financial interests and the employee's duties. *See* 7 Op. O.L.C. at 13; *see also* 5 C.F.R. § 2640.301(a)(1); OGE DAEOgram DO-07-006. When the disqualifying financial interest of the employee and the functions of the employee's position remain substantially the same as those covered by an existing waiver, the employee's previous agency's legal determination under 18 U.S.C. § 208(b)(1) – that the financial interest is not so substantial as to affect the integrity of the services that the Government may expect from the employee – effectively continues to waive the prohibitions of 18 U.S.C. § 208(a), absent a new determination by the receiving agency. Thus OGE has determined that during the period in which an employee is relying in good faith upon a previously issued waiver, and prior to a decision made by his or her receiving agency to cancel that waiver or issue a new waiver, an employee may participate in his or her official capacity in particular matters affecting an otherwise disqualifying financial interest covered by the existing waiver.

Once an employee's receiving agency is aware, however, that the employee has a previously issued waiver, the agency should determine whether the financial interest in question poses an actual or potential conflict of interest and, if so, whether the conflict can be avoided by recusal or divestiture. If either of those two remedies is possible, the receiving agency should decide whether to issue a new waiver or cancel the previous waiver by written instrument and require the employee to recuse or divest. If recusal or divestiture is not possible, the agency may issue a new waiver. Additionally, though an existing waiver will permit an employee to participate in an otherwise prohibited activity prior to a new determination by his or her receiving agency as to whether to issue a new waiver or cancel the existing waiver, the employee's ethics counselor and supervisor should perform a timely review of the employee's duties and last financial disclosure report, if available, to determine whether a waiver continues to be necessary or desirable.

The above analysis also applies when an employee in one "competitive area" of an agency or department is transferred to another "competitive area" of the same agency or

department because his or her functions are transferred.² In that circumstance, the ethics official for the receiving “competitive area” should make the same determination concerning the existing waiver as he or she would make if the incoming employee were transferred from another agency.

² Under 5 C.F.R. § 351.302, a transfer of functions pursuant to 5 U.S.C. § 3503 can occur both inter- and intra-agency, so long as the transfer is between “competitive areas.” *See* 5 C.F.R. § 351.302. The definition of “competitive area” is found at 5 C.F.R. § 351.402.