

UNITED STATES OFFICE OF
GOVERNMENT ETHICS



April 14, 1999
DO-99-015

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Stephen D. Potts, Director

SUBJECT: 18 U.S.C. § 208 and defined benefit pension plans

Under 18 U.S.C. § 208, an employee may not participate in a particular matter in which the employee or certain others specified in the statute have a financial interest, if the matter would have a direct and predictable effect on the financial interest. The Office of Government Ethics (OGE) in OGE Formal Advisory Letter 83 x 1, addressed the question "whether, or under what circumstances, a federal employee's vested rights in a private corporation's pension plan constitute a 'financial interest' under 18 U.S.C. § 208." In the opinion, we stated that although the facts of each situation must be examined separately, the typical pension plan is so closely linked to the sponsoring organization that a Government employee with a vested interest in the plan has a financial interest under § 208 in matters affecting the sponsoring organization unless the employee demonstrates otherwise. In accordance with 83 x 1, OGE's Public Financial Disclosure: A Reviewer's Reference, originally published in 1994, offers similar guidance on this issue.

Subsequently, in September 1995, OGE published a proposed regulation that contained an interpretation of section 208 as well as a number of exemptions from the application of section 208. See 60 Fed. Reg. 47208-47233 (September 11, 1995).(1) The preamble to that regulation, which was reviewed and approved by the Office of Legal Counsel at the Department of Justice, includes a discussion on page 47214 of the applicability of section 208 to employee pension interests. The purpose of this DAEOgram is to summarize that discussion in order to update and refine our previous guidance on this issue, and to address questions that have arisen about the continuing validity of our original advice in 83 x 1.

Most pension plans fall within one of two categories. A defined benefit plan is a type of retirement plan under which an employer makes payments to an investment pool which it holds and invests for all participating employees. Defined benefit plans are the obligation of the employer. Under this type of plan, participants receive 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. A defined contribution plan is a retirement plan that establishes an individual account for each participant. Under this type of plan, each participant will receive a retirement benefit that is based upon contributions to, and income generated by, the account. The amount the employee will receive under a defined contribution plan may vary depending upon the gains, losses, and expenses that are attributable

to the account. Typically, the employer is the sponsoring organization of either type of pension plan.

In applying section 208 to pension plan interests, we may be concerned about an employee's participation in a Government matter that could have an effect on the sponsoring organization that is responsible for funding or maintaining the Government employee's pension plan. This concern normally arises with defined benefit plans, rather than defined contribution plans, because the sponsor of a defined benefit plan is obligated to fund the plan. For matters affecting the sponsor of a defined contribution plan, an employee's interest is not ordinarily a disqualifying financial interest under section 208 because the sponsor is not obligated to fund the employee's pension plan.

However, with defined benefit plans, the sponsor may be so closely linked to the pension plan and the particular matter in which the employee would participate may be so significant, that the matter affecting the sponsor of the plan also will affect the sponsor's ability or willingness to pay the employee's pension. This might be the case, for example, when an employee is assigned to participate in important litigation involving a company that is his former employer and that maintains a defined benefit pension plan in which he has a vested interest. If the litigation could result in the dissolution of the sponsor organization and its subsequent inability to pay the employee's pension, the employee's interest in his pension would be a disqualifying financial interest under section 208. The employee would be disqualified from participating in the conduct of the litigation absent the issuance of a waiver under 18 U.S.C. § 208(b)(1).

OGE believes that, as a practical matter, 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 the employee's pension.⁽²⁾ For example, an employee who worked for IBM and who has an interest in a defined benefit plan sponsored by IBM may participate in the decision to deny an award of a \$500,000 contract to IBM for the purchase of computers. Although the decision affects IBM, given the large size and financial strength of the company, the denial is unlikely to have an effect on the ability or willingness of IBM to pay the employee's pension. In such a case, the employee's interest in his defined benefit plan would not be a disqualifying financial interest under section 208.

In conclusion, we recommend that agencies no longer automatically presume that employees have a conflict of interest in matters affecting the sponsor of their defined benefit plans. If an employee is assigned to participate in a particular matter that affects the sponsor of his defined benefit plan, the employee will not ordinarily have a disqualifying financial interest in his defined benefit plan under section 208, unless the matter would have a direct and predictable effect on the sponsor's ability or willingness to pay the employee's pension benefit. Accordingly, ethics officials need not routinely issue waivers or require recusals for matters affecting the sponsors of defined benefit plans and should continue to examine each situation on an individual basis.⁽³⁾

1. The regulation was published as a final regulation on December 18, 1996 at 61 Fed. Reg. 66830 et seq. It is codified at 5 C.F.R. part 2640.
2. For situations where an employee does have a disqualifying financial interest in an employee benefit plan, OGE has issued an exemption at 5 C.F.R. § 2640.201(c). Under this exemption, an employee may participate in a particular matter of general applicability that affects a State or local government sponsor of a pension plan. The exemption does not apply to matters involving a State or local government as a party, or to any matters involving a corporate or other nongovernmental sponsor of a pension plan.
3. Under 5 C.F.R. § 2635.502(b)(1)(i), an employee has a covered relationship with a person with whom he has a "business, contractual or other financial relationship that involves other than a routine consumer transaction." A vested interest in a defined benefit plan funded and maintained by a former employer would create a covered relationship. Therefore, in such cases, an employee should comply with the requirements of section 2635.502(a) when acting in matters involving his former employer who is the sponsor of the plan.