

Office of Government Ethics

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**Letter to a Department Official
dated October 5, 2000**

This responds to your letter of September 11, 2000, in which you request assistance "in interpreting the limitations included within the exemption contained in Title 18 U.S.C. § 208(b)(4)." As you know, 18 U.S.C. § 208(a) disqualifies employees from participating in any particular matter in which they, or certain other persons specified in the statute, have a financial interest. However, section 208(b)(4) exempts employees from the prohibition of section 208(a), where the otherwise disqualifying financial interest arises solely from the interests of the employee or the employee's spouse or minor children in birthrights in certain Indian tribes and organizations, certain Indian allotments, and certain Indian claims funds.¹ You seek guidance specifically

¹ Section 208(b)(4) provides:

(b) Subsection (a) shall not apply-

(4) if the financial interest that would be affected by the particular matter involved is that resulting solely from the interest of the officer or employee, or his or her spouse or minor child, in birthrights--

(A) in an Indian tribe, band, nation, or other organized group or community, including any Alaska Native village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians,

(B) in an Indian allotment the title to which is held in trust by the United States or which is inalienable by the allottee without the consent of the United States, or

(C) in an Indian claims fund held in trust or administered by the United States,

(continued...)

concerning the language in the final clause of section 208(b)(4), which limits this exemption to particular matters that do "not involve the Indian allotment or claims fund or the Indian tribe, band, nation, organized group or community, or Alaska Native village corporation as a specific party or parties."

We note at the outset your request that guidance concerning section 208(b)(4) be incorporated into regulations implementing section 208. Currently, the primary regulations pertaining to section 208 are found in 5 C.F.R. part 2640.² Part 2640, among other things, implements the Congressional directive to "issue uniform regulations for the issuance of waivers and exemptions under subsection (b)." 18 U.S.C. § 208(d)(2). OGE published proposed and interim final versions of certain provisions of part 2640 in 1995, after informal consultations with a number of agencies, including your own, concerning the scope and content of the proposed rule. Prior to the publication of the final rule in December of 1996, OGE also received and reviewed numerous written comments. At that time, OGE decided not to include any provisions dealing with section 208(b)(4), for essentially two reasons.

First, OGE received no significant expression of concern or interest with respect to this subject. In fact, during an informal meeting with OGE in 1994, the Alternate Designated Agency Ethics Official of your agency was specifically invited to submit a proposal pertaining to the treatment of "birthright interests" under section 208, but no such proposal ultimately was offered during the development or consideration of the proposed rule. Second, and more important, the exemption in section 208(b)(4) is self-executing and does not require any action by OGE, or any other agency, to become effective. By contrast, the exemption provision in section 208(b)(2) specifically requires rulemaking by OGE for its implementation. Likewise, the waiver provisions in section 208(b)(1) and (b)(3) require specific discretionary actions by agency officials, and the statute, as well as Executive

¹(...continued)

if the particular matter does not involve the Indian allotment or claims fund or the Indian tribe, band, nation, organized group or community, or Alaska Native village corporation as a specific party or parties.

² Your letter refers to 5 C.F.R. part 2635, as well as agency supplemental regulations promulgated thereunder; although part 2635 contains a brief treatment of certain aspects of section 208, the regulations in part 2640 provide OGE's principal guidance on this statute. See 5 C.F.R. § 2635.401(referring to part 2640 for amplification).

Order 12731, contemplate that OGE will provide agencies with uniform guidance concerning the exercise of their discretionary authority to grant waivers. See 18 U.S.C. § 208(d)(2); Executive Order 12731, section 201(c) (October 17, 1990). Consequently, it was deemed necessary for OGE to issue regulations concerning section 208(b)(1), (b)(2), and (b)(3), but not section 208(b)(4).

At this time, OGE continues to believe that the need for rulemaking concerning section 208(b)(4) has not been demonstrated. Moreover, any proposed regulation interpreting section 208(b)(4) could not provide detailed guidance as to what specific matters and financial interests would be covered by the exemption, because such determinations will vary according to the particular facts of each case, as noted further below. Nevertheless, we would be happy to consider any specific proposal for a regulatory amendment that you might think warranted, provided, of course, that such proposal is coordinated and forwarded through the Designated Agency Ethics Official (DAEO) of your agency. OGE also will continue to provide agencies with guidance, upon request, concerning the application of section 208(b)(4). In this connection, the following general guidance may assist you in understanding and applying the specific limitation in the final clause of section 208(b)(4) about which you inquired.

The scope of the limitation on the exemption can best be understood in light of the peculiar legislative history of section 208(b)(4). To the extent that section 208(b)(4) has any statutory predecessor, it was a short-lived provision first found in a continuing appropriations act for fiscal year 1988 and re-enacted in the Department of the Interior appropriations act for fiscal year 1989. See Pub. L. 100-102, § 318, 101 Stat. 1329-255 (December 22, 1987); Pub. L. 100-446, § 319, 102 Stat. 1826 (September 27, 1989) (hereinafter "section 319"). These identical appropriations act provisions stated: "Notwithstanding any other provision of law, hereafter for the purposes of section 208 of title 18, United States Code, 'particular matter', as applied to employees of the Department of the Interior and the Indian Health Service, shall mean 'particular matter involving specific parties'."

By limiting the disqualification requirement of section 208(a) only to those matters that involve specific parties, section 319 permitted employees of the Department of the Interior (DOI) and the Indian Health Service (IHS) to participate in all particular matters of general applicability. Particular matters of general applicability, which are otherwise covered by section 208(a), include such matters as rulemaking or policy decisions affecting a discrete and identifiable class of persons; particular matters

involving specific parties, by contrast, are limited to such matters as contracts, litigation, and other matters more narrowly focused on the rights of identified parties. See, e.g., 2 Op. O.L.C. 151 (1978) (explaining the well-established distinction between "particular matter," which may include policies and rules affecting a class of persons, and "particular matter involving specific parties," which is more narrowly focused). The evident purpose of the legislation was to address certain disqualification issues that had arisen under section 208(a) with respect to employees of two agencies that are substantially involved in Indian or Alaska Native matters. The provisions operated, however, by significantly reducing the scope of section 208(a) for *all* DOI and IHS employees, without regard to whether the disqualifying financial interest derived from any Indian or Alaska Native rights.

In 1989, President Bush recommended, and Congress passed, legislation repealing section 319 and replacing it with the exemption in section 208(b)(4). Although there are no committee reports explaining these changes, the rationale is suggested in the 1989 report of a Presidential commission appointed to recommend ethics law reforms, as well as in the written analysis prepared by the Office of the President to accompany the proposed legislation that formed the basis for section 208(b)(4). The President's Commission on Federal Ethics Law Reform observed that section 319 "seems to have been enacted to deal with the special problems of American Indians who are Government employees and may have birthrights in interests of their tribes which can be affected by actions of the Government, particularly the Interior Department." Report of the President's Commission on Federal Ethics Law Reform 116-17 (1989). The Commission noted, however, that section 319 was overbroad for this purpose, since it applied to all DOI employees, "many of whom have nothing to do with Indian affairs." *Id.* at 117. Moreover, the Commission concluded that the "special treatment afforded all employees of the Interior Department" was "inequitable in comparison to the rest of the executive branch," for which section 208(a) continued to cover all particular matters, not just those involving specific parties. *Id.* Explicitly echoing the views of OGE on the subject at that time, the Commission stated that it "agrees with the Office of Government Ethics and recommends that this provision be repealed in the interests of establishing uniform and consistent ethical standards." *Id.*

In response to this recommendation, the President included the repeal of section 319 in the legislative proposal that he sent to Congress, which ultimately evolved into the Ethics Reform Act of 1989. However, the President's proposal also included a new exemption, which became section 208(b)(4), to accompany the repeal

of the earlier provision. In a written analysis accompanying the President's proposal, the following explanation was offered: "This exemption is meant to address the situation that led Congress to generate a special definition of covered matters for Department of Interior officials under 18 U.S.C. § 208. The Commission recommended that this special treatment for all Interior Department employees be deleted (which the bill does in proposed section 602). In view of that deletion, this exemption is necessary to avoid unnecessary disqualification of a broad class of individuals from broad policy matters affecting tribes, pueblos, and Alaska Native corporations." Office of the President, Section-by-Section Analysis of Proposed "Government-Wide Ethics Act of 1989," April 12, 1989. Later in 1989, Congress enacted section 208(b)(4), using language that is substantially the same as the President's proposal.

In light of this legislative history, as well as the plain language of section 208(b)(4), certain things become apparent concerning the statutory limitation to which your letter refers.

First, we conclude that the limitation in the final clause of section 208(b)(4) covers only certain particular matters that involve specific parties. The clause expressly excludes matters that "involve" a covered tribe or other organization "as a specific party or parties." We recognize that the clause also refers to matters that "involve the Indian allotment or claims fund," and it is not absolutely clear, as a matter of grammar, whether the phrase "as a specific party or parties" is intended to modify "allotment" and "claims fund" as well as "tribes," etc. At the very least, however, the language suggests that the matters excluded from the exemption must be focused on the specific allotment or claims fund in which the employee has a birthright interest; the use of the word "involve," especially in a clause that elsewhere indicates concern over matters that "involve" specific parties, suggests that Congress was only concerned with those matters that more narrowly focus on a specific allotment or claims fund. Moreover, it is clear from section 319, which had excluded only matters involving specific parties from the exemption, that Congress' historical concern had been to prevent participation in such matters.³

³ Additionally, there is at least one other indication in the legislative history that the limitation in the final clause of section 208(b)(4) applies only to matters involving specific parties: a report on H.R. 3660 by the House Bipartisan Task Force on Ethics explained that the proposed exemption covered "certain conflicts of interest which arise because of one's birthright in an Indian tribe or other community or *in an Indian allotment or claims*" (continued...)

Second, as a corollary, it follows that section 208(b)(4) was intended to exempt all particular matters of general applicability, such as rulemaking or policy matters, that affect a class of Indian tribes or other Indian organizations identified in section 208(b)(4)(A), or a class of Indian allotments or Indian claims funds described in 208(b)(4)(B) and (C).⁴ The restriction covering matters involving specific parties plainly would not include rulemaking or policymaking of general applicability, pursuant to the well-recognized meaning of the phrase "particular matter involving specific parties" in the Federal conflict of interest statutes. See, e.g., 5 C.F.R. § 2640.201(l), (m); 5 C.F.R. § 2637.201(c)(1). This reading, moreover, is consistent with the explanation that the exemption was deemed "necessary to avoid unnecessary disqualification of a broad class of individuals from *broad policy matters* affecting tribes, Pueblos, and Alaska Native corporations." Section-by-Section Analysis (emphasis added).

Third, we believe that section 208(b)(4) also may be construed even to exempt certain particular matters involving specific parties. Unlike section 319, section 208(b)(4) does not merely distinguish between all "particular matters involving specific parties" and any other type of "particular matter." Rather, the limitation in the final clause of section 208(b)(4) refers only to those particular matters in which the employee's tribe or other covered organization is a specific party and those particular matters that specifically involve the allotment or claims fund in which the employee has a birthright interest. Conceivably, there could be other particular matters involving specific parties that do not meet these conditions. An example might be litigation brought by another tribe, in which the employee has no birthright, to challenge certain Government requirements that are applicable to all Indian claims funds, including the fund in which the employee has a birthright interest; although litigation always constitutes a particular matter involving specific parties, this litigation would not implicate the specific limitations articulated in

³(...continued)
fund if the matter does not involve such entity specifically as a party." 135 Cong. Rec. H9269 (daily ed. November 21, 1989)(reprinting report transmitted to the Speaker of the House on November 15, 1989)(emphasis added).

⁴ Of course, this is provided that the employee's financial interest in the matter derives solely from a covered birthright.

section 208(b)(4), because neither the employee's tribe nor the employee's claims fund would be specifically involved.⁵

On page two of your letter, you list examples of representative types of matters in which employees at your agency might participate. Without knowing the specific circumstances of many of these matters -- as well as the exact nature of the financial interest of any given employee in such matters -- it is not possible to determine in the abstract whether employees in your agency may participate personally and substantially in those matters, consistent with section 208(b)(4). However, we can generalize to the extent that we can suggest that some of the types of matters you list almost certainly would be particular matters involving specific parties: the awarding of contracts and grants to specific Indian tribes; the resolution of contract and grant audit findings with respect to such awards; the approval of specific requests to lease trust lands or individually allotted lands; distributions of trust estates to identified individuals; individual determinations of eligibility for various types of assistance.

It is possible that other matters you list might be viewed as particular matters involving specific parties as well, although we are not familiar enough with some of these types of matters (such as various determinations regarding tribal elections and intra-tribal governance disputes) to venture any conclusions. Suffice it to say that the distinction between particular matters involving specific parties and particular matters of general applicability is well-established, and OGE or your own DAEO can assist you in applying this distinction in individual cases, as necessary. Please note, however, that section 208(b)(4) will not protect employees who participate in any particular matter, whether or not it involves specific parties, where the disqualifying financial interest does not derive *solely* from a covered Indian birthright.

Sincerely,

F. Gary Davis
Acting Director

⁵ We note at least one additional way in which the exemption in section 208(b)(4) might be viewed as being broader than section 319: the appropriations act was limited expressly to employees of DOI and IHS (which is now an organizational component of the Department of Health and Human Services), whereas section 208(b)(4) applies without regard to the employee's agency.