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LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: Emory A. Rounds, III
Director

SUBJECT: Availability of Exemptions in 5 C.F.R. Part 2640 When an Agency Waives its Prohibited Holding Rule

The U.S. Office of Government Ethics (OGE) is issuing this Legal Advisory to provide guidance regarding the availability of the exemptions found at 5 C.F.R. part 2640, subpart B, when an agency waives its prohibited holding rule. As described below, OGE has concluded that once an agency grants an employee's request for a waiver of the agency's prohibited holding regulation or statute, the employee may rely on any applicable 2640 exemption for the waived asset because the employee no longer holds it "in violation of" an agency supplemental regulation or statute.

I. Agency Prohibited Holding Rules and Related Waivers

Several agencies have issued supplemental ethics regulations jointly with OGE¹ that, among other things, prohibit agency employees from holding or acquiring financial interests in entities that the agency regulates or that are otherwise affected by agency matters.² These prohibited holding rules generally include provisions that allow the Designated Agency Ethics Official (DAEO) or other agency designee to grant an employee a written waiver³ of the prohibited holding rule if the standards set forth in the waiver provisions are met.⁴ An employee

¹ Such supplemental regulations are issued pursuant to Executive Order 12674, as modified by Executive Order 12731, and 5 C.F.R. § 2635.105. While most agency prohibited holding rules are implemented in regulations issued jointly with OGE, some are implemented by statute. *See, e.g.*, Communications Act of 1934, 47 U.S.C. § 154.

² *See, e.g.*, 5 C.F.R. §§ 3201.103, 4401.102(c), 5601.102.

³ Some agencies' prohibited holding rules authorize the agency to grant a written exception but do not call it a waiver. *See, e.g.*, 5 C.F.R. § 5501.104(b)(4). For purposes of this Legal Advisory, the term "waiver" refers to both written waivers and exceptions to an agency's prohibited holding rule that are authorized by the agency's supplemental regulation.

⁴ For example, the Postal Regulatory Commission's prohibited holding rule contains the following waiver provision:

The DAEO may grant a written waiver from this section based on a determination that the waiver is not inconsistent with part 2635 of this title or otherwise prohibited by law and that, under the



who receives such a waiver would no longer be restricted by the agency prohibited holding rule; however, they would still be subject to the criminal conflict of interest prohibition.⁵

II. 2640 Exemptions Can be Applied When an Agency Waives its Prohibited Holding Rule

Employees who hold or acquire a financial interest prohibited by agency statute or regulation may not avail themselves of the 2640 exemptions⁶ that, if applicable, permit an employee to participate in certain particular matters affecting their financial interests.⁷ For example, if an employee acquires \$2,000 worth of stock in contravention of their agency's prohibited holding rule, the employee will not be able to apply the *de minimis* exemption at § 2640.202(a) and participate in a particular matter affecting the company in which they own stock, even though the stock value is below \$15,000.⁸

OGE has concluded, however, that when an agency waives application of its prohibited holding rule for a particular employee, the assets covered by the waiver are no longer prohibited and thus do not constitute interests "held or acquired by an employee, his spouse, or minor child *in violation of* a statute or agency supplemental regulation" (emphasis added). Accordingly, the employee may avail themselves of any applicable exemption referenced in § 2640.204 with respect to assets covered by the waiver.⁹ The following example illustrates this scenario:

Employees of Agency X are prohibited by Agency X's supplemental ethics regulation from having or acquiring a financial interest in Company ABC, which is regulated by the agency. An employee of Agency X inherits stock in Company ABC valued at around \$2,000, and submits a request to their DAEO for a waiver to retain the stock pursuant to the waiver provision of the agency's supplemental regulation. The DAEO grants the waiver request. As a result of this waiver, the employee does not hold the stock in violation of Agency X's prohibited holding rule, and may rely on the *de minimis*

particular circumstances, application of the prohibition is not necessary to avoid the appearance of an employee's misuse of position or loss of impartiality, or to otherwise ensure confidence in the impartiality and objectivity with which the Commission's programs are administered, or in the case of a special Government employee, divestiture would result in substantial financial hardship. A waiver under this paragraph must be in writing and may impose conditions, such as requiring execution of a written disqualification.

5 C.F.R. § 5601.102(g).

⁵ 18 U.S.C. § 208.

⁶ Subpart B of 5 C.F.R. part 2640 sets forth several exemptions pursuant to 18 U.S.C. § 208(b)(2).

⁷ Specifically, 5 C.F.R. § 2640.204 provides the following: "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, his spouse, or minor child 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)."

⁸ See § 2640.204, ex. 1.

⁹ As OGE has previously advised, waivers cannot be applied retroactively. See, e.g., OGE DAEOgram DO-10-005, at 3-4 (Apr. 22, 2010). Accordingly, the exemptions would not apply to any participation occurring prior to the waiver's issuance.

exemption in 5 C.F.R. § 2640.202(a) to participate in a particular matter affecting Company ABC.¹⁰

If agency ethics officials have any questions about this Legal Advisory, they should contact their OGE Desk Officer.

¹⁰ In the example above, if the employee inherits stock in Company ABC valued at \$55,000, instead of \$2,000, and the agency waives application of the prohibited holding rule with respect to that holding, the employee would not be able to apply the *de minimis* exemptions in § 2640.202 for securities because the value of the stock exceeds the *de minimis* amounts in § 2640.202. Similarly, if the written waiver issued by the agency includes limitations on the employee's participation in matters involving or affecting Company ABC, the employee would be required to follow the waiver's limitations and would not be able to apply any 2640 exemptions that are inconsistent with such limitations or other requirements included in the waiver.