Office of Government Ethics
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Letter to a Designated Agency Ethics Official
dated December 10, 1992

This is in response to your letter of July 6, 1992, in which you request an opinion regarding waivers for persons serving on advisory committees of [an agency within your department]. Your request is prompted by oral advice received from the staff of this Office that the distribution of preparatory materials to advisory committee members prior to a meeting may implicate 18 U.S.C. § 208(a). You believe that section 208 would not apply under the circumstances described in your letter.

You indicate that [the agency] distributes materials to advisory committee members in advance of a planned meeting in order to allow time for the members to become familiar with issues that may be addressed. You explain that at this time the agency also begins the process of preparing waivers under 18 U.S.C. § 208(b)(3) for members of the committees and determining whether individual members may participate in a particular meeting as well as the scope of their participation.

You advise that, because of the number of committees, the frequency of meetings, the fact-gathering required for financial interest analysis, and the levels of agency review, waivers for committee members are not executed until immediately before a meeting is convened. You indicate that the agency is revamping its procedures for preparing for meetings but that, without hardship, these revised procedures would not be able to accommodate the conflict of interest review required for granting a waiver prior to the distribution of preparatory materials.

Although these administrative factors are significant, you explain that your primary concern is a legal one. You do not view the examination of written materials and preparation for a meeting by an advisory committee member as constituting personal and substantial participation in a particular matter within the meaning of section 208.

Section 208(a) provides that an officer or employee of the executive branch, including a special Government employee, may not participate:

> . . . personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter [in which the employee has a financial interest].

See 18 U.S.C. § 208(a).

The legislative history of section 208, as well as subsequent case law, indicates that this provision is intended to be broadly interpreted. See United States v. Irons, 640 F.2d 872, 876-878 (7th Cir. 1981) (Irons). Section 208 speaks of participation "through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise." (Emphasis added). As the Irons court noted in interpreting the "or otherwise" language of section 208, the concept of participation is not limited to formal actions or final events but may apply to preliminary activities or matters in a formative stage.

This view of section 208 is reflected in the standards of conduct recently issued by this Office. See 5 C.F.R. Part 2635 "Standards of Ethical Conduct for Employees of the Executive Branch," 57 Fed. Reg. 35006 (August 7, 1992) (effective February 3, 1993). Section 2635.401(b)(4) of the standards of conduct defines personal and substantial participation as follows:

> (4) personal and substantial. To participate personally means to participate directly. It includes the direct and active supervision of the participation of a subordinate in the matter. To participate substantially means that the employee's involvement is of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. However, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but also on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. Personal and substantial participation

> may occur when, for example, an employee participates through decision, approval, disapproval, recommendation, investigation or the rendering of advice in a particular matter.

5 C.F.R. § 2635.401(b)(4).

Once an advisory committee meeting is formally convened, there is no question that the members are participating personally and substantially in the particular matters on the agenda for that meeting. However, we are not prepared to say that it is not possible for personal and substantial participation to occur prior to the formal convening of a meeting.

Your letter appears to recognize the possibility that certain kinds of pre-meeting activity might constitute personal and substantial participation in a particular matter since you advise that "members do not in any way interact with agency officials and cannot influence their decision-making." However, it is not clear from your letter whether this statement means that members of the committee have absolutely no contact with the agency or simply do not interact with the agency in a way that would be regarded as "substantial."

This uncertainty is heightened by the reference in your letter to "inadvertent activity" by advisory committee members. The fact that an activity may be "inadvertent" does not mean that it is not "substantial." As noted in the standards of conduct, a single act of participation at a critical step could be substantial. While section 208 requires that an employee have "knowledge" that a particular matter involves a personal financial interest, it does not require intent. Thus, the inadvertence of some pre-meeting activity would not remove possible liability of an advisory committee member.

While routine contacts with the agency that were strictly administrative in nature (such as confirming the date and time of a meeting) would not be likely to constitute substantial participation in a matter, other types of interaction with the agency might be. For example, requests by advisory committee members for additional information, for interpretations or clarifications of material received, or for the views of agency personnel on matters on the agenda, all of which might be considered preparation for a meeting, could nevertheless approach substantial participation in a matter. Conversely, advisory

committee members themselves might convey their views or provide data or information to agency officials or informally express their views on particular agenda items. Such pre-meeting activities could be involvement at a level that would be significant to the particular matters to be considered at the meeting.

Moreover, your letter is silent with regard to pre-meeting communications between advisory committee members or by advisory committee members with outside third parties. Personal and substantial participation could occur as a result of communications of advisory committee members among themselves prior to a formal meeting. Such contacts could range from a one-on-one exchange of views to informal discussions or meetings of several committee members. Committee members individually or in groups might also contact outside third parties for the purpose of obtaining relevant information or analysis. Again such activities could be a form of investigation or other activity that was significant to the matters to be formally considered.

As noted above, the definition of personal and substantial participation states that such participation requires more than official responsibility, knowledge, or perfunctory involvement. The question, then, is whether mere receipt of preparatory materials from the agency for a meeting and solely individual preparation for the meeting would constitute personal and substantial participation in a particular matter.

While the involvement of advisory committee members in the particular matters on the agenda even at this early stage is personal in that it is direct, it is reasonable to conclude that such participation is not yet substantial. At this point it may be said that advisory committee members have official responsibility for and knowledge of matters on the agenda but nothing more. They have taken no other action, exchanged no views, made no substantive input into the review process. Thus, the individual receipt and review by an advisory committee member of the information and material provided by the agency, standing alone, should not be regarded as "substantial" participation in a particular matter within the meaning of section 208.

We shall not venture to consider at what point, beyond mere receipt and review of information, pre-meeting activities such as those described above, either standing alone or in combination, might rise to the level of personal and substantial participation, thereby implicating section 208(a). Whether such pre-meeting

activities might constitute participation through the rendering of advice, investigation, approval or disapproval or otherwise would largely depend upon the facts of a specific case.

We can appreciate the time constraints that the agency may face in completing the waiver evaluation process, including the requirement under section 301(d) of Executive Order 12674 that agencies, where practicable, consult with this Office prior to granting a waiver. However, in view of the uncertainties that might be created by pre-meeting activity, the most prudent course would be to provide waivers as soon as it is administratively feasible. As a precaution, it would appear advisable to inform advisory committee members at the time they receive such materials that they should have no contact with the agency on other than routine administrative matters such as confirming the time and place of meetings and that they should not communicate with other members of the committee or other outside persons until they are notified that waivers have been granted or are not necessary. Other procedures may also be appropriate to avoid personal and substantial participation.

In this regard, we suggest that, if you have other questions concerning this matter or would like to consider other possible procedural safeguards to protect advisory committee members prior to the issuance of a waiver, you speak directly with the General Counsel of this Office. This would be a more efficient approach in dealing with specific details than requesting a written response.

Finally, we appreciate the fact that the statutory protections of trade secrets provided under [specific statutes] apply to advisory committee members from the outset and would cover the advance distribution of materials. We also take note of the fact that members are advised that they are subject to the penalties under these statutes and must sign an agreement to take precautions to protect the confidentiality of information they receive.

Nevertheless, these statutes address a concern and implement a policy that is distinct from conflict of interest concerns. Thus, we would not agree that the protections provided by these statutes are sufficient to allay potential conflict of interest concerns that might arise from certain pre-meeting activity as noted above. Nor would we agree that in the pre-meeting period the circumstances "warrant mere precaution with regard to confidential information," as you state in your letter. Rather

those concerns remain and can be adequately addressed only by an effective waiver where necessary or adequate procedures to ensure that members do not engage in personal and substantial participation in a particular matter prior to the issuance of a waiver.

Sincerely,

Stephen D. Potts
Director