Financial Conflicts of Interest: The Impact on Contractors and Federal Employees

By Mary Lou Soller and Brian A. Hill

Mary Lou Soller

Brian A. Hill

The widely publicized Darlene Druyun criminal matter has focused attention on the issue of financial conflicts of interest involving federal employees. The resultant scrutiny of potential financial conflicts by the press, Congress, and prosecutors inevitably means that the statute and regulations addressing such conflicts will become increasingly important in the years to come.

There are two legal regimes governing financial conflicts of interest. The first consists of the criminal statute prohibiting federal employees from engaging in acts affecting a personal financial interest, 18 U.S.C. § 208 (section 208), and cases interpreting the statute. The second consists of regulations promulgated by the Office of Government Ethics (OGE), as supplemented by agency-specific regulations, contained in 5 C.F.R. §§ 2635 *et seq*.

Section 208, on its face, applies only to federal employees. But the statute should be of great interest to contractors as well, because it can be used to impose criminal liability on contractors that conspire with or aid and abet violations by federal employees. Moreover, contracts or grants awarded in violation of section 208 may be voided and rescinded either by the affected agency[1] or in response to a bid protest.[2]

Mary Lou Soller is a member of Miller & Chevalier Chartered, specializing in government contracting law, white-collar defense, and ethics. Previously, she served as a trial attorney at the District of Columbia Public Defender Service and as senior investigative counsel of the Special Committee on Investigations of the United States Senate. She is a member of the D.C. Bar Rules of Professional Conduct Review Committee, and has served on the D.C. Bar Ethics Committee and the D.C. Commission on Judicial Disabilities and Tenure. Brian A. Hill is counsel at Miller & Chevalier, with experience in federal procurement and complex business litigation and trial and appellate practice.

The OGE regulations in part serve to implement section 208, but they also proscribe activities well beyond the ambit of the statute. Thus, an employee who has violated the OGE regulations may be terminated or disciplined for actions not constituting criminal conduct. Moreover, some agency-specific regulations—especially those promulgated recently at NIH—impose astonishingly strict rules that go far beyond the restrictions of section 208, to the point that they adversely affect the agency's ability to perform its mission.

In light of the importance of the rules governing financial conflicts of interest, it is timely to examine section 208 and its judicial interpretations, the OGE regulations, and some areas that remain unclear under the statute and regulations and are thus likely to cause future problems.

Criminalizing Financial Conflicts of Interest: A Brief History

Section 208(a) was enacted in 1962 as part of a general revision of the bribery and conflict of interest laws,[3] in reflection of the "growing concern, both in and out of Congress, with the ever present and perplexing problems of how best to assure high ethical standards in the conduct of the Federal Government."[4] The 1962 enactment was "part of what might be viewed as a third major effort by Congress to define conflict-of-interest restrictions for federal employees. The first phase lasted until the mid-nineteenth century, during which only limited and targeted prohibitions were in effect. In the second phase, public pressure led to passage of seven statutes of broader applicability."[5] In the third phase, Congress enacted section 208 "as part of an effort to bring greater coherence to the separately-enacted statutes from the Civil War era in view of the changed nature of the federal government and the Cold War era."[6]

> For almost 100 years, the predecessor conflict of interest statute to section 208, 18 U.S.C. § 434, proscribed participation by a government employee in the "transaction of business" with an entity in which the employee held a personal financial interest.[7] Section 434 "did not prevent government employees from investing or maintaining economic interests in private business. It only prevented an officer of the United States from transacting business with a corporation in such a way that his action might result in direct or indirect personal pecuniary benefit to the officer."[8]

Section 434 was examined in a 1958 study of the federal conflict-of-interest laws commissioned by the House Committee on the Judiciary. The committee report indicated that "consideration should be given to broadening the prohibition of transacting business with entities in which the

employee has an interest to include advising and recommending with respect to the Government's business with such entities."[9] "This recommended expansion in scope sought to bring in acts which led up to the formation of the contract as well as those (already covered) which might be performed in the execution of the contract."[10]

In early 1960, the Association of the Bar of the City of New York completed a comprehensive review of the federal conflict of interest laws. The bar's report highlighted what it found to be "unsatisfactory aspects of § 434" including that "it applies only to one acting as an officer or agent of the Government in dealing with the outside concern. The statute, as written, therefore, reaches only the front, or contact man, and has no apparent application to require an interested official to disqualify himself from participating in the transaction in other ways, as by advice or investigation."[11] In recommending a major revision of the federal conflict of interest laws, the bar suggested that participation in the transaction of business be redefined to include participation through "approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise."[12] That same language would eventually appear in section 208.

While Congress and the New York Bar were considering the need for change in the conflict of interest laws, the Supreme Court in *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), gave section 434 a relatively broad interpretation. The Court wrote that "Congress has drafted a statute which speaks in very comprehensive terms," and "is not limited in its application to those in the highest echelons of government service or to those government agents who have only a direct financial interest in the business entities with which they negotiate on behalf of the Government or to a narrow class of business transactions. . . . Rather, it applies, without exception, to whoever is directly or indirectly interested in the pecuniary profits or contracts of a business entity with which he transacts any business as an officer or agent of the United States."[13]

Notwithstanding the Supreme Court's expansive reading of section 434, Congress replaced it with section 208 in 1962. Section 208 was crafted to "strengthen" its predecessor, section 434, by adding, inter alia, a proscription against participation by an employee of the executive branch in matters of financial interest to a "prospective employer" or "persons with whom he has business connections."[14] Section 208, as enacted, forbids federal employees from

> participat[ing] personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a . . . particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner, or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest.[15]

The intended broad scope of section 208 is emphasized in both the House and Senate Reports. The House Report explained:

> Section 208 supplants 18 U.S.C. § 434 which disqualifies government officials who are pecuniarily interested in business entities from transacting business with such entity on behalf of the Government. Section 208(a) would prohibit not merely transacting business with a business entity in which the government employee is interested but would bar any significant participation in government action in the consequences of which to his knowledge the employee has a financial interest.[16]

Similarly, the Senate Report notes that section 208

> improves upon the present law (434) by abandoning the limiting concept of the transaction of business. The disqualification of the subsection embraces any participation on behalf of the Government in a matter in which the employee has an outside financial interest, even though his participation does not involve the transaction of business.[17]

Thus, section 208 was enacted "with the purpose of broadening rather than narrowing the scope of the covered business activity to include precontractual or preliminary activities such as recommendations or investigations as well as more easily identifiable acts of transacting business."[18] "The legislative history of section 208 demonstrates an intention to proscribe rather broadly employee participation in business transactions involving conflicts of interest and to reach activities at various stages of these transactions, including those activities specifically enumerated."[19] Courts have repeatedly referred to the legislative history as justification for broadly construing section 208 consistent with its stated purpose of "protect[ing] the Government against the manifold modern forms of conflict of interest."[20]

Section 208 in Action

To obtain a conviction under section 208 "the Government must prove beyond a reasonable doubt that the defendant (1) was an officer or employee of the executive branch or of an independent agency, (2) participated personally and substantially in his official, governmental capacity in a matter, and (3) knew that he, his spouse, or another statutorily-listed person had a financial interest in that particular matter."[21] Each of these elements of the offense contains ambiguities, only some of which have been fleshed out in subsequent judicial decisions or in the OGE regulations found at 5 C.F.R. § 2635.

Participating Personally and Substantially

While section 208 broadly applies to all federal employees at all levels—be they civilian or military, active or reserve[22]—the statute by its terms proscribes only behavior that is both "personal" and "substantial."[23] What constitutes "personal" or "substantial" behavior?

The courts have made it clear that "personally and substantially" does not encompass "purely ministerial or procedural duties."[24] This is the case because "[a] statute aimed at preserving the integrity of the decisionmaking process

does not need to extend to employees who have no discretion to affect that process."[25] But that rule only tells an employee what is *not* "personal" and "substantial."

The regulations promulgated by the OGE are more helpful in that they define what constitutes both "personal" and "substantial" action. "To participate personally means to participate directly" and "includes the direct and active supervision of the participation of a subordinate in the matter."[26] "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," but "it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue."[27]

Although these regulations provide some assistance, it may be hard in practice to determine whether certain types of activities would be deemed "personal and substantial." For example, does a Navy engineer act "personally and substantially" by providing information to a source selection panel on which he or she does not participate? Does a manager at the Department of Homeland Security act "personally and substantially" by having occasional conversations with a subordinate concerning a particular procurement?

Knowledge

The level of knowledge required to violate section 208 has received more attention in cases decided under the statute. Courts have consistently held "that specific intent is not a requisite element of 18 U.S.C. § 208(a)."[28] Instead, section 208 "sets forth an objective standard of conduct which is directed not only at dishonor, but also at conduct which tempts dishonor."[29] The standard is that "the defendant must have known" that the person with whom the defendant has an imputed interest "had a financial interest in the defendant's official work."[30]

Section 208 is thus "a strict liability offense" since "the statute specifically places the mental state requirement of knowledge in the last element and thus requires that the government official have knowledge of the conflicting financial interest." "As to the other elements, the individual should know that: (1) he is an officer and/or employee, (2) he is participating personally and substantially, and (3) he is negotiating or having an arrangement for employment."[31] Thus, an employee can violate section 208 without intending to do so, or even knowing he or she is running the risk of doing so. Accordingly, one aspect of this strict liability nature of the offense is that employees can violate section 208 even if they consult with agency counsel and are told they are acting appropriately.[32] However, in such circumstances employees may be entitled to assert an estoppel by entrapment defense.[33]

Financial Interest

Another question that has repeatedly arisen is how close the financial interest must be for the employee to violate section 208. Courts have adopted the OGE view that "[a] financial interest exists on the part of a party to a Section 208 action where there is a real possibility of gain or loss as a result of developments in or resolution of a matter. Gain or loss need not be probable for the prohibition against official action to apply. All that is required is that there be a real, as opposed to a speculative, possibility of benefit or detriment."[34] However, this definition only refines the issue to whether the financial interest at issue is "real" or "speculative," which hardly helps the inquiry.

Some courts appear to have analyzed the issue by looking at the number of degrees of separation between the official and the person with the financial interest. In one case the outgoing secretary of transportation was negotiating for employment with a D.C. law firm at the same time that one of the firm's clients had a matter pending before the secretary, but the firm was not representing the client in the matter at issue. The D.C. Circuit held that the financial interest of the firm's client did not disqualify the secretary under section 208, because the law firm was not involved. In so doing, the court endorsed "a bright-line rule: no participation by [the Secretary] when a law firm that might employ him served as counsel in the case; but no bar to his participation when the firm did not so serve, though the matter involved a client represented in other matters by the firm."[35]

The Eighth Circuit reached a similar result involving a federal prosecutor whose husband was a partner in a law firm representing a criminal defendant's insurer, where the insurer had sued the criminal defendant for a declaratory judgment rescinding the defendant's liability insurance policy. Although the prosecutor's husband did not participate in the case, the defendant argued that because the defendant's alleged dishonesty might bar recovery under the insurance policy, the insurer and its law firm would benefit from a guilty verdict. "The district court agreed that the insurer would benefit, but found that because the husband's law firm was paid on an hourly basis, it would not benefit from a guilty verdict, and the husband's interest as a partner in the firm was therefore too remote and speculative to implicate § 208."[36] The court of appeals affirmed.

Other courts have attempted to carve out a de minimis exception to section 208 by reasoning that "[a]lthough section 208(a) prohibits a government employee from participating substantially in a matter in which he has any financial interest, section 208(b) makes clear that insubstantial interests are to be exempted."[37] The problem with this approach is that although section 208(b) requires the employee to apply for an exemption to avoid liability under section 208(a), it does not follow that just because an exemption is available there is no liability if an exemption is not sought. Indeed, as one court has pointed out, the existence of section 208(b) may only reflect the fact that "Congress thought the scope of § 208(a) so broad that it

expressly provided several methods for obtaining exemptions from it."[38]

The regulations addressed this sticky issue by adding a requirement not found in the statute. Whereas the statute prohibits participation in matters where the defendant or a related party "has a financial interest," the OGE regulations prohibit participation only if "he or any person whose interests are imputed to him under this statute has a financial interest, *if the particular matter will have a direct and predictable effect on that interest*."[39]

The regulations then go on to define what is "direct" and "predictable." "A particular matter will have a direct effect on a financial interest if there is a close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest," but not "if the chain of causation is attenuated or is contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to, the matter."[40] "A particular matter will have a predictable effect if there is a real, as opposed to a speculative possibility that the matter will affect the financial interest," but "[i]t is not necessary" "that the magnitude of the gain or loss be known, and the dollar amount of the gain or loss is immaterial."[41] "If a particular matter involves a specific party or parties, generally the matter will at most only have a direct and predictable effect, for purposes of this subpart, on a financial interest of the employee in or with a party, such as the employee's interest by virtue of owning stock." However, there may also be "a direct and predictable effect on an employee's financial interests in or with a nonparty" if the non-party is an affiliate or competitor of the party involved.[42]

The regulatory approach is not fully reconcilable with the case law. The notion that the financial interest must have a "close causal link" is consistent with the cases holding that matters involving clients of related law firms are not implicated by section 208. However, the notion that "the dollar amount of the gain or loss is immaterial" is inconsistent with the cases holding that section 208 has a de minimis exception.

One can imagine many situations that confound a clear answer. Does an FDA employee have a "financial interest" in the approval of a drug, when her husband works for the drug's manufacturer but does not own stock in the company?[43] Do source selection officials living in Northern Virginia have a "financial interest" in the award of a sizeable contract that could benefit the economy of their domicile and therefore increase the value of their homes?

Given the lack of consistency and clarity in this area, an employee's best bet in the case of direct and predictable but numerically small interests would be to recuse themselves or seek exemption under section 208(b).

Particular Matters

What constitutes a "particular matter" has received little attention in the reported case law. The OGE regulations define the term "particular matter" as "encompasses only matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons."[44] A matter may be a particular matter "even if it does not involve formal parties and may include governmental action such as legislation or policy-making that is narrowly focused on the interests of such a discrete and identifiable class of persons. The term particular matter, however, does not extend to the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons."[45] Thus, according to the OGE regulations, while the IRS's "amendment of its regulations to change the manner in which depreciation is calculated is not a particular matter," the adoption of ICC "regulations establishing safety standards for trucks on interstate highways involves a particular matter." [46]

Imputed Interests

Under section 208, the financial interests of the following persons are imputed to the employee:

- the employee;
- the employee's spouse;
- the employee's minor child;
- the employee's general partner;
- an organization or entity in which the employee serves as officer, director, trustee, general partner or employee; and
- a person with whom the employee is negotiating for, or has an arrangement concerning, prospective employment.[47]

While the imputations for family are obvious, it is not obvious why the imputation stops where it does. It seems that an employee with strong family ties would be as likely to be affected by the financial interests of parents, siblings, or adult children as those of the employee's spouse and minor children. However, section 208 and its implementing regulations do not proscribe participating in matters that affect the financial interests of mothers, brothers, adult daughters, grandsons, or any other of a host of extended relatives.[48]

Section 208 also prohibits federal employees from participating in decisions affecting the financial interests of "any person or organization with whom he is negotiating or has any arrangement concerning prospective employment." This provision has proved the most troublesome for federal employees because, as the Federal Circuit has noted, "Government officials often are approached about possible private employment."[49] This obvious fact raises the equally obvious question of how many overtures, inquiries, or rejoinders are required before the proscribed "negotiations" and "arrangements" take place? While it is not hard to imagine what constitutes an "arrangement," what constitutes "negotiations" has proven more problematic.

For example, the Federal Circuit has held that "discussions" that are "only preliminary exploratory talks, directed to possibilities that never materialized," are "not negotia-

tions" within the meaning of section 208.[50] Thus, "[t]he statute does not bar government employees from participating in contract discussions, negotiations, or evaluations merely because, at an earlier time, they had some general discussions with some of the bidders about possible employment."[51] As the Court recognized, its holding was to some degree a rule of necessity: "To bar them from participation months later in decisions involving a company that raised the possibility could cause serious problems for the effective functioning of the government. As the Senate Committee Report on the Ethics in Government Act explained: Conflict of interest standards must be balanced with the government's objective in attracting experienced and qualified persons to public service . . . . There can be no doubt that overly stringent restrictions have a decidedly adverse impact on the government's ability to attract and retain able and experienced persons in federal office."[52]

The Eleventh Circuit, however, reached the opposite result in a case with seemingly similar facts. There, an Air Force reserve officer approached a contractor about the possibility of employment, and the contractor responded that he should fill out an application. After submitting an application, the officer was invited by the contractor to come to its offices for an interview. During the interview, the officer and contractor discussed the necessary qualifications to fill a particular position. Some months later, the officer received the exact position he had discussed at the interview. He was subsequently convicted of violating section 208(a). On appeal, the court rejected the officer's argument that no "negotiations" had taken place, finding that "[t]he two parties were not engaged in mere general discussions, but had a specific position in mind and discussed the qualifications of the position in detail," and "[t]o require that the statute does not apply until the moment when a formal offer is made is to read the statute too narrowly."[53]

Despite these seemingly inconsistent results, courts have been unsympathetic to the argument that the statute is vague. "Congress meant the words negotiating and arrangement in § 208(a) to be given a broad reading," "the terms negotiating and arrangement are not exotic or abstruse words, requiring detailed etymological study or judicial analysis," and "[p]eople of ordinary intelligence would have fair notice of the conduct proscribed by the statute."[54]

Fortunately, federal employees and contractors have not been left to apply their "ordinary intelligence" in determining whether or not "negotiations" or "arrangements" have taken place. The OGE regulations provide detailed guidance that purport to "ensure that an employee does not violate 18 U.S.C. 208(a) . . . when he is negotiating for or has an arrangement concerning future employment."[55] The regulations have solved the potential ambiguity of the prohibition on "negotiations" by instead proscribing work on a particular matter while the employee is "seeking employment" with an affected party.

"An employee is seeking employment once he has begun seeking employment" "and until he is no longer seeking employment."[56] "An employee has begun seeking employment if he has directly or indirectly" (1) "[e]ngaged in negotiations for employment with any person," (2) "[m]ade an unsolicited communication to any person, or such person's agent or intermediary, regarding possible employment with that person," or (3) "[m]ade a response other than rejection to an unsolicited communication from any person, or such person's agent or intermediary, regarding possible employment with that person."[57] "Negotiations" are defined as "discussion or communication with another person, or such person's agent or intermediary, mutually conducted with a view toward reaching an agreement regarding possible employment with that person," and are "not limited to discussions of specific terms and conditions of employment in a specific position."[58]

The regulations also contain a safe harbor excluding communications "[f]or the sole purpose of requesting a job application," or "[f]or the purpose of submitting a resume or other employment proposal to a person affected by the performance or nonperformance of the employee's duties only as part of an industry or other discrete class." This safe harbor expires "upon receipt of any response indicating an interest in employment discussions."[59]

The prohibitions end when an employee is no longer seeking employment. Under the regulations, the prohibitions end when (1) "[t]he employee or the prospective employer rejects the possibility of employment and all discussions of possible employment have terminated; or (2) [t]wo months have transpired after the employee's dispatch of an unsolicited resume or employment proposal, if the employee has received no indication of interest in employment discussions from the prospective employer."[60]

The regulations thus attempt to answer the questions left open by the statute and judicial decisions by broadly defining prohibited conduct, while creating a very limited safe harbor. But it is easy to foresee situations in which a federal employee has arguably violated the stringent OGE regulations, but may not have engaged in "negotiations" for purposes of the statute. For example, an employee who responds to a contractor's e-mail that a job might be available would violate the regulations, but might not have begun "negotiations" under section 208.

Conclusion

Given the potential consequences to contractors of even unintentional violations of section 208, contractors and their counsel would be wise to pay close attention to the financial conflicts of interest of the federal employees with whom they and their competitors deal in all procurements. Because of the current intense scrutiny of all ethical matters, contractors should also remain alert to new government ethics regulations, like the strict new regulations governing NIH employees.[61]

Endnotes

1. *See* 18 U.S.C. § 218.
2. *See* United States v. Ponnapula, 246 F.3d 576, 582 (6th Cir. 2001) ("the Supreme Court has held that transactions violating the predecessor to section 208 were unenforceable") (citing United States v. Mississippi Valley Generating Co., 364 U.S. 520, 566 (1961)); TRW Environmental Safety Systems, Inc. v. United States, 18 Cl. Ct. 33, 67 (1989) ("where there occurs within the federal procurement process a violation of a conflict of interest statute, which exists for the purpose of protecting the very integrity of that process, any contract arising from such tainted process must be disaffirmed.").
3. Pub. L. No. 87-849, 76 Stat. 1119 (Oct. 23, 1962).
4. H.R. REP. No. 87-748 at 2 (1962) [hereinafter House Report]. *See also* S. REP. No. 87-2213 at 4-5 (1962) [hereinafter Senate Report].
5. Van Ee v. EPA, 202 F.3d 296, 305 (D.C. Cir. 2000).
6. *Id.*
7. *See* 12 Stat. 696, 698 (1863), as amended, 35 Stat. 1088, 1097 (1909), as amended, 62 Stat. 683, 703 (1948), as amended, 76 Stat. 1119, 1124 (1962). *See generally* B. MANNING, FEDERAL CONFLICT OF INTEREST LAW (1964); Roswell B. Perkins, *The New Federal Conflict of Interest Law*, 76 HARV. L. REV. 1113 (1963).
8. United States v. Irons, 640 F.2d 872, 876-77 (7th Cir. 1981) (quoting 40 Ops. Atty. Gen. 168 (1942)).
9. U. S. Congress, House Committee on the Judiciary, Subcommittee No. 5, Federal Conflict of Interest Legislation, 85th Cong., 2d Sess. 42 (1958).
10. *Irons*, 640 F.2d at 877.
11. The Association of the Bar of the City of New York, Conflict of Interest and Federal Service 199 (1960).
12. *Id.* at 273.
13. United States v. Mississippi Valley Generating Co., 364 U.S. 520, 549 (1961).
14. House Report at 2, 13; Senate Report at 4, 13-14.
15. 18 U.S.C. § 208(a).
16. House Report at 24.
17. Senate Report at 7.
18. *Irons*, 640 F.2d at 876.
19. *Id.*
20. House Report at 2 (quoting Federal Conflict of Interest Legislation: Hearings before Subcomm. No. 5 of the House Comm. on the Judiciary, 86th Cong., 2d Sess. 388 (1960)).
21. United States v. Nevers, 7 F.3d 59, 62 (5th Cir. 1993).
22. United States v. Smith, 267 F.3d 1154, 1158 (D.C. Cir. 2001) (lower-level employee); United States v. Schaltenbrand, 930 F.2d 1554, 1556 (11th Cir. 1991) (military reservist).
23. 18 U.S.C. § 208(a).
24. United States v. Ponnapula, 246 F.3d 576, 582-83 (6th Cir. 2001) (citing Roswell B. Perkins, *The New Federal Conflict-of-Interest Law*, 76 HARV. L. REV. 1113, 1128 (1963)).
25. *Id.*
26. 5 C.F.R. § 2635.402(b)(4).
27. *Id.*
28. United States v. Lord, 710 F. Supp. 615, 617 (E.D. Va. 1989).
29. United States v. Gorman, 807 F.2d 1299, 1304 (6th Cir. 1986) (citing United States v. Miss. Valley Generating Co., 364 U.S. 520 (1960)).
30. *Id.* (citing K & R Eng'g Co. v. United States, 616 F.2d 469, 472 (Ct. Cl. 1980)).
31. United States v. Hedges, 912 F.2d 1397, 1400-01 (11th Cir. 1990).
32. *Id.* at 1404-05.
33. *Id.*
34. *Gorman*, 807 F.2d at 1303 (quoting Office of Government Ethics Advisory Opinion, 83 OGE 1 (January 7, 1983)).
35. Air Line Pilots Ass'n, Int'l v. United States DOT, 899 F.2d 1230, 1232 (D.C. Cir. 1990).
36. United States v. Tierney, 947 F.2d 854, 864-65 (8th Cir. 1991).
37. United States v. Conlon, 481 F. Supp. 654, 667 (D.D.C. 1979), *rev'd*, 628 F.2d 150 (D.C. Cir. 1980). *See also* TRW Env't Safety Sys., Inc. v. United States, 18 Cl. Ct. 33, 71 (1989) (holding that plaintiff failed to demonstrate that federal employee's vested pension in subcontractor "amounts to a substantial financial interest, as contemplated by § 208").
38. United States v. Lund, 853 F.2d 242, 246 (4th Cir. 1988) (citing 18 U.S.C. § 208(b)). *See also Hedges*, 912 F.2d at 1401 ("We are unable to follow Hedges' argument that Section 208(b) is helpful to him. On the contrary, it is no more than a safety valve which under the prescribed conditions eliminates criminal conduct that could ensue as a result of the stringent provisions of Section 208(a)").
39. 5 C.F.R. § 2635.402(a) (emphasis added).
40. *Id.* at § 2635.402(b)(1)(i).
41. *Id.* at § 2635.402(b)(1)(ii).
42. *Id.*
43. An example in the OGE regulations suggests that there is no financial interest in such a case. *See* 5 C.F.R. § 2635.402(b)(2), example 2. But what if the drug company's existence, and therefore the husband's livelihood, depends in part on approval of the drug?
44. *Id.* at § 2635.402(b)(3).
45. *Id.*
46. *Id.* at examples 1 & 2.
47. 18 U.S.C. § 208(a); 5 C.F.R. § 2635.402(b)(2).
48. *Id.*
49. CACI, Inc.-Federal v. United States, 719 F.2d 1567, 1578 (Fed. Cir. 1983).
50. *Id.* at 1578.
51. *Id.*
52. *Id.* (quoting S. REP. No. 170, 95th Cong., 2d Sess. 32 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 4216, 4248).
53. United States v. Schaltenbrand, 930 F.2d 1554, 1559 (11th Cir. 1991).
54. United States v. Conlon, 628 F.2d 150, 154, 155 (D.C. Cir. 1980). *See also Gorman*, 807 F.2d at 1303 ("Negotiation is to be given its common, everyday meaning for purposes of Section 208(a).").
55. 5 C.F.R. § 2635.402(a).
56. *Id.* at § 2635.603(b).
57. *Id.* at § 2635.603(b)(1).
58. *Id.* at § 2635.603(b)(1)(i).
59. *Id.* at § 2635.603(b)(1)(ii).
60. *Id.* at § 2635.603(b)(2).
61. *See* 5 C.F.R. parts 5501 & 5502.