NOTE TO PARAGRAPH (p): National securities exchanges include the American Stock Exchange and the New York Stock Exchange. Regional exchanges include Boston, Cincinnati, Intermountain (Salt Lake City), Midwest (Chicago), Pacific (Los Angeles and San Francisco), Philadelphia (Philadelphia and Miami), and Spokane stock exchanges.

(q) *Sector mutual fund* means a mutual fund that concentrates its investments in an industry, business, single country other than the United States, or bonds of a single State within the United States.

(r) *Security* means common stock, preferred stock, corporate bond, municipal security, long-term Federal Government security, and limited partnership interest. The term also includes ''mutual fund'' for purposes of §2640.202(e) and (f) and §2640.203(a).

(s) *Short-term Federal Government security* means a bill with a maturity of one year or less issued by the United States Treasury pursuant to 31 U.S.C. chapter 31.

(t) *Special Government employee* means those executive branch officers or employees specified in 18 U.S.C. 202(a). A special Government employee is retained, designated, appointed or employed to perform temporary duties either on a full-time or intermittent basis, with or without compensation, for a period not to exceed 130 days during any consecutive 365-day period.

(u) *Unit investment trust* means an investment company as defined in 15 U.S.C. 80a–4(2) that is a regulated investment company under 26 U.S.C. 851.

(v) *United States Savings bond* means a savings bond issued by the United States Treasury pursuant to 31 U.S.C. 3105.

[61 FR 66841, Dec. 18, 1996, as amended at 67 FR 12445, Mar. 19, 2002]

§2640.103 Prohibition.

(a) *Statutory prohibition.* Unless permitted by 18 U.S.C. 208(b) (1)–(4), an employee is prohibited by 18 U.S.C. 208(a) from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he or any other person specified in the statute has a financial interest, if the particular matter will have a direct and predictable effect on that interest. The restrictions of 18 U.S.C. 208 are described more fully in 5 CFR 2635.401 and 2635.402.

(1) *Particular matter.* The term ''particular matter'' includes 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. The term may include matters which do not involve formal parties and may extend to legislation or policy making that is narrowly focused on the interests of a discrete and identifiable class of persons. It does not, however, cover consideration or adoption of broad policy options directed to the interests of a large and diverse group of persons. The particular matters covered by this part include a judicial or other proceeding, application or request for a ruling or other determination, contract, claim, controversy, charge, accusation or arrest.

Example 1: The Overseas Private Investment Corporation decides to hire a contractor to conduct EEO training for its employees. The award of a contract for training services is a particular matter.

Example 2: The spouse of a high level official of the Internal Revenue Service (IRS) requests a meeting on behalf of her client (a major U.S. corporation) with IRS officials to discuss a provision of IRS regulations governing depreciation of equipment. The spouse will be paid a fee by the corporation for arranging and attending the meeting. The consideration of the spouse's request and the decision to hold the meeting are particular matters in which the spouse has a financial interest.

Example 3: A regulation published by the Department of Agriculture applicable only to companies that operate meat packing plants is a particular matter.

Example 4: A change by the Department of Labor to health and safety regulations applicable to all employers in the United States is not a particular matter. The change in the regulations is directed to the interests of a large and diverse group of persons.

Example 5: The allocation of additional resources to the investigation and prosecution of white collar crime by the Department of Justice is not a particular matter. Similarly, deliberations on the general merits of an omnibus bill such as the Tax Reform Act of 1986 are not sufficiently focused on the interests of specific persons, or a discrete and identifiable group of persons to constitute participation in a particular matter.

Example 6: The recommendations of the Council of Economic Advisors to the President about appropriate policies to maintain

economic growth and stability are not particular matters. Discussions about economic growth policies are directed to the interests of a large and diverse group of persons.

Example 7: The formulation and implementation of the response of the United States to the military invasion of a U.S. ally is not a particular matter. General deliberations, decisions and actions concerning a response are based on a consideration of the political, military, diplomatic and economic interests of every sector of society and are too diffuse to be focused on the interests of specific individuals or entities. However, at the time consideration is given to actions focused on specific individuals or entities, or a discrete and identifiable class of individuals or entities, the matters under consideration would be particular matters. These would include, for example, discussions whether to close a particular oil pumping station or pipeline in the area where hostilities are taking place, or a decision to seize a particular oil field or oil tanker.

Example 8: A legislative proposal for broad health care reform is not a particular matter because it is not focused on the interests of specific persons, or a discrete and identifiable class of persons. It is intended to affect every person in the United States. However, consideration and implementation, through regulations, of a section of the health care bill limiting the amount that can be charged for prescription drugs is sufficiently focused on the interests of pharmaceutical companies that it would be a particular matter.

(2) *Personal and substantial participation.* 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 the 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.

Example 1 to paragraph (a)(2): An agency's Office of Enforcement is investigating the allegedly fraudulent marketing practices of a major corporation. One of the agency's personnel specialists is asked to provide information to the Office of Enforcement about the agency's personnel ceiling so that the Office can determine whether new employees can be hired to work on the investigation. The employee personnel specialist owns $20,000 worth of stock in the corporation that is the target of the investigation. She does not have a disqualifying financial interest in the matter (the investigation and possible subsequent enforcement proceedings) because her involvement is on a peripheral personnel issue and her participation cannot be considered ''substantial'' as defined in the statute.

(3) *Direct and predictable effect.* (i) 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. An effect may be direct even though it does not occur immediately. A particular matter will not have a direct effect on a financial interest, however, 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. A particular matter that has an effect on a financial interest only as a consequence of its effects on the general economy does not have a direct effect within the meaning of this part.

(ii) 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. It is not necessary, however, that the magnitude of the gain or loss be known, and the dollar amount of the gain or loss is immaterial.

Example 1: An attorney at the Department of Justice is working on a case in which several large companies are defendants. If the Department wins the case, the defendants may be required to reimburse the Federal Government for their failure to adequately perform work under several contracts with the Government. The attorney's spouse is a salaried employee of one of the companies, working in a division that has no involvement in any of the contracts. She does not participate in any bonus or benefit plans tied

to the profitability of the company, nor does she own stock in the company. Because there is no evidence that the case will have a direct and predictable effect on whether the spouse will retain her job or maintain the level of her salary, or whether the company will undergo any reorganization that would affect her interests, the attorney would not have a disqualifying financial interest in the matter. However, the attorney must consider, under the requirements of §2635.502 of this chapter, whether his impartiality would be questioned if he continues to work on the case.

Example 2: A special Government employee (SGE) whose principal employment is as a researcher at a major university is appointed to serve on an advisory committee that will evaluate the safety and effectiveness of a new medical device to regulate arrhythmic heartbeats. The device is being developed by Alpha Medical Inc., a company which also has contracted with the SGE's university to assist in developing another medical device related to kidney dialysis. There is no evidence that the advisory committee's determinations concerning the medical device under review will affect Alpha Medical's contract with the university to develop the kidney dialysis device. The SGE may participate in the committee's deliberations because those deliberations will not have a direct and predictable effect on the financial interests of the researcher or his employer.

Example 3: The SGE in the preceding example is instead asked to serve on an advisory committee that has been convened to conduct a preliminary evaluation of the new kidney dialysis device developed by Alpha Medical under contract with the employee's university. Alpha's contract with the university requires the university to undertake additional testing of the device to address issues raised by the committee during its review. The committee's actions will have a direct and predictable effect on the university's financial interest.

Example 4: An engineer at the Environmental Protection Agency (EPA) was formerly employed by Waste Management, Inc., a corporation subject to EPA's regulations concerning the disposal of hazardous waste materials. Waste Management is a large corporation, with less than 5% of its profits derived from handling hazardous waste materials. The engineer has a vested interest in a defined benefit pension plan sponsored by Waste Management which guarantees that he will receive payments of $500 per month beginning at age 62. As an employee of EPA, the engineer has been assigned to evaluate Waste Management's compliance with EPA hazardous waste regulations. There is no evidence that the engineer's monitoring activities will affect Waste Management's ability or willingness to pay his pension benefits when he is entitled to receive them at age 62. Therefore, the EPA's monitoring activities will not have a direct and predictable effect on the employee's financial interest in his Waste Management pension. However, the engineer should consider whether, under the standards set forth in 5 CFR 2635.502, a reasonable person would question his impartiality if he acts in a matter in which Waste Management is a party.

(b) *Disqualifying financial interests.* For purposes of 18 U.S.C. 208(a) and this part, the term financial interest means the potential for gain or loss to the employee, or other person specified in section 208, as a result of governmental action on the particular matter. The disqualifying financial interest might arise from ownership of certain financial instruments or investments such as stock, bonds, mutual funds, or real estate. Additionally, a disqualifying financial interest might derive from a salary, indebtedness, job offer, or any similar interest that may be affected by the matter.

Example 1: An employee of the Department of the Interior owns transportation bonds issued by the State of Minnesota. The proceeds of the bonds will be used to fund improvements to certain State highways. In her official position, the employee is evaluating an application from Minnesota for a grant to support a State wildlife refuge. The employee's ownership of the transportation bonds does not create a disqualifying financial interest in Minnesota's application for wildlife funds because approval or disapproval of the grant will not in any way affect the current value of the bonds or have a direct and predictable effect on the State's ability or willingness to honor its obligation to pay the bonds when they mature.

Example 2: An employee of the Bureau of Land Management owns undeveloped land adjacent to Federal lands in New Mexico. A portion of the Federal land will be leased by the Bureau to a mining company for exploration and development, resulting in an increase in the value of the surrounding privately owned land, including that owned by the employee. The employee has a financial interest in the lease of the Federal land to the mining company and, therefore, cannot participate in Bureau matters involving the lease unless he obtains an individual waiver pursuant to 18 U.S.C. 208(b)(1).

Example 3: A special Government employee serving on an advisory committee studying the safety and effectiveness of a new arthritis drug is a practicing physician with a specialty in treating arthritis. The drug being studied by the committee would be a low cost alternative to current treatments for arthritis. If the drug is ultimately approved,

the physician will be able to prescribe the less expensive drug. The physician does not own stock in, or hold any position, or have any business relationship with the company developing the drug. Moreover, there is no indication that the availability of a less expensive treatment for arthritis will increase the volume and profitability of the doctor's private practice. Accordingly, the physician has no disqualifying financial interest in the actions of the advisory committee.

(c) *Interests of others.* The financial interests of the following persons will serve to disqualify an employee to the same extent as the employee's own interests:

(1) The employee's spouse;

(2) The employee's minor child;

(3) The employee's general partner;

(4) An organization or entity which the employee serves as officer, director, trustee, general partner, or employee; and

(5) A person with whom the employee is negotiating for, or has an arrangement concerning, prospective employment.

Example 1: An employee of the Consumer Product Safety Commission (CPSC) has two minor children who have inherited shares of stock from their grandparents in a company that manufactures small appliances. Unless an exemption is applicable under § 2640.202 or he obtains a waiver under 18 U.S.C. 208(b)(1), the employee is disqualified from participating in a CPSC proceeding to require the manufacturer to remove a defective appliance from the market.

Example 2: A newly appointed employee of the Department of Housing and Urban Development (HUD) is a general partner with three former business associates in a partnership that owns a travel agency. The employee knows that his three general partners are also partners in another partnership that owns a HUD-subsidized housing project. Unless he receives a waiver pursuant to 18 U.S.C. 208(b)(1) permitting him to act, the employee must disqualify himself from particular matters involving the HUD-subsidized project which his general partners own.

Example 3: The spouse of an employee of the Department of Health and Human Services (HHS) works for a consulting firm that provides support services to colleges and universities on research projects they are conducting under grants from HHS. The spouse is a salaried employee who has no direct ownership interest in the firm such as through stockholding, and the award of a grant to a particular university will have no direct and predictable effect on his continued employment or his salary. Because the award of a grant will not affect the spouse's financial interest, section 208 would not bar the HHS employee from participating in the award of a grant to a university to which the consulting firm will provide services. However, the employee should consider whether her participation in the award of the grant would be barred under the impartiality provision in the Standards of Ethical Conduct for Employees of the Executive Branch at 5 CFR 2635.502.

(d) *Disqualification.* Unless the employee is authorized to participate in the particular matter by virtue of an exemption or waiver described in subpart B or subpart C of this part, or the interest has been divested in accordance with paragraph (e) of this section, an employee shall disqualify himself from participating in a particular matter in which, to his knowledge, he or any other person specified in the statute has a financial interest, if the particular matter will have a direct and predictable effect on that interest. Disqualification is accomplished by not participating in the particular matter.

(1) *Notification.* An employee who becomes aware of the need to disqualify himself from participation in a particular matter to which he has been assigned should notify the person responsible for his assignment. An employee who is responsible for his own assignments should take whatever steps are necessary to ensure that he does not participate in the matter from which he is disqualified. Appropriate oral or written notification of the employee's disqualification may be made to coworkers by the employee or a supervisor to ensure that the employee is not involved in a matter from which he is disqualified.

(2) *Documentation.* An employee need not file a written disqualification statement unless he is required by part 2634 of this chapter to file written evidence of compliance with an ethics agreement with the Office of Government Ethics, is asked by an agency ethics official or the person responsible for his assignment to file a written disqualification statement, or is required to do so by agency supplemental regulation issued pursuant to 5 CFR 2635.105. However, an employee may elect to create a record of his actions by providing written notice to a supervisor or other appropriate official.

Example 1: The supervisor of an employee of the Department of Education asks the employee to attend a meeting on his behalf on developing national standards for science education in secondary schools. When the employee arrives for the meeting, she realizes one of the participants is the president of Education Consulting Associates (ECA), a firm which has been awarded a contract to prepare a bulletin describing the Department's policies on science education standards. The employee's spouse has a subcontract with ECA to provide the graphics and charts that will be used in the bulletin. Because the employee realizes that the meeting will involve matters relating to the production of the bulletin, the employee properly decides that she must disqualify herself from participating in the discussions. After withdrawing from the meeting, the employee should notify her supervisor about the reason for her disqualification. She may elect to put her disqualification statement in writing, or to simply notify her supervisor orally. She may also elect to notify appropriate coworkers about her need to disqualify herself from this matter.

(e) *Divestiture of a disqualifying financial interest.* Upon sale or other divestiture of the asset or other interest that causes his disqualification from participation in a particular matter, an employee is no longer prohibited from acting in the particular matter.

(1) *Voluntary divestiture.* An employee who would otherwise be disqualified from participation in a particular matter may voluntarily sell or otherwise divest himself of the interest that causes the disqualification.

(2) *Directed divestiture.* An employee may be required to sell or otherwise divest himself of the disqualifying financial interest if his continued holding of that interest is prohibited by statute or by agency supplemental regulation issued in accordance with §2635.403(a) of this chapter, or if the agency determines in accordance with §2635.403(b) of this chapter that a substantial conflict exists between the financial interest and the employee's duties or accomplishment of the agency's mission.

(3) *Eligibility for special tax treatment.* An employee who is directed to divest an interest may be eligible to defer the tax consequences of divestiture under subpart J of part 2634 of this chapter. An employee who divests before obtaining a certificate of divestiture will not be eligible for this special tax treatment.

(f) *Official duties that give rise to potential conflicts.* Where an employee's official duties create a substantial likelihood that the employee may be assigned to a particular matter from which he is disqualified, the employee should advise his supervisor or other person responsible for his assignments of that potential so that conflicting assignments can be avoided, consistent with the agency's needs.

[61 FR 66841, Dec. 18, 1996, as amended at 67 FR 12445, Mar. 19, 2002]

Subpart B—Exemptions Pursuant to 18 U.S.C. 208(b)(2)

§2640.201 Exemptions for interests in mutual funds, unit investment trusts, and employee benefit plans.

(a) *Diversified mutual funds and unit investment trusts.* An employee may participate in any particular matter affecting one or more holdings of a diversified mutual fund or a diversified unit investment trust where the disqualifying financial interest in the matter arises because of the ownership of an interest in the fund or trust.

Example 1 to paragraph (a): An employee owns shares worth $100,000 in several mutual funds whose portfolios contain stock in a small computer company. Each mutual fund prospectus describes the fund as a ''management company,'' but does not characterize the fund as having a policy of concentrating its investments in any particular industry, business, single country (other than the U.S.) or bonds of a single State. The employee may participate in agency matters affecting the computer company.

Example 2 to paragraph (a): A nonsupervisory employee of the Department of Energy owns shares valued at $75,000 in a mutual fund that expressly concentrates its holdings in the stock of utility companies. The employee may not rely on the exemption in paragraph (a) of this section to act in matters affecting a utility company whose stock is a part of the mutual fund's portfolio because the fund is not a diversified fund as defined in §2640.102(a). The employee may, however, seek an individual waiver under 18 U.S.C. 208(b)(1) permitting him to act.

(b) *Sector mutual funds.* (1) An employee may participate in any particular matter affecting one or more holdings of a sector mutual fund where the affected holding is not invested in