

THE WHITE HOUSE

Washington

April 5, 2017

MEMORANDUM FOR RENE AUGUSTINE, SPECIAL ASSISTANT TO THE PRESIDENT

FROM: DONALD F. MCGAHN II, COUNSEL TO THE PRESIDENT *DFM*

SUBJECT: Waiver Under 18 U.S.C. § 208 (b)(1)

This memorandum provides you with a limited waiver pursuant to 18 U.S.C. § 208(b)(1), which will allow you to participate as Special Assistant to the President and Clearance Counsel in the Presidential appointments hiring decision process that could potentially have a direct and predictable financial effect on the underlying assets of certain pooled investment funds you and your spouse own. This waiver is based on a full disclosure of your financial interests and in consideration of the nature and circumstance of matters in which you may be involved as Special Assistant to the President and Clearance Counsel.

Under the criminal conflict of interest law, 18 U.S.C. § 208(a), an “officer or employee of the executive branch of the United States Government” may not “participate[] personally and substantially as a Government officer or employee ... 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, to his knowledge, he, his spouse, [or] minor child, ... has a financial interest.” The term “particular matter” includes “matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons.” 5 C.F.R. § 2640.103(a)(1). This could include ““legislation or policy making that is narrowly focused on the interests of a discrete and identifiable class of persons,” including a particular industry, but does not “cover consideration or adoption of broad policy options directed to the interests of a large and diverse group of persons.” *Id.*

The prohibition established in 18 U.S.C. § 208 (a), however, may be waived in certain circumstances under 18 U.S.C. § 208 (b)(1) if a written determination is made that the employee’s otherwise disqualifying financial interest is “not so substantial as to be deemed likely to affect the integrity of the services that the government may expect from the employee.” *See also* 5 C.F.R. § 2640.301(a).

As Special Assistant to the President and Clearance Counsel, you are principally involved in the vetting and review of the background information of candidates for nomination to positions requiring Presidential appointment. Your work generally involves working with the Federal Bureau of Investigations, other Federal agencies, and candidates for nomination, to ensure that there are no disqualifying issues.

In your New Entrant OGE Form 278e, you reported that you and your spouse own passive investments in the following pooled investment funds: Almanack Alpha LP Hedge Fund (feeder fund for Eagle's View LP Hedge Fund); Brightwood Capital III Partners; Carlyle GMS Finance, Inc.; Hedge Premier Millennium USA Hedge Fund (feeder fund for Millennium USA Hedge Fund); Clinton Equity Strategies Fund LP; and Hedge Forum Renaissance Equity LLC (feeder fund for Renaissance Institutional Equities Fund LLC). These assets are held both directly and in trust for your minor children.

As it relates to these investments, you have explained that you have no knowledge of the underlying assets of Eagle's View LP Hedge Fund; Millennium USA Hedge Fund; or Renaissance Institutional Equities Fund LLC. You have also secured a letter from Eagle's View LP Hedge Fund and Hedge Forum Renaissance Equity LLC (feeder fund for Renaissance Institutional Equities Fund LLC) stating that Eagle's View LP Hedge Fund and Renaissance Institutional Equities Fund LLC do not disclose underlying investment positions to investors except where required by regulation or statute. You anticipate receiving a similar letter in the near future from Millennium USA Hedge Fund. You do have access to, or can legally access, some data on the underlying holdings of Brightwood Capital III Partners; Carlyle GMS Finance, Inc.; and Clinton Equity Strategies Fund LP. Based on this information, it appears that Brightwood Capital III and Carlyle GMS Finance, Inc. are principally invested in debt securities whereas Clinton Equity Strategies Fund LP is invested in publicly traded stocks.

Although these pooled investment funds account for around twenty-one percent of your total investment portfolio, you have indicated that you have no knowledge of the underlying assets of Eagle's View LP Hedge Fund; Millennium USA Hedge Fund; or Renaissance Institutional Equities Fund LLC. As stated above, you have received a letter explain that Eagle's View LP Hedge Fund and Renaissance Institutional Equities Fund LLC will not provide you the underlying holdings of the fund. Eagle's View LP Hedge Fund accounts for around 7.8% of your investment portfolio. Renaissance Institutional Equities Fund LLC accounts for around 5.5% of your investment portfolio. You also anticipate receiving a similar letter from Millennium USA Hedge Fund, which accounts for around 5% of your investment portfolio. Your investments in Brightwood Capital III Partners; Carlyle GMS Finance, Inc.; and Clinton Equity Strategies Fund LP account for around or less than 3% of your investment portfolio.

Based on the totality of the circumstances and the factors described below, I have determined that the financial interests covered by this waiver are not so substantial as to be deemed likely to affect the integrity of your services to the government. These factors include:

First, OGE has already determined that hiring decisions generally pose less conflict of interest concerns than other particular matters under 18 U.S.C. § 208(a). *See* 60 FR 47207, 47289 (1991). For example, OGE promulgated a regulatory exception pursuant to 18 U.S.C. 208(b)(2), found at 5 C.F.R. § 2640.203(a), that permits employees to participate in hiring decisions when they, or another person whose interests are imputed to them under 18 U.S.C. § 208(a), have a disqualifying financial interest arising from any direct ownership of publicly traded securities, including mutual funds. *See also id*; 5 C.F.R. § 2640.102(r) (providing for an expanded definition of security for 5 C.F.R. § 2635.203(a)). Although this exception does not apply to pooled investment funds that do not qualify as mutual funds, the same reasoning animating the exception would appear to apply to such pooled investment funds, i.e., that any financial interest

arising from such investments is “too remote or inconsequential to affect the integrity of the services” we would expect from you in your evaluation of candidates for nomination in the appointments process.

Second, you have advised that you have no knowledge of the underlying holdings of three of the pooled investment funds, and you have received, or are in the process of receiving, letters from the fund managers to that accord. Under 18 U.S.C. § 208(a), you must have knowledge of a financial interest in a particular matter to be disqualified from that particular matter. If you have no knowledge of the underlying positions of these funds, then 18 U.S.C. § 208(a) generally would not prevent your participation in any particular matter. *See* OGE Legal Advisory LA-14-05 (“In many cases, [employees] lack information about fund holdings because fund managers do not provide such information to investors. In these cases, there is little if any potential for conflicts of interest because knowledge is a critical element of a conflict of interest. *See* 18 U.S.C. § 208.”). These three funds account for the bulk of your pooled investment funds.

Third, the overall level of investment in any one pooled investment fund is a relatively small part of your overall portfolio, and the investments therein are an even smaller fraction of your portfolio. Moreover, as reflected in your Form 278e, you also hold a widely diversified portfolio of marketable assets, both in trust and directly, including publicly traded securities, mutual funds, and exchange traded funds that do not pose a conflict of interest for you in your position as per regulatory exemptions established by the U.S. Office of Government Ethics.

Fourth, the work that you do in the appointments process is subject to additional review. In general, the Office of Presidential Personnel is principally responsible for the selection of candidates for presentation to the President for decision on appointment. Selected candidates prepare their paperwork, which is then provided to certain agencies (including the Federal Bureau of Investigation and the Office of Government Ethics) for review. Your job is to review this paperwork as well as interview candidates and nominees to determine whether there are issues that would disqualify them from appointment. The final decision as to any Presidential appointment is left to the sole discretion of the President. Your role in the process, although immensely important, is therefore limited to only part of the appointment process and the ultimate decision is made not by you, but by the President.

Finally, this waiver applies only to hiring decisions in the appointments process, and not to other types of particular matters. As such, this waiver does not permit you to participate in any other particular matter in which you have a disqualifying financial interest arising from these funds or from any other investment.

In light of these factors, I am issuing this limited waiver to permit you to participate personally and substantially in hiring decisions in the appointments process in which you could have an otherwise disqualifying financial interest arising from ownership of Almanack Alpha LP Hedge Fund (feeder fund for Eagle’s View LP Hedge Fund); Brightwood Capital III Partners; Carlyle GMS Finance, Inc.; Hedge Premier Millennium USA Hedge Fund (feeder fund for Millennium USA Hedge Fund); Clinton Equity Strategies Fund LP; and Hedge Forum Renaissance Equity LLC (feeder fund for Renaissance Institutional Equities Fund LLC). The U.S. Office of Government Ethics has been consulted regarding this waiver, and a signed copy of this waiver will be provided to that office.