

THE WHITE HOUSE

Washington

February 2, 2017

MEMORANDUM FOR CHRISTOPHER P. LIDDELL

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 an interim waiver, which will allow you to participate in your position as Director of Strategic Initiatives and Assistant to the President in particular matters affecting financial interests in a trust which your spouse is an income beneficiary during the period in which these assets are being divested. This waiver is based on disclosure of your financial interests and in consideration of the nature and circumstance of matters in which you may be involved as Director of Strategic Initiatives and Assistant to the President. As described below, this waiver will expire 90 days from the date you assume office.

In your Form 278e, you reported your spouse and her children's beneficial interest in the JMH Marital Trust (hereinafter "the Trust"), which is an irrevocable trust with the segregation of GST Exempt and Non-Exempt assets (referenced as the JMH Exempt Marital Trust and the JMH Non-Exempt Marital Trust). You are not a beneficiary of the Trust, and your spouse and the children's status as beneficiaries of the Trust predates your marriage. As reflected in your Form 278e, the Trust holds a wide variety of assets in a broad range of sectors. These assets include a number of municipal bonds, real estate assets, mutual funds and exchange traded funds that are exempt from the conflict of interest prohibitions or are unlikely to pose conflicts of interest for you in the position of Director of Strategic Initiatives and Assistant to the President. Other holdings within the Trust, however, are more likely to pose potential conflicts, including a variety of publicly-traded securities, private equity investments and hedge fund holdings. A majority of the publicly-traded securities within the Trust are held within two investment funds - BNYMellon and Martingale - with highly diversified portfolios.

As Director of Strategic Initiatives and Assistant to the President, you will often participate in and advise the President on a wide range of policy matters involving, among other things, technology, trade, commerce and finance. The responsibilities of this position are necessarily wide-ranging, and your ability to participate fully in matters of national importance is in the public interest.

Section 208(a) provides that "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." This law prohibits an employee from participating "personally and substantially" in a particular matter that will "will have a direct and predictable effect" on the financial interests of the employee or another person listed in the statute. 5 C.F.R. § 2640.103(a). "Particular matters" that give rise to the prohibition under § 208 are "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). A “particular matter” does not “cover consideration or adoption of broad policy options directed to the interests of a large and diverse group of persons,” but it does cover “legislation or policy making that is narrowly focused on the interests of a discrete and identifiable class of persons,” including a particular industry. *Id.* OGE has explained that the term “particular matter” “covers two categories of matters: (1) those that involve specific parties ..., and (2) those that do not involve specific parties but at least focus on the interests of a discrete and identifiable class of persons, such as a particular industry or profession.” OGE Advisory Op. 06 x 9 at 7.

The prohibition established in 18 U.S.C. § 208 (a) may be waived under 18 U.S.C. § 208 (b)(1) where 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.”

Based on the totality of the circumstances, 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. Your agreement to divest of the underlying assets of the trust within 90 days of assuming office and the agreement of your spouse to resign her position as trustee of the trust are both persuasive in this regard.

As described above, this interim waiver is being issued to allow you to participate in your official duties while the trust divests the potentially conflicting assets. You will fully divest these assets within ninety (90) days, and the proceeds will be reinvested into non-conflicting investments. Prior to the divestiture of these assets, the trustees have also agreed to distribute to your spouse a fixed annual amount until such time that the Trust assets, which give rise to the necessity for this agreement, are divested. The trustees have agreed to divest the Trust assets within ninety (90) days of your assuming office. A list of the Trust assets which the trustees have agreed to divest are attached hereto as Schedule A. Additionally, in order to minimize the potential for conflict of interest during the pendency of this waiver, your spouse has agreed to resign as a trustee for the duration of your appointment.

Finally, the level of diversification in the Trust is also consistent with the issuance of a waiver under 18 U.S.C. § 208 (b)(1). The highest percentage level of any one investment in the publicly traded stock in the Trust is Microsoft, which currently represents approximately 0.3 percent of the value of the Trust holdings. Similarly, the highest level of investment in any one privately held asset in the Trust is 13 Partners Private Equity 2008, which currently represents 0.8 percent of the Trust holdings. The degree of diversification ensures that no one particular matter is likely to affect a significant percentage of the Trust’s holdings. See OGE Advisory Opinion 07 x 4, at 26. The practical result is that any gains to some of the Trust’s assets might be offset by corresponding losses to other trust assets.

In light of these factors, I am issuing this limited waiver for ninety (90) days in order to ensure that you are able to perform the full range of your official responsibilities during your tenure as Director of Strategic Initiatives and Assistant to the President. This waiver permits you to participate personally and substantially in particular matters affecting the financial interests of the Trust. 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.