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Description of document: Department of Justice (DOJ) Office of the Solicitor General (OSG) email regarding ethics waivers, 2006-2008

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Source of document: FOIA/PA Mail Referral Unit
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U.S. Department of Justice
Office of the Solicitor General

Executive Officer

Washington, D.C. 20530

SEP 30 2013

VIA U.S. MAIL and EMAIL

Re: OSG FOIA No. 2011-0020

This letter provides the response of the Office of the Solicitor General (OSG) to your Freedom of Information Act (FOIA) request to the Department of Justice dated August 1, 2010. You requested copies of ethics waivers. The Justice Management Division (JMD) referred the enclosed records to OSG.

Under the Freedom of Information and Privacy Acts, an individual is entitled to receive access to certain materials in identifiable records. The primary pertinent records maintained by OSG relate to current or recent past United States Supreme Court cases in which the federal government has participated.

Enclosed please find the ethics waivers referred to OSG by JMD. We are providing the enclosed records at no cost to you.

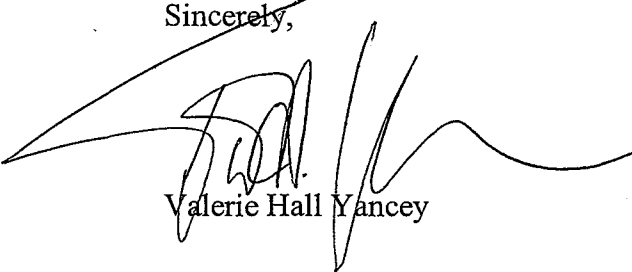
Portions of the enclosed records have been redacted to prevent unwarranted invasions of personal privacy pursuant to Exemption 6 of FOIA. Such redactions are marked with stamps indicating that material was redacted pursuant to Exemption 6. In addition, there other redactions that are not stamped with any indication of a FOIA exemption. These redactions were not made by OSG; JMD did not provide OSG with unredacted copies of these records.

If you are dissatisfied with my response to this request, you may administratively appeal by writing to the Director, Office of Information Policy, United States Department of Justice, Suite 11050, 1425 New York Ave., NW, Washington, DC 20530-0001.

Your appeal must be received by the Office of Information Policy within sixty days from the date of this letter. Both the letter and the envelope should be clearly marked "Freedom of

Information Act Appeal.” The Office of Information Policy also accepts administrative appeals by facsimile if sent to (202) 514-1009.

Sincerely,

A handwritten signature in black ink, appearing to read 'VH Yancey', with a long horizontal flourish extending to the right.

Valerie Hall Yancey

Enclosures: Email from Janice Rodgers to Jennifer Eichhorn, dated Aug. 18, 2006
 Email from Paul D. Clement to Esther Estry, dated Nov. 16, 2006
 Email from Paul D. Clement to Jennifer Eichhorn, dated Mar. 5, 2007
 Email from Paul D. Clement to Jennifer Eichhorn, dated Mar. 13, 2007 (2:11 pm)
 Email from Paul D. Clement to Jennifer Eichhorn, dated Mar. 13, 2007 (4:41 pm)
 Email from Janice Rodgers to Jennifer Eichhorn, dated May 30, 2007
 Email from Paul D. Clement to Jennifer Eichhorn, dated Mar. 3, 2008
 Email from Paul D. Clement to Jennifer Eichhorn, dated Mar. 4, 2008
 Email from Paul D. Clement to Jennifer Eichhorn, dated Apr. 14, 2008
 Email from David Margolis to Janice Rodgers, dated Oct. 23, 2008

VHY/jkd

Eichhorn, Jennifer (JMD)

From: Rodgers, Janice
Sent: Friday, August 18, 2006 5:01 PM
To: Eichhorn, Jennifer (JMD)
Subject: FW: Recommendation for waiver of conflict of interest

2...

-----Original Message-----

From: Clement, Paul D
Sent: Friday, August 18, 2006 4:54 PM
To: Garre, Gregory G
Cc: Rodgers, Janice
Subject: Re: Recommendation for waiver of conflict of interest

Greg,

Consistent with my earlier statements to you, this is fine. Thanks.

-----Original Message-----

From: Garre, Gregory G
To: Clement, Paul D
Sent: Fri Aug 18 16:31:12 2006
Subject: FW: Recommendation for waiver of conflict of interest

Attached is the waiver on the school cases.

From: Rodgers, Janice
Sent: Friday, August 18, 2006 4:28 PM
To: Garre, Gregory G
Subject: FW: Recommendation for waiver of conflict of interest

Greg, waiver re: the education cases.

Janice

From: Eichhorn, Jennifer (JMD)
Sent: Thursday, July 20, 2006 6:12 PM
To: Clement, Paul D
Cc: Rodgers, Janice
Subject: Recommendation for waiver of conflict of interest

To: Paul Clement, Solicitor General

Pursuant to 18 U.S.C. 208(b)(1) and 5 C.F.R. 2635.502, I recommend that you authorize Principal Deputy Solicitor General Gregory G. Garre to participate in Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1, et al., No. 05-908 (S. Ct.), and Crystal D. Meredith v. Jefferson County Bd. of Educ., et al., No. 05-915 (S. Ct.). It is my understanding that both cases involve challenges under the Fourteenth Amendment regarding the use of race in student assignments to secondary schools, and the Supreme Court has ordered that these cases be argued in tandem. Your office is considering whether to participate as amicus in these cases.

Mr. Garre's former firm, Hogan & Hartson, previously filed amicus briefs in these cases in the respective courts of appeals in support of the school districts, and on behalf of several educational organizations. In addition, Hogan & Hartson recently was retained by the Seattle School District to serve as co-counsel on its behalf before the Supreme Court. Mr. Garre left Hogan & Hartson on October 7, 2005.

Mr. Garre's [REDACTED] is [REDACTED] at Hogan & Hartson.

FOIA Exemption 6

FOIA Exemption 6

the pool of available funds may be influenced by the firm's total revenue. Pursuant to 18 U.S.C. 208(a), a federal employee is prohibited from participating personally and substantially in a particular matter in which he has a financial interest unless he obtains a waiver. A waiver may be granted upon a written determination that the financial interest involved "is not so substantial as to be deemed likely to affect the integrity of the service that the government may expect from" the employee. 18 U.S.C. 208(b)(1). Given the firm's significant annual revenues, we expect its earnings based on representation of the Seattle School District in this case likely will have a minimal impact on the pool of total funds

FOIA Exemption 6

These circumstances are far from being sufficiently substantial as to affect the integrity of Mr. Garre's performance of his duties. Accordingly, we believe a waiver is appropriate under Section 208 in this instance.

Hogan & Hartson had been retained by the educational organizations before Mr. Garre left the firm, but he did not work on these matters, and the educational organizations are not former clients of Mr. Garre's. In addition, Mr. Garre severed his financial ties to the firm with the following exceptions: as a participant in the retirement plans offered by Hogan & Hartson, Mr. Garre invested in the mutual funds as part of a retirement plan. His funds remain in the plan with no further contributions being made either by the firm or himself. This is not an uncommon circumstance among Department attorneys who formerly served in private law firms. Second, Mr. Garre is receiving fixed periodic payments from Hogan as repayment of his capital contribution. These payments will be completed by the end of 2006. This is a debt by the firm to Mr. Garre, and the repayment is pursuant to an agreement between him and the firm. This is not a financial interest in the firm, unless the matter in which Mr. Garre seeks to participate were to affect the ability or willingness of the firm to pay Mr. Garre according to the agreement. This matter will not affect the firm's ability or willingness to meet its obligations to Mr. Garre for repayment of his capital contribution.

The standard of conduct at 5 C.F.R. 2635.502 requires an employee to take appropriate steps to avoid an appearance of loss of impartiality in the performance of his official duties. Under this section, an employee should disclose a potential conflict to the appropriate Department official and seek a determination about disqualification in any matter in which he determines that a reasonable person would question his impartiality. Where an employee knows that a person with whom he has a "covered relationship" is or represents a party to the matter, he should not participate in the matter without informing an agency official and receiving authorization to participate. Included in the definition of a "covered relationship" is a person for whom the employee has, within the last year, served as a general partner, agent or attorney. Accordingly, Mr. Garre has a covered relationship with Hogan & Hartson.

An employee may be authorized to participate in the matter if the agency designee determines that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. Mr. Garre is the Principal Deputy Solicitor who has responsibility for, inter alia, civil rights claims arising in the education and other contexts. Therefore, these cases would be supervised by him in the usual course of matters in the OSG.

It is our understanding that a meeting currently is scheduled for Friday, July 21, 2006, at which representatives from Hogan & Hartson will present their position to your office. If approved to participate in this matter, Mr. Garre will be the most senior member of your office present, along with other members of the OSG, representatives from other divisions in the Department, and representatives from the Department of Education. It is my understanding that your office has a practice of allowing counsel representing both parties an opportunity to present their views to your office as they solicit your support for amicus participation. These meetings are standard practice. Your office decides whether to participate and its position as amicus only after extensive review of the state of the law and consultation with appropriate representatives within the Department and affected agencies.

Mr. Garre's participation is important on these cases given his past experience with the constitutional issues involved and the significance of these matters to the Office of Solicitor General. I believe the Department's and government's interest in Mr. Garre's participation and supervision in these matters outweighs the concern that a reasonable person might question the integrity of the Department's programs and operations. However, notwithstanding the presence of other representatives from the Department and Education at

this meeting and your office's extensive review, we are concerned that a reasonable person still may question the Department's impartiality if Mr. Garre is the most senior person from OSG who is present at the July 21 meeting. As with all determinations, our analysis is not a reflection on the Department official's (here, Mr. Garre's) integrity. The regulations impose an objective standard; that is, whether a reasonable person would consider the Department's decision to be influenced by the former employer's opportunity to meet with a key decision maker in this case. In order to avoid these appearance issues, we believe it would be best if you, as Solicitor General, also attended this meeting. Mr. Garre's [REDACTED] FOIA Exemption 6 [REDACTED] at Hogan & Hartson is another factor that influences our assessment and recommendation that you be present at this meeting.

It is our understanding that if your office decides to file in support of the school district, an attorney in OSG besides Mr. Garre may handle any necessary communications, such as requests for documents, with Hogan & Hartson. Again, we suggest that minimizing direct communication between Mr. Garre and his former firm is the more prudent approach, even if not required.

Under the Department's Order on Ethics Procedures, you are responsible for making such determinations for Mr. Garre with the concurrence of an ethics official. I have consulted with Janice M. Rodgers, Director, Departmental Ethics Office. As set forth above, we believe that you can determine that the financial interest is not so substantial and the government's interest in Mr. Garre's participation outweigh any concern that the integrity of the agency's programs and operations will be questioned. We recommend that you authorize Mr. Garre to participate in this matter, subject to the limitations discussed above.

Your affirmative response to this email will serve as authorization for Mr. Garre's participation as described herein. In addition, with your authorization, please forward this email to Mr. Garre so that he is aware of the parameters of his participation. Please feel free to contact me at 4-8196 if you have any questions.

Jennifer Levin Eichhorn
Departmental Ethics Office

Estryn, Esther

From: Clement, Paul D
Sent: Thursday, November 16, 2006 11:24 AM
To: Estryn, Esther
Cc: Garre, Gregory G, Rodgers, Janice
Subject: RE: Recommendation for Waiver of Conflict of Interest

Thanks. I hereby approve the waiver.

From: Estryn, Esther
Sent: Thursday, November 16, 2006 10:30 AM
To: Clement, Paul D
Cc: Garre, Gregory G, Rodgers, Janice
Subject: Recommendation for Waiver of Conflict of Interest

Janice Rodgers is out of the office. In the interest of time, she has asked me to forward to you this memo recommending approval of a waiver to Mr. Garre. Your affirmative response to this e-mail will serve as authorization for Mr. Garre's participation in Massachusetts, et al. v. Environmental Protection Agency, et. al. Please feel free to contact me at 4-8196 if you have any questions.

TO: Paul D. Clement
Solicitor General

Pursuant to 18 U.S.C. 208(b)(1), I recommend that you issue a waiver from the prohibitions in 18 U.S.C. 208(a), the criminal financial conflict of interest statute, to Principal Deputy Solicitor General Gregory G. Garre, so that he may participate in Massachusetts, et al. v. Environmental Protection Agency (EPA), et. al, No. 05-1120 (S. Ct.). Oral argument is scheduled for November 29, 2006, with Mr. Garre to argue for the government.

We understand that this case has its beginnings in October 1999, when the International Center for Technology Assessment (ITCA) and certain other environmental groups filed a rulemaking petition with the EPA under the Clean Air Act (CAA) asking it to regulate emissions of so-called greenhouse gases (GHG) from new motor vehicles. The EPA denied the petition, finding that it lacked authority to regulate GHG emissions from new vehicles to reduce global climate change and that, even if it had such authority, it would decline to exercise it given the scientific uncertainty surrounding the issue. EPA also made the point that based on the current scientific understanding, the only way to reduce GHG emissions from cars is to improve fuel economy, and the Department of Transportation already has passed fuel economy standards. A number of States (MA, CA, CN, IL, ME, NJ, NM, NY, OR, RI, VT, WA) and D.C. (hereinafter, States) along with various environmental groups petitioned for review of that decision in the D.C. Circuit. A number of other States (MI, TX, ID, ND, UT, SD, AK, KS, NE, OH) and other entities intervened in the D.C. Circuit to defend the EPA's decision: the Alliance of Automobile Manufacturers; National Automobile Dealers Association; Engine Manufacturers Association; Truck Manufacturers Association; CO2 Litigation Group; and Utility Air Regulatory Group.

The D.C. Circuit denied the petition and the States now seek review in the Supreme Court, in effect, asking the Supreme Court to order the EPA to

initiate a rulemaking regulating GHG emissions by new motor vehicles. The various vehicle intervenors object, claiming that new regulation in this area could impose a financial burden on them to the extent that they are required to modify their vehicles to comply with the regulations or devote their efforts to research and development.

Alliance of Automobile Manufacturers (Alliance), one of the intervenors, is a trade association whose membership consists of various automobile companies including Ford Motor Company. Mr. Garre owns approximately [FOIA Exemption 6] in securities in Ford Motor Company. He also has [FOIA Exemption 6] bond issued by Ford Motor Credit Company. As noted, Ford is not a party to the case, but is a member of Alliance. Alliance only recently filed a brief on the merits when EPA filed its brief.

Pursuant to 18 U.S.C. 208(a), an employee of the United States is prohibited from participating personally and substantially in a matter in which he has a financial interest, unless he obtains a waiver under section 208(b). Section 208(b)(1) provides that a waiver may be granted upon a written determination that the financial interest involved is not so substantial as to be deemed likely to affect the integrity of the service that the government may expect from the employee.

The total value of Mr. Garre's financial interest in Ford Motor Company and Ford Motor Credit Company [FOIA Exemption 6] is relatively small, and not that much greater than the de minimis exemption for matters affecting nonparties (\$25,000). Moreover, any direct impact on Mr. Garre's financial interests in Ford as a result of additional regulations is tenuous at best.

Mr. Garre is the principal deputy on this case and took the lead in reviewing and revising the government's brief before Alliance filed its brief on the merits in the Supreme Court. He has exceptional knowledge of the basic jurisdictional and administrative issues presented by the case as well as the numerous complex legal and scientific issues raised by it. In addition, the case is of such importance and complexity that it necessitates argument by the Solicitor General or one of his deputies. In the upcoming argument session, however, the Solicitor General and the other deputy with familiarity in this area are undertaking the oral arguments in other important matters within their areas of expertise. Accordingly, especially given the time frame of the upcoming argument, reassigning the case could materially and adversely impact the government's representation.

Based upon the foregoing, a waiver is appropriate. If you agree that Mr. Garre's financial interest in Ford is not so substantial as to be deemed likely to affect the integrity of his service to the government, I recommend that you approve the waiver under 18 U.S.C. 208(b)(1).

Eichhorn, Jennifer (JMD)

From: Clement, Paul D
Sent: Monday, March 05, 2007 5:01 PM
To: Eichhorn, Jennifer (JMD)
Cc: Rodgers, Janice
Subject: RE: Waiver recommendation, NYS Board of Elections v. Lopez-Torres

This sounds fine. Thanks.

From: Eichhorn, Jennifer (JMD)
Sent: Monday, March 05, 2007 4:53 PM
To: Clement, Paul D
Cc: Rodgers, Janice
Subject: Waiver recommendation, NYS Board of Elections v. Lopez-Torres

Paul -- Pursuant to 5 C.F.R. 2635.502, I recommend that you authorize Principal Deputy Solicitor General Gregory G. Garre to participate on behalf of the Office of the Solicitor General in your office's consideration and potential participation as *amicus curiae* in *New York State Bd. Of Elections v. Lopez-Torres*, No. 06-766 (S. Ct). Greg's former firm, Hogan & Hartson, represents the Republican National Committee (RNC), another *amicus* in this case. We further recommend that someone other than Greg communicate with Hogan and the RNC on this matter. This litigation raises a First Amendment challenge to the selection process for New York State judges.

Before returning to the Office of the Solicitor General (OSG) in October 2005, Greg was a partner at Hogan & Hartson. During his tenure at Hogan, Greg did not represent the RNC. In addition, Greg's [REDACTED] at Hogan & Hartson, has not represented the RNC in any matter.

FOIA Exemption 6

[REDACTED] however, the pool of available funds [REDACTED] may be influenced by the firm's total revenue. Pursuant to 18 U.S.C. 208(a), a federal employee is prohibited from participating personally and substantially in a particular matter in which he has a financial interest unless he obtains a waiver. A waiver may be granted upon a written determination that the financial interest involved "is not so substantial as to be deemed likely to affect the integrity of the service that the government may expect from" the employee. 18 U.S.C. 208(b)(1). Given the firm's significant annual revenues, we expect its earnings based on representation of the RNC in this case likely will have a minimal impact on the pool of total funds available [REDACTED]

FOIA Exemption 6

[REDACTED] These circumstances are far from being sufficiently substantial as to affect the integrity of Greg's performance of his duties. Accordingly, we believe a waiver is appropriate under Section 208 in this instance.

Pursuant to 5 C.F.R. 2635.502, an employee must to take appropriate steps to avoid an appearance of loss of impartiality in the performance of his official duties. Under this section, an employee should disclose a potential conflict to the appropriate Department official and seek a determination about disqualification in any matter in which he determines that a reasonable person would question his impartiality. Where an employee knows that a person with whom he has a "covered relationship" is or represents a party to the matter, he should not participate in the matter without informing an agency official and receiving authorization to participate. Included in the definition of a "covered relationship" is a person for whom the employee has, within the last year, served as a general partner, agent, or attorney. At this time, Greg does not have a "covered relationship" with Hogan & Hartson. However, as a matter of practice, the Department frequently considers appearance issues beyond the one year period for senior officials such as Greg with matters involving a former employer. 5 C.F.R. 2635.501 states that an employee may follow the procedures set forth in Section 502 if there are other

circumstances that may raise questions of his impartiality. As noted above, both the United States and RNC seek to participate as amicus. As a matter of prudence, the Department generally has applied the "party" standard to situations where an entity is an amicus or amicus representative in a matter assigned to a Department official. For these reasons, I am seeking a formal determination.

An employee may be authorized to participate in the matter if the agency designee determines that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. Greg is the Principal Deputy Solicitor who has responsibility for, *inter alia*, First Amendment issues. Although Greg has not participated in this case thus far, his expertise in this area and his participation would be of substantial benefit for the Department. Given the current caseload and assignments in the office, as a practical and administrative matter, it would be difficult to reassign this matter to another Deputy. Moreover, given that the Department is considering *amicus* participation and RNC is participating as *amicus*, it is expected that there will be minimal, if any, communication between your office and Hogan or the RNC.

Under the Department's Order on Ethics Procedures, you are responsible for making such determinations for Greg with the concurrence of an ethics official. It is within your discretion to determine that the interest of the government in Greg's participation in this matter outweighs any concern that the integrity of the agency's programs and operations will be questioned. In order to avoid appearance issues, we further recommend that someone in your office other than Greg communicate with Hogan on this matter. With this understanding, we recommend that you authorize Greg to participate in this matter.

Your affirmative response to this email will serve as authorization for Greg's participation as described herein. In addition, with your authorization, please forward this email to Greg so that he is aware of this determination and the limitations imposed. Please feel free to contact me or Janice Rodgers, Director, at 4-8196 if you have any questions. -Jennifer c: Janice

Eichhorn, Jennifer (JMD)

From: Clement, Paul D
Sent: Tuesday, March 13, 2007 2:11 PM
To: Eichhorn, Jennifer (JMD)
Cc: Garre, Gregory G
Subject: Re: Waiver recommendation in Board of Educ. v. Tom F.

This fine by me. Thanks.

-----Original Message-----

From: Eichhorn, Jennifer (JMD)
To: Clement, Paul D
CC: Rodgers, Janice
Sent: Tue Mar 13 12:35:16 2007
Subject: Waiver recommendation in Board of Educ. v. Tom F.

Paul — Pursuant to 18 U.S.C. 208 and 5 C.F.R. 2635.502, I recommend that you authorize Principal Deputy Solicitor General Gregory G. Garre to participate on behalf of the Office of the Solicitor General in your office's consideration and potential participation as amicus curiae in Board of Educ. v. Tom F., No. 06-637 (S. Ct). This litigation raises issues regarding the Individuals with Disabilities in Education Act (IDEA). Greg's former firm, Hogan & Hartson (Hogan), represents an education group, and a partner at Hogan contacted Greg to notify him of their intent to file as amicus. To the extent further communications are necessary with Hogan, we recommend that someone other than Greg communicate with Hogan on this matter.

Before returning to the Office of the Solicitor General (OSG) in October 2005, Greg was a partner at Hogan. During his tenure at Hogan, Greg did not represent Hogan's current client. Moreover, [REDACTED] at Hogan, has not and is not representing this client in any matter. It also is my understanding that at Hogan, Greg worked on issues involving IDEA that are distinct from the issues presented in this litigation.

[REDACTED]
FOIA Exemption 6

[REDACTED] the pool of available funds [REDACTED] may be influenced by the firm's total revenue. Pursuant to 18 U.S.C. 208(a), a federal employee is prohibited from participating personally and substantially in a particular matter in which he has a financial interest unless he obtains a waiver. A waiver may be granted upon a written determination that the financial interest involved "is not so substantial as to be deemed likely to affect the integrity of the service that the government may expect from" the employee. 18 U.S.C. 208(b)(1). Given the firm's significant annual revenues, we expect its earnings based on representation in this case likely will have a minimal impact on the pool of total funds [REDACTED]

FOIA Exemption 6

[REDACTED] These circumstances are far from being sufficiently substantial as to affect the integrity of Greg's performance of his duties. Accordingly, we believe a waiver is appropriate under Section 208 in this instance.

Pursuant to 5 C.F.R. 2635.502, an employee must to take appropriate steps to avoid an appearance of loss of impartiality in the performance of his official duties. Under this section, an employee should disclose a potential conflict to the appropriate Department official and seek a determination about disqualification in any matter in which he determines that a reasonable person would question his impartiality. Where an employee knows that a person with whom he has a "covered relationship" is or represents a party to the matter, he should not participate in the matter without informing an agency official and receiving authorization to participate. Included in the definition of a "covered relationship" is a person for whom the employee has, within the last year, served as a general partner, agent, or attorney. At this time, Greg does not have a "covered relationship" with Hogan & Hartson. However, as a matter of practice, the Department frequently considers appearance issues beyond the one year period for senior officials such as Greg with matters involving a former employer. 5 C.F.R. 2635.501 states that an employee may follow the procedures set forth in Section 502 if there are other

circumstances that may raise questions of his impartiality. As noted above, Hogan will participate as amicus and the United States is contemplating amicus participation. As a matter of prudence, the Department generally has applied the "party" standard to situations where an entity is an amicus or amicus representative in a matter assigned to a Department official. For these reasons, I am seeking a formal determination.

An employee may be authorized to participate in the matter if the agency designee determines that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. Greg is the Principal Deputy Solicitor who has responsibility for, inter alia, IDEA issues. Although Greg has not participated in this case thus far, his expertise in this area and his participation would be of substantial benefit for the Department. Given the current caseload and assignments in the office, as a practical and administrative matter, it would be difficult to reassign this matter to another Deputy. Moreover, given that the Department is considering amicus participation and Hogan is participating as amicus, it is expected that there will be minimal, if any, communication between your office and Hogan.

Under the Department's Order on Ethics Procedures, you are responsible for making such determinations for Greg with the concurrence of an ethics official. It is within your discretion to determine that the interest of the government in Greg's participation in this matter outweighs any concern that the integrity of the agency's programs and operations will be questioned. In order to avoid appearance issues, we further recommend that someone in your office other than Greg communicate with Hogan on this matter. With this understanding, we recommend that you authorize Greg to participate in this matter.

Your affirmative response to this email will serve as authorization for Greg's participation as described herein. In addition, with your authorization, please forward this email to Greg so that he is aware of this determination and the limitations imposed. Please feel free to contact me or Janice Rodgers, Director, at 4-8196 if you have any questions. -Jennifer c: Janice

Eichhorn, Jennifer (JMD)

From: Clement, Paul D
Sent: Tuesday, March 13, 2007 4:41 PM
To: Eichhorn, Jennifer (JMD)
Cc: Garre, Gregory G
Subject: Re: Additional waiver issues re: Wisconsin Right to Life v. FEC

This is fine. Thanks.

-----Original Message-----

From: Eichhorn, Jennifer (JMD)
To: Clement, Paul D
CC: Garre, Gregory G; Rodgers, Janice
Sent: Tue Mar 13 15:43:01 2007
Subject: Additional waiver issues re: Wisconsin Right to Life v. FEC

Paul - I am writing to recommend a grant of a waiver pursuant to 18 U.S.C. 208 for Greg Garre's continued participation in Wisconsin Right to Life v. FEC, based on Hogan and Hartson's representation of amicus in this matter. Greg's [REDACTED] FOIA Exemption 6 at Hogan. We were asked to consider another issue in this case and, in reviewing that issue, we determined that an earlier recommendation inadvertently did not include consideration of a waiver under 18 U.S.C. 208. I have set forth below the history of waivers granted in this case and the current recommendations.

As you may recall, this office initially recommended in favor of a waiver pursuant to 5 C.F.R. 2635.502 for Greg Garre's participation in Wisconsin Right to Life v. FEC in December 2005. At that time, Greg's former firm, Hogan & Hartson (Hogan), sought consent to participate as amicus in this case. Although Greg had a covered relationship with Hogan, we recommended in favor of a waiver for the following reasons: Greg would not need to communicate with his former firm in order to continue to represent the FEC, and the disadvantage to the Department should he recuse and another attorney be assigned to the case outweighed any appearance of a lack of impartiality. At the time Hogan sought consent to participate, Greg had participated substantially in this case on behalf of the U.S.

On February 22, 2007, when Hogan again sought our consent to participate as amicus, we recommended a continuation of the waiver pursuant to 2635.502 for similar and additional reasons. Again, given Hogan's amicus representation, any contact with Hogan would be minimal, and someone other than Greg would be responsible for these contacts. Given Greg's longstanding involvement in this case, his participation is even more significant, and the Department's burden should he be recused would be substantially greater. Moreover, more than one year has passed since Greg returned to federal service from Hogan, and Hogan is representing clients who neither Greg nor his [REDACTED] FOIA Exemption 6 represented.

We were asked to consider another issue in this case this week; the request by a former client of Greg's, the Chamber of Commerce, for consent to participate as amicus in the case. In addressing this issue we realized that our recommendation in February 2007 inadvertently did not recommend a waiver pursuant to 18 U.S.C. 208 as well as Section 502. We now recommend a waiver under 208. As you know, Greg's [REDACTED] at Hogan. [REDACTED] FOIA Exemption 6

[REDACTED] the pool of available funds [REDACTED] may be influenced by the firm's total revenue. Pursuant to 18 U.S.C. 208(a), a federal employee is prohibited from participating personally and substantially in a particular matter in which he has a financial interest unless he obtains a waiver. A waiver may be granted upon a written determination that the financial interest involved "is not so substantial as to be deemed likely to affect the integrity of the service that the government may expect from" the employee. 18 U.S.C. 208(b)(1). Given the firm's significant annual revenues, we expect its earnings based on representation in this case likely will have a minimal impact on the pool of total funds [REDACTED]

[REDACTED] FOIA Exemption 6 These circumstances are far from being sufficiently substantial as to affect the integrity of Greg's performance of his duties. Accordingly, we believe a

waiver is appropriate under Section 208 in this instance.

Finally, with respect to the request by the Chamber of Commerce to participate as amicus in this case, we do not believe a waiver under 5 C.F.R. 2635.502 is required for Greg's participation in this case for the reasons set forth below.

When Greg was employed at Hogan & Hartson, he worked on two matters for the Chamber that were completed after his departure from the firm. One of the two matters raised a jurisdictional question regarding Title VII of the Civil Rights Act of 1964, as amended. Greg also communicated with other counsel retained by the Chamber regarding potential matters for the Chamber's amicus participation. Neither of these earlier matters on behalf of the Chamber involved issues that are presented in this litigation. Moreover, it is my understanding that [REDACTED] FOIA Exemption 6 is not representing the Chamber in any matter. In addition, the Chamber will not be represented by Hogan in this case.

Under Section 502, an employee has a "covered relationship" with, inter alia, entities for whom the employee served as counsel during the prior year. 5 C.F.R. 2635.502(b)(1)(iv). Greg's brief attorney-client relationship with the Chamber ended almost 1 ½ years ago. We previously sought a waiver in another matter involving the Chamber since that matter arose during the one year period of his "covered relationship." Here, however, Greg's prior work for the Chamber is no longer considered a "covered relationship." Moreover, given these facts, we do not believe a reasonable person with knowledge of the relevant facts would question, on an objective basis, his impartiality in performing his duties in this case. See 5 C.F.R. 2635.502(a). Accordingly, we do not think a waiver is necessary with respect to the Chamber's participation as amicus in this matter.

Your affirmative response to this email will serve as authorization for Greg's continued participation as described herein. In addition, with your authorization, please forward this email to Greg so that he is aware of this determination and the limitations imposed. If you have any further questions, feel free to contact me or Janice Rodgers, Director, at 4-8196. Thank you. -Jennifer c: Greg, Janice

Eichhorn, Jennifer (JMD)

From: Rodgers, Janice
Sent: Wednesday, May 30, 2007 10:21 AM
To: Eichhorn, Jennifer (JMD)

From: Clement, Paul D
Sent: Wednesday, May 30, 2007 10:10 AM
To: Rodgers, Janice
Cc: Garre, Gregory G
Subject: RE: Recommendation for waiver under 18 USC 208 and determination under 5 CFR 2635.502 for Greg Garre

This sounds fine. Thanks.

From: Rodgers, Janice
Sent: Wednesday, May 30, 2007 9:18 AM
To: Clement, Paul D
Subject: Recommendation for waiver under 18 USC 208 and determination under 5 CFR 2635.502 for Greg Garre

Paul,

Pursuant to 18 U.S.C. 208 and 5 C.F.R. 2635.502, I recommend that you authorize Principal Deputy Solicitor General Gregory G. Garre to participate on behalf of the Office of the Solicitor General in *Navajo Nation v. Forest Service*. It is my understanding that your office is considering seeking *en banc* review in the Ninth Circuit. Greg's former firm, Hogan & Hartson (Hogan), represents an intervenor party, Arizona Snowbowl Resort Limited Partnership (ASRLP). To the extent communications on this case are necessary between your office and Hogan, we recommend that someone other than Greg communicate with Hogan.

Before returning to the Office of the Solicitor General in October 2005, Greg was a partner at Hogan. During his tenure at Hogan, Greg did not represent Hogan's current client, ASRLP. Moreover, Greg's [FOIA Exemption 6] at Hogan, has not and is not representing ASRLP in any matter. Moreover, this matter was not pending when Greg was at Hogan.

FOIA Exemption 6

[FOIA Exemption 6] the pool of available funds [FOIA Exemption 6] may be influenced by the firm's total revenue. Pursuant to 18 U.S.C. 208(a), a federal employee is prohibited from participating personally and substantially in a particular matter in which he has a financial interest unless he obtains a waiver. A waiver may be granted upon a written determination that the financial interest involved "is not so substantial as to be deemed likely to affect the integrity of the service that the government may expect from" the employee. 18 U.S.C. 208(b)(1). Given the firm's significant annual revenues, we expect its earnings based on representation in this case likely will have a minimal impact on the pool of total funds [FOIA Exemption 6]

[FOIA Exemption 6] These circumstances are far from being sufficiently substantial as to affect the integrity of Greg's performance of his duties. Accordingly, we believe a waiver is appropriate under Section 208 in this instance.

Pursuant to 5 C.F.R. 2635.502, an employee must to take appropriate steps to avoid an appearance of loss of impartiality in the performance of his official duties. Under this section, an employee should disclose a

potential conflict to the appropriate Department official and seek a determination about disqualification in any matter in which he determines that a reasonable person would question his impartiality. Where an employee knows that a person with whom he has a "covered relationship" is or represents a party to the matter, he should not participate in the matter without informing an agency official and receiving authorization to participate. Included in the definition of a "covered relationship" is a person for whom the employee has, within the last year, served as a general partner, agent, or attorney. At this time, Greg does not have a "covered relationship" with Hogan & Hartson. However, as a matter of practice, the Department may consider appearance issues beyond the one year period for senior officials such as Greg with matters involving a former employer. 5 C.F.R. 2635.501 states that an employee may follow the procedures set forth in Section 502 if there are other circumstances that may raise questions of his impartiality. For these reasons, I am seeking a formal determination.

An employee may be authorized to participate in the matter if the agency designee determines that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. Greg is the Principal Deputy Solicitor who has responsibility for, *inter alia*, issues arising under the Religious Freedom and Restoration Act (RFRA). Although Greg has not participated in this case thus far, his expertise in this area and his participation would be of substantial benefit for the Department. Moreover, it is our understanding that there are two distinct issues in this case that are assigned for review to two different deputies. As a practical and administrative matter, it would be difficult to reassign the RFRA issue to another deputy.

As you know, under the Department's Order on Ethics Procedures, you are responsible for making such determinations for Greg with the concurrence of an ethics official. It is within your discretion to determine that the interest of the government in Greg's participation in this matter outweighs any concern that the integrity of the agency's programs and operations will be questioned. In order to avoid appearance issues, we further recommend that someone in your office other than Greg communicate with Hogan on this matter. With this understanding, we recommend that you authorize Greg to participate in this matter.

Your affirmative response to this email will serve as authorization for Greg's participation as described herein. In addition, with your authorization, please forward this email to Greg so that he is aware of this determination and the limitations imposed. Please feel free to contact me at 4-8196 if you have any questions.

Thank you,

Janice

Janice Rodgers, Director
Departmental Ethics Office
(202) 514-8196
fax 514-3117

Eichhorn, Jennifer (JMD)

From: Clement, Paul D
Sent: Monday, March 03, 2008 11:06 AM
To: Eichhorn, Jennifer (JMD)
Cc: Rodgers, Janice
Subject: RE: Recommendation for 208 waiver for Greg Garre in Geren v. Omar, Munaf v. Geren

I authorize Greg's participation. Thanks.

From: Eichhorn, Jennifer (JMD)
Sent: Friday, February 29, 2008 5:11 PM
To: Clement, Paul D
Cc: Rodgers, Janice
Subject: Recommendation for 208 waiver for Greg Garre in Geren v. Omar, Munaf v. Geren

Paul -- Pursuant to 18 U.S.C. 208, I recommend that you authorize Principal Deputy Solicitor General Gregory G. Garre to participate on behalf of the Office of the Solicitor General in consolidated cases, *Geren v. Omar*, No. 07-394, and *Munaf v. Geren*, No. 06-1666. Greg's former firm, Hogan & Hartson (Hogan), represents amici who support the opposing parties, and submitted their brief yesterday. In addition, Greg's [FOIA Exemption 6] is [FOIA Exemption 6] at Hogan. While I expect there will be minimal communications on these cases between your office and Hogan, we recommend that someone other than Greg communicate with Hogan.

Before returning to the Office of the Solicitor General in October 2005, Greg was a partner at Hogan. During his tenure at Hogan, Greg did not represent Hogan's clients in this matter, the Constitution Project and the Rutherford Institute. In addition, [FOIA Exemption 6] has not and is not representing either amici client in this or any matter. Moreover, these matters were not pending when Greg was at Hogan.

FOIA Exemption 6

[FOIA Exemption 6] the pool of available funds [FOIA Exemption 6] may be influenced by the firm's total revenue. Pursuant to 18 U.S.C. 208(a), a federal employee is prohibited from participating personally and substantially in a particular matter in which he has a financial interest unless he obtains a waiver. A waiver may be granted upon a written determination that the financial interest involved "is not so substantial as to be deemed likely to affect the integrity of the service that the government may expect from" the employee. 18 U.S.C. 208(b)(1). Given the firm's significant annual revenues, we expect its earnings based on representation in this case likely will have a minimal impact on the pool of total funds [FOIA Exemption 6]

**FOIA
Exemption 6**

While we believe the minimal financial impact on [FOIA Exemption 6] if any, is sufficient to support a waiver under Section 208, Greg's extensive involvement in these matters to date, the expedited schedule, and the Department's strong interest in his continuing participation further support Greg's continuing participation in these matters. As you know, Greg has participated in these cases extensively thus far. His work began in April 2006. Greg had drafted the court of appeals briefs and argued both cases, submitted a rehearing en banc petition in the *Omar* case, submitted the petitions for certiorari in both cases, and submitted the opening merits brief to the Supreme Court in both cases. Given the expedited schedule, the Department's reply briefs are due March 18, and argument is scheduled for March 25, 2008. Given Greg's comprehensive participation thus far and the upcoming deadlines, it would be a substantial hardship and loss to the Department if he no longer participated in these matters. Moreover, any possible adverse appearances can be further mitigated if any communications between Hogan and your office are conducted by someone other than Greg.

As you may recall, in prior matters in which Hogan represented a party or amicus, we further recommended that you authorize Greg's participation pursuant to 5 C.F.R. 2635.502. Section 2635.502 requires an employee to seek prior authorization to participate in a particular matter when, *inter alia*, a former employer in the past year is or represents a party. Section 2635.501 similarly requires an employee to seek prior authorization to participate in a matter if any other circumstance would lead a reasonable person to question the integrity of the Department's programs or operations. As a matter of policy, we often extend the need for a senior employee such as Greg to request authorization to participate beyond the one year period when matters arise involving a former employer. However, given that Greg left Hogan more than two years ago, we do not believe we need to specifically authorize his participation because of his own prior employment with Hogan when Hogan is involved in a matter, either as amicus or as a party, as long as 1) none of his former clients also is involved, and 2) [FOIA Exemption 6] is not representing and has not represented the particular client. The practical consequence of this is minimal, however, since as long as [FOIA Exemption 6] remains [FOIA Exemption 6] Hogan, authorization under 18 U.S.C. 208 will be needed in each instance. We also recommend that, to the extent possible, communications on future matters continue to be addressed with Hogan by someone other than Greg.

Pursuant to the Department's Order on Ethics Procedures, you are responsible for making a determination under 18 U.S.C. 208 for Greg with the concurrence of an ethics official. It is within your discretion to determine that the financial interest is not so substantial as to be deemed likely to affect the integrity of Greg's performance of his duties, and we agree that is the circumstance here. We recommend that you authorize Greg to participate in this matter under the condition noted above.

Your affirmative response to this email will serve as authorization for Greg's participation as described herein. In addition, with your authorization, please forward this email to Greg so that he is aware of this determination and the limitations imposed. Please feel free to contact me at 4-8196 if you have any questions. Thank you.
-Jennifer cc: Janice

Jennifer Levin Eichhorn
Departmental Ethics Office

Eichhorn, Jennifer (JMD)

From: Clement, Paul D
Sent: Tuesday, March 04, 2008 3:08 PM
To: Eichhorn, Jennifer (JMD)
Cc: Rodgers, Janice; Garre, Gregory G
Subject: RE: Recommendation for Sec. 208 Waiver in Riley v. Kennedy

I authorize Greg's participation. Thanks.

From: Eichhorn, Jennifer (JMD)
Sent: Tuesday, March 04, 2008 2:46 PM
To: Clement, Paul D
Cc: Rodgers, Janice
Subject: Recommendation for Sec. 208 Waiver in Riley v. Kennedy

Paul – Pursuant to 18 U.S.C. 208, I recommend that you authorize Principal Deputy Solicitor General Gregory G. Garre to continue to participate as the supervisor/reviewer on behalf of the Office of the Solicitor General in *Riley v. Kennedy*, No. 07-77. Greg has been assigned this matter since November 2007, and he has reviewed and edited the Department's amicus brief (on behalf of the plaintiffs), and provided guidance to the Assistant Solicitor General (ASG) who is preparing for argument. Argument is scheduled for March 24, 2008. Greg's former firm, Hogan & Hartson (Hogan), represents amici who support the opposing party. In addition, Greg's [FOIA Exemption 6] is [FOIA Exemption 6] at Hogan. While I expect there will be minimal, if any, communications on this case between your office and Hogan, we recommend that someone other than Greg communicate with Hogan.

Before returning to the Office of the Solicitor General in October 2005, Greg was a partner at Hogan. During his tenure at Hogan, Greg did not represent Hogan's clients in this matter, who are two state court judges. In addition, [FOIA Exemption 6] has not and is not representing either amici client in this or any matter. Moreover, this matter was not pending when Greg was at Hogan.

FOIA Exemption 6

[FOIA Exemption 6] the pool of available funds [FOIA Exemption 6] may be influenced by the firm's total revenue. Pursuant to 18 U.S.C. 208(a), a federal employee is prohibited from participating personally and substantially in a particular matter in which he has a financial interest unless he obtains a waiver. A waiver may be granted upon a written determination that the financial interest involved "is not so substantial as to be deemed likely to affect the integrity of the service that the government may expect from" the employee. 18 U.S.C. 208(b)(1). Given the firm's significant annual revenues, we expect its earnings based on representation in this case likely will have a minimal impact on the pool of total funds [FOIA Exemption 6]

FOIA Exemption 6

While we believe the minimal financial impact on [FOIA Exemption 6] if any, is sufficient to support a waiver under Section 208, Greg's involvement in this case to date, his expertise on voting rights issues, the upcoming argument, and the Department's strong interest in his continuing participation further support Greg's participation in these matters. Given Greg's expertise on voting issues and his familiarity with this matter, it would be a substantial hardship and loss to the Department if he no longer participated in these matters. At this time, he is well-versed in the facts, issues, and nuances of this case, and he would play a substantial role in the ASG's moot court. He also intends to be present during oral argument to provide advice and support, as needed. Any possible adverse appearances can be further mitigated if any communications between Hogan and your office are conducted by someone other than Greg. (Certainly, there are no concerns if a representative of Hogan and Greg are present at oral argument.)

In another recent recommendation, we explained that we no longer believe we need to seek Greg's participation pursuant to 5 C.F.R. 2635.502, based on his former employer's representation of a party (or party status) in a particular matter when certain circumstances are present. Those circumstances, which are present here, are that 1) none of Greg's former clients is involved in this case, and 2) FOIA Exemption 6 is not representing and has not represented the particular client(s). Even so, we continue to recommend that, to the extent possible, communications on future matters continue to be addressed with Hogan by someone other than Greg.

Pursuant to the Department's Order on Ethics Procedures, you are responsible for making a determination under 18 U.S.C. 208 for Greg with the concurrence of an ethics official. It is within your discretion to determine that the financial interest is not so substantial as to be deemed likely to affect the integrity of Greg's performance of his duties, and we agree that is the circumstance here. We recommend that you authorize Greg to participate in this matter under the condition noted above.

Your affirmative response to this email will serve as authorization for Greg's participation as described herein. In addition, with your authorization, please forward this email to Greg so that he is aware of this determination and the limitations imposed. Please feel free to contact me at 4-8196 if you have any questions. Thank you.
-Jennifer cc: Janice

Jennifer Levin Eichhorn
Departmental Ethics Office

Eichhorn, Jennifer (JMD)

From: Clement, Paul D
Sent: Monday, April 14, 2008 12:38 PM
To: Eichhorn, Jennifer (JMD)
Cc: Rodgers, Janice; Garre, Gregory G
Subject: RE: Conflicts recommendation for moot court today

I authorize subject to the condition described below. Thanks.

From: Eichhorn, Jennifer (JMD)
Sent: Monday, April 14, 2008 12:35 PM
To: Clement, Paul D
Cc: Rodgers, Janice
Subject: Conflicts recommendation for moot court today

4/14/08

Paul – Pursuant to 18 U.S.C. 208, I recommend that you authorize Principal Deputy Solicitor General Gregory G. Garre to continue to participate as the supervisor/reviewer on behalf of the Office of the Solicitor General (OSG) in *Meacham v. Knolls Atomic Power Laboratory, et al.*, No. 06-1505. This case addresses the issue of whether the employee or employer bears the burden of persuasion on the “reasonable factor other than age” defense under the Age Discrimination in Employment Act (ADEA). Greg notified our office this morning about a conflict of interest that arose last Friday. A moot court on this case is scheduled for this afternoon at 3:00 p.m. and Greg would like to attend. Accordingly, we would appreciate your immediate attention to this matter.

Greg has been assigned as the reviewer of this case for several months. In December 2007, he reviewed and edited the office’s amicus brief in support of the petition for certiorari, and he similarly reviewed the Department’s amicus brief on the merits that was submitted in March 2008. Greg also has provided guidance to the Assistant Solicitor General (ASG) who is preparing for argument. Argument is scheduled for April 23, 2008 and, as noted above, a moot court is scheduled for this afternoon. Greg’s former firm, Hogan & Hartson (Hogan), submitted an amicus brief on Friday on behalf of the National School Boards Association (NSBA) in support of respondents. Greg’s [REDACTED] FOIA Exemption 6 is [REDACTED] FOIA Exemption 6 at Hogan. Given that Hogan and OSG are supporting opposing parties in this case, we anticipate that there will be minimal, if any, communications on this case between your office and Hogan. In any event, we recommend that someone other than Greg communicate with Hogan.

Before returning to the Office of the Solicitor General in October 2005, Greg was a partner at Hogan. During his tenure at Hogan, Greg did not represent NSBA. In addition, [REDACTED] has not and is not representing this amicus client in this or any matter.

[REDACTED]
FOIA Exemption 6

[REDACTED] the pool of available funds [REDACTED] may be influenced by the firm’s total revenue. Pursuant to 18 U.S.C. 208(a), a federal employee is prohibited from participating personally and substantially in a particular matter in which he has a financial interest unless he obtains a waiver. A waiver may be granted upon a written determination that the financial interest involved “is not so substantial as to be deemed likely to affect the integrity of the service that the government may expect from” the employee. 18 U.S.C. 208(b)(1). Given the firm’s significant annual revenues, we expect its earnings based on representation in this case likely will have a minimal impact on the pool of total funds [REDACTED]

FOIA Exemption 6

While we believe the minimal financial impact on [FOIA Exemption 6] if any, is sufficient to support a waiver under Section 208, Greg's involvement in this case to date, his expertise on the ADEA, the upcoming argument, and the Department's strong interest in his continuing participation further support Greg's participation in these matters. It would be a substantial hardship and loss to the Department if he no longer participated in this case. At this time, he is well-versed in the facts, issues, and nuances of this case, and he would play a substantial role in the ASG's moot court. He also intends to be present during oral argument to provide advice and support, as needed. Any possible adverse appearances can be further mitigated if any communications between Hogan and your office are conducted by someone other than Greg. (Certainly, there are no concerns if a representative of Hogan and Greg are present at oral argument.)

As you may recall, we explained in a recommendation submitted in February that we no longer believe we need to seek Greg's participation pursuant to 5 C.F.R. 2635.502, based on his former employer's representation of a party (or party status) in a particular matter when certain circumstances are present. Those circumstances, which are present here, are that 1) none of Greg's former clients is involved in this case, and 2) [FOIA Exemption 6] is not representing and has not represented the particular client. Even so, we continue to recommend that, to the extent possible, communications on future matters continue to be addressed with Hogan by someone other than Greg.

Pursuant to the Department's Order on Ethics Procedures, you are responsible for making a determination under 18 U.S.C. 208 for Greg with the concurrence of an ethics official. It is within your discretion to determine that the financial interest is not so substantial as to be deemed likely to affect the integrity of Greg's performance of his duties, and we agree that is the circumstance here. We recommend that you authorize Greg to participate in this matter under the condition noted above.

Your affirmative response to this email will serve as authorization for Greg's participation as described herein. In addition, with your authorization, please forward this email to Greg so that he is aware of this determination and the limitations imposed. Please feel free to contact me at 4-8196 if you have any questions. Thank you.

-Jennifer cc: Janice

Jennifer Levin Eichhorn
Departmental Ethics Office

From: Margolis, David
Sent: Thursday, October 23, 2008 2:56 PM
To: Rodgers, Janice
Subject: RE: Recommendation to approve participation of SG

approved

From: Rodgers, Janice
Sent: Thursday, October 23, 2008 10:57 AM
To: Margolis, David
Subject: Recommendation to approve participation of [REDACTED]

Dave,

[REDACTED] seeks authorization to continue to participate as the counsel of record in [REDACTED] and [REDACTED], two consolidated cases in which the issue is whether the antidumping-duty statute applies to the delivery of low enriched uranium under separate work unit contracts. As [REDACTED] and then as [REDACTED] reviewed the government's opening brief and reply brief on the merits in these cases. [REDACTED] seeks a waiver in order to allow him to continue as counsel of record in these cases. A conflict has arisen because Hogan & Hartson, [REDACTED] former firm, has filed an amicus brief on behalf of Alcoa, Inc. Alcoa's amicus brief was filed between the filing of the government's opening and reply briefs, but [REDACTED] did not see the amicus brief when reviewing the government's reply. While at Hogan & Hartson, [REDACTED] did not represent Alcoa. In addition, [REDACTED]'s [REDACTED] is [REDACTED] at Hogan & Hartson, but [REDACTED] has not represented Alcoa.

FOIA Exemption 6

[REDACTED] the pool of available funds [REDACTED] may be influenced by the firm's total revenue. Pursuant to 18 USC 208(a), a federal employee is prohibited from participating personally and substantially in a particular matter in which he has a financial interest unless he obtains a waiver. A waiver may be granted upon a written determination that the financial interest involved "is not so substantial as to be deemed likely to affect the integrity of the service that the government may expect from" the employee, 18 USC 208(b)(1). Given the firm's significant revenues, we expect its earnings based on representations in this case likely will have a minimal impact on the pool of total funds [REDACTED]

[REDACTED] While we believe the minimal financial impact on [REDACTED] FOIA Exemption 6 [REDACTED] if any, is sufficient to support a waiver under Section 208, [REDACTED] involvement in this case to date, and the Department's interest in his continuing participation, further support granting a waiver in this case.

As [REDACTED] is [REDACTED], you are the official authorized to determine under 18 USC 208 and the impartiality regulation, 5 CFR 2635.502, that the financial interest is not so substantial as to be deemed likely to affect the integrity of [REDACTED] performance of his duties, and we agree that this is the circumstance here. A waiver under 18 USC 208 also serves as an impartiality determination under the standards of conduct. We recommend that you authorize him to continue to participate in this matter with the limitation that he not have direct contact with the Hogan & Hartson attorneys. Such contact is unlikely in any event, but should it occur another OSG attorney will communicate on behalf of the office. Please be advised that former [REDACTED] authorized [REDACTED] to participate in similar matters, i.e., those in which [REDACTED] FOIA Exemption 6 [REDACTED] firm represented a party or amicus, so this authorization would be consistent with those previous determinations, as well as with your recent determinations to authorize his participation in *Crawford v. Metropolitan Gov't of Nashville and Davidson County*, and *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council* and *State of Alaska v. Southeast Alaska Conservation Council*. A difference of course is that [REDACTED] is now the [REDACTED] rather than the Deputy [REDACTED]. However, I believe that the Department's interest in his participation outweighs any concerns about the appearance of partiality.

I recommend that you grant a waiver under 18 USC 208(b)(1) authorizing Acting [REDACTED] to participate in [REDACTED] and [REDACTED]

Thanks,

Janice M. Rodgers, Director
Departmental Ethics Office
(202) 514-8196
fax 514-3117