Description of document:	Six (6) Selected Reports of Investigation (ROI) for Federal Trade Commission (FTC) Inspector General (OIG) Closed Investigations, 2018-2019
Requested date:	02-April-2020
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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

June 10, 2020

Re: FOIA-2020-00650

This is in response to your request dated April 2, 2020, under the Freedom of Information Act seeking access to FTC OIG closed investigations: I-18-192,[1] I-18-193, I-18-194, I-18-195, I-19-196, I-19-199, I-19-201. In accordance with the FOIA and agency policy, we have searched our records on May 22, 2020.

We have located six responsive reports. I am granting partial access to the accessible records. Portions of these pages fall within one or more of the exemptions to the FOIA's disclosure requirements, as explained below.

Some of the records were obtained on the condition that the agency keep the source of the information confidential and are exempt from disclosure under FOIA Exemption 7(D), 5 U.S.C. § 552(b)(7)(D). That exemption is intended to ensure that "confidential sources are not lost because of retaliation against the sources for past disclosures or because of the sources' fear of future disclosures." *Brant Constr. Co. v. EPA, 778 F.2d 1258, 1262* (7th Cir. 1985).

Some of the records contain personal identifying information compiled for law enforcement purposes. This information is exempt for release under FOIA Exemption 7(C), 5 U.S.C. § 552(b)(7)(C), because individuals' right to privacy outweighs the general public's interest in seeing personal identifying information.

I am denying access to names, addresses, and any other identifying information found in the reports. This information is exempt from release under FOIA Exemption 6, 5 U.S.C. § 552(b)(6), because individuals' right to privacy outweighs the general public's interest in seeing personal identifying information. *See The Lakin Law Firm v. FTC*, 352 F.3d 1122 (7th Cir. 2003).

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. 552(c) (2006 & Supp. IV 2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given in response to all requests for records

[1] In a previous FOIA request, a clerical error listed the record I-18-192, instead of I-17-192. Accordingly, I-18-192 has not been provided because it does not exist. Conversely, I-17-192 has already been provided to you in a previous FOIA request.

within the Office of the Inspector General and should not be taken as an indication that excluded records do, or do not, exist.

If you have any questions about the way we handled your request or about the FOIA regulations or procedures, please contact Kamay Lafalaise at 202-326-3780.

If you are not satisfied with this response to your request, you may appeal by writing to Freedom of Information Act Appeal, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580, or via email at FOIAAppeal@ftc.gov, within 90 days of the date of this letter. Please enclose a copy of your original request and a copy of this response.

You also may seek dispute resolution services from the FTC FOIA Public Liaison Richard Gold via telephone at 202-326-3355 or via e-mail at rgold@ftc.gov; or from the Office of Government Information Services via email at ogis@nara.gov, via fax at 202-741-5769, or via mail at Office of Government Information Services (OGIS), National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740. Please note that the FOIA Public Liaison's role relates to comments, questions or concerns that a FOIA Requester may have with or about the FOIA Response. The FOIA Public Liaison's role does not relate to taking action in matters of private controversy nor can he resolve individual complaints.

Sincerely,

Dione J. Stearns
Assistant General Counsel

FEDERAL TRADE COMMISSION

OFFICE OF INSPECTOR GENERAL

REPORT OF INVESTIGATION

ALLEGATIONS OF MISCONDUCT BY A FORMER FTC EMPLOYEE

File No. I-18-193

ORIGINAL

October 30, 2018

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of Inspector General

REPORT OF INVESTIGATION

INVESTIGATION NUMBER: I-18-193

TITLE: Allegations of Misconduct by a Former FTC Employee

INVESTIGATORS: Noel A. Rosengart, Attorney and Investigator
Odies Williams, IV, Counsel to the IG/Investigator

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6. Valerie Green, Chief Administrative Services Officer

PREPARED BY: Noel A. Rosengart NR Odies Williams, IV OHW	DATE: 10/30/2018

I. Predication & Background

On July 13 and 14, 2017, [redacted], (b) (7)(C), (b) (6), Federal Trade Commission (FTC), Office of the Chief Administrative Services Officer (OCASO), contacted the FTC Office of Inspector General (OIG) to report allegations of potential misuse of FTC contractors by [redacted], (b) (7)(C), (b) (6) [redacted] reported that an anonymous complainant (AC1) advised her that [redacted] whom [redacted] supervised at the time, instructed FTC contractors to use FTC fleet vehicles to pick up lunch for her, and to turn her office lights on and off during workdays when [redacted] was late or absent from work. The relevant FTC contractors for this matter were employed by CTR Management (CTR) and Management Support Technology, [redacted] (MSTI).

[redacted] initially refused to disclose the identity of AC1 to the OIG despite repeated requests. [redacted] later disclosed AC1's identity only upon being advised by (b) (7)(C), (b) [redacted] former Director, Administrative Services Office (ASO), of another incident that occurred on September 22, 2017, in which [redacted] asked him via telephone and email if he wanted to participate in a group food order from Crisp & Juicy, a Peruvian restaurant located several miles from the FTC Headquarters (HQ) Building. [redacted] advised that she now felt comfortable disclosing AC1's identity to the OIG due to this other incident, and that AC1 had given her permission to disclose AC1's identity to the OIG. The OIG subsequently obtained video surveillance footage for September 22, 2017, which appeared to show three MSTI contractors leaving HQ in an FTC fleet vehicle and returning approximately an hour later with what appeared to be white plastic bags containing carryout food.

In November 2017, the OIG received a complaint from another anonymous complainant (AC2) alleging that [redacted] frequently used her personal cell phone to conduct government business with FTC personnel. In particular, AC2 alleged that [redacted] text messaged AC2 a picture of the front and back of [redacted] assigned purchase card (a VISA card ending in (b) (7) [redacted]) for AC2 to make on-line purchases from Party City, a party supply store. The OIG interviewed AC2 regarding these and other matters on December 7, 2017. On February 8, 2018, the OIG issued a referral to management addressing potential vulnerabilities surrounding [redacted] alleged purchase card misuse. In response, management temporarily cancelled [redacted] purchase card and required her to complete the Government Services Administration's and the FTC's purchase card trainings. Management also conducted a reassessment of OCASO's purchase card usage and took steps to minimize vulnerabilities, including reducing the number of purchase cardholders.

Additionally, during the course of our review, the OIG identified evidence that [redacted] may have engaged in prohibited personal practices (PPP) in violation of one of the Merit System Protection Board (MSPB) principles. In particular, we obtained email correspondence indicating that [redacted] may have improperly provided an applicant for an FTC Supply Management Specialist vacancy (OED-CSU-2017-0005) a copy of both the draft announcement and the position description prior to its public posting. The position was open from September 29, 2017 – October 13, 2017, during

which time it was announced in the FTC Daily and on USAJOBS. [redacted] allegedly provided this information to [redacted], MSTI Program Manager, whom [redacted] initially hired under the MSTI contract while serving as its COR. This alleged act potentially gave [redacted] an unauthorized hiring preference or advantage for the vacancy to the disadvantage of other candidates. We later identified evidence that [redacted] was eligible to apply for the position due to his status as a Vietnam War veteran even though the vacancy was categorized as a Merit Promotion Plan (MPP) position, which excludes non-status applicants from the recruitment process. [1] The announcement explicitly stated that "[v]eterans who are preference eligible or who have been separated from the armed forces under honorable conditions after three (3) or more years of continuous active service may apply (VEOA)."[2]

On December 19, 2017, the OIG issued a memorandum to management alerting them of the alleged PPPs regarding [redacted] for their consideration with respect to filling the vacancy. We also opened a full administrative misconduct investigation into these and other allegations, as discussed below.

II. OIG Review

Pursuant to these allegations, the OIG initiated a full administrative misconduct investigation into the alleged misconduct by [redacted] At the time of the complaints, [redacted] (b) (7)(C), (b) (6) duties included supervising the following programs: [redacted] (b) (7)(C), (b) (6) also served as [redacted] (b) (7)(C), (b) (6) for the FTC, while [redacted] (b) (7)(C), (b) (6) . Key [redacted] (b) (7) personnel included [redacted], while key [redacted] (b) (7) personnel included [redacted].

In furtherance of our review, we conducted voluntary, under-oath witness interviews of several current and former [redacted] (b) (7) employees and contractors, including [redacted], AC1, and AC2. We also had an informal conference call with [redacted] (b) (7)(C), (b) Chief Human Capital Officer, Human Capital Management Office (HCMO), and [redacted], Employment and Labor Attorney, Office of the General Counsel (OGC).

On April 26, 2018, Odies Williams, IV, Counsel to the Inspector General and Investigator, and Noel Rosengart, Attorney and Investigator, conducted a sworn, under-oath subject interview of [redacted] (b) (7)(C), (b) represented [redacted] at her interview. Prior to the interview, [redacted] and the

[1] Per OPM, status applicants are described as "current or former Federal civilian employees who hold or held non-temporary appointments in the competitive service, not the excepted service." Other applicants would be considered "non-status." https://www.opm.gov/FAQs/QA.aspx?fid=de14aff4-4f77-4e17-afaa-fa109430fc7b&pid=51f3399e-b862-4af5-84e7-11f4f0a3ec5f.

[2] Per OPM, "[t]he Veterans Employment Opportunities Act of 1998 allows eligible veterans to apply for positions announced under merit promotion procedures when the agency is recruiting outside of its own workforce." https://www.opm.gov/policy-data-oversight/hiring-information/hiring-authorities/#.

OIG executed the Garrity Warning Form.

III. Potential Violations

- 5 U.S.C. § 2302(b)(6) – Prohibited Personnel Practices
- 31 U.S.C. § 1349(b) – Adverse Personnel Actions
- 5 CFR § 2635.704 – Misuse of Government Property
- FTC Administrative Manual Chapter 2: Section 310: Purchase Card Program (9)(F)
- FTC Administrative Manual Chapter 3: Section 090: Merit System Principles and Prohibited Practices
- FTC Administrative Manual Chapter 4: Section 450: Transportation Management
- FTC Administrative Manual Chapter 5: Section 300: Standards of Conduct
- Memorandum from David Shonka, Acting General Counsel, and Raghav Vajjhala, Chief Information Officer, entitled *Using Personal Devices for Agency Business and Texting on FTC Mobile Devices Memorandum*, dated November 21, 2016.

IV. Investigative Results

A. Providing of an Unauthorized Hiring Advantage or Preference

The OIG did not substantiate the allegation that [redacted] committed a PPP by providing [redacted] with a copy of the draft announcement and position description for the FTC Supply Management Specialist vacancy (OED-CSU-2017-0005) prior to its September 29, 2017, posting date. Per 5 U.S.C. § 2302(b)(6):

> any employee who has the authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority-grant any preference or advantage not authorized by law, rule, or regulation to any applicant for employment (including defining the scope or manner of competition or requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment.[3]

For a section 2302(b)(6) violation to occur, it must be established that the personnel action was intentionally or purposefully taken in order to give a preference to a particular applicant for the purposes of improving his/her prospects. *See Special Counsel v. Lee*, 114 M.S.P.R. 57 (2010), rev'd in part, 413 F.App. 298 (Fed. Cir. 2011). The preference must be given "for the purpose of" providing the improper advantage, or alternatively "an improper motive must be shown." *See Id*. It is not necessary that the action actually have resulted in an advantage, only that its purpose be to give an advantage. *See Special Counsel v. DeFord*, 28 M.S.P.R. 98, 104 (1985).[4]

[3] Chapter 3, Section 090, Paragraph 5, of the FTC Administrative Manual incorporates this code section and states that "an agency official may not … [g]ive an unauthorized preference or improper advantage."
[4] It is possible to violate section 2302(b)(6) using legally permissible hiring actions if the intent exists to afford

Requisite Authority

Our review determined that [redacted] had the requisite oversight authority with respect to filling the Supply Management Specialist vacancy. As the [redacted] announcement and [redacted], [redacted] was authorized to take, direct others to take, recommend, or approve a personnel action regarding the vacancy.[5] Per FTC policy, once interviews are complete, the selecting officials is responsible for making the tentative selection and providing the necessary candidate information to HCMO.[6]

Granting of Preferential Advantage

Our review determined that [redacted] utilized her [redacted] to grant a preference or advantage to [redacted] not authorized by law, rule, or regulation with respect to the vacancy. The OIG obtained an email sent by [redacted] to [redacted] via interoffice email at 3:44 p.m. on Wednesday, September 27, 2017 (two days before the September 29, 2017, posting of the job announcement), containing a draft of the job announcement and position description.[7] The first five pages of the eight-page email, subject line *Rear Door*, contained the job announcement, while the last three pages addressed a malfunctioning rear door in the Constitution Center (CC) mailroom. The OIG also found evidence that [redacted] provided the final position description to [redacted] at 7:00 p.m. on Thursday, September 28, 2017 (one day before the job posting), in an email with the subject line *OED-CSU-2017-0005 Supply Management Specialist GS2003-11 Vacancy For Review*. *See Exhibit 3*. [redacted] sent this message to [redacted] just one minute after she sent the same position description to [redacted] and [redacted] at 6:59 p.m., both via [redacted] FTC email account. *See Exhibit 4*.

On December 7, 2017, the OIG interviewed former [redacted], who acknowledged that [redacted] was one of three finalists for the Supply Management Specialist vacancy, and added that he would be retiring from the FTC prior to the selection.

On December 18, 2017, the OIG interviewed former [redacted], who stated that [redacted] selected [redacted] and two non-FTC personnel as finalists for the Supply Management Specialist vacancy. According to [redacted], and then [redacted][8] conducted interviews of two of the three candidates ([redacted] and external candidate [redacted]), adding that the third candidate declined an interview. [redacted] stated that [redacted] opined that [redacted] was the most qualified for the position, while [redacted] believed that [redacted] was the most qualified candidate. [redacted] added that, due to [redacted] position as

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preferential treatment, though hiring actions with the unintentional effect of favoring an applicant would not constitute a violation. *See Special Counsel v. Lee*, 114 M.S.P.R. 57 (2010).

[5] The vacancy announcement was provided by [redacted], HCMO Human Resources Specialist and Certifying Official, to [redacted] for approval, who approved it. *Exhibit 1*.

[6] *See* FTC Administrative Manual Chapter 3, Section 100, Part VIII(3)(B), *Responsibility of Selecting Official*.

[7] *See Exhibit 2*. The OIG also obtained an email from [redacted] containing the draft job announcement and position description he received from [redacted] to his personal email account four minutes later at 3:48 p m. on the same date.

[8] [redacted].

the COR for MSTI and her failure to provide any "matrix" or written rating system to her for the three candidates despite repeated requests, she began to question [redacted] impartiality and transparency with respect to this hiring [redacted] concluded by stating that the apparent close relationship between [redacted] and [redacted] was a "red flag" to her.

During our interview of [redacted], we provided her with the aforementioned email exhibits evidencing that [redacted] provided [redacted] with the position description and vacancy announcement prior to the posting date. Upon review of these documents, [redacted] suggested that [redacted] had engaged in an unfair hiring practice by giving [redacted] a "head start" to information that was not provided to the other candidates. [redacted] added that she was not surprised that [redacted] would provide this assistance to [redacted] because he was a friend whom she likely wanted to reward for his loyalty. Finally, [redacted] opined that [redacted] resume probably "repeat[ed] either the vacancy or the PD," and that any future candidate assessment documentation from [redacted] is going to be false, should she provide it.[9] On December 22, 2017, the OIG held a teleconference with (b) (7)(C), (b) (6) [redacted] and OGC Attorney [redacted] discuss the PPP allegations. During the call, (b) (7) [redacted] stated that she was less concerned about [redacted] advanced receipt of the vacancy announcement and more concerned about his advanced receipt of the position description, which she stated should only be viewed by the incumbent. (b) (7) [redacted] voiced concerns about this disclosure potentially giving [redacted] an advantage in the selection process. Similar to [redacted] stated that [redacted] did not send HCMO the occupational assessment for the candidates she interviewed.

During our April 26, 2018, sworn, under-oath interview of [redacted], she acknowledged providing [redacted] with an advanced copy of the draft vacancy announcement and position description, and she neither articulated a reason as to why she sent [redacted] the draft announcement and position description on two separate occasions nor asserted that her actions were done in error. [redacted] also acknowledged personally interviewing [redacted] for the vacancy (as well as [redacted]) and thinking [redacted] was the most qualified candidate, although [redacted] was ultimately hired based upon the joint recommendation of she and [redacted], possibly with input from [redacted] She further acknowledged not providing the draft vacancy announcement and position description documents to the other candidates.[10] Finally, with respect to [redacted] relationship with [redacted], she described it as professional and not personal.

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[9] On or around January 10, 2018, [redacted] provided Candidate Interview Evaluation Forms (CIEF) for [redacted] and [redacted] to [redacted] and [redacted], (b) (7)(C), (b) (6) [redacted], and job application packages, including candidate questionnaires and resumes. [redacted] subsequently provided the CIEFs to the OIG upon request, which were both dated November 29, 2017, despite the fact that the [redacted] and [redacted] interviews did not occur until after that date. (The OIG received a separate copy of [redacted]s job application package from HCMO, including his resume, which was identical to the package provided from [redacted] to [redacted].) A review of the CIEFs indicated that [redacted] gave [redacted] a candidate assessment score of 42 on a scale of 45, while [redacted] received a score of 39 out of 45.

[10] [redacted] stated that she likely "showed" the announcement to AC1 and [redacted], then Asset Manager, OCASO, neither of whom applied for the position.

Based on the totality of the evidence, including the fact that [redacted] was afforded an advantage via his receipt of exclusive position information that the other candidates did not receive, we determined that [redacted] granted [redacted] a preferential advantage with respect to the Management Supply Specialist vacancy.

Intentionally or Purposefully

Our review did not support a finding that the preferential advantage [redacted] granted to [redacted] was done intentionally or purposefully to improve his chances of being selected despite compelling evidence to the contrary. During her OIG interview, [redacted] stated that she provided [redacted] with a copy of the draft vacancy announcement and position description "for his information" after he inquired about the opening and because the MSTI team [redacted] supervises performs similar duties as those listed in the announcement. She added that she did not intentionally provide [redacted] with an unfair preference or advantage in the hiring process because: 1) she did not think that [redacted] would apply for the position; and 2) she did not think he was eligible because MPP positions are only open to federal employees and he is a contractor. [redacted] further added that she did not learn [redacted] for the job until she saw his name on the certification list [redacted] provided her and later learned from [redacted] that he had qualified due to his status as a military veteran During our review, we found no independent evidence to contradict [redacted] assertions as to her reasoning for providing [redacted] an advanced copy of the draft vacancy announcement and position description and, as a result, did not substantiate that the intentionally or purposefully element was met. Therefore, we did not substantiate that [redacted] actions constituted a PPP in violation of 5 U.S.C. § 2302(b)(6) and Chapter 3, Section 090, of the FTC Administrative Manual.

B. <u>Misuse of FTC Contractors to: 1) Turn Office Lights On and Off; and 2) Pick up Her Lunch Using FTC Vehicles</u>

Turning Office Lights On and Off

The OIG did not substantiate the allegation that [redacted] misused contractors to turn her office lights on and off when she was absent from work in violation of FTC Administrative Manual at Chapter 5: Section 300, *Standards of Conduct*. The Standards of Conduct, among other things, include restrictions pertaining to the misuse of an official position, including restrictions on the use of government property, resources, and information.

On December 7, 2017, the OIG interviewed AC2 regarding this allegation. AC2 stated that [redacted] frequently instructed AC2 to turn her office lights on and off when she was going to be late or absent from work. AC2 also stated that [redacted]s had FTC contractors [redacted], and [redacted] turn her lights on and off typically when she was going to be late to work or conducting personal errands during the workday. According to AC2, MSTI and CTR contractors were able to access [redacted]' office through either their own Medeco key or the Medeco master key maintained in the Customer Services Office.

On December 18, 2017, the OIG interviewed [redacted] regarding this allegation. At her interview, [redacted] stated that AC1 advised her that [redacted] was using FTC contractors to turn her office lights on and off when [redacted] was absent from work due to AC1's concerns about the alleged misconduct.[11]

On March 7, 2018, the OIG interviewed AC1 regarding this allegation. AC1 denied [redacted] assertion that AC1 reported the allegation to [redacted] and denied having any knowledge of [redacted] using contractors to turn her office lights on and off when she was absent from work.

On April 26, 2018, the OIG conducted a voluntary subject interview of [redacted] regarding these allegations. [redacted] denied instructing contractors to turn her office lights on and off when she was absent from work. [redacted] stated that she posted a note on her office door in Spanish several years ago requesting that the custodial staff keep her lights off. [redacted] added that she was concerned someone was accessing her office without authorization, as there were times she would arrive at work and find her office lights on.

Due to a lack of evidence and conflicting testimony, the OIG did not substantiate allegations that [redacted] misused contractors to turn her office lights on and off in violation of FTC Administrative Manual Chapter 5: Section 300, *Standards of Conduct*.

Picking Up Her Lunch Using FTC Vehicles

The OIG did not substantiate the allegation that [redacted] misused contractors to pick-up lunches using FTC fleet vehicles in violation of 31 U.S.C. § 1349(b), *Adverse Personnel Actions*; 5 CFR § 2635.704, *Misuse of Government Property*; or FTC Administrative Manual Chapter 4: Section 450, *Transportation Management*. In summary, these laws, rules, and regulations broadly and specifically prohibit the use of a passenger motor vehicle owned by the United States Government except for official government purposes.

During the OIG's December 7, 2017, interview of AC2, AC2 recounted a few occasions hearing that MSTI contractors used FTC vehicles to pick-up food or run personal errands for [redacted] but could not provide specifics. During our December 18, 2017, interview of [redacted] on this subject, she stated that AC1 approached her with allegations regarding [redacted] alleged misuse of the vehicles by FTC contractors because of AC1's concerns about [redacted]' alleged misconduct. However, during our March 7, 2018, interview of AC1, AC1 again denied [redacted] assertion that AC1 reported this allegation to [redacted] adding that AC1 had no knowledge of these events.

During the OIG's December 7, 2017, interview with [redacted] he recounted receiving a telephone call from [redacted] on September 22, 2017, asking whether he wanted to participate in a group lunch order from Crisp & Juicy. This phone call was followed-up several minutes later by an email from [redacted] containing the restaurant's website. [redacted] advised the OIG that he declined to participate in the order and provided the OIG the email and a handwritten notation of the time of [redacted]

[11] On December 7, 2017, the OIG interviewed [redacted] who stated that he had no knowledge of these allegations.

telephone call to him. *Exhibit 5*.

During the OIG's April 26, 2018, interview of [redacted], she denied using contractors to pick-up lunches or conduct personal errands for her using FTC vehicles. The OIG subsequently introduced an email into evidence between [redacted] and [redacted], MSTI Contractor, dated September 22, 2017, in which she instructed him to pick up lunch from Crisp & Juicy. *See Exhibit 6.* The OIG also showed [redacted] a videotape of three individuals leaving the FTC HQ Garage in a Grey FTC Dodge Grand Caravan – U.S. Government License G41 4752L – on September 22, 2017, at approximately 11:12 a.m. and returning at approximately 12:08 p.m. carrying white plastic bags appearing to contain food containers. [redacted] stated that these three individuals appeared to be MSTI contractors [redacted].

In response to OIG questioning, [redacted] stated that FTC vehicles should only be used for legitimate FTC business purposes. [redacted] stated that she has never instructed an FTC employee or contractor to use an FTC vehicle for personal reasons, including to pick-up food. [redacted] stated that she did not instruct [redacted] to use an FTC vehicle to pick-up food from Crisp & Juicy on September 22, 2017, or any other date. [redacted] stated that she assumed that either [redacted] or [redacted] used their personal vehicles, which they reportedly park close to HQ, to pick-up the food during their lunch breaks, which is permissible.

Due to a lack of evidence and conflicting testimony, the OIG did not substantiate that [redacted] misused contractors by requesting that they pick-up lunch using FTC vehicles in violation of either the federal regulations or internal policy pertaining to government contractor or vehicle usage.

C. Instructing Contractor to Make Online Purchases with Assigned Purchase Card

The OIG did not substantiate the allegation that [redacted] instructed AC2 to create a Party City on-line account and text messaged AC2 a picture of the front and back of her FTC purchase card from her personal cell phone so AC2 could make purchases. Such action would constitute a violation of the FTC's internal policies. The FTC Administrative Manual at Chapter 2, Section 310, Paragraph (9)(F) states that purchase cardholders "may not allow anyone to use his or her purchase card, account number, or other sensitive information related to the purchase card. The card is not transferable."

In addition to constituting a policy violation, such action would also constitute a violation of a memorandum (and authorities cited therein) from David Shonka, former Acting General Counsel, and Raghav Vajjhala, Chief Information Officer, entitled *Using Personal Devices for Agency Business and Texting on FTC Mobile Devices Memorandum*, dated November 21, 2016, which "… prohibits the use of SMS texting on any device whether personally owned or FTC issued to communicate with individuals or entities within or outside the FTC regarding any Commission-related business."

Due to phone storage limitations, the OIG was unable to obtain evidence from AC2's personal cell phone to corroborate AC2's claim. In addition, data storage limitations of the cell phone provider prevented the OIG from obtaining a copy of the billing statement with an image of the card.
At her December 7, 2017, OIG interview, AC2 stated that [redacted] text messaged AC2 a picture of the front and back of her purchase card (containing the number) from her personal cell phone, and that [redacted] instructed AC2 to create an online account with Party City so AC2 could purchase supplies for the FTC. AC2 opined that this occurred sometime in 2015 or 2016, but was unable to provide more specificity. According to AC2, the online account with Party City also contained AC2's personal credit card number, which AC2 used to make personal purchases.[12] In total, AC2 estimated making five or six purchases for the FTC using Lyles' purchase card number from the online Party City account she established.

During [redacted] April 26, 2018, OIG interview, we introduced a Party City invoice into evidence containing four online purchases that AC2 asserted were made using [redacted] purchase card number on March 16, 2015; May 4, 2015; November 30, 2016; and February 8, 2016, in the respective amounts of [redacted] *See Exhibit 7*. [redacted] stated that she used Party City as a vendor for FTC event planning, parties, and meetings and that several vendors kept her purchase card number on file [redacted] confirmed that her VISA purchase card ended with [redacted]

[redacted] however, denied texting a picture of the front and back of her purchase card to AC2 from her personal cell phone so AC2 could order office supplies from Party City. Additionally, [redacted] stated that she did not authorize AC2 to create an online account with her purchase card information. [redacted] s stated that she had no knowledge of AC2 making purchases using her purchase card and questioned whether the four online purchases allegedly made by AC2 were for legitimate FTC business purposes. Finally, [redacted] stated that she had no knowledge regarding how AC2 made the online purchases, and that she kept her purchase card in her desk drawer. She added, however, that the drawer remained unlocked, and that her office was accessible to MSTI and CTR contractors through either their own Medeco key or the Medeco master key maintained in the Customer Services Office.

Due to a lack of evidence and conflicting testimony, the OIG did not substantiate the allegation that [redacted] provided AC2 with a picture of her purchase card via a text message from her personal cell phone in violation of internal policy or the relevant authorities cited therein.

V. Conclusion

The Office of Inspector General (OIG) did not substantiate that [redacted], [redacted], [redacted], (b) (7)(C), (b) (6) [redacted] A) committed a *prohibited personnel practice* by providing MSTI Program

[12] The February 8, 2018, management referral cited above addressed, among other things, the ongoing vulnerability of fraud or misuse by AC2 due to the apparent commingling of her personal credit card information with [redacted] purchase card information on her Party City account. In response, management, among other actions, temporarily cancelled [redacted] purchase card.

Manager and job applicant [redacted] a copy of a draft vacancy announcement and position description for the FTC Supply Management Specialist vacancy (OED-CSU-2017-0005) in violation of 5 U.S.C. § 2302(b)(6) and Chapter 3, Section 090, of the FTC Administrative Manual; (B) violated any federal laws, regulations, or policies by using FTC contractors to: 1) turn her office lights on and off when she was absent; 2) pick up lunch using FTC fleet vehicles; or (C) violated any federal regulations or internal FTC policy (or the authorities cited therein) by texting AC2 with a picture of her purchase card number and instructing AC2 to create an online account. This matter is now closed, and we are referring it to management for informational purposes and any action deemed appropriate, while recognizing that [redacted] resigned from the FTC on April 28, 2018.

FEDERAL TRADE COMMISSION

OFFICE OF INSPECTOR GENERAL

REPORT OF INVESTIGATION

ALLEGATIONS OF FALSE STATEMENTS BY A CONTRACTOR

File No. I-18-194

ORIGINAL

September 28, 2018

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of Inspector General

REPORT OF INVESTIGATION

INVESTIGATION NUMBER: I-18-194

TITLE: Allegations of False Statements by a Contractor

INVESTIGATORS: Odies Williams IV, Counsel to the IG/Investigator
Noel A. Rosengart, Attorney and Investigator

DISTRIBUTION:

1. Joseph Simons, Chairman
2. Tara Koslov, Chief of Staff
3. Reilly Dolan, Principal Deputy General Counsel
4. Heather Hippsley, Deputy General Counsel for Legal Counsel
5. David Robbins, Executive Director
6. David Rebich, Chief Financial Officer

PREPARED BY: Odies Williams, IV	Odies H. Williams	Digitally signed by Odies H. Williams Date: 2018.09.28 11:28:01 -04'00'	DATE: 09/28/2018
Noel A. Rosengart	NOEL ROSENGART	Digitally signed by NOEL ROSENGART Date: 2018.09.28 11:09:19 -04'00'	DATE: 09/28/2018

I. Predication

On May 10, 2017, the Federal Trade Commission (FTC) Office of Inspector General (OIG) received a telephone call from U.S. official . The subject of the call was FTC contractor who formerly served as a until his , retirement.[1] According to and documentation subsequently obtained, departed from the during a investigation into whether . added that departed from the in lieu of termination and provided the OIG a copy of referral memorandum to management (" "), which stated that final Standard Form (SF) 50 specified that he was "retiring after receipt of proposal to remove [him] from federal service."[2]

According to , presented its findings to the U.S. Attorney's Office (USAO) for potential criminal prosecution, and the USAO declined prosecution in favor of administrative proceedings . subsequently relayed the aforementioned information to the FTC OIG based on his knowledge that now works at the FTC.

II. Background

Based on the referral, the OIG initiated an investigation to determine the circumstances surrounding onboarding as an FTC contractor. We obtained the following background information during our review:

is currently employed by (and is assigned to the company's contract with the FTC as a full-time contractor. onboarded at the FTC around -- approximately one year after he left the and retired from federal employment -- pursuant to acquisition support services contract award ( ). According to the Statement of Work (SOW),

[1] Per acquisition proposal to the FTC ( ) dated . "

[2] is included as Attachment 1.

[redacted]

[redacted] contract proposal dated [redacted], lists [redacted] as the sole "Key Personnel" and On-Site Team Lead. According to the SOW, "[t]he Team Lead is responsible for direct interaction with the [Contracting Officer's Representative] and the Contracting Officer regarding overall contract quality and performance, including responsiveness, work product quality, reporting, and workload management…." [redacted] labor rate is listed on the SOW at [redacted]. We estimate that [redacted] billed the FTC approximately $703,456 for [redacted] services from the [redacted], start date through the contract's [redacted], extended end date. We note that both [redacted] and [redacted] continue to serve the FTC under a new contract award ([redacted]), which went into effect on [redacted], and is expected to end on [redacted].

[redacted]

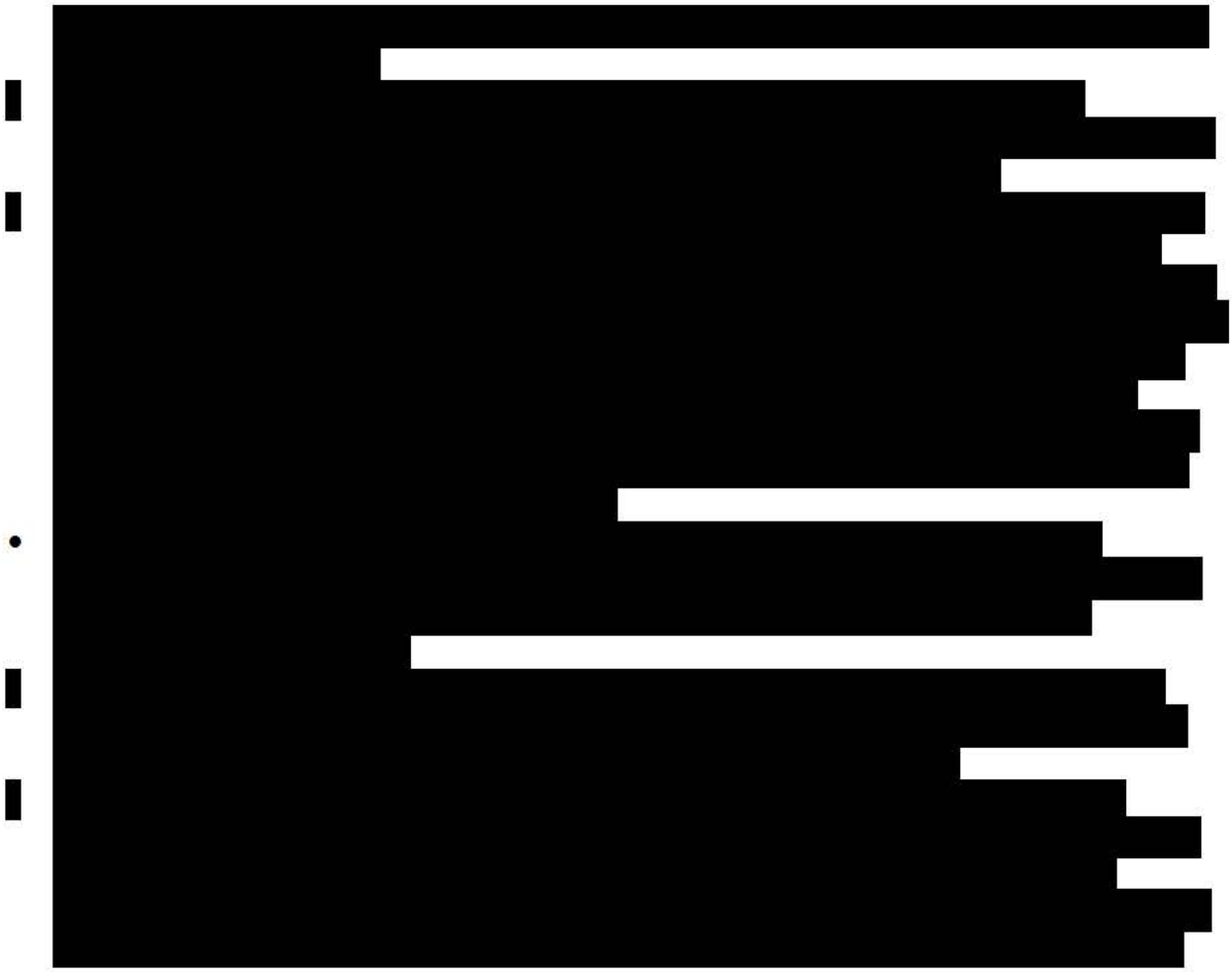
[redacted]

[redacted]

- [redacted]
- [redacted]
- [redacted]

---

3 [redacted]



FTC OIG Investigation

During its investigation, the OIG secured a copy of final SF-50 from the (dated), which stated he "[r]etired after receiving written notice on of a proposal to remove him from the Federal service, for Conduct unbecoming an Manager; Appearance of conflict of interest; and Lack of candor."[5] We also secured two federal forms signed by within 13 months of his receipt of his notice of proposed removal from that were associated with his FTC onboarding, namely: 1) his Standard Form (SF) 85P, *Supplemental Questionnaire for Public Trust Positions*, submitted on ; and 2) his Official Form (OF) 306, *Declaration of Federal Employment*, dated . During our review of the forms, we identified some irregularities on his SF 85P as listed below:

- On page 16, answered "no" to the question: "[h]as any of the following happened to you in the last 7 years?" … "[l]eft a job for other reasons under unfavorable circumstances;" and
- On page 24, attested that: "[m]y statements on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good

[5] final SF-50 dated , is included as Attachment 2.

faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both. (See section 1001 of title 18, United States Code)."[6]

We also reviewed [redacted] responses on his OF-306 to determine whether his "no" response to the form's question of "[d]uring the last 5 years, … did you leave any job by mutual agreement because of specific problems…?" and/or his certification as to the truthfulness of his responses also constituted potential false statements. However, we found insufficient evidence of the existence of any mutual agreement between [redacted] and the [redacted] for us to proceed with this inquiry.

OIG Interviews

On June 6 and July 18, 2018, [redacted] met with Odies Williams IV, Counsel to the Inspector General and Investigator, and Noel Rosengart, Attorney and Investigator, for sworn, under-oath, audio-recorded interviews, during which he relayed the following in substance, as augmented with supporting information he provided to the OIG after his interview:

- He was on administrative leave with pay status from approximately [redacted], until his [redacted], retirement. According to the June 26, 2013, letter to [redacted] from [redacted] Deputy Director for Procurement, [redacted] was being placed on administrative leave pending the [redacted] review of the circumstances surrounding his status as "the subject of an investigation by the [redacted]
- On August 15, 2013, [redacted] completed a Memorandum of Interview (MOI) stating that "[Assistant United States Attorney (AUSA)] [redacted] declined prosecution of [redacted] in favor of administrative proceedings because there was no apparent evidence of [redacted] receiving anything of value within the statute of limitations."
- [redacted] received an [redacted] Notice of Proposed Adverse Action Letter, dated [redacted]. The letter states that "it is proposed to remove you from the Service, or otherwise discipline you, at any time after thirty (30) full calendar days from the date you receive this notice." The letter adds that the proposed action is based on the following reasons: "Conduct unbecoming an [redacted] Manager;" "Appearance of conflict of interest;" and "Lack of candor." The letter concludes with: "[a] final decision will not be made in this matter until your reply or replies have been received and considered or, if no reply is received, until after the notice period has passed. Any replies submitted by you will be given full consideration. You will be notified in writing of the final decision. You will remain on administrative leave during the advance notice period."
- In May 2014, [redacted] and his attorney, [redacted]., had an in-person meeting with the [redacted] Human Resources Office (HRO). The meeting was in follow-up to the response package [redacted] provided to HRO on February 18, 2014. In response to the FTC OIG's inquiry regarding whether he was given the option during the meeting to retire in lieu of termination, [redacted] responded: "[n]othing ever came out of it. We just presented our case; we met for a couple hours and they said they'd be in touch with me. They never – they

[6] [redacted] SF-85P Questionnaire, submitted [redacted], is included as Attachment 3.

never got in touch. So I retired on [redacted] [sic]. I turned [redacted] on [redacted] and then I put my paperwork in and I went out on [redacted]."

- On [redacted], [redacted] retired from federal service. He acknowledged that the SF-50 dated [redacted] (which referenced the [redacted], notice of proposed removal), was his final SF-50 with the [redacted] and added that he did not receive the form until after he retired.
- Regarding whether he had within the 7-year period prior to the form's completion left a job for other reasons under unfavorable circumstances, he stated that he did not consider the [redacted] proposed termination an unfavorable circumstance because the [redacted] had yet to follow through on the termination. He stated that he was aware DOJ declined criminal prosecution in favor of administrative action based on [redacted] August 15, 2013, MOI. He also acknowledged he was on administrative leave with pay status when he retired ([redacted]).
- Regarding whether he considers administrative leave with pay an unfavorable circumstance, [redacted] stated, "yes, I do. Again, I would have answered this differently looking back. I did not -- I would have put an explanation here." When asked whether he considered the [redacted] investigation an unfavorable circumstance when he completed the SF-85P questionnaire, [redacted] stated that he did not because "I never heard anything. They sent me a letter. We appealed it; we went there; we talked to them; we gave it to them. Nothing came out of it. I retired and -- after I was [redacted] When Counsel/Investigator Williams reminded him that he was on administrative leave at the time of his retirement, he responded as follows: "[w]ell, I mean, that's a fair point. I don't know why I didn't do that. It wasn't – I didn't – you know, [redacted],] knew about the – [redacted] knew about it, FTC knew about it. I didn't – I would have answered that differently."
- Regarding whether the [redacted] was still pursuing his termination when he retired, [redacted] stated that "[w]e never heard back. My attorney never heard back that I recall." Regarding whether he decided to retire before the [redacted] was able to reach a termination decision, [redacted] responded: "I don't recall that. I just put it in. I mean, I was going to retire." [redacted] also acknowledged that he never received any assurances from the [redacted] prior to his retiring that their investigation was complete.
- [redacted] disclosed the details of both the [redacted] investigations to [redacted] in March 2015 when he met with [redacted] to discuss the prospect of working for [redacted] responded that he would discuss the matter with the other owners of [redacted]. [redacted] ultimately decided to hire [redacted] further addressed his misconduct allegations with [redacted] and [redacted] supervisor at the FTC, prior to his onboarding, but they mostly discussed his impending job duties.
- Regarding his recollection of his [redacted] interview addressing his potential false statements on his [redacted] OF-306, [redacted] responded as follows: "… this subject could have come up, very well could have. You know, that wasn't my concern at the time. My concern at the time was being railroaded and stuck in jail. That was my concern. Falsely accused."
- Neither [redacted] nor [redacted] alerted the FTC of the [redacted] investigations until a complaint was filed with the FTC shortly after his onboarding, prompting the FTC to contact [redacted] and request background information.

- Approximately two weeks after the FTC received the complaint, [redacted] called [redacted] and told him to meet with Nancy Moreno, then FTC Chief Acquisition Officer (CAO), and David Rebich, FTC Chief Financial Officer (CFO), to discuss the [redacted] investigations and provide relevant documentation. [redacted] subsequently met with Moreno and Rebich (and possibly [redacted] in Rebich's office and provided them with the requested documents, including the August 15, 2013, [redacted] memo stating that the Department of Justice (DOJ) declined prosecution. [redacted] never heard back from Rebich or Moreno or anyone from the FTC regarding this matter.

On July 18, 2018, then CAO Moreno met with OIG Counsel/Investigator Williams and Attorney/Investigator Rosengart for a sworn, under-oath, audio-recorded interview, during which she relayed the following in substance:

- She met (informally interviewed) [redacted] when he onboarded around the [redacted] to determine if he met the criteria she was seeking in a [redacted]. [redacted] alleged history of misconduct or his [redacted] investigations never came up.
- The FTC first learned of [redacted] investigation within a month of his onboarding, which she believed occurred around the [redacted], when a video clip of [redacted] was circulated around the FTC via email. In follow-up, Moreno and David Rebich contacted [redacted] and requested all relevant materials regarding the matter. Moreno added that [redacted] provided several documents, which included the August 15, 2013, [redacted] MOI stating that DOJ declined prosecution in favor of administrative proceedings. Rebich then discussed this matter with FTC management, including Executive Director (ED) David Robbins, a representative of the Office of the General Counsel (OGC), and then Inspector General (IG) Roslyn A. Mazer. Approximately one week later, Rebich alerted Moreno of management's decision to allow [redacted] to remain at the Commission, which was based in part on the following: 1) [redacted] could not financially bind the FTC with respect to any contractual matters; and 2) DOJ's criminal declination. Moreno added that she had heard good things from customers about [redacted] performance and was unaware of any complaints.[7]

AUSA Referral

On April 18 and August 24, 2018, the OIG consulted with Richard Evans, Trial Attorney, DOJ, Public Integrity Section (PIN), pursuant to an informal referral of [redacted] potential section 1001 violations. Evans relayed that PIN does not view the facts of this case as constituting a criminal matter.[8] Based on PIN's recommendation, we closed the criminal component of our investigation and are now providing our findings to management for any action it deems appropriate.

[7] A review of our records identified a July 1, 2015, email chain between then IG Mazer, then Counsel to the IG Kelly Tshibaka, and CFO Rebich that generally concurs with Moreno's statement. In the email, Mazer advised Rebich of the need to be vigilant in overseeing that matters on which [redacted] works, and stated that, "[u]ntil we review the anonymous message, the OIG does not plan any review of this matter."

[8] According to PIN, it is not their practice to provide formal declinations on case referrals.

III. Potential Violation(s) and Implication(s)

- **Title 18, United States Code, Section 1001, *Statements or Entries Generally*:**

  (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully— … (2) makes any materially false, fictitious, or fraudulent statement or representation … shall be fined under this title, imprisoned not more than 5 years ...[9]

- **Executive Order (EO) 13467, *Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information*, at Section 1.3(a)(v).**

IV. Analysis

Based on our investigation, we determined that [redacted] knowingly and willfully made materially false, fictitious, or fraudulent statements or representations on his SF-85P questionnaire in violation of 18 U.S.C. § 1001(a)(2).[10] We further determined these false statements may have impacted the FTC's determination of his fitness to perform work for or on behalf of the federal government as a contract employee. Our analysis is provided below.

False Statements

We identified evidence that [redacted] made materially false statements on his SF-85P questionnaire regarding the circumstances of his [redacted] departure.

> ***False Statement 1*** **– [redacted] responded "no" to the following question on his SF 85P Questionnaire, submitted by [redacted] on [redacted]: "Has any of the following happened to you in the last 7 years? … Left a job for other reasons under unfavorable circumstances."[11]**

[9] We also analyzed these false statement allegations under the Program Fraud Civil Remedies Act (PFCRA), which provides an administrative remedy for fraud cases declined by DOJ in which the amount of the fraud does not exceed $150,000. However, because [redacted] has billed the FTC well over $150,000 for [redacted] services since his [redacted] onboarding, the potential damages exceeds PFCRA's maximum threshold.

[10] We also analyzed whether [redacted] concealed material information on his SF-85P questionnaire by failing to provide a response to the form's instruction on page 12 to "Provide Previous Periods of Activity if you worked for this employer on more than one occasion at the same location." [redacted] failed to disclose that he worked at the same division of the [redacted] at [redacted]. This omission is notable because, during his under-oath interviews in furtherance of [redacted] criminal investigation, [redacted] stated that he agreed with a suggestion to be removed from this position due to negative conduct (see Attachment 4 at 5); and also because [redacted] answered this question as it related to all of the other jobs he listed. However, this evidence was mitigated by the fact that [redacted] disclosed these two periods of employment elsewhere on the SF-85P questionnaire. During his OIG interview, [redacted] acknowledged working for the [redacted] at the same location on the two occasions, adding that "I missed it" and the omission was "probably an oversight." Based on our review of the evidence, we did not find the omission to rise to the level of a material concealment.

[11] Attachment 3 at 16.

The evidence supports a finding that [redacted] departure from the [redacted] falls under the SF-85P question's catchall provision of "le[aving] a job for other reasons under unfavorable circumstances," which is contrary to his response on the form. [redacted] retired from federal service after receiving written notice from the [redacted] of an impending adverse event (*i.e.*, the [redacted] notice of the [redacted] proposal to remove him from federal service for "[c]onduct unbecoming an [redacted] Manager; [a]ppearance of conflict of interest; and [l]ack of candor").[12] We deem [redacted] prospect of removal based on his documented misconduct as an unfavorable circumstance surrounding his [redacted], retirement. This position is bolstered by [redacted] May 10, 2017, statement to the OIG that [redacted] departed from the [redacted] in lieu of termination.

During [redacted] OIG interview, he acknowledged that he was on administrative leave with pay status from approximately [redacted] retirement. According to the June 26, 2013, letter to [redacted] from [redacted] Deputy Director for Procurement, [redacted] was placed on administrative leave pending the [redacted] review of the circumstances surrounding his status as [redacted] responded in the affirmative regarding whether he considers administrative leave with pay an unfavorable circumstance and stated: "yes, I do. Again, I would have answered this differently looking back. I did not -- I would have put an explanation here." However, [redacted] did not acknowledge the [redacted] investigation as being an unfavorable circumstance, stating that: "I never heard anything. They sent me a letter. We appealed it; we went there; we talked to them; we gave it to them. Nothing came out of it. I retired and -- after I was [redacted]" When we reminded him that he was on administrative leave at the time, he stated: "[w]ell, I mean, that's a fair point. I don't know why I didn't do that. It wasn't – I didn't – you know, [redacted] knew about the – [redacted] knew about it, FTC knew about it. I didn't – I would have answered that differently."[13]

Reviewing the evidence, the OIG determined that [redacted] fell short of his responsibility to notify the FTC via his FTC onboarding forms of his documented history of misconduct. His purported alerting of [redacted] of the then closed [redacted] criminal investigation, the [redacted] investigation, his administrative leave with pay status, and his prospect of removal from the [redacted] based on his documented misconduct, fell short of his responsibility to notify the FTC via his SF-85P questionnaire, which we determined that [redacted] failed to do. Our determination is also based on our interview of then CAO Moreno, who stated she was unaware of his documented negative employment history at the [redacted] or of the negative circumstances surrounding his departure at the time of his onboarding. Moreno added that HCMO and not OCASO handles the contractor

[12] See Attachment 2.

[13] It is important to note a mitigating factor we identified, namely the language in the [redacted]s July 17, 2013, response to [redacted] July 3, 2013, letter responding to the [redacted] June 26, 2013, notice of a "pending adverse action" letter. The July 17 letter states that "[a]dministrative leave is paid leave and is not an adverse action." The OIG's position is that a situation does not have to be an "adverse action" to be considered an "unfavorable circumstance" as enumerated in the relevant SF-85P question. The fact that [redacted] was on administrative leave while a review was conducted into his alleged misconduct and the prospect of his removal was being considered are sufficient to be deemed an unfavorable circumstance.

onboarding process.[14]

Based on the totality of the evidence, we determined that the circumstances surrounding [redacted] departure (*i.e.*, his administrative leave with pay status and his prospect of removal from the [redacted] based on his documented misconduct) were unfavorable and in contradiction to his responses on his SF-85P.

> ***<u>False Statement 2</u>*** **– [redacted] attested to the following statement on his SF-85P Questionnaire:**
>
> **My statements on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both. (See section 1001 of title 18, United States Code).[15]**

We determined that [redacted] attestation on his SF-85P questionnaire contradicts information included in his final SF-50 with the [redacted] and other records discussed herein, especially as it pertains to the circumstances surrounding his [redacted] departure. Specifically, we found evidence that [redacted] provided at least one response on the questionnaire he knew was not true, complete, or correct, and that his statement(s) was not made in good faith. As established above, [redacted] had left a job under unfavorable circumstances within the seven-year period prior to his completion of his SF-85P (*i.e.*, he was on administrative leave with pay status and he was notified of his prospective removal from the [redacted] based on his documented misconduct). Additionally, [redacted] acknowledged to the OIG that his administrative leave with pay status was an unfavorable circumstance.[16]

Additional evidence supporting a false attestation finding includes [redacted]s MOIs of its July 15 and 23, 2013, under-oath interviews of [redacted] during which investigators asked about the OF-306 form he previously completed for the [redacted] The July 23 MOI documents inquiries by [redacted] investigators about [redacted] response to the question of whether he had left any job within the last 5 years by mutual agreement because of specific problems, which is designed to solicit similar information as the SF-85P question at the center of our inquiry. The MOI states the following in relevance:

[redacted]

[redacted] proposed termination an unfavorable circumstance, [redacted] stated that he did not because the [redacted] did not follow through on the termination. He opined that the criminal investigation was closed based on [redacted] August 15, 2013, MOI stating that DOJ declined prosecution in favor of administrative proceedings.

[15] Attachment 3 at 27.

[16] With respect to the [redacted] criminal investigation, we found [redacted] argument for not including a reference to it in his SF-85P questionnaire's page 16 response to have merit based, in part, on the fact that the criminal component had concluded by the time [redacted] submitted the form.

[redacted][17]

Based on [redacted] MOIs, [redacted] was made aware of the correct interpretation of the OF-306 question in July 2013, which was [redacted]. [redacted] evidence a history of concealing important facts, including his close friendship with the [redacted], who [redacted] allegedly helped through misconduct secure over a dozen [redacted] contracts valued at over $500 million. In response to FTC OIG interview questions about his recollection of his [redacted] interview addressing potential false statements on his prior OF-306, [redacted] responded as follows: "… this subject could have come up, very well could have. You know, that wasn't my concern at the time. My concern at the time was being railroaded and stuck in jail [regarding the other matters being investigated, including fraud, conspiracy, etc.]. That was my concern. Falsely accused." [redacted] later added that: "I would have answered [the question of whether I had left a position under unfavorable circumstances] differently looking back…. I would have put an explanation here…. I would have said no and then given you an explanation of what happened…. I shot myself in – I should have put an attachment to this. You know, it was an oversight."

Based on the totality of the evidence, including [redacted] prior counseling by [redacted] investigators on a similar question in a similar questionnaire and his documented history of concealing important facts, we deemed [redacted] attestation that his SF-85P responses were true, complete, and correct to the best of his knowledge and belief and were made in good faith to be false.

Materiality

Evidence exists that these false statements are material with respect to the FTC's onboarding process.

1. Natural Tendency to Influence Decision-makers

In *United States v. Gaudin*, the Supreme Court stated that for a statement to be materially false, it must have "a natural tendency to influence, or [be] capable of influencing, the decision of the decision-making body to which it was addressed."[18] The Seventh Circuit offered additional guidance in *United States v. Clark*, in which the Court stated that:

[17] [redacted] MOIs of its July 15 and 23, 2013, [redacted] interviews at pp. 5-6, which are included as Attachment 4.
[18] *U.S. v. Gaudin*, 515 U.S. 506 at 509 (1995) (quoting *Kungys v. United States*, 485 U.S. 759, 770 (1988)).

> [t]he 'central object' of the materiality inquiry is 'whether the misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect, the official decision.'[19]

Both *Gaudin* and *Clark* support our position that information provided on a SF-85P form has a natural tendency to influence, or is capable of influencing, the decision-makers for onboarding decisions. The federal questionnaire solicits information on the individual's history of criminal activity and workplace misconduct, and truthful responses enable decision-makers to make fully informed suitability determinations. This position is augmented by the fact that the SF-85P form includes a warning that providing false or fraudulent statements/responses is punishable by fine and/or imprisonment under 18 U.S.C. § 1001.

2. Impact on [redacted] Fitness to Serve as a Federal Contractor

[redacted] truthful disclosure of his documented history of misconduct would have potentially affected his ability to be deemed "fit to perform work for or on behalf of the Government as a contractor employee" via the FTC's adjudication process. E.O. 13467, *Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information*, at Section 1.3(a)(v). His documented history of workplace misconduct could have, among other things, adversely affected his ability to obtain a Personal Identity Verification (PIV) card, which contractors are required to have to access federal facilities and information systems. Homeland Security Presidential Directive 12 (HSPD-12), *Policies for a Common Identification Standard for Federal Employees and Contractors*, dated August 27, 2004, requires all federal staff, including contractors, to be eligible to receive a PIV card to access federally controlled facilities and information systems. A July 31, 2008, OPM memorandum, entitled *Final Credentialing Standards for Issuing Personal Identity Verification Cards under HSPD-12*, provides guidance for agencies in determining whether to issue PIV cards to contractor personnel.[20] The memorandum states that an agency may consider denying a card based on:

> an unacceptable risk to the life, safety, or health of employees, contractors, vendors, or visitors; to the Government's physical assets or information systems; to personal property; to records, including classified, privileged, proprietary, financial, or medical records; or to the privacy of data subjects.[21]

The "unacceptable risks" identified in the memorandum relevant to our investigation include the following:

(1) There is a reasonable basis to believe, based on the individual's misconduct or negligence in employment, that issuance of a PIV card poses an unacceptable risk;
(2) There is a reasonable basis to believe, based on the individual's criminal or dishonest conduct, that issuance of a PIV card poses an unacceptable risk; and
(3) There is a reasonable basis to believe, based on the individual's material, intentional

[19] *United States v. Clark*, 787 F.3d 451, 459 (2015) (quoting *U.S. v. Turner*, 551 F.3d 657, 663 (7th Cir. 2008)).
[20] https://www.opm.gov/investigations/suitability-executive-agent/policy/final-credentialing-standards.pdf.
[21] OPM Memorandum at 3.

false statement, deception, or fraud in connection with Federal or contract employment, that issuance of a PIV card poses an unacceptable risk.

[redacted] documented history of recent workplace misconduct potentially presents unacceptable risks to the FTC, namely the risk that [redacted] will display similar behavior at the FTC to the detriment of the agency and its records. As stated by [redacted], [redacted] allegedly played a role in the [redacted] alleged fraudulent granting of contracts to the company [redacted], which was potentially influenced by his close relationship with its [redacted], and he allegedly hid their relationship and failed to recuse himself from any acquisition on which [redacted] submitted a bid. [redacted] also allegedly played a role in modifying [redacted] s GSA Schedule so the company could successfully compete on a major [redacted] acquisition that was ultimately awarded to [redacted]. [redacted] documented history of misconduct at the [redacted] raises concerns that he will share classified, privileged, proprietary, and/or financial records with non-authorized individuals in an effort to help companies owned by his personal friends and associates win FTC contract awards. These concerns are based on the fact that [redacted] now plays a role in supporting the FTC's procurement personnel on acquisitions. We interpret [redacted] documented history of recent misconduct and dishonesty at the [redacted] as demonstrating a potential likelihood that he will pose similar risks to the FTC and its records that potentially meet the criteria established under elements 1 and 2 above. Moreover, we consider [redacted] failure to disclose his documented history of misconduct on his SF-85P for the FTC as additional evidence that he poses an unacceptable risk to the FTC and its records, as established under element 3 above. Had [redacted] disclosed his documented history of misconduct, he would have potentially been deemed ineligible to receive a PIV card.

As a result of the foregoing, we found the statements made by [redacted] on his SF-85P, which we determined to be false, to also be material. We note that then CAO Moreno stated during her OIG interview that FTC management addressed the risks to the agency of retaining [redacted] around August 2015, and that these discussions included ED Robbins, CFO Rebich, an OGC representative, and then IG Mazer. According to Moreno, she was notified shortly thereafter of management's decision to allow [redacted] to remain at the Commission based on the fact that: 1) [redacted] could not financially bind the FTC with respect to any contractual matters; and 2) DOJ's criminal declination. Moreno added that she had heard good things from customers about [redacted] performance and was unaware of any complaints.[22]

Knowingly and Willfully

We identified evidence that [redacted] statements that we determined to be false were made knowingly and willfully. In *U.S. v. Riccio*, the First Circuit offers guidance on the "knowingly and willfully" element and states that:

> [w]hile interpreting the term willfulness, we have held that it means "…nothing more in this context than that the defendant knew that his statement was false when he made it or -

[22] We identified a July 1, 2015, email chain between then IG Mazer, then Counsel to the IG Kelly Tshibaka, and CFO Rebich that generally concurs with Moreno's statement. In the email, Mazer advised Rebich of the need to be vigilant in overseeing that matters on which [redacted] works, and stated that, "[u]ntil we review the anonymous message, the OIG does not plan any review of this matter."

which amounts in law to the same thing - consciously disregarded or averted his eyes from its likely falsity." *United States v. Gonsalves*, 435 F.3d 64, 72 (1st Cir. 2006). In *Gonsalves*, we expressly rejected the argument that § 1001 requires "an intent to deceive." *Id.*; *see also United States v. Yermian*, 468 U.S. 63, 73 (1984). We need not go further.[23]

Evidence suggests that, at a minimum, [redacted] consciously disregarded or averted his eyes from the likely falsity of his SF-85P responses. We rely in part on [redacted] MOIs of its under-oath interviews of [redacted] to establish his in-depth familiarity with the OF-306 question (which was similar to the SF-85P question) that asked whether he had previously left any job within the last 5 years by mutual agreement because of specific problems. The MOI states the following in relevance:

[redacted][24]

Based on [redacted] MOI, [redacted] had knowledge of the OF-306 question that is similar to the SF-85P question at the center of our inquiry. The MOI offers evidence that, in July 2013 ([redacted]), [redacted] was made aware of the correct interpretation of the question. Moreover, the [redacted] evidence a history of [redacted] concealing important facts, including his close friendship with the [redacted], who [redacted] allegedly helped through misconduct, secure over a dozen [redacted] contracts valued at over $500 million. In response to FTC OIG interview questions about his recollection of his [redacted] interview addressing his potential false statements on his prior OF-306 form, [redacted] responded that: "… this subject could have come up, very well could have. You know, that wasn't my concern at the time. My concern at the time was being railroaded and stuck in jail [regarding the other matters being investigated, including fraud, conspiracy, etc.]. That was my concern. Falsely accused."

As noted above, in response to the FTC OIG's interview question about whether he considers administrative leave with pay an unfavorable circumstance, [redacted] replied: "yes, I do. Again, I would have answered this differently looking back. I did not -- I would have put an explanation here." Regarding whether he considered the [redacted] investigation an unfavorable circumstance

[23] *U.S. v. Riccio*, 529 F.3d 40, 46-47 (1st Cir. 2008). The First Circuit's interpretation is generally consistent with those of the Fourth, Fifth, Eighth, Ninth, and Tenth Circuits. *See U.S. v. Daughtry*, 48 F.3d 829, 831-832 (4th Cir. 1995), vacated on other grounds, 516 U.S. 984 (1995), reinstated in relevant part, 91 F.3d 675 (4th Cir. 1996); *U.S. v. Hopkins*, 916 F.2d 207, 214 (5th Cir. 1990); *U.S. v. Hildebrandt*, 961 F.2d 116, 118-119 (8th Cir. 1992), cert. denied, 506 U.S. 878 (1992); *U.S. v. Tatoyan*, 474 F.3d 1174, 1182 (9th Cir. 2007); and *Walker v. U.S.*, 192 F.2d 47, 49 (10th Cir. 1951). This interpretation differs from DOJ's position, which is that: "[t]o find that a defendant 'willfully' made a false statement in violation of Section 1035, a jury must conclude that he acted with knowledge that his conduct was unlawful. The same interpretation should apply to 18 U.S.C. 1001's materially identical prohibition on 'knowingly and willfully' making a false statement in a matter within the jurisdiction of the federal government." Br. In Opp., *Ajoku v. U.S.*, No. 12-7264 (Mar. 10, 2014). The Second and Third Circuits have shared a similar interpretation as DOJ, holding that a defendant must have knowledge of the general unlawfulness of his/her false statement. *U.S. v. Whab*, 355 F.3d 155 (2nd Cir. 2004), cert. Denied, 541 U.S. 1004 (2004); and *U.S. v. Starnes*, 583 F.3d 196, 211-212 (3rd Cir. 2009).
[24] Attachment 4 at 5-6.

when he completed the SF-85P questionnaire, [redacted] stated that he did not because "I never heard anything. They sent me a letter. We appealed it; we went there; we talked to them; we gave it to them. Nothing came out of it. I retired and -- after I was [redacted] When we reminded him that he was on administrative leave at the time of his retirement, he responded as follows: "[w]ell, I mean, that's a fair point. I don't know why I didn't do that. It wasn't – I didn't – you know, [redacted] knew about the – [redacted] knew about it, FTC knew about it. I didn't – I would have answered that differently."

Weighing the evidence, including the fact [redacted] acknowledged he was aware of his documented history of misconduct at the [redacted] we determined that [redacted] SF-85P statements that we found to be false were made, at a minimum, with a conscience disregard for their truthfulness.

V. Conclusion

The FTC OIG determined that [redacted] Contractor, [redacted] knowingly and willfully provided to the FTC materially false statements on his Standard Form 85P, *Supplemental Questionnaire for Public Trust Positions*, regarding his departure from his previous position at the [redacted] in violation of section 18 U.S.C. § 1001(a)(2). We also identified evidence that [redacted] truthful disclosure of his documented history of misconduct would have potentially affected his ability to be deemed "fit to perform work for or on behalf of the Government as a contractor employee" via the FTC's adjudication process. E.O. 13467, *Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information*, at Section 1.3(a)(v). We consulted with the Department of Justice's Public Integrity Section regarding our investigative findings, which opined that this case does not constitute a criminal matter. As a result, this matter is now closed, and we are providing this Report of Investigation to management for consideration and any action it deems appropriate.

*All redacted information withheld under FOIA Exemptions b(6) and 7(C)

FEDERAL TRADE COMMISSION

OFFICE OF INSPECTOR GENERAL

REPORT OF INVESTIGATION

ALLEGATION OF VIOLATION OF

FINANCIAL CONFLICTS STATUTE

BY CURRENT FTC EMPLOYEE

File No. I-18-195

ORIGINAL

September 5, 2018

Office of Inspector General

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

REPORT OF INVESTIGATION

INVESTIGATION NUMBER: I-18-195

TITLE: Allegation of Violation of Financial Conflicts Statute by Current FTC Employee

INVESTIGATORS: Noel A. Rosengart, Attorney and Investigator
Odies Williams, IV, Counsel to the IG/Investigator

DISTRIBUTION:

1. Joseph Simons, Chairman
2. Tara Koslov, Chief of Staff
3. Heather Hippsley, Acting Principal Deputy General Counsel
4. David Robbins, Executive Director

PREPARED BY: Noel A. Rosengart NAR Odies Williams, IV OAW	DATE: 09/05/2018

I. Predication

On May 24, 2018, the Federal Trade Commission (FTC) Office of Inspector General (OIG) received a referral and an attendant memorandum from Christian White, Designated Agency Ethics Official (DAEO), Office of the General Counsel (OGC), regarding a possible violation of 18 U.S.C. § 208(a), *Acts Affecting a Personal Financial Interest*, by [redacted], Bureau of Consumer Protection (BCP). According to White, [redacted] contacted Craig Bannon, OGC Ethics Attorney, via telephone on May 16, 2018, to request guidance on applying § 208 to [redacted] and an unrelated matter. During their conversation, [redacted] disclosed that on [redacted], he reviewed and approved three subpoenas issued to three companies in furtherance of the BCP Enforcement Division's investigation of [redacted], a company in which he had a direct or indirect stock interest. [redacted] reportedly relayed to Bannon that he served as the former lead attorney for the investigation at the time of the final order on [redacted].

According to OGC's referral memorandum, [redacted] signed the subpoenas as a favor to his former BCP colleagues, who asked him to sign the documents in order to avoid entering an appearance in the case, which would have required legal service upon the defendants and potentially alerted the target of the investigation. [redacted] provided Bannon with a calculation of his ownership in the three companies, which showed that his total aggregate interest as of that date exceeded $100,000. Specifically, [redacted]. Finally, the memorandum specifies that [redacted] did not request or obtain a waiver to participate on the matters in which he had a financial interest pursuant to 18 U.S.C. § 208(b)(1) and (3).

OGC's referral memorandum contains an analysis of [redacted] conduct with respect to § 208, which states that "whoever, being an …employee of the executive branch … participates personally and substantially as a Government officer or employee … in a … particular matter in which, to his knowledge, he … has a financial interest– [s]hall be subject to the penalties set forth in section 216 of this title." OGC determined that all the elements of a violation of § 208(a) were established, and that no exemption or waiver was applicable to [redacted] financial interest in the instant matter. OGC also recommended that the OIG consider several mitigating factors they identified, including that: [redacted] did not appear to sign the subpoenas for his own personal financial gain; he apparently sought ethics guidance in good faith when he made the disclosure, albeit on an unrelated matter; he purportedly acted quickly to correct his mistake; he allegedly mitigated any future conflicts of interest; and he appeared remorseful about his actions.

II. Potential Violations

- 18 U.S.C. § 208(a) – Acts Affecting a Personal Financial Interest
- 5 CFR § 2640.103(a) – Interpretation, Exemptions and Waiver Guidance Concerning 18 U.S.C. 208 (Acts Affecting A Personal Financial Interest)

III. Investigative Findings

On June 29, 2018, Odies Williams, IV, Counsel and Investigator, and Noel Rosengart, Attorney and Investigator, interviewed [redacted] regarding the aforementioned allegations. [redacted] was not represented by counsel at his interview. Prior to the interview, [redacted] and the OIG executed the Garrity Warning Form.

During the interview, [redacted] provided in substance that he became the trustee for his mother's revocable living trust in [redacted] and his father's irrevocable testamentary trust in [redacted]. He further stated that he sought and received OGC outside employment approval to be the trustee for his mother's trust in February 2017. [redacted] stated he received oral counseling on financial conflicts of interest when he received OGC approval, but does not recall receiving any documents from OGC, although he stated that it was possible he did.[1]

[redacted] relayed that he did not know he was the trustee for his father's testamentary trust when he sought OGC approval for his mother's trust. Rather, he thought his mother's trust was part of his father's will and that she was the trustee of his trust. He relayed that he only learned that he was the trustee of his father's trust when his mother's financial advisors advised him of such after he became her trustee. [redacted] also stated that he did not realize that OGC's approval for his father's testamentary trust was not a part of OGC's approval for his mother's living trust until his May 16, 2018, conversations with Craig Bannon, discussed in more detail below.[2]

[redacted] stated that he attended OGC ethics training in early [redacted], which included discussions of financial conflicts. [redacted] added that, on May 15, 2018, he received a statement from his mother's trust account and realized she held stock holdings in [redacted], companies with whom he recently met in his official capacity.[3] [redacted] stated that he called Bannon the next day, May 16, 2018, for guidance upon realizing that he needed to be more concerned about potential financial conflicts with holdings for his mother's trust and [redacted].

According to [redacted] Bannon inquired into the monetary value of [redacted] holdings for [redacted] and the extent of his participation at those meetings. Upon discussion, Bannon reportedly opined that [redacted] did not implicate § 208 because his participation at the meetings was not "personal and substantial" and his aggregate monetary holdings did not meet the threshold for a waiver request. ([redacted] acknowledged to the OIG that he did not request or obtain a waiver to participate on the matters in which he had a financial interest pursuant to 18 U.S.C. § 208(b)(1) and (3)). [redacted] stated that he engaged in further conversation with Bannon that day about what would constitute "personal and substantial" involvement, and that Bannon provided him with several examples of what would be included, including the issuance of subpoenas. [redacted] added that he then recalled the three subpoenas he reviewed and approved for the BCP Enforcement Division, [redacted], [redacted].

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[1] [redacted] received written financial conflicts guidance from Craig Bannon, OGC, on February 21, 2017, when his request was approved.

[2] Bannon then submitted an application for outside employment to OGC, which was approved on the same day.

[3] [redacted] stated that he had on-line and in-person OGC training on financial conflicts, but did not read § 208 until his consultations with OGC. He added that all OGC ethics training focused on the rules and applications of statutes, not the specific title or statute.

[redacted]. [redacted] added that BCP was investigating [redacted].

[redacted] relayed that he then reviewed his mother's monthly trust statement and realized he may have implicated § 208 by reviewing and approving three subpoenas for [redacted], companies included in his mother's trust and in which he held interest. [redacted] estimated he spent "just a few minutes" reviewing these subpoenas for form, compliance with Rule 11, and to compare the specifications of each subpoena to the group subpoena model.

[redacted] stated that he had no knowledge he held stock ownership in these three companies when he signed the subpoenas. Additionally, he did not see any references to these companies in the subpoenas that he reviewed and authorized, stating that he had "no inkling they were in there." It was only upon learning from Bannon that issuing a subpoena constituted "personal and substantial" participation in a matter for § 208 purposes that he thought to review his mother's monthly trust statements. [redacted] stated that, during this review, he determined that he had issued subpoenas for the aforementioned three companies in which the living trust had a financial interest.[4] [redacted] added that, upon receiving guidance from Bannon, he took the following corrective actions: 1) recused himself from the case within approximately one hour of their conversation; 2) sold his holdings for these three companies within 24 to 48 hours; 3) eventually sold the stocks from his mother's and father's trust and converted most of the remaining stocks into diversified mutual funds.

[redacted] stated that he has not "personally and substantially" participated in any other "matter" with respect to either his mother's or father's trust since becoming trustee or receiving OGC approval for outside employment, other than signing the three subpoenas. Finally, [redacted] stated that he did not receive any financial gain from approving these subpoenas, and our review did not identify any evidence showing otherwise.

IV. Analysis

The OIG conducted an independent review of whether [redacted] violated § 208, which prohibits an executive branch employee from "participat[ing] personally and substantially as a Government officer or employee … in a … particular matter in which, to his knowledge, he … has a financial interest..." The OIG reached the same conclusion as OGC, which determined that [redacted] conduct violated § 208, and that no applicable exemption or waiver existed under § 208(b)(1) or (3). In an effort to avoid duplicating efforts, our analysis below includes language from OGC's referral memorandum (included as an attachment), as augmented by our additional findings.

Financial Interest

The OIG substantiated that [redacted] had a financial interest in an FTC matter on which he worked. Section 2640.103(c)(4) states that the financial interests of an organization or entity for which the employee serves as "trustee" will "disqualify an employee to the same extent as the employees own

[4] [redacted] believes there were some holdings in his father's trust that implicated § 208 as well.

interests." In the present case, the assets of [redacted] father's testamentary trust and his mother's living trust, which included stock in [redacted], were imputed to [redacted]

Knowledge of the Financial Interest

The OIG substantiated that [redacted] had or should have had knowledge of his financial interest in the three companies that received the subpoenas, as required by § 208. Case law has established that an individual need not have specific intent to violate § 208. *See U.S. v. Lord*, 710 F.Supp. 615, 617 (E.D. VA. 1989). Thus, the fact that [redacted] should have known of his financial interest in the three companies should suffice. [redacted] became the trustee for his mother's living trust in [redacted], and he acknowledged during his OIG interview that the monthly statements he received included information on his interests in [redacted]. Thus, when his former BCP colleagues asked him to review and approve the subpoenas related to the three companies in [redacted], [redacted] should have known that he was conflicted out of participating in the matter.[5] Moreover, [redacted] should have been aware of the § 208 prohibitions from the online and in-person OGC Ethics trainings he has completed since joining the Commission in [redacted].

Particular Matter

The OIG substantiated that [redacted] financial interest was in a "particular matter," as described in 5 CFR § 2640.103(a)(1), which states:

> 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 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.

[redacted] engaged in a particular matter by reviewing and approving the three subpoenas for BCP's investigation of [redacted], which was being conducted to determine [redacted].

Personal and Substantial Participation

The OIG substantiated that participation on the matter in question was personal and substantial. Chapter 5 CFR § 2640.103(a)(2) states that:

> [t]o 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.... Personal and substantial participation may occur when, for example, an employee participates through decision, approval, disapproval, recommendation, investigation or the rendering of advice

[5] For § 208 purposes, the financial interests of an organization or entity which the employee serves as a trustee imputes to the employee. *See* 5 CFR § 2640.103(c)(4).

in a particular matter.

In this case, [redacted] participated personally and substantially in BCP's [redacted] investigation when he directly reviewed and approved three subpoenas in furtherance of the case. [redacted] involvement was significant to the case, as it helped determine [redacted]. His participation also helped BCP avoid entering an appearance in the case, which would have required legal service upon the defendants and potentially alerted the target of the investigation.

Direct and Predictable Effect

The OIG substantiated that [redacted] participation had a direct and predictable effect on his personal financial interests. Section 208 prohibits government employees from engaging in matters that have a *direct* and *predictable* effect on their personal financial interests. An effect is deemed *direct* "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." Section 2640.103(a)(3)(i). An effect is deemed *predictable* "if there is a real, as opposed to speculative, possibility that the matter will affect the financial interest." Section 2640.103(a)(3)(ii).

In the present case, we determined that BCP's [redacted] investigation had a direct effect on the financial interests of [redacted], which was issued a subpoena, and it likely had a direct effect on [redacted]. A close causal link exists between the subpoenas and the financial interests of these companies due to the time and resources spent on providing a response, as well as any shareholder response that could result if the investigation became public. We further determined that the aforementioned effect was predictable because the possibility the subpoenas would affect the financial interest of the three companies goes beyond mere speculation.

Therefore, the OIG determined that all of the elements of § 208 have been established.

Exemptions and Waivers

The OIG did not identify any exemptions or waivers that would permit [redacted] to participate on matters related to [redacted]. Chapter 5 CFR § 2640.202(b) states that employees are permitted to:

> participate in any particular matter involving specific parties in which the disqualifying financial interest arises from the ownership by the employee … of securities issued by one or more entities that are not parties to the matter but that are affected by the matter, if: (1) The securities are publically traded, or are long-term Federal Government or municipal securities; and (2) The aggregate market value of the holdings of the employee … in the securities of all affected entities … does not exceed $25,000.

The documents [redacted] provided to OGC establish that the aggregate value of his financial interest in the aforementioned companies was over $100,000, far in excess of the allowable $25,000, thus rendering the de minimis exception inapplicable.

Mitigating Factors

During our investigation, we did not identify evidence establishing that [redacted] participated in the issuance of the three subpoenas for financial gain. [redacted] advised both the OIG and OGC that he signed the subpoenas as a favor to his former team, who asked him to sign the documents in order to avoid entering an appearance in the case (which would have required legal service upon the defendants and potentially alerted the target of the investigation). We did not identify any evidence to the contrary. Moreover, [redacted] provided evidence establishing that, upon learning of the conflict, he immediately took several corrective action measures, including selling most of his holdings and reinvesting the proceeds into diversified mutual funds to prevent potential future conflicts.

V. Department of Justice Consultation

On July 3, 2018, the OIG consulted with Richard Evans, Trial Attorney, Department of Justice, Public Integrity Section (PIN), in an informal referral of [redacted] potential § 208 violation. Evans determined that this case did not constitute a "criminal matter" on the basis that the subpoenas did not benefit [redacted] financially and he acted quickly to report and ameliorate his actions. We note that it is not PIN's practice to provide formal declinations on case referrals. Evans did recommend that the OIG close the criminal component of this matter and provide a Report of Investigation to management.

VI. Disposition

Based on our consultation with PIN, which opined that this case does not constitute a criminal matter, this matter is now closed, and we are providing this Report of Investigation to management for consideration and any action it deems appropriate.

FEDERAL TRADE COMMISSION

OFFICE OF INSPECTOR GENERAL

REPORT OF INVESTIGATION

ALLEGATION OF VIOLATION OF

FINANCIAL CONFLICTS STATUTE

BY AN FTC EMPLOYEE

File No. I-19-196

ORIGINAL

February 7, 2019

Office of Inspector General

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

REPORT OF INVESTIGATION

INVESTIGATION NUMBER: I-19-196

TITLE: Allegation of Violation of Financial Conflicts Statute by an FTC Employee

INVESTIGATORS: Odies Williams IV, Counsel to the Inspector General & Investigator
Noel A. Rosengart, Attorney and Investigator

DISTRIBUTION:

1. Joseph Simons, Chairman
2. Tara Koslov, Chief of Staff
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PREPARED BY:	Odies Williams IV ODIES WILLIAMS Digitally signed by ODIES WILLIAMS Date: 2019 02 07 16:03:03 05 00 Noel A. Rosengart NOEL ROSENGART Digitally signed by NOEL ROSENGART Date: 2019 02 07 15:56:48 05'00'	Date: 2/7/19

I. Predication

On November 27, 2018, the Federal Trade Commission (FTC) Office of Inspector General (OIG) received a referral from Lorielle Pankey, then Alternate Designated Agency Ethics Official (ADAEO), Office of General Counsel (OGC), regarding a possible violation of 18 U.S.C. § 208(a), *Acts Affecting a Personal Financial Interest*, by an FTC employee.[1] The subject of the referral was (b) (7)(C), (b) (6), Litigation Attorney, OGC. According to Pankey, on November 5, 2018, (b) (7)(C), received a request from (b) (7)(C), (b) (6), Litigation Attorney, OGC, seeking (b) (7)(C), comments on a draft reply brief that was being prepared by Bureau of Competition (BC) staff in connection with pending litigation in *FTC v. Qualcomm* (FTC matter # 141-0199). (b) (7)(C), was not formally assigned to work on the Qualcomm case, but his expertise was sought in part because the brief cited another case on which (b) (7)(C), served as an assigned attorney. Later that same day, (b) (7)(C), reportedly provided (b) (7)(C), with comments and suggested revisions for the draft reply brief, which were incorporated in the FTC's final reply brief.

(b) (7)(C), reportedly discovered his potential financial conflict the following day, November 6, 2018, after seeing an article about FTC Chairman Joseph Simons being recused from the *Qualcomm* case. This article reportedly prompted (b) (7)(C), to check his investment portfolio, upon which he realized he owned (b) (7)(C), (b) (6) (b) (7)(C), (b) (6). According to the referral, (b) (7)(C), spoke with then ADAEO Pankey the following day, November 7, 2018, about the potential conflict to determine an appropriate course of action. Based on Pankey's advice, (b) (7)(C), informed relevant OGC staff that same day that he was recusing himself from any further involvement in the *Qualcomm* case.

II. Potential Violations

- 18 U.S.C. § 208(a) – Acts Affecting a Personal Financial Interest
- 5 C.F.R. § 2640.103(a) – Interpretation, Exemptions and Waiver Guidance Concerning 18 U.S.C. 208 (Acts Affecting A Personal Financial Interest)

III. Investigative Findings

OGC's referral memorandum provides a thorough analysis of (b) (7)(C), conduct with respect to section 208(a). OGC determined that all the elements of a section 208(a) violation were established, and that no exemption or waiver was applicable to (b) (7)(C), financial interest with respect to (b) (7)(C), (b) OGC also recommended that the OIG consider several mitigating factors they identified, including that: (b) (7)(C), participation appeared to be the result of carelessness and lacked any malicious intent ((b) (7)(C), reportedly did not think there could be any financial conflict since he was not formally assigned to the case); he did not appear to have participated in the matter for his own personal financial gain, as his actions would appear to oppose his financial interest in (b) (7)(C), (b) he was transparent and forthcomin re ardin his actions with OGC and sought ethics guidance the day after he realized he owned (b) (7)(C), (b) (6) and he reportedly took immediate corrective action by requiring his financial advisor to notify him prior to the purchase of any new stocks.

[1] OGC's November 27, 2018, referral memorandum (minus the attachments) is included as an attachment.

On December 20, 2018, Odies Williams IV, Counsel to the Inspector General and Investigator, and Noel Rosengart, Attorney and Investigator, conducted a sworn, under-oath interview of (b) (7)(C), regarding the aforementioned allegations. (b) (7)(C), was not represented by counsel at his interview. Prior to the interview, (b) (7)(C), and the OIG executed the Garrity Warning Form.

During the under-oath interview, (b) (7)(C), confirmed the background information provided in OGC's referral. He stated that his involvement on the Qualcomm matter was initiated by a Saturday, November 3, 2018, email he received from (b) (7)(C), who sought his input on the FTC's draft reply brief because the brief cited another case on which (b)(b) (7) had expertise as an assigned attorney, *FTC v. AbbVie Inc.* According to (b) (7)(C), (b) (6) reportedly reviewed the draft Qualcomm reply brief and provided (b) (7)(C), with comments and suggested revisions, which were incorporated into the final version.

According to (b) (7)(C), , he did not think he was really working on the Qualcomm case due to the "peripheral nature" of his involvement; thus, he did not think to consider whether any financial conflicts existed, which he believes contributed to his mistake. (b) (7)(C), relayed that he had no other involvement with the Qualcomm matter except for a mid-October 2018 interaction with lead BC Qualcomm case attorney (b) (7)(C), (b) (6) , during which he sent (b) (7)(C), two pharmaceutical briefs on which he worked in response to her request. He added that he did not benefit financially as a result of his work on the draft reply brief. In response to the OIG's questions regarding his Qualcomm stock ownership, (b) (7)(C), relayed that the stock purchases were made by his financial advisor and that he was unaware of when the purchases were made. (b) (7)(C), confirmed that he did not seek a waiver or exemption to participate on matters involving Qualcomm.

With respect to (b) (7)(C)(t(b knowledge of the criminal conflicts of interest rules and prohibitions [18 U.S.C. § 208(a) and the accompanying guidance at 5 C.F.R. § 2640.103], he stated that he is "generally aware, although not an expert." He added the OGC's annual live and on-line ethics trainings were the main sources of his knowledge of the authorities. His most recent annual ethics training reportedly occurred on November 5, 2018, which was the same day he was requested by and provided draft comments to (b) (7)(C), The training reportedly included questions about the financial conflicts statute and helped prompt him to notify the OGC Ethics Team regarding his potential conflict. (b) (7)(C), informed the OIG that, as a result of this incident, he is now diligent in checking his portfolio for conflicts with publicly traded companies whenever he is assigned a new case. (b) (7)(C), added that he now requires his financial advisor to obtain prior approval before purchasing any new stocks, holdings, etc. to avoid future conflicts.

IV. Analysis

The OIG conducted an independent review of whether (b) (7)(C), conduct violated section 18 U.S.C. § 208(a), which prohibits an executive branch employee from "participat[ing] personally and substantially as a Government officer or employee … in a … particular matter in which, to his knowledge, he … has a financial interest..." The OIG reached the same conclusion as OGC, which is that (b) (7)(C), conduct violated section 208(a), and that no applicable exemption or waiver existed under section 208(b)(1) or (3) authorizing him to work on the Qualcomm matter.

Financial Interest

The OIG determined that (b) (7)(C), (b) (6) had a financial interest in the *FTC v. Qualcomm* matter (FTC matter # 141-0199). Specifically, he owned (b) (7)(C), (b) (6) which was valued at (b) (7)(C), (b) (6)

Knowledge of the Financial Interest

The OIG determined that (b) (7)(C), (b) (6) had or should have had knowledge of his financial interest in Qualcomm. As OGC's referral memorandum points out,

> "Section 208 sets forth an *objective* standard of conduct which is directed not only at dishonor, but also at conduct which tempts dishonor." *U.S. v. Hedges*, 912 F.2d 1397, 1402 (11th Cir. 1990) (citations omitted) (emphasis added). Thus, "specific intent is not a requisite element of 18 U.S.C. § 208(a)." *U.S. v. Lord*, 710 F. Supp. 615, 617 (E.D. Va. 1989).

(b) (7)(C), (b) (6) acknowledged during his interview that he received notifications of executed trades regarding his financial holdings. A review of these notifications or of his stock portfolio in November 2018, the period during which he worked on the Qualcomm reply brief, would have revealed his ownership interest. Our position is not negated by the fact that the Qualcomm stock was reportedly purchased by (b) (7)(C), (b) (6) financial advisor without his input. (b) (7)(C), (b) (6) still has a responsibility to remain aware of his financial holdings under the circumstances, a process that would have simply entailed reviewing his notifications of executed trades or reviewing his portfolio. As a result, (b) (7)(C), (b) (6) should have known of his financial interest in Qualcomm.

Particular Matter

The OIG determined that (b) (7)(C), (b) (6) financial interest identified above was in a "particular matter," as described in 5 C.F.R. § 2640.103(a)(1), which states:

> [t]he 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 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.

The particular matter at present is the judicial proceeding against Qualcomm, in which both FTC and Qualcomm are parties – *FTC v. Qualcomm* (FTC matter # 141-0199).

Personal and Substantial Participation

The OIG determined that (b) (7)(C), (b) (6) participation in the Qualcomm matter was personal and substantial. Chapter 5 C.F.R. § 2640.103(a)(2) states that:

> [t]o 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…. 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.

(b) (7)(C), participated personally in the pending litigation of *FTC v. Qualcomm* by rendering advice for the FTC's related draft reply brief. This personal participation occurred on November 5, 2018, when (b) (7)(C), reviewed the FTC's draft reply brief and provided comments and suggested revisions to BC via OGC attorney (b) (7)(C), (b) (6) comments that were subsequently incorporated into the FTC's final brief.

(b) (7)(C), participation was substantial because his comments and suggestions were of significance to the substantive merits of the litigation as opposed to being merely administrative, perfunctory, or peripheral in nature. *See* 5 C.F.R. § 2640.103(a)(2). Among other things, his comments offered advice on the appropriate legal position to take based on the ongoing nature of Qualcomm's alleged anticompetitive practices. Our position is augmented by the fact that his input was specifically sought due to his involvement as an assigned attorney in *FTC v. AbbVie Inc.*, which was quoted in the reply brief, as well as by (b) (7)(C), asserted aim to ensure that *FTC v. Qualcomm* did not adversely affect the outcome in *FTC v. Shire ViroPharma Inc.*, another case he was handling. Our position regarding (b) (7)(C), participation is neither negated by the fact that he was not formally assigned to the Qualcomm matter, nor the fact that his participation was apparently limited to reviewing the draft reply brief in response to a request by an OGC attorney.

Direct and Predictable Effect

The OIG determined that (b) (7)(C), participation, as described above, had a direct and predictable effect on his personal financial interests, which is prohibited by Section 208(a). An effect is deemed *direct* "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." Section 2640.103(a)(3)(i). We found a close causal link to exist between the FTC's action regarding Qualcomm and (b) (7)(C), financial interest in the company. Among other things, (b) (7)(C), comments assisted the FTC in shaping its legal position in *FTC v. Qualcomm* as indicated in the agency's reply brief.

We further determined that (b) (7)(C), participation had a real and predicable effect on his personal financial interests. An effect is deemed *predictable* "if there is a real, as opposed to speculative, possibility that the matter will affect the financial interest." 5 C.F.R. § 2640.103(a)(3)(ii). The regulation further instructs that "[t]he disqualifying financial interest might arise from ownership of certain financial instruments or investments such as stock, bonds, mutual funds, or real estate." 5 C.F.R. § 2640.103(b). The outcome of the *FTC v. Qualcomm* litigation could predictably affect the value of Qualcomm shares, which is imputed to (b) (7)(C), as an owner of company stock.

Therefore, similar to OGC, we have determined that all of the elements of 18 U.S.C. § 208(a) have been established.

Exemptions and Waivers

The OIG did not identify any exemptions or waivers that would permit (b) (7)(C), to participate on

matters related to Qualcomm. Chapter 5 C.F.R. § 2640.202(b) states that employees are permitted to:

> participate in any particular matter involving specific parties in which the disqualifying financial interest arises from the ownership by the employee … of securities issued by one or more entities that are not parties to the matter but that are affected by the matter, if: (1) The securities are publically traded, or are long-term Federal Government or municipal securities; and (2) The aggregate market value of the holdings of the employee … in the securities of all affected entities … does not exceed $25,000.

The documents provided by (b) (7)(C), establish that the aggregate value of his financial interest in Qualcomm (b) (7)(C), (b) (6) , thus rendering the de minimis exemption inapplicable.

Mitigating Factors

During our investigation, we did not identify evidence that (b) (7)(C), participated on the FTC's draft Qualcomm reply brief for financial gain. (b) (7)(C), advised the OIG that his participation was, instead, the result of carelessness and lacked malicious intent, and we did not identify any evidence to the contrary. We determined that (b) (7)(C), was transparent and forthcoming to both the OGC Ethics Team and OIG regarding his actions, and that he sought ethics guidance the day after he realized he owned (b) (7)(C), (b) (6) We further identified evidence that, soon after learning of the potential conflict, he took remediating measures to include requiring his financial advisor to notify him prior to the purchase of any new stocks.

V. Department of Justice Consultation

On December 28, 2018, the OIG consulted with (b) (7)(C), (b) (6) Trial Attorney, Department of Justice, Public Integrity Section (PIN), about (b) (7)(C), potential section 208(a) violation via an informal email referral. On January 2, 2019, (b) (7) alerted the OIG that PIN would not be opening a criminal matter regarding the conduct. (b) (7)(C), (b) (6)

VI. Disposition

Based on our consultation with PIN, which declined criminal prosecution, this matter is now closed, and we are providing this Report of Investigation to management for consideration and any action it deems appropriate.

FEDERAL TRADE COMMISSION

OFFICE OF INSPECTOR GENERAL

REPORT OF INVESTIGATION

ALLEGATION OF MISUSE OF POSITION

File No. I-19-199

ORIGINAL

September 30, 2019

Office of Inspector General

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

REPORT OF INVESTIGATION

INVESTIGATION NUMBER: I-19-199

TITLE: Allegation of Misuse of Position

INVESTIGATORS: Noel A. Rosengart, Attorney and Investigator
Odies Williams, IV, Counsel to the IG/Investigator

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I. Predication

Our investigation was predicated on a December 19, 2018, referral to the Federal Trade Commission (FTC) Office of Inspector General (OIG) Hotline from (b) (7)(C), (b) (6) (b) (7)(C), (b) (6) The referral contained two Consumer Sentinel Network complaints against (b) (7)(C), (b) (6) , (b) (7)(C), (b) (6) ((b) (7) fro (b) (7)(C), (b) (6) , (b) (7)(C), (b) (6) , (b) (7)(C), (b) (6) Specifically, (b) (7) alleged that (b) (7) threatened to misuse FTC authorities and/or resources to take retaliatory action against (b) (for conducting her official duties on behalf of (b) (7) . The first complaint states as follows:

> Consumer reports that in the course of doing her job, she called an FTC employee who made threats about bringing the power of the FTC to bear against the consumer and her business. She made the same threats to co-workers of the consumer about the consumer when she was not in the office, and she has said she knows where the consumer lives. Consumer feels this was uncalled for, as she was just doing her job as an employee of (b) (7)(C), (b) (6) . Consumer says she feels it was an abuse of power.

An updated second complaint followed the initial complaint:

> The consumer states she received a call to her work number at her place of employment, (b) (b) (7)(C), (b) (6) The caller stated she worked for the Federal Trade Commission. She made threats of legal action, and stated that she knew where the consumer lived and asked if she knew the power of the Federal Trade Commission. The FTC employee threatened the consumer with a subpoena. The consumer had sent documentation to her personally about a refinance of her property. UPDATE 12/19/18 consumer was transferred to a supervisor. Consumer feels this is an abuse of power, consumer says the FTC employee called when she was not in the office and made the same threats to the consumers [*sic*] co-workers - directed at the consumer, not the co-workers. Consumer says the FTC employee may co-own the property with a family member and there may be some tension there. Consumer feels this was uncalled for, that it was the first call the consumer had made to the FTC employee.

Following this referral, the OIG contacted (b) (7)(C), (b) , who, on December 27, 2018, provided the OIG with a written statement further detailing her interactions with (b) (7) regarding property she jointly owned with members of her family.[1] Specifically, (b) (7) statement detailed a call from (b) (7) to her on October 11, 2018, and a call from (b) (7) to (b) (7)(C), (b) (6) , (b) (7) Assistant, on November 9, 2018. According to (b) (7) , (b) (7) , during both calls, allegedly threatened to take retaliatory action against (b) (7) and (b) (7)(C), (b) via (b) (7)(C), employment with the FTC and by invoking the FTC's legal authority.

The OIG subsequently opened a full investigation to review these allegations.

II. Background

(b) (b) (7) commenced employment with (b) (7) as a Secretary on March 3, 1995. Her current job title is GS-0318-06, (b) (7)(C), (b) (6) Her main duties include reception coverage,

[1] (b) (7) December 27, 2018, Written Statement to the OIG, included as Attachment 1.

clerical support, record-keeping, and managing staff schedules.

(b) (7)(C), interactions and dispute with (b) (7) involved a private residence located in San Francisco, CA, at which she and her husband resided. According to (b) (7), prior to May 2, 2018, the owner of this property was a Revocable Living Trust, and the trust was in the name of herself and her husband. On May 2, 2018, (b) (7) and her husband transferred the property out of the Trust and, as Trustees, signed a Grant Deed granting the property to their daughter and son-in-law, husband and wife, and to her husband and herself, husband and wife, all as Tenants-in-Common. According to (b) (7), her (b) (7)(C), subsequently purportedly applied for a (b) (7)(C), (b) (6) with (b) (7) and pledged the property as collateral without knowledge or consent.

Following the receipt of this matter, the OIG contacted (b) (7)(C), (b) (6), and (b) (7)(C), (b) (6), for further information. (b) (7) management stated that they were advised of this incident in Fall 2018 by a (b) (7)(C), (b) (6) (b) who reportedly overheard (b) (7) speaking with a financial institution about a personal billing dispute in a threatening manner. In particular, the (b) (7)(C), (b) (6) reportedly heard (b) (7) stating in words or in substance: "did you know that I work for the FTC and can get you in trouble?"[2] In response to (b) (7)(C), apparent failure to adhere to the ethical rules that apply to federal employees, (b) (7) reportedly orally counseled her in December 2018, directed her to complete an on-line ethics training class, and required her to attend live Office of the General Counsel (OGC) ethics training at (b) (7) in March 2019. (b) (7) management advised the OIG that the fact that (b) (7) (is employed at a relatively low-level grade position and has never received any ethics training from OGC may have contributed to her failure to understand the implications of her actions and, thus, may have contributed to this incident.

We also reviewed (b) (7)(C), FTC desktop telephone records. The OIG identified evidence through FTC @comm records that, on October 11, 2018, (b) (7) called (b) (7) at 10:04 a.m. for 12.3 minutes and again at 10:36 a.m. for 2.3 minutes using her desktop telephone. FTC @comm records also evidence that, on November 9, 2018, (b) (7) called (b) (7) main number at 10:19 a.m. for 12.6 minutes using her FTC desktop telephone.

Due to logistical challenges that presented themselves, including the fact that the (b) (7)(C), (b) (6) (b) (7)(C), (b) (6), the OIG determined that it would be most appropriate to provide (b) (7) with a set of written questions to answer in writing in lieu of an in-person or telephonic interview.[3] Thus, on July 5, 2019, the OIG sent (b) (7) via email, a set of written questions for her to answer completely and to the best of her knowledge and return to the OIG, along with a signed Garrity Warnings form, no later than July 12, 2019. On July 12, 2019, (b) (7) via email and Federal Express, submitted her answers to the set of written questions[4] and a signed Garrity Warnings form, which the OIG executed upon receipt.

[2] ((b) (7) December 14, 2018, Note to File Regarding Violet (b) (7) included as Attachment 2.
[3] The OIG determined that this approach would not only conserve FTC resources, but it would also protect (b) (7)(C), by affording her the opportunity to seek assistance from counsel prior to answering the questions.
[4] (b) (7) Written Statement to the OIG, which was received on July 12, 2019, is included as Attachment 3.

III. Potential Violations

- 5 C.F.R. § 2635.702, *Use of Public Office for Private Gain*
- 5 C.F.R. § 2635.704, *Use of Government Property*
- 5 C.F.R. § 2635.705, *Use of Official Time*
- FTC Administrative Manual-Chapter 1: Section 310, *Appropriate Use of Information Technology*
- FTC Administrative Manual – Chapter 5: Section 300, *Standards of Conduct*
- FTC Administrative Manual – Chapter 1: Section 550, *Computer Security-Part II.2, Limited Personal Use*

IV. Investigative Findings

The OIG determined that (b) (7)(C), conduct in telephoning (b) (7) personnel twice on October 11, 2018, and once on November 9, 2018, using her FTC desktop telephone during regular office hours, regarding property she owned jointly with her relatives, and invoking her employee status and the authority of the FTC, violated 5 C.F.R. § 2635.702 (Use of Public Office for Private Gain); 5 C.F.R. § 2635.704 (Use of Government Property); and 5 C.F.R. § 2635.705 (Use of Official Time), and that the FTC's "limited personal use" exception[5] is not available to shield her conduct. However, we did not conclude that she misused the FTC's IT resources in violation of FTC policy.

We also found, as both (b) (7) (and OGC acknowledged, that (b) (7) never received ethics training at any point during her nearly 25-year tenure at the FTC, which may have contributed to her conduct. Beginning in early 2000, the FTC has required initial agency ethics training for all FTC staff at new employee orientation. In accordance with federal ethics training requirements set out in the Government Employees Training Act (5 U.S.C. § 4118), Office of Government Ethics regulations (5 C.F.R. Part 2638), and internal FTC policy, the FTC provides annual ethics training to all employees at or above the GS-14 grade level. However, (b) (7)(C), entrance on duty date predated the regulation's effective date, thereby excluding her from the initial training requirement. The regulation's annual training requirement is limited to "covered employees," which are defined as:

> (1) employees appointed by the President; (2) employees of the Executive Office of the President; (3) employees defined as confidential filers in 5 C.F.R. § 2634.904; (4) employees designated by their agency under 5 CFR § 2634.601(b) to file confidential financial disclosure reports; (5) contracting officers; and (6) other employees designated by the head of the agency or his or her designee based on their official duties.[6]

[5] *See* FTC Administrative Manual – Chapter 1: Section 550, *Computer Security-Part II.2, Limited Personal Use. See also* memorandum from Christian S. White, former Designated Agency Ethics Official, and Patricia Bak, former Acting Chief Information Officer, to Commission, entitled: *Reissuance of Authority to Make Limited Personal Use of Government Office Equipment*, dated Jan. 6, 2011. This policy affords an exception to its employees to occasionally use government communication resources (e.g., telephone, email, calling card, conference calls, and cell phones) for personal reasons. However, employees who avail themselves of this policy must ensure that their use of government communication resources: 1) involves minimal or no additional expense to the Government; 2) does not impede your ability to complete a full day's work, or interfere with the agency's mission or operations; *and* 3) *does not violate the standards of conduct or any other applicable provision of law (emphasis added).*

[6] *See* 5 C.F.R. § 2638.705.

According to OGC directives, FTC employees who are deemed covered include presidential appointees, senior executives, and employees at or above the GS-14 grade level.[7] (b) (7)(C), secretary position is not included in this training requirement because her GS-6 grade level falls below the GS-14 level requirement and because she has not been designated a covered employee by the agency head or designee to receive annual ethics trainings based on her official duties or the sensitivity of her position.[8] Thus, we concluded that (b) (7) was exempt from the regulatory and FTC initial and annual training requirements.

V. Analysis

We provide the following analysis supporting our conclusions:

A. 5 C.F.R. § 2635.702 (Use of Public Office for Private Gain)

The OIG determined that (b) (7)(C), conduct violated 5 C.F.R. § 2635.702(a), *Inducement or Coercion of Benefits*, which states:

> [a]n employee shall not use or permit the use of his Government position or title or any authority associated with his public office in a manner that is intended to coerce or induce another person, including a subordinate, to provide any benefit, financial or otherwise, to himself or to friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity.

We found that (b) (7)(C), conduct in using her FTC desktop telephone to call (b) (7) employees three times in October and November 2018, violated 5 C.F.R. § 2635.702(a). For a violation to occur, an individual must have the requisite intent to coerce or induce an individual with whom the employee is affiliated in a nongovernmental capacity. The evidence supports a finding that (b) (7) *intended to* use her position as an employee of the FTC to coerce or induce the (b) (7) to close an (b) (7)(C), account allegedly opened by her (b)(b) (7) , on her residential property. Supporting evidence can be found in (b) (7) December 27, 2018, written statement, which details a telephone call she received from (b) (7) about an open transaction on her San Francisco, CA residence. During this call, (b) (7) stated that (b) (7) made the following statements in words or in substance[9]:

- Asked if she knew what the FTC was and what their "powers were;"
- Stated she worked for the FTC, which could subpoena her;
- Told her that she knew where she lived and that the FTC would investigate her for her actions; and
- Said the FTC would prosecute her unless she closed the escrow refinance account.

Additional supporting evidence includes a purported assertion from (b) (7) assistant, (b) (7)(C), (b) , which was included in (b) (7)(C), (b) (6) statement.[10] (b) (7)(C), (b) purportedly alleged that, on

[7] *See* FTC Administrative Manual at Chapter 5, Section 300, *Standards of Conduct*.
[8] On September 27, 2016, the OIG issued a Management Advisory alerting management of the need to provide ethics trainings to additional employees, entitled *Strengthening the FTC Ethics Program by Extending Mandatory Annual Ethics Training to Employees at or Below the GS-13 Grade Level Who Occupy High Risk Positions.*
[9] *See* Attachment 1.
[10] *See Id.*

November 11, 2018, she received a call from [redacted] who requested [redacted] personal cell phone number, and that when she declined, [redacted] told her she could obtain [redacted] cell phone number because she "knew where [redacted] lived because she worked for the Federal Trade Commission." These purported statements are supported by a statement to [redacted] management by a [redacted] Staff Attorney, who reported that she overhead [redacted] speaking with an employee from a financial institution [purportedly [redacted]] in a threatening manner and stating in effect, "did you know that I work for the FTC and can get you in trouble?"[11]

In [redacted], July 12, 2019, written response to the OIG,[12] she alleged that, on September 28, 2018, she received a letter from [redacted] that was addressed to her [redacted] at her [redacted] residence. She stated that she opened and read the letter, which she thought was intended for her and her husband because they are the sole residents of the jointly-owned property, and that her [redacted] has never lived there. [redacted] added that she advised [redacted] that she could report [redacted] and [redacted] to the FTC's Consumer Response Center for their illegal actions of opening up an escrow refinance account without their knowledge or consent.[13] In response, [redacted] stated that [redacted] asked her to shred the September 28, 2018, letter sent to her [redacted] and enclosed accompanying paperwork.

In balancing the evidence, we found [redacted] testimony to be more credible based upon: 1) the specificity of [redacted]' allegations against [redacted] her written statement, as well as the purported allegations by [redacted] included in the statement; 2) [redacted] @comm records, which indicate that [redacted] made three phone calls to [redacted] employees totaling approximately 17 minutes in October and November 2018; and 3) a [redacted] Staff Attorney's report to [redacted] management in Fall 2018 regarding a telephone call she overheard [redacted] purportedly make to [redacted].[14]

We also determined that [redacted] conduct violated 5 C.F.R. § 2635.702(b), *Appearance of Governmental Sanction*, which states:

> [e]xcept as otherwise provided in this part, an employee shall not use or permit the use of his Government position or title or any authority associated with his public office in a manner that could reasonably be construed to imply that his agency or the Government sanctions or endorses his personal activities or those of another.

The OIG determined that [redacted] violated this code section by invoking her status as an FTC

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[11] *See* Attachment 2.

[12] *See* Attachment 3.

[13] [redacted] advised the OIG that she wants to file a complaint against [redacted] on the basis that [redacted] and its agents: 1) have been in "cahoots" with her [redacted]; 2) have engaged in an unlawful business practice by opening an escrow refinance account initiated by her [redacted], a partial owner (25%) of the property, with the intent to bind or encumber [redacted] her husband's 50% ownership of the property without their prior knowledge or consent; and 3) retaliated against [redacted] because she confronted [redacted] with their improper actions. As relief, [redacted] seeking a letter of apology from [redacted] as its OIG complaint has unjustly damaged her reputations as an employee of the FTC. We note that the [redacted] falls outside of the OIG's jurisdiction.

[14] Although the FTC has in place a policy that authorizes the limited use of government office equipment for personal purposes under certain circumstances, the exception is not available to exempt [redacted] conduct that violates 5 C.F.R. § 2635.702. The policy explicitly states that "sending personal communications under your official title or giving the impression that your personal activities are endorsed by the Government" are "always" prohibited. *See* Limited Personal Use Policy at 2.

employee and the FTC's enforcement authority during her telephone calls with (b) (7) We determined that (b) (7)(C), reported express reference to her employment with the FTC and the FTC's legal authority constituted the misuse of her official position, title, and associated authority in a manner that could give the appearance of governmental sanction by the FTC. Our analysis is supported by the statements of ((b) employees (b) (7) and (b) (7)(C), (b) (6) , as well as the statement reported to (b) (7) management by a (b) (7) Staff Attorney.

Specifically, (b) (7) alleged in her written statement to the OIG, that (b) (7) during their October 11, 2018, telephone call: 1) asked (b) (7) if she knew what the FTC was and what their "powers were;" 2) stated that she worked for the FTC, which could subpoena her; 3) told her she knew where she lived and that the FTC would investigate her for her actions; and 4) the FTC would prosecute her unless she closed the escrow refinance account. (b) (7)(C), (b) reportedly stated that (b) (7) during their November 9, 2018, telephone call, told her that she could obtain (b) (7) cell phone number because she "knew where (b) (7) lived because she worked for the Federal Trade Commission." Finally, a (b) (7) Staff Attorney advised (b) (7) management that she overheard (b) (7) speaking in a threatening manner to a financial institution and stating, "did you know that I work for the FTC and can get you in trouble?"

B. 5 C.F.R. § 2635.704 (Use of Government Property)

Section 2635.704(a) provides that "[a]n employee has a duty to protect and conserve Government property and shall not use such property, or allow its use, for other than authorized purposes." The OIG determined that (b) (7) used government property to communicate with (b) (7) personnel about her private property dispute, in violation of this code section. Government property includes office supplies, telephones, and other telecommunications equipment and services.[15] The OIG analyzed the facts surrounding (b) (7)(C), use of government property to communicate with (b) (7) personnel regarding the private dispute over property she jointly owned.

(b) (7) acknowledged to the OIG that she used her FTC desktop telephone, which is government property, to resolve a private property dispute on two occasions.[16] The OIG reviewed (b) (7)(C), @comm records and determined that she made three telephone calls to (b) (7) two on October 11, 2018, and one of November 9, 2018. We determined that the FTC's limited personal use exception is not available to shield her conduct from these violations. Even though (b) (7)(C), use of FTC resources (telephone) to communicate with (b) (7) personnel met the first two conditions of the limited personal use policy (i.e., (1) involves minimal or no additional expense to the Government; and (2) does not impede one's ability to complete a full day's work, or interfere with the agency's mission or operations), our analysis focused on the fact that (b) (7) used governmental resources "for other than authorized purposes," as expressly prohibited in the exception's third condition.[17]

In sum, because (b) (7)(C), private property dispute fell outside of her official duties, and because of the inapplicability of the limited personal use exception under the circumstances, we determined that (b) (7)(C), use of government resources to make the three telephone calls to (b) (7) personnel violated 5 C.F.R. § 2635.704.

[15] *See* 5 C.F.R. § 2635.704(b)(1).
[16] *See* Attachment 3.
[17] *See* FTC Limited Personal Use Policy at 1-2.

C. 5 C.F.R. § 2635.705 (Use of Official Time)

The OIG determined that (b) (7) used official time to communicate with (b) (7) personnel three times via her FTC desktop telephone, in violation of 5 C.F.R. § 2635.705. The regulation specifies that, "[u]nless authorized in accordance with law or regulations to use such time for other purposes, an employee shall use official time in an honest effort to perform official duties." Our review of (b) (7)(C), FTC call records determined that she made three calls to (b) (7) during her work hours, which accounted for approximately 17 minutes of (b) (7)(C), official time. As mentioned above, the purpose of these calls fell outside of her official duties and were not authorized by the FTC. We note that (b) (7) acknowledged in her written answers to calling (b) (7) personnel twice.

Although the total official time spent on these communications appears to have been *de minimis*, the communications in furtherance of (b) (7)(C), private property dispute fall outside of her official duties and were not authorized by the FTC. Moreover, because they involved the use of public office for private gain, the limited personal use exception is not available to shield her conduct for these violations.[18]

D. Misuse of FTC Information Systems

The OIG did not substantiate that (b) (7) misused FTC Information Systems in furtherance of her private property dispute, in violation of FTC Administrative Manual at Chapter 1, Sections 310 and 550, or Chapter 5, Section 300. Allegations that (b) (7) violated these internal policies stemmed from allegations raised by (b) (7) and (b) (7)(C), (b) (6) . Specifically, (b) (7)(C), (b) reportedly alleged that (b) (7) , during their November 9, 2018, telephone call, told her that she could obtain (b) (7) cell phone number through her employment at the FTC." This reported statement, combined with (b) (7) allegation that, on October 11, 2018, (b) (7) told her that "she knew where she lived and that the FTC would investigate her for her actions," raised the question of whether (b) (7) used any of the FTC's IT investigative tools to obtain (b) (7) personal information. However, our interviews with (b) (7) (b) (7)(C), (b) (6) and (b) (7) determined that (b) (7) did not have accounts with any of the FTC IT systems that could ascertain (b) (7) personal records, and we did not find any evidence that (b) (7) did in fact access any of these systems.

VI. Conclusion

We determined that (b) (7)(C), actions in calling (b) (7) personnel a total of three times (twice on October 11, 2018, and once on November 11, 2018) using her FTC desktop telephone during official work hours regarding a private property dispute, during which she invoked her status as an FTC employee and the legal authority of the FTC, violated 5 C.F.R. §§ 2635.702(a) (Inducement or Coercion of Benefits) and 702(b) (Appearance of Governmental Sanction); 5 C.F.R. § 2635.704 (Use of Government Property); and 5 C.F.R. § 2635.705 (Use of Official Time). We also determined that the FTC's limited personal use exception is not available to shield (b) (7) from liability for these violations.

We note that (b) (7) management took immediate corrective action with respect to (b) (7)(C),

[18] *See* FTC Limited Personal Use Policy.

actions, including orally counseling her in December 2018, directing her to complete an on-line ethics training class, and requiring her to attend live OGC ethics training at (b) (7) (C), (b) in March 2019. We now refer these matters to management for informational purposes and any additional action deemed appropriate.

FEDERAL TRADE COMMISSION

OFFICE OF INSPECTOR GENERAL

REPORT OF INVESTIGATION

ALLEGATION OF VIOLATION OF FINANCIAL CONFLICTS STATUTE BY CURRENT FTC EMPLOYEE

File No. I-19-201

ORIGINAL

August 23, 2019

Office of Inspector General

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

REPORT OF INVESTIGATION

INVESTIGATION NUMBER: I-19-201

TITLE: Allegation of Violation of Financial Conflicts Statute by Current FTC Employee

INVESTIGATORS: Noel A. Rosengart, Attorney and Investigator
Odies Williams, IV, Counsel to the IG/Investigator

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PREPARED BY: Noel A. Rosengart
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NOEL ROSENGART Digitally signed by NOEL ROSENGART Date: 2019.08.23 13:08:07 -04'00'
ODIES WILLIAMS Digitally signed by ODIES WILLIAMS Date: 2019.08.23 12:44:00 -04'00'

DATE: 08/23/2019

I. Predication

On May 17, 2019, the Federal Trade Commission (FTC) Office of Inspector General (OIG) received a referral from Lorielle Pankey, Designated Agency Ethics Official (DAEO), Office of the General Counsel (OGC), regarding a possible violation of 18 U.S.C. § 208(a), *Acts Affecting a Personal Financial Interest*, by (b) (7)(C), (b) (6), Attorney Advisor, (b) (7)(C), (b) (6) (b) (7) According to Pankey, (b) (7) contacted Jeremy Wong, OGC Attorney, to obtain advice on a potential financial conflict of interest regarding his ownership of (b) (7)(C), (b) corporation stock (which he disclosed on his Office of Government Ethics (OGE) Form 450) and his participation in the FTC's pending Qualcomm matter (FTC Matter #141-0199). During their conversation, (b) (7) disclosed that from October 25, 2018 through May 3, 2019, he provided guidance to (b) (7)(C), (b) (6) about the terms of a potential Qualcomm settlement and the number of votes needed to pass a potential settlement. He further advised that during this period, he held stock valued at (b) (7)(C), (greater than the $25,000 *de minimis* threshold) with ((b) which was a third party witness at the litigation stage of the Qualcomm matter and a competitor of Qualcomm.

Section 208 states that "whoever, being an …employee of the executive branch … participates personally and substantially as a Government officer or employee … in a … particular matter in which, to his knowledge, he … has a financial interest– [s]hall be subject to the penalties set forth in section 216 of this title." Chapter 5, CFR Part 2640 provides additional detail on the statutory interpretation of § 208, including exemptions and waivers, and it states the prohibition applies if the particular matter will have a direct and predictable effect on that interest." OGC determined that all the elements of a violation of § 208(a) were established and that no exemption or waiver was applicable to (b) (7)(C), situation.

OGC also recommended that the OIG consider several mitigating factors they identified, including that (b) (7) was only (b) (7)(C), (b) (6) the $25,000 *de minimis* threshold; his participation in the matter was relatively limited in providing settlement advice to (b) (7)(C), (b) (6); he sought ethics guidance in good faith when he disclosed the facts regarding the matter; he immediately recused himself from any potential involvement in the matter until he divested his stock to well below the *de minimis* exception; and he requested additional guidance from OGC on how to avoid future financial conflicts of interest.

II. Potential Violations

- 18 U.S.C. § 208(a) – Acts Affecting a Personal Financial Interest
- 5 CFR Part 2640 – Interpretation, Exemptions and Waiver Guidance Concerning 18 U.S.C. 208

III. Investigative Findings

On July 1, 2019, Odies Williams, IV, Counsel to the Inspector General and Investigator, and Noel Rosengart, Attorney and Investigator, interviewed (b) (7) regarding the aforementioned allegations. (b) (7)(C), was not represented by counsel at his interview. Prior to the interview, (b) (7) and the OIG executed the Garrity Warning form.

During the interview, [redacted] relayed that he commenced employment with the FTC in fall 2009 in the Mergers IV Division, Bureau of Competition (BC). In fall 2019, [redacted] reportedly joined [redacted] staff as an [redacted]. [redacted] stated that he commenced work on the Qualcomm matter for [redacted] on October 25, 2018, but had no significant involvement until November 2018, when settlement discussions began. [redacted] stated that his primary role was to provide advice to Commissioner Phillips on the terms of a potential settlement of Qualcomm and the total number of votes needed to reach a settlement. In furtherance of his advisory role, [redacted] attended settlement meetings between [redacted] and: 1) Qualcomm representatives; 2) BC staff members; and 3) third parties (including [redacted] outside counsel) to discuss the settlement. [redacted] relayed that he did not learn that [redacted] was a third party witness to this matter and an aggrieved competitor of Qualcomm in the manufacturing of cellular chips until November 2018.

[redacted] stated that on or around May 3, 2019, Jeremy Wong, OGC Ethics Attorney, contacted him regarding his disclosure of diversified mutual funds on his OGE Form 450. During this conversation, Wong reportedly asked [redacted] to determine whether he had any financial conflicts of interest in any stocks that he held. Immediately following their conversation, [redacted] reportedly calculated his stock holdings and learned that he held [redacted] in [redacted] holdings, which exceeded the $25,000 *de minimis* threshold. [redacted] stated that, prior to the calculation, he only knew that he owned [redacted] shares of [redacted] stock, which his [redacted] purchased for him in [redacted] and had managed since. In performing the calculation, [redacted] reportedly learned that the stock had split numerous times and had greatly appreciated in value, and was now valued at greater than $25,000 [redacted] reportedly recused himself from the Qualcomm matter and contacted Wong, who advised him that if he sold enough stock to fall below the *de minimis* threshold, he would be permitted to continue working on the matter. On May 6, 2019, [redacted] reportedly sold [redacted] stock, which brought the value holdings to approximately [redacted], and he resumed working on the matter.

In response to OIG questions regarding [redacted] knowledge of the financial conflicts authorities, [redacted] stated that he is generally aware of 18 U.S.C. § 208(a) and 5 CFR Part 2640 and attended an in-person OGC ethics training in June 2019 on financial conflicts and recusals. He also recently attended an OGC ethics training that featured a Question and Answer exam, but he did not remember the date or topics covered. Finally, [redacted] stated that he did not receive prior approval to work on the Qualcomm matter or seek an exemption or waiver because he was unaware of the conflict.

IV. Analysis

The OIG conducted an independent review of whether [redacted] violated § 208, which prohibits an executive branch employee from "participat[ing] personally and substantially as a Government officer or employee … in a … particular matter in which, to his knowledge, he … has a financial interest..." The OIG reached the same conclusion as OGC, which determined that [redacted] conduct violated § 208, and that no applicable exemption or waiver existed under § 208(b)(1) or (3). In an effort to avoid duplicating efforts, our analysis below includes some language from OGC's referral memorandum (included as an attachment), as augmented by our additional findings.

Financial Interest

The OIG determined that (b) (7) had a financial interest in an FTC matter on which he worked. Section 2640.103(b) states that:

> [t]he 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.

(b) (7)(C), financial interest in the Qualcomm matter stems from the fact that he held (b) (7) shares of (b) stock at a value of least (b) (7)(C), when he participated in the matter. The nexus between the Qualcomm matter and (b) is discussed below.

Knowledge of the Financial Interest

The OIG determined that (b) (7) had or should have had knowledge of his financial interest in (b) as required by § 208. Case law has established that an individual need not have specific intent to violate § 208. *See U.S. v. Lord*, 710 F.Supp. 615, 617 (E.D. VA. 1989). Thus, the fact that (b) (7) should have known of his financial interest in (b) should suffice. (b) (7)(C), relayed that his father purchased (b) (7)(C), of (b) stock in (b) (and actively managed the stock for him until this incident. (b) (7) added that he neither knew the value of his (b) holdings nor that the holdings exceeded $25,000 until his recent calculation, which determined the stock had split numerous times and greatly appreciated.

Accordingly, (b) (7) should have known that he was conflicted out of participating in the matter.[1] Moreover, (b) (7) should have been aware of the § 208 prohibitions from the online and in-person OGC ethics trainings he has completed since onboarding at the FTC in fall 2009, including the two in-person OGC ethics trainings he attended within approximately the last year.

Particular Matter

The OIG determined that (b) (7)(C), financial interest was in a "particular matter," as described in 5 CFR § 2640.103(a)(1), which states:

> [t]he 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 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.

[1] Section 208 applies an "objective" standard of conduct and not a subjective standard. *See U.S. v. Hedges*, 912 F.2d 1397, 1402 (11th Cir. 1990). Therefore, it does not appear to be necessary to demonstrate that the employee subjectively had personal knowledge that he had financial interests in the particular matter. Rather, it seems a violation of section 208 may be established if a reasonable person under the same circumstances would or *should have known* that he had financial interests in the particular matter.

(b) (7) engaged in a particular matter involving (b) (7) by providing substantive and procedural guidance to (b) (7)(C), (b) (6) in the FTC's pending Qualcomm proceedings. The nexus between (b) and the Qualcomm proceedings stems from the fact that (b) served as a third party witness in the litigation phase of the Qualcomm matter, as well the fact that the two companies were competitors.

Personal and Substantial Participation

The OIG determined that (b) (7)(C), participation on the matter in question was personal and substantial. Chapter 5 CFR § 2640.103(a)(2) states that:

> [t]o 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…. 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.

From October 25, 2018 through May 3, 2019, (b) (7)(C), participated directly in the Qualcomm matter by rendering advice to (b) (7)(C), (b) (6) on the terms of a potential settlement and Qualcomm vote. His direct participation included attending settlement meetings with (b) and BC staff persons and third parties, including (b) (7) outside counsel. (b) (7)(C), participation was deemed significant to the matter because his guidance potentially aided (b) (7)(C), (b) (6) The substantial nature of (b) (7)(C), participation makes irrelevant his apparently limited scope of involvement in the matter or the fact that it occurred in the settlement negotiation stage, largely after (b) (7) direct involvement in the litigation stage had concluded.[2] Moreover, § 2640.103(a)(2) states that "personal and substantial participation may occur when … an employee participates though the rendering of advice in a particular matter."

Direct and Predictable Effect

The OIG determined that (b) (7)(C), participation had a direct and predictable effect on his personal financial interests, as prohibited by § 208. An effect is deemed *direct* "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." Section 2640.103(a)(3)(i). An effect is deemed *predictable* "if there is a real, as opposed to speculative, possibility that the matter will affect the financial interest." Section 2640.103(a)(3)(ii). Of significance here, a particular matter "may have a direct and predictable effect on an employee's financial interests in or with a nonparty," which can include a third party information provider.[3]

In the present case, we determined that the matter had a "direct" effect on the financial interests of (b) because there was a "close causal link" between the Commission's decisions or actions regarding the Qualcomm litigation and their expected effect on the value of (b) (7)(C), (b) stock

[2] "Provided that an employee participates in the substantive merits of a matter, his participation may be substantial even though his role in the matter, or the aspect of the matter in which he is participating, may be minor in relation to the matter as a whole." 5 CFR § 2641.201(i)(3).

[3] See the notes section of 5 CFR § 2635.402(b)(1), *Disqualifying Financial Interests.*

holdings. Moreover, third party witnesses invariably incur expenditures to prepare for their testimony in litigation. As a result, we determined that the potential impact of the Qualcomm litigation's impact on (b) (7)(C), financial interest in (b) was predictable and went beyond mere speculation.[4]

Therefore, the OIG determined that all of the elements of § 208(a) have been established.

Exemptions and Waivers

The OIG did not identify any exemptions or waivers that would permit (b) (7) to participate on matters related to (b) Chapter 5 CFR § 2640.202(b) states that employees are permitted to:

> participate in any particular matter involving specific parties in which the disqualifying financial interest arises from the ownership by the employee … of securities issued by one or more entities that are not parties to the matter but that are affected by the matter, if: (1) The securities are publically traded, or are long-term Federal Government or municipal securities; and (2) The aggregate market value of the holdings of the employee … in the securities of all affected entities … does not exceed $25,000.

The documents (b) (7)(C), provided to OGC establish that the aggregate value of his financial interest in the aforementioned companies was (b) (7)(C), , which is in excess of the allowable threshold of $25,000, thus rendering the *de minimis* exception inapplicable.

Mitigating Factors

(b) (7) advised the OIG that his participation in this matter was a result of ignorance and not intentional, and we did not identify any evidence to the contrary. (b) (7) provided evidence establishing that, upon learning of the conflict, he immediately recused himself from the matter until he sold enough stock to fall below the *de minimis* threshold and was then allowed by OGC to resume his participation. Finally, (b) (7) stated that due to this incident, he is now directly managing his stock portfolio and asked OGC for a guidance package to help him identify future financial conflicts of interest.

V. Department of Justice Consultation

On August 1, 2019, the OIG consulted with (b) (7)(C), (b) , Trial Attorney, Department of Justice, Public Integrity Section (PIN), in an informal referral (b (b) (7)(C), potential § 208 violation.[5] (b) (7) concluded that there was no criminal intent on the part of (b) (7) noting that (b) (7)(C), father purchased and managed (b) (7)(C), (b) stock and that his stock holdings only exceeded the *de minimus* threshold by a mere (b)(b) before he divested a portion of his holdings to come into compliance. As a result, PIN declined to open a case on this matter.

[4] With respect to whether the effect is predictable, "[i]t is not necessary…that the magnitude of the gain or loss be known, and the dollar amount of the gain or loss is immaterial." 5 C.F.R. § 2640.103(a)(3)(ii).

[5] (b) (7)(C), (b) (6)

VI. Disposition

Based on our consultation with PIN, and PIN's subsequent declination, this matter is now closed, and we are providing this Report of Investigation to management for consideration and any action it deems appropriate.