IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 11-30352

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

-vs-

FLORENCE A. WHITE EAGLE,

Defendant/Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

HONORABLE SAM E. HADDON
UNITED STATES DISTRICT JUDGE, PRESIDING

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SUMMARY OF THE ARGUMENT

White Eagle should be acquitted of all convictions. This is a case in which a federal government employee did not follow her supervisor's directive not to borrow money from the tribal credit program. Failing to follow an employer's directions should subject an employee to workplace discipline, not to a crime. The proceedings here involve the government's attempt to "criminalize" conduct which is not criminal.

In her opening brief, Ms. White Eagle showed that her conduct did not amount to embezzlement, conversion, theft, any form of misapplication of funds, or conspiracy to commit those acts. The government now asserts that the "conspiracy" merely involved Ms. White Eagle's assisting Toni Greybull in embezzling. That is not what the Indictment alleges, however. Further, while the government asserts that Ms. White Eagle's conduct is "all of the above," it ignores the elements of all of those forms of theft. When the elements are considered, it is plain that Ms. White Eagle did not embezzle, misapply, convert, or otherwise steal. Her "crime" is that she borrowed money from a third party when her supervisor told her not to.

The government's brief sheds little light on its bribery allegations. It is clear that the government alleged that Ms. White Eagle agreed to be compensated for writing a letter after the letter was written. Such "after the fact" bribery does not fit the definition of bribery.

The government alleged in Count IV that White Eagle concealed information by trick, scheme, or device but has been unable to show that she had any duty to disclose information or that she did so by trick, scheme or device.

Count V attempts to allege that White Eagle participated in a "particular matter" while having a financial interest in the matter. She did not do so. When the administrative regulations the government has promulgated interpreting 18 U.S.C. § 201(a) are considered, the government's allegations are without merit.

Count VI, alleging misprision, is flawed as well. The government was unable to introduce evidence that White Eagle took any affirmative steps to conceal Toni Greybull's alleged crimes. And in the final analysis, White Eagle reported what she knew of the situation to the person appointed to investigate Ms. Greybull, Darryl LaCounte.

Considering that the government alleged in the indictment that White Eagle was engaged in concealing Ms. Greybull's crimes for nearly a year, both Counts V and VI must also fail because Ms. White Eagle's Fifth Amendment rights protect her from incriminating herself.

Finally, the district court erred in adding four points to White Eagle's sentence because of "loss" or "pecuniary harm." There was no such harm to the government, which is the only entity that the sentencing guidelines consider in this case. Further,

the district court erred in failing to find money that White Eagle returned at the beginning of the loan and paid back over the course of the loan. Incredibly, the district court found greater harm here because White Eagle borrowed more money from the Tribal Credit Program later on, even though that later loan has never been part of this or any other criminal case.

ARGUMENT

I

CRIMINAL CONVICTIONS CANNOT BE BASED UPON WORKPLACE STANDARDS OF CONDUCT

Most if not all of the government's allegations and the resulting convictions against White Eagle are premised upon violations of alleged "ethical violations" and disregard of supposed instructions from her supervisor. The government argues throughout its brief, for example, that White Eagle should have followed ethical considerations set forth in training materials and at 5 U.S.C. § 2635. (See, e.g., Gov't br. at 9, 26) It had the training materials admitted into evidence, but the transcript shows the C.F.R. provisions were not so admitted. Further, the government had White Eagle's supervisor testify that he told her not to borrow money from the Fort Peck Tribal Credit Program. (ER 65; tr. 127, lines 21-22)

These "ethical violations" and workplace standards do not and cannot serve as

the basis for crimes for at least two reasons. First, common sense tells that if a person's supervisor forbids an employee to transact a certain type of business, violation of the supervisor's instructions might serve as the basis for work place discipline, but it does not amount to a crime. Second, federal case law shows that mere violations of workplace instructions and standards of conduct do not suffice as the basis for "criminalizing" such conduct.

These types of issues arose in United States v. Safavian, 528 F.3d 957 (D.C. Cir. 2008). Safavian involved a General Services Administration employee who obtained ethical advice from the GSA's ethics officer and was also questioned during an investigation relating to favors he had received from Jack Abramoff. The government contended that Safavian had not fully disclosed all information necessary to the ethics officer and the investigator, and he was convicted of violating 18 U.S.C. § 1001(a)(1). The government pointed to standards of conduct set forth at 5 C.F.R. § 2635 as part of the basis supporting Safavian's convictions. The court reversed, stating, "If an employee violates a standard of conduct, he may be subject to disciplinary action. . . . We cannot see how this translates into criminal liability under 18 U.S.C. § 1001(a)(1) . . . ." Id. at 964.

II

WHITE EAGLE IS NOT GUILTY OF ANY OF

THE COUNTS OF THE INDICTMENT

The Government asserts at various pages of its argument relating to Counts I and II that White Eagle committed theft, conversion, and willful misapplication and willfully permitted misapplication of tribal assets in the Credit Program. Despite these assertions, the Government makes no attempt to show how the facts here fit within any of the definitions of stealing, embezzlement, conversion, willful misapplication, or permitting willful misapplication as used in 28 U.S.C. § 1163.

The bottom line is that the Government failed to show either that White Eagle's loan modification from the Tribal Credit Program was unauthorized under the Program's rules or that the Program would not have made the loan modification if it had known what the purpose was. See United States v Shively, 715 F.2d 260, 265-66 (7th Cir.) (Willful misapplication requires, at the very least, that a bank's money "have been used for a purpose that the bank would not have agreed to had it known what the purpose was") cert. denied, 465 U.S. 1007 (1983). In fact, the government failed to call as a witness any official of the tribal credit program who could testify that the Credit Program's rules for lending money were violated by White Eagle's loan or that the program would not have made the loan modification if it had known what the purpose was. To the contrary, White Eagle disclosed the purpose of the loan modification in her application, and there is no dispute that she used the money for

the purposes for which she applied.

A. White Eagle Should Be Acquitted of Counts I and II.

The Government appears to argue mostly that White Eagle either conspired to assist Toni Greybull's embezzlement of funds or embezzled them herself. The argument that White Eagle assisted with an embezzlement by Greybull is contrary to the Indictment because the Indictment did not accuse White Eagle of this. Rather, the Indictment accused White Eagle and Greybull of working together so that White Eagle herself could embezzle. White Eagle replies to the government's argument on that issue below.

1. The Government plays fast and loose with Count I.

At pages 24-25 of its brief, the Government argues that Greybull "used her position overseeing the Credit Program to convert Credit Program funds to her own use. White Eagle then helped cover up that embezzlement by writing the letter to Greybull's mother and not reporting the embezzlement . . . ." (Gov't br. at 25)

This theory does not hold up, however, because Count I does not allege that as the conspiracy. Rather, it alleges a conspiracy "between on or about September 13, 2007, and continuing thereafter until on or about March 24, 2008 . . ." involving the taking of money by White Eagle, not by Greybull. (Indictment, Count I, p. 5) Count I does not allege or suggest in the slightest manner, nor was any evidence presented of, any embezzlement by Greybull during that time period. Indeed, the overt acts

alleged in Count I assert that White Eagle, not Greybull, sought to convert money during the time period alleged.

If the Government sought to convict White Eagle for a conspiracy involving allegations that White Eagle agreed to assist Greybull in covering up Greybull's past embezzlement, it should have obtained an Indictment to that effect. The Sixth Amendment requires no less, since White Eagle was entitled to be informed of the nature and cause of the accusation against her. This Court should not permit the Government to Indict White Eagle for an alleged conspiracy in 2007 and 2008 involving White Eagle's application for a loan from the Credit Program, and then assert on appeal that the "conspiracy" actually involved an alleged "cover up" of Greybull's own embezzlement sometime prior. Such "fast and loose" toying with the judicial system and with a defendant in a criminal proceeding should never be countenanced. See United States v. Neville, 985 F.2d 992, 1000 (9th Cir.) (Court "will not countenance" "fast and loose toying with the judicial system"), cert. denied, 508 U.S. 943 (1993).

2. White Eagle did not embezzle funds From the Tribal Credit Program.

White Eagle's Opening Brief shows that none of the prohibited acts set forth in 18 U.S.C. § 1163 – "embezzles, steals, knowingly converts to his use or the use of another, willfully misapplies, or willfully permits to be misapplied" – occurred here.

(Appellant's Opening Br. at 16-21) In response, the Government makes a scatter gun argument all of them (except "steals") were proven here. (Gov't br. at 25) But it does not cite legal authority or show how White Eagle's conduct fits within the definitions of any of these terms.

The statute's first proscription is against embezzlement. The Government asserts that White Eagle's actions "constituted embezzlement and conversion since she used her lawful authority over the funds to gain what was an otherwise unauthorized possession of the funds." (Gov't br. at 25-26)

Gaining "unauthorized possession" is, by definition, not part of embezzlement. Rather, embezzlement "'is the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come. It differs from larceny in the fact that the original taking of the property was lawful, or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking.'" Woxberg v. United States, 329 F.2d 284 (9th Cir.), (quoting Moore v. United States, 160 U.S. 268, 269-270 (1895)), cert. denied, 379 U.S. 823 (1964)).

The government argues that White Eagle's supervisor and government rules and regulations forbid her from borrowing from the Tribal Credit Program. If so, the Government should have charged her with violating those rules and regulations. The

fact that White Eagle's employer may have forbid her from borrowing from a third party tribal credit program is no more "embezzlement" than any employee's borrowing from a bank after the employee's employer tells her not to do so. It might be a violation of the employer's rules or policies, but it hardly constitutes embezzlement from the bank.

3. White Eagle did not convert funds.

The Government also contends that by borrowing from the Tribal Credit Program, White Eagle "converted" funds from the program. (Gov't br. at 25) How did this occur? The Government fails to explain.

Conversion, like embezzlement, requires a showing that "one who comes into possession of property by lawful means, but afterwards exercises the rights of ownership to the exclusion of the owner's rights and without the owner's authorization . . . ." (See CR 64, p. 42) The Government not only failed to make such a showing, it affirmatively argues that her possession was "unauthorized possession of the funds." (Gov't br. at 25-26) By definition, such unauthorized possession does not and cannot amount to conversion.

4. Defendant Did Not Misapply Or Permit Money To Be Misapplied.

The Government says at page 25 that White Eagle "willfully misapplied, and willfully permitted misapplication of the tribal assets in the Credit Program," again

apparently "[b]y obtaining loan monies that her supervisor had prohibited her from taking due to her conflicts of interest (and by doing so with her subordinate signing as Superintendent) . . . ." (Gov't br. at 25) Defendant here did not misapply the Program's money, nor did she permit the money to be misapplied. This is obvious first of all because defendant did not apply the Program's money. That was up to the Program. The Program's credit committee decided to make a loan to defendant. No evidence was offered, let alone admitted, to show that defendant applied the loan proceeds she received in any way inconsistent with the modification to the loan agreement or allowed anyone else to do so.

5. Section 1163 Is Not Violated By Consensual Acts.

The Tribal Credit Committee consented to lend money to White Eagle. Embezzlement and other forms of theft do not arise in such a situation. The government asserts that they do here, because White Eagle had some signing authority with respect to loans issued by the credit program. That begs the issue, however, because it is still a fact – an undisputed fact – that the credit committee approved the loan. The committee wanted White Eagle to borrow the money. That does not amount to stealing, embezzlement, misapplication, or conversion regardless of whether White Eagle also approved of the loan.

B. Defendant Should Be Acquitted of Count III.

The government's attempt to allege bribery in Count III is fatally flawed because it alleges that the "bribe" – White Eagle's loan modification – was agreed, accepted and received after the act supposedly induced by the bribe – White Eagle's letter to Patricia Menz. By definition, bribery does not exist in such a scenario. Rather, bribery requires that the "bribe" be agreed to, accepted or received before the defendant's act. This only stands to reason. If a person performs an allegedly nefarious act and someone comes along later with compensation for that act, there is no bribery. The "bribe" does not induce the act. See United States v. Schaffer, 183 F.3d 833, 842 (D.C. Cir. 1999) ("Bribery is entirely future-oriented, while gratuities can be either forward or backward looking").

The government agrees with Schaffer but asserts that the Indictment here "does not limit when *the agreement* for [White Eagle] to receive those loan proceeds was made . . . ." (Gov't br. at 32) That argument is false, and this is shown by the language in the Indictment itself:

> That on or about January 2, 2008, . . . the defendant, FLORENCE A. WHITE EAGLE, . . . directly and indirectly did corruptly receive, accept, and agree to receive and accept something of value; in return for being induced to do an act . . . .

(Indictment, Count III; ER 9-10) In other words, the Indictment alleges that White Eagle did not corruptly receive, accept, or agree to receive or accept anything of value

until January 2, 2008. That date was nearly three weeks after White Eagle had written the letter to Menz. By definition, this cannot be bribery.

The government argues that "[a]lthough the money may have been exchanged after the corrupt act, the jury could infer that the deal was struck before it." (Government's br. at 32-33) But that is inconsistent with the Indictment, which expressly alleges an agreement on or about January 2, 2008. Further, the government's argument is mere speculative conjecture. There is not one shred of evidence in the record showing an agreement prior to January 2, 2008. This Court does not permit an inference to be based upon such speculative conjecture. United States v. Del Toro-Barboza, 673 F.3d 1136, 1144 (9th Cir. 2012) ("[A]lthough "we must draw all reasonable inferences in favor of the prosecution, a 'reasonable' inference is one that is supported by a chain of logic, rather than ... mere speculation dressed up in the guise of evidence"). See also Fegles Constr. Co. v. McLaughlin Constr. Co., 205 F.2d 637, 639 (9th Cir. 1953) ("if the conclusion reached from the facts in the chain of circumstances is equally consonant with the issues to be proven and with some other theory or theories inconsistent therewith, it becomes a mere conjecture, and the rule of the burden of proof is not satisfied") (citing Shaw v. New Year Gold Mines Co., 31 Mont. 138, 77 P. 515 (1937)).

Any argument that the jury here could have "inferred" an agreement for bribery

between White Eagle and Greybull prior to January 2, 2008, is based upon mere speculation and conjecture. No inference may be based upon such speculative conjecture.

C. Defendant Should Be Acquitted of Count IV.

It is undisputed that White Eagle made a report to Darryl LaCounte relating to the loans that Arthur Greybull, Jr., paid. It is undisputed that LaCounte had been appointed to investigate the allegations relating to Toni Greybull. It is also undisputed that LaCounte made a decision not to pursue the matter further after he learned that Toni Greybull had died.

1. White Eagle had no duty to report, and her conviction violates her Fifth Amendment Rights.

The government's response brief takes issue with the extent of White Eagle's report to LaCounte. The government contends that White Eagle should have reported more than she did. That in turn, however, raises the issue of White Eagle's duty to report. What was the source and extent of the duty to report more than she reported? The government never says. There is no such duty, and without a duty to report, there can be no violation of 18 U.S.C. § 1001(a)(1). United States v. Varbel, 780 F.2d 758, 762 (9th Cir. 1986) (statutes and rules imposed no requirement to report bank transactions of less than $10,000; hence, there was no violation of 18 U.S.C. §

1001(a)(1)). In fact, convicting a defendant in the absence of such a statute or rule violates due process under the Fifth Amendment. Id.

In United States v. Safavian, 528 F.3d 957 (D.C. Cir. 2008), the government made a similar argument to that which it makes here: "'that once one begins speaking when seeking government action or in response to questioning, one must disclose all relevant facts.'" Id. at 965. The court held this is not the law, stating as follows:

> We do not think § 1001 demands that individuals choose between saying everything and saying nothing. No case stands for that proposition. We therefore conclude that Safavian had no legal duty to disclose and that his concealment convictions cannot stand.

Id.

2. Where is the trick, scheme or device?

The government's argument that White Eagle's conviction may be upheld because she did not disclose all of the material facts conveniently omits other requirements of § 1001(a)(1). The statute prohibits falsification, concealment, and covering up only if it is done "by trick, scheme or device." 18 U.S.C. § 1001(a)(1). As stated in United States v. Woodward, 469 U.S. 105 (1985):

> Section 1001 proscribes the nondisclosure of a material fact only if the fact is "conceal[ed] . . . by any *trick, scheme, or device*," (Emphasis added). *A person could, without employing a "trick, scheme, or device," simply and willfully fail to file a currency disclosure report.* A traveler who enters the country through Customs prepared to answer questions truthfully, but is never asked whether he is carrying over

> $5,000 in currency, might nonetheless be subject to conviction under 31 U.S.C. § 1058 (1976 ed.) for willfully transporting money without filing the required currency report. However, *because he did not conceal a material fact by means of a "trick, scheme, or device,*" (and did not make any false statement) *his conduct would not fall within 18 U.S.C. § 1001.*

Id. at 108 (emphasis added) (footnotes omitted). See also United States v. Shannon, 836 F.2d 1125, 1129-30 (8th Cir.) ("To establish a concealment violation of section 1001, the government must prove more than just a passive failure on the part of the defendant to reveal a material fact. Rather, the government must prove an affirmative act by which a material fact is actively concealed") cert. denied, 486 U.S. 1058 (1988). Here, there is no trick, scheme or device, and the government makes no attempt to show one.

B. Defendant Should Be Acquitted of Count V.

18 U.S.C. § 208(a) prohibits a government employee from participating personally and substantially in an official capacity in any "particular matter" in which she has a financial interest, if the "particular matter" will have a direct and predictable effect on that financial interest.

Here, the government claims that White Eagle participated in a "particular matter" involving long-term loans in the names of Linda Christiansen and Arthur Graybull, Jr. The government asserts that White Eagle's "participation" was two-

fold: (1) not participating in reporting this "particular matter," and (2) "concealing" it by convincing Toni Greybull's husband to pay the loans. The government contends that White Eagle had a "financial interest" in this "particular matter" because this "prevented further inquiry, protected her job, and permitted White Eagle to obtain additional loans in the future which . . . she did in June of 2009 . . . ." (Gov't br. at 37)

The government's argument with respect to White Eagle's failure to report wrongdoing in connection with the Christiansen and Greybull loans is essentially an allegation that White Eagle did not participate in a "particular matter" rather than that she actually did participate in it. The failure to participate, as opposed to actual participation, is not actionable under § 208(a).

Further, the government's argument conflicts with its own administrative rules interpreting § 208(a). 5 C.F.R. § 2640.103(a) requires that White Eagle's participation in the Christiansen and Arthur Greybull matters have "a direct and predictable effect on [her financial] interest." 5 C.F.R. § 2640.103(a)(3)(i) further provides as follows:

> Direct and predictable effect. (i) A particular matter will have a "direct" effect on a financial interest if there is a close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest. An effect may be direct even though it does not occur immediately. **A particular matter**

> **will not have a direct effect on a financial interest, however, if the chain of causation is attenuated or is contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to, the matter**. A particular matter that has an effect on a financial interest only as a consequence of its effects on the general economy does not have a direct effect within the meaning of this part.
>
> (ii) A particular matter will have a "predictable" effect if there is a real, as opposed to a speculative, possibility that the matter will affect the financial interest. It is not necessary, however, that the magnitude of the gain or loss be known, and the dollar amount of the gain or loss is immaterial.

(Emphasis added) The government's brief essentially concedes that White Eagle had no financial interest in the Christiansen and Greybull loans or the life insurance policy relating to those loans. The only financial interests of White Eagle the government has been able to identify – based upon speculation – are her generalized interest in preventing further inquiry, her employment, and some vague interest in obtaining future additional loans from the tribal credit program – none of which are based upon evidence presented at trial and none of which had anything to do with Christiansen's and Greybull's own loans. But assuming those were White Eagle's "financial interests," the government's theory still comes up short because "the chain of causation is attenuated [and] is contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to, the matter." Id.

The government seems to argue that disclosure of wrongdoing by Christiansen

and Greybull might somehow have led to "further inquiry." An interest in preventing "further inquiry," however, is not a financial interest at all. 5 C.F.R. § 2640.103(b) ("financial interest means the potential for gain or loss to the employee . . . as a result of governmental action on the particular matter").

The government's argument that White Eagle failed to report the Christiansen and Greybull loan problems and "concealed" them because "a logical consequence of such malfeasance would be termination from government service entirely, or at least a loss of position" (Gov't br. at 37), fairs no better. Such a "financial interest," which arises in connection with White Eagle's employment, cannot be considered under § 208(a). 5 C.F.R. § 2640.203(d) expressly exempts this and states in relevant part as follows:

> *Exemptions for financial interests arising from Federal Government employment or from Social Security or veterans' benefits.* An employee may participate in any particular matter where the disqualifying financial interest arises from Federal Government or Federal Reserve Bank salary or benefits . . . .

The full text of § 2640.203(d) is found in the Statutes and Regulations section of this brief. Section 2640.203(d) makes clear that 18 U.S.C. § 208(a) is not implicated when the disqualifying financial interest is merely the federal employee's desire to protect her federal job or benefits. The examples, particularly example 7, further clarify that an employee need not worry about § 208(a) merely because his or her job

might be eliminated because of his participation in a particular matter.

Finally, the government asserts that White Eagle had a "financial interest" in seeing that the Tribal Credit Program existed in the future in case she wished to obtain future loans from the program. As support, they noted that she obtained another loan from the Credit Program the following year, in 2009. The government never explains how such a generalized interest could possibly be a "financial interest" covered by § 208(a). Even if it could, the government needs to point to evidence that White Eagle's actions had some "direct and predictable effect" on such a financial interest. The government offered no evidence that the Tribal Credit Program would have been shut down if knowledge of corruption within it was disclosed. In fact, it is clear that despite the corruption uncovered several years ago, the Tribal Credit Program continues to make the same types of loans it has always made. (ER 117-28; tr 331-76) As such, the government, cannot avoid its own regulation, which states quite clearly that "[a] particular matter will not have a direct effect on a financial interest . . . if the chain of causation is attenuated or is contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to, the matter." 5 C.F.R. § 2640.103(3)(a)(3)(i). Here, it would have been speculative for anyone in 2008 to predict that the Tribal Credit Program would have shut down if White Eagle had done what the government says she should have done, and in fact, hindsight tells

us such speculation would have been wrong because the Tribal Credit Program never did in fact shut down.

B. Defendant Should Be Acquitted of Count VI.

In her opening brief, White Eagle set forth three reasons why her conviction for misprision of a felony should be reversed: (1) there is no evidence that defendant took an affirmative step to conceal the alleged crimes; (2) although the misprision statute requires that the defendant fail to make the underlying crime known to a judge or other person in authority, here White Eagle did so by informing Darryl LaCounte, the official designated to investigate Toni Greybull's alleged fraud; and (3) Christiansen and Arthur Greybull not only did not commit crimes by obtaining long-term loans from the Tribal Credit Program, the government never prosecuted them in connection with the long-term loans. (Opening br. at 30) Incredibly, the government offers no argument in response to any of these. The government makes no attempt to point to any evidence or any portion of the record supportive of the notion that payment of the Christiansen and Arthur Greybull debts somehow concealed them or that Christiansen and Greybull had committed crimes in connection with those loans. The government also fails to address in any manner the fact that White Eagle put Darryl LaCounte on notice of Arthur Greybull's payment of these loans. Finally, it fails to show how the Christiansen and Arthur Greybull loans amounted to

embezzlement as alleged in the Indictment. It has thus waived any argument on these points. As this Court has stated in numerous other cases:

> Here, Lomeli cannot overcome the presumption against him because he has failed to address prejudice in his answering brief, declining to advance any argument or identify any evidence to support a harmless error finding. He has therefore waived the argument. See United States v. Gamboa-Cardenas, 508 F.3d 491, 502 (9th Cir. 2007) (where appellees fail to raise an argument in their answering brief, "they have waived it") (citing United States v. Nunez, 223 F.3d 956, 958-59 (9th Cir. 2000).

Clem v. Lomeli, 566 F.3d 1177, 1182 (9th Cir. 2009).

The government's failure to address these issues is not a technicality. It is perfectly understandable, since there was no testimony that payment of the Christiansen and Arthur Greybull debts made it difficult to detect fraud. There was no testimony that payment somehow amounted to a concealment. None of the auditors or investigators who examined or investigated the Tribal Credit Program testified to any concealment, nor did they even explain how they obtained information about Christiansen's and Greybull's so-called long-term loan crimes or how it would have been easier to uncover such crimes prior to payment of the loans. Further, there was no testimony that Christiansen and Greybull had committed crimes in connection with the long-term loans. In fact, it is undisputed, and the evidence showed, that although Christiansen and Greybull were prosecuted for fraud in connection with

short-term loans obtained from the Tribal Credit Program, they were never prosecuted for any crimes associated with their long-term loans.

F. Defendant Should Be Acquitted of Counts V and VI Because Convictions Conflict With Her Fifth Amendment Rights.

Although the government denies that the crimes alleged in Counts V (conflict of interest) and VI (misprision of a felony) of the Indictment conflict with White Eagle's Fifth Amendment rights, its own brief admits part of the conflict. The government states at page 41 of its brief, "It is true that revealing the fraud involving the loans in the names of Greybull's sister and son had the potential to indirectly reveal her involvement in a crime if it led to a deeper investigation."

But the Fifth Amendment issue is much deeper than that. Count IV alleges that White Eagle was engaged in covering up Toni Greybull's fraud from September 18, 2007, through July 23, 2008. Count V alleges that White Eagle was engaged in further criminal conduct from May 27, 2008, through July 23, 2008, by "facilitating the repayment of illegally obtained loans . . . without referring the matter to law enforcement . . . ." (Indictment, Counts IV and V) If White Eagle was allegedly engaged in such criminal conduct, how could she be required to report the loans which she was allegedly covering up and not reporting? The Fifth Amendment does not require her to incriminate herself.

The government also asserts that White Eagle "did not have to reveal her own substantive criminal conduct to escape the misprision charge or the § 208(a) charge . . . . White Eagle's misprision involved a failure to report frauds (Greybull's loans using her sister and husband) to which White Eagle was not a party." (Gov't br. at 40) This is inaccurate. What about the charge in Count IV alleging that White Eagle had been engaged in concealing material facts about Toni Greybull's loans for nearly a year, from September 18, 2007, through July 23, 2008? How can the government contend that White Eagle was required to report these same loans during the period May 27, 2008, through July 23, 2008, as it has in Count VI?

The answer is that it cannot do so. This case is much like United States v. Graham, 487 F. Supp. 1317 (W. D. Ky. 1980), where the defendant was charged both with concealing his son from arrest and with misprision of a felony for not reporting the son and the son's crimes. The court reviewed the cases of United States v. Kuh, 541 F.2d 672 (7th Cir. 1976), United States v. Jennings, 603 F.2d 650 (7th Cir. 1979), and United States v. King, 402 F.2d 694, 697 (9th Cir. 1968), and held as follows:

> This Court is persuaded by the holdings in the above-cited cases. According to the allegations of the indictment in the case at bar, at the time the duty to disclose arose, Graham was simultaneously involved in criminal conduct through the harboring of his son. Graham's duty to notify the authorities was therefore precluded by constitutional privilege. Accordingly, [the misprision count] of the indictment will be dismissed as to Graham.

Graham, 487 F. Supp. at 1319.

Try as it might, the government cannot refute the reasoning of Graham, which applies equally here. In both cases the defendants were accused of being integrally involved in covering up other persons' crimes. The Fifth Amendment protects a defendant in such a situation from being compelled to report the other person's alleged crime. Once the government indicted Graham in his case for concealing his son from arrest and once the government indicted White Eagle in this case for concealing the allegedly fraudulent loans, it cannot expect the defendant to report the crimes which are the subject of the alleged concealment. The Fifth Amendment exists to prohibit such self-incrimination.

III

THE DISTRICT COURT ERRED IN SENTENCING

A. The Government Disregards § 2C1.1 And Its Comments.

The government asserts that Comment 3(A)(ii) from United States Sentencing Guidelines § 2B1.1 somehow overrides the comments to § 2C1.1. It is noteworthy that § 2C, not § 2B, applies in this case, since White Eagle was a government official. See § 2B1.1, application note no. 1. The government is wrong. Further, even if the comment to § 2B1.1 applies, that does not negate the application of § 2C1.1 and its comments. Here, § 2C1.1, comment note 3, incorporates § 2B1.1, comment note 3, but then adds that "[t]he value of the 'benefit received or to be received' means the net value of such benefit."

B. Section 2C1.1(b)(2) Requires Determining The Value of The Benefit Received.

The government puts forth a dissembling argument stating that "nothing in the definition of pecuniary harm suggests that because the loan was to be repaid, it did not result in pecuniary harm." (Gov't br. at 44) That is true in one sense, but "pecuniary harm" is only the beginning of the analysis necessary under § 2C1.1(b)(2). Section 2C1.1 provides the base sentencing calculation in cases involving bribery. It provides a base offense level of 14. The base offense level is then increased for

certain specific offense characteristics. In particular, § 2C1.1(b)(2) provides as follows:

> If the value of the payment, the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government from the offense, whichever is greatest, exceeded $5,000, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

Section 2C1.1 applies to a variety of crimes involving government officials, so § 2C1.1(b)(2) sets forth several variables that might apply, depending upon the particular crime involved. In this case, the district court determined that "the most serious count, Count III, Bribery, shall be used to determine the applicable Offense Level." (Supplemental Excerpts of Record "SER" 10; 11/7/2011 tr. at 22)

Count III alleged that "the defendant . . . directly and indirectly did corruptly receive, accept, and agree to receive and accept something of value; in return for being induced to do an act and omit to do an act in violation of her official duty . . . ." Applying USSG § 2C1.1(b)(2) to Count III, it is obvious that the part of this subsection relating to the value of "the benefit received or to be received" is the language to be applied in this case. The term "loss to the government from the offense" does not apply because there was no loss to the government.

C. The District Court Erred By Determining Pecuniary Harm Rather than The Value of the Benefit Received.

In determining the sentence, the district court at first employed this same reasoning. It quoted language from the bribery statute, 18 U.S.C. § 201(b)(2), relating to a public official receiving anything of value in return for being influenced. (SER 10; 11/7/2011 tr. at 24) The district court correctly found that "the benefit that the defendant received under this bribery scheme was the $15,000 loan . . . ." (Id.)

Then, however, the district court changed course and began discussing "pecuniary harm" and "loss". The district court erred in that regard because, as stated above, under § 2C1.1(b)(2), "loss" only refers to "loss to the government." Here, obviously, there was no loss to the government.

If the district court had continued with its original analysis, it should have determined the value of "the benefit received or to be received" which "means the net value of such benefit." USSG § 2C1.1(b)(2). That section makes clear both by definition and examples that the net value here is zero.

If embezzlement rather than bribery had been the basis for the base offense level, § 2B1.1 would have applied, and "loss" as referred to in that section applies not only to loss to the government, but loss to any victim. It is conceivable that the district court could have made a finding that loss to the tribal credit program should have been used to determine a specific offense characteristic under § 2B1.1(b)(1). It is noteworthy that the base offense level under § 2B1.1 would have been

considerably less in the first place, however.

Section 2C1.1 applied here. It provides a harsher punishment than does § 2B1.1, but it applies to a lesser range of conduct. It specifically restricts "loss" under § 2C1.1(b)(2) to loss to the government (as opposed to the Tribal Credit Program). Hence, "loss" does not apply and a determination of the value of the net benefit received does apply. The district court misapplied the rule, the net benefit to White Eagle of her loan is zero (because she was obligated to and did make payments back to the Tribal Credit Program), and hence the district court should be reversed.

D. The District Court Erred By Failing To Determine Net Benefit When Proceeds Were Used To Pay Short-Term Loans.

Next, the government takes issue with the fact that White Eagle's loan modification only resulted in net new proceeds to her of $11,500.00. It claims, without any support, that "simply because the $15,000 loan was used to pay off these other loans does not reduce the value that White Eagle received." (Gov't br. at 44-45)

The government's position is nonsense. Section 2C1.1(b)(2) makes abundantly clear that the value of the net benefit received must be taken into account. If the loan is a $15,000.00 initial loan, which is what the district court determined, it was used to make an immediate $3,500.00 repayment to the Tribal Credit Program, leaving a net benefit of only $11,500.00. The Tribal Credit Program's net loan was only

$3,500.00. No one received or gave up $15,000.00.

E. Section 2C1.1 Applies To All Parties Involved In Bribery.

Next, the government asserts that the language of § 2C1.1, comment 3 "talk[s] about how to calculate the 'benefit received or to be received' by the person giving the bribe" but not relating to the person giving the bribe. (Gov't br. at 45) That is untrue. Comment 3 does not limit its direction to "the person giving the bribe." It covers both the person giving the bribe and the person receiving the bribe.

F. The District Court Erred By Failing To Properly Determine Money Returned.

Finally, comment 3(E) to § 2B1.1 of the USSG Manual provides that "[l]oss shall be reduced by . . . [t]he money returned . . . by the defendant . . . to the victim before the offense was detected . . . ." The district court determined that the date of detection was August 6, 2009. (SER 11; 11/7/11 tr. at 25) The district court then determined that the balance of the loan on July 28, 2009, was $12,992.69, and thus that $12,992.69 should be used in the specific offense characteristic set forth in § 2C1.1(b)(2). (Id.)

This determination is clearly erroneous because White Eagle had borrowed an additional $5,050.00 approximately six weeks earlier on June 8, 2009. That $5,050.00 loan has never been disputed and has never been the subject of any criminal proceeding. It was clearly erroneous to determine that White Eagle had only

paid the $15,000.00 loan by slightly more than $2,000.00 to $12,992.69, when in fact she had paid it down such that the loan balance in early June, 2009, stood at $8,814.06. (SER 3) White Eagle legitimately borrowed an additional $5,050.00 at that time, which additional loan is not part of the conduct alleged as criminal in this case. The $5,050.00 should play no part in the calculation of "loss" under the sentencing guidelines.

The government contends that this "was not clearly erroneous" but fails to state why. This Court has stated many times that it "will not address claims that are not specifically and distinctly argued in appellant's opening brief," including claims that are "only argue[d] in passing" or are "bare assertion[s] ... with no supporting argument." Christian Legal Society v. Wu, 626 F.3d 483, 487 (9th Cir. 2010) (citations omitted) (alterations in original). Without some cogent argument as to why the district court's determination was proper, the government's position cannot be sustained, and the district court should be reversed.

CONCLUSION

For all of the reasons above, the Court should reverse the district court and order it to dismiss the Indictment.

RESPECTFULLY SUBMITTED this 23rd day of July, 2012.

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CERTIFICATE OF COMPLIANCE

This certifies that the body of the attached brief contains 6.999 words, excluding the table of contents, table of authorities, caption and certificate of compliance; using proportionally spaced Times New Roman type, 14-point.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of April, 2012, the foregoing was served upon the persons named below by mailing, hand-delivery, Federal Express, or by electronic transmission as indicated:

1 U.S. Mail
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_____ Hand delivery
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STATUTES AND REGULATIONS AT ISSUE

18 U.S.C. § 2. Principals
(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 4. Misprision of felony
Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

18 U.S.C. § 201. Bribery of public officials and witnesses
(a) For the purpose of this section--

(1) the term "public official" means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror;

(2) the term "person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be so nominated or appointed; and

(3) the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

(b) Whoever--

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent--

(A) to influence any official act; or

(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person;

(3) directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself

therefrom;

(4) directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity in return for being influenced in testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom;

shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

(c) Whoever--

(1) otherwise than as provided by law for the proper discharge of official duty--

(A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

(B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person;

(2) directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom;

(3) directly or indirectly, demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of the testimony under oath or

affirmation given or to be given by such person as a witness upon any such trial, hearing, or other proceeding, or for or because of such person's absence therefrom;

shall be fined under this title or imprisoned for not more than two years, or both.

(d) Paragraphs (3) and (4) of subsection (b) and paragraphs (2) and (3) of subsection (c) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or in the case of expert witnesses, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.

(e) The offenses and penalties prescribed in this section are separate from and in addition to those prescribed in sections 1503, 1504, and 1505 of this title.

18 U.S.C. § 208. Acts affecting a personal financial interest

(a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest--

Shall be subject to the penalties set forth in section 216 of this title.

(b) Subsection (a) shall not apply–

(1) if the officer or employee first advises the Government official responsible for appointment to his or her position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee;

(2) if, by regulation issued by the Director of the Office of Government Ethics, applicable to all or a portion of all officers and employees covered by this section, and published in the Federal Register, the financial interest has been exempted from the requirements of subsection (a) as being too remote or too inconsequential to affect the integrity of the services of the Government officers or employees to which such regulation applies;

(3) in the case of a special Government employee serving on an advisory committee within the meaning of the Federal Advisory Committee Act (including an individual being considered for an appointment to such a position), the official responsible for the employee's appointment, after review of the financial disclosure report filed by the individual pursuant to the Ethics in Government Act of 1978, certifies in writing that the need for the individual's services outweighs the potential for a conflict of interest created by the financial interest involved; or

(4) if the financial interest that would be affected by the particular matter involved is that resulting solely from the interest of the officer or employee, or his or her spouse or minor child, in birthrights--

(A) in an Indian tribe, band, nation, or other organized group or community, including any Alaska Native village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians,

(B) in an Indian allotment the title to which is held in trust by the United States or which is inalienable by the allottee without the consent of the United States, or

(C) in an Indian claims fund held in trust or administered by the United States,

if the particular matter does not involve the Indian allotment or claims fund or the Indian tribe, band, nation, organized group or community, or Alaska Native village corporation as a specific party or parties.

(c)(1) For the purpose of paragraph (1) of subsection (b), in the case of class A and B directors of Federal Reserve banks, the Board of Governors of the Federal Reserve System shall be deemed to be the Government official responsible for appointment.

(2) The potential availability of an exemption under any particular paragraph of subsection (b) does not preclude an exemption being granted pursuant to another paragraph of subsection (b).

(d)(1) Upon request, a copy of any determination granting an exemption under subsection (b)(1) or (b)(3) shall be made available to the public by the agency granting the exemption pursuant to the procedures set forth in section 105 of the Ethics in Government Act of 1978. In making such determination available, the agency may withhold from disclosure any information contained in the determination that would be exempt from disclosure under section 552 of title 5. For purposes of determinations under subsection (b)(3), the information describing each financial interest shall be no more extensive than that required of the individual in his or her financial disclosure report under the Ethics in Government Act of 1978.

(2) The Office of Government Ethics, after consultation with the Attorney General, shall issue uniform regulations for the issuance of waivers and exemptions under subsection (b) which shall--

(A) list and describe exemptions; and

(B) provide guidance with respect to the types of interests that are not so substantial as to be deemed likely to affect the integrity of the services the Government may expect from the employee.

18 U.S.C. § 216. Penalties and injunctions

(a) The punishment for an offense under section 203, 204, 205, 207, 208, or 209 of this title is the following:

(1) Whoever engages in the conduct constituting the offense shall be imprisoned for not more than one year or fined in the amount set forth in this title, or both.

(2) Whoever willfully engages in the conduct constituting the offense shall be imprisoned for not more than five years or fined in the amount set forth in this title, or both.

(b) The Attorney General may bring a civil action in the appropriate United States district court against any person who engages in conduct constituting an offense under section 203, 204, 205, 207, 208, or 209 of this title and, upon proof of such conduct by a preponderance of the evidence, such person shall be subject to a civil penalty of not more than $50,000 for each violation or the amount of compensation which the person received or offered for the prohibited conduct, whichever amount is greater. The imposition of a civil penalty under this subsection does not preclude any other criminal or civil statutory, common law, or administrative remedy, which is available by law to the United States or any other person.

(c) If the Attorney General has reason to believe that a person is engaging in conduct constituting an offense under section 203, 204, 205, 207, 208, or 209 of this title, the Attorney General may petition an appropriate United States district court for an order prohibiting that person from engaging in such conduct. The court may issue an order prohibiting that person from engaging in such conduct if the court finds that the conduct constitutes such an offense. The filing of a petition under this section does not preclude any other remedy which is available by law to the United States or any other person.

18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 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--

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to--

(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

18 U.S.C. § 1163. Embezzlement and theft from Indian tribal organizations
Whoever embezzles, steals, knowingly converts to his use or the use of another, willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, goods, assets, or other property belonging to any Indian tribal organization or intrusted to the custody or care of any officer, employee, or agent of an Indian tribal organization; or

Whoever, knowing any such moneys, funds, credits, goods, assets, or other property to have been so embezzled, stolen, converted, misapplied or permitted to be misapplied, receives, conceals, or retains the same with intent to convert it to his use or the use of another--

Shall be fined under this title, or imprisoned not more than five years, or both; but if the value of such property does not exceed the sum of $1,000, he shall be fined under this title, or imprisoned not more than one year, or both.

As used in this section, the term "Indian tribal organization" means any tribe, band, or community of Indians which is subject to the laws of the United States relating to Indian affairs or any corporation, association, or group which is organized under any of such laws.

5 C.F.R. § 2640.103 Prohibition.

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

> (1) Particular matter. The term "particular matter" includes only matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons. The term may include matters which do not involve formal parties and may extend to legislation or policy making that is narrowly focused on the interests of a discrete and identifiable class of persons. It does not, however, cover consideration or adoption of broad policy options directed to the interests of a large and diverse group of

persons. The particular matters covered by this part include a judicial or other proceeding, application or request for a ruling or other determination, contract, claim, controversy, charge, accusation or arrest.

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

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

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

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

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

Example 6: The recommendations of the Council of Economic Advisors to the President about appropriate policies to maintain economic growth and stability are not particular matters. Discussions about economic growth policies are directed to the interests of a large and diverse group of persons.

Example 7: The formulation and implementation of the response of the United States to the military invasion of a U.S. ally is not a particular matter. General deliberations, decisions and actions concerning a response are based on a

consideration of the political, military, diplomatic and economic interests of every sector of society and are too diffuse to be focused on the interests of specific individuals or entities. However, at the time consideration is given to actions focused on specific individuals or entities, or a discrete and identifiable class of individuals or entities, the matters under consideration would be particular matters. These would include, for example, discussions whether to close a particular oil pumping station or pipeline in the area where hostilities are taking place, or a decision to seize a particular oil field or oil tanker.

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

(2) Personal and substantial participation. To participate "personally" means to participate directly. It includes the direct and active supervision of the participation of a subordinate in the matter. To participate "substantially" means that the employee's involvement is of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. However, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to the matter, but also on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. Personal and substantial participation may occur when, for example, an employee participates through decision, approval, disapproval, recommendation, investigation or the rendering of advice in a particular matter.

Example 1 to paragraph (a)(2): An agency's Office of Enforcement is investigating the allegedly fraudulent marketing practices of a major corporation. One of the agency's personnel specialists is asked to provide information to the Office of Enforcement about the agency's personnel ceiling so that the Office can determine whether new employees can be hired to work on the investigation. The employee

personnel specialist owns $20,000 worth of stock in the corporation that is the target of the investigation. She does not have a disqualifying financial interest in the matter (the investigation and possible subsequent enforcement proceedings) because her involvement is on a peripheral personnel issue and her participation cannot be considered "substantial" as defined in the statute.

(3) Direct and predictable effect.

(i) A particular matter will have a "direct" effect on a financial interest if there is a close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest. An effect may be direct even though it does not occur immediately. A particular matter will not have a direct effect on a financial interest, however, if the chain of causation is attenuated or is contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to, the matter. A particular matter that has an effect on a financial interest only as a consequence of its effects on the general economy does not have a direct effect within the meaning of this part.

(ii) A particular matter will have a "predictable" effect if there is a real, as opposed to a speculative, possibility that the matter will affect the financial interest. It is not necessary, however, that the magnitude of the gain or loss be known, and the dollar amount of the gain or loss is immaterial.

Example 1: An attorney at the Department of Justice is working on a case in which several large companies are defendants. If the Department wins the case, the defendants may be required to reimburse the Federal Government for their failure to adequately perform work under several contracts with the Government. The attorney's spouse is a salaried employee of one of the companies, working in a division that has no involvement in any of the contracts. She does not participate in any bonus or benefit plans tied to the profitability of the company, nor does she own stock in the company. Because there is no evidence that the case will have a direct and predictable effect on whether the spouse will retain her job or maintain the level of her salary, or whether the company will undergo any reorganization that would affect her interests, the attorney would not have a disqualifying financial interest in the matter. However, the attorney must consider, under the requirements of § 2635.502 of this chapter, whether his impartiality would be questioned if he continues to work on the case.

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

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

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

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

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

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

Example 3: A special Government employee serving on an advisory committee studying the safety and effectiveness of a new arthritis drug is a practicing physician with a specialty in treating arthritis. The drug being studied by the committee would be a low cost alternative to current treatments for arthritis. If the drug is ultimately approved, the physician will be able to prescribe the less expensive drug. The physician does not own stock in, or hold any position, or have any business relationship with the company developing the drug. Moreover, there is no indication that the availability of a less expensive treatment for arthritis will increase the volume and profitability of the doctor's private practice. Accordingly, the physician has no disqualifying financial interest in the actions of the advisory committee.

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

(1) The employee's spouse;

(2) The employee's minor child;

(3) The employee's general partner;

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

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

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

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

Example 3: The spouse of an employee of the Department of Health and Human Services (HHS) works for a consulting firm that provides support services to colleges and universities on research projects they are conducting under grants from HHS. The spouse is a salaried employee who has no direct ownership interest in the firm such as through stockholding, and the award of a grant to a particular university will have no direct and predictable effect on his continued employment or his salary. Because

the award of a grant will not affect the spouse's financial interest, section 208 would not bar the HHS employee from participating in the award of a grant to a university to which the consulting firm will provide services. However, the employee should consider whether her participation in the award of the grant would be barred under the impartiality provision in the Standards of Ethical Conduct for Employees of the Executive Branch at 5 CFR 2635.502.

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

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

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

Example 1: The supervisor of an employee of the Department of Education asks the employee to attend a meeting on his behalf on developing national standards for science education in secondary schools. When the employee arrives for the meeting, she realizes one of the participants is the president of Education Consulting

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

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

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

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

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

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

conflicting assignments can be avoided, consistent with the agency's needs.

§ 2640.203 Miscellaneous exemptions.

(a) Hiring decisions. An employee may participate in a hiring decision involving an applicant who is currently employed by a corporation that issues publicly traded securities, if the disqualifying financial interest arises from:

(1) Ownership of publicly traded securities issued by the corporation; or

(2) Participation in a pension plan sponsored by the corporation.

(b) Employees on leave from institutions of higher education. An employee on a leave of absence from an institution of higher education may participate in any particular matter of general applicability affecting the financial interests of the institution from which he is on leave, provided that the matter will not have a special or distinct effect on that institution other than as part of a class.

Example 1: An employee at the Department of Defense (DOD) is on a leave of absence from his position as a tenured Professor of Engineering at the University of California (UC) at Berkeley. While at DOD, he is assigned to assist in developing a regulation which will contain new standards for the oversight of grants given by DOD. Even though the University of California at Berkeley is a DOD grantee, and will be affected by these new monitoring standards, the employee may participate in developing the standards because UC Berkeley will be affected only as part of the class of all DOD grantees. However, if the new standards would affect the employee's own financial interest, such as by affecting his tenure or his salary, the employee could not participate in the matter unless he first obtains an individual waiver under section 208(b)(1).

Example 2: An employee on leave from a university could not participate in the development of an agency program of grants specifically designed to facilitate research in jet propulsion systems where the employee's university is one of just two or three universities likely to receive a grant under the new program. Even though the grant announcement is open to all universities, the employee's university is among the very few known to have facilities and equipment adequate to conduct the research.

The matter would have a distinct effect on the institution other than as part of a class.

(c) Multi-campus institutions of higher education. An employee may participate in any particular matter affecting one campus of a State multi-campus institution of higher education, if the employee's disqualifying financial interest is employment in a position with no multi-campus responsibilities at a separate campus of the same multi-campus institution.

Example 1: A special Government employee (SGE) member of an advisory committee convened by the National Science Foundation is a full-time professor in the School of Engineering at one campus of a State university. The SGE may participate in formulating the committee's recommendation to award a grant to a researcher at another campus of the same State university system.

Example 2: A member of the Board of Regents at a State university is asked to serve on an advisory committee established by the Department of Health and Human Services to consider applications for grants for human genome research projects. An application from another university that is part of the same State system will be reviewed by the committee. Unless he receives an individual waiver under section 208(b)(1) or (b)(3), the advisory committee member may not participate in matters affecting the second university that is part of the State system because as a member of the Board of Regents, he has duties and responsibilities that affect the entire State educational system.

(d) Exemptions for financial interests arising from Federal Government employment or from Social Security or veterans' benefits. An employee may participate in any particular matter where the disqualifying financial interest arises from Federal Government or Federal Reserve Bank salary or benefits, or from Social Security or veterans' benefits, except an employee may not:

(1) Make determinations that individually or specially affect his own salary and benefits; or

(2) Make determinations, requests, or recommendations that individually or specially relate to, or affect, the salary or benefits of any other person specified in section 208.

Example 1: An employee of the Office of Management and Budget may vigorously and energetically perform the duties of his position even though his outstanding performance would result in a performance bonus or other similar merit award.

Example 2: A policy analyst at the Defense Intelligence Agency may request promotion to another grade or salary level. However, the analyst may not recommend or approve the promotion of her general partner to the next grade.

Example 3: An engineer employed by the National Science Foundation may request that his agency pay the registration fees and appropriate travel expenses required for him to attend a conference sponsored by the Engineering Institute of America. However, the employee may not approve payment of his own travel expenses and registration fees unless he has been delegated, in advance, authority to make such approvals in accordance with agency policy.

Example 4: A GS–14 attorney at the Department of Justice may review and make comments about the legal sufficiency of a bill to raise the pay level of all Federal employees paid under the General Schedule even though her own pay level, and that of her spouse who works at the Department of Labor, would be raised if the bill were to become law.

Example 5: An employee of the Department of Veterans Affairs (VA) may assist in drafting a regulation that will provide expanded hospital benefits for veterans, even though he himself is a veteran who would be eligible for treatment in a hospital operated by the VA.

Example 6: An employee of the Office of Personnel Management may participate in discussions with various health insurance providers to formulate the package of benefits that will be available to Federal employees who participate in the Government's Federal Employees Health Benefits Program, even though the employee will obtain health insurance from one of these providers through the program.

Example 7: An employee of the Federal Supply Service Division of the General Services Administration (GSA) may participate in GSA's evaluation of the feasibility of privatizing the entire Federal Supply Service, even though the employee's own position would be eliminated if the Service were privatized.

Example 8: Absent an individual waiver under section 208(b)(1), the employee in the preceding example could not participate in the implementation of a GSA plan to create an employee-owned private corporation which would carry out Federal Supply Service functions under contract with GSA. Because implementing the plan would result not only in the elimination of the employee's Federal position, but also in the creation of a new position in the new corporation to which the employee would be transferred, the employee would have a disqualifying financial interest in the matter arising from other than Federal salary and benefits, or Social Security or veterans benefits.

Example 9: A career member of the Senior Executive Service (SES) at the Internal Revenue Service (IRS) may serve on a performance review board that makes recommendations about the performance awards that will be awarded to other career SES employees at the IRS. The amount of the employee's own SES performance award would be affected by the board's recommendations because all SES awards are derived from the same limited pool of funds. However, the employee's activities on the board involve only recommendations, and not determinations that individually or specially affect his own award. Additionally, 5 U.S.C. 5384(c)(2) requires that a majority of the board's members be career SES employees.

Example 10: In carrying out a reorganization of the Office of General Counsel (OGC) of the Federal Trade Commission, the Deputy General Counsel is asked to determine which of five Senior Executive Service (SES) positions in the OGC to abolish. Because her own position is one of the five SES positions being considered for elimination, the matter is one that would individually or specially affect her own salary and benefits and, therefore, the Deputy may not decide which position should be abolished.

Note to paragraph (d): This exemption does not permit an employee to take any action in violation of any other statutory or regulatory requirement, such as the prohibition on the employment of relatives at 5 U.S.C. 3110.

(e) Commercial discount and incentive programs. An employee may participate in any particular matter affecting the sponsor of a discount, incentive, or other similar benefit program if the disqualifying financial interest arises because of participation in the program, provided:

(1) The program is open to the general public; and

(2) Participation in the program involves no other financial interest in the sponsor, such as stockholding.

Example 1: An attorney at the Pension Benefit Guaranty Corporation who is a member of a frequent flier program sponsored by Alpha Airlines may assist in an action against Alpha for failing to make required payments to its employee pension fund, even though the agency action will cause Alpha to disband its frequent flier program.

(f) Mutual insurance companies. An employee may participate in any particular matter affecting a mutual insurance company if the disqualifying financial interest arises because of an interest as a policyholder, unless the matter would affect the company's ability to pay claims required under the terms of the policy or to pay the cash value of the policy.

Example 1: An administrative law judge at the Department of Labor receives dividends from a mutual insurance company which he takes in the form of reduced premiums on his life insurance policy. The amount of the dividend is based upon the company's overall profitability. Nevertheless, he may preside in a Department hearing involving a major corporation insured by the same company even though the insurance company will have to pay the corporation's penalties and other costs if the Department prevails in the hearing.

Example 2: An employee of the Department of Justice is assigned to prosecute a case involving the fraudulent practices of an issuer of junk bonds. While developing the facts pertinent to the case, the employee learns that the mutual life insurance company from which he holds a life insurance policy has invested heavily in these junk bonds. If the Government succeeds in its case, the bonds will be worthless and the corresponding decline in the insurance company's investments will impair the company's ability to pay claims under the policies it has issued. The employee may not continue assisting in the prosecution of the case unless he obtains an individual waiver pursuant to section 208(b)(1).

(g) Exemption for employment interests of special Government employees serving

on advisory committees. A special Government employee serving on an advisory committee within the meaning of the Federal Advisory Committee Act (5 U.S.C. app.) may participate in any particular matter of general applicability where the disqualifying financial interest arises from his non-Federal employment or non-Federal prospective employment, provided that the matter will not have a special or distinct effect on the employee or employer other than as part of a class. For purposes of this paragraph, "disqualifying financial interest" arising from non-Federal employment does not include the interests of a special Government employee arising from the ownership of stock in his employer or prospective employer.

Example 1: A chemist employed by a major pharmaceutical company has been appointed to serve on an advisory committee established to develop recommendations for new standards for AIDS vaccine trials involving human subjects. Even though the chemist's employer is in the process of developing an experimental AIDS vaccine and therefore will be affected by the new standards, the chemist may participate in formulating the advisory committee's recommendations. The chemist's employer will be affected by the new standards only as part of the class of all pharmaceutical companies and other research entities that are attempting to develop an AIDS vaccine.

Example 2: The National Cancer Institute (NCI) has established an advisory committee to evaluate a university's performance of an NCI grant to study the efficacy of a newly developed breast cancer drug. An employee of the university may not participate in the evaluation of the university's performance because it is not a matter of general applicability.

Example 3: An engineer whose principal employment is with a major Department of Defense (DOD) contractor is appointed to serve on an advisory committee established by DOD to develop concepts for the next generation of laser-guided missiles. The engineer's employer, as well as a number of other similar companies, has developed certain missile components for DOD in the past, and has the capability to work on aspects of the newer missile designs under consideration by the committee. The engineer owns $20,000 worth of stock in his employer. Because the exemption for the employment interests of special Government employees serving on advisory committees does not extend to financial interests arising from the ownership of stock, the engineer may not participate in committee matters affecting his employer unless he receives an individual waiver under section 208(b)(1) or (b)(3), or determines whether the exemption for interests in securities at § 2640.202(b) applies.

(h) Directors of Federal Reserve Banks. A Director of a Federal Reserve Bank or a branch of a Federal Reserve Bank may participate in the following matters, even though they may be particular matters in which he, or any other person specified in section 208(a), has a disqualifying financial interest:

(1) Establishment of rates to be charged for all advances and discounts by Federal Reserve Banks;

(2) Consideration of monetary policy matters, regulations, statutes and proposed or pending legislation, and other matters of broad applicability intended to have uniform application to banks within the Reserve Bank district;

(3) Approval or ratification of extensions of credit, advances or discounts to a depository institution that has not been determined to be in a hazardous financial condition by the President of the Reserve Bank; or

(4) Approval or ratification of extensions of credit, advances or discounts to a depository institution that has been determined to be in a hazardous financial condition by the President of the Reserve Bank, provided that the disqualifying financial interest arises from the ownership of stock in, or service as an officer, director, trustee, general partner or employee, of an entity other than the depository institution, or its parent holding company or subsidiary of such holding company.

(i) Medical products. A special Government employee serving on an advisory committee within the meaning of the Federal Advisory Committee Act (5 U.S.C. app.) may participate in Federal advisory committee matters concerning medical products if the disqualifying financial interest arises from:

(1) Employment with a hospital or other similar medical facility whose only interest in the medical product or device is purchase of it for use by, or sale to, its patients; or

(2) The use or prescription of medical products for patients.

(j) Nonvoting members of standing technical advisory committees established by the

Food and Drug Administration. A special Government employee serving as a nonvoting representative member of an advisory committee established by the Food and Drug Administration pursuant to the requirements of the Federal Advisory Committee Act (5 U.S.C. app.) and appointed under a statutory authority requiring the appointment of representative members, may participate in any particular matter affecting a disqualifying financial interest in the class which the employee represents. Nonvoting representative members of Food and Drug Administration advisory committees are described in 21 CFR 14.80(b)(2), 14.84, 14.86, and 14.95(a).

Example 1: The FDA's Medical Devices Advisory Committee is established pursuant to 21 U.S.C. 360c(b), which requires that each panel of the Committee include one nonvoting industry representative and one nonvoting consumer representative. An industry representative on the Ophthalmic Devices Panel of this Committee has been appointed as a special Government employee, in accordance with the procedures described at 14 CFR 14.84. The special Government employee may participate in Panel discussions concerning the premarket approval application for a silicone posterior chamber intraocular lens manufactured by MedInc, even though she is employed by, and owns stock in, another company that manufactures a competing product. However, a consumer representative who serves as a special Government employee on the same Panel may not participate in Panel discussions if he owns $30,000 worth of stock in MedInc unless he first obtains an individual waiver under 18 U.S.C. 208 (b)(1) or (b)(3).

(k) Employees of the Tennessee Valley Authority. An employee of the Tennessee Valley Authority (TVA) may participate in developing or approving rate schedules or similar matters affecting the general cost of electric power sold by TVA, if the disqualifying financial interest arises from use of such power by the employee or by any other person specified in section 208(a).

(l) Exemption for financial interests of non–Federal government employers in the decennial census. An employee of the Bureau of the Census at the United States Department of Commerce, who is also an employee of a State, local, or tribal government, may participate in the decennial census notwithstanding the disqualifying financial interests of the employee's non–Federal government employer in the census provided that the employee:

(1) Does not serve in a State, local, or tribal government position which is filled

through public election;
(2) Was hired for a temporary position under authority of 13 U.S.C. 23; and
(3) Is serving in a Local Census Office or an Accuracy and Coverage Evaluation function position as an enumerator, crew leader, or field operations supervisor.