Ethics Fundamentals Training Course – *Conflict of Interest*

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Conflict of Interest Laws:

- 18 USC § 208
- 5 CFR § 2635.502
- 18 USC § 201
- 18 USC § 202
- 18 USC § 203
- 18 USC § 205
- 18 USC § 207
- 18 USC § 209
- 18 USC § 216

Ethics Mission

- The primary mission of the Executive Branch Ethics Program is to **prevent conflicts of interest**. (5 CFR 2638.101(a))

- How is that accomplished?
  - Ethics training
  - Financial disclosure
  - Ethics advice

Conflict of Interest – what does that mean?

- Exists when an individual or corporation has the opportunity – real or perceived – to exploit their position for personal or corporate benefit.
- Corruption occurs when the individual or corporation takes advantage of that opportunity and abuses their position for private gain.

18 USC § 208

- An employee is prohibited from participating personally and substantially in an official capacity in any particular matter in which, to his *knowledge*, he or any person whose interests are imputed to him under this statute has a financial interest if the particular matter will have a direct and predictable effect on that interest

Participate
Participating Personally & Substantially

An employee is prohibited from <u>participating personally and substantially</u>....

- <u>Participate</u>: decision, approval, recommendation, investigation, or rendering of advice
- <u>Personally</u>: directly, and includes the participation of a subordinate when actually directed by the Government employee
- <u>Substantially</u>: of significance to the matter (not administrative)

Participate Personally and Substantially Examples

Scenario 1

An employee owns stock in Company A. The agency is deciding whether to award a contract to Company A. The employee reviews the proposals and writes a memorandum recommending Company A. Did the employee participate personally and substantially?

Scenario 2

An agency attorney's spouse has a financial interest tied to Company B's performance. The agency is considering a large penalty against Company B. The attorney analyzes the agency's enforcement authority and advises the deciding official whether the penalty is legally supportable. Did the attorney participate personally and substantially?

Scenario 3

An employee has a financial interest in a business seeking an agency permit. The employee makes one call to the permitting official and, relying on technical expertise, recommends approval. Did the employee participate personally and substantially?

Scenario 4

An administrative assistant schedules a meeting about a company in which she owns stock, reserves the room, and sends the invitation, but does not participate in the substance. Did the employee participate personally and substantially?

Scenario 5

An employee attends a large informational briefing where a matter affecting his stockholding is discussed. He does not speak, advise, vote, ask substantive questions, or otherwise contribute. Did the employee participate personally and substantially?

Particular Matter

…prohibited…if the particular matter will have a direct and predictable effect on that interest.

- Matter focused upon the interests of specific persons
- Matter focused on the interest of a discrete and identifiable class of persons
- Does not extend to broad policy options or consideration directed toward the interest of a large and diverse group

Particular Matters

Broad policy options directed at the interests of a large and diverse group - Tax reform for everyone - Land use for a large geographical area	**Particular matters of general applicability focused on a discrete and identifiable class of persons** - Financial regulation that will affect only USAA and Navy Federal	**Particular matters involving specific parties** - Contracts - Grants - Licenses - Applications - Investigations - Litigation ("specific party matters")

Particular Matter Examples

→ Matter focused upon the interests of specific persons (specific party matters)

→ Matter focused on the interest of a discrete and identifiable class of persons (i.e., specific class)

Scenario 1

An agency evaluates proposals from Companies A, B, and C for a specific information-technology contract. Is this a particular matter?

Scenario 2

Company A has an agency contract. The agency determines whether Company A met a performance requirement and should receive payment. Is this a particular matter?

Scenario 3

The Department of Agriculture develops a regulation applicable only to companies operating meatpacking plants. Is this a particular matter?

Scenario 4

The Department of Commerce develops a rule governing domestic companies that export portable computers. Is this a particular matter?

Scenario 5

The Council of Economic Advisers recommends policies intended to promote national economic growth and stability. Is this a particular matter?

Scenario 6

The Department of Labor considers health and safety requirements applicable to every employer in the United States. Is this a particular matter?

Direct and Predictable

…prohibited…if the particular matter will have a direct and predictable effect on that interest.

- Direct:
  - Close causal link between any decision or action in the matter and any expected effect of the matter on the financial interest
- Predictable:
  - Real, as opposed to speculative, possibility that the matter will affect the financial interest

Some fun facts!

  - Magnitude of gain/loss is immaterial (no de minimis)
  - Question is whether the **MATTER** will affect the financial interest, not whether the employee's participation will affect the interest

Direct & Predictable Effect Examples

Scenario 1

Employee owns stock in Company A and evaluates Company A’s proposal for a large DoW contract. Is there a direct and predicable effect?

Scenario 2

Employee owns stock in Company A. Company A did not bid, but it's competitor, Company B, did. Employee evaluates Company B's proposal. Is there a direct and predicable effect?

Scenario 3

Employee owns stock in a pharmaceutical company and participates in deciding whether the DoW will approve that company's drug. Is there a direct and predicable effect?

Scenario 4

Employee owns Company A stock and participates in an enforcement matter that could impose a $110 million penalty on Company A. Is there a direct and predicable effect?

Scenario 5

Employee owns stock in a parent corporation. The agency is deciding a major contract involving its subsidiary. Is there a direct and predicable effect?

Scenario 6

Employee's spouse works for Company A on a fixed salary. Employee participates in an agency contract involving Company A. Is there a direct and predicable effect?

Scenario 7

Same facts, but now the spouse will receive a $25,000 bonus if Company A wins the contract. Is there a direct and predicable effect?

Scenario 8

Employee owns Company A stock and works on broad government economic policy, which will affect the entire U.S. economy. Is there a direct and predicable effect?

Scenario 9

Employee owns stock in several banks and participates in a regulation specifically governing a discrete class of banks that incudes those companies.

Scenario 10

Employee owns Company A stock. The agency decision will affect Company A financially, but no one can determine whether the effect will be \$500, \$5 million, or -\$50. Is there a direct and predicable effect?

Financial Interest

- Any current or contingent ownership, equity or security interest in real or personal property or a business. Includes:
  - Financial instruments or investments such as stocks, bonds, mutual funds, and real estate
  - Salary, indebtedness, or job offer

IMPUTED INTERESTS

Who else's interests are we responsible for?

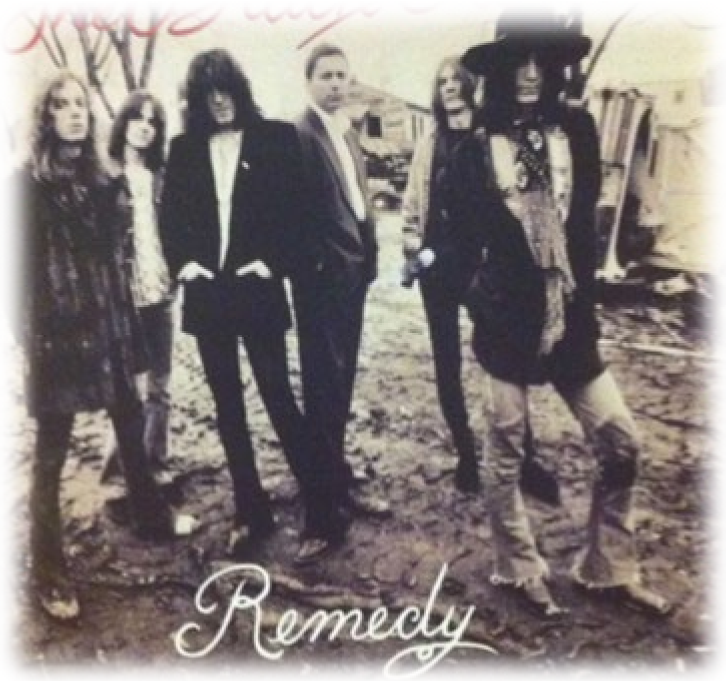
- Spouse
- Minor child
- Outside employer
- General partner
- Organization in which the Gov employees serves as officer, director, trustee or employee
- Prospective employer

Who do these rules apply to?

You do NOT have to be a financial disclosure filer for these rules to apply!

- Federal Civilian Employees
- Military Personnel
  - Active Duty and Reserve
  - Officers
  - Enlisted – JER (2640 & 2641)
- Special Government employees
- Presidential Appointees (Non-career SES & Schedule C)

Resolve Conflict



- Disqualification/Recusal
- Divest financial interest
- Individual waiver (208(b)(1))
- Reassignment/change of duty
- Regulatory exemption
- Waiver for Special Government Employees

Regulatory Exemptions

Regulatory Exemptions

Pooled Investments (208(b)(2))

- Widely Diversified Mutual Funds (no limit)
- Sector Mutual Funds (there is a limit on this - aggregate value is capped at $50,000)
- Employee Benefit Plans

Implemented at 5 CFR 2640.201

Regulatory Exemptions – Securities

Securities include, but are not limited to, common stock, preferred stock, corporate bond, municipal security, and bonds or notes issued by the U.S Treasury with a maturity of more than one year

What we use the most →

- De minimis (capped at $15,000)
- De minimis for matters affecting nonparties ($25,000)
  - Example – Company A seeks drug approval. Employee owns stock in the competitor – Company B – which is directly and predictably affected.
- De minimis for matters of general applicability ($25,000 in any one/$50,000 total in all)
  - Example – The agency writes a rule governing credit unions, a discrete and identifiable class of banks. You own stock in Navy Federal and USAA. If the cumulative value of both is under $50K, good to go.

Fun fact!

No de minimis exemption for virtual currency/cryptocurrency – i.e., no amount can save you if you need to be saved.

Implemented at 5 CFR §2640.202

18 U.S.C. § 208(b)(1) Waiver

- May be granted if the disqualifying financial interest is not so **substantial** as to affect the integrity of the employee's services to the Government
- Must be issued in advance of action
- Issued by Secretary & coordinated with U.S. Office of Government Ethics
- Publicly available
- RARE (almost never)

Implemented at 5 CFR § 2640.301

18 U.S.C. § 208(b)(1) Waiver – elements

(b) ***Agency determination concerning substantiality of the disqualifying financial interest.*** In determining whether a disqualifying financial interest is sufficiently substantial to be deemed likely to affect the integrity of the employee's services to the Government, the responsible official may consider the following factors:

(1) The type of interest that is creating the disqualification (e.g. stock, bonds, real estate, other securities, cash payment, job offer, or enhancement of a spouse's employment);

(2) The identity of the person whose financial interest is involved, and if the interest is not the employee's, the relationship of that person to the employee;

(3) The dollar value of the disqualifying financial interest, if it is known or can be estimated (e.g. the amount of cash payment which may be gained or lost, the salary of the job which will be gained or lost, the predictable change in either the market value of the stock or the actual or potential profit or loss or cost of the matter to the company issuing the stock, the change in the value of real estate or other securities);

(4) The value of the financial instrument or holding from which the disqualifying financial interest arises (e.g. the face value of the stock, bond, other security or real estate) and its value in relationship to the individual's assets. If the disqualifying financial interest is that of a general partner or organization specified in section 208, this information must be provided only to the extent that it is known by the employee; and

(5) The nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter.

(6) Other factors which may be taken into consideration include:

(i) The sensitivity of the matter;

(ii) The need for the employee's services in the particular matter; and

(iii) Adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that the integrity of the employee's services would be questioned by a reasonable person.

Special Government Employee 18 U.S.C. §203(b)(3) Waiver

- For Special Government Employees serving on a Federal Advisory Committee
- Based on agency determination that the need for the SGE's services is outweighed by the potential conflict of interest
- Issued prior to action
- Publicly available
- RARE (almost never)

PROHIBITED Financial Interests

- If prohibited by statute (e.g., 10 U.S.C. § 988)
- If prohibited by agency regulation
- If prohibited by agency determination of a conflict of interest
- PAS officials may have additional restrictions based on their Ethics Agreements

208 & Financial Disclosure Nexus

- If you understand 208, then you understand the importance of the financial disclosure reporting system (278 & 450). It is how we, as ethics officials, find & resolve conflicts.

5 CFR § 2635.502
Impartiality (Appearance of Bias)

- Employees are prohibited from participating on particular matters where a person with whom they have a covered relationship is a party to the matter or represents a party to the matter
- You do not need to have any *actual* financial conflict of interest

Covered Relationship

- Persons with whom the employee has or is seeking a business or a financial relationship (other than a routine consumer transaction);
- Members of employee's household;
- Close relatives;
- Employers and clients of employee's parents, dependent children, and spouse (and their prospective employers and clients);
- Former non-Federal employers and clients (for a one-year period, or a two-year period if received an extraordinary severance payment from the former employer before entering into Federal service); and
- Organizations in which the employee is an active participant (other than political organizations).

502 Waiver

- If the employee’s action would NOT violate 18 USC § 208, but would raise a question in the mind of a reasonable person about the employee’s impartiality, the agency designee may authorize the employee’s participation in the matter based on a determination made in the light of all relevant circumstances that the interest of the Government in the employee’s participation outweighs the concern that a reasonable person may question the integrity of the agency’s programs and operations. 5 CFR § 2635.502(d).

5 CFR § 2635.501
"The Catch-All"

- Employees who are concerned that others may question their impartiality for reasons other than covered relationships may request a written determination from their ethics official under 501, and the ethics official will use the process in 502 to provide a determination.
- Who asks for this?
  - Gov employees dating contractor employees
  - Gov employees taking meetings with their battle buddies who represent contractors

Remaining Criminal Conflict of Interest Statutes

- 201
- 202
- 203/205
- 207 - PGE
- 209
- 216

18 USC § 201
Bribery Statute

- Quid Pro Quo
- Crime to corruptly give, offer or promise anything of value directly or indirectly to a government official with the intent to influence any official act or the commission of fraud
- Crime for the government official to accept
- Fat Leonard
  - Leonard Glenn Francis, known as "Fat Leonard," is a Malaysian defense contractor who masterminded the largest bribery and corruption scandal in U.S. Navy history.
  - For over a decade, his company, Glenn Defense Marine Asia, showered high-ranking Navy officials with cash, luxury travel, and wild parties. In exchange, officers fed him classified information and ship schedules, allowing him to overbill the U.S. military by more than $35 million.
  - After a dramatic escape to Venezuela while on house arrest in 2022, he was captured and returned to the U.S., where a federal judge sentenced him to 15 years in prison.

18 USC § 202

- Defines Special Government Employee (SGE)
  - Any employee expect to work not more than 130 days in any consecutive 365-day period.
  - Note that this is an ethics construct – it's not a hiring authority!
  - SGE's are part-time
  - Includes reserve officers and excludes enlisted (but look at the JER)
- Defines Government official & employee—excludes enlisted

Special Government Employees (SGE)

- For purposes of 18 USC 203 & 18 USC 205, **60** is an important number
  - If the SGE works for 60 days or less in a one-year period, their limits only apply to the exact projects they touched.
    - Participated personally and substantially in a particular matter with specific matters
  - If the SGE works for more than 60 days (61+) in a one-year period, they cannot represent anyone on *any* matter pending in that specific agency.

18 USC § 203
Representation With Compensation

- Government employees are prohibited from accepting **compensation** for representing a third party back to the government
  - Exemption for representing the employee's parents, spouse, child or any person or estate for which the employee is guardian, executor, administrator, trustee or other personal fiduciary

18 USC § 203
Representation with Compensation

- Primary focus of 203 – the compensation!!
- Ask yourself:
  - Is the employee receiving compensation attributable to representational activity?
  - Is the representation occurring while the individual is a government employee?
- This isn't just about the employee – this can also very much be kicked into gear if the representational activity is done by another person.
- What does that look like? Think profit shares, contingency fees, bonuses, or any other compensation tied to representing before the Federal government while the individual is a government employee. (Statute was designed to prevent current gov't employees from using their public office for private gain.)
- Timing counts! But of the representational activities – not of the payment. If the representational activities were performed while the person was a government employee, then 203 will be implicated. Payment can happen later – don't focus on when the individual was paid.
  - Think post-government employment, too. If you leave and join a law firm, you cannot share in the any bonus, partnership share, etc., earned by your new firm for representational services before the government that occurred while you were a government employee.
- Exemptions for representing the employee's parents, spouse, child or any person or estate for which the employee is guardian, executor, administrator, trustee or other personal fiduciary

18 USC § 203 Examples

Scenario 1

Employee volunteers for a nonprofit and personally calls EPA on its behalf to influence a permit decision. Employee receives no pay. Is 203 implicated?

Scenario 2

Employee never contacts the EPA. Instead, another partner at the employee's private firm represents a client before the EPA, and the employee receives a profit share attributable to those fees. Is 203 implicated?

Scenario 3

Employee personally appears before the EPA for a private client and is paid for the work. Is 203 implicated?

Scenario 4

Employee researches an issue internally for an outside nonprofit but does not communicate with the government, has no authority to speak for the nonprofit, and does not get paid. Is 203 implicated?

18 USC § 205

Representation With or Without Compensation

- 18 U.S.C. § 205 bans a current federal worker from acting as an agent or attorney for anyone else before any federal agency, department, or court in matters where the U.S. has a direct and substantial interest
- Primary focus – personal representation
- Government employees are prohibited from representing <u>third parties</u> back to the government
- And this time, it's only YOU making the representation which will implicate 205. If someone else does it, you do not have a 205 issue.
  - Exemption for representing the employee's parents, spouse, child or any person or estate for which the employee is guardian, executor, administrator, trustee or other personal fiduciary

18 USC § 205 Examples

Scenario 1

Employee volunteers for a nonprofit and personally calls EPA on its behalf to influence a permit decision. Employee receives no pay. Is 205 implicated?

Scenario 2

Employee never contacts the EPA. Instead, another partner at the employee's private firm represents a client before the EPA, and the employee receives a profit share attributable to those fees. Is 205 implicated?

Scenario 3

Employee personally appears before the EPA for a private client and is paid for the work.
Is 205 implicated?

Scenario 4

Employee researches an issue internally for an outside nonprofit but does not communicate with the government, has no authority to speak for the nonprofit, and does not get paid. Is 205 implicated?

Key Differences Between § 203 and § 205

Feature	18 U.S.C. § 203	18 U.S.C. § 205
Core Focus	Compensation for representational services.	Acting as an agent or attorney (regardless of pay).
The Trigger	Seeking, receiving, or agreeing to receive money or anything of value.	Actively representing a private party, signing documents, or making appearances.
Post-Employment Impact	Yes. Directly restricts post-government law firm fee-sharing for work done during government tenure.	No. Only applies to current employees; once you leave, § 205 no longer applies.
Pass-Through Liability	Restricts partnerships or firms from sharing covered fees with the employee.	Focuses strictly on the employee's personal actions as an agent.

18 USC § 209
Supplementation of Salary

- Prohibits a third party from paying salary or any contribution to the employee for performing his/her official duties
- Includes gifts
- Excludes SGEs and persons serving without compensation

18 USC § 209 Examples

Scenario 1

Maria manages an agency contract with Company A. Company A gives her a $5,000 performance bonus because she's done an excellent job administering the federal program. Is 209 implicated?

Scenario 2

David earns $200,000 at Company A. He leaves to accept a federal position which pays him $180,000. Company A loves David so much that they decide to make up the difference and pay him $20,000 over the course of his first year. Is 209 implicated?

Scenario 3

A federal attorney gives a presentation as part of her official duties. The sponsoring association gives her a $1,500 honorarium. Is 209 implicated?

Scenario 4

Before joining the government, Lisa earns a bonus for her great work. The amount is based entirely on the work she completed before entering federal service, but is paid to her after she arrives at the agency. Is 209 implicated?

Scenario 5

A federal attorney teaches a Saturday pottery class at a community center. Is 209 implicated?

Scenario 6

A technology company is pleased with an agency employee’s work overseeing one of its projects. Instead of giving the employee cash, the company decides to pay 3 months worth of the employee’s mortgage because they know money is tight. Is 209 implicated?

18 USC § 209 - Resources

- 18 U.S.C. § 209 — Current statutory text and exceptions.
- OGE: Ethics and Working with Contractors — Explains former-employer payments, past private services, and related recusal rules.
- DOJ OLC: Standardized RSUs (2026) — Detailed analysis of the connection between a payment and Government services.
- DOJ OLC: Make a Dream Come True Program (1997) — Humanitarian benefits not treated as compensation for Government services.
- Crandon v. United States, 494 U.S. 152 (1990) — Supreme Court decision addressing payments made before federal employment.

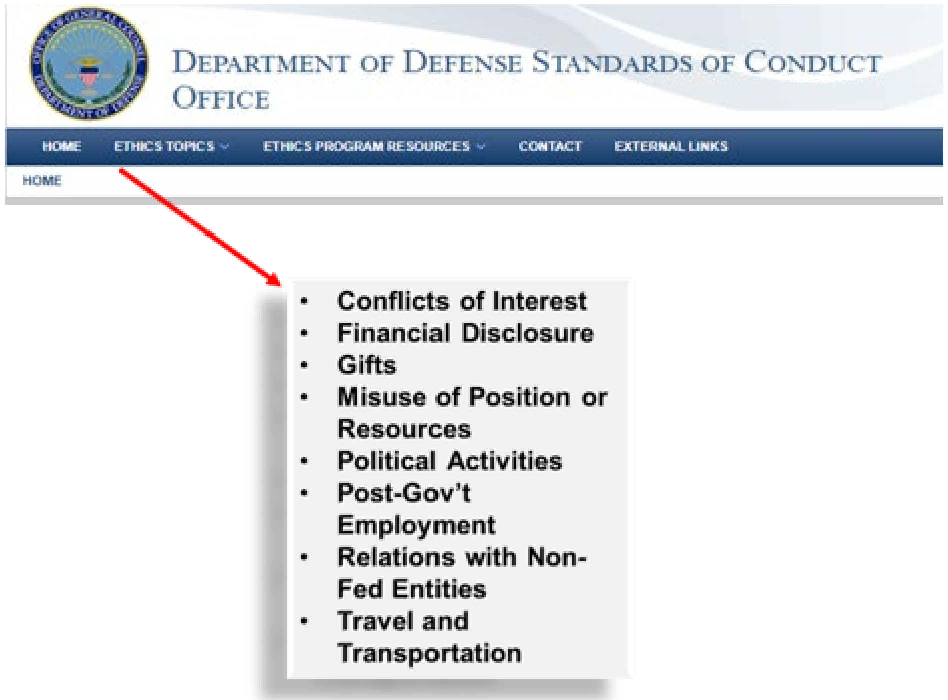
18 USC § 216
Penalty Statute

- Imprisoned for not more than 1 year
- If willful engagement, imprisonment for not more than 5 years
- Fined up to $50,000 (or amount of illegal compensation if greater)
- Penalties are per count

What we learned--

- 208 Conflicts
- 2635.502 Appearance of Bias
- 201 Bribes
- 202 Definitions
- 203/205 Representation
- 209 Supplementation of Salary

Where to go for help



- Questions on this presentation?
  - Contact SOCO:
    - 703-695-3422
    - OSD.SOCO@mail.mil
- Questions on a specific COI matter?
  - Work through your legal/ethics chain of command