

CONFLICTS OF INTEREST

I. REFERENCES

A. Conflicting Financial Interests – Officers and Civilian Employees

1. 18 U.S.C. § 208 - Acts Affecting a Personal Financial Interest
2. National Defense Authorization Act for Fiscal Year 2022, Public Law No 117-81, §1117, 135 Stat. 1541, 1955-1956 (2021) – Enhancement of Recusal for Conflicts of Personal Interest Requirements for Department of Defense Officers and Employees
3. 5 C.F.R. Part 2635, Subparts D – Conflicting Financial Interests
4. 5 C.F.R. Part 2635, Subpart F – Seeking Other Employment
5. 5 C.F.R. Part 2640 – Interpretation, Exemptions and Waiver Guidance Concerning 18 U.S.C. § 208 (Acts Affecting a Personal Financial Interest)
6. DoD 5500.07-R , Joint Ethics Regulation (JER), Chapter 5, Section 3 – Guidance on 18 U.S.C. § 208
7. JER, Chapter 5, Section 4 – Other Conflict of Interest Laws
8. JER 2-204 – Standard for Accomplishing Disqualification
9. Office of Legal Counsel (OLC) Opinion on 18 U.S.C. § 208, Jan. 11, 2006, <https://www.justice.gov/sites/default/files/olc/opinions/attachments/2015/05/29/op-olc-v030-p0064.pdf> Re: Nonprofit organizations does not having a financial interest in a particular matter solely by virtue of spending money to advocate a position on the policy under consideration in that matter.
10. Office of Government Ethics (OGE) Legal Advisory (LA) LA-22-06, July 22, 2022, “2022 Conflict of Interest Prosecution Survey” [https://www.oge.gov/web/oge.nsf/News+Releases/69A64B4389390D0C85258887005CF4C0/\\$FILE/LA-22-06.pdf](https://www.oge.gov/web/oge.nsf/News+Releases/69A64B4389390D0C85258887005CF4C0/$FILE/LA-22-06.pdf)
11. Encyclopedia of Ethical Failures: September 2022 & July 2023 Update. <https://dodsoco.oge.osd.mil/Portals/102/Documents/Training%20Materials/Encyclopedia%20of%20Ethical%20Failure%202022%20to%202023.pdf?ver=Mo01ILg7aH0JXqn3Fznu0g%3d%3d>

12. DoD Contracts Exceeding \$25K in FY 2022,
<https://dodsoco.ogc.osd.mil/Portals/102/Documents/Conflicts/2023/%2025K%20covering%20FY2022.pdf?ver=f7CHvUlbGeU%3d>

13. Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions (Final Rule), 76 Fed. Reg. 68017-68026, Nov. 12, 2010--
<http://www.gpo.gov/fdsys/pkg/FR-2011-11-02/pdf/2011-27780.pdf>; 48 C.F.R. Parts 1, 3, 12, and 52--http://www.ecfr.gov/cgi-bin/text-idx?SID=5d78aa0768cb9e6d6d617ae7a068f482&tpl=/ecfrbrowse/Title48/48cfrv1_02.tpl#0

14. Organizational Conflicts of Interest in Major Defense Acquisition Programs (Final Rule), 75 Fed. Reg. 81908-81915, Dec. 29, 2010--<http://www.gpo.gov/fdsys/pkg/FR-2010-12-29/pdf/2010-32713.pdf>; 48 C.F.R. Parts 209-- http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&tpl=/ecfrbrowse/Title48/48cfr209_main_02.tpl; and 252--
http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&tpl=/ecfrbrowse/Title48/48cfr252_main_02.tpl

B. Conflicting Financial Interests – Applicability to Enlisted Personnel and National Guard Members, JER 1-300.b.(1) and 5-301

C. Definition of Special Government Employee (SGE)

1. 18 U.S.C. § 202 - Definitions

2. JER 1-227 – Note that the definition of SGE in 18 U.S.C. § 202 does not include enlisted members. However, for purposes of the JER, enlisted members shall be considered SGEs to the same extent that military officers are included in the meaning of the term.

D. Other Conflicts of Interest Laws and Pertinent Regulations

1. Bribery

- a. 18 U.S.C. § 201 – Bribery of Public Officials and Witnesses

- b. JER 5-400 – Bribery of Public Officials and Witnesses

2. Representational Restrictions (Officers and Civilian Employees Only)

a. Compensated

- (1) 18 U.S.C. § 203 – Compensation to Members of Congress, Officers, and Others in Matters Affecting the Government

(2) JER 5-401 – Compensation to officers and others in matters affecting the Government

b. Compensated or Uncompensated

(1) 18 U.S.C. § 205 – Activities of Officers and Employees in Claims Against and Other Matters Affecting the Government

(2) JER 5-403 – Representation of Others. Prohibition Under 18 U.S.C. 205.

(3) OLC Memo on Application of 18 U.S.C. § 205 to Employees Serving on an Intergovernmental Personnel Act Assignment, Jan. 11, 1999.

<https://www.justice.gov/olc/opinion/application-18-usc-%C2%A7%C2%A0205-employees-serving-intergovernmental-personnel-act-assignment>

c. 18 U.S.C. § 206 – Exemption of Retired Officers of the Uniformed Services

3. Supplementation of Federal Salary

a. Officers and Civilian Employees

(1) 18 U.S.C. § 209 – Salary of Government Officials and Employees Payable Only by United States

(2) 10 U.S.C. § 12601 – Compensation: Reserve on Active Duty Accepting from any Person

(3) JER 3-205 – Remuneration;

(4) JER 5-404 – Compensation from Other Sources

b. Applicability to Enlisted Personnel and National Guards, JER 1-300.b.(1) and JER 5-404

E. Impartiality in Performance of Official Duties

1. National Defense Authorization Act for Fiscal Year 2022, Public Law No 117-81, §1117, 135 Stat. 1541, 1955-1956 (2021) – Enhancement of Recusal for Conflicts of Personal Interest Requirements for Department of Defense Officers and Employees

2. 5 C.F.R. Part 2635, Subpart E – Impartiality in Performing Official Duties

3. 48 CFR Subpart 3.6 – Contracts with Government Employees or Organizations Owned

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4. JER 5-402 – Contracts with DoD Employees
 5. 18 U.S.C. § 211 – Acceptance or Solicitation to Obtain Appointive Public Office
 6. 18 U.S.C. § 219 – Officers and Employees Acting as Agents of Foreign Principals
 7. 5 U.S.C. § 3110 – Employment of Relatives; Restrictions
 8. 5 C.F.R. Part 2635, Subpart H, Outside Activities
 9. 5 C.F.R. Part 2636, Subpart C, Limitations on Outside Earned Income, Employment and Affiliation for Certain Non-career Employees
 10. JER 3-203 – Impartiality of Agency Designee and Travel-Approving Authority
 11. JER 3-204 and 3-302 – Impartiality of DoD Employees
 12. JER 2-205 – Limitation on Solicited Sales
 13. JER 2-206 and 3-304 – Prior Approval of Outside Employment and Business Activities
 14. JER 5-408 – Assignment of Reserves for Training
 15. JER 5-409 – Commercial Dealings Involving DoD Employees
- F. OGE Advisories and Opinions –
<https://www.oge.gov/web/OGE.nsf/Legal%20Research%20Search%20Collection>

II. INTRODUCTION - ETHICS PRINCIPLES COMMONLY INVOLVED

- A. Employees shall place loyalty to the Constitution, the laws, and ethical principles above private gain. 5 C.F.R. 2635.101(b)(1).
- B. Employees may not hold financial interests that conflict with the conscientious performance of their duties. 5 C.F.R. 2635.101(b)(2).
- C. Employees shall not engage in financial transactions using nonpublic information or allow the improper use of such interest to further any private interest. 5 C.F.R. 2635.101(b)(3).
- D. Employees shall not use public office for private gain. 5 C.F.R. 2635.101(b)(7).
- E. Employees shall act impartially and not give preferential treatment to any private organization or individual. 5 C.F.R. 2635.101(b)(8).
- F. Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official duties and responsibilities. 5 C.F.R.

2635.101(b)(10).

- G. **Basic Definition: Conflict of Interest** – a personal or imputed interest, as defined by law or regulation, that conflicts with the faithful performance of one’s official duty.

III. CONFLICTING FINANCIAL INTERESTS, 18 U.S.C. § 208

- A. **Standard:** 18 U.S.C. § 208(a) prohibits an officer or employee 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 statute is intended to prevent an employee from allowing personal interests to affect his official actions and to protect government processes from actual or apparent conflicts of interest. If an employee has a financial interest in a particular matter, it may prevent him from being entirely objective in carrying out his official duties related to that matter.

- (1) The fact that an employee is an honest person is not relevant.
- (2) The fact that an employee does not make the final decision is not relevant.
- (3) All that is required for a violation is that the employee participate personally and substantially in a particular matter and that the particular matter have a direct and predictable effect on his financial interest.
- (4) Criminal Statute. Violators are subject to the penalties provided in 18 U.S.C. § 216.

Note: Employees may have conflicts with entities that are not reportable on financial disclosure reports. Do not be lulled into a false sense of security after reviewing such reports or by using lists of DoD contractors, either local lists or DoD's 25K list. See the Financial Disclosure chapter for additional information on reviewing reports and using such lists.

B. Definitions

1. Agency Designee: See JER 1-202.
2. 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. Particular matters include a judicial or other proceeding, application or request for a ruling or other determination, contract, claim, controversy, charge, accusation, or arrest. 5 C.F.R. 2640.103(a)(1).

- a. Particular matter involving specific parties: Typically involves specific proceedings affecting legal rights of parties or an isolatable transaction or related set of transactions between parties. 5 C.F.R. 2640.102(l).
 - b. Particular matter of general applicability: A particular matter focused on the interests of a discrete and identifiable class of persons, but does not involve specific parties (such as most legislation, rulemaking, or policy making). 5 C.F.R. 2640.102(m).
 - c. OGE DAE Ogram DO-06-029, Oct. 4, 2006, “Particular Matter Involving Specific Parties,” “Particular Matter,” and “Matter.” <https://oge.gov/Web/OGE.nsf/Resources/DO-06-029:+%22Particular+Matter+Involving+Specific+Parties,%22+%22Particular+Matter,%22+and+%22Matter%22>
3. Participate “personally” and “substantially”:
 - a. To participate "personally" means to participate directly. It includes the direct and active supervision of the participation of a subordinate in the matter.
 - b. 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. 5 C.F.R. 2640.103(a)(2).
 4. Direct and predictable effect:
 - a. 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.
 - b. 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. 5 C.F.R. 2640.103(a)(3).

5. Financial interests. For purposes of 18 U.S.C. § 208(a), the term financial interest means the potential for gain or loss to the employee or other persons specified in § 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. 5 C.F.R. 2640.103(b).
6. Imputed 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:
 - a. The employee's spouse. **Includes same-sex marriages.** See OGE LA-13-10: “Effect of the Supreme Court’s Decision in United States v. Windsor on the Executive Branch Ethics Program,” Aug. 19, 2013. [https://www.oge.gov/Web/OGE.nsf/0/3B1D3C208C657795852585BA005BEC7A/\\$FILE/LA-13-10.pdf](https://www.oge.gov/Web/OGE.nsf/0/3B1D3C208C657795852585BA005BEC7A/$FILE/LA-13-10.pdf)
 - b. The employee's minor child;
 - c. The employee's general partner;
 - d. An organization or entity in which the employee serves as an officer, director, trustee, general partner, or employee; and
 - e. A person with whom the employee is negotiating for, or has an arrangement concerning, prospective employment. 5 C.F.R. 2640.103(c).
7. Diversified. The fund, trust, or plan does not have a stated policy of concentrating its investments in any industry, business, country (other than the United States), or bonds of a single state within the United States, and, in the case of an employee benefit plan, means that the plan’s trustee has a written policy of varying plan investments. 5 C.F.R. 2640.102(a).

OGE Ethics DAEOgram DO-00-030, Aug. 25, 2000, “Diversified and Sector Mutual Funds”

<https://www.oge.gov/Web/oge.nsf/Resources/DO-00-030:+Diversified+and+Sector+Mutual+Funds>

and OGE LA-15-09, Jun. 30, 2015, “Diversified and Sector Real Estate Funds (Exemption under 5 C.F.R. 2640.201)”

[https://www.oge.gov/Web/OGE.nsf/Resources/LA-15-09:+Diversified+and+Sector+Real+Estate+Funds+\(Exemption+under+5+C.F.R.+%C2%A7+2640.201\)](https://www.oge.gov/Web/OGE.nsf/Resources/LA-15-09:+Diversified+and+Sector+Real+Estate+Funds+(Exemption+under+5+C.F.R.+%C2%A7+2640.201))

Note: Generally use the standards and definitions in Part 2640 in preference to those in

Part 2635. Part 2640 is the later of the two and addresses only conflicts of interest.

C. Applicability

1. Officers and Civilians – Direct application by the statute.
2. Application to Enlisted Personnel, JER 1-300.b.(1)(a) and 5-301. These sections apply a prohibition similar to § 208 to enlisted members and make it subject to the UCMJ. “Except as approved by the DoD Component DAEO or designee, a “Title 32 National Guard member” and an enlisted member of the Uniformed Services, including an enlisted special Government employee, shall not participate personally and substantially as part of his official DoD duties, in any particular matter in which he, his spouse, minor child, partner, entity in which he is serving as an officer, director, trustee, partner or employee, or any entity with which he is negotiating or has an arrangement concerning prospective employment, has a financial interest.”
3. Application to Special Government Employees (SGEs)
 - a. Definition.
 - (1) An officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States or of the District of Columbia, who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis. 18 U.S.C. § 202(a).
 - (2) A Reserve officer of the Armed Forces, or an officer of the National Guard of the United States, unless otherwise an officer or employee of the United States, shall be classified as an SGE while on active duty solely for training, regardless of the amount of time. 18 U.S.C. § 202(a).
 - (3) A Reserve officer of the Armed Forces or an officer of the National Guard of the United States who is voluntarily serving a period of extended active duty in excess of one hundred and thirty days shall be classified as an officer of the United States within the meaning of 18 U.S.C. §§ 203, 205 through 209, and 218. 18 U.S.C. § 202(a). The orders govern. If the orders stipulate voluntary service in excess of 130 days, then the officer is serving the entire time as a regular officer, but if the orders stipulate 130 days or less, the officer is serving as an SGE.
 - (4) A Reserve officer of the Armed Forces or an officer of the National Guard of the United States who is serving involuntarily shall be classified as an SGE. 18 U.S.C. § 202(a). Although there is no definition of involuntary service in § 202, it is recommend that it be considered any service pursuant to a call or order to active duty other than under 10 U.S.C. § 12301(d).

(5) Under 18 U.S.C. § 202, the terms "officer or employee" and "special Government employee" as used in 18 U.S.C. §§ 203, 205, 207 through 209, and 218, shall not include enlisted members of the Armed Forces.

b. JER 1-227 provides that, for the purposes of the JER, enlisted members shall be considered SGEs to the same extent that military officers are included in the meaning of the term.

D. Reserve Personnel. Prior to the start of active duty for Reserve personnel, Ethics Counselors should screen such personnel to prevent conflicts of interest, the appearance of conflicts of interest, or organizational conflicts of interest. Reservists have an affirmative obligation to disclose material facts in this regard. Reserve personnel also should not be assigned to duties in which they could obtain non-public information that they or their private employer could use to gain an unfair competitive advantage. JER 5-408.

E. Remedies. Remedies for conflicts of interest include regulatory exemptions, disqualification from participation in a conflicting particular matter, divestiture of the conflicting financial or other interest (to include resignation from the conflicting outside position), transfer, reassignment or limitation of duties, qualified trust, waiver, and resignation.

1. Regulatory Exemptions to the Statutory Prohibition (18 U.S.C. § 208(b)(2)).

a. Exemptions for Pooled Investment Vehicles.

(1) Diversified Mutual Funds and Unit Investment Trusts: An employee may participate in any particular matter that affects one or more of the holdings of a diversified mutual fund or diversified unit investment trust where the disqualifying financial interest in the matter arises because of ownership of an interest in the fund or trust. 5 C.F.R. 2640.201(a).

(2) Sector Mutual Funds and sector unit investment trusts: An employee may participate in any particular matter affecting one or more holdings of a sector mutual fund or sector unit investment trust where (a) the affected holding is not invested in the sector in which the fund or trust concentrates and where the disqualifying financial interest in the matter arises because of ownership of an interest in the fund or unit investment trust or (b) the disqualifying interest in the matter arises because of ownership of an interest in the sector fund or a unit investment trust and the aggregate market value of interests in any affected sector funds or unit investment trusts does not exceed \$50,000. 5 C.F.R. 2640.201(b).

(3) Employee Benefit Plans: An employee may participate in any particular matter affecting the holdings of (a) a Thrift Savings Plan (TSP), (b) a pension plan established or maintained by a state government or political subdivision of a State government for its employees, or (c) a diversified employee benefit plan. Note that for a diversified employee benefit plan to qualify for the exemption,

the plan must (i) be administered by an independent trustee, (ii) not allow the employee to participate in the selection of the plan's investments, and (iii) not be a profit-sharing or stock bonus plan. Most plans today give options of specific mutual funds from which to choose and would not fit within this exemption. 5 C.F.R. 2640.201(c). OGE LA-15-06, May 5, 2015, "Employee Benefit Plans through which Employees Hold Diversified Pooled Investment Funds and Employee Benefit Plans Established or Maintained Outside the U.S.";

<https://www.oge.gov/Web/OGE.nsf/Resources/LA-15-06:+Employee+Benefit+Plans+Through+Which+Employees+Hold+Diversified+Pooled+Investment+Funds+and+Employee+Benefit+Plans+Established+or+Maintained+Outside+of+the+United+States>

b. Exemptions for Securities.

- (1) De Minimis for Party Matters: An employee may participate in any particular matter involving specific parties in which the disqualifying financial interest arises from ownership of publicly traded, long-term Federal Government, or municipal securities issued by one or more of the entities affected by the matter and in which the aggregate market value of the securities does not exceed \$15,000. 5 C.F.R. 2640.202(a). Long-term Federal Government Security means a bond or a note, except for a U.S. Savings bond, with a maturity of more than one year issued by the U.S. Treasury. 5 C.F.R. 2640.102(i).
- (2) De Minimis for Matters Affecting Nonparties: An employee may participate in any particular matter involving specific parties in which the disqualifying financial interest arises from ownership of publicly traded, long-term Federal Government, or municipal securities issued by entities that are not parties to, but are affected by, the matter, and in which the aggregate market value of the securities of all affected entities (including those discussed in b.(1), above,) does not exceed \$25,000. 5 C.F.R. 2640.202(b).
- (3) De Minimis for Matters of General Applicability: An employee may participate in any particular matter of general applicability (such as rulemaking) in which the disqualifying financial interest arises from ownership of publicly traded or municipal securities issued by entities that are affected by the matter if the aggregate market value does not exceed \$25,000 in any one entity and \$50,000 in all affected entities, or the securities are long-term Federal securities the value of which does not exceed \$50,000. 5 C.F.R. 2640.202(c).
- (4) Short-term Federal Government Securities and U.S. Savings Bonds: An employee may participate in any particular matter affecting these holdings. 5 C.F.R. 2640.202(d). Short-term for this purpose is a bill with a maturity of one year or less issued by the U.S. Treasury. 5 C.F.R. 2640.102(s).
- (5) Securities Owned by Tax-Exempt Organizations: An employee may participate in any particular matter in which the disqualifying financial interest

arises from ownership by a tax-exempt organization (26 U.S.C. § 501(c)(3) or (4)) of publicly traded, long-term Federal Government securities, or municipal securities, in which the employee is an unpaid officer, director, trustee, or employee; the matter affects the organization's investments (not the organization directly); the employee plays no role in investment decisions; and the organization's relationship to the issuer is only that of investor. 5 C.F.R. 2640.202(e).

- (6) General Partners: An employee may participate in any particular matter in which the disqualifying financial interest arises from the general partner's ownership of publicly traded, long-term Federal Government, or municipal securities if (a) ownership is not related to the general partnership and the value does not exceed \$200,000, or (b) any interest of the general partner if the employee's relationship to the general partner is as a limited partner in a partnership that has at least 100 limited partners. 5 C.F.R. 2640.202(f).

c. Miscellaneous Exemptions (partial listing).

- (1) Hiring Decisions: An employee may participate in the hiring decision of an applicant who is currently employed by a corporation if the disqualifying financial interest arises from ownership of publicly traded securities issued by the corporation or participation in a pension plan sponsored by the corporation. 5 C.F.R. 2640.203(a).
- (2) Leave of Absence from Institutions of Higher Education: An employee on a leave of absence from an institution of higher education may participate in a particular matter of general applicability affecting the institution's financial interests provided the matter will not have a special or distinct effect on the institution other than as part of a class. 5 C.F.R. 2640.203(b).
- (3) Multi-Campus State Institutions of Higher Education: An employee whose disqualifying financial interest is employment at such an institution may participate in any particular matter affecting one campus if employed in a position with no multi-campus responsibilities at a separate campus. 5 C.F.R. 2640.203(c).
- (4) Official Duties that Affect Interest of Federal Employees: An employee whose disqualifying financial interest is a Federal Government salary or benefits or Social Security or veterans benefits may participate in any affected particular matter but may not make determinations that individually or specially affect their own salary or benefits, or those of persons whose interests are imputed to the employee under 18 U.S.C. § 208. 5 C.F.R. 2640.203(d).
- (5) 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 interest arises because of

participation in the program, it is open to the general public, and the employee has no other financial interest in the sponsor. 5 C.F.R. 2640.203(e).

- (6) **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 policy holder unless the matter would affect the company's ability to pay claims under the terms of the policy or to pay the cash value of the policy. 5 C.F.R. 2640.203(f).
- (7) **Special Government Employees:** SGEs serving on advisory committees established pursuant to the Federal Advisory Committee Act (FACA) may participate in particular matters of general applicability when the disqualifying financial interest arises from his non-Federal employment provided the matter will not have a special and distinct effect on the employee or employer other than as part of a class. This would not apply if the financial interest is ownership of stock in the non-Federal employer. 5 C.F.R. 2640.203(g).
- (8) **Official Participation in Nonprofit Organizations.** An employee may participate in any particular matter where the disqualifying financial interest is that of a nonprofit organization in which the employee serves (or is seeking to serve), solely in an official capacity, as an officer, director or trustee. 5 C.F.R. 2640.203(m). OGE LA-13-05, Apr. 9, 2013, "18 U.S.C. 208(b)(2) Exemption for Official Participation in Nonprofit Organizations." [https://www.oge.gov/Web/OGE.nsf/Resources/LA-13-05:+18+U.S.C.+%C2%A7+208\(b\)\(2\)+Exemption+for+Official+Participation+in+Nonprofit+Organizations](https://www.oge.gov/Web/OGE.nsf/Resources/LA-13-05:+18+U.S.C.+%C2%A7+208(b)(2)+Exemption+for+Official+Participation+in+Nonprofit+Organizations)

- 2. **Disqualification.** Disqualification is the statutory default remedy. Unless and until the conflict is remedied by any other means, resolution of the conflict is accomplished by not participating in the particular matter. In a program review, OGE will review all written notices of disqualification. Where disqualification is required, JER 2-204 requires a written notice of disqualification to the supervisor. See 5 C.F.R. 3601.105.
- 3. **Waivers.** Before a waiver is considered, all other remedies should be examined and determined to be inadequate or inappropriate.

a. **Individual Waiver** (18 U.S.C. § 208(b)(1) and 5 C.F.R. 2640.301).

- (1) **Procedure.** DoD employees must make a written request through their supervisors to the cognizant Ethics Counselor. The Ethics Counselor will forward the request, along with findings of fact regarding the items listed in JER 5-302.d(1)-(8), up their chain of command to the Agency DAEO. JER 5-302.b. The Agency DAEO will make a recommendation to the appointing official as to whether the waiver may be granted.

- (a) The disqualifying financial interest, and the nature and circumstances of the particular matter or matters, must be fully disclosed to the appointing

official. 5 C.F.R. 2640.301(a)(1).

- (b) The waiver must be issued in writing by the Government official responsible for appointing the individual to his position. 5 C.F.R. 2640.301(a)(2).
 - (c) The waiver should describe the disqualifying financial interest, the particular matter or matters to which it applies, the individual's role in the matter or matters, and any limitations on the individual's ability to act in such matters. 5 C.F.R. 2640.301(a)(3).
 - (d) The waiver must be issued prior to the individual taking any action in the matter or matters. 5 C.F.R. 2640.301(a)(5).
 - (e) The waiver may apply to both present and future financial interests. 5 C.F.R. 2640.301(a)(6).
- (2) Standard. On behalf of the Agency, the individual responsible for appointing the employee may determine that a disqualifying financial interest in a particular matter or matters is not so substantial as to be deemed likely to affect the integrity of the employee's services to the Government. 5 C.F.R. 2640.301(a)(4). Statements regarding the employee's good character are not relevant in making this determination. Id. The appointing official should consider the following factors in 5 C.F.R. 2640.301(b) in making this determination:
- (a) The type of interest that is creating the disqualification (*e.g.*, stocks, bonds, real estate, other securities, cash payment, job offer, and enhancement of spouse's employment).
 - (b) The identity of the person whose financial interest is involved and if that interest is not the employee's, the relationship of that person to the employee.
 - (c) The dollar value of the disqualifying financial interest, if it is known or can be estimated (*e.g.*, the amount of cash payment that may be gained or lost, the salary of the job that may 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 particular matter to the company issuing the stock, or the change in the value of real estate or other securities).
 - (d) The value of the financial instrument or holding from which the disqualifying financial interest arises (*e.g.*, face value of the stock, bond, other security, or real estate) and its value in relationship to the individual's investments. In making a recommendation, Ethics Counselors must include the current value of all investments. When the financial interest of an organization is imputed to a DoD employee, also include the value of the

particular matter to the organization and the relationship between that value and the organization's net worth or annual net income.

- (e) 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.
 - (f) Other factors: The sensitivity of the matter; the need for the employee's services in the particular matter; and 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.
- (3) See (b)(3) below.
 - (4) In a program review, OGE will review all waivers, so be careful.
 - (5) See OGE DAEOgram DO-07-006, Feb. 23, 2007, "Waivers Under 18 U.S.C. 208." [https://www2.oge.gov/web/oge.nsf/Resources/DO-07-006:+Waivers+under+18+U.S.C.+%C2%A7+C2%A7+208\(b\)\(1\)+and+\(b\)\(3\)](https://www2.oge.gov/web/oge.nsf/Resources/DO-07-006:+Waivers+under+18+U.S.C.+%C2%A7+C2%A7+208(b)(1)+and+(b)(3))
 - (6) See OGE DAEOgram DO-10-005, Apr. 22, 2010, "Guidance on Waivers under 18 U.S.C. 208, Authorizations under 5 C.F.R. 2635.502(d), and Waivers under Agency Supplemental Regulations." [https://www2.oge.gov/web/oge.nsf/Resources/DO-10-005:+Guidance+on+Waivers+under+18+U.S.C.+%C2%A7+208\(b\),+Authorizations+under+Agency+Supplemental+Regulations](https://www2.oge.gov/web/oge.nsf/Resources/DO-10-005:+Guidance+on+Waivers+under+18+U.S.C.+%C2%A7+208(b),+Authorizations+under+Agency+Supplemental+Regulations)
 - (7) See OGE LA-12-07, Dec. 6, 2012, "Continuing Waiver for Transferred Employees." <https://www2.oge.gov/Web/OGE.nsf/Resources/LA-12-07:+Continuing+Waiver+Validity+for+Transferred+Employees>
- b. Waiver for Special Government Employees (18 U.S.C. § 208(b)(3) and 5 C.F.R. 2640.302). An agency may determine, in an individual case, that the prohibition of 18 U.S.C. § 208(a) should not apply to a SGE serving on, or an individual being considered for appointment to, an advisory committee established under the FACA, notwithstanding the fact that the individual has one or more financial interests that would be affected by the activities of the advisory committee. The agency's determination must be based on a certification that the need for the employee's services outweighs the potential for a conflict of interest created by the financial interest involved. 5 C.F.R. 2640.302(a).

- (1) Waivers under 18 U.S.C. § 208(b)(3) must comply with the following requirements set forth in 5 C.F.R. 2640.302(a):
 - (a) The advisory committee must be one within the meaning of the FACA;
 - (b) The waiver must be issued in writing by the Government official responsible for the individual's appointment;
 - (c) The waiver must include a certification that the need for the employee's services on the advisory committee outweighs the potential for a conflict of interest.
 - (d) The facts upon which the certification is based should be fully described in the waiver, including the nature of the financial interest, and the particular matter or matters to which the waiver applies;
 - (e) The waiver should describe any limitations on the individual's ability to act in the matter or matters;
 - (f) The waiver must be issued prior to the individual taking any action in the matter or matters; and
 - (g) The waiver may apply to both present and future financial interests of the individual, provided the interests are described with sufficient specificity.
- (2) Standard. The agency's determination must be based on a certification that the need for the employee's services outweighs the potential for a conflict of interest created by the financial interest involved. In making this determination, the appointing official should consider the following factors set forth in 5 C.F.R. 2640.302(b):
 - (a) The type of interest that is creating the disqualification (*e.g.*, stock, bonds, real estate, other securities, cash payment, job offer, or enhancement of spouse's employment).
 - (b) The identity of the person whose financial interest is involved and if that interest is not the employee's, the relationship of that person to the employee.
 - (c) The uniqueness of the individual's qualifications;
 - (d) The difficulty in locating a similarly qualified individual without a disqualifying financial interest to serve on the committee.

- (e) The dollar value of the disqualifying financial interest, if it is known or can be estimated (*e.g.*, the salary of the job that may be gained or lost, the predictable change in either the market value of the stock or the potential profit or loss, or the change of value of real estate or other security.)
- (f) The value of the financial instrument or holding from which the disqualifying financial interest arises (*e.g.*, face value of stock, bond, or other security) and its value in relationship to the individual's investments. In making a recommendation, Ethics Counselors must include the current value of all investments. When the financial interest of an organization is imputed to a DoD employee, also include the value of the particular matter to the organization and the relationship between that value and the organization's net worth or annual net income.
- (g) The extent to which the disqualifying financial interest will be affected individually or particularly by the actions of the advisory committee.

(3) When practicable, a Government official is required to consult formally or informally with OGE prior to granting a waiver. 5 C.F.R. 2640.303. A copy of each such waiver is to be forwarded to OGE. 5 C.F.R. 2640.303. A copy of the waiver is publicly available upon request. 5 C.F.R. 2640.304. In a program review, OGE will review all waivers.

Note: DoD recommends that you use two memoranda. One is the actual waiver signed by the appointing official containing the statutory determination language and sufficient supporting facts, which is releasable, and the other is a legal memorandum discussing the facts in more detail for the official, which is not releasable.

4. Other Remedies.

- a. Reassignment.
- b. Change of Duties.
- c. Divestiture of Financial Interest. If an employee agrees to divest the disqualifying financial interest, he may be able to defer recognition of the capital gains tax with a Certificate of Divestiture (CD) issued by the Director, Office of Government Ethics. 5 C.F.R. Part 2634, Subpart J. CDs must be issued before the individual divests. If it is not issued before, the individual cannot use it to defer taxes.

We recommend putting that fact in writing to employee. Note that CDs are given only to defer taxes on capital gains and not other types of income.

See OGE DAEOgrams DO-06-030, Oct. 11, 2006 "Procedures for Requesting a Certificate of Divestiture,"

<https://oge.gov/Web/OGE.nsf/Resources/DO-06-030:+Procedures+for+Requesting+a+Certificate+of+Divestiture> and DO-07-035, Sep. 25, 2007, "Suggested Format for Requesting a Certificate of Divestiture" [DAEOgrams-- DO07035 -- September 25, 2007 -- Suggested Format for Requesting a Certificate of Divestiture \(oge.gov\)](#)

IV. PROHIBITED FINANCIAL INTERESTS, 5 C.F.R. 2635.403

- A. Basic prohibition. 5 C.F.R. 2635.403. Employees shall not acquire or hold any financial interest that they are prohibited from acquiring or holding by statute, by agency supplemental regulation, or by reason of an agency determination of substantial conflict.

NOTE: There is no statute of Government wide applicability prohibiting employees from holding or acquiring any particular financial interest. Statutory restrictions, if any, are contained in agency statutes which, in some cases, may be implemented by agency regulations. DoD has no such statute at this time. But see, Intelligence Community (IC) Directive 117, dated June 9, 2013, implementing 50 U.S.C. 403-1(u) requiring the DNI to establish policy prohibiting an officer or employee of an element of the intelligence community from engaging in outside employment if such employment creates a conflict of interest or appearance thereof. IC Directive 117 requires review and approval of all outside employment for IC personnel.

- B. Agency regulation prohibiting certain financial interests. 5 C.F.R. 2635.403(a). An agency may, by supplemental agency regulation issued after February 3, 1993, prohibit or restrict the acquisition or holding of a financial interest or a class of financial interests by agency employees, or any category of agency employees, and the spouses and minor children of those employees, based on the agency's determination that the acquisition or holding of such financial interests would cause a reasonable person to question the impartiality and objectivity with which agency programs are administered. Where the agency restricts or prohibits the holding of certain financial interests by its employees' spouses or minor children, any such prohibition or restriction shall be based on a determination that there is a direct and appropriate nexus between the prohibition or restriction as applied to spouses and minor children and the efficiency of the service. DoD has no such regulation at this time.
- C. Agency determination of substantial conflict. 5 C.F.R. 2635.403(b). An agency may prohibit or restrict an individual employee from acquiring or holding a financial interest or a class of financial interest based upon the agency designee's determination that the holding of such interest or interests will:
1. Require the employee's disqualification from matters so central or critical to the performance of his or her official duties that the employee's ability to perform the duties of the position would be materially impaired; or

2. Adversely affect the efficient accomplishment of the agency's mission because another employee cannot be readily assigned to perform work from which the employee would be disqualified by reason of the financial interest.

D. Definition of financial interest. 5 C.F.R. 2635.403(c)(1).

1. Except as provided in 5 C.F.R. 2635.403(c)(2), the term financial interest is limited to financial interests that are owned by the employee or by the employee's spouse or minor children. However, the term is not limited to only those financial interests that would be disqualifying under 18 U.S.C. § 208(a) and 5 C.F.R. 2635.402. The term includes any current or contingent ownership, equity, or security interest in real or personal property or a business and may include an indebtedness or compensated employment relationship. It thus includes, for example, interests in the nature of stocks, bonds, partnership interests, fee and leasehold interests, mineral and other property rights, deeds of trust, and liens, and extends to any right to purchase or acquire any such interest, such as a stock option or commodity future. It does not include a future interest created by someone other than the employee, his spouse, or dependent child or any right as a beneficiary of an estate that has not been settled.
2. Under 5 C.F.R. 2635.403(c)(2), the term financial interest includes service, with or without compensation, as an officer, director, trustee, general partner, or employee of any person, including a nonprofit entity, whose financial interests are imputed to the employee under 5 C.F.R. 2635.402(b)(2)(iii) or (iv).

- E. Reasonable period to divest or terminate. 5 C.F.R. 2635.403(d). Whenever an agency directs divestiture of a financial interest, the employee must be given a reasonable period of time, considering the nature of their particular duties and the nature and marketability of the interest, within which to comply with the agency's direction. Except in cases of unusual hardship, as determined by the agency, a reasonable period shall not exceed 90 days from the date divestiture is first directed. As long as the employee continues to hold the financial interest, however, he remains subject to any restrictions (disqualification) imposed by this subpart.

- F. An employee required to sell or divest a financial interest may be able to defer recognition of the capital gains tax with a CD issued by the Director, Office of Government Ethics. See Section III.E.4.c and d. above.

V. IMPARTIALITY IN PERFORMING OFFICIAL DUTIES, 5 C.F.R. 2635, SUBPART E

A. Standard.

1. Determination by Employee. Without prior authorization, an employee should not participate in a particular matter involving specific parties that he knows is likely to

- have a direct and predictable effect on the financial interests of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, if he determines that a reasonable person with knowledge of the relevant facts would question his impartiality in the matter. 5 C.F.R. 2635.502(a).
2. Catch-all Provision. An employee who is concerned that circumstances other than those specifically described in this section would raise a question regarding his impartiality should use the process described in this section to determine whether he should or should not participate in a particular matter. 5 C.F.R. 2635.502(a)(2).
 3. Hidden Provision. To ensure that the performance of his official duties does not give rise to an appearance of use of public office for private gain or of giving preferential treatment, an employee whose duties would affect the financial interests of a friend, relative or person with whom he is affiliated in a non-Governmental capacity shall comply with any applicable requirements of section 2635.502. 5 C.F.R. 2635.702(d).
 4. Determination by agency designee. An agency designee may make an independent determination as to whether a reasonable person with knowledge of the relevant facts would be likely to question the employee's impartiality in the matter. Ordinarily, this is initiated by the employee informing his agency designee of the potential appearance problem. However, the agency designee may make this determination on his own initiative or when requested by the employee's supervisor or any other person responsible for the employee's assignment. If the agency designee determines that the employee's impartiality is not likely to be questioned, the employee's participation in the matter would be proper. This determination may be made at any time, including after the employee has disqualified himself from participation. The agency designee's determination controls. If the agency designee determines that the employee's impartiality is likely to be questioned, he shall then determine whether the employee should be authorized to participate in the matter. 5 C.F.R. 2635.502(c).
 5. An employee's reputation for honesty and integrity is not a relevant consideration for purposes of this determination.

B. Definitions (5 C.F.R. 2635.502(b)).

1. "Member of household" includes grown children, significant others, in-laws, and roommates.
2. Employees have a "covered relationship" with:
 - a. A person (other than a prospective employer under 2635.603(c), in which case 5 C.F.R. Subpart F applies) with whom they have or seek a business, contractual, or other financial relationship that involves other than a routine consumer transaction;

- b. A person who is a member of their household, or who is a relative with whom they have a close personal relationship;
 - c. A person for whom the employee's spouse, parent, or dependent child, to their knowledge, is serving or seeking to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee.
 - d. A person for whom they have, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee; or
 - e. An organization, other than a political party described in 26 U.S.C. 527(e), in which they are active participants. Participation is active if, for example, it involves service as an official of the organization or in a capacity similar to that of a committee or subcommittee chairperson or spokesperson, or participation in directing the activities of the organization. In other cases, significant time devoted to promoting specific programs of the organization, including coordination of fundraising efforts, is an indication of active participation. Payment of dues or solicitation of financial support does not, in itself, constitute active participation.
3. Direct and predictable effect has the meaning set forth in 2635.402(b)(1). See III.B.4, above.
- C. Resolution of an Impartiality Concern. Similar to conflict under 18 U.S.C. § 208 except there are no regulatory exemptions and an administrative authorization by an agency designee is substituted for a statutory waiver.
- 1. Disqualification. Disqualification is the regulatory default remedy. Unless and until the impartiality concern is remedied by other means, resolution is accomplished by not participating in the particular matter. Where disqualification is required, JER 2-204 requires a written notice of disqualification to the supervisor. In a program review, OGE will review all written notices of disqualification.
 - 2. Authorization by Agency Designee. Where an individual's participation in a particular matter involving specific parties would not violate 18 U.S.C. § 208(a), but would raise a question in the mind of a reasonable person about his or her impartiality, the agency designee may authorize the individual to participate in the matter based on a determination, made in light of all the circumstances, that the interest of the Government in the individual's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. 5 C.F.R. 2635.502(d).
 - a. Factors that should be considered in making this determination include:

- (1) The nature of the relationship involved;
- (2) The effect that resolution of the matter would have upon the financial interests of the person involved in the relationship;
- (3) 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;
- (4) The sensitivity of the matter;
- (5) The difficulty of reassigning the matter to another employee; and
- (6) Adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

Documentation. Authorization by the agency designee shall be documented in writing at the agency designee's discretion or when requested by the employee. It is recommended that the determination be written to protect the employee. An employee who has been authorized to participate in a particular matter involving specific parties may not thereafter disqualify himself from participation in the matter on the basis of an appearance problem involving the same circumstances that have been considered by the agency designee.

VI. EXTRAORDINARY PAYMENTS FROM FORMER EMPLOYERS, 5 C.F.R. 2635.503

In the absence of a waiver, employees who have received an extraordinary severance or other payment from a former employer prior to entering Government service are subject to a two-year period of disqualification from participation in particular matters in which that former employer is or represents a party. The two-year period of disqualification begins to run on the date that the extraordinary payment is received.

A. Definitions. For purposes of this section, the following definitions shall apply:

1. Extraordinary payment means any item, including cash or an investment interest, with a value in excess of \$10,000, which is paid:
 - a. On the basis of a determination made after it became known to the former employer that the individual was being considered for or had accepted a Government position; and
 - b. Other than pursuant to the former employer's established compensation, partnership, or benefits program. A compensation, partnership, or benefits program

will be deemed an established program if it is contained in bylaws, a contract or other written form, or if there is a history of similar payments made to others not entering into Federal service.

2. Former employer includes any person for which that employee served as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee.

a. Waiver of disqualification. The disqualification requirement of this section may be waived based on a finding that the amount of the payment was not so substantial as to cause a reasonable person to question the employee's ability to act impartially in a matter in which the former employer is or represents a party. The waiver shall be in writing and may be given only by the head of the agency or, where the recipient of the payment is the head of the agency, by the President or his designee. Waiver authority may be delegated by agency heads to any person who has been delegated authority to issue individual waivers under 18 U.S.C. § 208(b) for the employee who is the recipient of the extraordinary payment.

VII. OTHER CONFLICT OF INTEREST STATUTES

A. Bribery, 18 U.S.C. § 201

1. Standard. It is a crime to corruptly give, offer or promise anything of value directly or indirectly to a public official with the intent to influence any official act (§ 201(b)(1)); or to corruptly receive anything of value as a public official to be influenced in the performance of an official act (§ 201(b)(2)).
2. Definitions.
 - a. "Public Official" includes anyone acting for or on behalf of the United States; can include persons who are not Federal personnel.
 - (1) Includes enlisted members. JER 5-400.
 - (2) Includes support contractor employees.
 - b. "Thing of Value" is used throughout Title 18 and is broadly construed to include intangibles as well as tangibles. It is the value attached to the bribe by the defendant rather than its commercial value.
 - c. "Official Act" is any decision or action on any matter or controversy in which the United States has an interest.
3. Intent. Proof must show two specific elements:
 - a. The offender must have acted "corruptly," that is, "willfully."

- b. The offender must have also acted with the intent to influence (*i.e.*, there must be an actual or intended quid pro quo).
4. Lesser Included Offense - Unlawful Gratuities - 18 U.S.C. § 201(c) - Must not offer or take anything of value for or because of any official act performed or to be performed.
- a. Varying degrees of same conduct.
 - b. Primary difference between bribes and gratuities -- intent to influence.
 - c. 1989 Ethics Reform Act gave OGE the authority to define exceptions to 18 U.S.C. § 201(c) -- see 5 C.F.R. 2635.202(b).
 - d. See United States v. Sun-Diamond Growers of California, 526 U.S. 398 (1999).
- B. Prohibition Against Private Compensation for Services Before Government Agencies, 18 U.S.C. § 203; JER 5-401. This prohibition does not apply to enlisted members.
1. Standard. Officers or employees may not:
 - a. demand, seek or receive compensation for any representational services as agent or attorney, rendered personally or by another, while an officer or employee;
 - b. before any Executive or Judicial branch agency, court or commission in relation to a "particular matter" in which the United States is a party or has a direct and substantial interest.
 2. Exceptions:
 - a. Special Government Employees (subsection 203(c)). The prohibition applies only to particular matters involving specific parties in which the individual participated personally and substantially as a Government employee or SGE. The prohibition also applies to particular matters involving specific parties that are pending in the agency in which SGE is serving, but only if the SGE served more than a total of 60 days during the preceding 365 days. As such, an SGE serving more than 60 days, even if uncompensated (e.g., most FACA members), may have severe representational restrictions. This is especially the case for a full-time employee who resigns and then becomes an SGE as it will take 10 months to clear a 60-day period. See US DoD SOCO: “An Ethics Guide for Special Government Employees, including Consultants and Experts (such as Advisory Committee Members”,
<https://dodsoco.ogc.osd.mil/Portals/102/Documents/Special%20Interest%20topics/SGE/2020%20SGE%20Guide%20no%20certificate.pdf?ver=6t8rMBUZxIpsEMvVHYjnNw%3d%3d>
 - b. Representing Family Members or Estate (subsection 203(d)). A Federal employee may represent his parents, spouse, children, or any person or estate for which he

serves as a fiduciary. The exception does not apply, however, if:

- (1) he participated personally and substantially in the particular matter; or
- (2) the particular matter is under his official responsibility.

- c. Performance Under Government Contract or Grant (subsection 203(e)). There is also an exception for an SGE representing another person regarding performance under a grant or contract with the U.S. if the head of the agency certifies in writing that the national interest requires the representation and publishes the certification in the Federal Register.
 - d. Testifying Under Oath (subsection 203(f)). There is an exception for providing testimony under oath or for making statements required to be made under penalty of perjury.
 - e. Retired Officers. 18 U.S.C. § 203 does not apply to a retired officer not on active duty (and not otherwise an officer or employee). 18 U.S.C. § 206.
3. A military officer on terminal leave or engaged in off-duty employment (moonlighting) is covered, and so may not represent his civilian employer to U.S. officials during this period. Almost all work in a Federal workspace as a contractor employee would trigger this prohibition. Ensure a discussion of 18 U.S.C. § 203 is included in all outside employment/activity and post-government employment counseling and advice.
 4. This prohibition may also affect an employee who leaves government service and shares in the proceeds of a partnership or business for representational services that occurred before the employee terminated government service (e.g., lobbying, consulting, and law firms).
- C. Prohibitions Against Representing Others in Claims against, and in other matters affecting, the United States, 18 U.S.C. § 205; JER 5- 403. This prohibition does not apply to enlisted members.
1. Standard. Officers or employees may not:
 - a. Act as agent or attorney to prosecute any claim against the United States, or receive any gratuity, or share of any such claim, in exchange for assistance; or
 - b. Act as agent or attorney before any Executive or Judicial branch agency, court or commission concerning a covered matter in which the United States is a party or has a direct and substantial interest.
 2. A "covered matter" is virtually the same as a "particular matter." 18 U.S.C. § 205(h).
 3. See OGE DAEOgram DO-07-015, May 17, 2007, "Immigration Support Letters and 18 U.S.C. § 205." Where an employee makes a communication to the Government in support of the interests of another person, the employee does not violate 18 U.S.C.

§ 205 unless there is some degree of control by the principal over the agent who acts on his or her behalf.

<https://www.oge.gov/Web/OGE.nsf/Resources/DO-07-015:+Immigration+Support+Letters+and+18+U.S.C.+%C2%A7+205>

4. Exceptions.

- a. Special Government employees. 18 U.S.C. § 205(c). See VII.B.2.a., above.
 - b. Federal employees may, without compensation, represent other Federal employees in disciplinary, loyalty, or other personnel administration proceedings. 18 U.S.C. § 205(d)(1)(A).
 - c. Employees may provide uncompensated representation for non-profit cooperative voluntary, professional, recreational, or similar organizations, if a majority of members are current officers or employees of U.S. or the District of Columbia, their spouses or dependent children. The exception does not apply, however, if the covered matter is a claim involving the U.S., a proceeding in which the organization is a party, or involves a grant, contract, or other agreement for disbursement of Federal funds to the organization. 18 U.S.C. § 205(d)(1)(B).
 - d. Family members or estate. 18 U.S.C. § 205(e). See VII.B.2.b., above. See OGE LA-12-09, Dec. 14, 2012, “Scope of Exception for Representation of a Parent or Child before the Government Under 18 U.S.C. § 205(e).”
[https://www.oge.gov/Web/OGE.nsf/Resources/LA-12-09:+Scope+of+the+Exception+for+Representation+of+a+Parent+or+Child+before+the+Government+under+18+U.S.C.+%C2%A7+205\(e\)](https://www.oge.gov/Web/OGE.nsf/Resources/LA-12-09:+Scope+of+the+Exception+for+Representation+of+a+Parent+or+Child+before+the+Government+under+18+U.S.C.+%C2%A7+205(e))
 - e. Performance under Government Contract or Grant. 18 U.S.C. § 205(f). See VII.B.2.c., above.
 - f. Testifying Under Oath. 18 U.S.C. § 205(g). See VII.B.2.d., above.
 - g. Retired officers. 18 U.S.C. § 206. See VII.B.2.e., above.
 - h. Labor Organization Activities under Chapter 71 of Title 5. 18 U.S.C. § 205(i).
5. A military officer on terminal leave or engaged in off-duty activities is covered, and so may not represent others to U.S. officials during this period. Ensure a discussion of 18 U.S.C. § 205 is included in all outside employment/activity and post-government employment counseling and advice.
- D. Restrictions on Post-Government Employment Activities, 18 U.S.C. § 207. See Deskbook Chapter on Post-Government Employment Restrictions.
- E. Prohibition against Compensation by Private Parties for Official Services of Regular Government Officials (improper supplementation of salary), 18 U.S.C. § 209; JER 5-404.

Conflicts of Interest
Ethics Counselor's Deskbook
2023

18 U.S.C. § 209 does not apply to enlisted members. However, JER 5-404 is applicable to enlisted personnel and prohibits similar conduct.

1. Based on the principle that Government officials should not be paid for their official acts by private parties having the discretion to terminate such payments at will. One concern is that Government officials whose salaries are supplemented by private parties will tend to show favoritism to their paymasters even in the absence of any specific quid pro quo. See Perkins, "The New Federal Conflict of Interest Law", 76 Harv. L. Rev. 1113, 1119, 1137-38 (1963).
 2. Must demonstrate that the payment was made specifically for the officer's or employee's services as such an officer or employee; the statute does not prohibit receipt of payment for the official's non-Government work nor gifts unrelated to Government service. United States v. Muntain, 610 F.2d 964 (D.C. Cir. 1979). Be careful, and see 5 C.F.R. 2635.202(c)(4). If a gift is actually compensation prohibited by § 209, it may not be accepted under the Part 2635 gift exceptions.
 3. Recurring issue. Whether a payment made to a Federal official upon entry into Federal service from private industry is a payment for past services or was instead made to supplement his Federal salary. Relevant factors include the form of the payment (lump sum or monthly payments), or the presence of dealings between the former employee and the Federal official's agency.
 4. This section does not prohibit a member of the reserve components of the armed forces on active duty pursuant to a call or order to active duty under a provision of law referred to in 10 U.S.C. § 101(a)(13) from receiving from any employer before the call or order, any payment of any part of the salary or wages that such person would have paid the member if the member's employment had not been interrupted by such call or order. 18 U.S.C. § 209(h) and 10 U.S.C. § 12601.
 5. OGE DAEOgram DO-02-016/016A; Jul. 1, 2002, "18 U.S.C. 209 Guidance," and "Attachment – Summary of Restrictions on Supplementation of Salary 18 U.S.C. 209." <https://www.oge.gov/Web/oge.nsf/Resources/DO-02-016:+18+U.S.C.+%C2%A7+209+Guidance>
 6. OGE DAEOgram DO-08-037; Nov. 6, 2008, Recent Legislative Activity Affecting Executive Branch Programs." Employee participation in loan forbearance or payment programs under the College Opportunity and Affordability Act, Pub. L. 110-315, would not violate 18 U.S.C. § 209. <https://www2.oge.gov/web/oge.nsf/Resources/DO-08-037:+Recent+Legislative+Activity+Affecting+the+Executive+Branch+Program>
- F. The Procurement Integrity Act, 41 U.S.C. § 2101 - 2107; FAR Subpart 3.104. See Chapter on Post-Government Employment Restrictions.
- G. Additional Pay and Allowances, 5 U.S.C. § 5536, JER 5–405. See Chapter on Outside Activities.

- H. Interference with Military Duties, 10 U.S.C. § 973(a), JER 5-406. See Chapter on Outside Activities.
- I. Civil Office Prohibition, 10 U.S.C. § 973(b), JER 5-407. See Chapter on Outside Activities.

VIII. HELPFUL HINTS - HOW TO IDENTIFY A CONFLICT

- A. Financial Disclosure Reports (OGE Form 278/OGE Form 450).
- B. Training (Briefings for Procurement Boards).
- C. Frequent Interaction with Supervisors.
- D. Know Your Client.

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