



# SOCO Short Course Conflicts of Interest

August 2023

# Why Ethics Laws Matter:

- ▶ If you once forfeit the confidence of your fellow citizens, you can never regain their respect and esteem. It is true that you may fool all of the people some of the time; you can even fool some of the people all of the time; but you can't fool all of the people all of the time. Speech at Clinton, Illinois, September 8, 1854—Abraham Lincoln



# 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 & Procurement Integrity Act
- ▶ 18 USC § 209
- ▶ 18 USC § 216



# What You Should Learn:

- ▶ To spot a 208 issue
- ▶ To spot a 203/205 issue
- ▶ To spot a 209 issue
- ▶ To spot a 502 issue



# Conflict of Interest:

- ▶ 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 indeed abuses their position for private gain.



# Preventing Conflicts of Interest

- ▶ The primary mission of the Executive Branch Ethics Program is to prevent conflicts of interest on the part of Executive Branch employees. 5 CFR 2638.101(a)
- ▶ How is that accomplished?
  - ▶ Ethics training
  - ▶ Financial disclosure
  - ▶ Ethics advice



# 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 Personally & Substantially

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



# Particular Matter:

- ▶ Matter focused upon the interests of specific persons, or 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
- ▶ Key: Can you identify who is involved?



# Direct and Predictable

## ▶ Direct:

- ▶ Close causal link between any decision or action in the matter, &
- ▶ Any expected effect of the matter on the financial interest

## ▶ Predictable:

- ▶ Real as opposed to speculative possibility
  - ▶ Matter will effect the financial interest
- ▶ Magnitude of gain/loss is immaterial (no de minimis)

# 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
- ▶ Ask: Is there a real possibility that someone may gain or lose as a result of Government action on the particular matter?

# IMPUTED INTERESTS:

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

# Applies to

- ▶ Federal Civilian Employees
- ▶ Military Personnel
  - ▶ Active Duty and Reserve
  - ▶ Officers
  - ▶ Enlisted (not 208)
- ▶ Special Government employees
- ▶ Presidential Appointees (Non-career SES & Schedule C)

# Resolve Conflict:

- ▶ Disqualification/Recusal
- ▶ Divest financial interest
- ▶ Individual waiver
- ▶ Reassignment/change of duty
- ▶ Regulatory exemption
- ▶ Waiver for special Government employees



# Regulatory Exemptions

## -Pooled Investments (208(b)(2))

- ▶ Widely Diversified Mutual Funds (no limit)
- ▶ Sector Mutual Funds (capped at \$50,000)
- ▶ Employee Benefit Plans
- ▶ 5 CFR 2640.201

# Regulatory Exemptions -Securities

- ▶ De minimis (capped at \$15,000)
- ▶ De minimis for matters affecting nonparties (\$25,000)
- ▶ De minimis for matters of general applicability (\$25,000 in any one/\$50,000 total in all)
- ▶ No de minimis exemption for virtual currency/cryptocurrency
- ▶ Short Term Federal Securities
- ▶ Securities Owned by Tax Exempt Organizations (& employee is an unpaid officer, director or employee)
- ▶ General Partners (certain interests)
- ▶ 5 CFR §2640.202



# Regulatory Exemptions -Miscellaneous

- ▶ Hiring Decisions
- ▶ Leave of Absence
- ▶ Multi-Campus Institution
- ▶ Official Duties
- ▶ Commercial Discounts
- ▶ Mutual Insurance Company
- ▶ Special Government employees
- ▶ Official Participation in Nonprofit Organizations
- ▶ 5 CFR § 2640.203

# Waiver 208(b)(1)

- ▶ 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)

# Waiver 203(b)(3)

- ▶ For special Government employee 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
- ▶ Identity of sGe & his qualifications a factor
- ▶ Issued prior to action
- ▶ Consult with U.S. Office of Government Ethics when practicable
- ▶ Publicly available
- ▶ RARE (almost never)

# PROHIBITED Financial Interests

- ▶ If prohibited by statute
- ▶ 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.



# War Stories

## #1 & 2

- ▶ Druyan—prospective employer
- ▶ Stadd—outside employer



# 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



# 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)



# NEW/from NDAA for FY2022

- ▶ For two years, for DoD employees, any organization, to include a trade organization, for which the officer or employee served as an employee, officer, director, trustee or general partner
- ▶ Effective for those terminating non-Federal employment after December 27, 2021

# 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).

# War Stories

## #3

- ▶ Gov employee who is also the president of an outside organization is the keynote speaker at the outside organization's annual meeting, and he is on Official Time and Gov Travel Orders



# 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



# 18 USC § 201 Bribery Statute

- ▶ Quid Pro Quo
- ▶ Crime to corruptly give, offer or promise anything of value directly or indirectly to a Gov official with the intend to influence any official act or the commission of fraud
- ▶ Crime for the Gov official to accept



# War Story

## #4

- ▶ US Attorney's Office for SDNY prosecutions of DOC employees



# 18 USC § 202

- ▶ Defines special Government employee (sGe)
- ▶ Defines Government official & employee—excludes enlisted





# War Story

## #5

- ▶ The definition of a special Gov employee



# 18 USC § 203

## Representation/Compensation

- ▶ Gov employees are prohibited from accepting compensation for representing a third party back to the Gov
  - ▶ Does not apply in full for special Government employees working less than 61 days
  - ▶ 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 § 205

## Representation

- ▶ Gov employees are prohibited from representing third parties back to the Gov
  - ▶ Again, limited for special Government employees working less than 61 days
  - ▶ 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

# War Story #6

- ▶ DHA Director & speaker requests from ADSMs & the organizations in which they are active participants



# Post Gov Employment Restrictions

- ▶ Procurement Integrity Act
- ▶ 18 USC § 207
- ▶ Both statutes will be covered in detail by SOCO's Jeff Green on Wednesday



# 18 USC § 209

## Supplementation of Salary

- ▶ Prohibits a third party from paying salary or any contribution to Gov employee for performing Gov duties
- ▶ Includes gifts



*"I appreciate your offer, but I'm afraid I'm already bought and paid for."*

# War Story

## #7-9

- ▶ \$20K retention bonus
- ▶ Boy Scouts & Astronauts
- ▶ Secretary Espy



# 18 USC § 216

## Penalty Statute

- ▶ Imprisoned for not more than one (1) year
- ▶ Willful engagement, imprisoned for not more than five (5) years
- ▶ Fined \$50,000
- ▶ Per count



# What we learned--

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



# Test Your Knowledge

- ▶ May I work on matters for the Gov that affect my spouse's employer?
- ▶ May I continue to work on matters affecting my prospective employer?
- ▶ May I serve on an SSEB where my former employer is a competitor?
- ▶ May I represent my elderly neighbor in a proceeding before the IRS?
- ▶ May I accept a post Pandemic/Return to Work gift of a weekend stay at a spa from a company with a Gov contract for which I am the COR?

# References:

- ▶ 18 USC §§ 201-209, 216
- ▶ 5 CFR Parts 2635, 2638 & 2640
- ▶ DoD 5500.07-R (JER), Chapters 2, 3 & 5
- ▶ [www.usoge.gov](http://www.usoge.gov)
- ▶ [http://ogc.osd.mil/defense\\_ethics/](http://ogc.osd.mil/defense_ethics/)
- ▶ Ethics Community (War Stories)

# Remember:

- ▶ Nearly all men can stand adversity, but if you want to test a man's character, give him power.





QUESTIONS???