

April 2023

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This Ethics Flash is
brought to you by:

18 USC § 208

5 CFR § 2640.201 et seq

5 CFR § 2635.501 - 502

DoD 5500.7-R
Joint Ethics Regulation**ETHICS FLASH**
Fiscal, Ethics, and Administrative Law Division
(SAF/GCA)

Navigating Conflicts of Interest

A Layover from Travel in Conflicts of Interest Land

We interrupt our three-part travel series to bring you the low down (do the kids still say that? Are we showing our age?) on conflicts of interest under 18 USC § 208. Why? So glad you asked! Scrutiny over the financial conflicts of interest of federal employees is on the rise. It's the perfect time to highlight a complicated area of law. Before we get started, there are a few things you should keep in mind.

First, it may seem obvious but surprisingly few employees

understand that federal criminal law governs financial conflicts of interest. A violation of 18 USC § 208 comes with jail time, a sizable fine, or both. Second, as a reminder, this newsletter is not a substitute for legal advice. If you think you may have a conflict, phone a friend (that would be us)! Last, 18 USC § 208 applies to all federal employees. Do not assume that since you don't file an OGE Form 278e or 450, the law does not apply to you.

For this Ethics Flash, we are going to stick to the general ap-

plication of 18 USC § 208. We will define its components, how to resolve conflicts (if possible), and touch on conflicts involving spouses. The goal is not to make you an expert, but rather to help you issue spot so you know when to stop and phone a friend. This Ethics Flash will not cover Special Government Employees, impartiality, or the additional restrictions that political appointees have under the President's Ethics Pledge. Okay? Okay. Off we go!

18 USC § 208 – The Law and its Definitions

A conflict of interest is a personal interest or relationship that conflicts with the performance of your official duties. 18 USC § 208 prohibits employees from participating **personally and substantially** in any **particular Government matter** that will have a **direct and predictable effect** on their **financial interests**, OR, the financial interests of others with whom they have **certain relationships**. Simple, right? No, we get it. We also love statutes written in defiance of the rules of grammar. Let's break it down.

Personally means that you will participate directly, including the direct and active supervision of the participation of a subordinate. To **participate substantially** means your involvement is significant. It does

not have to be determinative of the outcome, but it does have to be more than official responsibility, knowledge, or involvement on an administrative or peripheral issue. Substantial involvement can be through decision, approval or disapproval, recommendation, investigation, or the rendering of advice.

A **particular matter** typically involves specific proceedings that affect the legal rights of parties – not broad policy options or considerations directed toward the interest of a large and diverse group. **Direct and predictable effect** means a close causal link between decisions and actions. Not speculation but a real possibility the matter will affect the financial interest. The effect can be positive or negative. **Financial interest** is generally current own-

ership or a security interest in real or personal property, or a business. The most common financial interest is ownership of stocks, bonds, mutual funds, real estate, or even a job offer.

Financial interests of **certain relationships** impute to you. These include financial interests of a spouse, minor children, general partner, an organization in which you serve as an employee, officer, etc., or a prospective employer.

When analyzing potential conflicts of interest, ethics officials look at who is involved, what are the relationships, and is there a possibility that someone may gain or lose as a result of Government action (or inaction) on the particular matter. We also consider various resolutions. Yes, some conflicts can be resolved.

“Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.”

Principle One of the 14 General Principles of Ethical Conduct.



Ask your local ethics official!

*“Employees shall not hold financial interests that conflict with the conscientious performance of duty.”**

Principle Two of the 14 General Principles of Ethical Conduct.

*(Other than what is allowed by Federal Regulation)

Resolving Conflicts of Interest – Pooled Investment Vehicles

If you have a conflict of interest, there are several ways to resolve the conflict. First, a regulatory exemption in the Code of Federal Regulations (CFR) may apply. There are various exemptions for different financial interests. We are only going to cover the most common.

You may own any amount of widely **diversified mutual funds** and still participate in a particular matter affecting one or more of the holdings. Diversified means the fund does not have a

stated policy of concentrating its investments in any industry, business, single foreign country, or bonds of a State. You may also participate in any particular matter affecting one or more holdings of a **sector mutual fund** where the disqualifying interest in the matter arises due to ownership of an interest in the fund and the aggregate market value does not exceed \$50,000. A sector mutual fund is a fund that concentrates its investments in

an industry, business, single foreign country, or bonds of a single State. For **employee benefit plans**, you may participate in a particular matter affecting the holdings of a Thrift Savings Plan, a plan established by a State government, or a diversified employee benefit plan so long as the investments are administered by an independent trustee, the employee doesn't participate in selection of the investments or designate specific plan investments, and the plan is not a profit-sharing or stock bonus plan.

Resolving Conflicts of Interest – Exemptions for Securities

Let's talk about stock ownership. The regulatory exemption applies to all sorts of securities, but we are going to focus on stocks. The most common conflict of interest is ownership of stocks of Department of Defense contractors – Microsoft, Leidos, Northrop Grumman, etc.

You may participate in any particular matter involving specific parties in which you have a disqualifying financial interest so long as the stock is (1) publicly traded, and (2) the market value

of the stock does not exceed \$15,000. If you own stock with a company that is not a direct party to the matter but may be affected, the value cannot exceed \$25,000. If the matter is one of general applicability, the value cannot exceed \$50,000.

A note for all financial interests: unless your assets are in an executive branch blind trust, it does not matter if you hire an outside party to manage your investments. You are still responsible for your financial interests.

A Word on Disqualifications

Disqualification is a statutory default remedy. If a conflict cannot be resolved by other means, the resolution to the conflict is to not participate at all. Disqualification must be in writing to both you and your supervisor.

Resolving Conflicts of Interests – Other Remedies & Waivers

There are also a number of other remedies to resolve a conflict if none of the above apply. Your supervisor could consider reassignment or changing your duties. If you agree, you could divest the disqualifying financial interest. If you do divest, you may be able to defer capital gains tax with a certificate of divestiture issued by the Director, Office of Government Ethics (OGE). Certificates of divestiture must be issued **before** you divest. Otherwise, your request for a certificate of divestiture will be denied.

Now, a word on waiver. Waivers are a last resort. All other remedies should be carefully reviewed before resorting to a waiver. The approval authority for waivers is the Designated Agency Ethics Official (DAEO). For the Air and Space Force, that is the General Counsel. First, you must make a written request for a waiver to the cognizant Ethics Official via your supervisor. Your ethics official will then forward the request, along with findings of facts as required by the Joint Ethics Regulation, section 5-302. Pending a deci-

sion, you will be disqualified from participation in the matter. The DAEO will then make a decision about whether to grant the waiver. The waiver must be in writing and can apply to both present and future financial interests. Waivers are subject to review by OGE; hence the particular care in the process.



When Your Spouse is Employed by a DoD Contractor

In the super small world of the defense industry, it's not uncommon to run across a conflict of interest involving a spouse's employer. For example, there is a potential for a conflict of interest when a spouse works for a DoD contractor.

If your spouse serves as an officer, director, trustee, general partner, agent, attorney, consultant, or contractor (deep breath) for a non-federal entity, you may not participate in matters involving your spouse's employer without written authorization. In addition, if your spouse holds financial interests in the employer, such as stock options or profit interests, these interests impute to you.

What does this mean? Take it back to page 1 of this Ethics Flash. 18 USC § 208 (a criminal statute!) prohibits you from participating in matters that will have a direct

and predictable effect on your spouse's financial interests. Even if your actions will not have a direct and predictable effect on your spouse's employment, you must consider whether your **impartiality** would be questioned if you continue to work on the matter.

Oops...we didn't plan to cover impartiality but here is brief taste. Impartiality in performing your official duties is governed by federal regulation. Essentially, if you think a reasonable person with knowledge of the relevant facts would question your impartiality, you cannot work on the matter if there will be a direct and predictable effect on the financial interests of a **member of your household**, or a person with whom you have a covered relationship. An ethics official may make an independent determination on the issue –

whether or not you ask for assistance.

Let's boil this section down to two key points: First, if your spouse has equity in the employer, such as stock or stock options, those interests are imputed to you under the criminal statute, 18 USC § 208, and you must recuse yourself from participating in matters involving your spouse's employer. You are subject to criminal prosecution if you act in such matters.

Second, if your spouse does not have equity in the employer and is a salaried employee, you have a covered relationship with the employer under 5 CFR § 2635.502 and should consult with your ethics official. It may be permissible for you to participate in matters involving the employer; however, you may need written authorization to do so.

“A member of household includes grown children, significant others, in-laws, and roommates.”

5 CFR § 2635.502(b)

And the Moral of the Story is.....

If you read this far, congratulations! You achieved bragging rights on making it through one of the most complicated and, let's be honest, tiresome areas of law. Even ethics officials stifle a sigh when facing a question involving a potential violation of the federal criminal conflicts of interest. Okay, not really, but that's because we are administrative law nerds and love this stuff!

Think about it, though. Conflicts of interest is not an easy area

to navigate and even with a broad overview and general guidance, you really don't want to decide on your own that you don't have a conflict. Reach out to your ethics official and ask for help. It's the only way to be certain that you are operating within the law.

We will be back soon with the promised part three of our travel series. Other upcoming Ethics Flashes include a reminder on the Widely Attended Gatherings rules, using 31 USC § 1353 to

accept a gift of travel from a non-federal source, and everyone's favorite, the requirements of filing an OGE Form 278-T in accordance with the STOCK Act.

As always, thank you to the SAF/GCA team for their peer review, grammar check, and humor. If you have a question, don't hesitate to reach out to us via our workflow: SAF.GCA.Ethics.Workflow@us.af.mil.

“Employees shall not use public office for private gain.”

Principle Seven of the 14 General Principles of Ethical Conduct



Financial Conflicts of Interest are receiving increased scrutiny from not only Congress, but the media, too.

This newsletter provides general information. It is not a substitute for obtaining advice from an ethics counselor on the application of the ethics laws and regulations to a specific set of facts and circumstances.