



Conflicts of Interest

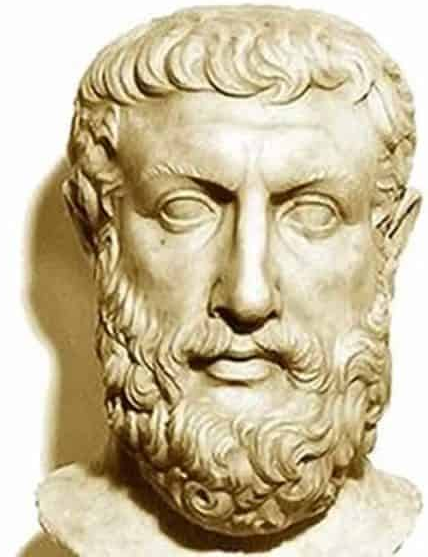
Thomas R. Serrano
Defense Human Resources
Activity
October 2020





First, Some Philosophizing

- **Ethics**
- **Compliance**
- **What Do ECs Do?**





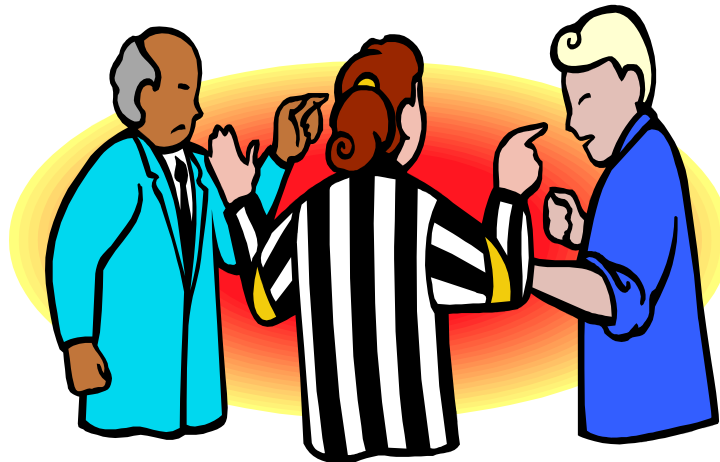
References

- **18 U.S.C. 201-209, 216**
- **5 C.F.R., Parts 2635 (Subparts D, E, F), 2638, and 2640**
- **DoD 5500.07-R (JER), Chapters 2, 3, and 5**
- **www.usoge.gov**
- **http://ogc.osd.mil/defense_ethics/**
- **Ethics Community**



Conflict of Interest - Definition

- **A conflict of interest is a personal interest or relationship, as defined by law or regulation, that conflicts with the faithful performance of official duty**





Why is this Important?

- **5 C.F.R. § 2638.101(a):** “The *primary mission* of the executive branch ethics program is to *prevent* *conflicts of interest* on the part of executive branch employees.”

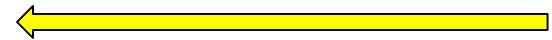
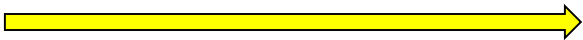


In A Nutshell



**Professional
Life**

**Personal
Life**



DO NOT CROSS!

UNCLASSIFIED



18 U.S.C. § 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.



Breakin' it down

THIS IS LEGIT



ALMOST *TOO* LEGIT



Participate Personally & Substantially

- **Participate:** decision, approval, recommendation, investigation or rendering advice
- **Personally:** directly, and includes the participation of subordinate when actually directed by Government employee
- **Substantially:** of significance to the matter



In a “Particular Matter”

- **A Particular Matter is**
 - **matter focused upon the interests of specific persons, or a discrete and identifiable class of persons**
 - **does not extend to broad policy options or considerations directed toward the interest of a large and diverse group of personnel**
- **Ask: Can I identify who is involved?**



Direct and Predictable Effect

- **Direct:**
 - close causal link between any decision or action in the matter and
 - any expected effect of the matter on the financial interest
- **Predictable:**
 - a real, as opposed to speculative possibility
 - that the matter will affect the financial interest
- **Magnitude of gain/loss is immaterial**



Financial Interest

- **Financial Interest: Any current or contingent ownership, equity, or security interest in real or personal property or a business. Includes:**
 - **Ownership of financial instruments or investments such as stocks, bonds, mutual funds or real estate**
 - **Salary, indebtedness, or job offer**
- **Ask: Is there a real possibility that the Federal employee may **gain or lose** as a result of governmental action on the particular matter?**



Imputed Interests

- **Spouse**
- **Minor children**
- **General partner**
- **Organization in which the employee serves as an employee, officer, etc.**
- **An organization with whom the employee is negotiating for or has an arrangement concerning prospective employment**



Applicability

- **Military Personnel:**
 - Active and Reserve
 - Officers
 - Enlisted personnel
- **Federal Civilian Employees**
- **Special Government Employees**
- **Presidential Appointees**



Resolution of a Conflict of Interest

- **Disqualification/Recusal**
- **Regulatory exemptions**
- **Individual waiver**
- **Waiver for Special Government Employees**
- **Reassignment**
- **Change of duties**
- **Divestiture of the financial interest**



Regulatory Exemptions - Pooled Investments

- **Diversified Mutual Funds**
- **Sector Mutual Funds**
- **Employee Benefit Plans**





Regulatory Exemptions - Securities

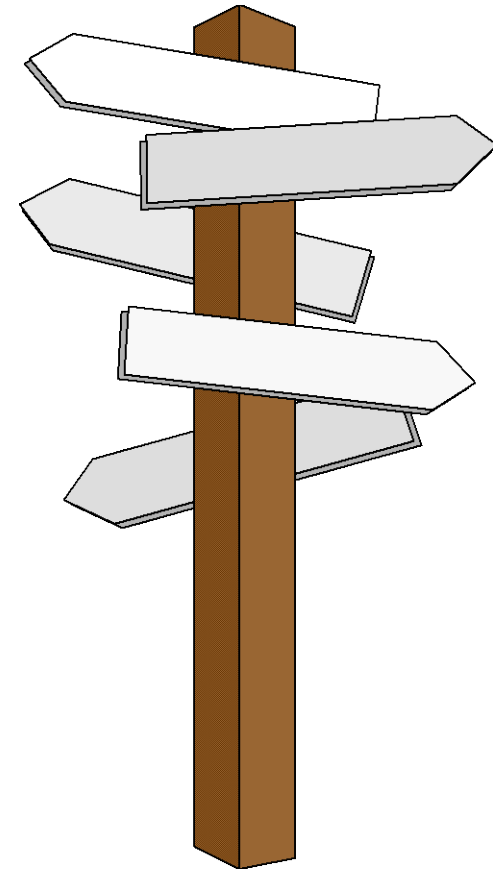
- De Minimus holdings
- Short Term Federal Securities
- Securities Owned by Tax Exempt Orgs
- General Partners





Regulatory Exemptions -Miscellaneous

- **Hiring Decisions**
- **Leave of Absence**
- **Multi-Campus Institution**
- **Official Duties**
- **Commercial Discounts**
- **Mutual Insurance Co.**
- **Special Govt. Employees**
- **Official Participation in Nonprofit Organizations**





Official Duties

- **Examples:**
- **An employee of the Federal Supply Service Division of GSA may participate in GSA's evaluation of the feasibility of privatizing the entire Federal Supply Service, even though the employee's own position would be eliminated if the Service were privatized**
- **Employee may draft legislation that would increase healthcare benefits for all Federal employees**
- **Employee may not participate in a group recommending which one of five positions to be eliminated if spouse occupies one of the positions being studied**



Official Participation in Nonprofit Organizations

- **Permits employees to participate in particular matters that affect the interests of a nonprofit where the employee serves in an official capacity as an officer, director or trustee**
- **Agency determines whether to permit official service with nonprofit and may restrict scope of employee's participation (e.g., no fundraising)**
- **With a few noted exceptions (e.g., military relief societies) JER 3-202 currently prohibits official management of NFEs**



208 (b)(1) Waiver

- **Where the disqualifying financial interest in a particular matter is not so substantial as to affect the integrity of the employee's services to the Government**





Waivers - 18 U.S.C. 208(b)(1)

- **Individual Waiver**
- **Requirements**
 - **Full disclosure**
 - **Issued in writing**
 - **Describe the interest, the matter, employee's role, and limitations on employee's ability to act**
- **Issued by official responsible for employee's appointment to his position**
- **Must be issued prior to employee taking action on the matter**



Waivers - 18 U.S.C. 208 (b)(1)

- **Factors:**
 - **The type of interest that is creating the conflict**
 - **The identity of the person/relationship**
 - **The dollar value of the financial interest**
 - **Value in relation to individual's total assets**
 - **Nature & importance of employee's role**
 - **Need to *consult* with OGE prior to issuance *when practicable***
 - **Waiver is publicly available**



Waivers - 18 U.S.C. 208(b)(3)

- **Applies to Special Government Employees *who serve on Federal Advisory Committees***
- **Based on agency determination that the need for the Special Government Employee's services outweighs the potential conflict of interest**
- **If committee established by legislation, read carefully to ensure that FACA does/does not apply!**



Waivers - 18 U.S.C. 208(b)(3)

- **Requirements:**
 - **FACA must apply to the advisory committee**
 - **Waiver issued in writing by appointing official**
 - **Need for individual must outweigh conflict**
 - **Facts must be fully described in the waiver**
 - **Waiver should describe any limitations**
 - **Waiver must be issued prior to taking action**
 - **Waiver may apply to present or future financial interest**



Waiver - 18 U.S.C. 208(b)(3)

- **Factors to consider:**
 - Type of interest that creates disqualification
 - Identity of person whose interest is involved
 - Uniqueness of individual's qualifications
 - Dollar value of disqualifying financial interest
 - Value of the financial instrument involved
- Need to **consult** with OGE **when practicable**
- Waiver is publicly available



Other Remedies

- **Reassignment**
- **Change of duties**
- **Divestiture of financial interest**





Prohibited Financial Interests

- **Employees shall not acquire or hold financial interests:**
 - **prohibited by statute**
 - **prohibited by agency regulation**
 - **prohibited by reason of agency determination of substantial conflict of interest**
 - **Question: Investing in “Legal” Colorado Marijuana Store?**
- **PAS Employees may have additional restrictions**



Appearances (Impartiality)- 5 C.F.R. § 2635.502

- **Analysis:**
 - **Reasonable person with knowledge of all relevant facts**
 - **Question employee's impartiality in conducting official business**
 - **Particular matter involving specific parties**
 - **Persons with whom you have a relationship either have a financial interest in, or are parties, or represent parties to the matter**
 - **Reputation for honesty/integrity = irrelevant**



Covered Relationships

- **Members of household**
- **Relatives (close personal relationship)**
- **Persons, organizations, entities, that:**
 - **Have or seek some business relationship**
 - **Spouse, parent, or dep. child seeking employment**
 - **Employee served as officer, director, trustee, partner in last year**
 - **Organization in which employee is “active participant”**



Appearances- “Catch-All” Provisions

- Catch-all #1: An employee who is concerned that circumstances other than those described would raise a question about his impartiality should use this process
- Catch-all #2: An employee whose duties **affect the financial interests** of a friend, relative, etc. shall comply with this process (5 CFR 2635.702(d))



Appearances - Resolution

- **Generally the same as for actual conflict situations (no regulatory exemptions)**
- **Permit participation with authorization by agency designee where it is determined that interest of the Government in the employee's participation outweighs concern over appearance of lack of impartiality**





Agency Authorization- 5 C.F.R § 2635.502(d)

- **Nature of relationship**
- **Effect on person's financial relationship**
- **Nature and importance of employee's role**
- **Sensitivity of the matter**
- **Difficulty of reassigning the matter**
- **Adjustments to employee's duties**



Extraordinary Payments from Former Employer

- **Disqualified for 2 years**
- **Value is greater than \$10,000 and not part of standard benefits plan or practice**
- **Waiver of disqualification by agency head if amount of payment is not so substantial as to cause a question of employee's impartiality**



Other Statutes - Bribery

- **18 U.S.C. § 201**
 - **Crime to corruptly give, offer or promise anything of value directly or indirectly to a public official with intent to influence any official act or the commission of fraud**
 - **Public official can include those who are not Federal employees**
 - **Includes enlisted personnel**
 - **Includes support contractors**



Other Statutes - Bribery

- **Elements of the offense**
 - **Offender acted “corruptly” (“willfully”)**
 - **Offender acted with intent to influence**
 - **Actual or intended quid pro quo**





Other Statutes - Bribery

- **Lesser included offense**
 - **Unlawful Gratuities (18 U.S.C. § 201(c))**
 - Varying degrees of same conduct
 - Primary difference between bribes and gratuities - intent to influence
 - 1989 Ethics Reform Act gave OGE authority to define exceptions
 - See ***U.S. v. Sun-Diamond Growers of California***



Other Statutes -18 U.S.C. § 203

- **Prohibition Against Private Compensation for Services Before Government Agencies**
 - **Employees may not demand, seek, or receive compensation for any representational services:**
 - **In relation to a particular matter**
 - **In which the U.S. is a party or has a direct & substantial interest**
 - **Exceptions: SGEs, family members/estates, retired officers, testimony under oath**



Other Statutes- 18 U.S.C. § 205

- **Prohibition Against Representing Others (with or without compensation) in Claims Against and in Other Matters Affecting the United States**
 - **Includes virtually any matter**
 - **Exceptions**
 - **SGEs**
 - **Federal personnel matters**
 - **Fiduciaries of family members or estates**
 - **Testimony under oath**
 - **Retired officers**
 - **Certain employee non-profit organizations**



Miscellaneous Provisions

- **Nepotism - 5 USC § 3110**
- **Contracts with Employees - JER 5-402**
- **Multiple Positions - JER 5-405**
- **Civil Office Prohibition - JER 5-407**
- **Assignment of Reserves - JER 5-408**
- **Commercial Dealings - JER 5-409**



Assignment of Reservist

- **Don't assign to duties where they will have access to information that could give unfair advantage to private employer**
- **Screen Reservists to ensure no actual or apparent conflict exists**
- **Reservist has an affirmative duty to disclose any likely conflict**

JER 5-408



Helpful Hints

- **Understand the “double yellow line”**
- **How to identify a conflict of interest**
 - **Financial Disclosure Reports**
 - **Training (briefings for procurement boards)**
 - **Frequent interaction with supervisors**
- **Know your client; be accessible**
- **Reach out to contacts in ethics community**



Remember!!!

- **5 C.F.R. § 2638.101(c): *Conflicts-based program.*** The executive branch ethics program is a ***conflicts-based program***, rather than a solely disclosure-based program. ... This program seeks to ***ensure the integrity of governmental decision making and to promote public confidence by preventing conflicts of interest.*** Taken together, the systems in place to identify and address conflicts of interest ***establish a foundation on which to build and sustain an ethical culture*** in the executive branch.



QUESTIONS??