0:01

good afternoon I'm Maura Leary

0:05

I'm an assistant counsel and oge's

0:07

general counsel and legal policy

0:09

Division and today I will be discussing

0:12

18 USC 208 the most widely known

0:16

conflict of interest law designed to

0:19

prevent executive branch officials and

0:21

employees

0:22

from benefiting financially from their

0:25

public service

0:27

we already have some content on our

0:29

website on 18 USC 208

0:32

so I want to emphasize that this is

0:35

meant to be a brass tax introductory

0:37

course for new ethics officials and to

0:41

provide a framework for talking to

0:43

employees about 208 issues next slide

0:46

please

**Language**

0:53

so this is the language of 18 USC 208

0:57

I'll give you a moment to read it

1:09

if you haven't been exposed to 208

1:12

before your reaction may have been

1:15

something like next slide

1:23

this

1:25

pretty much every word in the actual

1:27

statue is a term of art that needs to be

1:30

unpacked so it's understandable that

1:33

employees and even new ethics officials

1:35

don't necessarily understand what it

1:38

means initially

1:39

so we're going to really simplify it

1:42

here

1:43

next slide please

1:51

in English 18 USC 208 means that

1:56

government employees can't work on

1:58

things that they know will affect their

2:00

financial interests

2:02

you can't make money off your government

2:04

job you can't lose money either but

2:07

we'll get into that in a moment

2:09

but the big picture idea here is this

2:12

law is intended to prevent public

2:15

officials from benefiting financially

2:17

from their jobs

2:19

at its simplest level this law is

2:22

intended to prevent corruption

2:25

next slide please

2:32

okay so preventing corruption is an

2:35

important public policy goal but how can

2:38

ethics officials actually identify a

2:41

potential 208 violation

2:43

key is to break down each of these terms

2:46

of art that read a little bit like

2:48

gobbledygook into a list of elements if

2:52

all of those elements are met there is a

2:54

potential 208 problem next slide please

**Elements**

3:04

so here they are this is the list of six

3:08

elements which if all present would

3:11

indicate that 18 USC 208 is a potential

3:14

concern for an employee

3:16

for the rest of this training let's

3:18

unpack these elements together

3:20

next slide please

3:27

first the individual has to be an

3:30

executive branch employee

3:32

this is usually pretty clear we do note

3:35

that it includes special government

3:37

employees employees of independent

3:39

agencies the District of Columbia and

3:42

the Federal Reserve Bank and that it

3:44

does not include the president vice

3:47

president members of Congress or federal

3:49

judges

3:50

it's also worth noting that this relates

3:53

only to official participation

3:56

if an employee has involvement in a

3:59

matter while for example volunteering

4:01

for a non-profit group in their personal

4:03

capacity 208 does not apply next slide

4:07

please

4:07

[Music]

4:15

now I'd like to talk about the second

4:16

element which is a bit more complex

4:19

we mentioned at the top that employees

4:21

can't work on things relating to their

4:23

official duties but what do we mean by

4:26

things

4:27

we are talking about particular matters

4:31

that is matters that involve

4:33

deliberation decision or action that is

4:37

focused upon the interest of specific

4:38

persons or a discrete and identifiable

4:42

class of persons

4:44

particular matters are not broad policy

4:48

initiatives that affect large and

4:50

diverse groups

4:52

Health Care legislation and tax reform

4:54

legislation for example affect almost

4:57

everyone

4:58

and thus are not particular matters

5:02

next slide please

**Types of Particular Matters**

5:14

the two types of particular matters

5:16

we're concerned about are first those

5:19

that involve specific people and second

5:21

those that focus on a specific group of

5:23

people

5:25

this first type is a particular matter

5:28

involving specific parties or what we

5:31

call party matter for short

5:34

this is a matter that involves a

5:36

specific proceeding

5:38

affecting the legal rights of the

5:40

parties or an isolatable transaction or

5:43

related set of transactions between

5:45

identified parties

5:47

a lawsuit is a great example of a party

5:50

matter

5:51

so is a contract application

5:54

you should keep in mind that the

5:56

specific parties can be individual

5:58

people or individual companies or

6:01

organizations

6:02

key is that you can identify who those

6:05

parties are

6:06

next slide please

6:14

the second type of particular matter we

6:17

are concerned about

6:18

particular matters of General

6:20

applicability these are particular

6:23

matters that are focused on the

6:25

interests of a discrete and identifiable

6:28

class of persons rather than specific

6:31

parties

6:32

these tend to be policies regulations

6:36

and legislation

6:38

for example would include a rule making

6:41

on air quality standards for automobile

6:44

manufacturers

6:46

legislation on toy safety rules

6:49

or regulation governing taxation rules

6:52

for financial services firms

6:54

the key difference between particular

6:57

matters of General applicability

7:00

and just matters is the language

7:03

discrete and identifiable class

7:06

matter needs to be targeted to a

7:09

specific group

7:12

next slide please

7:19

moving on to the third element

7:22

the particular matter the employee is

7:24

working on must have a direct and

7:27

predictable effect on the employee's

7:29

personal or imputed financial interest

7:32

a few key points here

7:35

an effect being direct and predictable

7:37

does not mean that it's the most likely

7:41

thing to happen only that there exists a

7:44

realistic scenario that would affect the

7:47

company or person we're concerned about

7:49

financially

7:51

second

7:52

this effect can be again or a loss even

7:56

though we traditionally think of

7:58

financial impacts as Financial gains

8:01

finally the dollar amount of the gain or

8:03

loss does not matter

8:05

any Financial effect meets this element

8:09

I also want to briefly mention that this

8:13

is an element of the statute that can

8:15

appear to be a little more subject to

8:17

debate than others many employees want

8:20

to ask is there really a direct and

8:23

predictable effect from the action

8:26

but from a prevention standpoint as

8:29

ethics officials if this is the only

8:32

missing element it is prudent to assume

8:36

that there is a potential 208 risk

8:38

after all the Department of Justice May

8:41

evaluate the facts that you're looking

8:43

at differently and it's just not worth

8:45

the potential criminal exposure

8:48

next slide please

8:55

next you must ask

8:57

did the employee's participation in the

9:00

particular matter direct and predictably

9:02

impact the employee's personal or

9:05

imputed financial interest

9:07

let's break down the terms in this

9:09

element

9:10

a personal financial interest is one

9:12

held directly by the employee so the

9:16

employee's Investments or their

9:17

businesses they own or their debts for

9:20

example

9:22

cuded Financial interests are held by

9:24

specific named other people the

9:27

employee's spouse minor child

9:30

employer

9:32

and those with whom the employee is

9:33

negotiating for employment

9:36

so the employee's spouse's jobs or the

9:40

stock of the company with whom the

9:42

employee is negotiating for employment

9:45

are examples of imputed interests

9:48

but for 18 USC 208 purposes

9:52

personal and imputed interests are

9:54

treated the same

9:56

next slide please

10:03

so we know the financial interest can

10:05

belong to the employee or belong to

10:07

others and can be imputed to the

10:10

employee

10:11

but what is a financial interest

10:14

as you can see here it's very broad a

10:18

financial holding like stocks bonds or

10:21

mutual funds are Financial interests but

10:24

many things can be Financial interests

10:27

without being Holdings like outside

10:29

positions life insurance or student

10:32

loans

10:34

any financial interest is in the

10:37

broadest terms the potential for a gain

10:39

or a loss

10:41

however it doesn't matter for 208

10:44

purposes how that potential gain or loss

10:47

might occur

10:48

the stock could go down or up a company

10:51

could become more or less profitable

10:53

real estate could be valued more or less

10:56

it only matters that the potential

10:59

exists

11:00

next slide please

**Personal Substantial Participation**

11:07

the next element is whether the employee

11:09

personally and substantially

11:11

participated in the matter

11:14

generally anything beyond ministerial or

11:17

administrative involvement constitutes

11:20

personal and substantial participation

11:22

so this is also a fairly low evidentiary

11:26

bar

11:27

you're looking for whether the employee

11:29

has participated directly in the matter

11:32

and that their involvement is

11:34

significant to the matter

11:36

one way to frame this question is did

11:38

the employee perform meaningful work on

11:40

the matter

11:42

a key point to remember is the question

11:44

is not whether the employee's

11:46

participation in the matter impacted the

11:48

financial interests but whether the

11:51

matter itself did

11:52

we're not slicing and dicing whether the

11:55

employee's action alone impacted the

11:57

financial interest

11:59

if the employee meaningfully

12:02

participated in the matter and the

12:04

matter affected the employee's direct or

12:06

imputed Financial interests that is

12:09

enough

12:10

next slide please

**Knowledge**

12:16

the final element is knowledge

12:20

broadly speaking employees generally

12:22

have to know what their financial

12:24

interests are in order to run afoul of

12:27

the statute

12:28

but employees can't avoid being criminal

12:31

criminally liable because they try to

12:33

self-blind or in other words be

12:36

knowingly ignorant of their financial

12:38

interests

12:40

from an Ethics counseling perspective it

12:42

makes sense to encourage your employees

12:44

to stay knowledgeable about their

12:46

financial interests because

12:48

investigators and prosecutors can and do

12:51

argue that the employee should have

12:53

known about their financial interests

12:56

and it's better not to be in that

12:58

position

13:00

next slide please

13:04

okay

13:07

so here's the list of all the elements

13:09

of 18 USC 208 once again

13:13

hopefully now that we've spent some time

13:15

unpacking them all of these terms make a

13:18

bit more sense

13:20

next slide please

**Questions**

13:28

looping out even more broadly these sets

13:31

of questions are a good way of starting

13:33

208 conversations with employees

13:36

first is there a particular matter

13:40

if there is

13:41

is the employee participating and is the

13:44

employee doing so personally and

13:46

substantially

13:47

finally does the employee have a

13:50

disqualifying financial interest

13:53

if the answer to any of these questions

13:55

is no

13:56

the employee can participate

13:59

next slide please

14:00

[Music]

**General Points**

14:05

wanted to highlight some other General

14:06

points to keep in mind as you advise

14:09

employees on 18 USC 208

14:13

first you want to ask who is affected by

14:16

the matter when you're asking your

14:18

initial questions this will help you

14:20

determine if it is a matter

14:23

a party matter or a particular matter of

14:26

General applicability

14:29

second you need to look at the big

14:31

picture Financial interests of the

14:33

company to determine

14:35

potential for gain or loss

14:38

broader than just stock price of the

14:40

company

14:41

and finally as a reminder there is no

14:44

minimum Financial impact for 18 USC 208

14:48

to apply

14:50

next slide please

**Remedies**

14:58

so assume that you've identified a

15:00

potential 208 Conflict by working

15:03

through all of the elements what should

15:06

the employee do to avoid criminal

15:08

liability

15:13

questions could be their own training so

15:15

we'll just touch on them very briefly

15:18

first there are certain Financial

15:19

interests that qualify for exemptions

15:21

that can be found in five CFR

15:26

2640.

15:28

these include include for example

15:31

Holding stock under the de minimis

15:33

amount

15:34

review all the exemptions to see if one

15:37

applies

15:39

second the employee could remove the

15:42

financial interest

15:43

they could do so by divesting it selling

15:46

it

15:47

forfeiting it if it cannot be sold or

15:50

resigning from a conflicting outside

15:51

position

15:54

third the employee could recuse from the

15:56

matter in other words not participate

15:59

once a 208 conflict has been identified

16:02

the employee must refuse as an immediate

16:05

matter this is the default remedy and

16:08

often what the employee should do until

16:10

another remedy long-term remedy like

16:13

divestiture resignation is agreed upon

16:16

and completed

16:17

finally in certain limited cases it may

16:21

be possible to waive the financial

16:23

interest waivers are based on a variety

16:26

of factors such as the nature of the

16:28

interests and the importance of the

16:30

employee participating in the matter but

16:32

this is the last resort

16:35

again there's much more to say on

16:37

remedies but this is a very broad

16:39

overview of options available once a 208

16:42

conflict is identified

16:44

next slide please

16:50

that concludes my presentation today

16:53

I hope it was helpful and if you have

16:55

any questions you can feel free to reach

16:57

out to me at M Leary

17:00

oge.gov thanks again

welcome back to oge's training on 18 USC

0:08

208

0:09

today we are going to apply the concepts

0:12

from the previous training

0:14

next slide

0:19

as we discussed in the previous training

0:21

it's important to use the elements of 18

0:23

USC 208 as a checklist when evaluating

0:27

situations that may implicate conflicts

0:30

of interest concerns

0:32

all of the elements need to be met to

0:34

establish a 208 violation

0:37

next slide

**Simple Fact Scenario**

0:42

throughout the exercises today we're

0:44

going to start with this simple fact

0:46

scenario and change the facts slightly a

0:49

number of times so you can see how the

0:52

208 analysis changes based on the

0:55

specific facts presented

0:57

the initial scenario is

1:00

Sandra is an attorney at the FTC who's

1:03

assigned to Begin work on an

1:04

investigation of Apple

1:06

she owns twenty thousand dollars of

1:09

stock in Apple

1:10

supervisor wants to know if this

1:12

presents any issues

1:14

next slide

1:19

so now we're going to apply the

1:21

checklist

1:22

first Sandra is an officer or employee

1:26

of the executive branch since she works

1:29

at the FTC

1:31

she is participating participating in a

1:34

particular matter an investigation is an

1:37

example of a particular matter involving

1:39

specific parties or a party matter

1:42

that matter would have a direct and

1:45

predictable effect on the financial

1:47

interests of Sandra because she owns

1:50

stock in the company being investigated

1:54

and as one of the attorneys on the

1:57

investigation for her participation is

2:00

almost certainly not just ministerial

2:02

but personal and substantial

2:06

and Sandra knows that she owns stock in

2:10

Apple since she disclosed this

2:12

information to The Athlete's office

2:13

during a conflicts check

2:16

so in this case all of the elements are

2:20

met and this presents a 208 issue if she

2:24

were to move forward Sandra would likely

2:27

violate 208.

2:29

next slide

2:33

of course just identifying the issue is

2:36

only half the battle you as the ethics

2:39

official next need to determine how to

2:42

resolve the 208 problem

2:45

as discussed earlier once a 208 issue is

2:49

identified the first step is to recuse

2:52

so Sandra does not begin work on this

2:54

investigation in the first place

2:57

are two major options if the agency

2:59

wants her to work on the matter

3:01

first Sondra can divest she can sell the

3:05

Apple stock which completely cures the

3:07

conflict

3:08

second the agency could potentially

3:10

issue an 18 USC 208 B1 waiver

3:15

the appropriateness of a waiver depends

3:18

on variety of factors including the

3:21

amount of stock stock in the her

3:23

portfolio so is this Apple stock 20 or 2

3:28

percent of Sandra's portfolio and the

3:31

importance of the employee to the

3:33

investigation does Sandra have specific

3:35

expertise needed to fulfill the ftc's

3:39

objectives in this investigation

3:42

those are all the issues an Ethics

3:44

officials should be thinking about when

3:46

presented with this basic fat pattern

3:49

now let's change up the facts a little

3:51

bit

3:52

next slide

**DeMinimis Exemption**

3:56

okay in this version Sandra only owns

3:59

ten thousand dollars worth of stock in

4:02

Apple

4:03

next slide

4:07

so all of the elements are still met but

4:11

Sondra now qualifies for the de minimis

4:13

exemption so 208 does not apply in this

4:17

situation she is exempt from 208.

4:21

as the ethics official you will still

4:23

need to advise Sandra to monitor this

4:25

holding to make sure she does not exceed

4:27

the de minimis threshold but no further

4:30

action is needed

4:32

let's tweak the facts of it again next

4:34

slide

4:40

in this version Sandra doesn't own stock

4:42

in Apple but her spouse works there and

4:45

likely has some employment related

4:47

assets too

4:49

how would you evaluate this set of facts

4:52

next slide

4:58

so again all the elements are met since

5:01

the employee's spouse's employment

5:03

interest is imputed to the employee that

5:06

this is much harder to resolve generally

5:09

it's difficult to cure the conflict as

5:13

the employee's spouse won't quit her job

5:15

it's difficult to ask the employees fast

5:18

to do that this would also be a

5:20

difficult candidate for a waiver since

5:22

this is a very significant financial

5:24

interest for the employee and her spouse

5:28

most likely Sandra is not going to be

5:31

able to work on this matter recusal is

5:33

the best option here

5:36

next slide

5:40

let's change the facts a bit again

5:43

in this scenario the employee isn't

5:46

working on an investigation into Apple

5:48

but instead a regulation governing the

5:52

Energy Efficiency of consumer

5:54

electronics

5:55

how would we analyze this version

5:58

next slide

6:03

using our checklist the thing we want to

6:06

focus on here is the definition of

6:09

particular matter

6:10

a rule regulating consumer electronics

6:13

in particular would be considered a

6:16

particular matter of General

6:17

applicability affecting a discrete and

6:20

identifiable class in which apple is a

6:23

part

6:24

so 208 applies again and we're looking

6:27

at recusal divestiture or waiver again

6:30

as remedies

6:32

one note here is that a waiver might be

6:35

more appropriate for a particular matter

6:37

of General ability rather than party

6:39

matter

6:40

since the matter is not just focusing on

6:43

the one company or the employee has a

6:46

financial interest

6:47

next slide

**Tax Regulation**

6:52

so what if the regulation employees

6:55

working on is a tax regulation that will

6:58

affect all businesses

7:01

next slide

7:05

the key difference here is that this

7:08

would be just a matter not a particular

7:10

matter since it does not focus on either

7:13

specific parties or a discrete and

7:16

identifiable class

7:17

208 would not apply here

7:21

next slide

**Employee Attorney**

7:25

okay finally this is the trickiest quest

7:28

what if the employee attorney does not

7:30

have any financial interest in apple but

7:34

does own stock in a company that does

7:36

business with alcohol

7:38

such as for example a company that makes

7:41

parts that Apple uses in this Hardware

7:45

next slide

7:50

it would be difficult in this case to

7:53

clearly establish that the particular

7:55

matter would have a direct and

7:57

predictable effect on the employee's

8:00

financial interest

8:02

however ethics officials should still

8:05

consider impartiality issues and

8:08

appearance issues and counsel the

8:10

employee accordingly we're not going to

8:12

get into those analyzes here but it's

8:15

important to keep in mind

8:19

next slide

8:23

this concludes the applied portion of

8:27

our 18 USC 208 training

8:29

please remember to reach out to your OGE

8:32

desk officer if you have any questions

8:34

thank you for your attendance and your

8:37

attention have a great rest of your day