

# Conflicts of Interest Considerations: Common Employment Interests

(Last updated August 2024)



Topics covered include: Employee's Former Position Held Outside U.S. Government (no equity interest) | Position Held Outside U.S. Government | Bonus | Severance Payment | Deferred Compensation Plan | Defined Benefit Plan | Defined Contribution Plan | Future Employment and Related Seeking, Negotiations, or Arrangements

This guidance focuses on potential conflicts of interest that can arise from employment interests that are common to employment generally. For guidance regarding potential conflicts that can arise from specific types of employment or business ownership, see the following:

- [Conflicts of Interest Considerations: Business or Farm Ownership](#)
- [Conflicts of Interest Considerations: Corporate Employment](#)
- [Conflicts of Interest Considerations: Employment with Institutions of Higher Education and Related Research, Speaking, and Writing Activities](#)
- [Conflicts of Interest Considerations: Law Firm or Consulting Employment](#)
- [Conflicts of Interest Considerations: Private Investment Funds and Employment by an Investment Fund](#)

Please note that this guide is an evolving document that OGE plans to update over time. If you have any questions, please contact your OGE desk officer or your agency ethics official.

*This guide does not contain legal advice. It is intended solely for educational and informational purposes for ethics officials in the Federal executive branch.*

## **Employee's Former Position Held Outside U.S. Government (no equity interest)**

*5 C.F.R. § 2635.502 (Impartiality)*

Under 5 C.F.R. § 2635.502, an employee will have a “covered relationship” with their former employer for one year after separation.<sup>1</sup> Therefore, until the covered relationship has terminated, when an employee knows that their former employer is or represents a party to a particular

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<sup>1</sup> 5 C.F.R. § 2635.502(b)(1)(iv).

matter, the employee should not participate in the matter without informing the agency designee and receiving authorization.<sup>2</sup>

*Executive Order No. 13989 (Ethics Pledge)*

Political appointees will generally be subject to additional restrictions under the Ethics Pledge (Executive Order No. 13989).<sup>3</sup> An appointee will have a two-year recusal from their former employer pursuant to paragraph 2 of the Ethics Pledge, which prohibits the appointee from participating in any particular matter in which their former employer is or represents a party.<sup>4</sup> This generally includes, with a few exceptions,<sup>5</sup> any employer for which the employee worked in the two years prior to the employee's appointment to Federal service.<sup>6</sup> In addition, under paragraph 2, the appointee will have a similar two-year recusal to former clients.<sup>7</sup> If the appointee was registered under the Lobbying Disclosure Act or the Foreign Agents Registration Act (FARA), the appointee will be subject to the restriction in paragraph 3 of the Ethics Pledge, which prohibits the appointee from doing the following:

- participating in any particular matter on which the appointee lobbied or engaged in registrable activity under the FARA during the two-year period before being appointed;
- participating in the “specific issue area” in which that particular matter falls;<sup>8</sup> or
- seeking or accepting employment with any executive agency with respect to which the appointee lobbied or engaged in registrable activity under the FARA within the two years before the date of appointment.<sup>9</sup>

Finally, under paragraph 7, appointees are prohibited from accepting, either before or after entering Government, any “golden parachute.” For purposes of this paragraph, a golden parachute is any salary or other cash payment from their former employer, if such payment is given only to individuals accepting U.S. Government positions. Similarly, appointees are also prohibited from accepting, either before or after entering Government, any non-cash benefit from their former employer provided in lieu of a prohibited cash payment described above.

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<sup>2</sup> *Id.* § 2635.502(a)(2).

<sup>3</sup> *See* OGE Legal Advisory LA-21-03 (2021); OGE Legal Advisory LA-21-05 (2021).

<sup>4</sup> *See supra* note 3.

<sup>5</sup> “Former employer’ does not include any executive agency or other entity of the Federal Government, State or local government, the District of Columbia, Native American tribe, any United States territory or possession, or any international organization in which the United States is a member state.” Exec. Order No. 13,989, § 2, par. (k).

<sup>6</sup> *See supra* note 3.

<sup>7</sup> *Id.*

<sup>8</sup> “As used in [the Ethics Pledge], the term ‘specific issue area’ means a ‘particular matter of general applicability.’” OGE Legal Advisory LA-17-03 (2017). *See* OGE Legal Advisory LA-21-05 (2021).

<sup>9</sup> *See supra* note 3.

## Position Held Outside U.S. Government

### Employee's Position

#### *18 U.S.C. § 208*

18 U.S.C. § 208 prohibits an employee from participating personally and substantially in a particular matter that the employee knows will have a direct and predictable effect on the financial interests of (1) any organization in which the employee serves as officer, director, trustee, general partner, or employee and (2) any person or organization with which the employee is negotiating or has an arrangement concerning prospective employment. Section 208 “imputes” the financial interests of these persons and organizations to the employee. This imputation occurs regardless of the organization’s status as a for-profit or non-profit entity and regardless of whether the employee’s position is compensated or uncompensated. When an employee continues to hold a position, the employee is prohibited by 18 U.S.C. § 208 from participating in any particular matters affecting the financial interest of the organization.

The receipt of **salary** from an outside position does not create any additional concerns for the employee under 18 U.S.C. § 208. Other forms of compensation are discussed below.

#### *5 C.F.R. § 2635.502 (Impartiality)*

Even if 18 U.S.C. § 208 does not prohibit the employee’s participation in a particular matter, such as when an employee holds a position other than those identified in the statute, the restrictions in 5 C.F.R. § 2635.502 will nevertheless apply.

#### *18 U.S.C. §§ 203 and 205 (Representation)*

In accordance with 18 U.S.C. § 203, an employee may not seek, agree to receive, or receive compensation for their own or for another’s representational services, when the representational services meet all of the following conditions:

- made on behalf of a third party,
- rendered while that employee is a Federal employee,
- in a particular matter before the U.S. Government or any court,
- if the United States is a party to or has a direct and substantial interest in the particular matter.

Representational issues are more likely to be a concern if the employee does outside legal work or is a partner in a partnership that represents others before or solicits contracts or grants from the U.S. Government. An employee can violate 18 U.S.C. § 203 if the employee shares in compensation from a former employer that was paid in exchange for representational services that occurred at a time after the employee became a Government employee.<sup>10</sup>

Section 205 generally prohibits employees from (1) representing a third party in a claim against the United States or receiving a gratuity, or any share of or interest in any such claim in consideration of assistance in the prosecution of such claim and (2) representing a third party in a

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<sup>10</sup> See OGE Inf. Adv. Op. 99 x 22 (1999); OGE Inf. Adv. Op. 06 x 7, at 28 (2006).

covered matter<sup>11</sup> before the U.S. Government or any court if the United States is a party or has a direct and substantial interest in the covered matter. The representational restrictions pursuant to 18 U.S.C. § 205 apply to both compensated and uncompensated activities. Representational issues are more likely to be a concern if the employee continues to do outside legal work, is a partner in a partnership, or solicits contracts or grants from the United States Government.

### *Outside Earned Income Restrictions*

Presidential appointees to full-time noncareer positions are subject to the ban on receiving any outside earned income for activities performed during Government service.<sup>12</sup> Covered noncareer employees, as defined by 5 C.F.R. § 2636.303(a), are subject to a ban on receiving, in a calendar year, outside earned income – including honoraria – that exceeds 15% of the annual rate of basic pay for level II of the Executive Schedule (\$31,815 for calendar year 2024).<sup>13</sup>

Under 5 U.S.C. § 13144(a), covered noncareer employees, as defined by § 2636.303(a), are subject to additional restrictions with respect to the receipt of compensation. First, covered noncareer employees are barred from receiving compensation for practicing a profession that involves a fiduciary relationship.<sup>14</sup> Second, they are barred from receiving compensation for affiliating with or being employed by an entity that provides professional services involving a fiduciary relationship.<sup>15</sup> Third, they are barred from receiving compensation for serving as an officer or member of the board of any association, corporation, or other entity.<sup>16</sup>

### *Other Restrictions for Covered Noncareer Employees*

**Use of Name:** Under 5 U.S.C. § 13144(a)(2) and 5 C.F.R. § 2636.305(a)(2), a covered noncareer employee, as defined by 5 C.F.R. § 2636.303(a), is prohibited from permitting the use of their name by any firm, partnership, association, corporation, or other entity which provides professional services involving a fiduciary relationship.<sup>17</sup> Therefore, if a business entity that provides professional services involving a fiduciary relationship bears the name of a prospective covered noncareer employee, the prospective employee must take steps to have the business entity remove their name from the business's name. If the employee is not successful in having their name removed, the employee must be able to demonstrate that they have taken all reasonable steps to comply with the law.

**Teaching for Compensation:** A covered noncareer employee may receive compensation for teaching only when specifically authorized in advance by the designated agency ethics official.<sup>18</sup> Covered noncareer employees and their ethics officials should be aware that “teaching” is not

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<sup>11</sup> Although the term “covered matter” is used in 18 U.S.C. § 205, OGE has understood it to be the same as the term “particular matter.” See OGE DAE Ogram DO-06-029 (2006).

<sup>12</sup> See Exec. Order No. 12,674, § 102; 5 C.F.R. § 2635.804(a).

<sup>13</sup> See 5 U.S.C. § 13143(a)(1); 5 C.F.R. § 2636.304; OGE Legal Advisory LA-24-01 (2024).

<sup>14</sup> 5 U.S.C. § 13144(a)(3); 5 C.F.R. § 2636.305(a)(1)(i).

<sup>15</sup> 5 U.S.C. § 13144(a)(1); 5 C.F.R. § 2636.305(a)(1)(ii).

<sup>16</sup> 5 U.S.C. § 13144(a)(4); 5 C.F.R. § 2636.306.

<sup>17</sup> 5 U.S.C. § 13144(a)(2); 5 C.F.R. § 2636.305(a)(2).

<sup>18</sup> 5 U.S.C. § 13144(a)(5); 5 C.F.R. § 2636.307.

limited to teaching that occurs in a formal setting, such as a classroom. Rather, it also extends to instruction on an individual basis or in an informal setting.<sup>19</sup>

### *Agency-Specific Restrictions*

Some agencies have supplemental regulations or other rules that may restrict or prohibit an employee from participating in outside employment or other outside activities. Additionally, employees must comply with any prior approval requirements established by their agency regarding participation in outside employment or other activities.<sup>20</sup>

### *Other Restrictions on Outside Activities*

In holding an outside position, employees must comply with the provisions of Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) on misuse of position.<sup>21</sup> Employees are prohibited from using their public office to endorse or promote the business, or otherwise for their own private gain.<sup>22</sup> Further, employees must comply with the provisions of the Standards of Conduct relating to the proper use of official time, Government equipment and facilities, and nonpublic information.

Employees must also comply with the provisions of the Standards of Conduct on outside activities.<sup>23</sup> If the employee will engage in teaching, speaking, or writing that relates to the employee's official duties as defined by 5 C.F.R. § 2635.807, an employee generally will not be allowed to receive compensation for that activity.<sup>24</sup> Further, when teaching, speaking, or writing in a personal capacity, an employee may refer to their official title or position only as permitted by 5 C.F.R. § 2635.807(b).

## **Spouse's Position**

### *18 U.S.C. § 208*

18 U.S.C. § 208 prohibits an employee from participating personally and substantially in particular matters that the employee knows will have a direct and predictable effect on the financial interests of the employee's spouse. The financial interests of an organization are not imputed to an employee under 18 U.S.C. § 208 simply because the employee's spouse has a position as an officer, director, trustee, general partner, or employee, unless the spouse otherwise has an equity interest in the organization. When a spouse does not have an ownership interest in an employer, such as when the spouse receives a fixed salary, 18 U.S.C. § 208 only prohibits the employee from participating personally and substantially in particular matters that the employee knows will affect the spouse's continued employment, salary, and benefits.

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<sup>19</sup> 5 C.F.R. § 2636.307(b).

<sup>20</sup> *See id.* § 2635.803.

<sup>21</sup> *See* 5 C.F.R. pt. 2635, subpt. G.

<sup>22</sup> 5 C.F.R. § 2635.702.

<sup>23</sup> *See* 5 C.F.R. pt. 2635, subpt. H.

<sup>24</sup> *See* 5 C.F.R. § 2635.807(a).

*5 C.F.R. § 2635.502 (Impartiality)*

Under 5 C.F.R. § 2635.502, an employee will have a “covered relationship” with any organization for which the employee’s spouse is, to the employee’s knowledge, serving or seeking to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee.<sup>25</sup> Therefore, (1) when an employee knows that a person with whom they have a covered relationship is or represents a party to a particular matter, and (2) when the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question their impartiality in the matter, the employee should not participate in the matter without informing the agency designee and receiving authorization.<sup>26</sup> The employee does not, however, have a covered relationship with an organization merely because the employee’s spouse is an active participant in the organization.

## **Director’s Fees and Other Forms of Compensation**

*See Conflicts of Interest Considerations: Corporate Employment.*

### **Bonus**

#### **Incoming Employee’s Bonus**

*18 U.S.C. § 208*

If an incoming Federal employee’s bonus will vary based on the overall profitability of the former employer and is unpaid and undetermined at the time of appointment, 18 U.S.C. § 208 will prohibit the employee from participating personally and substantially in any particular matter that they know will have a direct and predictable effect on the financial interests of the employer. If the Federal employee is no longer employed by the outside employer, an anticipated bonus with a fixed amount will normally not present a potential conflict under 18 U.S.C. § 208, unless the employee could participate in particular matters affecting the former employer’s ability or willingness to make the payment.

The employee will not have any potential conflicts under 18 U.S.C. § 208 if the employee has already received the bonus and has no continuing equity or other financial interests based on the former employer’s profitability.

*5 C.F.R. § 2635.502 (Impartiality)*

Under 5 C.F.R. § 2635.502, an employee will have a “covered relationship” with their former employer for a period of one year after separation.<sup>27</sup> An employee will also have a covered relationship for as long as an anticipated bonus is outstanding because the employee has a business, contractual, or other financial relationship that involves other than a routine consumer

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<sup>25</sup> *Id.* § 2635.502(b)(1)(iii).

<sup>26</sup> *Id.* § 2635.502(a)(2).

<sup>27</sup> *Id.* § 2635.502(b)(1)(iv).

transaction.<sup>28</sup> Therefore, until the covered relationship has terminated, when an employee knows that their former employer is or represents a party to a particular matter the employee should not participate in the matter without informing the agency designee and receiving authorization.<sup>29</sup>

*18 U.S.C. § 209 (Supplementation of Federal Salary) and  
5 C.F.R. § 2635.503 (Covered Payment)*

Section 209 prohibits the supplementation of a Federal employee’s salary, which means that an outside entity may not pay an employee to perform their official duties or enhance the employee’s pay because of those official duties. An employee’s bonus can raise supplementation concerns under 18 U.S.C. § 209 if it is received or will be received after the employee’s entry into Government service. A bonus with a value in excess of \$10,000 that is received at any time – whether before or after entry into Government service – may raise a concern as to whether it constitutes a “covered payment” under 5 C.F.R. § 2635.503, thus necessitating a two-year party-matter recusal.

If a bonus varies from an established company plan,<sup>30</sup> a bonus plan permits discretion in determining the nature or amount of payments in a way that could favor individuals entering Government service, or if the former employer does not have a history of making similar payments to individuals who did not enter Federal service, a more thorough analysis under 18 U.S.C. § 209 or the “covered payment” provision at 5 C.F.R. § 2635.503 is required. A plan that gives benefits only to individuals transitioning to Government service warrants close scrutiny and a thorough analysis by ethics officials.<sup>31</sup> For additional assistance interpreting 18 U.S.C. § 209, see OGE DAEOgram DO-02-016 (2002).

## **Spouse’s Bonus**

*18 U.S.C. § 208*

If a spouse’s bonus is directly tied to the profitability of their employer, 18 U.S.C. § 208 will prohibit the employee from participating personally and substantially in any particular matter that the employee knows will have a direct and predictable effect on the financial interests of the spouse’s employer. Otherwise, 18 U.S.C. § 208 will only prohibit participation with respect to particular matters that would have a direct and predictable effect on the ability or willingness of the spouse’s employer to pay the bonus to the spouse, the amount of the bonus, or otherwise on the spouse’s compensation or employment.

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<sup>28</sup> *Id.* § 2635.502(b)(1)(i).

<sup>29</sup> *Id.* § 2635.502(a)(2).

<sup>30</sup> When analyzing whether a bonus constitutes a “covered payment” under § 2635.503, the company’s history of making similar payments to others not entering Government that is contrary to an express provision of a written plan will not be relevant.

<sup>31</sup> Additionally, appointees who sign the ethics pledge required by Executive Order 13989 are prohibited from accepting a “golden parachute,” which is “any salary or other cash payment from [their] former employer the eligibility for and payment of which is limited to individuals accepting a position in the United States Government.” They are also prohibited from accepting “any non-cash benefit from [their] former employer that is provided in lieu of such a prohibited cash payment.” The prohibition applies regardless of whether the payment or benefit is received before or after entering Government. Exec. Order No. 13,989, § 1, par. 7.

## Severance Payment

### Employee's Severance Payment

#### *18 U.S.C. § 208*

If a Federal employee will receive a severance payment after appointment, 18 U.S.C. § 208 will prohibit the employee from participating personally and substantially in any particular matter that they know will have a direct and predictable effect on the former employer's ability or willingness to make the payment. In addition, if the amount of the payment has not yet been fixed and the severance is tied to the overall profitability of the former employer, 18 U.S.C. § 208 will prohibit the employee from participating personally and substantially in any particular matter that the employee knows will have a direct and predictable effect on the financial interests of the former employer.

The employee will not have any potential conflicts under 18 U.S.C. § 208 if the employee has already received a severance payment and has no continuing equity or other financial interests based on the former employer's profitability.

#### *5 C.F.R. § 2635.502 (Impartiality)*

Under 5 C.F.R. § 2635.502, an employee will have a "covered relationship" with their former employer for a period of one year after separation.<sup>32</sup> An employee will also have a covered relationship for as long as the severance payment is outstanding because the employee has a business, contractual, or other financial relationship that involves other than a routine consumer transaction.<sup>33</sup> Therefore, until the covered relationship has terminated, when an employee knows that their former employer is or represents a party to a particular matter, the employee should not participate in the matter without informing the agency designee and receiving authorization.<sup>34</sup>

#### *18 U.S.C. § 209 (Supplementation of Federal Salary) and 5 C.F.R. § 2635.503 (Covered Payment)*

Section 209 prohibits the supplementation of a Federal employee's salary, which means that an outside entity may not pay an employee to perform their official duties or enhance the employee's pay because of those official duties. An employee's severance payment received after the employee's entry into Government service can raise supplementation concerns under 18 U.S.C. § 209. A severance payment with a value in excess of \$10,000 that is received at any time – whether before or after entry into Government service – may raise a concern as to whether it constitutes a "covered payment" under 5 C.F.R. § 2635.503, thus necessitating a two-year party-matter recusal.

If a severance payment varies from an established plan or agreement,<sup>35</sup> the plan treats individuals

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<sup>32</sup> 5 C.F.R. § 2635.502(b)(1)(iv).

<sup>33</sup> *Id.* § 2635.502(b)(1)(i).

<sup>34</sup> *Id.* § 2635.502(a)(2).

<sup>35</sup> When analyzing whether a severance payment constitutes a "covered payment" under § 2635.503, the company's history of making similar payments to others not entering Government that is contrary to an express provision of a written plan will not be relevant.

entering Government service more favorably, or if the former employer does not have a history of making similar payments to individuals who did not enter Federal service, a more thorough analysis under 18 U.S.C. § 209 or the “covered payment” provision at 5 C.F.R. § 2635.503 is required.<sup>36</sup> For additional assistance interpreting 18 U.S.C. § 209, see OGE DAE Ogram DO-02-016 (2002).

### **Spouse’s Severance Payment**

*18 U.S.C. § 208*

If the severance payment has not been determined and the severance is tied to the overall profitability of the employer, 18 U.S.C. § 208 will prohibit the employee from participating personally and substantially in any particular matter that the employee knows will have a direct and predictable effect on the financial interests of the spouse’s employer. Otherwise, 18 U.S.C. § 208 will prohibit participation with respect to particular matters that would have a direct and predictable effect on the amount of the payment or the ability or willingness of the spouse’s employer to make the severance payment to the spouse, until the payment is received.

### **Deferred Compensation Plan**

*18 U.S.C. § 208*

The discussion below focuses on the potential for conflicts of interest under 18 U.S.C. § 208 specific to the type of deferred compensation plan for both the employee and the employee’s spouse.

**Already Received Cash Payment:** A received cash payment poses no conflict of interest concerns under 18 U.S.C. § 208.

**Future Cash Payment that is Fixed:** If the employee is owed a fixed cash payment in the future, the employee will have a potential conflict of interest only with respect to particular matters the employee knows will have a direct and predictable effect on the former employer’s ability or willingness to honor its obligation to pay the receivable.

**Payments in the Form of Assets – Received or Anticipated:** If a deferred compensation plan makes payments in the form of assets instead of cash, consider any potential conflicts of interest posed by the assets themselves.<sup>37</sup> If the payment is still outstanding during Federal employment,

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<sup>36</sup> Additionally, appointees who sign the ethics pledge required by Executive Order 13989 are prohibited from accepting a “golden parachute,” which is “any salary or other cash payment from [their] former employer the eligibility for and payment of which is limited to individuals accepting a position in the United States Government.” They are also prohibited from accepting “any non-cash benefit from [their] former employer that is provided in lieu of such a prohibited cash payment.” The prohibition applies regardless of whether the payment or benefit is received before or after entering Government. Exec. Order No. 13,989, § 1, par. 7.

<sup>37</sup> See Conflicts of Interest Considerations: Assets.

the employee will also have a potential conflict with respect to particular matters having a direct and predictable effect on their former employer's ability or willingness to pay.

**Deferred Compensation Plan with Income from Underlying Assets:** As compared to payments in the form of assets, some deferred compensation plans have underlying assets that produce income in the form of cash. The primary concern with these types of plans is the potential conflicts of interest posed by the assets themselves.<sup>38</sup> Note that, depending on the way in which the plan is structured, the employee might have a financial interest in the former employer as well if any of the underlying assets create a financial interest in the former employer.

**Deferred Compensation Plan Linked to an Index or Other Benchmark:** Although some deferred compensation plans result in a fixed cash payment, others that depend on the performance of something tracked, such as an index, mutual fund, or other benchmark, might result in variable payments. The employee will have a potential conflict of interest with respect to particular matters that the employee knows will have a direct and predictable effect on the employer's ability or willingness to make payments. A potential conflict of interest may also arise with respect to the benchmark itself. If the plan tracks the performance of a particular sector (*e.g.*, "energy" or "financial services"), a single company, or a relatively small number of companies, the employee might be prohibited from participating personally and substantially in particular matters affecting the companies the index comprises because such participation would be more likely to have a direct and predictable effect on the benchmark. However, if the plan tracks the performance of a broad, diversified index such as the Standard & Poor's 500 Index, the employee's participation in a particular matter affecting one of the companies the index comprises would likely not have a direct and predictable effect on the benchmark and therefore the employee's financial interest in the plan.

#### *5 C.F.R. § 2635.502 (Impartiality)*

Under 5 C.F.R. § 2635.502, an employee will have a "covered relationship" with their former employer until all payments are received because the employee has a business, contractual, or other financial relationship that involves other than a routine consumer transaction.<sup>39</sup> Therefore, until the covered relationship has terminated, when an employee knows that their former employer is or represents a party to a particular matter, the employee should not participate in the matter without informing the agency designee and receiving authorization.<sup>40</sup>

#### *18 U.S.C. § 209 (Supplementation of Federal Salary) and 5 C.F.R. § 2635.503 (Covered Payment)*

Section 209 prohibits the supplementation of a Federal employee's salary, which means that an outside entity may not pay an employee to perform their official duties or enhance the employee's pay because of those official duties. An employee's deferred compensation payment received after the employee's entry into Government service can raise supplementation concerns under 18 U.S.C. § 209. Deferred compensation with a value in excess of \$10,000 that is received at any time – whether before or after entry into Government service – may raise a concern as to

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<sup>38</sup> See Conflicts of Interest Considerations: Assets.

<sup>39</sup> 5 C.F.R. § 2635.502(b)(1)(i).

<sup>40</sup> *Id.* § 2635.502(a)(2).

whether it constitutes a “covered payment” under 5 C.F.R. § 2635.503, thus necessitating a two-year party-matter recusal.

If the deferred compensation does not follow a pre-existing agreement or policy,<sup>41</sup> the plan treats individuals entering Government service more favorably, or if circumstances otherwise suggest special treatment associated with entry into Government service, a more thorough analysis under 18 U.S.C. § 209 or the “covered payment” provision at 5 C.F.R. § 2635.503 is required.<sup>42</sup> For additional assistance interpreting 18 U.S.C. § 209, see OGE DAEOgram DO-02-016 (2002).

## Defined Benefit Plan

### *18 U.S.C. § 208*

Upon retirement, a defined benefit pension plan<sup>43</sup> provides an employee with fixed payments for life. Under a defined benefit plan, the employer guarantees the targeted benefit level; therefore, an employee does not have a financial interest in particular matters affecting the underlying assets held by the defined benefit plan. Rather, the employee has a financial interest in particular matters affecting the plan sponsor’s ability or willingness to meet its pension commitments (*i.e.*, particular matters affecting the financial stability of the employer). The analysis is the same for a defined benefit plan belonging to the employee’s spouse. As a practical matter, most particular matters in which an employee could participate are unlikely to have a direct and predictable effect on the sponsor’s ability or willingness to support a defined benefit plan, unless the particular matter is likely to affect the continued existence of the company.<sup>44</sup>

### *5 C.F.R. § 2635.502 (Impartiality)*

Under 5 C.F.R. § 2635.502, an employee will have a “covered relationship” with the sponsor of a defined benefit plan in which the employee participates because the employee has a business, contractual, or other financial relationship that involves other than a routine consumer transaction.<sup>45</sup> Therefore, (1) when an employee knows that the sponsor is or represents a party to a particular matter, and (2) when the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question their impartiality in the matter, the employee should not participate in the matter without informing the agency designee

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<sup>41</sup> When analyzing whether deferred compensation constitutes a “covered payment” under § 2635.503, the company’s history of making similar payments to others not entering Government that is contrary to an express provision of a written plan will not be relevant.

<sup>42</sup> Additionally, appointees who sign the ethics pledge required by Executive Order 13989 are prohibited from accepting a “golden parachute,” which is “any salary or other cash payment from [their] former employer the eligibility for and payment of which is limited to individuals accepting a position in the United States Government.” They are also prohibited from accepting “any non-cash benefit from [their] former employer that is provided in lieu of such a prohibited cash payment.” The prohibition applies regardless of whether the payment or benefit is received before or after entering Government. Exec. Order No. 13,989, § 1, par. 7.

<sup>43</sup> This analysis encompasses **cash balance pension plans**, which are very similar to traditional defined benefit plans.

<sup>44</sup> See OGE DAEOgram DO-99-015 (1999).

<sup>45</sup> 5 C.F.R. § 2635.502(b)(1)(i).

and receiving authorization.<sup>46</sup> In most cases an employee would not have to recuse themselves from participating in a particular matter involving specific parties unless a reasonable person would question the employee's impartiality.

## Defined Contribution Plan

*18 U.S.C. § 208*

A defined contribution plan, such as a **401(k) plan**, **403(b) plan**, **457 plan**, or a **money purchase pension plan**, is a type of retirement plan that an employer establishes for its employees in which an employee selects various investments (*e.g.*, mutual funds and other investments) and makes pre-tax contributions to those investments with deductions from the employee's salary. Often, the employer will also make contributions to the employee's investments. A Federal employee has a financial interest in the particular matters affecting the assets held by the plan. Analyze each asset using the guidance appropriate for that type of asset (*e.g.*, publicly traded stock, sector mutual fund, etc.). Note, however, that some plans offer employees an option of investing in the employer's stock through the plan, which would create a financial interest in the employer. Nevertheless, the analysis of defined contribution plans is always the same—look to the underlying assets. The analysis is the same for a defined contribution plan belonging to the employee's spouse.

If a former employer's contribution is still outstanding during the employee's Federal service but is a fixed amount, the employee has a financial interest in particular matters affecting the employer's ability or willingness to make the employer contribution to the defined contribution plan (*i.e.*, particular matters affecting the financial stability of the employer). If the contribution is unpaid and is tied to the profitability of the employer during the employee's Federal service, 18 U.S.C. § 208 will prohibit the employee from participating personally and substantially in any particular matter the employee knows will have a direct and predictable effect on the financial interests of the employer, until the amount is fixed.

**Exemptions:** In many cases, the underlying assets of a defined contribution plan will qualify for the exemption at 5 C.F.R. § 2640.201(a) for diversified mutual funds, the exemption at 5 C.F.R. § 2640.201(b) for sector mutual funds, the exemption at 5 C.F.R. § 2640.201(c) for employee benefit plans, or the *de minimis* exemptions at 5 C.F.R. § 2640.202 for publicly traded securities. For additional guidance, see Conflicts of Interest Considerations: Legal Entities that Hold Assets and Conflicts of Interest Considerations: Assets.

## TIAA

See Conflicts of Interest Considerations: Employment with Institutions of Higher Education and Related Research, Speaking, and Writing Activities.

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<sup>46</sup> *Id.* § 2635.502(a)(2).

## **Future Employment and Related Seeking, Negotiations, or Arrangements**

### *18 U.S.C. § 208*

Under 18 U.S.C. § 208, the financial interests of a person or organization are imputed to a Federal employee if the employee is negotiating or has an arrangement for prospective employment with the person or organization. An employee is prohibited under 18 U.S.C. § 208 from participating personally and substantially in any particular matter that the employee knows will affect the financial interests of the future employer.

### *5 C.F.R. Part 2635, Subpart F (Seeking Employment)*

Under 5 C.F.R. § 2635.604, an employee will have an obligation to recuse from particular matters that the employee knows would have a direct and predictable effect on the financial interests of any person or organization with which the employee is seeking employment within the meaning of 5 C.F.R. § 2635.603(b), unless the employee receives written authorization from the agency designee.

### *5 C.F.R. Part 2635, Subpart B (Gifts from Outside Sources)*

Subpart B of the Standards of Conduct generally prohibits a Federal employee from receiving a gift from a prohibited source.<sup>47</sup> However, even if the prospective employer were a prohibited source, an exception permits the employee to receive meals, lodgings, transportation, and other benefits customarily provided by a prospective employer in connection with bona fide employment discussions.<sup>48</sup>

### *18 U.S.C. § 207 (Post-Government Employment)*

Federal employees should be aware that a criminal conflict of interest statute, 18 U.S.C. § 207, will affect their activities after they leave Government service. These restrictions include prohibitions on representing a third party before any Federal agency or court concerning specific-party matters in which the employee participated personally and substantially,<sup>49</sup> or which the employee knows (or reasonably should know) was pending under their official responsibility within a period of one year before termination.<sup>50</sup> Additional restrictions apply to former employees who participated personally and substantially in an ongoing trade or treaty negotiation,<sup>51</sup> former “senior employees” as defined at 18 U.S.C. § 207(c)(2), and former “very senior employees,” as defined at 18 U.S.C. § 207(d)(1). For additional assistance interpreting 18 U.S.C. § 207, see OGE Legal Advisory LA-16-08 (2016).

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<sup>47</sup> *Id.* § 2635.202(b).

<sup>48</sup> *Id.* § 2635.204(e)(3).

<sup>49</sup> 18 U.S.C. § 207(a)(1).

<sup>50</sup> *Id.* § 207(a)(2).

<sup>51</sup> *Id.* § 207(b).

*Executive Order No. 13989 (Ethics Pledge)*

Political appointees will generally be subject to additional post-employment restrictions under the Ethics Pledge (Executive Order No. 13989).<sup>52</sup> These restrictions include the following:

- a requirement that appointees who are senior employees under 18 U.S.C. § 207(c) (1) abide by the § 207(c) restriction for two years following the end of appointment, and (2) abide by the same two-year communication restriction with respect to senior White House staff;<sup>53</sup>
- a requirement that appointees who are senior or very senior employees under 18 U.S.C. § 207(c) or (d) abide by a one-year prohibition on materially assisting others in making certain communications or appearances that the appointee would be prohibited from personally undertaking;<sup>54</sup>
- a prohibition on lobbying any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration or for two years following the end of appointment, whichever is later;<sup>55</sup> and
- a prohibition on engaging in certain activities on behalf of any foreign government or foreign political party for the remainder of the Administration or for two years following the end of appointment, whichever is later.<sup>56</sup>

For additional assistance interpreting the Ethics Pledge, see OGE DAEOgram DO-10-004 (2010), OGE Legal Advisory LA-21-03 (2021), and OGE Legal Advisory LA-21-05 (2021).

*Additional Considerations*

Former Federal employees should also be aware of additional restrictions that may affect their post-Government activities, including those restrictions that are imposed by agency-specific laws. Further, former Federal employees must ensure that their post-Government activities are in compliance with other requirements that may apply without regard to their Federal employment. For example, if a former employee will serve as the agent of a foreign principal, the individual must comply with the Foreign Agents Registration Act.<sup>57</sup> Additional examples of post-Government restrictions are as follows:

- In accordance with 18 U.S.C. § 203, an employee or former employee may not seek, agree to receive, or receive compensation for their own or for another's representational services, made on behalf of a third party and rendered while that employee is or was a Federal employee, in a particular matter before the U.S. Government or any court if the United States is a party to or has a direct and substantial interest in the particular matter.<sup>58</sup> Former employees should keep in mind that when compensation for representational services is prohibited under 18 U.S.C. § 203, the former employee may not receive any

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<sup>52</sup> See OGE Legal Advisory LA-21-03 (2021); OGE Legal Advisory LA-21-05 (2021).

<sup>53</sup> Exec. Order No. 13,989, § 1, par. 4.

<sup>54</sup> *Id.* 13,989, § 1, par. 5.

<sup>55</sup> *Id.* 13,989, § 1, par. 6.

<sup>56</sup> *Id.*

<sup>57</sup> See 22 U.S.C. § 611, *et seq.*

<sup>58</sup> 18 U.S.C. § 203(a)(1).

compensation for representations made during the employee's Federal service, even if the payment is made after the employee leaves Federal service.

- A former employee may be prohibited from accepting compensation from a contractor if the former employee served in a Government position or made a Government decision involving more than \$10,000,000 given to that contractor.<sup>59</sup>
- A retired member of the uniformed services may not accept employment (or compensation for that employment) from a foreign government unless they first obtain approval from the Secretary concerned and the Secretary of State.<sup>60</sup>

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<sup>59</sup> 41 U.S.C. § 2104.

<sup>60</sup> 37 U.S.C. § 908; *see* U.S. CONST., art. I § 9, cl. 8.