

# Conflicts of Interest Considerations: Corporate Employment

(Last updated October 2021)



Topics covered include: Director's Fees and Other Forms of Compensation | Equity-Related Interests for Corporate Officers or Employees

This guidance focuses on potential conflicts of interest that can arise from financial interests that often accompany employment with a corporation. For guidance regarding potential conflicts that can arise from employment generally, see [Conflicts of Interest Considerations: Common Employment Interests](#).

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.*

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

### **Employee's Compensation**

*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 personally and substantially in any particular matters that the employee knows will affect 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.

For guidance regarding other forms of compensation, see [Conflict of Interest Considerations: Common Employment Interests](#).

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

Under 5 C.F.R. § 2635.502, an employee will have a “covered relationship” with a corporate employer.<sup>1</sup> Further, the Federal employee will generally have a covered relationship for a period of one year after separation.<sup>2</sup> Therefore, until the covered relationship has terminated, (1) when an employee knows that their former employer 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>3</sup>

### *18 U.S.C. § 209 (Supplementation of Federal Salary)*

18 U.S.C. § 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. In other words, only the United States may compensate a Federal employee for the work that they perform as a Federal employee. If circumstances suggest special treatment associated with Government service, a more thorough analysis under 18 U.S.C. § 209 is required. For additional assistance interpreting 18 U.S.C. § 209, see OGE DAEOgram DO-02-016 (2002).

### *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>4</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 (\$29,595 for calendar year 2021).<sup>5</sup>

Under 5 U.S.C. app. § 502(a)(4) and 5 C.F.R. § 2636.306, a covered noncareer employee is prohibited from receiving compensation for serving on the board of any association, corporation, or other entity. Note, however, that this restriction does not prohibit uncompensated service with any entity.<sup>6</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>7</sup>

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

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* § 2635.502(a).

<sup>4</sup> See Exec. Order No. 12,674, § 102; 5 C.F.R. § 2635.804(a).

<sup>5</sup> See 5 U.S.C. app. § 501(a)(1); 5 C.F.R. § 2635.804(b); OGE Legal Advisory LA-21-01 (2021).

<sup>6</sup> 5 C.F.R. § 2636.306(a).

<sup>7</sup> See *id.* § 2635.803.

## Spouse's Compensation

### *18 U.S.C. § 208*

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, unless the spouse otherwise has an equity interest in the organization. When a spouse's position does not create an ownership interest in an employer, such as when the spouse only receives salary, a fixed bonus, a bonus based on the spouses performance, or fixed director's fees, and does not have an ownership interest in the organization, 18 U.S.C. § 208 only prohibits the employee from participating personally and substantially in a particular matter that the employee knows will affect the spouse's continued employment, compensation, and benefits.

### *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>8</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>9</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.

## **Equity-Related Interests for Corporate Officers or Employees**

### Employee's Equity-Related Interests

#### *18 U.S.C. § 208*

Under 18 U.S.C. § 208, an employee is prohibited from participating personally and substantially in any particular matter in which the employee knows they have a financial interest directly and predictably affected by the matter, or in which they know that a person whose interests are imputed to them has a financial interest directly and predictably affected by the matter. A potential conflict of interest under 18 U.S.C. § 208 may arise if a Federal employee continues to hold an equity-related interest in a company for which the employee works or worked while in Federal service. For the employee, any equity related interest that the employee will forfeit upon leaving corporate employment, such as **unvested options** or **restricted stock units (RSUs)**, does not create a conflict of interest once the interest is forfeited. The typical types of equity-related interests an ethics official is likely to encounter include **stock**, **incentive stock options**, **restricted stock**, **RSUs**, **stock appreciation rights**, **phantom stock**, **warrants**, and

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<sup>8</sup> *Id.* § 2635.502(b)(1)(iii).

<sup>9</sup> *Id.* § 2635.502(a).

participation in either an **employee stock option plan (ESOP)** or an **employee stock purchase plan (ESPP)**.

A particular matter that has a direct and predictable effect on the issuing company's financial interests is treated as having a direct and predictable effect on the financial interests of the shareholders. Therefore, an employee who holds stock or any other equity-related interest in a company may not participate personally and substantially in a particular matter that the employee knows will directly and predictably affect the company in which they have the equity-related interest, unless an exemption applies or a waiver is issued. Generally, a financial interest in a particular matter affecting a subsidiary of a company in which the employee holds an equity-related interest is treated as a financial interest in a particular matter affecting the parent. Whether the particular matter that affects the parent will have a direct and predictable effect on the subsidiary will depend on the factual circumstances.

The potential for a conflict of interest will arise when the equity-related interest is received, regardless of whether any applicable exercise or vesting has occurred:

- For stock, restricted stock, phantom stock, and an interest in an ESOP, the potential for a conflict arises as soon as the equity-related interest is received by the employee.
- For incentive stock options, warrants, and RSUs, the potential for a conflict arises when the employee receives the warrants, options, or RSUs, even if they have not yet vested.
- For stock appreciation rights, the potential for a conflict arises when the employee receives the right, even if it is not yet exercised.
- For an ESPP, the potential for a conflict arises when the employee enrolls in the plan.

**Exemptions:** If the equity-related interest in a company is a publicly traded security as defined at 5 C.F.R. § 2635.102(p), the exemptions at 5 C.F.R. § 2640.202 for interests in securities are available. These exemptions only apply to publicly traded securities.<sup>10</sup> Shares of stock that are not publicly traded and holdings in foreign stocks not sold on an U.S. exchange will not qualify for these exemptions regardless of their value. Because stock options, warrants, RSUs, stock appreciation rights, or phantom stock do not constitute ownership of the underlying stock and are not securities as defined at 5 C.F.R. § 2640.102(r), the exemptions at 5 C.F.R. § 2640.202 for interests in securities are not available. However, after the employee has exercised a warrant, for example, thereby purchasing the stock, the applicable exemptions at 5 C.F.R. § 2640.202 may be available for the stock itself.

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

Employees may remedy a potential conflict of interest under 18 U.S.C. § 208 by divesting their equity-related interest. In some cases before the employee can divest, an employer must accelerate the vesting schedule of the equity-related interest. Acceleration may be required for

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<sup>10</sup> See the definition of “publicly traded securities” at 5 C.F.R. § 2640.102(p) that references the definition of “security” at 5 C.F.R. § 2640.102(r). With regard to equity-related interests, the security (1) must be registered pursuant to section 12 of the Securities Exchange Act of 1934, and (2) must be listed on a national or regional exchange in the U.S. or traded through the NASDAQ.

incentive stock options, warrants, interests in an ESOP, restricted stock, RSUs, stock appreciation rights, or phantom stock.

For an employee entering Federal service, the ethics official should review the accelerated vesting to ensure that it is not an illegal supplementation of salary under 18 U.S.C. § 209 or an extraordinary payment under 5 C.F.R. § 2635.503.<sup>11</sup> 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 accelerated vesting can raise supplementation concerns under 18 U.S.C. § 209 if it occurs or will occur after the employee's entry into Government service. An accelerated vesting that occurs before entry into Government service with a value in excess of \$10,000 may raise a concern as to whether it constitutes an "extraordinary payment" under 5 C.F.R. § 2635.503, thus necessitating a two-year party-matter recusal.

When analyzing the accelerated vesting under 18 U.S.C. § 209 or 5 C.F.R. § 2635.503, the ethics official first must check whether the acceleration is being made pursuant to a pre-existing plan, agreement, or policy, or whether the employer has a history of accelerating the vesting schedule for individuals who are not entering Federal service. In the absence of a pre-existing plan, agreement, policy, or practice, the ethics official will need to conduct a more detailed analysis as to whether the acceleration constitutes an extraordinary payment or a supplementation of Federal salary. For additional assistance interpreting 18 U.S.C. § 209, see OGE DAE Ogram DO-02-016 (2002).

**Vested Interests:** In contrast to the acceleration of the payment of an equity-related interest that is not already vested, when the ownership of the interest has already vested an employee may receive an earlier payment to remediate a conflict of interest without running afoul of either 18 U.S.C. § 209 or 5 C.F.R. § 2635.503. This is because the employee is entitled to receive the payment and only the timing is being altered, not the entitlement to the payment itself. If the payment has been accelerated a significant period of time or the amount of the payment is substantial, ethics officials should consider whether the amount of the payment should be adjusted to reflect present value.

## **Spouse's Equity-Related Interests**

### *18 U.S.C. § 208*

Because the financial interests of an employee's spouse or minor children are imputed to the employee, an equity-related interest that is owned by a spouse or minor child is analyzed under 18 U.S.C. § 208 as if the employee owns it. Therefore, unless otherwise noted, the section 208

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<sup>11</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.

analysis described above for the employee's equity-related interest applies in the same manner regardless of whether it is owned by the employee or by the employee's spouse or minor child.