

**Ethics Briefing Book
for
BRAC Commissioners**

May 13, 2005

**MEMORANDUM FOR CHAIRMAN AND COMMISSIONERS
DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION**

Subj: CONFLICT OF INTEREST AND BRAC

1. The ethics guidance below and that contained in the ethics binder are provided for your information and ready reference.

Potential Conflicting Financial and Personal Interests

What is a conflict of interest? You will have a conflict of interest if any of your personal financial interests, or those of someone with whom you have a specified relationship, may be affected by BRAC decisions or recommendations. Ethics laws and regulations require you to avoid not only actual conflicts, but even the appearance of a conflict of interest or loss of impartiality. Because of the importance and visibility of the BRAC process, which will impact the lives of many Americans and their communities, we must insure that the public has complete confidence in the process.

As commissioners, you are participating personally and substantially in the BRAC process. As such, you must be concerned about potential conflicts of interest.

While the SF 278, Financial Disclosure Form, that you have already submitted, is a good starting point, you have interests and relationships that may be involved in the BRAC process that are not reportable on them. For example, you do not report your personal residence or vacation property on the SF 278 unless you rent them.

We have developed this guidance to help you identify the relationships and interests that are not reported on the disclosure forms. Please review this guidance to determine whether you have any of the financial interests or relationships discussed below. If you believe that any of these interests or relationships may be affected by any potential BRAC decision, we can discuss them at your earliest convenience. When you become aware that specific installations are identified in the BRAC process, please review your interests and relationships again in connection with those installations.

Relationships

- **General Partners:** Do you have general partners in business ventures?
- **Potential Employers:** Are you negotiating for, or do you have an arrangement concerning, prospective employment with an organization?

- **Members of your Household:** Do you have members of your household in addition to those whose interests are already reported on our financial statement, i.e., someone other than your spouse or minor children?
- **Business Relationship:** Do you have, or seek to have, a business, contractual or financial relationship with someone, other than a routine consumer transaction?
- **Close Relatives:** Do you have relatives with whom you have a close personal relationship? (Yes, of course.)
- **Previous Employers:** Have you, in the last year served as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee?
- **Relative's Employers:** Is your spouse, parent, or dependent child serving, or are they seeking to serve, as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee?
- **Organizations:** Are you an active participant in an organization, other than a political party?

Potential Conflict

If you have identified any of the relationships in the previous questions, do any of them, to your knowledge, involve an entity at a military installation subject to the BRAC process, or do any have a financial interest that could be “directly and predictably” affected by a BRAC decision?

“Directly” means a close causal link between a BRAC recommendation and any expected effect on a financial interest. The effect does not have to be immediate. “Predictable” means a real, not speculative, possibility that a BRAC recommendation will affect the financial interest. The dollar amount of the gain or loss is immaterial.

For your convenience, we have developed the following list of financial interests to help you in evaluating the effect of a BRAC decision. You should also consider any other interests of which you are aware.

Financial Interests

- Salaries from military installations or contractors at military installations.
- Ownership of real estate in the vicinity of a military installation.
- Interest in business activities, including utilities and DoD contractors, that do business with a military installation.

- Bonds issued by towns/cities in the vicinity of a military installation.
- Pensions from contractors at military installations.
- Active affiliation with a civic or private BRAC-proofing or Save-the-Base type organization.
- Potential employment interest with a person/organization that could be affected by closing or realigning a military installation.

Examples of how the relationships and interests may interact follow:

- Your sister works for a contractor whose major source of business is a military installation, and she owns her home in the vicinity.
- Your daughter works at a restaurant that depends upon the patronage of personnel at a military installation.
- You are actively participating in a Save-the-Base organization in your personal capacity.
- Your son has a large investment in municipal bonds issued by a city that could be greatly affected if a major base closed.

2. If you determine that any of these interests or relationships exist, we can review them in a timely fashion and take appropriate action to resolve any questions.

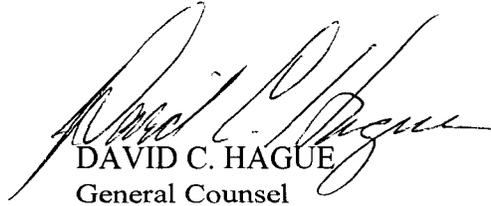

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General Counsel

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Conflicts of Interest

And

Impartiality

Synopsis of Conflict of Interest Statutes

Statute	Brief Summary
18 U.S.C. § 201	Prohibits public officials from seeking, receiving or agreeing to accept anything of value for themselves or others in return for being influenced to aid in the commission of a fraud on the United States; or being induced to omit an act in violation of official duty.
18 U.S.C. § 203	Bars employees from seeking or accepting compensation for representing another before a Federal department, agency or court in matters where the U.S. is a party or has a substantial interest; or receiving money for anyone else's representation.
18 U.S.C. § 205	Forbids employees from prosecuting or assisting in the prosecution of claims against the U.S.; or representing before a Federal department, agency or court in matters where the U.S. is a party or has a substantial interest.
18 U.S.C. § 207	Places certain restrictions on a former employee's representation back to the U.S. government.
18 U.S.C. § 208	Bars an employee, including a special government employee, from participating personally and substantially in an official capacity in any particular government matter that would have a direct and predictable effect on his own or his imputed financial interests.
18 U.S.C. § 209	Prohibits employees from receiving any salary or contribution to or supplementation of salary from a source other than the United States and compensation for services as a government employee.

18 U.S.C. §208(a)

An employee is prohibited from participating personally and substantially in an official capacity, in any particular matter in which, he or any other person whose interests are imputed to him¹, has a financial interest, if the particular matter will have a direct and predictable effect on that interest.

¹ The following persons' assets are imputed to the employee: his spouse, his minor child, his general partner (includes all interests), any organization in which the employee serves as an officer, director, trustee, general partner or employee, any person or organization with which the employee is negotiating or has an arrangement for prospective employment.

18 U.S.C. § 208

Key Terms:

- Personal and Substantial Participation

Your involvement makes a difference; it includes advice and recommendations even if not determinative.

- Particular Matter

Focused on specific parties or an identifiable class of persons (like a certain community).

- Direct and Predictable Effect

Involves a close causal link and real possibility that any decision or action will affect the financial interests involved

- Financial Interest

Personal financial asset, or that of someone whose interests are imputed to you.

Appearance of Conflict/Impartiality Concerns

5 CFR section 2635.502—Impartiality in Performing Official Duties

Subpart F of the Standards of Ethical Conduct requires an employee to *refrain from participating*:

- in a specific party matter
- that would affect the financial interests of a member of his household, or
- in which certain parties with whom he has a “covered relationship”* are or represent a party

if a reasonable person with knowledge of the relevant facts would question his impartiality.

“Covered relationships” include:

- anyone with whom you have a business, contractual, or other financial relationship
- relatives with whom you have a close personal relationship
- anyone for whom your spouse, parent or dependent child is serving or seeking to serve as an employee, agent, consultant, attorney, contractor, or officer, etc.
- anyone for whom you have served within the last year as employee, agent, consultant, attorney, contractor, officer, etc.
- any organization in which you have been an active participant

Authorization to Participate (5 CFR section 2635.502(d))

The BRAC Commission General Counsel may, at his discretion, issue you an authorization allowing you to participate in a matter notwithstanding that a reasonable person might question your impartiality. This authorization must be based upon a determination that *the interest of the Government in your participation outweighs the concern that a reasonable person may question the integrity of the agency’s programs.*

Resolving Conflicts

Options include:

1) **Disqualification**

- This simply means you do not participate in the matter.
- You must disqualify as soon as you identify a potential conflict.

2) **Waiver**

- Permits an employee to participate in the matter notwithstanding a conflict under 18 USC §208.
- The BRAC Commission General Counsel has the authority to issue a (b)(1) waiver.
- For circumstances where the interests are not so substantial as to be deemed likely to affect the integrity of the employee's services to the government.

3) **Authorization**

- Permits an employee to participate in matter in spite of impartiality concerns, provided an overriding government interest.
- The BRAC General Counsel has the authority to issue a 2635.502(d) authorization.

4) **Divesting**

- This simply means you sell the conflicting interest.

5) **Resignation**

- This simply means you resign from a conflicting outside position.

**Representation in Claims
Against the United States**

18 U.S.C. § 205

An employee is prohibited from

acting as agent or attorney

for prosecuting any claim against the United States
or having any share or interest in such a claim in consideration of
assistance in prosecuting the claim.

OR

acting as agent or attorney for anyone

before any department, agency, court, court-martial, officer, or civil,
military, or naval commission

in connection with any covered matter

in which the United States is a party or has a direct and substantial
interest.

A Special Government Employee is subject to the above prohibitions only in relation to a covered matter involving a specific party or parties¹,

in which he has participated personally and substantially as a government employee or SGE

through decision, approval, disapproval, recommendation, the rendering of advice², investigation, or otherwise; or

which is pending in the department or agency in which he is serving (provided the SGE serves more than 60 days in a given 365 day period.).

¹ SGEs unlike regular employees may represent others or receive compensation for representational services in connection with particular matters of general applicability (i.e. matters not involving specific parties).

² 18 U.S.C. § 205 does not require that the individual make determinative decisions, merely giving a recommendation is sufficient to constitute personal and substantial participation.

18 U.S.C. § 205

Key terms:

- Covered Matter

any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter.

- Personal and Substantial Participation

Your involvement makes a difference; it includes advice and recommendations even if not determinative.

- Special Government Employee

an *officer or employee* . . . who is retained, designated, appointed, or employed by the Government to perform temporary duties, with or without compensation, for not more than 130 days during any period of 365 consecutive days.

Gifts and Travel

*“Only he can be trusted with gifts
who can present a face of bronze
to expectations.”*

Henry David Thoreau

GIFTS FROM OUTSIDE SOURCES

Subpart B--5 CFR §2635.202(a)

What is the Basic Rule?

An employee shall not, directly or indirectly, solicit or accept a gift:

- (1) From a prohibited source; or**
- (2) Given because of the employee's official position.**

What is a “Prohibited Source”?

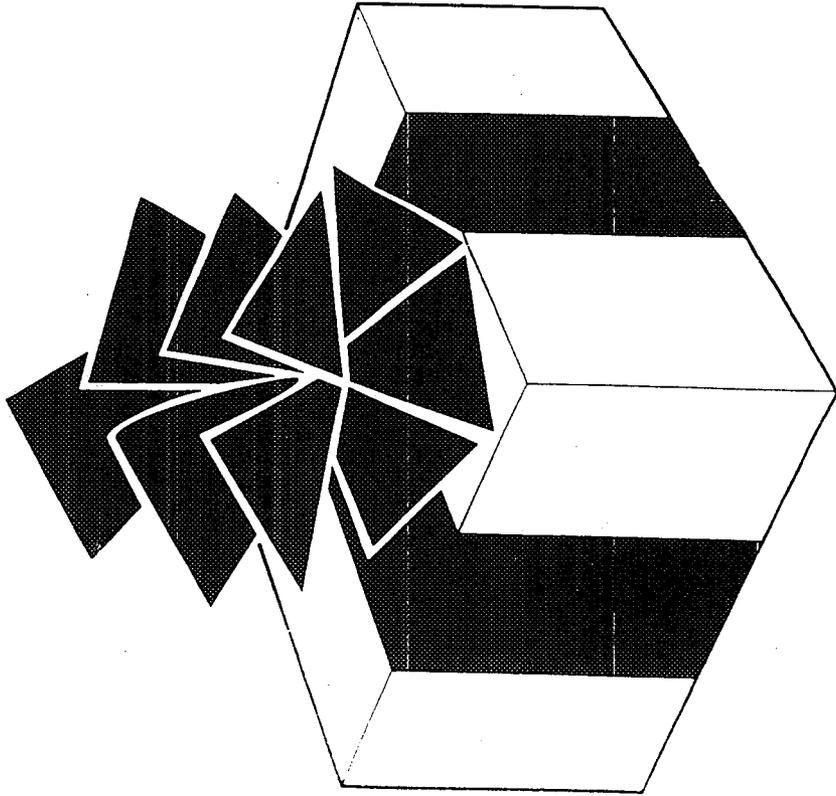
Any person who:

- (1) Is seeking official action** by the employee's agency;
- (2) Does business or seeks to do business** with the employee's agency;
- (3) Conducts activities regulated by** the employee's agency;
- (4) Has interests that may be substantially affected** by the performance or nonperformance of the employee's official duties;
- (5) Is an organization a majority of whose members** are described above.

GIFT

Gift includes any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value.

It includes services as well as gifts of training, transportation, local travel, lodgings and meals, whether provided in-kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred.



The definition of "gift" can be found at 5 C.F.R. § 2635.203(b).

9 GIFT EXCLUSIONS

DCN: 11503

Modest items of food and refreshments, such as soft drinks, coffee and donuts, offered other than as part of a meal;

Greeting cards and items with little intrinsic value, such as plaques, certificates, and trophies, which are intended solely for presentation;

Loans from banks and other financial institutions on terms generally available to the public;

Opportunities and benefits, including favorable rates and commercial discounts, available to the public or to a class consisting of all Government employees or all uniformed military personnel, whether or not restricted on the basis of geographic considerations;

Rewards and prizes given to competitors in contests or events, including random drawings, open to the public unless the employee's entry in to the contest or event is required as part of his official duties;

Pension and other benefits resulting from continued participation in an employee welfare and benefits plan maintained by a former employer;

Anything which is paid for by the Government or secured by the Government under Government contract;

Any gift accepted by the Government under specific statutory authority ...;

Anything for which market value is paid by the employee.

THE 12 GIFT EXCEPTIONS

5 C.F.R. § 2635.204(a)-(l)

- (a) Gifts of \$20 or less.
- (b) Gifts based on a personal relationship.
- (c) Discounts and similar benefits.
- (d) Awards and honorary degrees.
- (e) Gifts based on outside business or employment relationships.
- (f) Gifts from a political organization.
- (g) Widely attended gatherings and other events.
- (h) Social invitations from persons other than prohibited sources.
- (i) Meals, refreshments and entertainment in foreign areas.
- (j) Gifts to the President or Vice President.
- (k) Gifts authorized by supplemental agency regulation.
- (l) Gifts accepted under specific statutory authority.

Travel and Other Benefits

Government employees sometimes receive offers from non-federal sources to pay for all or a portion of an employee's travel, lodging, meals, and other similar expenses. Depending on the source and the circumstances, either the employee or the agency may accept such offers. In order to do so, an appropriate authority must be used.

Following is a table referencing three common authorities under which such expenses may be accepted.

PLEASE consult with the BRAC Commission General Counsel before accepting any offers for free attendance, meals, transportation, lodging, or other incidental expenses from any non-federal source.

TRAVEL AND OTHER BENEFITS IN CONNECTION WITH MEETINGS

Authority	Type of Event	Location	Source/Type Payment	Nature of Benefits	Conflict Analysis	Agency Approval
<p>31 U.S.C. § 1353 as implemented by GSA regulation at 41 C.F.R. §§301-1 and 304-1 "Acceptance of Payment from a Non-Federal Source for Travel Expenses"</p> <p><i>Gift is to the agency</i></p>	<p>Meeting or similar function that relates to the employee's official duties.*</p> <p>Examples: conferences, seminars, speaking engagements, etc.</p>	<p>Event must take place away from the employee's official duty station.</p>	<p>Source: any non-Federal source.</p> <p>Payment in-kind (to employee) or by check made payable to the agency.</p>	<p>Travel, subsistence, and related expenses. May exceed Government per diem rates, if comparable to those made available to other participants.</p>	<p>Acceptance permitted only if the agency determines that a reasonable person wouldn't question the integrity of agency programs or operations.</p>	<p>Authorization must be issued by the agency in advance of the travel.</p>
<p>5 U.S.C. § 4111 as implemented by OPM regulation at 5 C.F.R. §§ 410.501-410.503</p> <p>"Government Employees Training Act"</p> <p><i>Gift is to the employee</i></p>	<p>Training in a non-Government facility or meetings.</p>	<p>No restrictions on location. Event may be local or away from duty station.</p>	<p>Source: either an organization exempt from taxation under 26 U.S.C. 501(c)(3), or a State or local government.</p> <p>Payment in cash or in-kind to the employee.</p>	<p>Contributions or awards incident to training; or payments of travel, subsistence, and related expenses incident to attendance at meetings.</p>	<p>Acceptance permitted if the agency applies specific criteria regarding conflicts and appearance concerns and decides payment is proper.</p>	<p>The head of the agency or his/her designee must authorize acceptance in writing after a full evaluation of the circumstances in each case.</p>
<p>5 C.F.R. § 2635.204(g)(2)</p> <p>"The Widely Attended Gatherings Exception"</p> <p><i>Gift is to the employee</i></p>	<p>Widely attended gatherings of mutual interest to a number of parties.</p>	<p>No restrictions on location (normally used for local events).</p>	<p>Source: the sponsor of the event, or a nonsponsor if more than 100 persons will be attending and the cost of attendance is \$260 or less.</p> <p>Payment in-kind only.</p>	<p>Waiver of attendance fee, food, refreshments, entertainment and instructional materials integral to the event. No travel expenses.</p>	<p>Agency must determine that the employee's attendance is in the interest of the agency, in that it will further agency programs or operations.</p>	<p>If the person who extends the invitation has interests that could be substantially affected by the performance of the employee's duties, the agency must make a written determination of agency interest in advance of the event.</p>

* Does not include activities required to carry out an agency's statutory or regulatory functions.

Statutes and Regulations

From the U.S. Code Online via GPO Access
[wais.access.gpo.gov]
[Laws in effect as of January 2, 2001]
[Document not affected by Public Laws enacted between
January 2, 2001 and January 22, 2002]
[CITE: **18USC205**]

TITLE 18--CRIMES AND CRIMINAL PROCEDURE

PART I--CRIMES

CHAPTER 11--BRIBERY, GRAFT, AND CONFLICTS OF INTEREST

Sec. 205. Activities of officers and employees in claims against
and other matters affecting the Government

(a) Whoever, being an officer or employee of the United States in the executive, legislative, or judicial branch of the Government or in any agency of the United States, other than in the proper discharge of his official duties--

(1) acts as agent or attorney for prosecuting any claim against the United States, or receives any gratuity, or any share of or interest in any such claim, in consideration of assistance in the prosecution of such claim; or

(2) acts as agent or attorney for anyone before any department, agency, court, court-martial, officer, or civil, military, or naval commission in connection with any covered matter in which the United States is a party or has a direct and substantial interest;

shall be subject to the penalties set forth in section 216 of this title.

(b) Whoever, being an officer or employee of the District of Columbia or an officer or employee of the Office of the United States Attorney for the District of Columbia, otherwise than in the proper discharge of official duties--

(1) acts as agent or attorney for prosecuting any claim against the District of Columbia, or receives any gratuity, or any share of or interest in any such claim in consideration of assistance in the prosecution of such claim; or

(2) acts as agent or attorney for anyone before any department, agency, court, officer, or commission in connection with any covered matter in which the District of Columbia is a party or has a direct and substantial interest;

shall be subject to the penalties set forth in section 216 of this title.

(c) A special Government employee shall be subject to subsections (a) and (b) only in relation to a covered matter involving a specific party or parties--

(1) in which he has at any time participated personally and substantially as a Government employee or special Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise; or

(2) which is pending in the department or agency of the Government in which he is serving.

Paragraph (2) shall not apply in the case of a special Government employee who has served in such department or agency no more than sixty days during the immediately preceding period of three hundred and sixty-

five consecutive days.

(d)(1) Nothing in subsection (a) or (b) prevents an officer or employee, if not inconsistent with the faithful performance of that officer's or employee's duties, from acting without compensation as agent or attorney for, or otherwise representing--

(A) any person who is the subject of disciplinary, loyalty, or other personnel administration proceedings in connection with those proceedings; or

(B) except as provided in paragraph (2), any cooperative, voluntary, professional, recreational, or similar organization or group not established or operated for profit, if a majority of the organization's or groups's \1\ members are current officers or employees of the United States or of the District of Columbia, or their spouses or dependent children.

 \1\ So in original. Probably should be ``group's''.

(2) Paragraph (1)(B) does not apply with respect to a covered matter that--

(A) is a claim under subsection (a)(1) or (b)(1);

(B) is a judicial or administrative proceeding where the organization or group is a party; or

(C) involves a grant, contract, or other agreement (including a request for any such grant, contract, or agreement) providing for the disbursement of Federal funds to the organization or group.

(e) Nothing in subsection (a) or (b) prevents an officer or employee, including a special Government employee, from acting, with or without compensation, as agent or attorney for, or otherwise representing, his parents, spouse, child, or any person for whom, or for any estate for which, he is serving as guardian, executor, administrator, trustee, or other personal fiduciary except--

(1) in those matters in which he has participated personally and substantially as a Government employee or special Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or

(2) in those matters which are the subject of his official responsibility,

subject to approval by the Government official responsible for appointment to his position.

(f) Nothing in subsection (a) or (b) prevents a special Government employee from acting as agent or attorney for another person in the performance of work under a grant by, or a contract with or for the benefit of, the United States if the head of the department or agency concerned with the grant or contract certifies in writing that the national interest so requires and publishes such certification in the Federal Register.

(g) Nothing in this section prevents an officer or employee from giving testimony under oath or from making statements required to be made under penalty for perjury or contempt.

(h) For the purpose of this section, the term ``covered matter'' means any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter.

(i) Nothing in this section prevents an employee from acting pursuant to--

(1) chapter 71 of title 5;

(2) section 1004 or chapter 12 of title 39;

(3) section 3 of the Tennessee Valley Authority Act of 1933 (16

U.S.C. 831b);

(4) chapter 10 of title I of the Foreign Service Act of 1980 (22 U.S.C. 4104 et seq.); or

(5) any provision of any other Federal or District of Columbia law that authorizes labor-management relations between an agency or instrumentality of the United States or the District of Columbia and any labor organization that represents its employees.

(Added Pub. L. 87-849, Sec. 1(a), Oct. 23, 1962, 76 Stat. 1122; amended Pub. L. 101-194, title IV, Sec. 404, Nov. 30, 1989, 103 Stat. 1750; Pub. L. 101-280, Sec. 5(c), May 4, 1990, 104 Stat. 159; Pub. L. 104-177, Sec. 2, Aug. 6, 1996, 110 Stat. 1563.)

References in Text

The Foreign Service Act of 1980, referred to in subsec. (i)(4), is Pub. L. 96-465, Oct. 17, 1980, 94 Stat. 2071, as amended. Chapter 10 of title I of the Act is classified generally to subchapter X (Sec. 4101 et seq.) of chapter 52 of Title 22, Foreign Relations and Intercourse. For complete classification of this Act to the Code, see Short Title note set out under section 3901 of Title 22 and Tables.

Prior Provisions

A prior section 205, act June 25, 1948, ch. 645, 62 Stat. 692, related to the acceptance by a Member of Congress of anything of value to influence him, prior to the general amendment of this chapter by Pub. L. 87-849 and is substantially covered by revised section 201.

Provisions similar to those comprising this section were contained in section 283 of this title prior to the repeal of such section and the general amendment of this chapter by Pub. L. 87-849.

Amendments

1996--Subsec. (d). Pub. L. 104-177, Sec. 2(a), amended subsec. (d) generally. Prior to amendment, subsec. (d) read as follows: ``Nothing in subsection (a) or (b) prevents an officer or employee, if not inconsistent with the faithful performance of his duties, from acting without compensation as agent or attorney for, or otherwise representing, any person who is the subject of disciplinary, loyalty, or other personnel administration proceedings in connection with those proceedings.''

Subsec. (i). Pub. L. 104-177, Sec. 2(b), added subsec. (i).

1990--Subsec. (a)(2). Pub. L. 101-280, Sec. 5(c)(1), substituted ``civil'' for ``any civil''.

Subsec. (b)(2). Pub. L. 101-280, Sec. 5(c)(2), substituted ``commission'' for ``any commission''.

1989--Pub. L. 101-194 amended section generally, revising and restating as subssecs. (a) to (h) provisions formerly consisting of eight undesignated pars.

Effective Date

Section effective 90 days after Oct. 23, 1962, see section 4 of Pub. L. 87-849, set out as a note under section 201 of this title.

Delegation of Authority

Authority of President under subsec. (e) of this section to grant exemptions or approvals to individuals delegated to agency heads, see section 401 of Ex. Ord. No. 12674, Apr. 12, 1989, 54 F.R. 15159, as amended, set out as a note under section 7301 of Title 5, Government Organization and Employees.

Authority of President under subsec. (e) of this section to grant exemptions or approvals for Presidential appointees to committees, commissions, boards, or similar groups established by the President, and for individuals appointed pursuant to sections 105 and 107(a) of Title 3, The President, delegated to Counsel to President, see section 402 of Ex Ord. No. 12674, Apr. 12, 1989, 54 F.R. 15159, as amended, set out as a note under section 7301 of Title 5.

Exemptions

Exemptions from former section 283 of this title deemed to be exemptions from this section, see section 2 of Pub. L. 87-849, set out as a note under section 203 of this title.

Section Referred to in Other Sections

This section is referred to in sections 14, 202, 206, 216 of this title; title 5 sections 568, 3374; title 7 section 2009aa-1; title 10 section 942; title 12 section 2245; title 15 section 4805; title 16 section 459b-7; title 22 sections 3507, 3508, 3613; title 25 section 450i; title 26 section 7802; title 28 section 594; title 30 section 663; title 38 section 5902; title 40 App. section 108; title 41 section 120; title 42 sections 1314, 2297h-3; title 50 section 405; title 50 App. section 463.

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[Laws in effect as of January 2, 2001]
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[CITE: **18USC208**]

TITLE 18--CRIMES AND CRIMINAL PROCEDURE

PART I--CRIMES

CHAPTER 11--BRIBERY, GRAFT, AND CONFLICTS OF INTEREST

Sec. 208. Acts affecting a personal financial interest

(a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest--

Shall be subject to the penalties set forth in section 216 of this title.

(b) Subsection (a) shall not apply--

(1) if the officer or employee first advises the Government official responsible for appointment to his or her position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee;

(2) if, by regulation issued by the Director of the Office of Government Ethics, applicable to all or a portion of all officers and employees covered by this section, and published in the Federal Register, the financial interest has been exempted from the requirements of subsection (a) as being too remote or too inconsequential to affect the integrity of the services of the Government officers or employees to which such regulation applies;

(3) in the case of a special Government employee serving on an advisory committee within the meaning of the Federal Advisory Committee Act (including an individual being considered for an appointment to such a position), the official responsible for the employee's appointment, after review of the financial disclosure report filed by the individual pursuant to the Ethics in Government Act of 1978, certifies in writing that the need for the individual's services outweighs the potential for a conflict of interest created by the financial interest involved; or

(4) if the financial interest that would be affected by the particular matter involved is that resulting solely from the interest of the officer or employee, or his or her spouse or minor child, in birthrights--

(A) in an Indian tribe, band, nation, or other organized group or community, including any Alaska Native village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians,

(B) in an Indian allotment the title to which is held in trust by the United States or which is inalienable by the allottee without the consent of the United States, or

(C) in an Indian claims fund held in trust or administered by the United States,

if the particular matter does not involve the Indian allotment or claims fund or the Indian tribe, band, nation, organized group or community, or Alaska Native village corporation as a specific party or parties.

(c) (1) For the purpose of paragraph (1) of subsection (b), in the case of class A and B directors of Federal Reserve banks, the Board of Governors of the Federal Reserve System shall be deemed to be the Government official responsible for appointment.

(2) The potential availability of an exemption under any particular paragraph of subsection (b) does not preclude an exemption being granted pursuant to another paragraph of subsection (b).

(d) (1) Upon request, a copy of any determination granting an exemption under subsection (b)(1) or (b)(3) shall be made available to the public by the agency granting the exemption pursuant to the procedures set forth in section 105 of the Ethics in Government Act of 1978. In making such determination available, the agency may withhold from disclosure any information contained in the determination that would be exempt from disclosure under section 552 of title 5. For purposes of determinations under subsection (b)(3), the information describing each financial interest shall be no more extensive than that required of the individual in his or her financial disclosure report under the Ethics in Government Act of 1978.

(2) The Office of Government Ethics, after consultation with the Attorney General, shall issue uniform regulations for the issuance of waivers and exemptions under subsection (b) which shall--

(A) list and describe exemptions; and

(B) provide guidance with respect to the types of interests that are not so substantial as to be deemed likely to affect the integrity of the services the Government may expect from the employee.

(Added Pub. L. 87-849, Sec. 1(a), Oct. 23, 1962, 76 Stat. 1124; amended Pub. L. 95-188, title II, Sec. 205, Nov. 16, 1977, 91 Stat. 1388; Pub. L. 101-194, title IV, Sec. 405, Nov. 30, 1989, 103 Stat. 1751; Pub. L. 101-280, Sec. 5(e), May 4, 1990, 104 Stat. 159; Pub. L. 103-322, title XXXIII, Secs. 330002(b), 330008(6), Sept. 13, 1994, 108 Stat. 2140, 2143.)

References in Text

The Federal Advisory Committee Act, referred to in subsec. (b)(3), is Pub. L. 92-463, Oct. 6, 1972, 86 Stat. 770, as amended, which is set out in the Appendix to Title 5, Government Organization and Employees.

The Ethics in Government Act of 1978, referred to in subsecs. (b) (3) and (d) (1), is Pub. L. 95-521, Oct. 26, 1978, 92 Stat. 1824, as amended. For complete classification of this Act to the Code, see Short Title note set out under section 101 of Pub. L. 95-521 in the Appendix to Title 5 and Tables.

The Alaska Native Claims Settlement Act, referred to in subsec. (b) (4) (A), is Pub. L. 92-203, Dec. 18, 1971, 85 Stat. 688, as amended, which is classified generally to chapter 33 (Sec. 1601 et seq.) of Title 43, Public Lands. For complete classification of this Act to the Code, see Short Title note set out under section 1601 of Title 43 and Tables.

Prior Provisions

A prior section 208, act June 25, 1948, ch. 645, 62 Stat. 693, related to the acceptance of solicitation of a bribe by a judicial officer, prior to the general amendment of this chapter by Pub. L. 87-849 and is substantially covered by revised section 201.

Provisions similar to those comprising this section were contained in section 434 of this title prior to the repeal of such section and the general amendment of this chapter by Pub. L. 87-849.

Amendments

1994--Subsec. (b) (4). Pub. L. 103-322, Sec. 330008(6), inserted ``if'' after ``(4)''.

Subsec. (c) (1). Pub. L. 103-322, Sec. 330002(b), substituted ``banks'' for ``Banks''.

1990--Subsec. (a). Pub. L. 101-280, Sec. 5(e) (2), made technical correction to directory language of Pub. L. 101-194, Sec. 405(1) (C). See 1989 Amendment note below.

Subsec. (b) (2). Pub. L. 101-280, Sec. 5(e) (1) (A), substituted ``subsection (a)'' for ``paragraph (1)''.

Subsec. (b) (3). Pub. L. 101-280, Sec. 5(e) (1) (B), struck out ``section 107 of'' after ``individual pursuant to''.

Subsec. (d) (1). Pub. L. 101-280, Sec. 5(e) (1) (C), amended par. (1) generally. Prior to amendment, par. (1) read as follows: ``A copy of any determination by other than the Director of the Office of Government Ethics granting an exemption pursuant to subsection (b) (1) or (b) (3) shall be submitted to the Director, who shall make all determinations available to the public pursuant to section 105 of the Ethics in Government Act of 1978. For determinations pursuant to subsection (b) (3), the information from the financial disclosure report of the officer or employee involved describing the asset or assets that necessitated the waiver shall also be made available to the public. This subsection shall not apply, however, if the head of the agency or his or her designee determines that the determination under subsection (b) (1) or (b) (3), as the case may be, involves classified information.''

1989--Subsec. (a). Pub. L. 101-194, Sec. 405(1), as amended by Pub. L. 101-280, Sec. 5(e) (2), inserted ``or'' after ``United States Government,' ' and ``an officer or employee'' before ``of the District of Columbia'', substituted ``general partner'' for ``partner'' in two places, and substituted ``Shall be subject to the penalties set forth in section 216 of this title'' for ``Shall be fined not more than \$10,000, or imprisoned not more than two years, or both''.

Subsec. (b). Pub. L. 101-194, Sec. 405(2), added subsec. (b) and struck out former subsec. (b), which read as follows: ``Subsection (a) hereof shall not apply (1) if the officer or employee first advises the Government official responsible for appointment to his position of the

nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee, or (2) if, by general rule or regulation published in the Federal Register, the financial interest has been exempted from the requirements of clause (1) hereof as being too remote or too inconsequential to affect the integrity of Government officers' or employees' services. In the case of class A and B directors of Federal Reserve banks, the Board of Governors of the Federal Reserve System shall be the Government official responsible for appointment.'

Subsecs. (c), (d). Pub. L. 101-194, Sec. 405(2), added subsecs. (c) and (d).

1977--Subsec. (a). Pub. L. 95-188, Sec. 205(a), extended conflicts of interest prohibition to a Federal Reserve bank director, officer, or employee.

Subsec. (b). Pub. L. 95-188, Sec. 205(b), inserted at end ``In the case of class A and B directors of Federal Reserve banks, the Board of Governors of the Federal Reserve System shall be the Government official responsible for appointment.''

Effective Date

Section effective 90 days after Oct. 23, 1962, see section 4 of Pub. L. 87-849, set out as a note under section 201 of this title.

Exemptions

Exemptions from former section 434 of this title deemed to be exemptions from this section, see section 2 of Pub. L. 87-849, set out as a note under section 203 of this title.

Regulations

Responsibility of Office of Government Ethics for promulgating regulations and interpreting this section, see section 201(c) of Ex. Ord. No. 12674, Apr. 12, 1989, 54 F.R. 15159, as amended, set out as a note under section 7301 of Title 5, Government Organization and Employees.

Delegation of Authority

Authority of the President under subsec. (b) of this section to grant exemptions or approvals to individuals delegated to agency heads, see section 401 of Ex. Ord. No. 12674, Apr. 12, 1989, 54 F.R. 15159, as amended, set out as a note under section 7301 of Title 5, Government Organization and Employees.

Authority of the President under subsec. (b) of this section to grant exemptions or approvals for Presidential appointees to committees, commissions, boards, or similar groups established by the President, and for individuals appointed pursuant to sections 105 and 107(a) of Title 3, The President, delegated to Counsel to the President, see section 402 of Ex. Ord. No. 12674, Apr. 12, 1989, 54 F.R. 15159, as amended, set out as a note under section 7301 of Title 5.

``Particular Matter'' Defined

Pub. L. 100-446, title III, Sec. 319, Sept. 27, 1988, 102 Stat. 1826, which provided that notwithstanding any other provision of law, for the purposes of this section ``particular matter'', as applied to employees of the Department of the Interior and the Indian Health Service, means ``particular matter involving specific parties'', was repealed by Pub. L. 101-194, title V, Sec. 505(b), Nov. 30, 1989, 103 Stat. 1756, as amended by Pub. L. 101-280, Sec. 6(c), May 4, 1990, 104 Stat. 160.

Similar provisions were contained in Pub. L. 100-202, Sec. 101(g) [title III, Sec. 318], Dec. 22, 1987, 101 Stat. 1329-213, 1329-255.

Section Referred to in Other Sections

This section is referred to in sections 14, 202, 216 of this title; title 5 sections 568, 3374; title 7 section 2009aa-1; title 10 section 9447; title 12 section 2245; title 15 section 4805; title 16 section 1852; title 20 section 5508; title 22 sections 3507, 3508, 3613, 3622; title 26 section 1043; title 28 section 594; title 28 App. section 302; title 40 App. section 108; title 41 section 423; title 42 section 1396a; title 47 section 154; title 49 section 106.

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(e) *Eligibility for special tax treatment.* An employee required to sell or otherwise divest a financial interest may be eligible to defer the tax consequences of divestiture under subpart J of part 2634 of this chapter.

[57 FR 35042, Aug. 7, 1992, as amended at 59 FR 4780, Feb. 2, 1994; 60 FR 6391, Feb. 2, 1995; 60 FR 66858, Dec. 27, 1995; 61 FR 40951, Aug. 7, 1996; 62 FR 48748, Sept. 17, 1996]

Subpart E—Impartiality in Performing Official Duties

§ 2635.501 Overview.

(a) This subpart contains two provisions intended to ensure that an employee takes appropriate steps to avoid an appearance of loss of impartiality in the performance of his official duties. Under § 2635.502, unless he receives prior authorization, an employee should not participate in a particular matter involving specific parties which he knows is likely to affect the financial interests of a member of his household, or in which he knows a person with whom he has a covered relationship is or represents a party, if he determines that a reasonable person with knowledge of the relevant facts would question his impartiality in the matter. An employee who is concerned that other circumstances would raise a question regarding his impartiality should use the process described in § 2635.502 to determine whether he should or should not participate in a particular matter.

(b) Under § 2635.503, an employee who has received an extraordinary severance or other payment from a former employer prior to entering Government service is subject, in the absence of a waiver, to a two-year period of disqualification from participation in particular matters in which that former employer is or represents a party.

NOTE: Questions regarding impartiality necessarily arise when an employee's official duties impact upon the employee's own financial interests or those of certain other persons, such as the employee's spouse or minor child. An employee is prohibited by criminal statute, 18 U.S.C. 208(a), from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he, his spouse, general partner or minor child has a financial

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interest, if the particular matter will have a direct and predictable effect on that interest. The statutory prohibition also extends to an employee's participation in a particular matter in which, to his knowledge, an organization in which the employee is serving as officer, director, trustee, general partner or employee, or with whom he is negotiating or has an arrangement concerning prospective employment has a financial interest. Where the employee's participation in a particular matter would affect any one of these financial interests, the standards set forth in subparts D or F of this part apply and only a statutory waiver or exemption, as described in §§ 2635.402(d) and 2635.605(a), will enable the employee to participate in that matter. The authorization procedures in § 2635.502(d) may not be used to authorize an employee's participation in any such matter. Where the employee complies with all terms of the waiver, the granting of a statutory waiver will be deemed to constitute a determination that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of agency programs and operations. Similarly, where the employee meets all prerequisites for the application of one of the exemptions set forth in subpart B of part 2640 of this chapter, that also constitutes a determination that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of agency programs and operations.

[57 FR 35042, Aug. 7, 1992, as amended at 62 FR 48748, Sept. 17, 1997]

§ 2635.502 Personal and business relationships.

(a) *Consideration of appearances by the employee.* Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section.

(1) In considering whether a relationship would cause a reasonable person

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to question his impartiality, an employee may seek the assistance of his supervisor, an agency ethics official or the agency designee.

(2) An employee who is concerned that circumstances other than those specifically described in this section would raise a question regarding his impartiality should use the process described in this section to determine whether he should or should not participate in a particular matter.

(b) *Definitions.* For purposes of this section:

(1) An employee has a *covered relationship* with:

(i) A person, other than a prospective employer described in § 2635.603(c), with whom the employee has or seeks a business, contractual or other financial relationship that involves other than a routine consumer transaction;

NOTE: An employee who is seeking employment within the meaning of § 2635.603 shall comply with subpart F of this part rather than with this section.

(ii) A person who is a member of the employee's household, or who is a relative with whom the employee has a close personal relationship;

(iii) A person for whom the employee's spouse, parent or dependent child is, to the employee's knowledge, serving or seeking to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee;

(iv) Any person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee; or

(v) An organization, other than a political party described in 26 U.S.C. 527(e), in which the employee is an active participant. Participation is active if, for example, it involves service as an official of the organization or in a capacity similar to that of a committee or subcommittee chairperson or spokesperson, or participation in directing the activities of the organization. In other cases, significant time devoted to promoting specific programs of the organization, including coordination of fundraising efforts, is an indication of active participation. Payment of dues or the donation or solicitation of financial support does not,

in itself, constitute active participation.

NOTE: Nothing in this section shall be construed to suggest that an employee should not participate in a matter because of his political, religious or moral views.

(2) *Direct and predictable effect* has the meaning set forth in § 2635.402(b)(1).

(3) *Particular matter involving specific parties* has the meaning set forth in § 2637.102(a)(7) of this chapter.

Example 1: An employee of the General Services Administration has made an offer to purchase a restaurant owned by a local developer. The developer has submitted an offer in response to a GSA solicitation for lease of office space. Under the circumstances, she would be correct in concluding that a reasonable person would be likely to question her impartiality if she were to participate in evaluating that developer's or its competitor's lease proposal.

Example 2: An employee of the Department of Labor is providing technical assistance in drafting occupational safety and health legislation that will affect all employers of five or more persons. His wife is employed as an administrative assistant by a large corporation that will incur additional costs if the proposed legislation is enacted. Because the legislation is not a particular matter involving specific parties, the employee may continue to work on the legislation and need not be concerned that his wife's employment with an affected corporation would raise a question concerning his impartiality.

Example 3: An employee of the Defense Logistics Agency who has responsibilities for testing avionics being produced by an Air Force contractor has just learned that his sister-in-law has accepted employment as an engineer with the contractor's parent corporation. Where the parent corporation is a conglomerate, the employee could reasonably conclude that, under the circumstances, a reasonable person would not be likely to question his impartiality if he were to continue to perform his test and evaluation responsibilities.

Example 4: An engineer has just resigned from her position as vice president of an electronics company in order to accept employment with the Federal Aviation Administration in a position involving procurement responsibilities. Although the employee did not receive an extraordinary payment in connection with her resignation and has severed all financial ties with the firm, under the circumstances she would be correct in concluding that her former service as an officer of the company would be likely to cause a reasonable person to question her impartiality if she were to participate in the

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administration of a DOT contract for which the firm is a first-tier subcontractor.

Example 5: An employee of the Internal Revenue Service is a member of a private organization whose purpose is to restore a Victorian-era railroad station and she chairs its annual fundraising drive. Under the circumstances, the employee would be correct in concluding that her active membership in the organization would be likely to cause a reasonable person to question her impartiality if she were to participate in an IRS determination regarding the tax-exempt status of the organization.

(c) *Determination by agency designee.*

Where he has information concerning a potential appearance problem arising from the financial interest of a member of the employee's household in a particular matter involving specific parties, or from the role in such matter of a person with whom the employee has a covered relationship, the agency designee may make an independent determination as to whether a reasonable person with knowledge of the relevant facts would be likely to question the employee's impartiality in the matter. Ordinarily, the agency designee's determination will be initiated by information provided by the employee pursuant to paragraph (a) of this section. However, at any time, including after the employee has disqualified himself from participation in a matter pursuant to paragraph (e) of this section, the agency designee may make this determination on his own initiative or when requested by the employee's supervisor or any other person responsible for the employee's assignment.

(1) If the agency designee determines that the employee's impartiality is likely to be questioned, he shall then determine, in accordance with paragraph (d) of this section, whether the employee should be authorized to participate in the matter. Where the agency designee determines that the employee's participation should not be authorized, the employee will be disqualified from participation in the matter in accordance with paragraph (e) of this section.

(2) If the agency designee determines that the employee's impartiality is not likely to be questioned, he may advise the employee, including an employee who has reached a contrary conclusion under paragraph (a) of this section,

that the employee's participation in the matter would be proper.

(d) *Authorization by agency designee.*

Where an employee's participation in a particular matter involving specific parties would not violate 18 U.S.C. 208(a), but would raise a question in the mind of a reasonable person about his impartiality, the agency designee may authorize the employee to participate in the matter based on a determination, made in light of all relevant circumstances, that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. Factors which may be taken into consideration include:

(1) The nature of the relationship involved;

(2) The effect that resolution of the matter would have upon the financial interests of the person involved in the relationship;

(3) The nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;

(4) The sensitivity of the matter;

(5) The difficulty of reassigning the matter to another employee; and

(6) Adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

Authorization by the agency designee shall be documented in writing at the agency designee's discretion or when requested by the employee. An employee who has been authorized to participate in a particular matter involving specific parties may not thereafter disqualify himself from participation in the matter on the basis of an appearance problem involving the same circumstances that have been considered by the agency designee.

Example 1: The Deputy Director of Personnel for the Department of the Treasury and an attorney with the Department's Office of General Counsel are general partners in a real estate partnership. The Deputy Director advises his supervisor, the Director of Personnel, of the relationship upon being assigned to a selection panel for a position for which his partner has applied. If selected,

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the partner would receive a substantial increase in salary. The agency designee cannot authorize the Deputy Director to participate on the panel under the authority of this section since the Deputy Director is prohibited by criminal statute, 18 U.S.C. 208(a), from participating in a particular matter affecting the financial interest of a person who is his general partner. See § 2635.402.

Example 2: A new employee of the Securities and Exchange Commission is assigned to an investigation of insider trading by the brokerage house where she had recently been employed. Because of the sensitivity of the investigation, the agency designee may be unable to conclude that the Government's interest in the employee's participation in the investigation outweighs the concern that a reasonable person may question the integrity of the investigation, even though the employee has severed all financial ties with the company. Based on consideration of all relevant circumstances, the agency designee might determine, however, that it is in the interest of the Government for the employee to pass on a routine filing by the particular brokerage house.

Example 3: An Internal Revenue Service employee involved in a long and complex tax audit is advised by her son that he has just accepted an entry-level management position with a corporation whose taxes are the subject of the audit. Because the audit is essentially complete and because the employee is the only one with an intimate knowledge of the case, the agency designee might determine, after considering all relevant circumstances, that it is in the Government's interest for the employee to complete the audit, which is subject to additional levels of review.

(e) *Disqualification.* Unless the employee is authorized to participate in the matter under paragraph (d) of this section, an employee shall not participate in a particular matter involving specific parties when he or the agency designee has concluded, in accordance with paragraph (a) or (c) of this section, that the financial interest of a member of the employee's household, or the role of a person with whom he has a covered relationship, is likely to raise a question in the mind of a reasonable person about his impartiality. Disqualification is accomplished by not participating in the matter.

(1) *Notification.* An employee who becomes aware of the need to disqualify himself from participation in a particular matter involving specific parties to which he has been assigned should notify the person responsible for

his assignment. An employee who is responsible for his own assignment should take whatever steps are necessary to ensure that he does not participate in the matter from which he is disqualified. Appropriate oral or written notification of the employee's disqualification may be made to coworkers by the employee or a supervisor to ensure that the employee is not involved in a particular matter involving specific parties from which he is disqualified.

(2) *Documentation.* An employee need not file a written disqualification statement unless he is required by part 2634 of this chapter to file written evidence of compliance with an ethics agreement with the Office of Government Ethics or is specifically asked by an agency ethics official or the person responsible for his assignment to file a written disqualification statement. However, an employee may elect to create a record of his actions by providing written notice to a supervisor or other appropriate official.

(f) *Relevant considerations.* An employee's reputation for honesty and integrity is not a relevant consideration for purposes of any determination required by this section.

§ 2635.503 Extraordinary payments from former employers.

(a) *Disqualification requirement.* Except as provided in paragraph (c) of this section, an employee shall be disqualified for two years from participating in any particular matter in which a former employer is a party or represents a party if he received an extraordinary payment from that person prior to entering Government service. The two-year period of disqualification begins to run on the date that the extraordinary payment is received.

Example 1: Following his confirmation hearings and one month before his scheduled swearing in, a nominee to the position of Assistant Secretary of a department received an extraordinary payment from his employer. For one year and 11 months after his swearing in, the Assistant Secretary may not participate in any particular matter to which his former employer is a party.