

**STATEMENT FOR THE RECORD OF MS. SHELLEY K. FINLAYSON,  
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U.S. OFFICE OF GOVERNMENT ETHICS**

**FOR A LEGISLATIVE HEARING BEFORE THE SUBCOMMITTEE ON HEALTH  
COMMITTEE ON VETERANS' AFFAIRS  
U.S. HOUSE OF REPRESENTATIVES**

**SEPTEMBER 11, 2024**

The U.S. Office of Government Ethics (OGE) is pleased to provide its views on proposed legislation to amend title 38, U.S. Code, to provide exceptions to the criminal conflict of interest laws, 18 U.S.C. §§ 203, 205, and 208, for employees of the Department of Veterans Affairs (VA) who concurrently hold outside positions with certain outside employers. OGE has not reviewed and takes no position on other pending legislation being considered at this hearing.

OGE appreciates VA's and the Subcommittee's ongoing work to address the complex balance between recruitment and retention of qualified VA medical personnel and the need to protect government processes from abuse and conflicts of interest. OGE is concerned, however, that the draft legislation does not effectively balance these competing equities. As written, the draft legislation would disturb the carefully balanced conflict of interest program that has existed for the past 60 years by providing overly broad exemptive relief, reducing oversight and transparency in the process of waiving the conflict of interest laws, and creating inconsistent treatment between dually appointed VA scientists and other scientists. More importantly, OGE believes that the existing legal framework is flexible enough to provide exemptive relief in many cases in which there is a legitimately low risk of an actual conflict of interest.

*I. Current Law and Effect of Proposed Legislation*

Congress enacted 18 U.S.C. §§ 203, 205, and 208 as part of omnibus legislation updating the federal bribery, conflict of interest, and graft laws in 1962.<sup>1</sup> These laws were promulgated carefully, with the goals of not only strengthening limitations on conflicts but also ensuring that the government could access qualified experts from outside government, particularly scientists.<sup>2</sup>

Section 208 provides that an employee may not participate in any particular matter in which, to the employee's knowledge, the employee, a spouse, minor child, general partner, or any "organization in which [the employee] is serving as officer, director, trustee, general partner or employee, or any person or organization with whom [the employee] is negotiating or has any arrangement concerning prospective employment" has a financial interest.<sup>3</sup> While the prohibition is broad, it provides several authorities that allow OGE or an agency to waive insubstantial

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<sup>1</sup> Modern Bribery, Graft and Conflict of Interest Law, P.L. 87-849, 76 Stat. 1119 (1962). Additional conflict of interest laws are found in chapter 11, title 18, of the United States Code. Employees of the executive branch are also covered by comprehensive standards of conduct found in 5 C.F.R. part 2635.

<sup>2</sup> H. Rep. 748, 87th Cong., 1st Sess. 4 (1961); S. Rep. No. 2213, 87th Cong., 2d Sess. (1962).

<sup>3</sup> 18 U.S.C. § 208(a). For OGE regulations interpreting and providing guidance on § 208, see 5 C.F.R. pt. 2640.

conflicts of interest. These authorities include personalized waivers<sup>4</sup> and regulatory exemptions.<sup>5</sup> The draft legislation would change this framework by creating two special exemptions at 38 U.S.C. §§ 7302(f)(1) and 7303(e)(1) that would allow dually appointed VA employees to participate in health profession education and research particular matters affecting the financial interests of their outside employers—so long as they do not make a final, binding determination related to that matter—notwithstanding 18 U.S.C. § 208(a).

Section 205 provides that an employee may not represent an outside party before the federal government in relation to any particular matter in which the United States has a direct and substantial interest.<sup>6</sup> Section 203 provides that an employee may not receive any compensation for representational services provided by themselves or another person in any particular matter in which the United States has a direct and substantial interest.<sup>7</sup> Although these two laws apply to all government employees, there are several exemptions, including exemptions for intermittent and temporary appointees.<sup>8</sup> These exemptions balance the need for specialized expertise from outside the government with the need to prevent these employees from using their positions to unfairly advantage their outside employer. The draft legislation would change this framework by creating two special exemptions at 38 U.S.C. §§ 7302(f)(2) and 7303(e)(2), allowing dually appointed VA employees to lobby the government on behalf of their outside employers on health profession education and research matters, as well as receive compensation for those communications, notwithstanding 18 U.S.C. §§ 203 and 205.

## *II. Concerns Regarding Proposed Legislation*

OGE is concerned that the draft legislative exemptions to 18 U.S.C. §§ 203, 205, and 208 are overbroad and lack the necessary protections against substantial conflicts of interest found in current law. Unlike current exemptions to 18 U.S.C. § 208, which are only available when a conflict of interest is insubstantial, remote, or inconsequential,<sup>9</sup> the proposed legislation would allow an employee to participate in any health profession education or research particular matter regardless of how substantial the potential financial gain to their home institution—potentially including multi-million-dollar contracts, grants, cooperative agreements, and other financial assistance arrangements. In addition, by enacting exemptions to 18 U.S.C. §§ 203 and 205, dually appointed VA employees would be free to both lobby for benefits on behalf of their outside employer and participate in the decision to grant those same benefits in their official role, so long as they were not the final signatory. Without necessary safeguards, dually appointed VA researchers could be placed in the position of making decisions not because it is the right thing to do, but because it advantages their home institution.

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<sup>4</sup> 18 U.S.C. § 208(b)(1). Agencies must confer with OGE prior to issuance of an individualized waiver whenever practicable, provide OGE with a copy of each executed waiver, and make each executed waiver available to the public upon request. OGE is committed to reviewing waivers as fast as possible while meeting its responsibility to objectively review the facts of each case to ensure the statutory standard is met.

<sup>5</sup> 18 U.S.C. § 208(b)(2).

<sup>6</sup> 18 U.S.C. § 205(a)(2).

<sup>7</sup> 18 U.S.C. § 203(a).

<sup>8</sup> 18 U.S.C. §§ 203(c), (e); 18 U.S.C. §§ 205(c), (f).

<sup>9</sup> See 18 U.S.C. § 208(b)(1)-(2).

OGE is also concerned that the draft legislation would remove important checks and balances that ensure that waivers and exemptions are done in an accountable and transparent way. For example, agencies are currently required to consult with OGE prior to issuing individual waivers when practicable and must make those waivers public upon request.<sup>10</sup> Likewise, OGE provides centralized review and issuance of regulatory exemptions to 18 U.S.C. § 208.<sup>11</sup> OGE's involvement ensures that those waivers and exemptions are consistent with the statutory criteria and that these authorities are not subject to abuse. The proposed legislation does not contain similar checks and balances as the existing conflicts of interest statutes.

OGE is likewise concerned that the draft legislation would treat dually appointed VA researchers differently than other VA employees and other scientists and medical professionals that work for other agencies.<sup>12</sup> Avoiding inconsistent treatment and a proliferation of "nonuniform ad hoc exemptions" was one of the principal reasons Congress established a single, uniform set of conflict of interest rules.<sup>13</sup>

Finally, OGE believes that the legislation may be unnecessary. In instances in which a conflict of interest arising from a health professional education or research particular matter is insubstantial, remote, or inconsequential, the VA can issue an individualized waiver or may be able to work with OGE to promulgate an appropriately scoped regulatory exemption. Likewise, dually appointed VA employees serving only intermittently with the government may be able to rely on a pre-existing exemption or receive an individualized waiver of 18 U.S.C. §§ 203 and 205 to communicate on a grant or contract with the United States if the VA Secretary has determined it is in the public interest.

OGE thanks the Subcommittee for the opportunity to present views related to this draft legislation. OGE stands ready to work with the Subcommittee and with VA to identify and implement procedures that ensure the VA can continue to retain qualified VA researchers, while also limiting the influence of conflicts of interest in the research and education process. We believe that an approach is possible that will appropriately balance the needs to secure qualified medical professionals while protecting Government processes from abuse and conflicts of interest.

Please do not hesitate to contact us if we may be of additional assistance.

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<sup>10</sup> 18 U.S.C. § 208(d)(1).

<sup>11</sup> 18 U.S.C. § 208(b)(2).

<sup>12</sup> Congress recently enacted a limited exemption to 18 U.S.C. § 209 for dually appointed VA researchers. *See Consolidated Appropriations Act, 2023, P.L. 117-328, § 182, 136 Stat. 5436 (2023)* (codified at 38 U.S.C. § 7382(b)). While that provision has no effect on the views in this statement, OGE notes that there are more safeguards that apply to that provision than are found in this draft legislation, including a requirement that the Secretary authorize use of the exemption in writing.

<sup>13</sup> H. Rep. No. 748 at 14.