

# Conflicts of Interest Considerations: Law Firm or Consulting Employment

(Last updated December 18, 2020)



Topics covered include: Partnership or Equity Share in a Law or Consulting Firm (including distributions) | Capital Account | Dissolving a Business or Placing a Business in an Inactive Status | Contingency Fee | Referral Fee | Spouse's Law or Consulting Firm

This guidance focuses on potential conflicts of interest that can arise from financial interests that often accompany employment with a law firm or employment as a consultant. For guidance regarding potential conflicts that can arise from employment interests 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.*

## Partnership or Equity Share in a Law or Consulting Firm (including distributions)

18 U.S.C. § 208

A partner in a law or consulting firm usually will have a financial interest in the firm, often in the form of a partnership or profit share. A potential conflict of interest under 18 U.S.C. § 208 will arise if a Federal employee continues to hold a financial interest in the firm while the employee is in Federal service. This is most likely to happen when the employee is a Special Government Employee (SGE) because SGEs usually provide temporary service to the Government while retaining their outside activities and financial interests. An employee who retains a financial interest in a law or consulting firm may not participate personally and substantially in any particular matter that to the employee's knowledge has a direct and predictable effect on the financial interests of the firm.

If an employee resigns from the firm and receives the final partnership share distribution prior to assuming Federal employment, the employee's conflict of interest concerns related to the partnership share are resolved. If the partnership distribution has not been received but is fixed at the time of resignation, then the Federal employee will be recused from participating personally and substantially in particular matters only if the matter will directly and predictably affect the "ability or willingness" of the firm to honor its financial obligation in making the agreed-upon payments.

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

Under 5 C.F.R. § 2635.502, an employee will have a “covered relationship” with their former firm for a period of one year after separation and with their former clients for one year after last providing services to the particular client.<sup>1</sup> In addition, the employee will have a covered relationship with their former employer or clients until any outstanding financial obligation, such as repayment of a capital account or payment of an outstanding fee, is satisfied. Further, an employee who continues to have clients while in Government service will have a covered relationship with those clients.<sup>2</sup> Until the covered relationship at issue has terminated, when where an employee knows that a person with whom they have a covered relationship is or represents a party to a particular matter, the employee should not participate in the particular matter without informing the agency designee and receiving authorization.<sup>3</sup>

### *Executive Order No. 13770 (Ethics Pledge)*

Political appointees will generally be subject to additional restrictions under the Ethics Pledge (Executive Order No. 13770).<sup>4</sup> An appointee resigning from a law firm or a consulting firm will have a two-year recusal from their former employer pursuant to paragraph 6 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>5</sup> In addition, under paragraph 6, the appointee will have a similar two-year recusal to former clients.<sup>6</sup> If the appointee was a lobbyist, the appointee will be subject to the restriction in paragraph 7 of the Ethics Pledge, which prohibits the appointee from participating in any particular matter on which the appointee lobbied during the two-year period before being appointed or in the “specific issue area” in which that particular matter falls.<sup>7</sup>

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

The prohibitions at 18 U.S.C. §§ 203 and 205 can be extremely problematic for employees who maintain a position, a partnership share, or other equity interest in a law or consulting firm while a Federal employee.

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.

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

<sup>2</sup> *Id.* § 2635.502(b)(1)(i).

<sup>3</sup> *Id.* § 2635.502(a).

<sup>4</sup> See OGE Legal Advisory LA-17-02 (2017); OGE Legal Advisory LA-17-03 (2017).

<sup>5</sup> See *supra* note 4.

<sup>6</sup> *Id.*

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

This means that the prohibition at 18 U.S.C. § 203 prevents the Federal employee from receiving any portion of their partnership share that is from the representational services described above rendered personally or by another member of the law firm, if such services were rendered during the time the partner was a Federal employee. Furthermore, when compensation for representational services is prohibited under 18 U.S.C. § 203, an employee may not receive any portion of a partnership share for those representations made during the employee's Federal service, even if the payment is made after the employee leaves Federal service.

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 covered matter<sup>8</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. An employee may not receive any payments described in 18 U.S.C. § 205(a)(1) during the employee's Federal service, even if the employee completed the services described prior to beginning Federal service. Additionally, the representational restrictions pursuant to 18 U.S.C. § 205 also apply to uncompensated activities.

**Special Government employees (SGEs):** Sections 203 and 205 “are limited . . . in their application to SGEs. 18 U.S.C. § 203(c) and 18 U.S.C. § 205(c) contain identical provisions that substantially narrow the prohibitions with respect to SGEs. One of the most significant limitations is that SGEs are restricted by sections 203 and 205 only in connection with ‘particular matters involving specific parties.’”<sup>9</sup>

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

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. A future payment of a partnership or equity share can raise significant concerns under 18 U.S.C. § 209 if it occurs or will occur after the employee's entry into Government service. Further, a payment of a partnership or equity share that occurs before an employee enters Government service can raise concerns under 5 C.F.R. § 2635.503 as to whether it constitutes an “extraordinary payment.”

The 18 U.S.C. § 209 and 5 C.F.R. § 2635.503 analysis of a partnership distribution should focus on the timing of the payment and whether the payment distribution follows the firm's established plan or practice. If the employee receives the entire final partnership distribution in accordance with an established plan or practice, the payment or amount of which is not affected by the fact that the employee is entering Federal service, 18 U.S.C. § 209 will not prohibit the payment. However, if the employee receives any portion of the partnership share after beginning Federal service, and the distribution varies from the established plan or practice or the firm does not have a history of making similar payments to other partners who are not entering Federal service, then

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<sup>8</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 DAEOgram DO-06-029 (2006).

<sup>9</sup> OGE DAEOgram DO-00-003 (2000).

the payment might violate 18 U.S.C. § 209.<sup>10</sup> In addition, if a partnership share received prior to the employee entering Federal service is in excess of \$10,000, and is not made pursuant to an established plan or practice, it will often be an “extraordinary payment” that will necessitate a two-year party-matter recusal under 5 C.F.R. § 2635.503.

### *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>11</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 (\$28,845 for calendar year 2020).<sup>12</sup>

Under 5 U.S.C. app. § 502(a), covered noncareer employees, as defined by 5 C.F.R. § 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, which includes the practice of law.<sup>13</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>14</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>15</sup>

### *Other Restrictions for Covered Noncareer Employees*

**Use of Employee’s Name:** Under 5 U.S.C. app § 502(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>16</sup> Legal practices and consulting firms are typical examples of business entities that provide professional services involving a fiduciary relationship. 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, including, in the case of a law firm, sending a letter to the state bar association seeking their assistance in the matter.

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<sup>10</sup> For a complete discussion of 18 U.S.C. § 209, see OGE DAE Ogram DO-02-016 (2002) and its attachment, DO-02-016A.

<sup>11</sup> See Exec. Order No. 12,674, § 102; 5 C.F.R. § 2635.804(a).

<sup>12</sup> See 5 U.S.C. app. § 501(a)(1); 5 C.F.R. § 2635.804(b); OGE Legal Advisory LA-20-01 (2020).

<sup>13</sup> 5 U.S.C. app. § 502(a)(3); 5 C.F.R. § 2636.305(a)(1)(i).

<sup>14</sup> 5 U.S.C. app. § 502(a)(1); 5 C.F.R. § 2636.305(a)(1)(ii).

<sup>15</sup> 5 U.S.C. app. § 502(a)(4); 5 C.F.R. § 2636.306.

<sup>16</sup> 5 U.S.C. app. § 502(a)(2); 5 C.F.R. § 2636.305(a)(2).

### *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>17</sup>

### *Emoluments Clause*

The Emoluments Clause of the U.S. Constitution prohibits Federal employees from receiving compensation from a foreign state.<sup>18</sup> Employees who receive partnership distributions tied to earnings for services provided following the employee's resignation from the firm or who maintain an equity interest or position with their firm after assuming Federal employment will need to consider the application of the Emoluments Clause if some of the firm's earnings are from the representation of a foreign state.

## Capital Account

### *18 U.S.C. § 208*

A partner in a law or consulting firm who is leaving their firm to enter Federal service may expect the refund of a capital account. If the payment is received prior to the employee beginning Federal service, there are no issues under 18 U.S.C. § 208 that arise from that payment. If the capital account is not completely refunded when the employee begins Federal service, then the employee may not participate personally and substantially in any particular matters that employee knows will directly and predictably affect the "ability or willingness" of the firm to honor its obligation to make the fixed payment to the employee.

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

Under 5 C.F.R. § 2635.502, an employee will have a "covered relationship" with their former firm for a period of one year after separation.<sup>19</sup> An employee will also have a covered relationship with their former firm until their capital account is refunded because the employee has a business, contractual, or other financial relationship that involves other than a routine consumer transaction.<sup>20</sup> Therefore, until the covered relationship has terminated, when an employee knows that their former firm is or represents a party to a particular matter, the employee should not participate in the particular matter without informing the agency designee and receiving authorization.<sup>21</sup>

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<sup>17</sup> See 5 C.F.R. § 2635.803.

<sup>18</sup> See U.S. CONST., art. I, § 9, cl. 8.

<sup>19</sup> 5 C.F.R. § 2635.502(b)(1)(iv).

<sup>20</sup> *Id.* § 2635.502(b)(1)(i).

<sup>21</sup> *Id.* § 2635.502(a).

## Dissolving a Business or Placing a Business in an Inactive Status

### *18 U.S.C. § 208*

Most employees with a solo law practice or consulting business agree to place the entity in an inactive status for the duration of Government service or dissolve the entity entirely to mitigate or eliminate the conflict of interest concerns. If an employee who is entering Federal service has not received full payment of outstanding fees for prior work, the employee continues to have concerns under 18 U.S.C. § 208 until payment is received by the employee. In most cases when a business is in the process of being dissolved or placed in an inactive status, the outstanding fees are fixed and the employee will be prohibited only from participating personally and substantially in any particular matter that has a direct and predictable effect on the ability or willingness of any client to pay the agreed upon amount.

If the employee continues to have a financial interest in the inactive firm at the time they enter Federal service, the employee will be prohibited under 18 U.S.C. § 208 from participating personally and substantially in particular matters that to the employee's knowledge have a direct and predictable effect on the financial interests of the firm.

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

Under 5 C.F.R. § 2635.502, an employee will have a “covered relationship” with their former clients for one year after last providing services to the particular client.<sup>22</sup> In addition, the employee will have a covered relationship with their clients until any outstanding financial obligation, such as payment of an outstanding fee, is satisfied. Therefore, until the covered relationship at issue has terminated, (1) when an employee knows that the 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>23</sup>

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

If the employee continues to have a financial interest in an inactive firm when fees are still outstanding at the time the employee enters Federal service, the employee will be subject to the restrictions in 18 U.S.C. §§ 203 and 205. Additional information on 18 U.S.C. §§ 203 and 205 can be found in this document under “Partnership or Equity Share in a Law or Consulting Firm.”

### *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>24</sup> Covered noncareer employees, as defined by 5 C.F.R. § 2636.303(a), are subject to a ban on receiving, in a calendar

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<sup>22</sup> *Id.* § 2635.502(b)(1)(iv).

<sup>23</sup> *Id.* § 2635.502(a).

<sup>24</sup> *See* Exec. Order No. 12,674, § 102; 5 C.F.R. § 2635.804(a).

year, outside earned income – including honoraria – that exceeds 15% of the annual rate of basic pay for level II of the Executive Schedule (\$28,845 for calendar year 2020).<sup>25</sup>

If the business is placed in an inactive status, the employee may still perform ministerial duties that do not generate income and are necessary to maintain the legal existence of the entity while in an inactive status. While in an inactive status, the employee must agree not to represent clients, advertise, or engage in any business activities while in Federal service.

## Contingency Fee

### *18 U.S.C. § 208*

A continuing interest in a contingency fee arrangement may pose a number of conflicts for the employee. Under 18 U.S.C. § 208, an employee is prohibited from participating personally and substantially in any particular matter that the employee knows will have a direct and predictable effect on the amount of the fee or on the ability or willingness of the firm, any of the clients involved in the cases, or any of the opposing parties to pay the fee.

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

Any potential 18 U.S.C. § 203 and 18 U.S.C. § 205 issues related to the contingency fee must also be considered. If the United States is a party or has a direct and substantial interest in the case (or other particular matter), 18 U.S.C. § 203 generally prohibits receiving any compensation for representations made by the employee or anyone else during the employee's Federal service, regardless of whether the employee receives the funds during or after Federal service. A separate statute, 18 U.S.C. § 205, prohibits an employee from receiving payments in consideration of assistance in prosecuting a claim against the United States, regardless of whether such assistance occurred prior to Government service. Additional information on 18 U.S.C. §§ 203 and 205 can be found in this document under "Partnership or Equity Share in a Law or Consulting Firm."

In the event that 18 U.S.C. §§ 203 or 205 are not currently an issue, the employee and their ethics official should consider whether the facts could change in a way that would raise 18 U.S.C. §§ 203 or 205 issues at some later time, for example the possibility of the United States intervening in a matter. Further, if an ethics official is considering having the employee resolve a potential 18 U.S.C. §§ 203 or 205 issue by fixing the amount of the payment, it is recommended that the ethics official contact OGE for assistance.

## Referral Fee

### *18 U.S.C. § 208*

Particularly when a business is being placed in an inactive status or dissolved upon the employee's entry into Federal service, the employee may want to refer clients to another attorney or consultant. Under 18 U.S.C. § 208, an employee is prohibited from participating personally

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<sup>25</sup> See 5 U.S.C. app. § 501(a)(1); 5 C.F.R. § 2635.804(b); OGE Legal Advisory LA-20-01 (2020).

and substantially in any particular matter that the employee knows will have a direct and predictable effect on the amount of the fee or on the ability or willingness to pay the fee.

*5 C.F.R. § 2635.502 (Impartiality)*

Under 5 C.F.R. § 2635.502, an employee will have a “covered relationship” with a person with whom the employee has or seeks a business, contractual, or other financial relationship that involves other than a routine consumer transaction.<sup>26</sup> This could include an attorney or other professional with whom the employee has an agreement to refer clients. An employee would also have a covered relationship with that professional for as long as payment of a referral fee is outstanding.<sup>27</sup> Therefore, until the covered relationship at issue has terminated, when an employee knows that the person with whom they have a covered relationship is or represents a party to a particular matter, the employee should not participate in the particular matter without informing the agency designee and receiving authorization.<sup>28</sup>

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

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. If the referral fee is in excess of what is customarily paid and is received after Federal employment begins, a more thorough analysis under 18 U.S.C. § 209 or the gifts provisions of the Standards of Ethical Conduct for Employees of the Executive Branch<sup>29</sup> is required. For additional assistance interpreting 18 U.S.C. § 209, see OGE DAEOgram DO-02-016 (2002).

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

Any potential 18 U.S.C. § 203 and 18 U.S.C. § 205 issues related to the referral fee must also be considered. If the United States is a party or has a direct and substantial interest in the case (or other particular matter), 18 U.S.C. § 203 generally prohibits receiving any compensation for representations made by the employee or anyone else during the employee’s Federal service, regardless of whether the employee receives the funds during or after Federal service. A separate statute, 18 U.S.C. § 205, prohibits an employee from receiving payments in consideration of assistance in prosecuting a claim against the United States, regardless of whether such assistance occurred prior to Government service. If an ethics official is considering having the employee resolve a potential 18 U.S.C. §§ 203 or 205 issue by fixing the amount or the payment, it is recommended that the ethics official contact OGE for assistance.

In the event that 18 U.S.C. §§ 203 or 205 are not currently an issue, the employee and their ethics official should consider whether the facts could change in a way that would raise 18 U.S.C. §§ 203 or 205 issues at some later time, for example the possibility of the United States intervening in a

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<sup>26</sup> 5 C.F.R. § 2635.502(b)(1)(i).

<sup>27</sup> *See id.*

<sup>28</sup> *Id.* § 2635.502(a).

<sup>29</sup> 5 C.F.R. pt. 2635, subpt. B.



matter. Additional information on 18 U.S.C. §§ 203 and 205 can be found in this document under “Partnership or Equity Share in a Law or Consulting Firm.”

## Spouse’s Law or Consulting Firm

### *18 U.S.C. § 208*

A potential conflict of interest under 18 U.S.C. § 208 is created if a spouse of a Federal employee holds an equity interest in a law or consulting firm while the employee is in Federal service. An employee whose spouse retains a financial interest in a law or consulting firm may not participate personally and substantially in any particular matter that to the employee’s knowledge has a direct and predictable effect on the financial interests of the firm.

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

Under 5 C.F.R. § 2635.502, an employee will have a “covered relationship” with any person for whom 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>30</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 (*e.g.*, the spouse’s employer or client), 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>31</sup>

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<sup>30</sup> 5 C.F.R. § 2635.502(b)(1)(iii).

<sup>31</sup> *Id.* § 2635.502(a).