

Conflicts of Interest Considerations: Business or Farm Ownership

(Last updated June 22, 2018)



Topics covered include: Business Ownership | Farm (or farmland) | Sale of a Business or Farm

This guidance focuses on potential conflicts of interest that can arise from financial interests that often accompany ownership of a business or farm. 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.

Business Ownership

Employee's Ownership of a Business

18 U.S.C. § 208

Ownership of a business by a Federal employee creates the potential for conflicts of interest under 18 U.S.C. § 208. When evaluating whether a potential conflict of interest may arise under 18 U.S.C. § 208, consider whether the employee is likely to participate personally and substantially in a particular matter that the employee knows would directly and predictably affect the financial interests of the business.

Businesses Organized as Partnerships or LLCs: 18 U.S.C. § 208 imputes the interests of a general partner to a Federal employee, whether the employee is also a general partner or merely a limited partner. Therefore, if a business is organized as a partnership, the interests of the business's general partner of which the employee is aware will be imputed to the employee. The imputation of a general partner's interests can prove problematic in the case of smaller businesses consisting of the employee's friends or relatives. At the same time, 18 U.S.C. § 208 does not impute the interests of a managing member of a limited liability company to the other members, so the analysis for partnerships does not apply to LLCs.

Exemptions: For businesses organized as limited partnerships, the exemption at 5 C.F.R. § 2640.202(f)(2) applies for certain interests of general partners when an employee is a limited partner in a partnership with at least 100 limited partners. Ethics officials are encouraged to contact OGE when applying this exemption because OGE has found it difficult to meet the exemption's criteria in practice.

For businesses organized as general partnerships or limited partnerships that do not qualify for the exemption at 5 C.F.R. § 2640.202(f)(2), the exemption at 5 C.F.R. § 2640.202(f)(1) is nonetheless available. Section 2640.202(f)(1) permits an employee to participate in any particular matter when the financial interest arises from a general partner's interest, known to the employee, in publicly traded securities, long-term Federal securities, and municipal securities, provided that (1) the ownership is not related to the partnership between the employee and general partner, and (2) the value of the securities does not exceed \$200,000.

5 C.F.R. § 2635.502 (Impartiality)

Under 5 C.F.R. § 2635.502, an employee will have a “covered relationship” with a business in which they have an ownership interest.¹ Additionally, there are other relationships that the employee may have in connection with the business ownership that will also be covered relationships:

- a person or organization with whom the employee has or seeks a business, contractual, or other financial relationship that involves other than a routine consumer transaction.²
- a person or organization for whom the employee has, within the last year, served as officer, director, trustee, general partner, employee, agent, attorney, consultant, or contractor.³

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.⁴

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

If the employee continues to operate a business while working for the Federal Government, the employee must be aware of the limitations on representations made on behalf of the business or clients of the business to the Government. Under 18 U.S.C. § 205, employees generally may not represent a third party in a covered matter⁵ 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.⁶ This prohibition applies to both compensated and uncompensated activities. Another statute, 18 U.S.C. § 203, prohibits an employee from seeking, agreeing to receive, or receiving compensation for their own or for another's representational services, made on behalf of a third party and rendered while that employee is a Federal employee, in a particular matter before the

¹ 5 C.F.R. § 2635.502(b)(1)(i).

² *Id.* § 2635.502(b)(1)(i).

³ *Id.* § 2635.502(b)(1)(iv).

⁴ *Id.* § 2635.502(a).

⁵ 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).

⁶ In addition, 18 U.S.C. § 205 typically bars an employee from prosecuting a claim or receiving payments in consideration of assistance in prosecuting a claim against the United States.

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.⁷

These statutes do not prevent an employee from making representations on behalf of a business that the employee runs as a sole proprietorship because such representations are viewed as representations made on one's own behalf and not on behalf of a third party. However, the restrictions do extend to representations made on behalf of a partnership, corporation, limited liability company (LLC), or other legal entity.

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.⁸ 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 (\$28,050 for calendar year 2018).⁹

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.¹⁰ Legal practices and medical practices, consulting firms, and insurance brokers 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 making a formal request to the entity.

Other Restrictions on Outside Activities

In operating an outside business, employees must comply with the provisions of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) on misuse of position.¹¹ Employees are prohibited from using their public office to endorse or promote the business for their own private gain.¹² Further, employees must comply with the provisions of the Standards of Conduct relating to the proper use of official time, Government equipment and facilities, and nonpublic information.¹³

⁷ See OGE Inf. Adv. Op. 99 x 25 (1999); OGE Inf. Adv. Op. 06 x 7, at 28 (2006).

⁸ See Exec. Order No. 12,674, § 102; 5 C.F.R. § 2635.804(a).

⁹ See 5 U.S.C. app. § 501(a)(1); 5 C.F.R. § 2635.804(b); OGE Legal Advisory LA-18-01 (2018).

¹⁰ 5 U.S.C. app. § 502(a)(2); 5 C.F.R. § 2636.305(a)(2).

¹¹ See 5 C.F.R. pt. 2635, subpt. G.

¹² 5 C.F.R. § 2635.702.

¹³ *Id.* §§ 2635.703-.705.

Employees must also comply with the provisions of the Standards of Conduct on outside activities.¹⁴ If an employee will engage in teaching, speaking, or writing that relates to the employee's official duties, as defined by 5 C.F.R. § 2635.807, then the employee generally will not be allowed to receive compensation for that activity.¹⁵ Further, when teaching, speaking, or writing in a personal capacity, employees may refer to their official title or position only as permitted by 5 C.F.R. § 2635.807(b).

Agency-Specific Restrictions

Some agencies have prohibited holdings statutes or regulations that restrict ownership of a business, or that 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.¹⁶

Spouse's or Child's Ownership of a Business

18 U.S.C. § 208

Because the financial interests of an employee's spouse or minor children are imputed to the employee, a business that is owned by a spouse or minor child is analyzed under 18 U.S.C. § 208 as if the employee owns it. Therefore, unless otherwise noted, the 18 U.S.C. § 208 analysis described above for the employee's ownership of a business applies in the same manner regardless of whether it is owned by the employee or by the employee's spouse or minor child. Note, however, that 18 U.S.C. § 208 imputes only the interests of the *employee's* general partner to the employee, so the analysis for general partners does not need to be conducted if it is the employee's spouse or minor child who is the owner.

5 C.F.R. § 2635.502 (Impartiality)

Under 5 C.F.R. § 2635.502, an employee will have a "covered relationship" with any organization for which the employee's spouse 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.¹⁷ Therefore, (1) when an employee knows that a person with whom they have a covered relationship is or represents a party to a particular matter, and (2) when the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question their impartiality in the matter, the employee should not participate in the matter without informing the agency designee and receiving authorization.¹⁸ The employee does not, however, have a covered relationship with an organization merely because the employee's spouse or dependent child is an active participant in the organization.

¹⁴ See 5 C.F.R. pt. 2635, subpt. H.

¹⁵ See 5 C.F.R. § 2635.807(a)(2)(i).

¹⁶ See *id.* § 2635.803.

¹⁷ *Id.* § 2635.502(b)(1)(iii).

¹⁸ *Id.* § 2635.502(a).

Farm (or farmland)

18 U.S.C. § 208

Under 18 U.S.C. § 208, an employee is prohibited from participating personally and substantially in any particular matter in which the employee knows they have a financial interest directly and predictably affected by the matter, or in which they know that a person whose interests are imputed to them has a financial interest directly and predictably affected by the matter. A potential conflict of interest under 18 U.S.C. § 208 may arise if a Federal employee or their spouse owns a farm or farmland. When evaluating whether a potential conflict of interest may arise, consider the following:

- whether the employee could take action to affect the price of the crops that the employee farms or the price of the livestock the employee raises;
- the geographic location of the farm in relation to Government activities in which the employee will be involved;
- any contracts into which the farm has entered that could be affected by the employee's work at the agency; or
- whether the farm participates in any subsidy or other farm support programs administered by the agency for which the employee works.

An employee in an agriculture-related agency who works on particular matters that could affect the price of the farm's crops or livestock also may have a potential conflict of interest when renting out land for a share of the crops or income rather than receiving a fixed cash payment. A sharecropping agreement would make the price of the crops a financial interest of the employee. To remedy this potential conflict, an employee could change the land use agreement to a simple land rent, payable regardless of the success or failure of the crops.

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

If the employee continues to operate a farm while working for the Federal Government, and the farm is operated as anything other than a sole proprietorship,¹⁹ the employee must be aware of the limitations in 18 U.S.C. §§ 203 and 205 on representations made on behalf of the farm to the Government. Prohibited activity could include making a claim for Federal benefits on behalf of the entity operating the farm. Additional information on 18 U.S.C. §§ 203 and 205 can be found in this document under "Business Ownership."

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.²⁰ Covered noncareer employees, as defined by 5 C.F.R. § 2636.303(a), are subject to a ban on receiving, in a calendar

¹⁹ See OGE Inf. Adv. Op. 99 x 25 (1999); OGE Inf. Adv. Op. 06 x 7, at 28 (2006).

²⁰ 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 (\$28,050 for calendar year 2018).²¹

Agency-Specific Restrictions

Some agencies may have prohibitions related to farming interests.

Sale of a Business or Farm

18 U.S.C. § 208

Under 18 U.S.C. § 208, an employee is prohibited from participating personally and substantially in any particular matter in which the employee knows they have a financial interest directly and predictably affected by the matter, or in which they know that a person whose interests are imputed to them has a financial interest directly and predictably affected by the matter. If the employee or the employee’s spouse is selling their business or farm, once the sale is complete an employee will no longer have the potential for a conflict of interest with respect to the business or farm itself under 18 U.S.C. § 208. However, if an employee or the employee’s spouse received a **note** in return for the sale of the business or farm, the employee would be prohibited from participating personally and substantially in a particular matter that the employee knows would have a direct and predictable effect on the purchaser’s ability or willingness to repay the note.²²

An employee or the employee’s spouse may use a **third-party escrow agreement** in the course of the sale of the business or farm. These arrangements will not create the potential for a conflict of interest under 18 U.S.C. § 208 unless the employee could participate personally and substantially in a particular matter that the employee knows would affect the ability, willingness, or obligation of the third party to release the escrow funds. In most cases, a particular matter affecting the financial interests of the sold business will not affect the funds in the escrow account that an employee or spouse is entitled to receive because such funds are generally calculated before the particular matter occurs.

5 C.F.R. § 2635.502 (Impartiality)

If an employee receives a **note** in return for the sale of the business or farm, under 5 C.F.R. § 2635.502 the employee will have a “covered relationship” with the borrower because the employee has a business, contractual, or other financial relationship that involves other than a routine consumer transaction.²³ Therefore, (1) when an employee knows that the borrower 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

²¹ See 5 U.S.C. app. § 501(a)(1); 5 C.F.R. § 2635.804(b); OGE Legal Advisory LA-18-01 (2018).

²² An ability and willingness creates a sliding scale of concern about an employee’s ability to affect their financial interest to be paid, in particular, when the repayment is in some way tied to the profits of the business. If the particular matter in which the employee seeks to participate affects the ability of the issuer (which could be third party or the business itself) to repay the note, then the employee likely would need to be recused. The larger the business that is being sold, the less likely it is that a particular matter in which the employee seeks to participate could affect the ability to pay.

²³ 5 C.F.R. § 2635.502(b)(1)(i).

their impartiality in the matter, the employee should not participate in the matter without informing the agency designee and receiving authorization.²⁴

Similarly, if the employee uses a third-party escrow agreement, the employee will have a covered relationship under 5 C.F.R. § 2635.502 with the buyer and possibly the third party holding the escrow funds, until the funds are released.

Additional Considerations

Typically, the sale of a business or farm will not raise concerns under other provisions of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct)²⁵ or 18 U.S.C. § 209, which prohibits an outside entity from paying a Federal employee to perform their official duties or enhancing the employee's pay because of those official duties.²⁶ However, if an employee sells a business or farm in a transaction that is not arms-length and was for above-market value,²⁷ the payment to the employee could be an extraordinary payment as defined at 5 C.F.R. § 2635.503(b)(1), a gift as defined at 5 C.F.R. § 2635.203(b), or in an unusual case, a potential supplementation of salary under 18 U.S.C. § 209.

Payments received prior to the start of Government service may constitute an “extraordinary payment” under 5 C.F.R. § 2635.503, depending on the circumstances; however, such payments do not implicate 18 U.S.C. § 209 or the gift provisions of the Standards of Conduct.

²⁴ *Id.* § 2635.502(a).

²⁵ 5 C.F.R. pt. 2635.

²⁶ For additional assistance interpreting 18 U.S.C. § 209, see OGE DAEogram DO-02-016 (2002).

²⁷ Ethics officials may not have information available to make this determination.