

Impartiality in Performing Official Duties
5 CFR section 2635.502

Conflicts = Process Biases

18 U.S.C. section 208

- Private pecuniary interests

5 C.F.R. 2635.502

- Personal non-pecuniary biases/preferences such as loyalty/filial obligations/associations

Impartiality / Appearance

- ▶ Government's best interests
- ▶ No bias toward persons or organizations
- ▶ Agency's reputational risk

Impartiality Standards

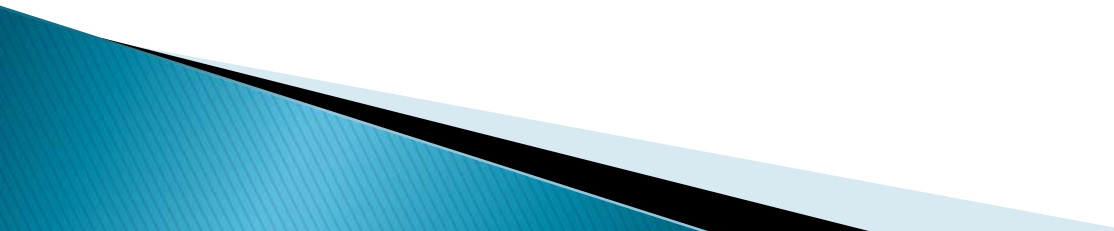
- ▶ Personal and business relationships
5 CFR 2635.502(a)
- ▶ Extraordinary payments
5 CFR 2635.503

Appearance Problem - Who Decides?

- ▶ Employee
- ▶ Supervisor
- ▶ Agency Designee
5 CFR 2635.102(b)

Reading 502(a)

2 prongs/provisions:

1. Financial interest of member of household; OR
 2. Person with whom employee has a covered relationship is or represents a party
- 

Personal and Business Relationships

- ▶ Covered relationships—*Affiliations that can create biases*
- ▶ 502 financial interest—*Pecuniary biases*
- ▶ Other appearances

Personal and Business Relationships

Covered Relationships 5 CFR § 2635.502(a)	502 Financial Interests 5 CFR § 2635.502(a)	Other Appearances 5 CFR § 2635.502(a)(2)
Is there a particular matter involving specific parties?	Is there a particular matter involving specific parties?	
Is there a covered relationship?	Is the matter likely to have a direct and predictable effect on household member's financial interest?	
Is the person with whom the employee has a covered relationship a party to the matter? <u>OR</u> Does the person with whom the employee has a covered relationship represent a party to the matter?		
Would a reasonable person with knowledge of the relevant facts question the employee's impartiality?	Would a reasonable person with knowledge of the relevant facts question the employee's impartiality?	Would a reasonable person with knowledge of the relevant facts question the employee's impartiality? (optional)

Analyzing the Covered Relationship Rule

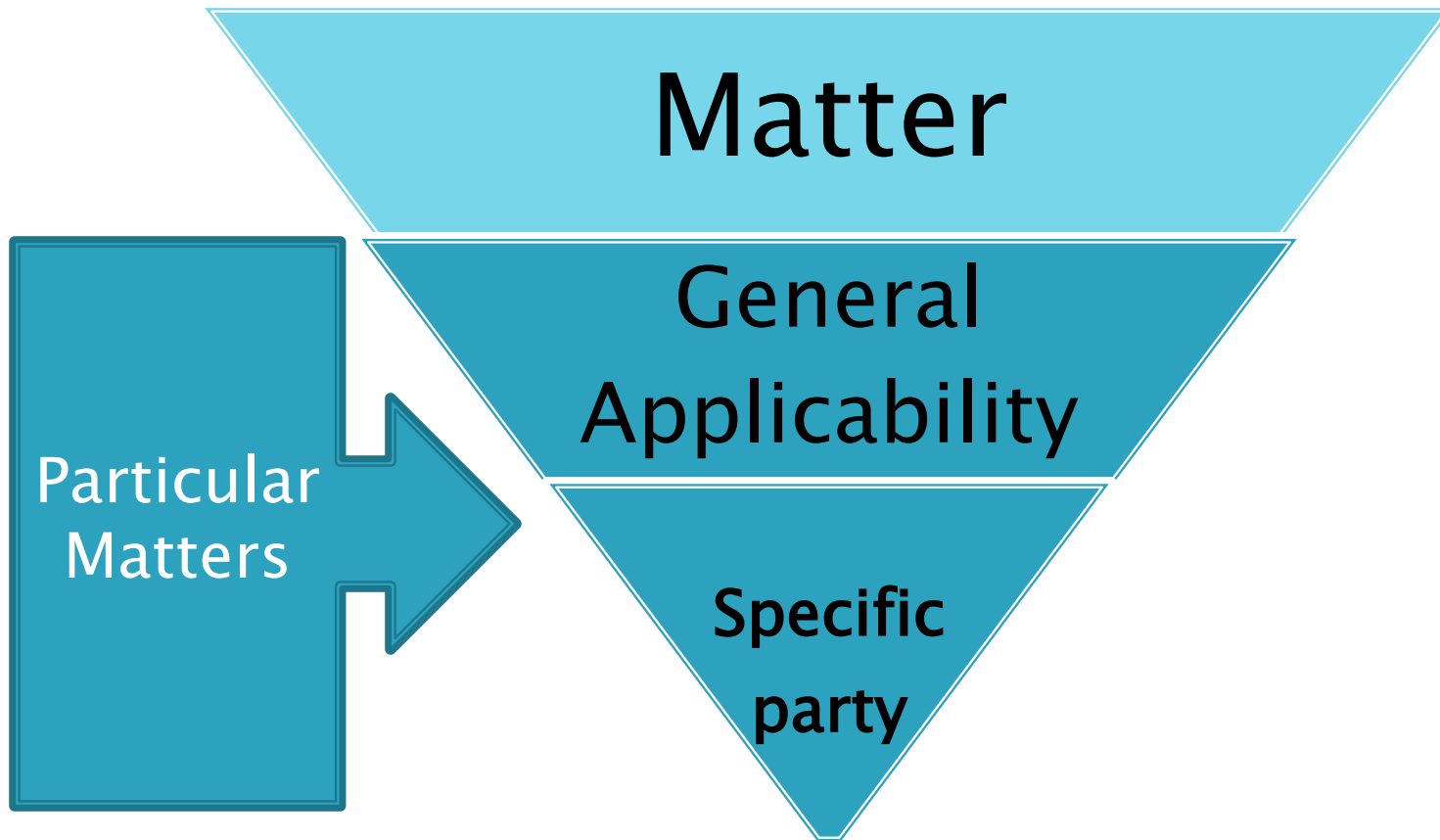
- ▶ Are there any 208 concerns?
- ▶ Particular matter involving specific parties?
- ▶ Covered relationship?
- ▶ Covered relationship is or represents a party?
- ▶ Question by reasonable person?

Analyzing the Covered Relationship Rule

- ▶ Are there any 208 concerns?
- ▶ Particular matter involving specific parties?
- ▶ Covered relationship?
- ▶ Covered relationship is or represents a party?
- ▶ Question by reasonable person?

Analyzing the Covered Relationship Rule

- ▶ **Particular matter involving specific parties?**
- ▶ Covered relationship?
- ▶ Covered relationship is or represents a party?
- ▶ Question by reasonable person?



See: Particular Matter Involving Specific Parties, Particular Matter, and Matter.
OGE Advisory Memo 06x9 of October 4, 2006.

Analyzing the Covered Relationship Rule

- ▶ Particular matter involving specific parties?
- ▶ **Covered relationship?**
- ▶ Covered relationship is or represents a party?
- ▶ Question by reasonable person?

Covered Relationships

- ▶ Business, contractual, or other financial relationships
- ▶ Close relatives
- ▶ Member of household

Covered Relationships

Cronyism-hiring/benefiting associates

Nepotism—hiring/benefiting relatives

Nepotism—hiring/benefiting relatives

Household Member?

- ▶ Spouses
- ▶ Children living at home
- ▶ Parents
- ▶ Roommates
- ▶ Live-in girlfriends and boyfriends

Not brief visitors

More Covered Relationships

- ▶ Person for whom employee's spouse, parent, or dependent child serves or seeks to serve in various capacities

More Covered Relationships

- ▶ Person the employee served within the last year

More Covered Relationships

Revolving door

—special access and influence from certain groups

More Covered Relationships

Organizations where employee is active: e.g. chairperson, spokesperson, directing activities, promoting specific programs

More Covered Relationships

Special interests—
special access and influence from certain groups

Analyzing the Covered Relationship Rule

- ▶ Particular matter involving specific parties?
- ▶ Covered relationship?
- ▶ **Covered relationship is or represents a party?**
- ▶ Question by reasonable person?

Is or Represents a Party Means

Is the person/entity involved in the matter?

It does NOT mean

Is the person/entity *affected financially* by the matter?

Analyzing the Covered Relationship Rule

- ▶ Particular matter involving specific parties?
- ▶ Covered relationship?
- ▶ Covered relationship is or represents a party?
- ▶ **Question by reasonable person?**

Basis for Answering Reasonable Person Question

- ▶ Reasonable person armed with relevant facts
- ▶ Not the employee's honesty and integrity

Reasonable Person Guidance

- ▶ No bright line test
- ▶ Risk assessment for the agency

Exercise 1—Covered relationships

Scenario	Covered Relationship with Whom?	Particular Matter Involving Specific Party(ies)?	Covered Relationship	Would a Reasonable Person Question
<p>Dr. Mantini is a research scientist who serves as a Co-chair on an advisory panel to review the efficacy of certain drug protocols being used in various intramural and extramural clinical research. Several companies that have been awarded grants to do related research are invited to appear before the panel to make recommendations based upon their own research. One of the companies is a client of Dr. Mantini's spouse.</p>		<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> is a party to the matter <input type="checkbox"/> represents a party to the matter <input type="checkbox"/> N/A	<input type="checkbox"/> Yes, because <input type="checkbox"/> No, because <input type="checkbox"/> Need to know

Analysis Steps for Covered Relationship Rule

- ✓ Are there any 208 concerns?
- ✓ Particular matter involving specific parties?
- ✓ Covered relationship?
- ✓ Covered relationship is or represents a party?
- ✓ Question by reasonable person?

Exercise 2—Covered relationships

Scenario	Covered Relationship with Whom?	Particular Matter Involving Specific Party(ies)?	Covered Relationship	Would a Reasonable Person Question
<p>Jane served as a government relations executive for a financial institution. She was recently hired by a federal agency that regulates financial institutions. She is to attend a meeting of the agency's senior management. Among the agenda items is a briefing on several enforcement actions to be taken against various banks, including Jane's former employer.</p>		<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> is a party to the matter <input type="checkbox"/> represents a party to the matter <input type="checkbox"/> N/A	<input type="checkbox"/> Yes, because <input type="checkbox"/> No, because <input type="checkbox"/> Need to know

Analysis Steps for Covered Relationship Rule

- ✓ Are there any 208 concerns?
- ✓ Particular matter involving specific parties?
- ✓ Covered relationship?
- ✓ Covered relationship is or represents a party?
- ✓ Question by reasonable person?

Personal and Business Relationships Rules

- ▶ Covered relationship
- ▶ **502 financial interest**
- ▶ Other appearances

Analyzing the 502 Financial Interest Rule

- ▶ **Are there any 208 concerns?**
- ▶ Particular matter involving specific parties?
- ▶ Direct and predictable effect likely on household member's financial interest?
- ▶ Question by reasonable person?

Household Member 208 vs 502

- ▶ Spouse and minor child's financial interests are ALWAYS imputed 208 interests
- ▶ Dependents (esp. non-minor child) can sometimes create 208 interests for employee

Analyzing the 502 Financial Interest Rule

- ▶ **Particular matter involving specific parties?**
- ▶ Direct and predictable effect likely on household member's financial interest?
- ▶ Question by reasonable person?

Analyzing the 502 Financial Interest Rule

- ▶ Particular matter involving specific parties?
- ▶ **Direct and predictable effect likely on household member's financial interest?**
- ▶ Question by reasonable person?

Analyzing the 502 Financial Interest Rule

- ▶ Particular matter involving specific parties?
- ▶ Direct and predictable effect likely?
- ▶ **Question by reasonable person?**

Exercise 2—Financial Interest of Household

Scenario	Who is the Household Member?	What Is/Are the Household Member's Financial Interest(s)?	Particular Matter Involving Specific Party(ies)?	Likely to Have a Direct and Predictable Effect on a Household Member's Financial Interest?	Would a Reasonable Person Question?
<p>Joseph, a National Highway Traffic Safety Administration employee, is assigned to a GM recall case.</p> <p>Joseph's 21 year old son lives at home and works on the line at a GM plant.</p>			<input type="checkbox"/> YES <input type="checkbox"/> NO	<input type="checkbox"/> YES <input type="checkbox"/> NO	<input type="checkbox"/> Yes, because <input type="checkbox"/> No, because <input type="checkbox"/> Need to know

Analysis Steps for 502 Financial Interest Rule

- ✓ Are there any 208 concerns?
- ✓ Particular matter involving specific parties?
- ✓ Direct and predictable effect likely on household member's financial interest?
- ✓ Question by reasonable person?

Exercise 2—Covered Relationship

Exercise 2—Part 2— Covered relationship	Covered Relationship with Whom?	Particular Matter Involving Specific Party(ies)?	Covered Relationship	Would a Reasonable Person Question?
<p>Joseph, a National Highway Traffic Safety Administration employee, is assigned to a GM recall case.</p> <p>Joseph's 21 year old son lives at home and works on the line at a GM plant.</p>		<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> is a party to the matter <input type="checkbox"/> represents a party to the matter <input type="checkbox"/> N/A	<input type="checkbox"/> Yes, because <input type="checkbox"/> No, because <input type="checkbox"/> Need to know

Personal and Business Relationships Rules

- ▶ Covered relationship
- ▶ 502 financial interest
- ▶ **Other appearances**
5 CFR 2635.502(a)(2)

Analyzing the Other Appearances Rule

- ▶ Catch all
- ▶ Option to use the reasonable person question

Analyzing the Other Appearances Rule

- ▶ Management discretion to assign matters
- ▶ Serious optics concerns not captured by regulation (e.g. less than arms length relationships developed in the course of conducting government business)

Impartiality Remedies

- ▶ Disqualification
(5 C.F.R. §2635.502(e))

- ▶ Impartiality authorization
(5 C.F.R. §2635.502(d))

Impartiality Authorization

- ▶ Participation does not violate § 208
- ▶ Determination by agency only
- ▶ Government interests outweigh reasonable person concern

Impartiality Authorization

What is the reputational risk to the agency?

Do the benefits outweigh the risks?

Are authorizations issued in a consistent/even-handed way ?

How frequently are authorizations issued?

Summary of 18 USC section 208

Prohibition:

An employee may not participate in a particular matter if the outcome of that matter will have a direct and predictable effect on the employee's financial interest, which includes the financial interests of others that are imputed to him under the statute. (See chart of imputed interests).

Definitions:

"Particular matter": For purposes of applying 18 USC section 208 and the exemptions in 5 CFR part 2640, the term "particular matter" refers to two different categories of matters, those "involving specific parties" and those "of general applicability."

a. **"Particular matter involving specific parties"**—refers to government matters that involve named persons or organizations.

Examples of particular matters involving specific parties include contracts, grants, licenses, product approval applications, investigations, and litigation.

b. **"Particular matter of general applicability"**—refers to government matters that focus on the interests of a discrete and identifiable class of persons or organizations, such as a particular industry or profession.

Examples of particular matters of general applicability include rulemaking, legislation, or policy-making of general applicability. The term also can include legislation and policymaking, as long as it is narrowly focused on a discrete and identifiable class.

See DAEOgram DO-06-029, October 4, 2006

"Particular Matter Involving Specific Parties," "Particular Matter," and "Matter"

Summary of 5 CFR section 2635.502—Impartiality

Prohibition:

An employee may not participate in a specific party matter:

- 1) that will directly and predictably affect the financial interest of a member of the employee's household; or
- 2) in which someone with whom the employee has a "covered relationship" is or represents a party to the matter. (See chart for covered relationships).

IF—A reasonable person with knowledge of the relevant facts would question his/her impartiality in the matter.

Other circumstances:

An agency may disqualify an employee from participating in matters where circumstances, other than those described above, would cause a reasonable person with knowledge of the relevant facts to question an employee's impartiality.

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 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 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 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, 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.

Relationships under 18 U.S.C. § 208 and 5 C.F.R. § 2635.502(b)

Imputed Interests under 18 U.S.C. § 208
<ul style="list-style-type: none">• Spouse• Minor Child• General Partner• Organization which the employee serves as:<ul style="list-style-type: none">◦ Officer◦ Director◦ Trustee◦ General partner or◦ Employee• Organization with which employee is negotiating for or has an arrangement concerning prospective employment.

Covered Relationships under 5 C.F.R. § 2635.502(b)
<ul style="list-style-type: none">• Person with whom the employee has or seeks a business, contractual, or other financial relationship that involves other than a routine transaction <i>NOTE: This definition does NOT include a prospective employer described in § 2635.603. An employee seeking employment shall comply with Subpart F instead of this section.</i>• Person who is a member of the employee's household• Relative with whom the employee has a close personal relationship• 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• Any person for whom the employee has, within the last year, served as officer, director, trustee, general partner, employee, agent, attorney, consultant or contractor• Organization, other than a political party, in which the employee is an active participant.