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Financial Assets and Conflict of Interest Regulation in the Executive Branch

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Summary

Congressional offices reviewing or conducting oversight concerning the operations of executive agencies and departments, reviewing executive branch nominees for high-level appointments, or responding to constituent inquiries or petitions, may often be confronted with issues and questions of possible “conflicts of interest” of agency officials or nominees. This report summarizes and analyzes the issues of conflicts of interest that are addressed in federal law and regulation regarding officers and employees in the executive branch of the federal government.

Federal conflict of interest laws and regulations deal for the most part with the potential conflict between the official duties and responsibilities of a public officer on the one hand, and the outside, personal economic or financial interests of that individual (including the financial interests of that individual’s spouse and minor children) on the other. When a particular governmental matter may have a real and predictable impact on an officer’s or employee’s personal financial interests or assets, that officer’s or employee’s work on such a matter for the government would raise conflict of interest issues. The concern in such cases is that the judgment of the officer or employee could be influenced and affected, even subtly or unconsciously, by his or her own personal financial stake in the matter, as opposed to decisions, advice, and official actions of public officers being based solely on the overall, general public interest.

Although federal officials may have many and varied outside, personal “interests,” federal conflict of interest law and regulation focuses specifically on regulating outside, personal *financial* interests of the officer. The regulatory scheme for conflicts of interest in the executive branch of the federal government may generally be summarized in three broad categories: disqualification, disclosure, and divestiture.

The principal conflict of interest statute under federal law is a criminal provision which requires federal executive branch officials to *disqualify* or “recuse” themselves from working personally and substantially on any particular matter before the government in which that official (or those close enough to the official that their interests may be imputed to the official) has any “financial interest.” 18 U.S.C. § 208. There are certain financial interests which are considered either *de minimis*, or too remote or inconsequential to affect the duties expected of employees, and such interests are exempted from the prohibition by regulations of the Office of Government Ethics. Most high-ranking federal officials must file public annual financial *disclosure* reports, as well as periodic disclosure reports on certain financial transactions, which detail financial holdings, assets, property, and financial transactions of the official, the official’s spouse, and dependent children. Additionally, there may be confidential financial disclosure reports required from certain rank-and-file employees who do not file publicly. All of these disclosure reports are reviewed by agency ethics personnel, and are intended to facilitate conflict of interest regulation by identifying assets, property, and ownerships with a conflict potential, and to resolve any such conflicts of interest. Although there is no overall, general *divestiture* requirement in federal law, the divestiture of assets may be one method of conflict of interest resolution or avoidance that could be required by agency ethics personnel for assets with conflict of interest potential. Additionally, there are particular statutes and regulations applicable to certain officers and agencies which may prohibit the ownership of a range or category of particular assets. These provisions, in addition to prohibiting the acquisition of such assets, may also require the divestiture of such assets already held by incumbent officers or nominees to certain positions.

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This report discusses the federal regulation of potential “conflicts of interest” which may arise as a result of the personal financial holdings, assets, securities, property, and financial transactions in assets and securities of an official in the executive branch of the federal government.

Conflicts of Interest, Generally

Principles Underlying Conflict of Interest Regulation

The underlying principle of the financial conflict of interest laws adopted by Congress, and of the regulations promulgated in the executive branch, embodies the axiom “that a public servant owes undivided loyalty to the Government,”¹ and that decisions, advice, and recommendations made by or given to the government by its officers be made in the public interest and not be tainted, even unintentionally, with influence from personal financial interests.² The House Judiciary Committee, reporting out major conflict of interest revisions made in the 1960s, found:

The proper operation of a democratic government requires that officials be independent and impartial; that Government decisions and policy be made in the proper channels of the governmental structure; ... and that the public have confidence in the integrity of its government. The attainment of one or more of these ends is impaired whenever there exists, or appears to exist an actual or potential conflict between the private interests of a Government employee and his duties as an official.³

As noted in expert studies in the field of conflicts of interest, the concern in such regulation is generally, “... not only the possibility or appearance of private gain from public office, but the risk that official decisions, whether consciously or otherwise, will be motivated by something other than the public’s interest. The ultimate concern is bad government....”⁴

The conflict of interest laws are thus directed not only at conduct which is improper, but rather are often preventative or prophylactic in nature, directed at situations which merely have the *potential* to tempt or subtly influence an official in the performance of official public duties. As explained by the Supreme Court with regard to a predecessor conflict of interest law requiring disqualification of officials from matters in which they have a personal financial interest:

This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government.⁵

¹ H. Rpt. No. 748, 87th Cong., 1st Sess. at 3 (1961). House Judiciary Committee report on the comprehensive amendments and revisions to the conflict of interest laws in 1962.

² H. Rpt. No. 748, *supra* at 4-6; *see also* United States v. Mississippi Valley Generating Co., 364 U.S. 520, 549 (1960); and Association of the Bar of the City of New York, CONFLICT OF INTEREST AND FEDERAL SERVICE, at 3-4 (1960).

³ H. Rpt. No. 748, *supra* at 4-6.

⁴ The Association of the Bar of the City of New York, Special Committee on Congressional Ethics, James C. Kirby, Executive Director, CONGRESS AND THE PUBLIC TRUST, 38-39 (1970).

⁵ United States v. Mississippi Valley Generating Co., *supra* at 549, concerning 18 U.S.C. § 434 (1960 Code ed.), the predecessor statute to current 18 U.S.C. § 208.

Outside Interests Regulated

The term “conflict of interest” may have many diverse meanings in common usage. When used specifically in reference to federal laws and rules regulating official conduct, however, it generally relates to a potential conflict between a federal employee’s official governmental duties and responsibilities on the one hand, and the personal financial or economic interests of the employee on the other.⁶

Officers and employees of the federal government may naturally have many outside, private, and personal “interests.” However, limiting the federal regulation of an employee’s outside interests to *financial* interests may avoid, as one federal court has noted, “invit[ing] challenges to officials based not upon true conflicts of interest but upon their philosophical or ideological leanings....”⁷ Such limitation of conflict of interest regulation to outside, personal financial interests may also ameliorate First Amendment issues regarding attempts to regulate the outside, private associations, memberships, or organizational activities of public employees.⁸

Federal employees in the executive branch have an express obligation to be “impartial” in the exercise of their official responsibilities.⁹ Although the impartiality language is fairly broad on its face, the “impartiality” actually required of a federal employee in a governmental matter by the *specific* conflict of interest and federal ethical standards—in addition to treating all organizations and individuals fairly—is a disinterestedness in the matter from the point of view of any financial impact that such a matter may have upon the employee personally (or upon certain entities, persons, or organizations which are closely associated with the employee and whose interests may thus be fairly “imputed” to the employee).¹⁰ As noted by the Office of Government Ethics, the central office for ethics administration and interpretation in the executive branch of the federal government:

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.¹¹

The “impartiality” required of a federal employee in a matter thus does not mean that every federal employee must be completely “neutral” on an issue or matter before him or her, in the sense that the employee has no personal opinion, view, position, or predilection on a matter based

⁶ Manning, *FEDERAL CONFLICT OF INTEREST LAW*, at 2-3 (1964); Association of the Bar of the City of New York, *CONFLICT OF INTEREST AND FEDERAL SERVICE*, at 3 (1960); House Committee on Ethics, *House Ethics Manual*, 110th Cong., 2d Sess. at 187 (2006); see Regulations of the Office of Government Ethics, 5 C.F.R. part 2635. There may be statutes or regulations which are characterized as “conflict of interest” provisions which do not expressly deal with financial interests or compensated activities, such as, for example, 18 U.S.C. § 205, which prohibits a federal employee from acting as an agent or attorney for a private party before a federal agency even if the activity is uncompensated.

⁷ *Center for Auto Safety v. Federal Trade Commission*, 586 F. Supp. 1245, 1248 (D.D.C. 1984).

⁸ The Supreme Court explained in *Smith v. Arkansas Highway Employees*, 441 U.S. 463, 465 (1979): “The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so.” See also, *Van Ee v. E.P.A.*, 202 F.3d 296, 304 (D.C. Cir. 2000); *United States v. N.T.E.U.*, 513 U.S. 454, 465 (1995), citing *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); and *Connick v. Meyers*, 461 U.S. 138 (1983).

⁹ “Basic obligation of public service,” 5 C.F.R. § 2635.101(8): “(8) Employees shall act impartially and not give preferential treatment to any private organization or individual.”

¹⁰ “Impartiality in Performing Official Duties,” 5 C.F.R. part 2635, subpart E, §§ 2635.501 *et seq.*

¹¹ 5 C.F.R. § 2635.501, note.

on noneconomic “interests” and factors such as the ethical, religious, ideological, or political beliefs in the background or in the current outside affiliations of the employee. In the specific regulations on “impartiality” and participation in outside organizations, the Office of Government Ethics notes: “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.”¹² Executive branch employees—whose duties involve generally administration, enforcement, or regulation—are not held to the strict neutrality standard applicable to federal judges and to those involved in adjudications or quasi-adjudicatory functions.¹³ As a federal court has noted, “We must not impose judicial roles upon administrators when they perform functions very different from those of judges.”¹⁴ The Supreme Court has recognized that the Due Process Clause which imposes “rigid” neutrality requirements “designed for officials performing judicial or quasi-judicial functions, are not applicable” to officials performing different, executive and administrative duties.¹⁵

There are several methods by which conflicts of interest for public employees may be regulated and avoided. In the federal sector, for executive branch employees, these methods have been described as involving the “3-D” scheme of conflict of interest regulation: (1) disqualification, (2) disclosure, and (3) divestiture.

Disqualification

The principal statutory method of dealing with potential conflicts of interest of an executive branch officer or employee is to require, under 18 U.S.C. § 208, the disqualification (or “recusal”) of the officer or employee from participating in any official governmental matter in which that official (or those persons or entities close enough to the official that their interests may be “imputed” to the official) has any “financial interest.”¹⁶ This criminal statute requiring disqualification applies to all officers and employees in the executive branch and independent agencies, but expressly excludes the President and Vice President.¹⁷

There is, it should be noted, no *de minimis* exception expressly stated in the statute for the value of an asset or ownership interest. However, regulations may exempt certain categories of investments and interests which are deemed too remote or inconsequential to affect the

¹² 5 C.F.R. § 2635.502(b)(1)(v), note.

¹³ *Association of National Advertisers, Inc. v. F.T.C.*, 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). *Note* discussion in *Center for Auto Safety v. F.T.C.*, 586 F. Supp. 1245, 1248-1249 (D.D.C. 1984); *United States v. Halderman*, 559 F.2d 31, 132-133 n. 274 (D.C.Cir. 1976); *Cinderella Career & Finishing Schools, Inc. v. F.T.C.*, 425 F.2d 583 (D.C.Cir. 1970).

¹⁴ *Association of National Advertisers, Inc. v. F.T.C.*, *supra* at 1168.

¹⁵ *Marshall v. Jerrico*, 446 U.S. 238, 248 (1980).

¹⁶ 18 U.S.C. § 208 provides criminal penalties for “an officer or employee of the executive branch of the United States Government ... [who] participates personally and substantially as a Government officer or employee, through decision, approval, 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 ... has a financial interest....”

¹⁷ 18 U.S.C. § 202(c). The statute does not cover elected officials such as the President and Vice President because it may have potentially interfered with constitutionally required functions. See letter to Senate Committee on Rules and Administration, from Dept. of Justice, Acting Attorney General Laurence H. Silberman, September 20, 1974, at 4.

performance of federal officials' governmental duties,¹⁸ and Office of Government Ethics regulations exempt several such interests in stocks, bonds, and mutual funds.¹⁹ Additionally, executive branch officers or employees may receive an individual written waiver from their employing authority to participate in a matter when the employees' interests are not deemed so substantial as to affect the integrity of the performance of their official duties.²⁰

Effect on Covered Financial Interests

The statutory language of § 208 requires a disqualification of a government employee in a particular matter in which the employee, the employee's family, or an organization or business connected to the employee, "has a financial interest." This has been interpreted to mean that the particular governmental matter in which the employee would be involved has a "real possibility" of affecting those financial interests.²¹ The regulations of the Office of Government Ethics (OGE) state that an employee must recuse himself or herself if the governmental matter "will have a direct and predictable effect" on those covered financial interests.²² OGE explains that a matter will have a direct effect on a financial interest "if there is a close causal link between any decision or action to be taken in the matter and any expected effect," that is, if the "chain of causation" is neither "attenuated" nor "contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to, the matter."²³

The financial interests of businesses and outside private entities with which an employee is associated (as an "officer, director, trustee, general partner or employee" of such organization) are among those interests which are imputed to the employee for disqualification purposes. However, the participation by an employee in or association with an outside non-profit organization which has an *advocacy* interest in public policy matters, even concerning public policy matters associated and connected with one's agency, does not necessarily raise a "conflict of interest" disqualification requirement.²⁴ This is because it is only "financial" interests that are regulated and affected by the disqualification statute, and it has been determined that a non-profit, advocacy organization's "financial interests" are not generally directly or predictably affected by the attainment or non-attainment of public policy goals.²⁵

¹⁸ 18 U.S.C. § 208(b)(2).

¹⁹ 5 C.F.R. § 2640.202. Exemptions and waivers from the disqualification requirement of § 208 are discussed in more detail below.

²⁰ 18 U.S.C. § 208(b)(1).

²¹ The required impact on a financial holding of an employee, or on an entity with which the employee is connected, for the disqualification provision to apply, was described in terms of the real, as opposed to a speculative, possibility of financial gain or detriment to an entity, by the United States Court of Appeals in *United States v. Gorman*, 807 F.2d 1299, 1303 (6th Cir. 1988): "A financial interest exists on the part of a party to a Section 208 action where there is a real possibility of gain or loss as a result of developments in or resolution of a matter. Gain or loss need not be probable for the prohibition against official action to apply. All that is required is that there be a real, as opposed to a speculative, possibility of benefit or detriment." See also *United States v. Mississippi Valley Generating Co.*, *supra* at 549, 555 (1960). Note 5 C.F.R. § 2635.402(b)(1)(ii).

²² 5 C.F.R. § 2635.402(a).

²³ 5 C.F.R. § 2635.402(b)(1)(i).

²⁴ Department of Justice, Office of Legal Counsel [OLC], Memorandum Opinion for the General Counsel Office of Government Ethics, January 11, 2006.

²⁵ *Id.* at 4: The "interests" that such "organizations have in the matters you describe are *policy* interests in the questions being addressed by the Government, not *financial* interests in the resolution of those questions."

The disqualification requirement of § 208 applies only to current and existing financial and economic factors. The language of the statute requires an official's recusal from a particular governmental matter in which the officer, his or her spouse, or dependent "has a financial interest," or which impacts a financial interest of an outside entity "in which he [the government official] is serving" as an employee, officer, or director, or with whom he "is negotiating or has an arrangement" for future employment.²⁶ The statutory language is thus stated in the present tense and is directed only to current financial interests and existing arrangements or current understandings for future employment, and the statutory provision does not require disqualification on a matter because of a past affiliation or previous economic interest.²⁷ Although past affiliations and prior economic interests may not be a subject of the law, certain *pensions* to which an employee is entitled because of past employment may be considered a current and existing economic interest.²⁸

Recusal from Personal and Substantial Participation

The kind of "participation" which is barred for a federal official in matters such as contracts, claims, drafting of regulations, applications, or determinations which affect the financial interests of the employee, is participation in a matter "personally and substantially ... through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise...." It would appear that the qualifier "personally" within § 208 means that one took the governmental action (or inaction) in question oneself, as opposed to having it merely under one's overall, general responsibility (as a head of a department would have over all department matters). However, regulations adopted by the Office of Government Ethics note that personal participation "includes the direct and active supervision of the participation of a subordinate in the matter."²⁹ The qualifier "substantially" would appear to rule out merely "ministerial" or procedural acts or acts on a peripheral matter, and relates to the significance and nature of the involvement, and not merely the time devoted to the matter.³⁰

Particular Matter

The personal participation by an official in a governmental matter, such as giving advice or making recommendations, will come within the statute when such involvement is in regard to a "particular matter," rather than just merely in relation to a general area of public policy, such as

²⁶ 18 U.S.C. § 208 (2000 Code ed.), emphasis added.

²⁷ *CACI, Inc.-Federal v. United States*, 719 F.2d 1567,1578 (Fed. Cir. 1983); *Center for Auto Safety v. F.T.C.*, 586 F. Supp. 1245, 1246 (D.D.C. 1984).

²⁸ Conflict of interest concerns arise more typically in a "defined benefit plan" where the employer itself is obligated to make the pension payments, but not so in a "defined contribution plan" where the pension payments come out of an already established and funded retirement account. For purposes of the statutory disqualification requirement, therefore, the Office of Government Ethics [OGE] would not consider a "defined contribution plan" as a "disqualifying" financial interest of the employee: "For matters affecting the sponsor of a defined contribution plan, an employee's interest is not ordinarily a disqualifying financial interest under section 208 because the sponsor is not obligated to fund the employee's pension plan." OGE Memorandum 99 x 6, to Designated Agency Ethics Officials, April 14, 1999.

²⁹ 5 C.F.R. § 2635.402(b)(4).

³⁰ Note discussion in Perkins, *The New Federal Conflict of Interest Laws*, 76 HARVARD LAW REVIEW, 1113, 1128 (1963): "The qualifying adverbs personally and substantially are intended to rule out participation by purely ministerial or procedural acts, but not to create a loophole for the lazy executive in the chain of command who may not have bothered to dig into the substance of the case." See also 5 C.F.R. § 2635.402(b)(4).

“in relation to economics.”³¹ The term “particular matter” and the enumeration of those particular matters in the statute have been recognized to be “comprehensive of all matters that come before a federal department or agency.”³² Since, for the statutory disqualification requirement, the “particular matter” need not involve specific or identified parties,³³ such term has been broadly interpreted to mean any “discrete and identifiable matter” such as “general rulemaking” or proposed regulations.³⁴ As stated by the Department of Justice’s Office of Legal Counsel, the restrictions of § 208 will apply when a federal official reviews proposed rules that will impact an entire industry of which a firm connected to the federal official is part, and need not affect or deal with *only* that particular firm to come within the restrictions of § 208(a):

[W]e have consistently interpreted § 208(a) to apply to rule-making proceedings or advisory committee deliberations of general applicability where the outcome may have a “direct and predictable effect” on a firm in which the Government employee is affiliated, even though all other firms similarly situated will be affected in a like manner. An example might be the drafting or review of environmental regulations which would require the considerable expenditures by all firms in the particular industry of which the company is a part.³⁵

The Office of Government Ethics, in regulations issued under the statutory disqualification provision, has explained that the recusal requirement will extend to “governmental action such as legislation or policy-making that is narrowly focused on the interests of ... a discrete and identifiable class of persons.”³⁶ These regulations note, however, that the disqualification provision will not apply to “the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons.”³⁷

Accomplishing Recusal

Recusal or disqualification is generally accomplished simply by not participating in a matter. An employee who knows that he needs to be disqualified on a matter is instructed to notify the “person responsible for his assignment,” who is then instructed to “take whatever steps are necessary to ensure” that the employee does not participate in the matter.³⁸ There is no general requirement for a written or filed disqualification, unless such statement is required from an official to comply with a written “ethics agreement” with the Office of Government Ethics, or is required by the agency.³⁹ It is suggested that an employee “may elect to create a record” of his actions concerning a disqualification, and so provide written statements.⁴⁰ Although there is no general requirement for written recusal statements, employees of particular agencies may be

³¹ Note discussion of “particular” matter as used in 18 U.S.C. §§ 203 and 208, in Manning, *FEDERAL CONFLICT OF INTEREST LAW*, Harvard University Press (Cambridge 1963), at 134-135, 54-55, citing H.R. Rpt. No. 748, 87th Congress, 1st Session, at 20 (1961).

³² H.R. Rpt. No. 748, *supra* at 20.

³³ Compare to 18 U.S.C. § 207(a),(b), and 5 C.F.R. § 2635.502(a); see 2 O.L.C. 151, 153-154 (1978).

³⁴ 2 Op.O.L.C. 151, 153-154 (1978).

³⁵ 2 Op.O.L.C. *supra* at 155. A different interpretation and application of the restriction may apply to those who are “special Government employees” employed on a part-time or intermittent basis to advise the government.

³⁶ 5 C.F.R. § 2635.402(b)(3).

³⁷ *Id.*

³⁸ 5 C.F.R. § 2635.402(c)(1).

³⁹ 5 C.F.R. § 2635.402(c)(2).

⁴⁰ 5 C.F.R. § 2635.402(c)(2).

required, under agency-specific supplemental ethics regulations, to file such written recusal statements with agency personnel.

Exemptions, Waivers for Covered Interests

The statutory provision at 18 U.S.C. § 208 applies generally to all officers and employees in the executive branch of government, including the independent agencies, but does not apply to the President or the Vice President.⁴¹ Although there is no *de minimis* exception expressly stated in the statute, the law does provide that regulations may exempt certain categories of investments and interests which are deemed too remote or inconsequential to affect the performance of an official's governmental duties.⁴² The current Office of Government Ethics regulations exempt several such interests, including all interests in "diversified" mutual funds; interests in sector funds which include some companies affected by a governmental matter but where those companies are outside of the primary sector in which that fund specializes; and other sector funds specializing in the particular sector but where one's interest in the fund is no more than \$50,000; securities, stocks, and bonds in a publicly traded company which is a party to and directly affected by a governmental matter if one's ownership value is no more than \$15,000; securities, stocks, and bonds in such a company which is not a specific party to a matter but is in a class affected by the governmental matter, if the employee's ownership interest is no more than \$25,000 (if securities in more than one such company are owned, then the aggregate value cannot exceed \$50,000 to be exempt from the statute).⁴³

Waivers may also be obtained by an individual employee for insubstantial financial interests under § 208(b)(1). These individual waivers may be obtained by an employee or officer concerning a particular financial interest if the employee advises the government official responsible for his or her appointment about the nature and circumstances of the interest, discloses the interest, and receives a written determination from the appointing official that the financial 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."⁴⁴ Finally, advisory committee members who are "special Government employees" may receive individual waivers for conflicting interests even though such interests are not "insubstantial" (as under a 208(b)(1) waiver), if, after a review of the financial disclosure report of the advisory committee member by the official who appoints that advisory committee member, the appointing official determines that the "potential" conflicts of interest raised by the financial interests of the individual, or by those imputed to him, are "outweigh[ed]" by the "need for the individual's services...."⁴⁵ This waiver may apply to even substantial economic or financial interests of the employee/advisor.

⁴¹ 18 U.S.C. § 202(c).

⁴² 18 U.S.C. § 208(b)(2). There may also be an individual exception for a particular government officer made in writing by the officer's appointing authority that the interest in question is "not so substantial as to ... affect the integrity of the services" of that officer. 18 U.S.C. § 208(b)(1).

⁴³ 5 C.F.R. § 2640.201 (mutual funds); § 2640.202 (securities in companies).

⁴⁴ 18 U.S.C. § 208(b)(1); 5 C.F.R. § 2635.402(d)(2).

⁴⁵ 18 U.S.C. § 208(b)(3). Note also other "general" waivers for "special Government employees" on advisory committees under § 208(b)(2).

Regulatory Disqualification Requirement

In addition to the *statutory* disqualification requirement, recusal or disqualification may be required of executive branch officials under *regulations* promulgated by the Office of Government Ethics. These regulations require recusal from a narrower range of official “matters” (narrower than the statutory recusal requirement), but which may impact the financial interests of a broader range of persons or entities associated with the public official (a broader range of “imputed” personal interests than the statute includes).⁴⁶

The regulations of the Office of Government Ethics provide this *regulatory* disqualification provision to help assure the avoidance of “an appearance of loss of impartiality in the performance of” official duties by a federal employee.⁴⁷ The recusal regulation covers a government employee’s participation in a “particular matter involving specific parties” when (1) the employee knows that the matter will have a direct and predictable effect on the financial interests of a member of his or her household, or (2) when a person or entity with whom the employee has a “covered relationship” represents or is a party in that matter. The employee must recuse himself or herself from such a matter where the employee believes that his or her impartiality may be questioned, unless the employee first advises his or her agency about the matter and receives authorization to participate in the matter.⁴⁸ This regulation, like the *statutory* recusal requirement, expressly excludes the President and Vice President,⁴⁹ and may be waived for other officers and employees by supervisory personnel.⁵⁰

For the purposes of requiring recusal, the regulation imputes to the employee the financial interests of persons other than the employee’s spouse, minor children, and entities with whom the employee is affiliated (as in the statutory recusal requirement), and requires recusal from a “particular matter involving specific parties” when the employee knows that the matter will have a direct and predictable effect on the financial interests of a “member of his household.” Additionally, the interests of an even wider range of persons and entities may be relevant when any person or entity with whom the employee “has a covered relationship” is a party to the matter, or represents a party to the matter. The regulation defines a “covered relationship” to be one with: those persons or entities with whom the employee seeks a business, contractual or other financial relationship; a member of the employee’s household, or a relative with whom the employee has a close personal relationship; a person or entity with whom the employee’s spouse, child, or parent is serving or seeks to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee; any person or entity for whom the employee served within the last year as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee; or an organization (other than a political party) in which the employee is an active participant.⁵¹

Under the regulation, therefore, although the financial interests of persons or entities that may be imputed to the employee are broadened, the types of governmental “matters” from which an

⁴⁶ 5 C.F.R. § 2635.502.

⁴⁷ 5 C.F.R. § 2635.501(a).

⁴⁸ 5 C.F.R. § 2635.502(a).

⁴⁹ 5 C.F.R. § 2635.102(h).

⁵⁰ 5 C.F.R. § 2635.502(c) and (d).

⁵¹ 5 C.F.R. § 2635.502(b)(1). An “active participant” means more than merely paying dues and attending meetings of an organization

employee should recuse himself or herself are narrowed. A particular governmental matter “involving specific parties” is narrower than merely a “particular matter,” and would not include such things as general rulemaking affecting an industry, but rather would apply only to matters such as a determination, contract, claim, controversy, investigation, charge, accusation, arrest or other such matter involving a particular party where the United States is also a party or has a direct or substantial interest. A particular matter “involving specific parties” is generally or typically a matter involving “a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identifiable parties,” as opposed to rulemaking, legislation, or the formulation of general policy or standards.⁵² Additionally, when it is the financial interests of those with whom the employee may have a “covered relationship” beyond the household of the employee, the disqualification requirement would only apply when such persons or entities are actually parties to the particular matter or represent parties to the particular matter involving specific parties.

Disclosure

Detailed annual public financial *disclosure* is required for all high-level officials in all three branches of the United States Government under the public financial disclosure provisions of the Ethics in Government Act of 1978, as amended.⁵³ Such disclosures were intended to serve the purpose of identifying “potential conflicts of interest or situations that might present the appearance of a conflict of interest” for government officials in policy making positions; to increase public confidence in the integrity of the institutions of government and in those who serve them; and to deter the ownership of particular assets and interests which may raise conflicts issues for a public official.⁵⁴

Under the disclosure law, assets “held for investment or the production of income,”⁵⁵ such as stocks, stock options, bonds, mutual funds, and other income producing property held by the reporting individual, and the individual’s spouse and dependent children, are the types of financial interests that must be disclosed.⁵⁶ Although the financial disclosure laws are principally directed at current and existing financial interests, such current interests may also reflect “retain[ed] ties” to a former employer or to former associates of a current executive branch official.⁵⁷

⁵² See definition of “particular Government matter involving a specific party” at 5 C.F.R. § 2637.102(a)(7) (in context of 18 U.S.C. § 207); and at 5 C.F.R. § 2637.201(c)(same).

⁵³ P.L. 95-521, as amended. See now 5 U.S.C. appendix, §§ 101 *et seq.*

⁵⁴ S. Rpt. No. 95-170, 95th Cong., 1st Sess. 117 (1977).

⁵⁵ U.S. Office of Government Ethics, *Public Financial Disclosure: A Reviewer’s Reference*, at 3-7.

⁵⁶ *Public Financial Disclosure: A Reviewer’s Reference*, *supra* at 6-5.

⁵⁷ *Id.* “Filers may retain ties to a former employer in a number of ways, each of which they must list on the SF 278 [the standard form for executive branch financial disclosures]. One common linkage is a leave of absence, which many people take to retain a highly competitive position, such as a tenured faculty slot at a university. In addition, an employee may have other benefits from a former employer, such as deferred compensation, profit-sharing, stock options, employee pension, medical and insurance plans. Most of these linkages to former employers represent a continuing financial interest in those employers, which makes them potential conflicts of interest.”

Who Must Publicly Disclose

Generally, all high-level officials of the federal government are required to file by May 15 of every year a public financial disclosure statement. The public disclosure law applies to the President and Vice President, all Members of Congress, federal judges, and all officers and employees of the executive branch occupying, for more than 60 days in a calendar year, “a position classified above GS-15,” or, if not on the General Schedule, in a position compensated at a “rate of basic pay ... equal to or greater than 120 percent of the minimum rate of basic pay payable for GS-15.”⁵⁸

Information Disclosed

The annual disclosure statement provides detailed financial information about the private financial interests and ownerships of the public official, and the official’s spouse and dependent children. The disclosure statement requires public revelation of the identity and/or the value (generally in “categories of value”) of such items as (1) the official’s private income (including unearned income and capital gains), (2) gifts received (including reimbursements for travel over certain amounts), (3) assets and income-producing property of over \$1,000 in value (including savings accounts over \$5,000), (4) liabilities exceeding \$10,000, (5) financial transactions exceeding \$1,000 in income-producing property and securities, (6) positions held in outside businesses and organizations, (7) agreements for future employment or leaves of absence with private entities, continuing payments from or participation in benefit plans of former employers, and (8) the cash value of the interests in any blind trusts.⁵⁹

Filing and Availability of Reports

An official’s annual financial disclosure report is generally to be filed with the designated agency ethics officer within the individual’s agency or department, and for high-level presidential appointees such report is then required to be transmitted to the Director of the Office of Government Ethics (OGE).⁶⁰ The report is reviewed within the agency (and by the Director of the Office of Government Ethics when appropriate for high level officials and nominees) to flag potential conflict of interest issues or problems, and to resolve any such conflicts.⁶¹

The financial disclosure reports of the highest level federal officials—the President, Vice President, Cabinet officers (Level I of the Executive Schedule), and sub-Cabinet positions and certain heads of regulatory agencies (on Level II of the Executive Schedule)—are now required to be posted on the Internet, and may be accessed and searched by the public.⁶² For all other executive branch officials, the public financial disclosure reports remain available to the public

⁵⁸ 5 U.S.C. app. § 101(d) and (f)(1) - (12). Covered employees also file a report upon entry into government service, and upon leaving government service.

⁵⁹ 5 U.S.C. app., § 102(a)(1) - (8). For items to be disclosed in relation to the official’s spouse and dependent children, see 5 U.S.C. § 102(e)(1)(A) - (F).

⁶⁰ 5 U.S.C. app. § 103(a), (c).

⁶¹ 5 U.S.C. app. § 106.

⁶² P.L. 112-105, 126 Stat. 291 (April 4, 2012), Sections 8(a)(1) and 11(a)(1), as amended by P.L. 113-7, 127 Stat. 438 (April 15, 2013). In the legislative branch, the disclosure reports of Members of Congress are also required to be posted on the Internet.

for copy or inspection from the official's agency within 30 days after the May 15 filing deadline, and are to be released to a member of the public (for a reasonable fee to cover necessary reproduction and mailing) when requested by written application providing the requester's name, occupation, and address; the name of the organization or other person on whose behalf the inspection or copy is requested; and a statement that the person requesting the copy is aware of the prohibitions on using such reports for commercial, credit rating, or solicitation purposes.⁶³ The reports are generally retained by the filing agency for six years, then are destroyed.

Periodic Reporting of Financial Transactions

Under the provisions of the "STOCK Act," signed into law on April 4, 2012, all federal officials who are required to file annual public financial disclosure statements must also file periodic reports during the year which detail financial transactions of \$1,000 or more taken by or for the official.⁶⁴ These more frequent, periodic transaction reports must be filed within 30 days after the official is notified of a covered transaction in stocks, bonds, or other such securities (but no later than 45 days after the date of the transaction). The requirement for more frequent filing applies generally to transactions in stocks and bonds of individual companies, but does not apply to most mutual funds or to exchange traded funds (ETFs), nor to transactions in real property.

Confidential Disclosures

In addition to the legislative and regulatory scheme for *public* financial disclosure for certain federal officials, there is in place a requirement for *confidential* disclosure reports to be filed with an employee's agency by some lower level federal officers and employees. The confidential reporting requirements are intended to complement the public disclosure system, and apply to those employees who do not have to file under the public reporting provisions of the Ethics in Government Act.⁶⁵

Generally, the confidential reporting requirements apply to certain "rank and file" employees who are compensated below the threshold rate of pay for public disclosures (GS-15 or below, or less than 120% of the basic rate of pay for a GS-15), *and* who are determined by the employee's agency to perform duties or exercise responsibilities in regard to government contracting or procurement, government grants, government subsidies or licensing, auditing, or other duties which may particularly require the employee to avoid financial conflicts of interest.⁶⁶ Such a person may be required to file a confidential report if he or she performs the duties of the position "for a period in excess of 60 days during the calendar year."⁶⁷ Additionally, unless required to file *public* reports, confidential reports are required from all "special Government employees" in the executive branch (those employees who are employed by the government for not more than 130

⁶³ 5 U.S.C. app. § 105.

⁶⁴ P.L. 112-105, Section 6; 5 U.S.C. app. § 103(l).

⁶⁵ 5 U.S.C. app. § 107; see also 5 C.F.R. § 2634.901(a). Supplemental information, however, may be requested by an agency even from employees filing *public* disclosures. 5 C.F.R. § 2634.901(c).

⁶⁶ 5 C.F.R. § 2634.904(a). Confidential filing in the executive branch is done on form OGE-450, optional form 450-A, or with the approval of OGE, in an alternative procedure using an agency-specific form. 5 C.F.R. § 2634.905.

⁶⁷ 5 C.F.R. § 2634.903(a).

days in a year), including those “special Government employees” who serve on federal advisory committees.⁶⁸

Divestiture

There is no federal statute which expressly implements a general, executive branch-wide requirement for federal officials to divest particular private assets or holdings to resolve likely or potential conflicts of interest with an official’s public duties. However, there are a few instances in which divestiture of an asset or assets may be required. In some cases, a statutory provision might provide that a director, commissioner, or board member of a particular federal regulatory entity shall have no financial interests in the business, industry, or sector which the agency, bureau, or commission regulates or oversees. Furthermore, an agency may by regulation prohibit or restrict the ownership of certain financial assets or class of assets by its officers and employees where a perceived “conflict of interest” with the agency mission may arise. In such instances, these statutory and regulatory provisions would not only prohibit the acquisition of such assets, but may also require the divestiture of a particular asset or holding of certain individuals to be appointed to such positions or who are incumbents in such positions. Finally, in reviewing financial holdings of its officers, an agency’s ethics officer may recommend (or require) divestiture of particular assets of a certain official which, because of the official’s duties and responsibilities, may raise substantial conflict issues.

Prohibitions on Owning Certain Assets

There may be certain statutory provisions, often the organic act establishing an agency, bureau, or commission, which will provide an express prohibition upon the directors or heads of such agency or commission from owning stock or having other such financial interests in businesses or other private entities in the particular industry or field that the agency is to regulate. For example, federal law provides that “No member of the Board of Governors of the Federal Reserve System shall ... hold stock in any bank, banking institution, or trust company....”⁶⁹ With respect to the Federal Aviation Administration, federal law provides that “The Administrator and the Deputy Administrator may not have a pecuniary interest in, or own stock in or bonds of, an aeronautical enterprise, or engage in another business, vocation, or employment.”⁷⁰ Federal law provides that no person may be appointed to the National Indian Gaming Commission who has any financial interest in any gaming activity.⁷¹ The Office of Surface Mining Reclamation and Enforcement is within the Department of Interior, and the legislation establishing such office provides that “No employee of the Office or any other Federal employee performing any function or duty under this chapter shall have a direct or indirect financial interest in underground or surface coal mining

⁶⁸ 5 C.F.R. § 2634.904(a)(2), 5 C.F.R. § 2634.901(e). Only persons who are serving on advisory committees and are federal “employees,” however, must file disclosure reports. Private “representatives” on advisory committees are not federal employees and thus are not generally required to file disclosure reports. See OGE, DO-05-012, Memorandum to Designated Agency Ethics Officials, “Federal Advisory Committee Appointments,” August 18, 2005; DO-04-022, “SGEs and Representatives on Federal Advisory Committees,” July 19, 2004; and Advisory Opinion 82 x 22, “Members of Federal Advisory Committees and the Conflict-of-Interest Statutes,” July 9, 1982.

⁶⁹ 12 U.S.C. § 244.

⁷⁰ 49 U.S.C. § 106(e).

⁷¹ 25 U.S.C. § 2704.

operations.”⁷² The head of the Transportation Security Administration is the Under Secretary of Transportation for Security, and such person “may not own stock in or bonds of a transportation or security enterprise or an enterprise that makes equipment that could be used for security purposes.”⁷³ Members of the Surface Transportation Board within the Department of Transportation may also “not have a pecuniary interest in, hold an official relation to, or own stock in or bonds of, a carrier providing transportation by any mode....”⁷⁴

In addition to statutory provisions, executive agencies are permitted to issue additional and supplemental ethics regulations for their own personnel upon the concurrence and joint issuance of the regulations by the Office of Government Ethics.⁷⁵ Agencies may, therefore –by such regulations –prohibit officers and employees of the agency from acquiring, or owning or holding, certain financial interests, assets, and property when the ownership or holding of such interests would, because of the mission of the agency, “cause a reasonable person to question the impartiality and objectivity with which agency programs are administered.”⁷⁶ The broadest regulatory restriction upon the employees of an agency would appear to be that of the Securities and Exchange Commission which prohibits, with some exceptions, officers and employees (as well as an employee’s spouse and dependent children) from “knowingly purchasing or holding a security or other financial interest in an entity regulated by the Commission.”⁷⁷ Other examples of agency or departmental-specific restrictions on agency officers and employees (and in many cases, their spouse and dependent children) owning particular assets or financial interests of companies and entities directly regulated by or affected by the agency include restrictions on employees of: the Bureau of Alcohol, Tobacco and Firearms; the Office of the Comptroller of the Currency; the Office of Thrift Supervision; Federal Deposit Insurance Corporation; the Federal Energy Regulatory Commission; Department of Interior; the Farm Credit System Insurance Corporation; Farm Credit Administration; the Interstate Commerce Commission; Mine Safety and Health Administration (Department of Labor); Food and Drug Administration (HHS); National Institutes of Health (HHS); Postal Rate Commission; Nuclear Regulatory Commission; Federal Railroad Administration and Federal Aviation Administration, Department of Transportation; Environmental Protection Agency; Board of Governors of the Federal Reserve System; Housing and Urban Development; Rural Development, Department of Agriculture; Federal Mine Safety and Health Review Commission; Federal Housing Finance Agency; and the Consumer Financial Protection Bureau.⁷⁸

⁷² 30 U.S.C. § 1211(f).

⁷³ 49 U.S.C. § 114(c).

⁷⁴ 49 U.S.C. § 701(b)(6).

⁷⁵ 5 C.F.R. § 2635.105.

⁷⁶ 5 C.F.R. § 2635.403(a).

⁷⁷ 5 C.F.R. § 4401.102(c). This would appear to include all corporations which issue publicly traded securities.

⁷⁸ 5 C.F.R. § 3101.105 (Bureau of Alcohol, Tobacco, and Firearms); 5 C.F.R. § 3101.108 (Comptroller of the Currency); 5 C.F.R. § 3101.109(b) (Office of Thrift Supervision); 5 C.F.R. § 3201.103 (FDIC); 5 C.F.R. § 3401.102 (FERC); 5 C.F.R. §§ 3501.103 and 104 (Department of Interior); 5 C.F.R. § 4001.103 (Farm Credit System Insurance Corporation); 5 C.F.R. § 4101.193 (Farm Credit Administration); 5 C.F.R. § 5001.102 (Interstate Commerce Commission); 5 C.F.R. § 5201.105 (Mine Safety and Health Administration); 5 C.F.R. § 5501.104 (FDA); 5 C.F.R. § 5501.110 (NIH); 5 C.F.R. § 5601.102 (Postal Rate Commission); 5 C.F.R. § 5801.102 (Nuclear Regulatory Commission); 5 C.F.R. § 6001.104 (FRA and FAA); 5 C.F.R. § 6401.102 (EPA); 5 C.F.R. § 6801.103 (Board of Governors of the Federal Reserve System); 5 C.F.R. § 7501.104 (HUD); 5 C.F.R. § 8301.107 (RD, Department of Agriculture); 5 C.F.R. § 8401.102 (Federal Mine Safety and health Review Commission); 5 C.F.R. § 9001.104 (Federal Housing Finance Agency); 5 C.F.R. § 9401.106 (Consumer Financial Protection Bureau).

In reviewing or examining the financial interests and potential conflicts of interest of an executive branch official, the agency-specific regulations or statutory provisions—specifically applicable only to officers and employees of that particular agency, commission, or bureau—which limit or prohibit the acquisition or ownership of a particular category or type of financial asset or financial interest, need to be considered and consulted.

Divestiture Required Upon Ethics Review

The divestiture of particular assets, properties, or holdings may be required of an individual as a conflict of interest resolution or avoidance mechanism by administrative provisions and review in the executive branch, as well as required by a Senate committee or the Senate as a whole as a condition of favorable action on a presidential nominee requiring Senate confirmation.

With respect to administrative review, as noted above, the principal statutory method of conflict of interest avoidance—concerning particular assets and holdings of a federal official—is to require the *disqualification* of that official from a governmental matter affecting those financial interests.⁷⁹ Under current regulations of the Office of Government Ethics, as part of the ethics review process, an agency may require the divestiture of certain assets of an individual employee where those interests would require the employee’s disqualification from matters so central to his or her job that it would impair the employee’s ability to perform his or her duties, or where it could adversely affect the agency’s mission because another employee could not easily be substituted for the disqualified employee.⁸⁰ Such a requirement may be imposed as part of an “ethics agreement” which an appointee or a nominee may make with his or her agency, and approved by the Office of Government Ethics, as a device to provide options and alternatives to avoid conflicts of interest because of the ownership of certain assets and financial instruments.⁸¹

When divestiture is required for ethics reasons, a current employee should be afforded a “reasonable amount of time” to effectuate the disposal of the asset; furthermore, it is possible to ameliorate potential unfair tax burdens that may arise because of such required sale of an asset by receiving a certificate of divestiture and postponing capital gains taxes.⁸²

Blind Trusts

In some instances, the establishment of a “qualified blind trust” may be used to ameliorate or avoid conflicts of interest as an alternative to divestiture of conflicting assets. Although generally, the underlying assets in a trust in which one has a beneficial interest must normally be disclosed in annual public financial disclosure reports⁸³—and would under conflict of interest law be considered “financial interests” of the employee/beneficiary for disqualification purposes—federal officials may, as a conflict of interest avoidance measure, place certain assets with an independent trustee in what is called a “qualified blind trust.”⁸⁴

⁷⁹ 18 U.S.C. § 208.

⁸⁰ 5 C.F.R. § 2635.403(b).

⁸¹ 5 C.F.R. §§ 2634.801 *et seq.*

⁸² 26 U.S.C. § 1043. *See* 5 C.F.R. §§ 2635.403(d),(e), and 2634.1001 *et. seq.*

⁸³ 5 U.S.C. app. § 102(f)(1).

⁸⁴ *See, generally,* 5 U.S.C. app. § 102(f). Assets of an official may also be in a qualified “diversified trust” which has (continued...)

The nature of a “blind trust,” generally, is such that the official will have no control over, will receive no communications about, and will (eventually as existing assets are sold and new ones obtained by the trustee) have no knowledge of the identity of the specific assets held in the trust. As such, an official will not need to identify and disclose the particular assets in the corpus of a “blind trust” in future financial disclosure reports,⁸⁵ and such assets will not be “financial interests” of the employee for disqualification purposes.⁸⁶ The conflict of interest theory under which the blind trust provisions operate is that since the official will not know the identity of the specific assets in the trust, those assets and financial interests could not influence the official decisions and governmental duties of the reporting official, thus avoiding potential conflict of interest problems or appearances.⁸⁷ Assets originally placed into the trust by the official will, of course, be known to that official, and therefore will continue to be “financial interests” of the public official for conflict of interest purposes until the trustee notifies the official “that such asset has been disposed of, or has a value of less than \$1,000.”⁸⁸

Author Contact Information

(name redacted)
Legislative Attorney
[redacted]@crs.loc.gov, 7-....

(...continued)

been established for the benefit of the official, the official’s spouse or children, and may avoid disclosure and conflict of interest disqualification requirements. 5 U.S.C. app. § 102(f)(4)(B). However, in addition to being required to be well diversified, such a trust may not consist of the assets of entities “having substantial activities in the area of the [official’s] primary area of responsibility.” 5 U.S.C. app. § 102(f)(4)(B)(i)(II). Such well diversified portfolios of assets with an independent trustee, with no conflicting assets in the trust portfolio, are not considered “financial interests” of the employee for conflict of interest purposes at any time. 5 C.F.R. § 2634.401(a)(1)(iii).

⁸⁵ 5 U.S.C. app. § 102(f)(2)(A).

⁸⁶ 5 U.S.C. app. § 102(f)(4)(A); 5 C.F.R. § 2634.401(ii).

⁸⁷ S. Rpt. 95-639, 95th Cong., 2d Sess., Report of the Committee on Governmental Affairs, *Blind Trusts*, at 13 (1978).

⁸⁸ 5 U.S.C. app. § 102(f)(4)(A); 401(a)(1)(ii). One of the requirements of a blind trust is that there can be no conditions placed on the independent judgment of the trustee to dispose of any assets in the corpus of the trust. 5 U.S.C. app. § 102(f)(3)(B).

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