

Conflicts of Interest Considerations: Assets

(Last updated August 2024)



Topics covered include: American Depositary Receipt (ADR) | Annuity | Art and Other Collectible Items | Bank or Credit Union Account (cash deposit account) | Bond (corporate) | Bond (municipal) | Competition Winnings, Awards, and Prizes | Equity Index-Linked Note | Fannie Mae, Freddie Mac, and Other Government-Sponsored Enterprise (GSE) Securities | Foreign Exchange Position | Futures Contract | Government Agency Security | Government Benefit or Payment | Life Insurance | Loan Made to Another Party | Master Limited Partnership (MLP) | Oil, Gas, or Other Mineral Rights Lease | Option | Open Short Position (short sale) | Precious Metal | Real Estate | Real Estate Investment Trust (REIT) | Stock | Treasury Security | Virtual Currency | Warrant

This guidance focuses on potential conflicts of interest that can arise from stocks, stock derivatives, and bonds, as well as other types of assets that are not investment vehicles. For guidance regarding potential conflicts that can arise from other types of securities, such as mutual funds and exchange-traded funds (ETFs), see [Conflicts of Interest Considerations: Legal Entities that Hold Assets](#). For guidance regarding the related topics of employee stock purchase plans, phantom stock, restricted stock, restricted stock units, and stock appreciation rights, see [Conflicts of Interest Considerations: Corporate Employment](#).

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. The guidance below addresses potential conflicts that can arise from assets owned by the employee. However, because the financial interests of an employee's spouse or minor children are imputed to the employee, an asset 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 section 208 analysis described in each entry applies in the same manner regardless of whether the asset is owned by the employee or by the employee's spouse or minor child.

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.

American Depositary Receipt (ADR)

18 U.S.C. § 208

An American depositary receipt (ADR) is a certificate representing shares of foreign securities. An employee who holds an ADR has a financial interest in the issuer of the underlying foreign

security. Under 18 U.S.C. § 208, an employee is prohibited from participating personally and substantially in any particular matter that they know would affect their own financial interest or financial interests attributed to them. Because an ADR represents an ownership interest in a company, a particular matter that has a direct and predictable effect on the issuing company's financial interests is treated as having a direct and predictable effect on the financial interests of the shareholders.¹ Therefore, an employee who holds an ADR for a company is prohibited from participating personally and substantially in any particular matter that the employee knows would have a direct and predictable effect on the issuing company.

Generally, a financial interest in a particular matter affecting a subsidiary of a company in which an employee holds an equity-related interest is treated as a particular matter affecting the parent. Whether the particular matter that affects the parent will have a direct and predictable effect on the subsidiary will depend on the factual circumstances.

Exemptions: If the ADR is a publicly traded security as defined at 5 C.F.R. § 2640.102(p), the exemptions at 5 C.F.R. § 2640.202 for interests in securities may be available. An ADR will meet the criteria, for example, if the ADR is listed on a U.S. national exchange (*e.g.*, NYSE or NASDAQ) or a U.S. regional exchange. However, the exemptions for securities are unavailable if the ADR does not meet the criteria for a publicly traded security (*e.g.*, an ADR that is traded over-the counter (OTC)).

Annuity

18 U.S.C. § 208

A **fixed annuity** is a contract with an insurance company offering a guaranteed, specified rate of return. An employee does not have a financial interest in any of the investments that the issuing insurance company makes to support a fixed annuity policy because the specific rate of return is guaranteed by the insurance company. Instead, an employee has a financial interest in the ability or willingness of the insurance company to honor the annuity's contractual terms. The potential for a conflict of interest under 18 U.S.C. § 208 does not ordinarily arise in connection with an employee's ownership of a fixed annuity unless the employee has the potential to participate in particular matters affecting the financial soundness of the insurance company involved.

In contrast, a **variable annuity** is a contract with a life insurance company in which the rate of return is based on the performance of investment options chosen by the employee. An employee who has a variable annuity has an interest in the underlying portfolio options selected, and unless an exemption applies, is prohibited from participating personally and substantially in any particular matter that the employee knows would affect an underlying portfolio option. Additionally, an employee who has a variable annuity would be prohibited from participating personally and substantially in a particular matter that the employee knows has a direct and

¹ See OGE Legal Advisory LA-20-03 (2020). ("Under Section 208, therefore, an employee may not participate in any particular matter that would have a direct and predictable effect on the financial interests of a company in which the employee (or any imputed person) owns stock, not merely those particular matters that would affect the stock price.")

predictable effect on the issuing insurance company's ability or willingness to support a variable annuity contract (*e.g.*, in an unusual case, by affecting the company's overall financial stability).

Exemptions: A variable annuity's investment options usually qualify for the diversified mutual fund exemption at 5 C.F.R. § 2640.201(a). Sector-specific investment options (*e.g.*, "energy") would not qualify for the diversified mutual fund exemption, but they may qualify for the sector mutual fund exemptions at 5 C.F.R. § 2640.201(b). Additional information on analyzing diversified and sector mutual funds is available in [Conflicts of Interest Considerations: Legal Entities that Hold Assets](#) under "Mutual Funds, Exchange-Traded Funds (ETFs), and Unit Investment Trusts (UITs)."

Art and Other Collectible Items

18 U.S.C. § 208

For most employees, a potential conflict of interest under 18 U.S.C. § 208 will not usually arise in connection with the employee's ownership of art and other collectible. The value of collectibles depends primarily on the market for those items. A few agencies may have missions that could affect the value of specific types of collectibles. Even when this possibility exists, however, it is unlikely that an employee would participate in a particular matter that would have a direct and predictable effect on the employee's financial interests based on the employee's ownership of art or other collectible items.

Bank or Credit Union Account (cash deposit account)

18 U.S.C. § 208

For most employees, a potential conflict of interest under 18 U.S.C. § 208 will rarely arise in connection with the employee's ownership of a bank or credit union account. Such accounts would only pose a potential conflict of interest if an employee could participate personally and substantially in a particular matter that the employee knows would have a direct and predictable effect on either the deposit's security (for example, amounts over the FDIC limit) or the institution's ability to pay the promised rate of interest (for example, in the extreme case of a bank bailout).²

Bond (corporate)

18 U.S.C. § 208

Corporate bonds constitute a debt owed by the corporate issuer to the bondholder. Since corporate bonds are debt obligations rather than equity, a potential conflict of interest under

² The deposit's security and the payment of interest depend on the solvency of the bank, which few employees could influence.

18 U.S.C. § 208 will not ordinarily arise in connection with an employee's ownership of a corporate bond because merely affecting the issuer of a corporate bond does not affect the employee's financial interest. Instead, the potential for a conflict of interest depends on whether the employee has the potential to participate personally and substantially in a particular matter that the employee knows would affect the corporation's ability or willingness to repay the debt (*e.g.*, by affecting its financial stability) or affect the marketability or market resale value of the bond (*e.g.*, by affecting the corporation's credit rating).

Exemptions: Because corporate bonds are securities and the corporation that issues the bond usually has publicly traded stock, the bonds often meet the criteria for publicly traded securities, as defined by 5 C.F.R. § 2640.102(p). If these criteria are met, the exemptions at 5 C.F.R. § 2640.202 for interests in securities may be available.

Bond (municipal)

18 U.S.C. § 208

Municipal bonds are debt obligations of states, cities, counties, or other political subdivisions of states in the United States. As with corporate bonds, a potential conflict of interest under 18 U.S.C. § 208 will not ordinarily arise in connection with an employee's ownership of a municipal bond. The potential for conflict depends on whether the employee can participate personally and substantially in a particular matter that the employee knows would affect the marketability or market resale value of the bond (*e.g.*, by affecting the issuer's credit rating) or the issuer's ability or willingness to repay its debt obligations (*e.g.*, by affecting the issuer's financial stability or, for a revenue bond, by affecting the financial viability of the specific project funding the bond).

Employees at some agencies work on particular matters such as grants and fund allocations to states and local communities. When these particular matters would have a direct and predictable effect on the value of municipal bonds or, in rare cases, the financial stability of the issuer, the employee would have a conflict of interest.

Municipal industrial development bonds, which are a subset of municipal bonds, may present additional conflicts of interest concerns. The private company to which the bond issuer expects to lease the facilities being financed is responsible for backing the bonds. In addition to the potential conflict of interest described above, a conflict could also arise in the rare case when an employee has the potential to participate personally and substantially in a particular matter that the employee knows would affect the ability or willingness of the company to lease the facilities. In such a case, both the issuer of industrial development bonds and the private company involved must be analyzed.

Exemptions: The following exemptions may be available for interests in municipal bonds: 5 C.F.R. § 2640.202(a) (*de minimis* exemption for matters involving parties), 5 C.F.R. § 2640.202(b) (*de minimis* exemption for matters affecting nonparties), 5 C.F.R. § 2640.202(c) (*de minimis* exemption for matters of general applicability), 5 C.F.R. § 2640.202(e) (exemption for interests of tax-exempt organizations), and 5 C.F.R. § 2640.202(f) (exemption for certain interests of general partners).

Competition Winnings, Awards, and Prizes

18 U.S.C. § 208

For most employees, a potential conflict of interest under 18 U.S.C. § 208 will not usually arise in connection with the employee's receipt of competition winnings and awards. If the employee is entitled to competition winnings, an award, or a prize that has not yet been received, the employee will have a financial interest in the issuing entity's ability or willingness to disburse the winnings, award, or prize. Winnings, awards, or prizes no longer implicate 18 U.S.C. § 208 after they are received.

Other Considerations

The primary concerns with winnings, awards, and prizes typically arise from the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct). The restrictions at 5 C.F.R. Part 2635, Subpart B, must be considered if the circumstances suggest that the item was given for or because of the employee's official position.³ In rare cases, winnings, awards, or prizes that are won in the course of an employee's official duties may also raise supplementation of salary concerns under 18 U.S.C. § 209, which prohibits an outside entity from paying an employee to perform their official duties or enhancing the employee's pay because of those official duties.⁴ Additionally, the applicability of the restrictions at 5 C.F.R. § 2635.807 must be considered if the item was given in connection with teaching, speaking, or writing related to the employee's official duties.

Equity Index-Linked Note

18 U.S.C. § 208

An equity index-linked note is a debt instrument that affords the investor interest payments based on the performance of an equity index⁵ and, sometimes, a guaranteed return. An employee does not have a disqualifying financial interest in a particular matter merely because that matter may affect a company whose market performance is incorporated into an index or similar market measure representing a diverse group of companies, when the employee merely holds a non-equity instrument or contractual arrangement producing income dependent on statistical changes in that measure. Therefore, when the index reflects market changes among a diverse group of securities, an employee may participate personally and substantially in particular matters that the employee knows will directly and predictably affect the companies whose securities are part of the relevant index.⁶ On the other hand, if the interest on the note tracks the performance of a particular sector (*e.g.*, "energy" or "financial services"), a single company, or a relatively small

³ See 5 C.F.R. § 2635.202.

⁴ For additional assistance interpreting 18 U.S.C. § 209, see OGE DAEOgram DO-02-016 (2002).

⁵ Generally speaking, an index is a statistical measure of changes in a group of representative securities chosen to reflect a particular market or section of a market. *Index*, INVESTOPEDIA, <http://www.investopedia.com/terms/i/index.asp> (last visited Sept. 8, 2021).

⁶ Because stock market fluctuations are subject to so many variables and uncertainties, many particular matters would have at best a speculative effect on stock price or an effect that is contingent on independent, unrelated events.

number of companies, it is more likely that the employee may be prohibited under 18 U.S.C. § 208 from participating personally and substantially in particular matters that the employee knows will directly and predictably affect the companies included in the index. In such cases, the potential for a particular matter to have a direct and predictable effect on the relevant measure should be evaluated on a case-by-case basis, taking into account whether the particular matter will directly and predictably affect the value of the index.

Additionally, an employee who holds an equity index-linked note may not participate personally and substantially in a particular matter that the employee knows will have a direct and predictable effect on the ability or willingness of the issuer to honor any guarantee under the note's contractual terms. As a practical matter, most employees' official duties will not involve particular matters affecting the ability or willingness of the issuers of equity index-linked notes to make the note payments.

Fannie Mae, Freddie Mac, and Other Government-Sponsored Enterprise (GSE) Securities

18 U.S.C. § 208

Government-sponsored enterprise (GSE) securities, such as Fannie Mae or Freddie Mac, consist of equity shares and debt obligations issued by GSEs. A potential conflict of interest under 18 U.S.C. § 208 will rarely arise in connection with an employee's ownership of GSE securities, unless the employee works for an agency that regulates the issuer of the security, has investigative authority related to the security or its issuer, or could affect the existence of the issuer of a security. In those cases, consider whether the employee has the potential to participate personally and substantially in particular matters that would directly and predictably affect the GSE or the securities it issues.⁷

Agency-Specific Restrictions

Some agencies have prohibited holdings statutes or regulations that restrict ownership of Government-sponsored enterprise securities. If a prohibited holdings statute or regulation applies, then the exemptions in 5 C.F.R. Part 2640 will not be available for that asset.⁸

⁷ Note that the Federal National Mortgage Association (FNMA or Fannie Mae) and the Federal Home Loan Mortgage Corporation (FHLMC or Freddie Mac) are not, at present, publicly traded securities as defined at 5 C.F.R. § 2640.102(p) and do not qualify for the *de minimis* exemptions at 5 C.F.R. § 2640.202.

⁸ 5 C.F.R. § 2640.204. Note, however, that "once an agency grants an employee's request for a waiver of the agency's prohibited holding regulation or statute, the employee may rely on any applicable 2640 exemption for the waived asset." OGE Legal Advisory LA-23-09 (2023).

Foreign Exchange Position

18 U.S.C. § 208

A potential conflict of interest under 18 U.S.C. § 208 will not ordinarily arise in connection with an employee's ownership of a foreign exchange position. Because changes in exchange values reflect complex market forces, it is unlikely that the employee will participate in a particular matter having a direct and predictable effect on a foreign exchange position.

If the employee works for an agency with a mission that involves regulating foreign currency exchanges, or with a mission that may directly and predictably influence foreign exchange rates, there might be potential conflict of interest concerns under 18 U.S.C. § 208. However, even in these cases, the 18 U.S.C. § 208 prohibition only applies to participation in particular matters of general applicability (focused on the interests of a discrete and identifiable class)⁹ and party matters (involving a specific party or parties),¹⁰ and not to broad policy matters that affect the interests of a large and diverse group of people.

Futures Contract

18 U.S.C. § 208

A futures contract is an agreement to buy or sell an underlying commodity (such as an agricultural product, a precious metal, an energy product, or a financial instrument) at a specified time, price, and quantity. Therefore, the underlying commodity should be examined for potential conflicts of interest with the employee's responsibilities. The risk for a conflict under 18 U.S.C. § 208 is greatest for employees at agencies that have responsibilities affecting the value of agricultural products, energy products, or interest rates. In addition, potential conflicts may be encountered by employees at agencies that can affect the futures and options market itself. In either case, the central question is whether the employee has the potential to participate personally and substantially in particular matters that the employee knows will have a direct and predictable effect on the value of the futures.

Exemptions: Because futures contracts are not securities as defined at 5 C.F.R. § 2640.102(r), the exemptions at 5 C.F.R. § 2640.202 for interests in securities are not available.

Government Agency Security

18 U.S.C. § 208

Government agency securities are debt obligations issued by U.S. Government agencies, other than U.S. Treasury securities.¹¹ The potential for a conflict of interest under 18 U.S.C. § 208 will

⁹ 5 C.F.R. § 2640.102(m).

¹⁰ *Id.* § 2640.102(j).

¹¹ Examples of Government entities that issue this type of security include the Government National Mortgage Association (GNMA or Ginnie Mae), the Export-Import Bank of the United States (EXIM), and the

rarely arise in connection with an employee's ownership of Government agency securities, unless the employee works for an agency that issues such securities or that regulates the issuer of a security. In those cases, consider whether the employee has the potential to participate personally and substantially in particular matters that the employee knows will have a direct and predictable effect on the value and interest rate of such securities.¹²

Agency-Specific Restrictions

Some agencies have prohibited holdings statutes or regulations that restrict ownership of Government agency securities.

Government Benefit or Payment

18 U.S.C. § 208

A potential conflict of interest under 18 U.S.C. § 208 will not ordinarily arise in connection with an employee's receipt of Social Security benefits, veterans' benefits, or compensation and benefits received in connection with U.S. Government employment. In contrast, a potential conflict of interest is more likely to arise in connection with Federal grants, subsidy programs, and other targeted benefits, as well as benefits from a state or local government. For example, an employee would be prohibited from participating personally and substantially in a particular matter the employee knows would affect the level of benefits the employee's spouse receives from a subsidy program administered by the employee's agency.

Exemptions: The exemption at 5 C.F.R. § 2640.203(d) for financial interests arising from Federal Government employment or from Social Security or veterans' benefits generally permits employees to participate in any particular matter when the disqualifying financial interest arises from Federal Government or Federal Reserve Bank salary or benefits, or from Social Security or veterans' benefits. However, this exemption does not permit the employee to (1) make determinations that individually or specially affect the employee's own salary and benefits or (2) make determinations, requests, or recommendations that individually or specially relate to, or affect, the salary or benefits of any other person whose interests are imputed to the employee under 18 U.S.C. § 208 (*e.g.*, an employee may not advocate for the employee's spouse to receive a pay raise).¹³

Tennessee Valley Authority (TVA). Additional information on analyzing U.S. Treasury securities is available in this document under "Treasury Security."

¹² Note that Government agency securities do not qualify for the *de minimis* exemptions at 5 C.F.R. § 2640.202, which are available for Federal Government securities, among other things. Pursuant to 5 C.F.R. § 2640.102(i) and (s), a "Federal Government security" must be "issued by the United States Treasury pursuant to 31 U.S.C. chapter 31." *See* Interpretation, Exemptions and Waiver Guidance Concerning 18 U.S.C. 208 (Acts Affecting a Personal Financial Interest), 60 Fed. Reg. 47,208, 47,216 (proposed Sept. 11, 1995) (to be codified at 5 C.F.R. pt. 2640).

¹³ 5 C.F.R. § 2640.203(d); Interpretation, Exemptions and Waiver Guidance Concerning 18 U.S.C. 208 (Acts Affecting a Personal Financial Interest), 61 Fed. Reg. 66,830 (Dec. 18, 1996) (to be codified at 5 C.F.R. pt.

Emoluments Clause

Benefits or payments from foreign governments should also be analyzed to ensure that they do not violate the Emoluments Clause of the U.S. Constitution, which prohibits Federal employees from receiving compensation from a foreign state.¹⁴

Life Insurance

18 U.S.C. § 208

Term life insurance is pure insurance with no investment component. The potential for a conflict of interest under 18 U.S.C. § 208 will rarely arise in connection with an employee's ownership of term life insurance, unless the employee could participate personally and substantially in a particular matter that the employee knows has a direct and predictable effect on the insurer's ability or willingness to support the policy (*e.g.*, by affecting the insurer's overall financial stability).

Whole life and **universal life insurance** are life insurance policies that pair death benefits with a tax-deferred investment. An employee does not have any disqualifying financial interest in the assets in which the life insurance company invests or in the general profitability of the insurer. Rather, a potential conflict of interest under 18 U.S.C. § 208 would arise in connection with an employee's ownership of a whole or universal life insurance policy only if the employee could participate personally and substantially in a particular matter that the employee knows would have a direct and predictable effect on the insurer's ability or willingness to support the policy (*e.g.*, by affecting the insurer's overall financial stability).¹⁵

Variable life insurance is a form of life insurance that pairs death benefits with tax-deferred savings. Here, the amount of the savings depends on the performance of the underlying assets selected by the employee. An employee who has variable life insurance has an interest in the underlying assets selected and, unless an exemption applies, is prohibited from participating personally and substantially in any particular matter that the employee knows would affect an underlying asset. As with term, whole, and universal life insurance, an employee would also be prohibited from participating personally and substantially in a particular matter that the employee knows would have a direct and predictable effect on the insurer's ability or willingness to support the policy (*e.g.*, by affecting the insurer's overall financial stability).

Exemptions: In OGE's experience, most of the investment options available through variable life insurance policies qualify for the diversified mutual fund exemption at 5 C.F.R. § 2640.201(a). Additional information on analyzing diversified mutual funds is available in [Conflicts of Interest](#)

2640); Certain Miscellaneous Exemptions Under 18 U.S.C. 208(b)(2) (Acts Affecting a Personal Financial Interest), 60 Fed. Reg. 44,706 (interim final Aug. 28, 1995) (to be codified at 5 C.F.R. pt. 2640).

¹⁴ See U.S. CONST., art. I, § 9, cl. 8.

¹⁵ A regulatory exemption allows employees to "participate in any particular matter affecting a mutual insurance company if the disqualifying financial interest arises because of an interest as a policyholder, unless the matter would affect the company's ability to pay claims required under the terms of the policy or to pay the cash value of the policy." 5 C.F.R. § 2640.203(f).

Considerations: Legal Entities that Hold Assets under “Mutual Funds, Exchange-Traded Funds (ETFs), and Unit Investment Trusts (UITs).”

Loan Made to Another Party

18 U.S.C. § 208

Under 18 U.S.C. § 208, an employee who makes a loan to another party is prohibited from participating personally and substantially in any particular matter that the employee knows would have a direct and predictable effect on the debtor’s ability or willingness to repay the obligation.¹⁶

5 C.F.R. § 2635.502 (Impartiality)

Under 5 C.F.R. § 2635.502, an employee will have a “covered relationship” with the debtor because the employee has a business, contractual, or other financial relationship that involves other than a routine consumer transaction.¹⁷ Therefore, (1) when an employee knows that the debtor 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

Master Limited Partnership (MLP)

18 U.S.C. § 208

A master limited partnership (MLP) is a type of publicly traded partnership. MLPs are generally focused on the exploration, development, mining, processing, or transportation of minerals or natural resources,¹⁹ and most of their income is generally derived from real estate, mineral and natural resources, or commodities. Under 18 U.S.C. § 208, an employee who holds an interest in an MLP is prohibited from participating personally and substantially in any particular matter that the employee knows would have a direct and predictable effect on the financial interests of the partnership (*e.g.*, by affecting one of its underlying holdings).

18 U.S.C. § 208 also imputes the financial interests of a general partner to an employee, to the extent those interests are known to the employee. This is true regardless of whether the employee is a general partner of the partnership or merely a limited partner. Consequently, to the extent they are known to the employee, the financial interests of the general partner, both within the

¹⁶ An ability and willingness creates a sliding scale of concern about an employee’s ability to affect their financial interest to be paid. If the matter in which the employee participates affects the debtor’s ability to pay the loan, then the employee likely would need to be recused. The larger the debtor the less likely it is an employee could participate in a matter that would affect the ability to pay.

¹⁷ 5 C.F.R. § 2635.502(b)(1)(i).

¹⁸ *Id.* § 2635.502(a)(2).

¹⁹ OGE Legal Advisory LA-21-02 (2021), citing *Updated Investor Bulletin: Master Limited Partnerships – An Introduction*, SEC. & EXCH. COMM’N (Nov. 3, 2017), https://www.sec.gov/oiea/investor-alerts-bulletins/ib_mlpintro.html.

partnership and outside of the partnership, will need to be examined. Note that because 18 U.S.C. § 208 imputes only the interests of the *employee's* general partner to the employee, the interests of a general partner need not be examined if it is the employee's spouse or child who has the investment interest.

Exemptions: Many MLPs register their securities under the Securities Exchange Act of 1934 and thereafter list and publicly trade those securities on national exchanges. If the MLP's shares are publicly traded securities as defined at 5 C.F.R. § 2640.102(p), the exemptions at 5 C.F.R. § 2640.202 for interests in securities may be available. Additionally, the exemption at 5 C.F.R. § 2640.202(f) for certain interests of general partners is typically available. Because MLPs are not registered as investment companies under the Investment Company Act of 1940 (1940 Act), the exemptions for diversified or sector mutual funds and unit investment trusts found in section 2640.201 are not available.

Oil, Gas, or Other Mineral Rights Lease

18 U.S.C. § 208

An oil, gas, or other mineral rights lease allows a lessee (*e.g.*, an energy company) to extract such commodities from real estate held by the lessor. Under 18 U.S.C. § 208, an employee who leases oil, gas, or other mineral rights is prohibited from participating personally and substantially in any particular matter that the employee knows would have a direct and predictable effect on the value of or income from the lease, or the lessee's ability or willingness to honor its contractual obligations.

5 C.F.R. § 2635.502 (Impartiality)

Under 5 C.F.R. § 2635.502, an employee will have a "covered relationship" with the lessee because the employee has a business, contractual, or other financial relationship that involves other than a routine consumer transaction.²⁰ Therefore, (1) when an employee knows that the lessee 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.²¹

Option

18 U.S.C. § 208

Options are rights to buy²² or sell²³ stocks at specified quantities and prices within a certain time period. Stock options pose the same conflict of interest concerns under 18 U.S.C. § 208 as actual

²⁰ 5 C.F.R. § 2635.502(b)(1)(i).

²¹ *Id.* § 2635.502(a)(2).

²² A call option is a contract that provides an investor the option to buy a security.

²³ A put option is a contract that provides an investor the option to sell a security.

shares of the underlying security. Therefore, an employee who owns stock options is prohibited from participating personally and substantially in any particular matter that the employee knows would have a direct and predictable effect on the financial interests of the issuer of the underlying security. This analysis is the same even if the employee acquired the option through an employer's incentive stock option plan (discussed in Conflicts of Interest Considerations: Corporate Employment) or on the open market, and regardless of whether the option was purchased or written.²⁴

Exemptions: Because options do not constitute ownership of the underlying stock and are not securities as defined at 5 C.F.R. § 2640.102(r), the exemptions at 5 C.F.R. § 2640.202 for interests in securities are not available. After the employee has exercised a call option, thereby purchasing the stock, the applicable exemptions at 5 C.F.R. § 2640.202 may be available for the stock itself. Additional information on analyzing stock is available in this document under "Stock."

Option (incentive stock option plan)

See Conflicts of Interest Considerations: Corporate Employment.

Open Short Position (short sale)

18 U.S.C. § 208

A short sale is the sale of securities that an investor has borrowed from a broker. The investor must eventually purchase an equal number of the same securities and return them to the broker. When the investor acquires and subsequently sells the initial borrowed securities from the broker, but has not yet purchased the replacement securities, the investor is in an "open short position." An employee, therefore, has a financial interest in the issuer of the securities that the employee has borrowed. When the employee purchases the replacement securities and returns them to the broker, the position has been closed and the employee no longer has a financial interest. Therefore, under 18 U.S.C. § 208, an employee who is in an open short position is prohibited from participating personally and substantially in any particular matter that the employee knows would have a direct and predictable effect on the financial interests of the issuer of the securities that the employee has borrowed.

Exemptions: Because a financial interest in an open short position does not constitute ownership of the underlying securities and is not a security as defined at 5 C.F.R. § 2640.102(r), the exemptions at 5 C.F.R. § 2640.202 for interests in securities are not available.

²⁴ The writer of a put option has an obligation to buy the security at a specified price (*i.e.*, the "strike price") from the buyer if the buyer exercises the option before the contract's expiration date. The writer of a call option has an obligation to sell the security at a specified price to the buyer if the buyer exercises the option before the contract's expiration date.

Precious Metal

18 U.S.C. § 208

For most employees, a potential conflict of interest under 18 U.S.C. § 208 will not ordinarily arise in connection with an employee's ownership of precious metals. The value of these items and their potential for producing capital gains upon resale are controlled primarily by the market forces of supply and demand, interest rates, and foreign exchange rates. A few agencies may have missions that could affect the value of precious metals. It is unlikely, however, that an employee would participate in a particular matter that the employee knows would have a direct and predictable effect on the employee's financial interests based on the employee's ownership of precious metals.

Real Estate

18 U.S.C. § 208

The term "real estate" includes land, the buildings and structures on it, and rights within the land, such as minerals. A potential conflict of interest under 18 U.S.C. § 208 may arise from an employee's interest in real estate when the value of the real estate or the income produced from it could be directly and predictably affected by agency programs in which the employee might participate personally and substantially.

5 C.F.R. § 2635.502 (Impartiality)

If an employee leases out the property, under 5 C.F.R. § 2635.502 the employee will have a "covered relationship" with the lessee because the employee has a business, contractual, or other financial relationship that involves other than a routine consumer transaction.²⁵ Therefore, (1) when an employee knows that the lessee 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.²⁶

Other Considerations

Analysis of potential conflicts that could arise from the ownership of farms or farmland can be found in Conflicts of Interest Considerations: Business or Farm Ownership.

Real Estate Investment Trust (REIT)

18 U.S.C. § 208

A real estate investment trust (REIT) is a specific type of real estate holding company, which owns or finances income-producing real estate or mortgages. Although REITs are a type of real

²⁵ 5 C.F.R. § 2635.502(b)(1)(i).

²⁶ *Id.* § 2635.502(a)(2).

estate holding company, they have specific legal requirements that distinguish them from other real estate holding companies. Under 18 U.S.C. § 208, an employee who holds an interest in a REIT is prohibited from participating personally and substantially in any particular matter that the employee knows would have a direct and predictable effect on the financial interest of the REIT, unless an exemption applies.

Exemptions: Many REITs register their securities under the Securities Exchange Act of 1934 (Exchange Act) and thereafter list and publicly trade those securities on national exchanges. If the REIT's shares are publicly traded securities as defined at 5 C.F.R. § 2640.102(p), the exemptions at 5 C.F.R. § 2640.202 for interests in securities may be available. Because REITs are not registered as investment companies under the Investment Company Act of 1940 (1940 Act), they are not mutual funds and the exemptions for diversified or sector mutual funds and unit investment trusts found in section 2640.201 are not available.²⁷

Other Considerations

Analysis of potential conflicts that could arise from the ownership of real estate holding companies that are not REITs can be found in [Conflicts of Interest Considerations: Legal Entities that Hold Assets](#).

Stock

18 U.S.C. § 208

Under 18 U.S.C. § 208, employees are prohibited from participating personally and substantially in any particular matter that they know would affect their own financial interest or financial interests attributed to them. Because shares of stock represent an ownership interest in a company, a particular matter that has a direct and predictable effect on the issuing company's financial interests is treated as having a direct and predictable effect on the financial interests of the shareholders.²⁸ Therefore, an employee who holds stock in a company is prohibited from participating personally and substantially in any particular matter that the employee knows would have a direct and predictable effect on the issuing company. The same analysis applies to both common stock and preferred stock.

Generally, a financial interest in a particular matter affecting a subsidiary of a company in which an employee holds an equity-related interest is treated as a particular matter affecting the parent. Whether the particular matter that affects the parent will have a direct and predictable effect on the subsidiary will depend on the factual circumstances.

²⁷ OGE Legal Advisory LA-21-02 (2021). (“The Investment Company Act of 1940 (1940 Act) excludes an entity that is primarily engaged in ‘purchasing or otherwise acquiring mortgages and other liens on or interests in real estate’ from the definition of ‘investment company’ and, as a result, REITs will never qualify as mutual fund[s].”)

²⁸ See OGE Legal Advisory LA-20-03 (2020). (“Under Section 208, therefore, an employee may not participate in any particular matter that would have a direct and predictable effect on the financial interests of a company in which the employee (or any imputed person) owns stock, not merely those particular matters that would affect the stock price.”)

Exemptions: If the shares of stock in a company are publicly traded securities as defined at 5 C.F.R. § 2640.102(p), the exemptions at 5 C.F.R. § 2640.202 for interests in securities may be available. Shares of stock that are not publicly traded and holdings in foreign stocks not traded on a U.S. exchange will not qualify for these exemptions, regardless of their value.

Treasury Security

18 U.S.C. § 208

United States Treasury securities, often simply called Treasuries, are debt obligations issued by the U.S. Government and secured by the full faith and credit (the power to tax and borrow) of the United States. For most employees, a potential conflict of interest under 18 U.S.C. § 208 will rarely arise in connection with an employee's ownership of Treasury securities because the duties of most employees will not involve participation in particular matters that would have a direct and predictable effect on the value or interest rate of these securities.

Exemptions: The exemption at 5 C.F.R. § 2640.202(d) is available for interests in short-term Federal Government securities and U.S. savings bonds. An employee's interests in long-term Treasury securities may qualify for one of the other exemptions at 5 C.F.R. § 2640.202.

Agency-Specific Restrictions

Some agencies have prohibited holdings statutes or regulations that restrict ownership of U.S. Treasury securities. If a prohibited holdings statute or regulation applies, then the exemptions in 5 C.F.R. Part 2640 will not be available for that asset.²⁹

Virtual Currency

18 U.S.C. § 208

Virtual currency, also known as **cryptocurrency** or **digital currency**, is an investment asset.³⁰ Like other property held for investment, virtual currency may create a conflict of interest under 18 U.S.C. § 208 for employees who own it.³¹ Therefore, an employee who owns virtual currency is prohibited from participating personally and substantially in any particular matter that the employee knows would have a direct and predictable effect on the value of their virtual currency.³²

²⁹ 5 C.F.R. § 2640.204. Note, however, that “once an agency grants an employee's request for a waiver of the agency's prohibited holding regulation or statute, the employee may rely on any applicable 2640 exemption for the waived asset.” OGE Legal Advisory LA-23-09 (2023).

³⁰ OGE Legal Advisory LA-18-06 (2018).

³¹ The conflict of interest analysis under 18 U.S.C. § 208 for virtual currency applies equally to other digital assets, such as “coins” or “tokens” received in connection with initial coin offerings or issued or distributed using distributed ledger or blockchain technology.

³² For additional discussion of the application of 18 U.S.C. § 208 to digital assets, see OGE Legal Advisory LA-23-12 (2023).

Exemptions: Virtual currency will not qualify for any of the regulatory exemptions at 5 C.F.R. Part 2640.³³

Warrant

18 U.S.C. § 208

A warrant is a certificate entitling a holder to purchase a specified amount of securities at a specified price. The specified price is usually higher than the current market value of the security, but the holder will benefit if the market value increases above the specified price before the warrant expires. Therefore, an employee who owns a warrant is prohibited from participating personally and substantially in any particular matter that the employee knows would have a direct and predictable effect on the financial interests of the issuer of the underlying security. This analysis is the same regardless of how the employee acquires the warrant.

Exemptions: Because a warrant does not constitute ownership of the underlying stock and is not a security as defined at 5 C.F.R. § 2640.102(r), the exemptions at 5 C.F.R. § 2640.202 for interests in securities are not available. After the employee has exercised a warrant, thereby purchasing the stock, the applicable exemptions at 5 C.F.R. § 2640.202 may be available for the stock itself.

³³ For a discussion of the application of the securities and mutual fund exemptions to cryptocurrency, stablecoins, and related investments, see OGE Legal Advisory LA-22-04 (2022).