Report for Congress

Entering the Executive Branch of Government: Potential Conflicts of Interest With Previous Employments and Affiliations

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Summary

Ethics and conflict of interest concerns have been expressed about the impartiality, bias, or fairness of Government regulators, administrators and other executive branch decision makers who, shortly before entering Government service, had represented, owned or were employed by industries, firms or other entities which they must now regulate and oversee. Federal conflict of interest law and regulation, for the most part, deal with the potential influence of existing and *current* financial assets, properties, arrangements, and relationships of the federal official. While the laws and regulations focus primarily on *current* economic and financial interests of a Government official and those closely associated with the official, there are some limited conflict of interest regulations and ethics standards which look also to previous employment and past associations of those entering federal service.

The regulatory scheme regarding financial interests encompasses what has colloquially been called the "three-D" method of conflict of interest regulation, that is: disclosure, disqualification and divestiture. Public financial disclosure is required of in-coming federal officials who will be compensated above certain amounts, including those officials nominated by the President who must receive Senate confirmation. Disclosure information will cover not only existing assets, property, debts and income, but also certain information about past clients and employers who during the previous two years compensated the in-coming federal official over $5,000 in a year, other past income sources, and certain past positions held in private organizations and entities in the preceding two years.

Disqualification or "recusal" is the principal statutory method of dealing with potential conflicts of interest of an executive branch officer or employee, whereby the officer or employee is prohibited from participating in any particular official governmental matter in which that official, or those close to the official whose financial interests may be "imputed" to the official, has any financial interest. While the *statutory* provision requiring disqualification is a criminal provision of law, and covers only current or existing financial interests of the officer or employee, there is also a "regulatory" recusal requirement that may apply to certain *past* affiliations and previous economic interests. Such recusals may be required in matters affecting, as parties to the matter, organizations, entities or clients with which the federal official had been associated during the previous one-year period. Additionally, executive branch regulations also provides for a two-year recusal requirement barring an official in the executive branch from participating in a particular matter in which a former employer is a party when that former employer had made an "extraordinary payment" to the official prior to entering Government. Aside from the specific regulatory and statutory restrictions and requirements on past associations and employments, there is no general regulation or standard on possible or perceived "philosophical" or "ideological" biases which a federal regulator or administrator may allegedly have on a subject because of the past affiliations or previous employments or professional activities of that official.

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Entering the Executive Branch of Government: Potential Conflicts of Interest With Previous Employments and Affiliations

This report examines the federal laws and regulations relevant to entering into Government employment from the private sector, with respect particularly to the potential conflicts of interest that may arise because of the past employment, affiliations or financial interests or involvements of a nominee or new officer or employee in the executive branch of Government. The report is intended to provide those conducting congressional oversight with an outline of some of the issues, rules, regulations, and oversight tools that may be available regarding this subject.

Background/Issues

There has been expressed ongoing concerns about the impartiality, bias, or fairness of Government regulators, administrators and other executive branch decision makers who, shortly before entering Government service, had represented, owned or were employed by industries, firms or other entities which they must now regulate and oversee, or concerning whom such officials must otherwise make or advise the Government on policies directly and significantly impacting those former clients, employers or firms. Several instances of alleged conflicts of interest, "appearances" of conflicts of interest or bias, or "cozy relationships" between the regulated entities and the Government official who had formerly worked for or represented that regulated entity, have been examined in the press over the last few years.[1] The allegations and concerns in such instances are that loyalty to *private* economic and business interests, rather than fealty to the general *public* interest, is being served by such officials in their actions.

Individuals entering federal service will, of course, bring with them existing financial investments, ownerships, properties, and other economic arrangements typical of anyone similarly placed in American society. Those entering federal

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[1] Washington Post, "Official's Lobbying Ties Decried: Interior's Griles Defends Meetings as Social, Informational," September 25, 2002, p. A1: "Within weeks of taking office, Griles began a series of meetings with former clients and administration officials on regulatory matters important to several of his former clients"; Washington Post, "Pitt's Role in AOL Time Warner Case Uncertain," October 18, 2002, p. E1: "Pitt, who has been criticized for participating in SEC cases involving former law clients, represented [AOL's chairman] and the company on several significant accounting matters in recent years"; Washington Post, "Pentagon Official From Enron in Hot Seat," January 27, 2002, p. A8: "[White's] corporate experience - his role at ... Enron Energy Services (EES) - is raising questions of possible conflicts of interest... In his first major speech as secretary, he vowed to step up privatization of utility services at military bases. EES ... had been seeking to contract with the military."

service immediately from private industry will also enter with certain former affiliations, employment or other financial, economic or business associations with particular private interests. While federal conflict of interest law and regulation focuses primarily on *current* economic and financial interests of a Government official and those closely associated with the official, there are some limited conflict of interest regulations and ethics standards which look also to previous employment and past associations of those becoming federal officers and employees.

Conflicts of Interest Generally

The term "conflict of interest" may have a broad meaning in general usage. However, under federal law and regulation a "conflict of interest," for the most part, deals with a 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.[2] When the official duties of a Government employee may impact upon the outside, private business or economic interests of that employee, or the economic interests of those closely associated with the employee, a conflict of interest situation presents itself.

The overall scheme of the conflict of interest laws adopted by Congress generally embodies the principle "that a public servant owes undivided loyalty to the Government,"[3] and that advice and recommendations given to the Government by its employees and officials be made in the *public* interest and not be tainted, even unintentionally, with influence from *private* or personal financial interests.[4] The House Judiciary Committee, reporting out major conflict of interest revisions made to federal law in the 1960's 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.[5]

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[2] 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 Standards of Official Conduct, *House Ethics Manual*, 102d Cong., 2d Sess. at 87 (April 1992); *see* Regulations of the Office of Government Ethics, 5 C.F.R. part 2635. There may be certain so-called "conflict of interest" statutes or regulations 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.

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

[4] H. R. Rpt. No. 748, *supra* at 4-6; *see* also *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 549 (1960); and *Conflict of Interest and Federal Service, supra* at 3-4.

[5] H. R. Rpt. No. 748, *supra* at 4-6.

The concern in such regulation "is 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..."[6] The conflict of interest laws are thus directed not only at conduct which is improper, but rather are often preventative 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.[7]

Conflict of Interest Regulation

The application of federal conflict of interest laws and regulations, particularly the laws requiring an official's recusal or disqualification from certain matters, or regulations or procedures requiring the divestiture of certain assets, have traditionally been directed at *current* and existing financial interests and ties of that official, and those closely associated with the official. The regulatory scheme regarding financial interests encompasses what has colloquially been called the "three-D" method of conflict of interest regulation, that is: disclosure, disqualification and divestiture.

Financial Disclosure: Identifying and Deterring Potentially Conflicting Financial Interests

Upon entering the Federal Government, and then annually on May 15 thereafter, high-level Government officials must file detailed, public financial disclosure statements. Public financial disclosures were first required by law with the passage of the Ethics in Government Act of 1978 (P.L. 95-521, as amended), and 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.[8]

In addition to the purpose of merely identifying potential conflicts, and then attempting to resolve such conflicts of interest, the committees considering the ethics legislation adopted in 1978 recognized the fact that there was potentially a "deterrent

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[6] 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).

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

[8] S. Rpt. No. 95-170, 95th Cong., 1st Sess. 117 (1977). The fact that the disclosures were to be made public was also seen as serving the purpose of increasing public confidence in the integrity of the institutions of Government and in those who serve them.

factor" in requiring public disclosure of a Government official's personal and family financial information, – both in deterring the holding of certain assets (and thus deterring certain potential conflicts of interest), but also possibly in deterring the recruitment of certain persons into the Government because of such persons' uneasiness with the required details of public financial disclosure. As noted by the Senate Committee, however, this latter deterrent effect was not necessarily a negative consequence of required public disclosures, but could be a *positive* consideration in the enactment of the financial disclosure requirement:

> Public financial disclosure will deter some persons who should not be entering public service from doing so. Individuals whose personal finances would not bear up to public scrutiny ... will very likely be discouraged from entering public office altogether, knowing in advance that their sources of income and financial holdings will be available for public review.[9]

Who Must File, Generally.

Anyone entering the federal service who is covered by the public financial disclosure laws generally must, within 30 days of appointment, file an entry report.[10] Thereafter, covered employees must file annual reports by May 15. Whether an employee of the Federal Government is required to file public financial disclosure statements is determined, in the first instance, by the rate of compensation that the employee receives or will receive from the Federal Government, and then, secondly, by the number of days such an employee works for the Federal Government. Any officer or employee of the executive branch of Government who "occupies a position classified above GS-15," or, if "not under the General Schedule," is 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," is generally subject to the public disclosure provisions.[11] Those employees compensated at the rate of pay described above will be required to file public disclosure statements if the individual works for the Government for more than 60 days in the calendar year.[12]

This requirement for detailed, public financial disclosure under the Ethics in Government Act of 1978 currently applies to more than 20,000 officials in the Federal Government.[13] In addition to the statutory mandate for public disclosure

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[9] S. Rpt. No. 95-170, *supra* at 22.

[10] 5 U.S.C. app. §§ 101(a), 102(b).

[11] 5 U.S.C., app. § 101(f)(3). As of this writing in 2003, for example, the threshold rate of pay for 2003 will be $102,168 annually. The definition for legislative employees, it should be noted, differs slightly and covers *anyone* who is compensated at a rate in excess of 120% of a the base salary of a GS-15, regardless of whether or not that person is on the General Schedule or not, thus covering certain GS-15's in the legislative branch not covered in the executive branch.

[12] 5 U.S.C., app. § 101(d). Certain exemptions and waivers may be permitted upon particular findings and determinations regarding special Government employees. *See* 5 U.S.C., app. § 101(i).

[13] Statement of Amy L. Comstock, Director of the Office of Government Ethics, before the (continued...)

based on salary level, the Office of Government Ethics requires by regulation that all "Schedule C" employees, regardless of salary, file public disclosures.[14]

Where Filed.

For most incoming federal officials filing their entry report, as well as for current employees filing their annual financial disclosure statements by May 15 of each year, such reports are generally to be filed with the designated agency ethics officer (most commonly in the office of general counsel) in the agency in which the reporting officer or employee serves or is to serve.[15] The President and the Vice President, however, file their reports with the Director of the Office of Government Ethics. All filed reports by officials are open generally for public inspection upon request made in writing, subject to rules on the impermissible commercial or political use of the information contained in the reports.[16] The agencies having such reports are instructed to keep them as public records for six years.[17]

Advice and Consent Positions.

All presidential nominees requiring Senate confirmation must file public disclosure statements regardless of salary (but uniformed and foreign service nominees file only if they meet the pay threshold),[18] and such reports incur other specific procedural steps. Their disclosure statements are not only filed with and reviewed by their department or agency, but are also "transmitted" to the Office of Government Ethics for review, and are "foward[ed]" for review to the Committee of the Senate with jurisdiction over the particular individual's nomination.

Once the President has transmitted to the Senate the nomination of a person required to be confirmed by the Senate, the nominee must within 5 days of the President's transmittal (or any time after the public announcement of the nomination,

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[13] (...continued)
Senate Committee on Governmental Affairs, "OGE Recommendations on Streamlining Public Financial Disclosure and Other Aspects of the Presidential Appointment Process," April 5, 2001, p. 2.

[14] 5 C.F.R. § 2634.202(e). Exceptions may be provided under some circumstances. There are also confidential reporting requirements which apply generally to certain lower-level "rank and file" employees, that is, those compensated below the threshold rate of pay for public disclosure (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 exercise responsibilities regarding Government contracting or procurement, Government grants, Government subsidies or licensing, Government auditing, or other governmental duties which may particularly require the employee to avoid financial conflicts of interest. 5 C.F.R. §§ 2634.901-908.

[15] 5 U.S.C. app. § 103(a).

[16] 5 U.S.C.,app. § 105(a), (b).

[17] 5 U.S.C. app. § 105(d).

[18] 5 U.S.C. app. § 101(b).

but no later than 5 days after transmittal), file a financial disclosure statement.[19] This financial disclosure statement is filed with the designated agency ethics officer of the agency in which nominee will serve,[20] and copies of the report are transmitted by the agency to the Director of the Office of Government Ethics.[21] The Director of OGE then forwards a copy to the Senate committee which is considering the nomination of that individual.[22] A presidential nominee must file an updated report to the Committee reviewing his nomination at or before the commencement of hearings, updating the information through the period "not more than five days prior to the commencement of the hearing," concerning specifically information related to honoraria and outside earned income.[23]

Information to Be Reported: *Current* Financial Interests.

Most of the information to be filed and publicly disclosed concerns current and existing financial information on assets, property, debts, income and existing associations which may present or potentially involve a conflict of interest with the officer's or employee's official responsibilities for the Government. The regular annual financial disclosure reports to be filed in May of each year generally require information concerning eight different categories of financial information. The disclosure statement[24] requires public listing of the identity and/or the value (generally in "categories of value") of such items as: (1) the official's private income of $200 or more (including earned and unearned income such as dividends, rents, interest and capital gains) and the source of income; (2) gifts received over a certain amount (including reimbursements for travel over threshold amounts); (3) the identification of assets and income-producing property (such as stocks, bonds, other securities, rental property, etc.) of over $1,000 in value (including savings accounts over $5,000); (4) liabilities owed to creditors exceeding $10,000 (but not including one's home mortgage or car loans); (5) financial transactions, including purchases, sales or exchanges exceeding $1,000 in value, of income-producing property, stocks, bonds, or other 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 a qualifying blind trust.[25]

The incoming reports, including the reports of incoming presidential appointees requiring Senate confirmation, include most of the information required in the annual reports under § 102(a) of the Ethics Act, but does not include the information on

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[19] 5 U.S.C. app. § 101(b); 5 C.F.R § 2634(c)(1). The disclosure report form is provided to the nominee by the Executive Office of the President. 5 C.F.R. § 2634.605(c)(1).

[20] 5 C.F.R. §2634.602(a).

[21] 5 U.S.C. app. § 103(c), 5 C.F.R. § 2634.602(c)(1)(vi),.

[22] 5 U.S.C. app. § 103(c), 5 C.F.R. § 2634.602(c)(3).

[23] 5 U.S.C. app. § 101(b). 5 C.F.R. § 2634.606(a).

[24] In the executive branch, disclosure form SF 278.

[25] 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. app. § 102(e)(1)(A) - (F).

gifts and travel reimbursements (§ 102(a)(2)), nor does it need to include the information on financial transactions during the previous year (§ 102(a)(5) or the cash value of trusts (§ 102(a)(8)).[26] The new entrant reports specifically require disclosure of private income received for the filing year and the preceding calendar year; ownership interests in assets and income producing property over $1,000 in value, and liabilities of over $10,000 owed, as of the date specified in the report, but which must be no more than 31 days before the filing date; the identity of positions held in private entities; and any future agreements for employment, leave of absence, continuing payments from or participation in benefit plans of former employers.[27]

Information to Be Reported: *Past* Associations, Clients.

While most of the financial disclosure requirements are directed at current and existing financial holdings and interests, there are certain provisions which look to past affiliations and interests. Perhaps most significantly for first-time filers, including nominees to Senate-confirmed positions, the public disclosure law requires non-elected reporting individuals to list in public reports the identity of persons, including clients, from whom the reporting official had received more than $5,000 in compensation in any of the two calendar years prior to the year in which the reporting official files his or her first disclosure report.[28] Such listing of clients and others who paid the reporting individual compensation above the statutory threshold, should also include a statement of "the nature of the duties performed or services rendered" for such client or employer. Furthermore, new entrant reports, including reports of nominees, are to contain the required information concerning all private income received for the filing year, and additionally for the preceding calendar year; and the identity of positions held in private entities must be disclosed not only for positions held during the current calendar year, but also during the two preceding years.[29]

Executive Branch Review and Ethics Agreements.

The ethics officials to whom the annual disclosure reports are made are instructed to review the reports within 60 days to determine if the filer is in compliance with applicable conflicts of interest laws and ethical standards of conduct regulations, and if so, to sign off on such reports.[30] If there are assets, ownerships, income or associations which indicate a conflict of interest or ethics problem, that is, that "an individual is not in compliance with applicable laws and regulations," then after consultation with the individual, the reviewing ethics official or office may recommend several steps which may be appropriate to rectify the ethics problems, including "divestiture," "restitution," the establishment of a "blind trust," the request

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[26] 5 U.S.C. § 102(b)(1).

[27] 5 U.S.C. app. § 102(b)(1), referencing § 102(a)(1),(3),(4), (6) and (7).

[28] Ethics in Government Act, Section 102(a)(6)(B); *see* now 5 U.S.C. app. § 102(a)(6)(B).

[29] 5 U.S.C. app. § 102(b)(1)(C) and 102(a)(6)(A).

[30] 5 U.S.C. app. § 106(a),(b)(1).

for a personal conflict of interest exemption under 18 U.S.C. § 208(b), or a request for a "transfer, reassignment, limitation on duties or resignation."[31]

Presidential nominees who are subject to Senate confirmation also file with the agency or department in which they will serve. That agency or department conducts an expedited ("accelerated") review of disclosure report,[32] and where appropriate the reviewing official is to certify that there are no problems with the private financial interests of the nominee, that is, that there are "no unresolved conflict of interest" issues.[33] Where there are real or apparent conflict of interest problems revealed in the financial disclosure reports, the reviewing official, consulting with the reporting officer, must determine what "remedial action" is to be taken. "Remedial action" may include divestiture where appropriate, agreements to recuse, and the establishment of a qualified blind trust or a diversified trust.[34] Subsequently, a letter to the Director of the Office of Government Ethics must be provided setting out the apparent or real conflicts of interest, the remedial measures taken to resolve those issues, and any "ethics agreements" entered into to resolve such conflicts.[35] Ethics agreements are specific agreements between the nominee or official and the agency, as approved by OGE, as to future conduct that the nominee or official will take, such as divestiture, recusal or resignation from an outside position, to resolve a conflict of interest problem.[36] If the Director of OGE is satisfied that all conflicts have been resolved, the Director signs and dates the report form, then submits the form and any ethics agreement, with a letter to the appropriate Senate committee expressing the Director's opinion that the nominee has complied with all conflict of interest laws and regulations.[37]

Committee Requirements for Advice and Consent Positions.

As noted, all financial disclosure statements from presidential nominees who require Senate confirmation are forwarded to the committee of jurisdiction from the Office of Government Ethics. The nominee is also required to update the disclosure statement with respect to certain items within 5 days before nomination hearings. Committees of the Senate, because of the Senate's express constitutional power of approval of presidential nominations of officers of the United States,[38] are not limited nor restrained by the disclosure forms as to the information that they may request from a nominee to assist in its constitutional "advice and consent" function; and may require any additional information from a nominee that it deems necessary or

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[31] 5 U.S.C. app. § 106(b)(3).

[32] 5 C.F.R. § 2634.605(c).

[33] 5 C.F.R. § 2634.605(c)(2).

[34] 5 C.F.R. § 2634.605(b)(4) and (5).

[35] 5 C.F.R. § 2634.605(c)(2)(iii)(B).

[36] *See*, generally, 5 C.F.R. § 2634.801 *et seq*. Ethics agreements are monitored for future compliance by the agency and OGE. 5 C.F.R. § 2634.804; OGE Memoranda, DO-01-013, March 28, 2001, and DT-02-004, March 8, 2002, to Designated Agency Ethics Officials.

[37] 5 C.F.R. § 2634.605(c)(3).

[38] United States Constitution, Article II, Section 2, clause 2.

desirable. Furthermore, a Senate Committee, or the Senate, may require certain ethics agreements from the nominee as to the disposition of certain assets, or the intention to recuse oneself from certain governmental matters, even beyond any "ethics agreement" made between the nominee and agency or OGE officials.[39]

Disqualification and Prohibited Conflicts of Interest

The principal statutory method of dealing with potential conflicts of interest of an executive branch officer or employee is to require the disqualification (or "recusal") of the officer or employee from participating in any official governmental matter in which that official, or those close to the official whose financial interests may be "imputed" to the official, has any financial interest. The statutory provision requiring disqualification and recusal is a criminal provision of law, and covers only current or existing financial interests of the officer or employee. There is also a "regulatory" recusal requirement that may be broader in some instances than the statutory restriction, and may apply to certain *past* affiliations and previous economic interests. Current regulations promulgated by the Office of Government Ethics expressly require in certain circumstances that the executive branch official refrain from participating in certain particular matters having a direct and predictable effect on businesses, entities or economic enterprises with which the official had been affiliated in the past one year; and requires as well certain disqualifications for two years in cases where the private entity had made "extraordinary" payments to the Government official upon the official's departure.

Statutory Disqualification or Recusal.

The federal statutes deal with existing conflicts of interest principally by requiring the disqualification of a federal official from certain governmental matters in which he may be financially interested, as opposed to specifically requiring the divestiture of conflicting interests. The federal statute at 18 U.S.C. § 208, which is the principal, general conflict of interest provision under federal law, thus requires an official's disqualification (recusal) from a particular governmental matter in which the officer, his or her spouse or dependent "*has* a financial interest," or where there is affected 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.[40] 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.[41]

The statutory provision at 18 U.S.C. § 208 specifically bars a federal officer or employee in the executive branch of the Federal Government from taking official

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[39] 5 U.S.C. app. § 101(b); see 5 C.F.R. § 2634.803(a)(2).

[40] 18 U.S.C. § 208 (2000 Code ed.), emphasis added.

[41] *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).

action "personally and substantially" through "decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise," in any "particular" governmental matter, such as a proceeding, request for a ruling, claim, or a contract, which affects the financial interests of that officer or employee, that employee's spouse or dependents, or which affects the financial interests of an organization in which the employee is affiliated as an officer, director, trustee, general partner or employee, or "with whom he is negotiating or has any arrangement concerning prospective employment." While 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 have 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 even 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 can not exceed $50,000 to be exempt from the statute).[43]

Regulatory Disqualification for *Current* Conflicts of Interest.

In addition to the *statutory* recusal requirement, there also exists *regulatory* requirements for disqualification for other financial interests and connections. Although the range of private interests potentially affected by an official's governmental actions are broadened in the regulation, the regulatory recusal provision is more narrowly focused than the statutory provision as to those specific governmental matters covered. 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.[44] The regulation, in comparison to the statutory recusal requirement, expands the persons and entities who are deemed to be so connected to the employee that their financial interests may be "imputed" to that employee (and, as such, would constitute cause for recusal or disqualification of the employee from a governmental matter affecting those interests); but, as compared to the statutory disqualification, narrows those particular governmental matters that are included in the disqualification requirement. Even if covered by this particular regulatory provision,

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[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] 5 C.F.R. § 2635.501(a).

there are circumstances in which the employee may still be authorized by his or her agency to participate in the particular matter when warranted.[45]

The regulation requires a Government employee in the Executive Branch to recuse himself or herself 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 or her household, or upon a person or entity with whom the employee has a "covered relationship," and 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.[46] As to current and existing financial interests, the regulation deems an "imputed" financial interest of an employee, that is, 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; or an organization (other than a political party) in which the employee is an active participant.[47]

As noted, the regulatory recusal requirement, although broader as to the affected financial interests, applies to a narrower range of governmental matters than the statutory provision. The regulation applies only to particular governmental matters "involving specific parties," and as such would not cover such "particular matters" as general policymaking or drafting regulations affecting an economic or business sector; while the statutory recusal requirement applies to all governmental "particular matters," including even the drafting of such regulations.[48]

One-Year Regulatory Disqualification for *Past* Affiliations.

In addition to the Office of Government Ethics regulations applying a recusal requirement beyond the interests and relationships set out in the criminal conflict of interest statute concerning other *current* or existing interests, the regulations also expand and apply a potential recusal and disqualification requirement of a federal executive branch official for certain *past* business and economic associations. The regulations provide, in effect, that a federal official should recuse or disqualify himself or herself from working on a particular governmental matter involving specific parties if that matter "is likely to have a direct and predictable effect" on the financial interests of any "person for whom the employee has, within the last year,

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[45] 5 C.F.R. § 2635.502(c),(d).

[46] 5 C.F.R. § 2635.502(a).

[47] 5 C.F.R. § 2635.502(b)(1).

[48] The statutory disqualification requirement need not involve specific or identified parties, and therefore may apply to any "discrete and identifiable matter" such as "general rulemaking" or proposed regulations (2 Op.O.L.C. 151, 153-154 (1978); 5 C.F.R. § 2635.402(b)(3)), while the regulatory recusal applies only to particular matters involving specific parties, such as a contract or grant, or a particular investigation.

served as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee ..."[49] Such former employers and clients are considered within the regulation to be persons with whom the employee has a "covered relationship" for a one year period. This one-year recusal requirement as to matters affecting an official's former employers, businesses, clients or partners, applies to any officer or employee of the executive branch, but applies narrowly only to "a particular matter involving specific parties." As noted above, such matters cover generally things as contracts, investigations, or prosecutions involving specific individuals or parties, as opposed to broader "particular matters" which may involve a number of persons or entities (such as most rule making). Notwithstanding a direct impact on a past employer or client with whom the employee has a "covered relationship," an employee may, as with the regulatory restriction on current interests, receive authorization by his or her agency to participate in the matter.[50]

Two-Year Regulatory Disqualification for Extraordinary Payments From Past Employers.

In addition to the one-year recusal requirement for particular matters involving specific parties which may affect a former client, employer, firm, or business, the regulations of the Office of Government Ethics also provide for a two-year recusal requirement which bars an official in the executive branch from participating in a particular matter in which a "former employer" is a party when that former employer had made an "extraordinary payment" to the official prior to entering Government. An "extraordinary payment" is one in excess of $10,000 in value made by an employer after the employer has learned that the employee is to enter Government service, and one which is not an ordinary payment, that is, is a payment other than in conformance with the employer's "established compensation, benefits or partnership program."[51] Since the restriction would apply only to a particular matter in which the former employer is a "party," it would apply in the more narrow circumstances described above in the one-year regulatory recusal, and would not apply, for example, to the formulation, drafting or promulgation of regulations, even those directly affecting the former employer as one business in a particular sector governed by those regulations. This disqualification provision may be waived in writing by an agency head, or if the individual involved is the head of an agency, by the President or his designee.

Severance Payments, Generally.

There is a criminal provision of federal conflict of interest law, at 18 U.S.C. §209, which prohibits a federal employee from receiving any outside, additional or supplemental compensation from a private source for his or her official Government duties as a federal employee. One who has entered federal service may not, therefore, accept a salary supplementation from a business or organization intended to "make up the difference" between private sector and Federal Government salaries

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[49] 5 C.F.R. § 2635.502(a), (b)(1)(iv).

[50] 5 C.F.R. § 2635.502(c),(d).

[51] 5 C.F.R. § 2635.503(b)(1).

or to otherwise reward or compensate the new federal employee for his or her public service. This statutory restriction originated in 1917 from an initial legislative concern over private foundations paying the compensation of persons who were serving under a cooperative agreement in the Bureau of Education within the Department of Interior, and the undue and, to some, "noxious" influence of such foundations on national educational policy.[52] The law at §209 has been described as a conflict of interest statute "in the strictest sense," that is, an "employee does not have to *do* anything improper in his office to violate the statute," but rather his or her special status as a government employee "makes an unexceptionable act wrongful – wrongful because of the potential dangers in serving two paymasters."[53] The law thus seeks to assure that a federal employee is compensated for his or her services to the Government only by the Government, is not placed in a position of "serving two masters," and is not, nor appears to be, beholden or grateful to any outside group or private interest which "could affect the independent judgment of the employee."[54]

This provision might come into play, therefore, regarding certain "severance" payments, packages, or plans from a former private employer to an individual who has entered federal service if there is evidenced an "intent to compensate" an individual for that person's federal employment.[55] The provision is not as broad in application to severance payments, however, as it may seem at first glance, since the language of the statute applies expressly only to "an officer or employee of the executive branch of the United States Government," and has been interpreted by the courts as applying only to persons who at the time payments were received were federal employees, that is, the restriction does not apply to severance payments which are made at the time one leaves private employment but *before* the individual actually becomes an officer or employee of the Government.[56] Even if made to reward the employee for taking a public service job, or is intended to or has the effect of instilling in the about-to-become-official a sense of gratitude or goodwill towards the private employer, there is no violation of this criminal conflict of interest provision for severance payments made before one is a federal official, since federal employment status is an express element of the statute. Of course, as noted above, "extraordinary payments" from a private employer to an incoming federal official,

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[52] Formerly 18 U.S.C. §1914; *see* discussion in The Association of the Bar of the City of New York, Special Committee on the Federal Conflict of Interest Laws, *Conflict of Interest and Federal Service*, 53-56 (Harvard University Press 1960), and Bayless Manning, *Federal Conflict of Interest Law*, 148-149 (Harvard University Press 1964).

[53] *Conflict of Interest and Federal Service, supra* at 55-56. There needs to be no wrongful or "corrupt" intent or motivation in the payment of private compensation to an employee for his or her public duties for a violation of the law.

[54] Roswell B. Perkins, "The New Federal Conflict of Interest Law," 76 *Harvard Law Review* 1113, 1137 (1963), discussing 18 U.S.C. §209.

[55] *United States v. Muntain*, 610 F.2d 964, 969-970 (D.C.Cir. 1979). "Buyouts" of ownership interests, even those made on an installment basis over a few years after the recipient becomes a federal official, may thus not violate the provision since such buyouts are generally moneys received for past interests and work, and as such would lack the "intent to compensate" an employee for current federal duties for the Government.

[56] *Crandon v. United States*, 494 U.S. 152, 159 (1990).

even if made before the person is actually a federal employee (and thus not within §209), may still encounter the two-year disqualification requirement under OGE regulations, requiring the recusal of the employee for two years from any particular governmental matter involving that former employer as a party.

Pensions: Past or Present Financial Interest?.

One of the issues that arises with respect to current or past associations under the statutory recusal or disqualification requirement is the treatment of pensions from outside entities. Pensions generally involve *current* payments or vested interests from a fund controlled by an outside entity, but in recognition of or as compensation for *past* services. There are thus questions raised as to whether an employee's vested interest in a pension is a current financial interest or association with or in the entity making the payment, subject to all of the disqualification restrictions and limitations on current and existing financial interests, or whether pensions are excluded from being a disqualifying interest of an employee. The issue under the statutory recusal requirement is, as stated by the Office of Government Ethics, the concern "about an employee's participation in a Government matter that could have an effect on the sponsoring organization that is responsible for funding or maintaining the Government employee's pension plan."[57]

In interpreting the law at 18 U.S.C. § 208 and the regulations under it, the Office of Government Ethics has distinguished between two common types of pension plans, the "defined benefit plan," and the "defined contribution plan." In a "defined benefit plan," the employer typically "makes payments to an investment pool which it holds and invests for all participating employees"; and such plans are the "obligation of the employer" which pays the former employee an amount generally based on some percentage of what the employee's compensation had been.[58] A "defined contribution plan," however, typically involves contributions by the employer and/or the employee to a specific, individual retirement account, and the payout of income or annuity is based on the amounts, earnings, gains or losses generated by such account.

The expressed conflict of interest concerns thus generally arise more typically with a "defined benefit plan" type of pension 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 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."[59]

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[57] OGE Memorandum, 99 x 6, to Designated Agency Ethics Officials, April 14, 1999.

[58] *Id.*

[59] *Id.* It may be noted that stocks, bonds or other securities being held in an employee

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If the employee's pension is based on a "defined benefits plan," then the Office of Government Ethics would consider such a pension as a current, disqualifying interest under 18 U.S.C. § 208, in some circumstances. A defined benefit plan will be considered a disqualifying interest in governmental matters relating to the sponsor of the employee's pension if the governmental matter involved is so significant to the pension's sponsor that it could actually affect employee's pension plan, that is, that "the matter would have a direct and predictable effect on the sponsor's ability or willingness to pay the employee's pension benefit," such as if the matter could result in "the dissolution of the sponsor organization."[60] OGE notes that in a practical sense, it is unlikely that a governmental matter will have such an effect on a private pension sponsor, since even large contracts worth, for example, $500,000 to a firm, would not materially affect a sizable corporation's ability to pay its pension obligations to former employees.

In most cases it is therefore unlikely that a current interest in or receipt of payment from a pension plan, either a defined benefit or defined contribution plan, would trigger the broad statutory, criminal recusal or disqualification requirement of 18 U.S.C. §208, for a federal employee as to the sponsor of his or her private pension; and the Office of Government Ethics has advised agencies to no longer "automatically presume that employees have a conflict of interest in matters affecting the sponsor of their defined benefit plans."[61] The private sponsor of a defined benefit pension plan would, however, for purposes of the regulatory "impartiality" requirement, be one with whom the federal employee has a "covered relationship."[62] In such a case, absent a disclosure to and authorization from the agency, the employee should therefore disqualify himself or herself concerning any official governmental matter which involves the sponsor of the pension plan as a "specific party."[63]

Divestiture

There is no federal statute which expressly implements a general requirement for federal employees to divest particular private assets or holdings to resolve likely or potential conflicts of interest with employees' public duties. Occasionally, a statutory provision, often the organic act establishing an agency, bureau or commission, will provide expressly that the directors or board members of such entities shall have no financial interests in the business or sector which the agency, bureau or commission is to regulate or oversee. Furthermore, an agency may by regulation prohibit or restrict the ownership of certain financial assets or class of

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[59] (...continued)
benefit plan or other retirement plan, such as an IRA or 401(k), are not disqualifying interests if the plan is "diversified," as long as the plan is administered by an independent trustee and the employee does not choose the specific assets in the plan, and the plan is not a profit sharing or stock bonus plan. 5 C.F.R. § 2640.210(c).

[60] *Id.*

[61] *Id.*

[62] 5 C.F.R. §2635.502(b)(1)(i), *see* OGE Memorandum, 99 x 6, *supra* at n.3

[63] 5 C.F.R. §2635.502(a).

assets by its officers and employees where, because of the mission of the agency, such interests would "cause a reasonable person to question the impartiality and objectivity with which agency programs are administered."[64] In such instances, these statutory and regulatory provisions would, in their effect, require the divestiture of particular assets and holdings of certain individuals to be appointed to such positions or who are incumbents in such positions.

While there is no general statutory divestiture requirement, the divestiture of assets, properties or holdings may be required as a conflict of interest avoidance mechanism by administrative provisions and oversight, as well as by a Senate committee or the Senate as a whole as a condition of favorable action on a presidential nominee requiring Senate confirmation. As noted earlier, the principal statutory method of conflict of interest avoidance, with respect to particular assets and holdings of a federal official, is to require the disqualification of that official from a governmental matter affecting those financial interests. However, 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 do 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.[65] 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.[66]

In some instances, the establishment of a "qualified blind trust" may be used as a conflict of interest avoidance device as an alternative "divestiture" of conflicting assets. While the underlying assets in a trust in which one has a beneficial interest must normally be disclosed in annual public financial disclosure reports,[67] and would under conflict of interest law generally be "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."[68] The nature of a "blind trust,"

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[64] 5 C.F.R. § 2635.403(a).

[65] 5 C.F.R. § 2635.403(b).

[66] *See* 5 C.F.R. §§ 2635.403(d),(e), and 2634.1001 *et. seq.*

[67] 5 U.S.C. app. §102(f)(1).

[68] *See*, generally, 5 U.S.C. app. § 102(f). Assets of an official may also be in a qualified "diversified trust" which has 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,

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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,[69] and such assets will not be "financial interests" of the employee for disqualification purposes.[70] 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.[71] 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."[72]

A Note on General "Impartiality," Alleged "Bias," and Past Affiliations or Activities

The standards of conduct regulations promulgated by the Office of Government Ethics and derived from Executive Order, provide generally that an employee in the executive branch must "act impartially and not give preferential treatment to any organization or individual."[73] As to past associations, the Office of Government Ethics has noted that: "It has long been recognized that former employment with a private organization can raise impartiality concerns. Members of the public, the press, and even the Congress sometimes have questioned whether a particular public official might be subject to continuing influence by a former employer."[74]

The "general principles" in the OGE regulations regarding financial interests and connections, outside employment or activities, and "impartiality," are fleshed out and covered in the more specific regulations promulgated by OGE.[75] Although the

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[68] (...continued)
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).

[69] 5 U.S.C. app. §102(f)(2)(A).

[70] 5 U.S.C. app. § 102(f)(4)(A); 5 C.F.R. § 2634.401(ii).

[71] S. Rpt. No. 95-639, 95th Cong., 2d Sess., Report of the Committee on Governmental Affairs, "Blind Trusts," at 13 (1978).

[72] 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).

[73] 5 C.F.R. § 2635.101(b)(8).

[74] OGE Letter Opinion, 01 x 5, July 9, 2001.

[75] 5 C.F.R. § 2635.101(b): "Where a situation is not covered by the standards set forth in this part, employees shall apply the principles set forth in this section in determining whether (continued...)

basic 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 ethics standards, 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 or persons which are closely associated with the employee, that is, those whose financial interests may be fairly "imputed" to the employee.[76] As noted by the Office of Government Ethics:

> 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.[77]

Thus, while *past* employment or other past professional affiliations or connections to private entities may implicate conflict of interest concerns and trigger certain restrictions under regulations, the current ethical standards of conduct and conflict of interest rules do not necessarily imply a prohibited "favoritism" or "impartiality" by the mere fact of past employments or past professional associations or positions *beyond* those past employment connections that are specifically covered and dealt with in the regulatory disqualification restrictions.[78] That is, no matter how philosophically pre-disposed an administrative official may arguably seem towards an issue because of his or her professional or employment background, a specific "bias" or "partiality" in a decision cannot be gleaned, as a matter of federal law, merely by the past associations and /or past employment of a federal regulatory or administrative official beyond the specific regulatory restrictions.

In general, the "impartiality" required of a federal employee in a matter clearly 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 opinion, view, position or predilection on a matter based either on past associations of the employee, or based upon current non-economic factors such as the ethical, religious, ideological, or political beliefs in the background or in the current affiliations of the employee. In the specific regulations on "impartiality" and participation in outside organizations, in fact, the Office of Government Ethics notes that: "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."[79]

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[75] (...continued)
their conduct is proper."

[76] "Impartiality in Performing Official Duties," 5 C.F.R. part 2635, subpart E, §§ 2635.501 *et seq.*

[77] 5 C.F.R. § 2635.501, note.

[78] In addition to bias because of past employment affiliations, it should be noted that federal employees are specifically prohibited by ethics regulations from using their public office for the financial gain of themselves, their personal friends or for entities with which they are currently affiliated. 5 C.F.R. § 2635.702.

[79] 5 C.F.R. § 2635.502(b)(1)(v), note.

As to the issue of "bias" or "impartiality" generally in decision making of federal officials, federal cases dealing with the alleged bias of a federal official have arisen on occasion in a due process context with respect to rule making of an agency, in that there had been alleged a lack of due process or fairness in the agency proceeding because of some claimed "bias" of a federal agency official. In those cases, the courts have noted that when a federal official is *not* acting in an adjudicatory capacity, that is, in a similar position as a judge, then judicial standards of impartiality need not apply.[80] The Court of Appeals for the District of Columbia Circuit has noted: "We must not impose judicial roles upon administrators when they perform functions very different from those of judges."[81] The disqualification requirement for those who are part of formal adjudications was "never intended ... to apply in a rulemaking procedure," even a formal rulemaking procedure.[82] In an earlier case in the District of Columbia Circuit, the court had explained:

> Agencies are required to consider in good faith, and to objectively evaluate, arguments presented to them; agency officials, however, need not be subjectively impartial.[83]

Going beyond specific statutory or regulatory restrictions on employees' economic interests and attempting to judicially apply very broad bias or impartiality standards upon regulators and administrators beyond those standards, noted one court, "is to invite challenges to officials based not upon true conflicts of interest but upon their philosophical or ideological leanings ...."[84] While there could, of course, be legitimate questions raised about general notions of "bias" or partiality in a governmental function based on alleged conflicts or associations of particular employees involved in a certain matter, issues involving the ethics and conflict standards in *internal* governmental standards of conduct regulations are generally not amenable to legal resolution by private litigants, that is, those regulations do not raise an actionable standard for litigation by outside private parties, but rather are generally considered internal, discretionary or disciplinary matters within the agency.

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[80] *Association of National Advertisers, Inc. v. F.T.C.*, 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). The "judicial standard" cited involves such factors as "would lead a reasonable person with the knowledge of all the facts to conclude that [an official's] impartiality might reasonably be questioned." *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).

[81] *Association of National Advertisers, Inc. v. F.T.C., supra* at 1168.

[82] *Id.*

[83] *Carolina Environmental Study Group v. United States*, 510 F.2d 796, 801 (D.C.Cir. 1975).

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