Conflicts of Interest Considerations: Liabilities

(Last updated October 2021)

Topics covered include: Liabilities Generally | Special Considerations for Capital Commitments/Capital Calls

This guidance focuses on potential conflicts of interest that can arise from liabilities generally, and will highlight unique considerations for a specific type of liability.

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 liabilities owed by the employee. However, because the financial interests of an employee's spouse or minor children are imputed to the employee, a liability that is owed by a spouse or minor child is analyzed under 18 U.S.C. § 208 as if the employee owes it. Therefore, the analysis described in each entry applies in the same manner regardless of whether the liability is owed 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.

Liabilities Generally

18 U.S.C. § 208

Generally speaking, liabilities are claims on the assets of an individual. Commonly owed liabilities include mortgage debt, student loans, credit card debt, consumer loans, exercised lines of credit, margin accounts, and capital calls. In the normal course, liabilities do not raise conflicts concerns under 18 U.S.C. § 208 for most Government employees. A potential issue under 18 U.S.C. § 208 could be present in the extremely rare case when an employee has the potential to participate in a particular matter that the employee knows has a direct and predictable effect on a creditor's ability or willingness to collect a debt or on the amount or terms of a liability.

5 C.F.R. § 2635.502 (Impartiality)

Most liabilities owed by employees are loans from commercial lenders that are offered on terms generally available to the public. As such, they would be considered "routine consumer transactions" and would not create a "covered relationship" under 5 C.F.R. § 2635.502 between the employee and the creditor.[1]

Certain less-typical liabilities – such as a loan from a friend or other non-commercial lender, or a loan from a commercial lender on terms that are not generally available to the public – would not qualify as "routine consumer transactions." For these liabilities, employees will have a covered relationship with the creditor. Therefore, (1) when an employee knows that the creditor 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.[2]

Additional Considerations

Just as commercially available liabilities are generally unlikely to be problematic under 5 C.F.R. § 2635.502, they also do not typically raise concerns under other provisions of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct)[3] or 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] However, the terms of a liability (such as the finance charge, repayment period, and required collateral) should be examined, particularly when the creditor is a prohibited source under 5 C.F.R. § 2635.203(d), an outside employer, or another Government employee. Special terms do not always raise ethical concerns; they may simply reflect economic motives on the part of the creditor, such as offering a lower rate to a customer with very large deposits or exceptional creditworthiness. However, special terms in unusual cases may give the liability the characteristics of a gift restricted under Subpart B of the Standards of Conduct,[5] or suggest that the loan could potentially be a supplementation of salary prohibited by 18 U.S.C. § 209. In the case of a loan from a fellow Government employee, special terms may give the liability characteristics of a gift restricted under Subpart C of the Standards of Conduct or suggest that the liability may have been coerced from a subordinate in violation of 5 C.F.R. § 2635.702(a).

Special Considerations for Capital Commitments/Capital Calls

18 U.S.C. § 208

When an employee is involved with a private equity fund, there often are capital commitments and capital calls associated with such involvement. A capital commitment/capital call is a legal right stemming from a contract which allows an investment firm to demand money (the "capital

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1 *See* 5 C.F.R. § 2635.502(b)(1)(i).
2 *Id.* § 2635.502(a).
3 5 C.F.R. pt. 2635.
4 For additional assistance interpreting 18 U.S.C. § 209, see OGE DAEOgram DO-02-016 (2002).
5 *See* 5 C.F.R. § 2635.202(a).

call") that an investor has agreed to contribute.[6] Beyond the general considerations for liabilities discussed above, this specific type of liability can pose unique concerns from a conflicts-management perspective. Specifically, if an employee is involved with investments or arrangements that have a capital commitment, the employee knows that new assets may be acquired by virtue of capital calls. An employee with a capital commitment therefore should proactively discuss with ethics officials how to manage conflicts that may arise from future capital calls and associated asset acquisition. For example, the employee and ethics officials should consider how to handle a situation when the contributions the employee makes in response to a capital call may be used to acquire assets that pose conflicts concerns under 18 U.S.C. § 208. Employees with capital commitments will need to be vigilant in monitoring any newly acquired assets and discuss with ethics officials the feasibility of recusal, divestiture of the fund, or other appropriate remedies. OGE encourages employees (and often requires Presidential nominees) to divest private investment funds acquiring new assets if the employee has knowledge of some or all of the holdings of the fund.

Agency-Specific Restrictions

Some agencies have prohibited holdings statutes or regulations that restrict ownership of certain assets. Employees and ethics officials should consider whether the contributions the employee makes in response to a capital call could be used to acquire assets that are prohibited by statute or regulation. 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.[7]

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[6] For the relevant discussion in OGE's Public Financial Disclosure Guide, see CAPITAL COMMITMENT, U.S. OFF. GOV'T ETHICS: PUB. FIN. DISCLOSURE GUIDE, https://www.oge.gov/Web/278eGuide.nsf/Content/Definitions~Capital+Commitment (last visited Sept. 8, 2021).

[7] 5 C.F.R. § 2640.204.