

Ethics Issues Common to Regulatory Agencies

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Agency Missions



The FDIC is an independent agency with a 5-member board (Presidentially-appointed with Senate Confirmation –PASs) that regulates and insures deposits in banks and thrift institutions.



FERC is an independent agency with 5 commissioners (PASs) that regulates the interstate transmission of natural gas, oil, electricity and natural gas and hydropower projects.



The FCA is an independent agency with a 3-member board (PASs) that regulates the Farm Credit System, a cooperative system of lending institutions for farmers and ranchers.

Agency Mandate

A golden scale of justice is positioned in the upper half of the image, with its pans hanging from a central point. Below the scale, a wooden gavel with a dark head and a lighter handle lies horizontally. The background is a warm, golden-yellow gradient, suggesting a courtroom or a place of legal significance.

- ▶ It is particularly important for regulatory agencies to make ethics a top priority. Breaches of ethics regulations could not only have an impact for a particular employee, but for the entire agency regulatory processes.
- ▶ If an employee's decisions are questioned because of their financial interests or relationships, the public could lose confidence in the integrity of the Agency regulatory processes.

Agency Mandate

FERC

Practices: FERC's senior officials have put ethics at the forefront of the Commission's mission.

- ▶ FERC's Chairman usually introduces Annual Ethics Training and personally explains the importance of maintaining a strong ethical environment.
- ▶ All FERC employees receive annual ethics training that reinforces the importance of avoiding conflicts and the appearance of conflicts of interests.
 - The Ethics Office tries to be creative in providing this training. We prepare a multi-media training vehicle involving skits, questions, and written materials. Employees have informed us that training in this format is not only informative but highly entertaining, and they look forward to receiving it.
- ▶ FERC and other regulatory agencies must prioritize integrity, impartiality, fairness, transparency, and due process in their proceedings. FERC's participants must be above reproach avoiding even the slightest appearance of impropriety, and directly addressing any known instances of such appearances or potential appearances.

Agency Mandate

FDIC

▶ Supplemental Regulation:

- 5 CFR Part 3201

▶ Practices:

- 5 CFR Part 3201.102 – Outlines restrictions on Extensions of Credit from FDIC-insured depository institutions;
- 5 CFR Part 3201.103 – Clarifies the Prohibitions on the ownership of securities in FDIC depository Institutions;
- 5CFR Part 3201.104 – Outlines the restrictions concerning the purchase of property held by the FDIC;



Agency Mandate

FDIC

5 CFR Part 105 – Prohibition on Dealings with Former employers, associates and clients;

5 CFR Part 106 – Employment of Family Members outside of the Corporation;

5 CFR Part 107 – Outside Employment and other activities;

Agency Mandate

FCA

- ▶ The FCA Board has issued a Policy Statement that confirms its commitment to the ethics program and the agency's status as an arm's length regulator.



The FCA Board Members and Agency staff are committed to maintaining an arm's-length relationship with the System. This means Agency decisions must be independent of any undue influence, favoritism, or special access so that all parties coming before the Agency stand on an equal footing. The Board Members, as final arbiters of Agency actions affecting the System, as well as all Agency employees who have decision-making authority affecting System institutions and related entities, must be especially mindful to conduct themselves in a fair and impartial manner, avoiding any actions that create an appearance of a loss of impartiality. This is especially important in light of FCA's examination, rulemaking and adjudicatory functions. While open and informative communications with regulated parties is essential for an effective regulator, the FCA Board and staff will strive to maintain an appropriate balance in its communications with the System, keeping in mind the totality of the circumstances – including the content, timing and setting of such communications – before engaging with the System. FCA Board and staff will consult with the ethics staff whenever in doubt about the propriety of such communications.



Agency Mandate



FCA

- ▶ **Ethics Outreach:** We publish “Ethics in Action” articles in Agency newsletter twice a month.
- ▶ **Ethics Report at Public Board Meeting:** We report on the Ethics Program at our public board meetings twice a year.
- ▶ **Training:** One-on-one training to Board Members, in-person training to new employees, mandatory on-line orientation training course, mandatory annual ethics training.
- ▶ **Ethics Meeting with Agency Head:** Once a month.

Revolving Door

Entering Federal Government

- ▶ Often, employees (particularly senior officials) come to Regulatory Agencies from regulated sectors.
- ▶ Regulatory Agencies need people with experience in areas they regulate but have to guard against conflicts of interests.



Revolving Door

Entering Federal Government

- ▶ Changing Hats–Moving from employment with regulated entity to employment with agency regulator can be a difficult transition.



Revolving Door

Entering Federal Government

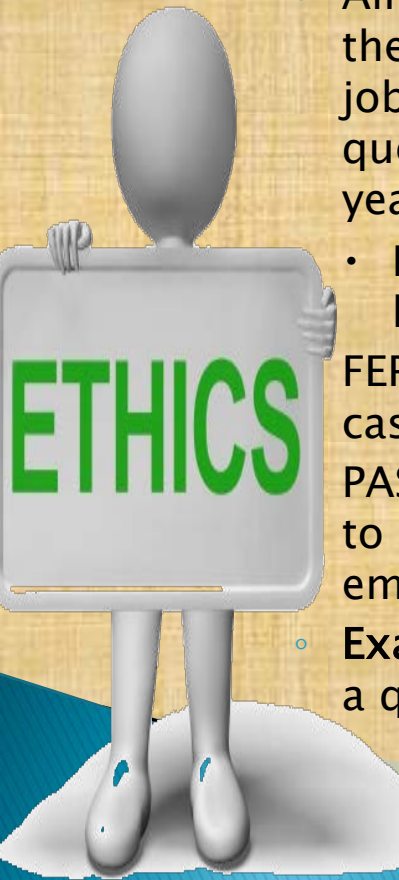
- ▶ Regulatory Agencies often utilize the parameters as established by 5 CFR 2635.502 to resolve conflicts related to transitioning into the government.
- ▶ As established in 502, for one year from the end of the prior business relationship, a new entrant employee should not participate in a matter concerning his previous employer, partner, associate, or client (unless authorized pursuant to 2635.502(d) when (s)he:
 - Knows that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his/her impartiality.

Revolving Door Entering Federal Government

FERC

▶ Practices –Application of 502

- All FERC employees are restricted from working on matters involving their previous employer for at least one year after leaving the previous job. FERC presumes that an employee's impartiality would be questioned if (s)he participated in a prior employer's matter within a year.
 - FERC only issues 502 authorization involving previous employers or business associates in very limited circumstances.
- FERC Employees are restricted permanently from working on specific cases or assignments they were involved in before coming to FERC. PAS -- detailed screening measures are put in place through advisors to guard against Commissioners voting on matters involving previous employers or business associates.
- **Example** – Authorization granted for PAS when Commission would lack a quorum without the participation.



Revolving Door Entering Federal Government

FERC

- ▶ Challenges: Restricting assignments for 1 year can mean that an employee must be recused from some matters for which they have very useful expertise.



Revolving Door Entering Government

FCA

- ▶ Supplemental Rule: 502 and Ethics Pledge.
- ▶ Practices: Board Members are subject to *Screening Agreements* to ensure they abide by their recusals.
- ▶ Challenges: Our Board Members often come from the Farm Credit System. Learning to change hats from the regulated entity to the regulator is a challenge.
- ▶ Examples: Board Member wants to attend holiday party at the Farm Credit Bank where he had been a director. We say “no” due to necessity to remain at arm’s length and impartial.

Revolving Door Exiting Government

5 C.F.R. § 2635 (Subpart F) – Seeking Employment

5 C.F.R. § 2641 – Post Employment

- ▶ Possible conflicts of interest arise when employees are seeking other employment or exiting regulatory agencies to work for companies that appear before them.
- ▶ Challenge of allowing employees to seek employment without affecting Regulatory Agencies' missions.
- ▶ Conflicts that arise because an employee was seeking employment while working on a particular matter involving potential employer. (5 C.F.R. § 2635.602)
- ▶ Prohibited communications with agency staff after leaving. (18 U.S.C. 207; 5 C.F.R. §§ 2641.204; 2641.205; and current Administration's Ethics Pledge.)



Revolving Door Exiting the Government

FERC

Practices (Seeking employment): Commission's supplemental regulations require that all disqualifications, including for employees seeking employment, must be in writing and filed with Ethics office and employee's supervisor. (5 C.F.R. 3401.103(a)).

- ▶ If employee reaches negotiation stage but does not ultimately take the job, recusal time frame may continue for a reasonable cooling-off period. (5 C.F.R. §2635.606(b)).



NEW JOB →



NEW JOB →

Revolving Door Exiting Government

FERC

- ▶ Supplemental Regulations: Prohibits post-employment participation in matters at the Commission, including rulemakings, in which the employee was personally and substantially involved while at the Commission. See 18 C.F.R. § 385.2103(a).
- ▶ FERC also prohibits post-employment participation, within one year after ceasing employment, *in any matter* before the Commission that was under an employee's official responsibility (as defined in 18 U.S.C. § 202) *during their service* at the Commission. See 18 C.F.R. § 385.2103(b).
 - FERC's supplemental restriction is more expansive than that in 18 U.S.C. 207 which only restricts participation in matters that were under an employee's responsibility within the last year of service.

Revolving Door Exiting Government

FERC

► Practices

- **Post employment:** Provide written post-employment guidance to all employees leaving Commission.
- Provide senior officials (especially PAS) with individualized guidance about their ability to work on matters before the US Government after they leave.
- Former employees frequently call the Ethics office after leaving the Commission to seek post employment advice.
- Collaborate with HR to inform employees as part of their close out procedures to discuss post employment issues with an Ethics officer.



- ## Examples:

- ▶ A potential employer contacts a FERC employee (who has not submitted an application or resume) through LinkedIn.
- ▶ An agency employee uses social media to describe himself as “a reluctant bureaucrat” in search of new employment, and questions his agency’s commitment to impartial regulation. There is a link to his resume
- ▶ which shows his current government employer.

Revolving Door Exiting Government

- ▶ **FDIC – Senior Examiner Restriction**

- **Serve for 60 or more days as dedicated examiner in an institution during last year of service**
- ▶ Section 10(k) of the FDI Act imposes post-employment restrictions on senior examiners of depository institutions and depository institution holding companies. Under section 10(k), a senior examiner employed or commissioned by an Agency may not knowingly accept compensation as an employee, officer, director, or consultant from certain depository institutions or depository institution holding companies he or she examined, or from certain related entities, for one year after the examiner leaves the employment or service of the Agency
- ▶ If an examiner violates the one-year restriction, he or she is subject to an order of removal and prohibition from the depository institution or company that controls the institution he or she examined, and from the banking industry as a whole for a period of up to 5 years, or to a civil monetary penalty of up to \$250,000, or both.



Revolving Door Exiting Government

FCA

- ▶ **Supplemental Rule:** Our enabling statute prevents our Board Members from working for a System entity for two years after the end of their Board tenure. 207 for all other employees.
- ▶ **Practices:** We provide each departing employee with post-employment counseling (part of check-out process) and give them a package of material.
- ▶ **Challenge:** Those employees leaving for System entities must understand their 207 restrictions and must be careful about keeping confidential information from their new employer.
- ▶ **Example:** Examiner leaves FCA for System entity. Cannot make a communication or appearance before FCA regarding the exam that he was working on. We regularly counsel departed employees about their 207 restrictions.



Financial Interests



5 C.F.R. §2635(Subpart D)

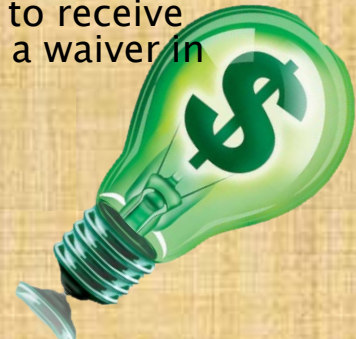
- ▶ Independent regulatory agencies must ensure that officials and staff remain at arm's length from regulated entities.
- ▶ Since independent agencies regulate a specific industry or sector, there is the potential risk for financial conflicts.
- ▶ As such, Independent regulatory agencies must have mitigation measures in place to prevent and, when necessary, address financial conflicts of interest.



Financial Interests

FERC

- ▶ Financial Interests Supplemental Regulation:
 - Prohibited Securities – FERC has a supplemental regulation that prohibits the ownership of securities in jurisdictional entities or in the parent companies of jurisdictional entities. *See* 5 C.F.R. § 3401.102(a).
 - Prohibited Sector Funds – FERC has a supplemental regulation that prohibits ownership in funds primarily invested in the regulated sector. *See* 5 C.F.R. § 3401.12(b).
- ▶ FERC maintains a non-exhaustive prohibited securities list on its intranet that is updated regularly. Ethics staff is also on hand to assist with inquiries.
- ▶ Challenges: The energy sector is common area to invest in, and markets are inter-related. As such, we employ remedies like recusal and waiver for non-primary energy holdings and typically require divestiture for primary energy holdings.
 - We restrict waivers to the amount of shares that an employee has at the time of initial disqualification. Employees cannot expand the amount of shares while recused, including automatic re-investments. In addition, employees are unlikely to receive additional waivers even for non-primary energy holdings if they received a waiver in the past.



Financial Interests



FDIC

▶ Supplemental Regulation:

- 3201.103 – Prohibition on ownership of securities in FDIC insured institutions
 - Special reporting for all new entrants to disclose any securities or pension interests in insured institutions (FDIC Form 2410/07)
 - Exception granted for new interests in financial institutions if securities acquired through marriage, inheritance or gift
 - Waiver of financial interests is not granted
- ▶ **Challenges:** Division of labor and manpower when large numbers of employees are conflicted out of service



Financial Interests

▶ 3201.102 – Extensions of credit from FDIC–insured depository institutions



Employees assigned to our general supervision and review divisions and all senior managers are restricted from obtaining an extension of credit from FDIC supervised institutions (Credit cards exempted)

Assignment of FDIC Form 2410/06 – Report of Liabilities in FDIC–insured Institutions – to all employees of these divisions upon entry and annually thereafter

- All liabilities carried into FDIC reported and paid down on same terms and conditions as originally granted if with FDIC supervised institution
- Exception granted for primary residence credit
- Waiver may be granted if deemed necessary and reviewed and agreed to by Supervisor and Deputy Ethics Counselor

Financial Interests

FCA

Supplemental Ethics Regulations:

- ▶ Prohibit the ownership of System securities,
- ▶ Prohibit System borrowing,
- ▶ Prohibit involvement in System board member elections, and
- ▶ Require the reporting to a supervisor and the DAEO of certain relatives employed by the System.

Practices: We may require examiners to recuse themselves from participating in an examination of a regulated entity where a close relative is employed.

Challenges: With a large portion of the staff coming from agricultural backgrounds, relationships with our regulated entities is inevitable.

Examples: Close relatives are often borrowers or employees of System institutions. Recusals are in order for employees due to such relationships.

Outside Employment & Activities

5 C.F.R. §2635(Subpart H)

- ▶ Regulatory agency employees are often requested to participate in outside activities such as conferences, meetings, dinners, boards, associations, functions, or other gatherings involving regulated entities.

(See also gift and travel reimbursement regulations:

5 C.F.R. 2635 (Subpart B); 41 C.F.R. Ch. 304)

- ▶ Regulators provide disclaimers for outside activities such as teaching, speaking, and writing: individual opinions could present issues of pre-judgment and bias.
- ▶ **Competing objectives:** While it is important for regulators to maintain an appropriate distance from those they regulate, it is also important for regulators to keep abreast of current issues and to maintain important networks within the regulatory community.



Outside Employment & Activities

FERC

- ▶ **Outside Employment Supplemental Rule:** FERC employees are required to obtain prior approval from the DAEO before an employee can engage in any outside activity with a “prohibited source.” See 5 C.F.R. § 3401.104 (citing 5 C.F.R. § 2635.203(d))
- ▶ **Outside Employment & Activities Practice:**
 - In addition, we ask that all employees seek guidance regarding any outside activity or employment, even those that are not with “prohibited sources.”
- ▶ **Challenges:** We often encounter situations in which FERC staff seek to participate in energy associations. In those situations, we evaluate whether there are any fiduciary duties, particularly for boards, and closely examine whether the association is active in FERC matters.



Outside Employment & Activities

FDIC

3201.106 – Employment of Family members outside of Corporation

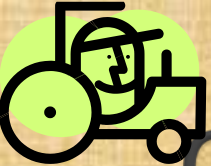
- ▶ No restrictions on employment of family members at insured institutions
 - Appropriate recusals in place
 - Exception to allow family member to participate in ESOP if offered
 - If no immediate family covered by 18 USC 208, 5 CFR 502 (Appearance concerns) may force recusal of employee assignments

Outside Employment & Activities

FDIC

- ▶ **3201.107 – Outside Employment and other Interests.** All employees restricted from working outside of FDIC at insured institution or affiliate of insured institution
 - No exception/waiver granted
- ▶ Employee whose work requires certain professional license (broker, appraiser, real estate etc.), may not use that license for the production of income aside from FDIC work
- ▶ All other outside work for the production of income requires prior approval by Supervisor and Deputy Ethics Counselor





Outside Employment & Activities



FCA

- ▶ **Supplemental Regulation:** FCA employees are required to obtain prior approval from the DAEO before an employee can engage in any outside activity. Our supplemental rules prohibit them from working for Farm Credit System entities.
- ▶ **FCA Practices:** We usually approve these requests within a day or so, unless they involve thorny issues.
- ▶ **Challenges:** Misuse of official time and Gov't. equipment are often collateral issues with outside activities.
- ▶ **Examples:** We review these requests for conflicts and provide counseling on all the issues that may arise with regard to outside employment, such as proper use of official time, not using ones' official position to endorse outside interests, etc., 203 and 205 representational issues, proper use of Government property, etc.



Administrative Proceedings

FERC

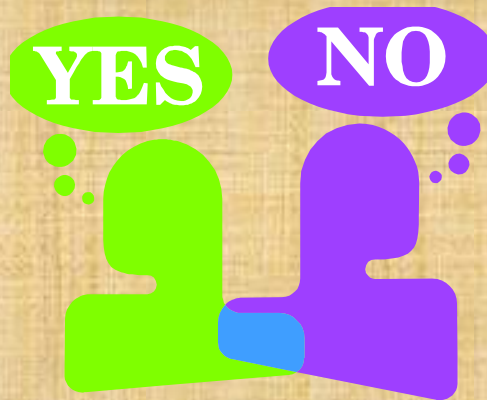
- External Communications: FERC has an ex parte communications rule that prohibits certain off-the-record communications between staff and outside parties. *See* 18 C.F.R. § 385.2201.
- Internal Communications: separation of functions rule prohibits communications among decisional and non-decisional staff (*e.g.* trial staff) during a pending proceeding. *See* 18 C.F.R. § 385.2202.



Administrative Proceedings

FERC

- ▶ FERC's ex parte rule provides:
 - “in *any contested on-the-record proceeding*, no person outside the Commission shall make or knowingly cause to be made to any decisional employee, and no decisional employee shall make or knowingly cause to be made to any person outside the Commission, *any off-the-record communication*.”



Administrative Proceedings

- ▶ The text of FERC's Separation of Functions rule provides:
 - "In any proceeding in which a Commission adjudication is made after hearing, or in any proceeding arising from an investigation under part 1b of this chapter beginning from the time the Commission initiates a proceeding governed by part 385 of this chapter, no officer, employee, or agent assigned to work upon the proceeding or to assist in the trial thereof, in that or any factually related proceeding, shall participate or advise as to the findings, conclusion or decision, except as a witness or counsel in public proceedings."

