

**NIOSH Policy on the Appearance of Bias
for the EEOICPA Program
&
General Conflict of Interest Requirements**

This document summarizes the legal requirements regarding conflicts of interest which apply to NIOSH employees and members of the Advisory Board on Radiation and Worker Health (“the Board”) as Federal employees; it also outlines NIOSH’s Appearance of Bias Policy regarding participation in activities related to the Energy Employees Occupational Illness Compensation Program Act (EEOICPA). The NIOSH policy requirements apply to NIOSH employees, members of the Board, and employees of Federal contractors (“contractors”) who provide scientific and technical support to NIOSH and/or the Board under EEOICPA (through contract modifications).

The contents of this document do not represent the full scope of the conflict of interest laws and ethics regulations; rather, the intent of this document is to provide a summary of the laws and regulations relevant to individuals involved in the NIOSH implementation of the Energy Employees Occupational Illness Compensation Program. The “Financial Conflict of Interest” and “Appearance of Loss of Impartiality” sections provide an overview of the provisions of the conflict of interest laws (18 U.S.C. § 208) and ethics regulations (5 C.F.R. § 2635.502) applicable to Federal employees (both Regular Government Employees, such as NIOSH employees, and Special Government Employees, such as Board members). When facing a potential conflict of interest situation, Federal employees should work with an ethics official (NIOSH employees please contact Frank Hearl and Teresa Walker-Mason; members of the Board please contact Ted Katz) to evaluate the situation under 18 U.S.C. § 208, 5 C.F.R. § 2635.502, and NIOSH’s Appearance of Bias Policy, which is discussed in the third section of the document.

Financial Conflicts of Interest

Legal Requirement for Federal Employees:

Financial conflicts of interest are governed by 18 U.S.C. § 208 and associated rules and regulations. This criminal statute prohibits a NIOSH employee (any Regular Government Employee) or a member of the Board (any Special Government Employee) determined to have a financial conflict from participating personally and substantially in an official capacity in a particular matter concerning a DOE or AWE facility for which the individual is determined to have the financial conflict. Therefore, a NIOSH employee, or a member of the Board, would be prohibited from participating in a particular matter involving a DOE or AWE facility, if that individual has a financial

NIOSH Policy on the Appearance of Bias for the EEOICPA Program
& General Conflict of Interest Requirements

interest in the outcome of that particular matter.¹ For purposes of this statute, the financial interests of other individuals or entities with certain relationships with the Federal employee are also imputed to the employee. The statute reads:

...[W]hoever, being an officer or employee of the executive branch of the United States Government, ... including a special Government employee, participates personally and substantially as a Government officer or employee, ... in a ... particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest -- Shall be subject to the penalties set forth in section 216 of this title.

18 U.S.C. § 208(a).

This statute permits HHS to make limited exceptions to the above prohibition. Such exceptions may be made through the granting of waivers. Waivers require careful consideration by the appropriate HHS officials and are only granted on a limited, case-by-case basis. In order for such a waiver to be considered, the employee must disclose the disqualifying financial interest and the nature and circumstances of the particular matter to the proper government official before participating in that matter.

For a Regular Government Employee (such as a NIOSH employee), under 18 U.S.C. § 208(b)(1) the prohibition may be waived only in very limited circumstances where:

...[T]he officer or employee first advises the Government official responsible for appointment ... of the nature and circumstances of the ... particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee...

18 U.S.C. § 208(b)(1).

The statute also contains an exception to allow the participation of Special Government Employees who are serving on a committee established under the Federal Advisory Committee Act (such as Board members) and have a conflicting financial interest. The standard for granting a waiver under this provision, however, differs from that for Regular Government Employees:

¹ Any Federal employee (either a Regular Government Employee or a Special Government Employee) with covered employment at an EEOICPA-covered facility who has been diagnosed with a covered cancer (during or after their employment) has been determined to have a financial conflict under 18 U.S.C. § 208. The financial conflict exists even if the individual has not filed for compensation under Part B of EEOICPA.

NIOSH Policy on the Appearance of Bias for the EEOICPA Program & General Conflict of Interest Requirements

[I]n the case of a special Government employee serving on an advisory committee within the meaning of the Federal Advisory Committee Act ..., the official responsible for the employee's appointment, after review of the financial disclosure report filed by the individual ..., certifies in writing that the need for the individual's services outweighs the potential for a conflict of interest created by the financial interest involved....

18 U.S.C. § 208 (b)(3).

To summarize, in order for either a Board member or an NIOSH employee to participate in matters where he or she has a financial conflict, HHS must grant that individual a waiver. These waivers require careful consideration by appropriate HHS officials and are only granted on a limited, case-by-case basis. Waivers cannot be issued for past conduct.

Policy Requirement for Contractor Employees:

Contractors are not covered by 18 U.S.C. § 208, although they are governed by the Federal Acquisition Regulation and its requirements regarding organizational conflicts of interest. In addition, NIOSH and CDC have contractually required contractors providing technical support to NIOSH (DCAS) or the Board to have conflict of interest plans. Under these plans, the contractors shall prohibit any employee (or the employee of a subcontractor) determined to have a financial conflict of interest from participating in any capacity in a particular matter concerning a DOE or AWE facility for which the individual is determined to have the financial conflict. Such determinations of financial conflict shall be made by the contractor's project manager in consultation with the contract officer's technical representative, the agency's contract officer, and agency and HHS officials under the contractor's conflict of interest plan.

Appearance of Loss of Impartiality

Legal Requirement for Federal Employees:

Regulations under the "Standards of Ethical Conduct for Employees of the Executive Branch" govern the appearance of a loss of impartiality in the performance of government duties. Specifically, the regulation at 5 C.F.R. § 2635.502 prohibits participation by a Federal employee (either a Regular Government Employee or a Special Government Employee) in his or her official capacity in a particular matter involving specific parties if the employee has a covered relationship² with one of the parties to the

² An employee is deemed to have a covered relationship with: anyone with whom the employee has or seeks a business or financial relationship (other than a routine consumer transaction); a member of the employee's

NIOSH Policy on the Appearance of Bias for the EEOICPA Program
& General Conflict of Interest Requirements

matter and such participation would cause a reasonable person to question the employee's impartiality, unless participation has been specifically authorized by an agency designee. The regulation states:

Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter....

5 C.F.R. § 2635.502.

Under 5 C.F.R. § 2635.502, neither a NIOSH employee nor a member of the Board³ may participate in a particular matter involving specific parties (such as a matter in which a DOE or AWE facility is a party) if the individual has a covered relationship with that DOE or AWE facility or an appearance of impartiality concern, **unless** that employee has both informed the agency designee of the appearance problem and received an authorization from the agency designee. Without such authorization, participation is prohibited. HHS may grant an authorization for a NIOSH employee or a member of the Board to participate in such a matter at its discretion. The regulation states:

Where an employee's participation in a particular matter involving specific parties would not violate 18 U.S.C. § 208(a), but would raise a question in the mind of a reasonable person about his impartiality, the agency designee may authorize the employee to participate in the matter based on a determination, made in light of all relevant circumstances, that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. Factors which may be taken into consideration include:

- (1) The nature of the relationship involved;

household; a relative with whom the employee has a close personal relationship; anyone with whom the employee's spouse, parent, or dependent child is serving or seeking to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee; any person with whom the employee has served as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee within the past year; and any organization in which the employee is an active participant. See 5 C.F.R. § 2635.502(b)(1).

³ In certain circumstances involving more broadly applicable issues, there is also a regulatory exemption available to Special Government Employees serving on advisory committees. An SGE "may participate in any particular matter of general applicability where the disqualifying financial interest arises from his non-Federal employment or non-Federal prospective employment, *provided* that the matter will not have a special or distinct effect on the employee or employer other than as part of a class." 5 C.F.R. § 2640.203(g).

NIOSH Policy on the Appearance of Bias for the EEOICPA Program
& General Conflict of Interest Requirements

- (2) The effect that resolution of the matter would have upon the financial interests of the person involved in the relationship;
- (3) The nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) The sensitivity of the matter;
- (5) The difficulty of reassigning the matter to another employee; and
- (6) Adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

5 C.F.R. § 2635.502(d).

Policy Requirement for Contractor Employees:

Contractors are not covered by 5 C.F.R. § 2635.502, although they are governed by the Federal Acquisition Regulation and its requirements regarding organizational conflicts of interest. In addition, NIOSH and CDC have contractually required contractors providing technical support to NIOSH (DCAS) or the Board to have conflict of interest plans. Under these plans, a contractor's employee must obtain an authorization in order to participate in a particular matter involving specific parties concerning a DOE or AWE facility for which the individual is determined to have an appearance of conflict. Without such authorization, participation is prohibited. Authorization may be granted when it is determined, based on all relevant circumstances, that the interest of the Government in the contractor employee's participation outweighs the concern that the program's integrity may be questioned. This determination shall be made by the contract officer's technical representative in consultation with the project manager, the agency's contract officer, and agency and HHS officials.

NIOSH's Appearance of Bias Policy

As permitted by HHS, CDC and NIOSH specify the following policy requirements regarding potential appearance of bias, which go beyond the legal requirements for Federal employees specified above. These requirements apply to NIOSH employees and members of the Board, and have been incorporated to apply, through contract modification, to contractors providing scientific and technical support to NIOSH and/or the Board under EEOICPA.

A NIOSH employee or member of the Board determined to have an appearance of bias is prohibited from participating in a particular matter involving specific parties, unless s/he has first requested and received an approval to participate in such matters. CDC, in consultation with HHS, may grant an approval for a NIOSH employee or a member of

NIOSH Policy on the Appearance of Bias for the EEOICPA Program & General Conflict of Interest Requirements

the Board when CDC determines, based on all relevant circumstances, that the interest of the Government in the employee's participation outweighs the concern that the program's integrity may be questioned.

Policy Requirement for Contractor Employees:

NIOSH and CDC have contractually required contractors providing technical support to NIOSH (DCAS) or to the Board to have conflict of interest plans. Under these plans, a contractor must obtain an approval in order to participate in a particular matter involving specific parties (such as a matter concerning a DOE or AWE facility) for which the individual is determined to have a potential appearance of bias. Without such approval, participation is prohibited. Approval may be granted when it is determined, based on all relevant circumstances, that the interest of the Government in the contractor's participation outweighs the concern that the program's integrity may be questioned. This determination shall be made by the contract officer's technical representative in consultation with the project manager, the agency's contract officer, and agency and HHS officials.

Potential Appearance of Bias

The circumstances deemed to constitute a potential appearance of bias include, but are not necessarily limited to:

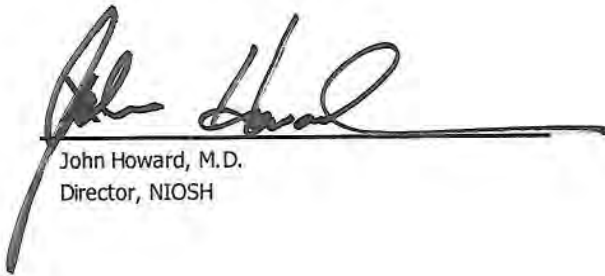
- Status as a covered employee under EEOICPA based on employment at the DOE or AWE facility.
- Employment for any duration in the design, development, or management of radiation safety or dosimetry records management operations of the DOE or AWE facility.
- Covered employment at the DOE or AWE facility for any duration with possible exposure to an acute radiation exposure incident potentially covered under the definition of a "discrete incident" under 42 C.F.R. § 83.3(c)(i).⁴
- Where a spouse, parent, or non-dependent child has the status of either a claimant under the Act or a covered employee under EEOICPA based on employment at the DOE or AWE facility.
- Participation as one of the following: (1) an authorized representative for a claim under EEOICPA; (2) an SEC petitioner; or (3) an advocate for a claimant or an SEC petition at a specific DOE or AWE facility.
- Membership in a union which serves as a petitioner for an SEC petition.
- Participation as an expert witness in litigation involving safety or health conditions at the DOE or AWE facility, when such participation is not deemed

⁴ To the extent this item and the two preceding it are considered with regard to a potential claimant, they should be evaluated pursuant to 5 C.F.R. § 2635.502 (*i.e.*, "potential appearance of loss of impartiality"), and not to the NIOSH Appearance of Bias Policy.

NIOSH Policy on the Appearance of Bias for the EEOICPA Program
& General Conflict of Interest Requirements

a financial conflict of interest under 18 U.S.C. § 208 or an appearance of conflict under 5 C.F.R. § 2635.502.

- Authorship of a report or the delivery of a public statement (including testimony) indicating that the individual has taken a position on a particular matter involving specific parties at a DOE or AWE facility, independent of his or her position with NIOSH, the Board, or a contractor providing technical support to NIOSH or the Board, when such particular matter is now at issue in the program.



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