



U.S Department of Defense Standards of Conduct Office

AN ETHICS GUIDE FOR SPECIAL GOVERNMENT EMPLOYEES, INCLUDING CONSULTANTS AND EXPERTS (SUCH AS ADVISORY COMMITTEE MEMBERS)

At the Department of Defense (DoD or Department), we are fortunate to have many experts and industry leaders from outside of the Government to provide advice to the Secretary as consultants and experts, such as members of an advisory committee. Because many of you retain ties to Defense industries or other organizations related to national security, it is important that you understand potential conflicts of interest that may arise from your appointment to this Department. Recognizing your demanding schedules, this guidance only briefly summarizes those statutes and regulations most likely to affect you, and does not describe each element or exception. You should consult an ethics official for more detailed advice.

1. Getting Advice

If you believe your situation may be affected by any of the guidance below, please contact the Standards of Conduct Office (SOCO) of the Office of the DoD General Counsel at (703) 695-3422, fax us at (703) 695-4970, or email us at OSD.SOCO@MAIL.MIL. We also have posted considerable guidance, including information on financial disclosure reporting, to our website at: http://www.dod.mil/dodgec/defense_ethics/.

SOCO is available to provide advice on any ethics question you may have, many of which may be answered in a telephone call or by email. Good faith reliance on the advice from an ethics official will, in most cases, protect you from adverse administrative action and deter criminal prosecution.

2. What does it mean to be a Special Government Employee?

In the Department, almost all employees appointed as consultants and experts, including members of advisory committees, serve as “Special Government Employees” (SGEs). Your appointment as a consultant and expert requires you to assume many of the responsibilities, obligations, and restrictions that are part of public service. Because of your status as an SGE, however, several of the ethics restrictions apply to you only in limited circumstances.

Service as an SGE may be compensated or uncompensated, for temporary duties which are either on a full-time or intermittent basis but may not be for more than 130 days during a 365-day period. Your status as an SGE is determined prospectively at the time of your appointment based upon a good faith estimate that you will not be expected to serve more than 130 days during the ensuing 365-day period. This 130-day period is an aggregate of all your

Federal service, and not just your appointment to one office or advisory committee at DoD. For example, it includes days you serve as a consultant or expert in another Federal agency or department, and days you serve as a military reservist. If you have served in other Federal agencies or departments within the last year or will serve with other Federal agencies or departments in the coming 365-day period, please advise the appropriate committee manager, executive director, or Designated Federal Official (DFO), to ensure you do not exceed the 130-day period of appointment.

When computing days that you work as an SGE, you must count each day in which you perform services as a full day, even if you did not perform services for an entire workday. Brief non-substantive interactions, such as emails or phone calls to set up a meeting or coordinate travel, do not have to be counted as a day of duty. Any day for which you are paid by the Government (not including travel reimbursement) must be counted as a day.

3. Financial Disclosure

Within DoD, the vast majority of our SGEs are required to file a Confidential Financial Disclosure Report (OGE Form 450), or in some cases the DoD alternate form (DoD Confidential Conflict-of Interest Statement for DoD Advisory Committee Members). As the name implies, the OGE Form 450 (and DoD alternate form) is treated as confidential and is not available to members of the public. On very rare occasions, SGEs are required to file a Public Financial Disclosure Report (OGE Form 278) because of the nature of the duties they are being asked to perform, the level of compensation for the position, or the statute authorizing the creation of the position mandates the filing of a public report. Again, as the name implies, the OGE Form 278 can be released to a member of the public upon request. The purpose of the financial disclosure report is to enable ethics officials to examine whether your financial interests may create a conflict of interest that would either hinder or preclude your performance of official duties for the Department.

4. Criminal Conflict of Interest Statutes

You are required to comply with various criminal statutes while you are in a SGE status. These statutes are codified at 18 U.S.C. §§ 203, 205, 207, and 208, and are divided into the following subject areas: (1) financial conflicts of interest; (2) representational activities; and (3) limits on representation after you leave the Government.

Financial Conflicts of Interest

The main financial conflict of interest statute, **18 U.S.C. § 208(a)**, prohibits you from participating personally and substantially in any particular matter that affects your financial interests, as well as the financial interests of your spouse or minor child; a general partner; an organization in which you serve as an officer, director, trustee, general partner, or employee; or an organization with which you are negotiating for or have an arrangement concerning prospective employment. The primary reason you are required to disclose your financial interests is to alert your supervisor (or DFO) and the appropriate DoD ethics official of any

potential conflict of interest prior to your participation in a particular matter that would affect your financial interests or those of another that are imputed to you under the law.

Your interest might arise in various ways. For example, you could have a financial interest that could conflict with your participation in an advisory committee meeting that reviews whether a certain weapons program should be continued if:

- you own stock in the prime or subcontractor that supplies the weapon;
- your spouse owns stock in, or works for, the contractor(s);
- you are a consultant to, or employee of, the contractor(s);
- you are a member of the board of directors of the contractor(s), or
- you have a contract with the contractor(s) to provide supplies, parts, or services.

This statute only applies when you participate in a particular matter. Generally, DoD advisory committees address broad policy matters, not particular matters. This greatly reduces the potential that conflicts of interest will arise. A particular matter is a matter that involves deliberation, decision or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons. A deliberation that focuses on a discrete and identifiable class of persons as part of a broader policy deliberation, however, would not be a particular matter. For example, if an advisory committee deliberates on the topic of unmanned aerial vehicles (UAVs), which have a limited number of companies that manufacture them, then committee deliberations would be a particular matter. If, on the other hand, the topic is the future of aerial vehicles in general, then committee deliberations of UAVs as part of a broader policy deliberation would not be a particular matter. In the former example, any committee members who have a financial interest in a company that manufactures UAVs would have a conflict of interest if they participated in the advisory committee discussion.

If you become aware of such a conflict of interest, you must disqualify yourself from acting in a governmental capacity in the matter and notify your supervisor (or DFO). You should also consult your DoD ethics official, since there are several regulatory exemptions that may permit you to participate even when you have certain financial interests that cause a conflict of interest.

The statute and implementing Federal regulations provide for waivers that may also allow you to work on matters in which you have a financial conflict of interest. Such waivers must be issued by an authorized authority before you participate in the matter. Since waivers are complex and rarely granted, you should seek advice from your DoD ethics official.

You should also keep in mind that, even though the deliberations may not involve a particular matter under the criminal statute, having an interest in or being affiliated with any entity that is the focus of a deliberation would also require your recusal from discussions. A combination of DoD policy, and appearance and misuse of position concerns under the Standards of Conduct regulations, would prohibit your participation unless you received an authorization to participate. 5 C.F.R. § 2635.502 (*See* Impartiality guidance below).

Another Federal statute, **18 U.S.C. § 201**, commonly known as the bribery statute, prohibits Federal employees, including SGEs, from seeking, accepting, or agreeing to receive anything of value in return for being influenced in the performance of an official act.

Representational Activities

Two statutes, 18 U.S.C. §§ 203 and 205, prohibit Federal employees, including those in an SGE status, from acting as an agent or attorney for private entities before any agency or court of the Executive or Judicial Branches. As an SGE, section 203 prohibits the receipt of compensation for representational services only in particular matters involving a specific party: (1) in which you have participated personally and substantially as a Government employee; or (2) which is pending in DoD if you have served for more than 60 days in DoD (aggregating all days served at any DoD component or organization) during the immediately preceding 365 days. For example, this would include service within DoD as a regular employee, military member on active duty, and/or as an SGE. Representational services include written or oral communications and appearances made on behalf of someone else with the intent to influence the Government. An inquiry into the status of a pending matter, such as an application for Federal funding, a progress report regarding a Cooperative Research and Development Agreement or clinical trial, or a pending investigation, is not necessarily a representation, but could give rise to an appearance of a prohibited representation. Section 205 parallels section 203, except that even uncompensated representations by you are prohibited.

Limits on Representations After You Leave the Government

The final statute, 18 U.S.C. § 207, prohibits former employees, including you when you terminate from your SGE status, from representing another person or entity to this Department or to another Federal agency or court in any particular matter involving a specific party in which you participated personally and substantially while with the Government. This bar lasts for the lifetime of the particular matter.

Additionally, if you were paid for your SGE services, and your basic rate of pay was equal to or greater than 86.5% of the annual rate of basic pay for level II of the Executive Schedule (currently \$158,554.50), and you served 60 or more days as an SGE during the 365-day period before terminating service, you are also subject to the same 1-year cooling-off period that is applicable to former senior officials. For 1 year after terminating this senior appointment, you would be prohibited from making a communication or appearance on behalf of any other person, with the intent to influence, before any employee of the agency in which you served, in connection with any matter on which such a person seeks official action. Please note that this bar is not limited to particular matters, but includes policy matters as well, and that it does not apply to the entire Department of Defense, but only to the component in which you were appointed. A list of the separate designated components is below:

- Defense Information Systems Agency
- Defense Intelligence Agency
- Defense Logistics Agency
- Defense Threat Reduction Agency

- Department of the Air Force
- Department of the Army
- Department of the Navy
- National Geospatial-Intelligence Agency
- National Reconnaissance Office
- National Security Agency
- Office of the Secretary of Defense remainder agency*

* *Employees of DoD components not designated as separate agencies, including employees of the Office of the Secretary of Defense, will be treated as employees of the “Office of the Secretary of Defense remainder agency.” E.g., Combatant Commands, Joint Chiefs of Staff, and other Defense agencies like Defense Advanced Research Project Agency, Defense Health Agency, Defense Human Resources Agency, etc.*

SGEs who trigger the above restriction are also prohibited, for 1 year after their appointment terminates, from representing a foreign entity before any Federal agency, or aiding or advising a foreign entity, with the intent to influence a decision by that agency.

You should consult with an ethics official at the end of your service to determine if you believe these rules may impact you or to see more specific guidance about your particular circumstances.

5. Standards of Ethical Conduct

The following paragraphs highlight some of the administrative Standards of Ethical Conduct regulations (5 C.F.R., Part 2635) that pertain to SGE’s in DoD.

Teaching, Speaking, and Writing in a Personal Capacity

Generally, during your term of appointment, you may continue to receive fees, honoraria, and other compensation for teaching, speaking, and writing undertaken in your personal or non-Government capacity, but there are several limitations. Most important of which is the general policy that SGEs do not speak externally on behalf of DoD as these representational duties are generally considered inherently governmental and should be performed by full-time DoD personnel.

You are prohibited from receiving compensation for teaching, speaking, or writing (“activity”) that relates to your official duties as an SGE. 5 C.F.R. § 2635.807. For you, the “relatedness” test is met if:

- the activity is undertaken as an official Governmental duty;
- the invitation was extended to you primarily because of your position in the Government rather than your expertise on the particular subject matter; the invitation

- was extended to you, directly or indirectly, by a person who has interests that may be affected substantially by the performance or nonperformance of your official duties;
- the information conveyed through the activity draws substantially on ideas or official data that are confidential or not publicly available; or
 - during a 1-year period of your current appointment,
 - 1) if you serve for more than 60 days and the subject of the activity deals in significant part with any matter to which you are presently assigned or were assigned during the previous 1-year period, or
 - 2) if you serve 60 days or less and the subject deals in significant part with a particular matter involving specific parties in which you participated or are participating personally and substantially.

Notwithstanding the above limitations, in some instances you may receive compensation for teaching, speaking, or writing on a subject within your discipline or inherent area of expertise based on your educational background or experience. In addition, in some instances these restrictions do not apply to teaching a course requiring multiple presentations that is part of the regularly established curriculum of an institution of higher education, an elementary or secondary school, or a program of education or training sponsored and funded by the Federal, state, or local governments. You should consult with an ethics official before relying on one of these exceptions.

If you use or permit the use of your military rank or your DoD title or position as one of several biographical details given to introduce yourself in connection with your personal teaching, speaking, or writing, whether or not compensated, and the subject of the teaching, speaking or writing deals in significant part with any ongoing or announced policy, program or operation of DoD (but not one of the separately designated components listed above), you must use a disclaimer (at the beginning of your speech or prominently placed for written material), expressly stating that the views presented are yours and do not necessarily represent the views of this Department or its components.

Acceptance of Gifts from Outside Sources

Any gift given to you because of your DoD position or given by a DoD prohibited source (e.g., DoD contractor) is generally prohibited. 5 C.F.R. § 2635.202. There are a number of possible exclusions or exceptions that apply that may permit you to accept a gift. For example, you may accept gifts given to you because of your personal, outside business, or employment relationships, which are clearly unrelated to your service as a DoD SGE. If you receive a gift which may trigger this rule, you should consult an ethics official.

Providing Expert Testimony

While serving as an SGE in DoD, you are prohibited from participating, with or without compensation, as an expert witness for anyone other than the United States Government in any United States judicial or administrative proceeding in which the United States is a party or has a direct and substantial interest, unless you are authorized by the DoD General Counsel. This

restriction applies only where you participated as an employee or SGE in the particular proceeding or in the particular matter that is the subject of the proceeding. 5 C.F.R. § 2635.805.

In addition, if you are appointed by the President, serve on a commission established by statute, or have served or are expected to serve for more than 60 days in a period of 365 consecutive days, you may not serve, except on behalf of the United States, as an expert witness, with or without compensation, in any proceeding before a United States court or agency in which the DoD is a party or has a direct and substantial interest, unless authorized by the DoD General Counsel.

If you get called to testify as an expert witness while you are an SGE in DoD, contact an ethics official.

Impartiality

Although you are prohibited by 18 U.S.C. § 208(a) from participating in particular matters in which you have a financial interest, there may be other circumstances in which your participation in a particular matter involving specific parties would raise a question regarding your impartiality in the matter. For example, you may be asked to review a grant application submitted by your mentor or someone with whom you have a close personal or professional relationship. Or your advisory committee may consider a weapons program operated by your former employer or former client. This may raise a concern about your impartiality in the review. 5 C.F.R. § 2635.502.

While the impartiality rule is quite complex and very broad in scope, there are several triggers that must be present for it to apply:

- Your official duties must involve a particular matter involving specific parties (as discussed above, DoD advisory committees usually focus on policy-level issues and do not consider particular matters involving specific parties);
- The circumstances would cause a reasonable person with knowledge of the relevant facts to question your impartiality; and
- Either:
 - 1) The matter is likely to have a direct and predictable effect on the financial interests of a member of your household, or
 - 2) someone with whom you have a covered relationship is, or represents, a party to the matter. This includes relationships with persons such as a relative, a person with whom you have or seek a business or financial relationship, a former employer, an employer or client of your spouse, or an organization in which you are an active participant)

Considering the breadth of this prohibition (it could even apply to participating in a particular matter that would affect the financial interests of a friend) and how much it depends

upon the perception of the beholder, if you believe your participation in a particular matter as an SGE in DoD could subject you to criticism, please contact your supervisor (or DFO) or ethics official to determine whether you should be disqualified from participation in the matter or authorized to participate in the matter.

Serving Two Masters

As indicated in the above discussion on impartiality, you cannot represent two entities and retain impartiality. For example, you may be an employee of a corporation or nonprofit organization which intends to submit its views to Government officials regarding the same subject matter that your advisory committee is studying. In such a situation, you must recuse yourself from participation in the advisory committee's recommendation, and make sure you do not trigger the representational restrictions if you are a signatory to the submission. If you find yourself in this situation, consult your DFO or ethics official.

Endorsement of Non-Federal Entities

Many SGEs in DoD hold senior and influential positions in their private lives. However, please remember that you may not use, or permit the use of, your official title, position, organization name, or authority associated with your Government position to imply a DoD endorsement of a non-Federal entity, event, product, service, or enterprise. 5 C.F.R. § 2635.702. Provided that you act exclusively outside the scope of your official position and abide by the restrictions discussed above, you may participate and support the activities of non-Federal entities in your personal capacity.

Misuse of Position

Primarily because of the stature and visibility of many of our SGEs, actions that may be perceived as the misuse of their public office tend to receive heightened public scrutiny. The prohibition, which applies to all Federal employees, bars the use of public office for private gain. 5 C.F.R. §2635.702. This broad prohibition generally is triggered by the following:

- Using your title, position, or authority for your own private gain, or the private gain of friends, relatives, clients, or anyone with whom you are affiliated in a non-Governmental capacity (including nonprofit organizations in which you serve as an officer, member, employee, or persons with whom you have or seek an employment or business relationship);
- Using your title, position, or authority to coerce or induce another person to provide any benefit to yourself or any person identified above;
- Using non-public information in a financial transaction to further your private interests or those of another, or disclosing confidential or non-public information without authorization; or
- Using Government property and time for unauthorized purposes.

A good example is when a private entity issues a press release announcing that one of its employees will serve on a DoD advisory committee. To many, selection to serve on a DoD advisory committee confirms one's expertise and wisdom, and therefore tends to lend similar credence to the private entity. It also suggests DoD endorsement of the private organization. Thus we discourage private companies from issuing such press releases.

Fundraising

There are several rules that cover fundraising activity, both in an official capacity and in a personal capacity, that are applicable to DoD employees, including SGEs. Although it is not likely that you will be asked to participate officially in the solicitation of funds or the endorsement of a fundraising effort, you should seek the guidance of this Office prior to such participation.

Generally, you may fundraise in your personal capacity. However, you may not fundraise in the Federal workplace (except for collecting gifts-in-kind, such as food, clothing and toys), and you may not solicit funds from any person that you know is a prohibited source whose interests may be substantially affected by performance or non-performance of your official duties. Finally, please do not use or permit the use of your official title, position, or authority associated with your position to further any personal fundraising effort.

Lobbying Activities

While the time you spend performing official duties as an SGE is usually brief, please remember that during those periods, you are prohibited from engaging in any activity that directly or indirectly encourages or directs any person or organization to lobby one or more members of Congress. 18 U.S.C. § 1913. This statute does not bar you, in your official capacity, from appearing before any individual or group for the purpose of informing or educating the public about a particular policy or legislative proposal, or from communicating to members of Congress at their request. Communications to members of Congress initiated by you, in your official capacity as a member of an advisory committee or as a consultant, must be coordinated through the Office of Legislative Affairs.

As a private citizen, you may express your personal views (but not the views of the advisory committee as a whole or the opinions of this Department) to anyone. In doing so, you may state your affiliations with the advisory committee, may factually state the committee's official position on the matter (to the extent that non-public information is not used), but may not represent your positions or views as the committee's or the Department's position on the matter. Moreover, in expressing your private views, as with all other personal (non-Government) activities, you are not permitted to use Government computers, copiers, telephones, letterhead, staff resources, or other appropriated funds.

Foreign Agents

You may not act as an agent or lobbyist of a foreign principal required to register under the Foreign Agents Registration Act or the Lobbying Disclosure Act of 1995 unless the head of the agency certifies that your employment is in the national interest. 18 U.S.C. § 219. If you have registered under either of these statutes, please contact SOCO.

Hatch Act

The Hatch Act, which limits the political activities of Federal civilian employees, applies to you only while you are conducting Government business. 5 U.S.C. §§ 7321-7326.

Disclosure of Information

You may not disclose classified or proprietary information that you receive in the course of your official duties. Before disclosing information that is proprietary, not releasable under the Freedom of Information Act, protected by the Privacy Act, or otherwise restricted, please confirm that it may be released. 18 U.S.C. § 1905. Furthermore, you may not disclose Government information that is designated as confidential or has not been disseminated to the general public and is not authorized to be made available to the public on request. 5 C.F.R. § 2635.703

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